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BY EMAIL and RESS

January 28, 2016
Our File: EB20150141

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2015-0141 – Motion to R&V Decision EB-2013-0416/247 – SEC Correspondence

We are counsel to the School Energy Coalition (“SEC”). We are in receipt of correspondence from the Carriers, dated January 26th, seeking a “clarification order” to limit the scope of the proceeding to only the issues regarding Hydro One’s proposed Pole Access Charge that they take issue with. The requested order is the second attempt by the Carriers in this proceeding to limit the scope of the review. Similar to the Board’s decision on the Carriers’ request to exclude Hydro One’s supplementary evidence, the Board should deny this request.

The Board has already set out the scope of this proceeding: to determine the just and reasonable Pole Access Charge. As the Board stated in Procedural Order No. 3, “[t]he evidence and submissions in this motion should therefore focus on whether Hydro One’s proposed increase to the Pole Access Charge is just and reasonable.” The Board’s only limitation is that the Pole Access Charge will be set “in the context of the current approved OEB methodology as described in the Decision in RP-2003-0249”.¹ While the various parties may have different views about what is included in that methodology, and which are the proper inputs, the Board has stated that that is a matter for hearing.²

The Carriers’ latest attempt to limit the scope of this proceeding to areas that are favorable only to them, on the grounds of *res judicata* and abuse of process, should be rejected. Those related common law doctrines are about ensuring that parties do not re-litigate issues that had already been

¹ Procedural Order No. 3, p.1

² Procedural Order No. 6, p. 2

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decided on a final basis.³ They have no application in a statutory authorized review proceeding.⁴ The Carriers have cited no authority, such as case law, Board rule, or any provision of the *Ontario Energy Board Act* or *Statutory Powers Procedure Act*, that suggests that in a motion for review proceeding, the Board can only consider the issues with the Pole Access Charge raised within the proceeding by the initiator of the review. All the cases they cite in their letter, involve circumstances where parties attempted to re-litigate the same issues that were decided in some other unconnected or collateral proceeding. None involve an appeal, judicial review, let alone in the much more flexible administrative tribunal review or reconsideration process.

The Board's review authority is broad. It allows the Board to determine the scope of the review as it deems appropriate. In this case the Board has determined that it will do so by allowing all parties, not just the Carriers, to ask interrogatories to Hydro One, file evidence if they so choose, and participate in both the technical and settlement conferences.⁵ In essence, the Board is hearing the Hydro One's proposed Pole Access Charge *de novo*. This full review is what the Carriers sought when they brought their motion to review. Now faced with significant evidence demonstrating that the appropriate rate should be higher than what Hydro One proposed, they seek for the second time in less than a month to exclude it from consideration.

The Board would not be fulfilling its statutory mandate to set a just and reasonable rate if it can only consider certain arguments and evidence on the appropriate inputs to the approved methodology and not others. In Procedural Order No. 6, the Board, in denying the Carriers' request to exclude Hydro One's supplementary evidence on very similar grounds, was clear that it was interested in evidence "in so far as it may assist the OEB in setting the Pole Access Charge at a level that is just and reasonable".⁶ The evidence from interrogatory responses and the technical conference, and arguments that the intervenors may make regarding that evidence, will help the Board set the appropriate Pole Access Charge.

SEC submits the Board should reject the Carriers' request.

All of which is respectfully submitted.

Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
All parties (by email)

³ SEC notes that contrary to the claims of the Carriers, the Board has explicitly not made final decision on the Pole Access Charge. The Board ordered the Pole Access Charge to be set on an interim, not final basis, at the previously approved (\$22.35), not the proposed (\$37.05) rate, until the Carriers' motion had been resolved. (see EB-2013-0416, *Decision on the Draft Rate Order*, April 17 2015, p.3)

⁴ *Statutory Powers Procedure Act*, section 21.2(1)

⁵ Procedural Order No. 3, p.2

⁶ Procedural Order No, 6, p.2