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BY EMAIL and RESS

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2300 Yonge Street
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January 7, 2018
Our File: EB20180270

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2018-0270 – Hydro One/OPDC MAAD Application – SEC Motion Material

We are counsel to the School Energy Coalition ("SEC"). Enclosed, please find SEC's Submissions, and Motion Record and Book of Authorities,

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicants and interested parties (by email)

EB-2018-0270

ONTARIO ENERGY BOARD

IN THE MATTER OF an application made by Hydro One Inc. for leave to purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation, made pursuant to section 86(2)(b) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking to include a rate rider in the current1 Board-approved rate schedules of Orillia Power Distribution Corporation to give effect to a 1% reduction relative to their Base Distribution Delivery Rates (exclusive of rate riders), made pursuant to section 78 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its distribution system to Hydro One Networks Inc., made pursuant to section 86(1)(a) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking cancellation of its distribution licence, made pursuant to section 77(5) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc. seeking an order to amend its distribution licence, made pursuant to section 74 of the *Ontario Energy Board Act, 1998*, to serve the customers of the former Orillia Power Distribution Corporation.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its rate order to Hydro One Networks Inc., made pursuant to section 18 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc., seeking an order to amend the Specific Service Charges in Orillia Power Distribution Corporation's transferred rate order made pursuant to section 78 of the *Ontario Energy Board Act.*

SUBMISSIONS OF THE SCHOOL ENERGY COALITION
(Motion)

A. OVERVIEW

1. Hydro One Inc. ("Hydro One") and Orillia Power Distribution Corporation ("OPDC") have filed an application with the Ontario Energy Board ("Board" or "OEB") for approval for the purchase of OPDC by Hydro One. This is the second application filed for approval of the very same transaction, and the third time the Board has considered the issue. The Board has previously rejected the application for failure to meet the no harm test, and subsequently dismissed the motions to review for failure to meet the threshold test.

2. The School Energy Coalition ("SEC") brings this motion to dismiss this second application. This new application seeks to relitigate the same matter the Board has already considered and decided, justifying it by saying that they are providing new evidence in support. The supposedly new evidence is a) not fundamentally different from evidence previously filed, and b) not even responsive to the concerns the Board raised in its previous decision.

3. Allowing this application to proceed would undermine the integrity of the Board's adjudicative processes, and is contrary to established legal principles. This application should therefore be dismissed as *res judicata* and an abuse of process.

Background

First MAADs Proceeding

4. On September 27, 2016, Hydro One and Hydro One Networks Inc. filed an application with the Board seeking approval under Section 86(2)(b) of the *Ontario Energy Board Act, 1998* ("*OEB Act*")[1] to purchase all of the shares of OPDC (collectively the "Applicants").[2] As part of the share purchase, the Applicants requested Board approval for various types of related relief. The Board assigned this application Board file No. EB-2016-0276 ("the First MAADs Proceeding").[3]

5. After discovery, the Board received and considered submissions from the parties, including SEC.[4] Those submissions raised concerns related to Hydro One's then recently filed 2018-2022

[1] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched B ["*OEB Act*"]. Motion Record and Book of Authorities of the School Energy Coalition ["MRBA"], Tab 1

[2] *Decision and Order* (EB-2016-0276 – Hydro One/OPDC), April 12 2018 ["*First MAADs Decision*"], p.1, MRBA, Tab 2

[3] *Ibid*

[4] EB-2016-0276, SEC Submissions, April 17 2017, MRBA, Tab 3

distribution rates application (EB-2017-0049, the "Dx Proceeding"). The evidence in the Dx Proceeding showed that, despite previous claims to the contrary, Hydro One's costs to serve customers in Norfolk, Haldimand, and Woodstock, service territories previously acquired by Hydro One, appeared to be higher than expected, and maybe higher than costs would have been had the acquisitions not occurred.[5] In light of the issues raised by that information, the Board panel in the First MAADs Proceeding issued Procedural Order No. 6, determining that the evidence in the Dx Proceeding could be relevant, since it could give the Board an opportunity to see if the assumptions of Hydro One relating to future costs to serve were reasonable:

> The OEB granted its approval for Hydro One's acquisitions of Norfolk, Haldimand and Woodstock in recognition of evidence that Hydro One could serve the acquired entities at a lower cost. In granting those approvals the OEB established a clear expectation that the future rates for the customers of those acquired service areas would be reflective of the lower costs.[6]

6. The Board decided to hold the First MAADs Proceeding in abeyance until a decision had been rendered in the Dx Proceeding.[7] In doing so, it sought to allow Hydro One to defend its proposed cost allocation approach in the Dx Proceeding, prior to the Board determining if the acquisition of Orillia would be likely to cause harm to its current customers.[8]

7. The Applicants challenged Procedural Order No.6 by filing motions to review. By decision dated January 4, 2018, the Board granted the motions to review, and remitted the matter back to the panel in the First MAADs Proceeding to proceed with a determination of the application.[9]

8. The panel in the First MAADs Proceeding then issued Procedural Order No. 7, which provided the Applicants with an opportunity to file further evidence and submissions relating to specific issues over which the Board had expressed concerns.[10] The Board was specific in what concerns it sought to have addressed, saying:

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[5] EB-2016-0276, *Procedural Order No. 6*, July 27 2017, p.4, MRBA, Tab 4

[6] *Ibid*, p.4

[7] *Ibid*, p.5

[8] *Ibid*, p, p.4-5

[9] *Decision and Order*, (EB-2017-0320 - Hydro One/OPDC Motion to Review) January 4, 2018 ["*First Review Decision*"], p.9, MRBA, Tab 5

[10] EB-2016-0276, *Procedural Order No. 7*, February 5, 2018, p.3, MRBA, Tab 6

> In response to the Motions Decision, the OEB has determined that it will re-open the record of the MAAD application as it wishes to receive further material, in the form of evidence or submissions from Hydro One on what it expects the overall cost structures to be following the deferred rebasing period and the impact on Orillia Power customers.[11]

9. After considering further material filed by the Applicants, the Board issued its final decision on April 12, 2018, denying the application (the "First MAADs Decision").[12] The Board determined that the Applicants had not met their onus, and that it was "not satisfied that the no harm test had been met."[13] The Board found that:

> Hydro One has not demonstrated that it is reasonable to expect that the underlying cost structures to serve the customers of Orillia Power will be no higher than they otherwise would have been, nor that they will underpin future rates paid by these customers. [14]

10. With respect to the further material filed by Hydro One, the Board found that it "simply restated [Hydro One's] expectation that based on the projected Hydro One cost savings forecast for the 10 year period following the transaction, the overall cost structures to serve the Orillia area will be lower following the deferred rebasing period in comparison to the status quo."[15] The Board had expected a forecast of what the costs to serve Orillia would be after the deferral period, and how costs would be allocated to Orillia ratepayers. Without that information, the Board was not in a position to determine that the transaction would result in no harm:

> The OEB is of the view that it would have been reasonable to see **a forecast of costs to service Orillia customers beyond the ten year period and an explanation of the general methodology of how costs would be allocated to Orillia ratepayers after the deferral period**. Hydro One takes the position that this information is not known. The OEB recognizes that any forecast of cost structures and cost allocation 10 years out would include various assumptions and could not be expected to be 100% accurate. However, the OEB has highlighted its concern and its need to better understand the implications of how Orillia customers will be impacted by the consolidation beyond the ten year period. In the absence of information to address that OEB concern, the OEB cannot reach the conclusion that there will be no harm. [emphasis added] [16]

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[11] *Ibid*

[12] *First MAADs Decision*, p.20, MRBA, Tab 2

[13] *Ibid*, p.20

[14] *Ibid*

[15] *Ibid*, p.13

[16] *Ibid*

Review Motion

11. On May 2, 2018, the Applicants filed further motions to review and vary, this time with respect to the First MAADs Decision, alleging a number of material errors. Included with Hydro One's Notice of Motion was an affidavit from Joanne Richardson (the "Richardson Affidavit").[17] Those Motions were assigned Board file No. EB-2018-0171 (the "Second Review Proceeding").

12. After hearing submissions on the threshold question, the Board denied the motions to review pursuant to Rule 43.01 of the Board's *Rules of Practice and Procedure*. In its decision (the "Second Review Decision"), the Board determined it need not hear the merits of the motions, as the Applicants had not met the threshold test. After providing an analysis of each of the grounds raised, the Board concluded that the motions had not shown "an identifiable error in the decision as the findings were reasonable and correct concerning the issues that form the grounds for these motions."[18]

13. The Board also found that the Richardson Affidavit consisted of information that could have been presented in the hearing of the First MAADs Application and that it "does not present new facts that have arisen or facts that could not have been discovered by reasonable diligence".[19]

14. Neither of the Applicants further challenged the First MAADs Decision or the Second Review Decision, whether by way of an appeal to the Divisional Court pursuant to section 33(1) of the *OEB Act*[20], or by way of a judicial review pursuant to section 2(1) of the *Judicial Review Procedure Act.*[21].

Second MAADs Proceeding

15. The same Applicants filed this second application on September 26, 2018. The Board has issued a Notice of Hearing and assigned the matter Board File No. EB-2018-0270 (the "Second

[17] EB-2018-0171, Hydro One Networks Inc. Notice of Motion, dated April 12, 2018, Affidavit of Joanne Richardson, sworn May 2 2018 ["Richardson Affidavit"], MRBA, Tab 7

[18] *Decision and Order* (EB-2018-0171 - Hydro One/OPDC Motion to Review EB-2016-0276), August 23 2018 ["*Second Review Decision*"], p.12, MRBA, Tab 8

[19] *Ibid*, p.12

[20] *OEB Act*, s.33(1), MRBA, Tab 1

[21] *Judicial Review Procedure Act*, R.S.O. 1990, s.2(1), MRBA, Tab 9

MAADs Proceeding"). The relief sought by the Applicants is identical to the relief requested in the First MAADs Proceeding, i.e. the same relief that was considered and rejected by the Board in the First MAADs Decision, which decision was then upheld in the Second Review Decision.

16. The evidence filed in support of this second application is similar to that filed in the First MAADs Proceeding, and contained in the Richardson Affidavit. The Board determined in the Second Review Decision that the latter did not contain information that was new or that could not have been discovered with reasonable diligence.

17. As compared to the First MAADs Proceeding, Hydro One has filed additional evidence related to 'Future Cost Structures', which it claims is responsive to the concerns raised by the Board in the First MAADs Decision.[22]

18. The additional evidence shows OPDC's forecast revenue requirement and low voltage charges in Year 11 if there is no acquisition ("Status Quo Straw Man"), and then compares it to what Hydro One calls the "residual cost to serve" if the transaction is approved. The residual cost to serve represents the forecast Hydro One incremental costs to serve OPDC customers in Year 10, plus 2% ("Residual Cost To Serve Scenario").[23] The Hydro One incremental costs to serve for Year 10 have been largely the same in the First MAADs Proceeding[24] and in the Second MAADs Proceeding[25].

19. Hydro One readily admits that the residual cost to serve is not the only category of costs Orillia customers would be responsible for paying in their rates if the acquisition is approved. Residual cost to serve does not include any of the shared costs that would need to be allocated to Orillia customers.[26] These shared costs include i) shared facilities, billing and IT system costs, and other general plant costs, ii) OM&A costs associated with shared services, such as planning, finance,

[22] Exhibit A, Tab 4, Schedule 1, p.4-6, MRBA, Tab 10

[23] *Ibid*, p.5. This is identical to the calculation in the Richardson Affidavit, with two exceptions. First, the year 10 numbers have changed from the original application, largely because Year 10 is now expected to be two years later. Second, the Richardson Affidavit escalated Year 10 by 1%, while the current application escalates Year 10 by 2%. Otherwise, the residual cost to serve information is essentially identical to that which was filed in the previous proceeding, and held to be not new at that time.

[24] EB-2016-0276, Exhibit. A, Tab 2, Schedule 1, p.2, MRBA, Tab 11

[25] Exhibit A, Tab 2, Schedule, p.2, MRBA, Tab 12

[26] Exhibit A, Tab 4, Schedule 1, p.6, MRBA, Tab 10

regulatory, IT, and customer services, and iii) both assets and OM&A related to upstream distribution facilities.[27]

20. Hydro One has not provided, a) a forecast of what those costs would be, b) the cost allocation methodology that is forecast to be used, nor c) the resulting rates forecast for OPDC customers after the deferral period. Hydro One has taken the view that it "is not in a position to determine the specific amount of costs that would be collected from OPDC's customers, as that will depend on the cost allocation and rate design proposed from the harmonized rate classes in Year 11."[28] Despite the concerns expressed by the Board panel in the First MAADs Proceeding, Hydro One has not, in the Second MAADs Proceeding, providing any forecast of the costs to serve the OPDC customers after the deferral period.

21. Instead, Hydro One proposes to the Board that it will commit to limit its allocation to OPDC customers of shared costs to a kind of "cap". Its proposed approach is that it will bring forward, in a post-deferral period rebasing and harmonization, a proposal that would ensure that the total costs collected from former OPDC customers would be an amount between the Residual Cost to Serve Scenario, and the Status Quo Straw Man scenario.[29] Even then, it says it may need to adjust these amounts depending on cost drivers over the deferred rebasing period.[30]

22. Hydro One is not seeking any relief regarding this approach. Further, since all Hydro One has provided is a promise not to seek to allocate more shared costs than the capped amount, there is no evidence before the Board to suggest that the allocation then proposed would reflect the actual costs to serve Orillia at that time.

B. ARGUMENT

23. SEC submits that this second application is an attempt to relitigate matters already decided and should be dismissed on the basis that it is barred by *res judicata* and is an abuse of process.[31] The

[27] *Ibid*, p.6

[28] *Ibid*, p.9

[29] *Ibid*, p.8

[30] *Ibid*, p.9

[31] In the Notice of Motion, SEC stated that it was also relying on the application being vexatious as pursuant to section 4.6(1) of the *Statutory Powers Procedure Act.* This would allow the Board to dismiss the application on that

new evidence filed in support of the application is neither new nor responsive, nor is it sufficient to be considered a "change of circumstances" for the purposes of justifying exceptions to these legal principles. Furthermore, any residual discretion that the Board has to determine whether it will consider this application further should be decided in favor of dismissing the application, in order to avoid undermining the Board's adjudicative process.

Res Judicata and Abuse of Process

24. ***Res Judicata.*** The law requires litigants to put their best foot forward. Litigants should not be able to relitigate issues on which the decision-maker has already made a determination.[32] *Res judicata* specifically prevents parties from relitigating an issue that has been decided previously in litigation between those parties.[33] The doctrine is designed to advance the interest of justice. It is founded on two central policy concerns: finality in decision-making, and fairness.[34] It expressly applies to litigation before administrative tribunals such as the Board.[35]

25. *Res judicata* has two branches: cause of action and issue estoppel.[36] It is the second branch that is most relevant here. The issue estoppel branch has been applied in similar circumstances to this one, where an applicant has applied for certain statutory approvals for a second time.[37] The legal requirements to invoke *res judicata* are that: i) the parties in the previous proceeding are the same, ii) the previous decision was final, and iii) the issue is the same.[38]

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basis without a hearing. Since the Board has issued Notice and determined it will hold a hearing, SEC no longer relies on this ground to dismiss the application.

[32] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460 ["*Danyluk*"], para. 18, MRBA, Tab 13

[33] *Enmax Energy Corporation v TransAlta Generation Partnership,* 2015 ABCA 383, para. 39, MRBA, Tab 14

[34] *Re EnerNorth Industries Inc.*, 2009 ONCA 536 ["*Re EnerNorth*"], para. 53, MRBA, Tab 15

[35] *Danyluk*, para. 22, MRBA, Tab 13; *Universal Am-Can Ltd. v. Ontario (Municipal Board)*, [2001] O.J. No. 3615, para. 9 MRBA, Tab 16; *Elsner v. British Columbia (Police Complaint Commissioner)*, 2018 BCCA 147, para. 86, MRBA, Tab 17; *Umar v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 1391, MRBA, Tab 18; *Kaloti* v. *Canada (Minister of Citizenship and Immigration*), [1998] F.C.J. No. 1281(aff'd on appeal), ["*Kaloti*"], para. 12 MRBA, Tab 19

[36] *Re EnerNorth*, para. 53, MRBA, Tab 15

[37] For example, see *Baron v. Nova Scotia (Community Services),* 2009 NSSC 122 ["*Baron*"], para. 5, MRBA, Tab 20; *Heer v. Canada (Minister of Citizenship and Immigration)*, [2013] I.A.D.D. No. 274, para. 5, MRBA, Tab 21

[38] *Anishinabek Police Service v. Public Service Alliance of Canada*, 2012 ONSC 4583, para. 23, MRBA, Tab 22; *Danyluk*, para 25, MRBA, Tab 13

26. All three requirements are met in the present case. First, the central parties are the same. Second, the First MAADs Decision is final, as the motions to review were dismissed and no appeal or judicial review was taken. Third, the issues are the same, i.e. does the acquisition of OPDC by Hydro One meet the no harm test.

27. ***Abuse of Process.*** Abuse of process is a broader doctrine that is available even when *res judicata* is not strictly available.[39] The Supreme Court has said that the doctrine is triggered when allowing an application to proceed would violate the principle of "judicial economy, consistency, finality, and the integrity of the administration of justice".[40]

28. In considering abuse of process by relitigation, the focus is not on the parties, but on the integrity of the adjudicative process itself:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.[41]

29. The abuse of process doctrine is explicitly incorporated into the Board's powers under the *Statutory Powers Procedure Act*. Section 23(1) provides that "[a] tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."[42]

30. ***Change of Circumstances.*** In the administrative law context where a party is applying for an approval or benefit from the government (or its delegated decision-maker) neither *res judicata* nor

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[39] *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422 ["*Figliola*"], para. 33, MRBA, Tab 23; *Canam Enterprises Inc. v. Coles*, 51 O.R. (3d) 481, para. 31, MRBA, Tab 24; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 ["*Toronto (City)*"], para. 37, MRBA, Tab 25

[40] *Toronto (City)*, para. 37, MRBA, Tab 25; *Winter v. Sherman Estate*, 2018 ONCA 703, para. 7, MRBA, Tab 26

[41] *Toronto (City),* para. 51, MRBA, Tab 25

[42] *Statutory Powers Procedure Act*, R.S.O. 1990, s.23(1), MRBA, Tab 27

the abuse of process doctrine have generally applied when there has been a change of circumstances between applications. In *Katloli v. Canada*, the Federal Court commented that while these doctrines against relitigation apply to administrative tribunals, it should not prevent a second application where there has been a change in circumstances between applications:

> Consequently, I must find that, generally, res judicata has an application in public law. Otherwise, applicants could re-apply ad infinitum and ad nauseam with the same application, an abuse of the process of administrative tribunals. However, that would not prevent an applicant from launching a second application based on change of circumstances provided, of course, that the change of circumstances was relevant to the matter to be decided. [43]

31. The Nova Scotia Supreme Court requires that there must be at least a "change of circumstances" present to allow a second administrative application without necessarily offending the principles underlying *res judicata*.[44]

32. Similarly, in Ontario, other administrative tribunals have adopted such a view. For example, the Environmental Review Tribunal ("ERT") has summarized the authorities as requiring "the need for a change of circumstances and to new evidence that could support a different finding from the earlier proceeding" to justify a second application not being considered an abuse of process by relitigation.[45]

No Change in Circumstances

33. SEC submits that there has not been a sufficient change of circumstances that would allow this second application to proceed (i.e. not be considered *res judicta* or an abuse of process), for two reasons.[46] First, it is not a change of circumstances to provide evidence that was not only available to Applicants at the time of the previous proceeding, but was specifically requested at that time. Second, even if responding to the criticisms of the First MAADs Decision were sufficient to constitute a change of circumstance, which it is not, the new evidence does not actually do so.

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[43] *Kaloti*, para. 12, MRBA, Tab 19

[44] *Baron,* para. 15, MRBA, Tab 20

[45] *McIntosh v. Ontario (Ministry of the Environment),* [2010] O.E.R.T.D. No. 11, para. 39, MRBA, Tab 28

[46] SEC questions if there could ever be a change of circumstance that could ever warrant a second application. This is because under Rules 41.03(a)(ii) of the Board's *Rules of Practice and Procedure*, a "change of circumstance is a ground for a motion to review (MRBA, Tab 29). This would appear to indicate that a change of circumstance should be dealt with by way of a motion to review which has its own procedures including the Rule 43.01 threshold test. SEC notes that neither Applicant raised as a ground of their motions to review of the First MAAD Decision a change of circumstance.

New Evidence That Was Requested At the Time Cannot Not Constitute A Change of Circumstance

34. While a change of circumstance *could* include the filing of new evidence, it cannot be new evidence that was not only available to a party at the time of the First MAADs Proceeding, but was specifically requested at the time[47]. As the Federal Court of Appeal has said that "the general prohibition on re-litigation applies both to issues that have been determined by a tribunal *and* those that the litigant could have raised in the proceeding before the tribunal, but did not."[48] The same principles apply to the filing of evidence.

35. The Applicants' new evidence filed regarding post-deferral cost structures is similar to that which was contained in the Richardson Affidavit, filed as an attachment to Hydro One's motion to review of the First MAADs Decision. The Board found the contents of that affidavit "consiste[d] of information that could have been presented during the MAADs proceeding in Response to Procedural Order No.7" and that "does not assist the moving parties with meeting the threshold test required by Rule 43.01".[49] It makes little sense for the Board to reject this new evidence for the purpose of a motion to review, but allow it for the purposes of a second application, which requires significantly more time and expense of all parties and the Board to deal with.

36. It is misleading for Hydro One to say in its evidence that with this application it has "complied with the Board's order".[50] This suggests that the Board in the First MAADs Decision invited this second application, or ordered Hydro One to file this evidence after the First MAADs Decision. This is not the case. The Board denied the first application after providing the Applicants an opportunity to file, in that very proceeding, information in response to its concerns.

37. It is not as if the Applicants were unaware of the evidentiary requirements which led to the denial of their first application so as to allow filing the supposed new evidence to constitute a change of circumstance. The Board in the Second Review Decision rejected that very argument, and found that the panel hearing the First MAADs Proceeding "provided the applicants with adequate notice of

[47] The Richardson Affidavit, which is essentially the same as the Future Cost Structures evidence, was also not new at the time it was filed. It simply escalated year 10 incremental costs to year 11. Year 10 costs were already in the evidence, so adding 1% to those costs was a *de minimis* change in the evidence.

[48] *Chaudhry v. Canada (Attorney General)*, 2012 FCA 113, para. 29, MRBA, Tab 30

[49] *Second Review Decision*, p.12, MRBA, Tab 8

[50] Exhibit A, Tab 1, Schedule 1, p. 5, MRBA, Tab 31

the type of information required".[51] The Board noted correctly that given the combination of the concerns said out in Procedural Order No. 6 and requests to address them in Procedural Order No.7 "it should have been clear to the applicants what was at issue".[52]

38. It is not apparent that the Applicants themselves believe the new evidence constitutes a sufficient change of circumstance. They did not raise it as a basis of their motions to review of the First MAADs Decision, even though it is an explicit ground available under Rule 41.[53] The evidence that the Board said in the Second Review Decision did not, consistent of new facts, or facts that could not have been discovered with reasonable diligence for the purposes of the threshold test, cannot today be a change of circumstances sufficient to justify exceptions to application of *res judicata* and abuse of process.[54]

Applicants Have Not Responded To The Concerns Raised In The First MAADs Decision

39. Even if the Board determines that new evidence filed in response to the First MAADs Decision *could* constitute a change of circumstances, a review of that evidence shows it is neither new, nor relevant to the no harm test. It is not responsive to the concerns expressed by the Board, so it in effect changes nothing.

40. While the Applicants claim that they have responded to the Board's comments in the First MAADs Decisions regarding the deficiencies of their evidence,[55] a review of that evidence shows that they have not in fact done so.

41. In the First MAADs Decision the Board found that in the absence of two pieces of important information, it could not determine that the proposed transaction met the no harm test. That information consisted of two interrelated, yet distinct pieces of information:

i. ***Cost to Serve.*** "A forecast of costs to service Orillia customers beyond the ten year period."[56]

[51] *Second Review Decision*, p.12, MRBA, Tab 8

[52] *Ibid*, p.11

[53] Ontario Energy Board, *Rules of Practice and Procedure,* Rule 41.03(a)(ii), MRBA, Tab 29

[54] *Second Review Decision*, p.12, MRBA, Tab 8

[55] Exhibit A, Tab 1, Schedule 1, p.5, MRBA, Tab 31

[56] *First MAADs Decision*, p.13, MRBA, Tab 2

ii. ***Cost Allocation Methodology.*** "An explanation of the general methodology of how costs would be allocated to Orillia ratepayers after the deferral period."[57]

42. Hydro One did not provide either. What they did provide in Exhibit A, Tab 4 is something else. They provided:

i. ***Status Quo Costs.*** A straw man calculation of the costs to serve Orillia customers at the end of the deferral period (2030) under the "status quo" option[58] This is similar to evidence filed in the First MAADs Proceeding.[59]

ii. ***Residual Cost to Serve.*** A calculation of the "residual cost to serve" Orillia customers under Hydro One ownership in 2030, to which would be added the "shared costs" that all Hydro One customers, including those of Orillia, must share. There is no forecast or estimate of shared costs. This is therefore essentially the incremental costs for Hydro One to serve Orillia, not the costs Orillia customers would have to pay in rates in a scenario where the transaction is approved.[60]

iii. ***Cost Allocation Commitment.*** A non-binding commitment, which in addition to being non-binding is likely contrary to the Board's cost allocation principles that the shared costs allocated to the Orillia customers will not be less than zero, and will not be more than the difference between the straw man and the residual costs.[61] Thus, they say, the Orillia customers will not be harmed.

43. ***Cost to Serve vs. Residual Cost to Serve.*** It is surprising that the Applicants have filed no new evidence on this distinction, given that it was the central concern of the Board in the First MAADs Proceeding. Cost to serve has two components, as the Applicants rightly admit:[62] first, the residual costs to serve, which are the direct or incremental costs related to serving Orillia customers[63]; second, the shared costs, which are the Orillia customers' share of the overall costs to operate Hydro One.[64]

44. The residual costs to serve are not new to the Board, as they were filed (in different numbers as they have been updated) in the First MAADs Proceeding. While SEC has concerns that these costs

[57] *Ibid*

[58] Exhibit A, Tab 4, Schedule 1, p.2-4, MRBA, Tab 10

[59] EB-2016-0276, Ex. A, Tab 2, Schedule 1, p.2, MRBA, Tab 11, and the Richardson Affidavit, already rejected by the Board

[60] Exhibit A, Tab 4, Schedule 1, p.5, MRBA, Tab 10

[61] *Ibid*, p. 8

[62] *Ibid*, p.6

[63] *Ibid*, p.4-5

[64] *Ibid*, p.6

have been artificially lowered, even if accepted they are lower than the Status Quo Straw Man scenario costs.

45. But the issue before the Board in the First MAADs Proceeding was never the difference in the Status Quo Straw Man versus the Residual Cost to Serve. The shared costs are what drove the real concern, since they are not included in the residual cost to serve and were not then, and are not now, forecast by Hydro One. While Hydro One admits that shared costs have to be allocated to Orillia customers, it gives the Board no information on what those shared costs might be.[65] Hydro One appears to suggest that it has a discretion to allocate some amount, that it solely determines, based on a number of factors, to the Orillia customers:

> The manner in which Shared Costs will be allocated, and the amount that will ultimately be borne by former OPDC customers following the deferral period, will be matters for the OEB to consider and determine at such time that Hydro One proposes a rate structure and rate harmonization plan as part of its rebasing application following the 10-year deferral period.
>
> At that time, Hydro One would determine the quantum of its Shared Costs and the appropriate methodology for allocating those Shared Costs among all of its customer groups, including its distribution customers in the former OPDC service territory, resulting in what it then believes to be an appropriate amount of Shared Costs to be collected from the former OPDC customers. [66]

46. In substance there is nothing different today from what the Applicants provided to the Board in the First MAADs Proceeding in response to Procedural Order No. 7. Then, as now, it did not provide the forecast cost to serve Orillia customers after the deferral period.[67] In the First MAADs Proceeding, Hydro One simply said it would allocate shared costs "adher[ing] to the cost allocation and rate design principles in place at such time in the future".[68] This was an answer that the Board found was inadequate for the purposes of its role in determining if the no harm test had been met.[69]

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[65] *Ibid*, p.7

[66] *Ibid*, p.7

[67] EB-2016-0276, Procedural Order No.7 Submissions of Hydro One Inc,, February 15 2018, p.4-6, MRBA, Tab 32

[68] *Ibid*, p.6

[69] *First MAAD Decision*, p.12-13, MRBA, Tab 2

47. While the Board recognized that "any forecast of cost structures and cost allocation 10 years out would include various assumptions and could not be expected to be 100% accurate"[70], it did expect that the Applicants would have provided a forecast. They did not then, and they still have not. Hydro One has simply refused to provide a forecast cost to serve Orillia customers after the deferral period.

48. ***Cost Allocation Methodology vs. Cost Allocation Commitment.*** The Board in the First MAADs Decision said it lacked information on the cost allocation methodology that will be used to allocate costs to acquired customers after the deferral period. Hydro One has provided no information whatsoever on what that cost allocation methodology will be, except to say that they will propose something in their 2030 rate application.[71]

49. In lieu of providing evidence on the cost allocation methodology to be used for Orillia customers at the end of the deferral period, Hydro One proposes to make a commitment that the total costs allocated to Orillia customers will not exceed their Status Quo Straw Man. This so-called commitment is inappropriate on its face, and is in any case not responsive to the Board's concerns in the First MAADs Decision. There are a number of problems with their proposed approach.

50. First, the commitment is non-binding. Hydro One is not seeking an order that would bind itself to this commitment in any way, nor does it appear it could get such an order even if it wanted it. It is trite law that a Board panel's decision cannot bind the decision of another panel, so any commitment made to this Board panel could not limit the authority of the another Board panel setting rates in 2030.

51. Second, the commitment is not even a firm cap. As Hydro One is quick to point out, it wants to have the opportunity to argue that costs went up more than expected, so the cap has to be increased.[72]

[70] *Ibid*, p.13

[71] Exhibit A, Tab 4, Schedule 1, p.8-9, MRBA, Tab 31

[72] *Ibid*, p.9

52. Third, the commitment is premised on the notion that Hydro One has discretion to allocate more or less shared costs to the Orillia customers. Board policy is that cost allocation is based primarily on cost causality.[73] An applicant in a case cannot simply decide that legacy customers should pay more, and acquired customers should pay less, or vice versa. The Board's obligation is to set just and reasonable rates for all customers which means that it must follow a principled approach to cost allocation and rate design.

53. Hydro One's approach appears to be that, to ensure that this transaction meets the no harm test from the perspective of Orillia customers, existing Hydro One customers will cross-subsidize them by having shared costs not allocated in a principled way. This is exactly why the Board commented that it needs to see the cost allocation methodology. It is almost certain that a Board panel in 2030 setting rates for Orillia customers will not accept the "discretionary" cost allocation approach Hydro One says it will propose, since it is so fundamentally counter to the Board's usual rate-setting methodology. To set rates using such an approach would violate the Board's rate-setting mandate. This is why the Board in the First MAADs Decision wanted to understand the expected post-deferral period cost allocation methodology. Unless there is a principled way to allocate costs at the end of the deferral period so that the OPDC customers are not harmed, the Board could not conclude that the no harm test had been met.

54. The bottom line is that, in this application, Hydro One has not provided the costs to serve Orillia customers, and has not provided sufficient cost allocation information for the Board to assess whether there is a reasonable likelihood that the costs to serve Orillia customers will be at or lower than the status quo.

Significant Harm in Allowing the Application To Proceed

55. The residual discretion that the Board has in deciding whether or not to apply the doctrines of *res judicata* and abuse of process, on the facts of this case weighs on the side of dismissing the application. There is significant harm in allowing this application to proceed.

[73] See for example: *Board Directions on Cost Allocation Methodology For Electricity Distributors - Cost Allocation Review* (EB-2050-0317), September 29, 2006, p.3, MRBA, Tab 33

56. As noted earlier[74], the Supreme Court of Canada has identified some specific harms that can arise from relitigation that undermine the "integrity of the adjudicative process":[75]

a. No assumption that relitigation will produce a different result.

b. If it does not, everyone's time and resources – parties, adjudicators, and witnesses – have been wasted.

c. If it does, there is inconsistency that by definition undermines the credibility and authority of the adjudicative process.[76]

57. The open-ended question as to whether relitigation will produce a different result is demonstrated by the Second Review Decision, which decided that the First MAADs Decision was not only just reasonable, but correct.[77] Thus, there is every possibility that, if this Second MAADs Proceeding is allowed to proceed on the merits, the result will be the same (for the third time), wasting resources for everyone.

58. A new panel could decide the case differently. As the Board is aware, there is rarely a strictly correct or incorrect decision in a given matter before it. Cases before the Board are not fundamentally 'right vs. wrong' in nature. In exercising authority to determine if leave should be granted to allow a proposed MAADs transaction by ensuring the "no harm" test has been met, setting "just and reasonable" rates, or ensuring the "public interest" has been met in approving a leave to construct or license amendment, the Board is tasked with balancing a number of sometimes competing objectives, and they often do not lead themselves to one objectively correct outcome.[78] The Board has broad authority and significant discretion on how to apply it to the circumstances of each case.[79] Different panels of the Board may reasonably come to different decisions based on their exercise of the statutory discretion granted to them, which leads to the possibility of conflicting decisions on the same request for relief, undermining the authority and credibility of the Board. That is, for example, why the Board has said that on a motion to review, the hearing panel deserves

[74] See paras. 27-28; *Toronto (City)*, para. 51, MRBA, Tab 25

[75] *Ibid*

[76] *Ibid*

[77] *Second Review Decision*, p.12, MRBA, Tab 8

[78] *OEB Act*, s. 36(2), 74(1)(b), 78(3), 86(1),(2), 92, 96(1),(2), MRBA, Tab 1

[79] See for example, *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 S.C.R. 147, para. 61,78, MRBA, Tab 34 ; *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 28, para. 12, MRBA, Tab 35

deference, and that its decision should be reviewed on a standard of reasonableness, and findings should only be overturned if they are "clearly wrong". [80]

59. The problem of consistency of decisions is even more critical here, because there is the potential that applicants before the Board will keep asking for the same relief until they get a favourable result. Aside from being wasteful, this also builds in a bias in favour of regulated entities eventually getting what they want. That is completely inimical to the Board's independence, credibility, and authority.

60. Here, the Applicants are seeking a third attempt to have their transaction approved. Two panels of the Board have already rejected it. While utilities, such as the Applicants, may have the resources to keep coming back for more, customers who are involved in these proceedings do not. Under the approach being proposed by the Applicants, they would have a built-in advantage in Board proceedings. They can keep coming back for the same relief, again and again. Whereas the Applicants only need to be successful once, for customers who believe the proposed transaction is a detriment to them, they need to be successful each and every time. This is unfair, and biases the Board's processes in favour of those the Board regulates, rather than those the Board is charged with protecting.

61. This all more egregious in this case, where the Applicants were asked to provide specific information and refused to do so. They then went to another Board panel on a motion for review, and were again unsuccessful. Now they come before the Board for a third time, still not providing the information requested, and expect the Board to decide differently this time around. Just the fact that the Applicants filed this new application demonstrates that the Applicants do not respect the decisions of the Board, and that lack of respect by itself undermines the Board's credibility and authority.

62. It is not as if the Applicants did not know the information that the Board required. In the First MAADs Proceeding, the Board made provision in Procedural Order No.7 for the filing of further evidence or submissions on the very issue of future cost structures. The Board noted that it would

[80] *Decision and Order* (EB-2016-0255- Milton Hydro Motion to Review), February 22 2018, p.10, MRBA, Tab 36; *Decision and Order*, (EB-2009-0063 Brantford Power Inc,/Brant County Power Inc. Motion to Review), August 10, 2010, para. 35-36,38, MRBA, Tab 37;

"re-open the record in the MAAD application as it wishes to receive further material in the form of evidence or submissions from Hydro One on what it expects the overall cost structures to be following the deferral period and the impact on the Orillia Power customers". [81] The Board bent over backwards to allow the Applicants to provide the evidence the Board needed on the potential for future harm to OPDC customers. As the Second Review Decision confirmed, "no new evidence was provided in the MAADs proceeding, despite the opportunity to do so, to address the issues specifically in Procedural Order No. 7, and the concern set out in Procedural Order No. 6".[82]

63. Since neither Hydro One nor OPDC further challenged the Second Review Decision (or even the First MAADs Decision), by way of an appeal or judicial review as they could have, by allowing this second application, the Board would be allowing them to "circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision."[83]

64. The Applicants' attempt at relitigation here engages all three of the issues that the Supreme Court identified as undermining the adjudicative process.[84] There is no reason to assume that this panel will reach a different decision this time. If it does not, this proceeding is entirely a waste of resources. If the result does change, then the inconsistency itself undermines the credibility of the Board, and the finality of its decisions.

C. ORDER SOUGHT

65. SEC requests the Board dismiss the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 7, 2018

Original signed by

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Mark Rubenstein
Jay Shepherd

Counsel to the School Energy Coalition

[81] EB-2016-0276, *Procedural Order No. 7,* February 5, 2018, p.3, MRBA, Tab 6

[82] *Second Review Decision*, p.11, MRBA, Tab 8

[83] *Figliola*, para. 34, MRBA, Tab 23

[84] *Toronto (City)*, para. 37, MRBA, Tab 25