



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2017-0320

HYDRO ONE INC.

**ORILLIA POWER DISTRIBUTION
CORPORATION**

Motions to review and vary Procedural Order No. 6 issued in
Ontario Energy Board Proceeding EB-2016-0276

BEFORE: Lynne Anderson
Presiding Member

Emad Elsayed
Member

Michael Janigan
Member

January 4, 2018

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1 INTRODUCTION AND SUMMARY

This is a Decision of the Ontario Energy Board (OEB) in response to filings by each of Hydro One Inc. (Hydro One) and Orillia Power Distribution Corporation (Orillia Power) of a notice of motion to review and vary the OEB's Procedural Order No. 6 issued in Hydro One's application for approval to acquire Orillia Power.¹

On September 27, 2016, Hydro One filed an application (MAAD application) requesting the OEB's approval to purchase all of the shares of Orillia Power. As part of the share purchase, Hydro One proposed that the 2016 base electricity delivery rates of Orillia Power's residential and general service classes be reduced by 1% and kept frozen at this level until 2022. Hydro One and Orillia Power also requested approval to: (a) transfer Orillia Power's rate order to Hydro One; (b) transfer Orillia Power's distribution system to Hydro One; (c) cancel Orillia Power's electricity distributor licence; and (d) amend Hydro One's electricity distributor licence. The OEB assigned the application file number EB-2016-0276.

In Procedural Order No. 5 issued in the MAAD application, the OEB made provision for the filing of submissions and reply submissions. OEB staff observed in its submission that the rates proposed for previously acquired utilities (Norfolk, Haldimand, and Woodstock) in Hydro One's distribution rate application², filed March 31, 2017, suggest large distribution rate increases for some customers of these acquired utilities once the deferred rebasing period elapses. Some intervenors in the MAAD application raised concerns with Hydro One's rate proposals and revenue requirements for those acquired service areas contained in its distribution rate application, submitting that it is not clear the no harm test has been met.

Hydro One submitted that its rate making proposals are based on a cost allocation model consistent with the OEB's principles and that it would defend its allocation proposals in its distribution rate application. Hydro One further argued that its distribution rate application is for the period 2018 to 2022 and it includes no rate proposals for Orillia Power's customers. In the MAAD application, Hydro One proposes to freeze Orillia Power customers' rates for 10 years, beyond the effective dates proposed in Hydro One's current distribution rate application. Orillia Power argued that the evidence filed supports a finding that efficiencies will be gained and lower costs will be realized as a result of the proposed acquisition.

¹ EB-2016-0276 - Application by Hydro One Inc. and Orillia Power Distribution Corporation For Approval of Share Acquisition and Related Transactions

² EB-2017-0049

The OEB issued Procedural Order No. 6 (Procedural Order) in the MAAD proceeding on July 27, 2017, in which it determined that the hearing of the MAAD application would be adjourned until the OEB rendered its decision on Hydro One's distribution rate application. The OEB found that Hydro One should defend its cost allocation proposal in the rate application prior to the OEB determining if the Orillia Power acquisition is likely to cause harm to any of its current customers.

Hydro One and Orillia Power each filed a Notice of Motion for a review and variance of the Procedural Order on August 14, 2017 and August 16, 2017, respectively.

Rule 42.01 of the OEB's *Rules of Practice and Procedure* (Rules) states that all motions brought under Rule 40.01 shall set out the grounds for the motion that raise a question as to the correctness of the order or decision.

The OEB's Rules state that the OEB may determine a threshold question of whether the matter should be reviewed before conducting any review of the merits of the motion. The OEB must ensure that the motion is not merely a request for a reconsideration of the original application. A full explanation of the application of the threshold test is set out in chapter 3 of this Decision.

The OEB has determined that the threshold test has been met for the reasons set out in this Decision. The OEB grants the motions and refers this matter back to the panel on the MAAD application for re-consideration.

2 THE PROCESS

The OEB issued a Notice of Hearing and Procedural Order No.1 on October 24, 2017 confirming that it would hear the motions filed by Hydro One and Orillia Power together.

The OEB adopted all intervenors to the MAAD proceeding. The only intervenor to participate in the motion proceeding was the School Energy Coalition (SEC). Mr. Kehoe, an intervenor in the MAAD proceeding, filed a submission opposing the acquisition of Orillia Power by Hydro One, but did not make a submission on the motion being heard in this proceeding.

The OEB provided an opportunity for cross-examination of new materials filed with the motions and also made provision for written submissions on both the threshold and the merits of the motions.

OEB staff and SEC cross-examined the new material filed with the motions on November 10, 2017. OEB staff filed its submissions on November 24, 2017 and SEC filed its submissions on November 27, 2017. Hydro One and Orillia Power filed their reply arguments on December 13, 2017.

3 MOTIONS TO REVIEW

3.1 The OEB's *Rules of Practice and Procedure*

Rule 42.01(a) of the OEB's Rules provides the grounds upon which a motion may be raised with the OEB:

Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
 - (i) error in fact;
 - (ii) change in circumstances;
 - (iii) new facts that have arisen;
 - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Rule 43.01 of the Rules states:

In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

3.2 The Threshold Test

In the Motions to Review the Natural Gas Electricity Interface Review Decision³, the OEB found:

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

³ EB-2006-0322/0338/0340, May 22, 2007

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

The OEB has adopted these findings in its consideration of the threshold question on many occasions over the past several years and does so again in consideration of arguments on the threshold question in these motions.

4 POSITIONS OF PARTIES

In their motions, Hydro One and Orillia Power submitted that the evidence and record in the rate application is not relevant to the MAAD application and will not inform the analysis and determination of the OEB's no harm test for the proposed share acquisition transaction. Hydro One and Orillia Power also submitted that the issuance of the Procedural Order without giving the applicants an opportunity to make submissions was procedurally unfair.

Orillia Power submitted that the adjournment of the MAAD application until the OEB renders a decision in the rate application causes undue delay and prejudice to Orillia Power. As part of its motion, Orillia Power filed new evidence regarding operational problems that have arisen as a result of the adjournment. As part of its motion, Hydro One filed new information providing a 10-year customer rate outlook comparing the Orillia Power status quo rates to the rate benefit to customers if the MAAD application is approved.

SEC argued that the motions put forward by Hydro One and Orillia Power should be denied on the basis that they fail to meet the threshold test.

SEC submitted that while the applicants have argued that they did not have a chance to argue the relevance and substance of the rate application, they could have provided arguments on how the rates proceeding evidence should be interpreted if it was found to be relevant. SEC argued that the operational consequences claimed by Orillia Power only arise because Orillia Power wrongly assumed that the MAAD application would be approved and did not have a backup plan in place if the OEB did not approve the application.

SEC also argued that the OEB's adjournment decision is only wrong if there is an error of law or if there is a manifest error of interpretation, neither of which, in its view, is applicable in this case. SEC submitted that the use of the evidence in the rate proceeding in the MAAD proceeding is part of an area of law relating to "similar fact evidence", i.e. evidence which might be probative in determining in the MAAD proceeding whether the Orillia Power customers will be harmed.

SEC submitted that if the OEB finds the threshold test is met with respect to the issue of relevance of the rate proceeding evidence, the OEB is still required to meet its objective with respect to price protection and suggested the following options:

- Accept the procedural solution determined by the OEB panel in the MAAD proceeding and therefore deny the motions; or

- Allow the Motions and remit the matter back to the OEB panel in the MAAD proceeding to hear evidence on how they can protect Orillia Power customers with respect to prices.

SEC further submitted that, if the OEB finds the threshold test is met with respect to operational consequences, that in balancing the consequences of additional delay with the protection of Orillia Power customers with respect to prices, the latter should prevail.

OEB staff argued that it is not entirely correct to say that the moving parties had no opportunity to address the relevance of the rate proceeding in the MAAD proceeding as this was raised by SEC in its final submissions and responded to by Hydro One in its reply argument. However, OEB staff also submitted that the information presented with the motions was not all available to the OEB when the Procedural Order was issued and that it is at least potentially relevant to that decision. OEB staff noted the applicants' arguments relating to the "right to be heard" on the adjournment issue and the resultant material impacts on the applicants, and submitted that under such circumstances parties should have the opportunity to make submissions on all issues that could impact them materially.

OEB staff submitted that the threshold test has been passed and that the OEB should consider the motions filed on their merits.

OEB staff submitted that the motions should be granted in part, stating that any information from the rate application is not directly relevant to the MAAD application. OEB staff submitted that the rate application contains no information on Orillia Power, regarding what rates or overall cost structures will be. While the rate case may be indicative of Hydro One's overall strategy with respect to acquired utilities, OEB staff noted that Hydro One may well have different plans for Orillia Power, and the relevance of the information from the rate application will be largely speculative. OEB staff submitted that the assessment of no harm in a consolidation application should include a consideration of whether the underlying cost structures are sustainable and beneficial beyond the proposed 10-year deferral period.

OEB staff suggested that the adjournment is not the optimal course as a lengthy delay may impose operational challenges for Orillia Power and that the decision on Hydro One's five-year rate application is unlikely to provide the information that is required.

OEB staff submitted that the matter should be referred back to the panel on the MAAD application and suggested that, if the panel believes more or better information is required, the panel should re-open the record and require the production of that information.

In reply arguments, Hydro One and Orillia Power submitted that the threshold test is met reiterating the grounds set out in their motions, namely the irrelevance of the rate proceeding evidence and procedural unfairness arising from the adjournment of the MAAD application. The moving parties argued that the OEB brought rate-setting into the scope of the MAAD application, which is inconsistent with OEB policies and past decisions, and made findings contrary to the evidence that was before the panel, thereby making an identifiable and material error of law or fact.

The moving parties also submitted, in final arguments, that in issuing the Procedural Order which effectively stayed the MAAD application, the OEB erred because the threshold test for a stay of proceedings under the *Statutory Powers and Procedures Act, 1990* was not met and that the OEB's decision causes prejudice to Orillia Power.

5 DECISION ON THE MOTIONS

The OEB finds that the threshold test has been met, and that the motions succeed on their merits.

The OEB's findings are based on its consideration of the following aspects. The first relates to the aspect of procedural fairness. In the OEB's view, the moving parties did not have the opportunity to thoroughly explore the relevance of the distribution rate application to the MAAD application before the Procedural Order was issued, particularly considering that the rate application was not filed until after the discovery process for the MAAD application was completed. The second aspect relates to new information filed as part of Orillia Power's motion regarding the potential impact of a lengthy delay in the MAAD application that was not available when the Procedural Order was issued. These reasons apply to both the threshold and the merits.

The OEB grants the motions and refers this matter back to the panel on the MAAD application for re-consideration. The OEB has determined that the panel in the MAAD proceeding is in the best position to continue hearing the MAAD application and to re-open the record if it becomes necessary to seek additional information or clarification in areas that are within the scope of the MAAD proceeding. These areas could include issues raised herein in the submissions of the moving and responding parties such as:

- whether the outcome of the rate application involving the acquisition of other distributors will provide relevant information about the effect of the acquisition on customers of Orillia Power
- the overall cost structures following the deferral period and their effect on the customers of the acquired utility
- the significance of a delay in the determination of the MAAD application balanced against the evidence that may be obtained as a result of such delay

This panel of the OEB is not determining the merits of the MAAD application. Any issues on the merits of the MAAD application and the conduct of that proceeding raised in the submissions of the moving or responding parties herein are referred back to the panel in the MAAD proceeding for its consideration.

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The motions filed by Hydro One Inc. and Orillia Power Distribution Corporation are granted and refers this matter back to the panel on the EB-2016-0276 proceeding for re-consideration.
2. SEC shall file with the OEB and serve on Hydro One Inc. and Orillia Power Distribution Corporation, its cost claim within 7 days from the date of issuance of this Decision.
3. Hydro One Inc. and Orillia Power Distribution Corporation shall file with the OEB and serve on SEC any objections to the claimed costs within 14 days from the date of issuance of this Decision.
4. SEC shall file with the OEB and serve on the Hydro One Inc. and Orillia Power Distribution Corporation any responses to any objections for cost claims within 21 days of the date of issuance of this Decision.
5. Hydro One Inc. and Orillia Power Distribution Corporation shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file number, EB-2017-0320, be made in searchable/ unrestricted PDF format electronically through the OEB's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.oeb.ca/industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto January 4, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary