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11 January 2019

VIA E-MAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge St.
Toronto, ON

Dear Ms. Walli:

**Re: EB-2018-0270 –Hydro One Networks Inc. MAAD S86 to Purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation
SEC Motion
Submissions and Motion Record and Book of Authorities of the
Vulnerable Energy Consumers Coalition (VECC)**

Please find enclosed the Submissions, and Motion Record and Book of Authorities of the Vulnerable Energy Consumers Coalition (VECC) on the Schools Energy Coalition's Motion in EB-2018-0270 – HONI/OPDC MAAD Application.

Yours truly,

John Lawford

Counsel for VECC

cc: Applicants and interested parties (by email)

attachment

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 current 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.

OVERVIEW

1. This application should be dismissed as an abuse of process because it seeking to indirectly challenge the correctness of OEB decision EB-2016-0276. A challenge to the correctness of an OEB decision must be made as a motion to review and vary pursuant to Rule 42.01(a) of the OEB's Rules of Practice and Procedure.
2. The OEB's Rules of Procedure prescribe the grounds which a motion to review and vary must meet. By implication, those grounds require a challenge to be incremental. The motion must challenge the decision by showing an error, change in circumstances, new facts, or newly obtainable evidence. It is not permissible to challenge a decision through a new application relitigating issues which were already decided using largely repackaged evidence which has already been considered. That is what this application attempts to do.
3. There are compelling policy reasons for requiring challenges to the correctness of OEB decisions to be brought as motions to review and vary, to the exclusion of new applications. Restricting challenges to motions to review and vary promotes judicial economy because the OEB does not have to rehear and redecide the entire application, only the particular aspect of the prior decision which is called into question. It also promotes consistency and confidence in the administration of justice because any change in result must justified on the basis of an error in fact, change in circumstances, new facts, or new evidence, rather than merely the different composition or inclination of the OEB. Restricting challenges to motions to review and vary also promotes finality, keeping utilities from pursuing rejected opportunities in the hopes that a differently composed board might offer a different decision.
4. These policy considerations – judicial economy, consistency, and finality, have been identify by the courts as the key principles underlying the application of the doctrine of abuse of process. They weigh heavily in favor of rejecting an indirect challenge to the correctness of an OEB decision through a new application requesting the same relief in support of the same transaction, as is occurring in this application.

HISTORY OF THIS FILE

5. This application requests the same relief as EB-2016-0276, seeking to implement the same 15 August 2016 Share Purchase Agreement.¹ Most parties to this proceeding, including VECC, were also parties to EB-2016-0276.
6. In that proceeding, Mr. Kehoe, a residential customer of Orillia Power and former chair and board member of the former Orillia Water Light and Power, estimated that customers will receive \$400 dollar in savings during the first 10 years but would have to pay \$2,000 in costs in years 10 to 20.² Other parties filed similar supporting evidence. In response, the OEB specifically ordered HONI to

¹ EB-2018-0270, HONI Application, Attachment 5; EB-2016-0276, HONI Application, Attachment 5.

² EB-2018-0171, Decision and Order at 6.

file “evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers.”³ HONI made submissions “to the effect that it intended to follow the OEB’s Filing Requirements and Cost Allocation Model” but provided “no new evidence [...] despite the opportunity to do so, to address the issue specifically referenced in Procedural Order No. 7, and the concern set out in Procedural Order No. 6 [i.e. the costs structures following the deferred rebasing period and the effect on Orillia Power Customers.” On this basis, the OEB decided it was not satisfied that the “no harm test” test was met and denied HONI’s application.

7. Hydro One Networks Inc (HONI) and Orillia Power Distribution Corporation (OPDC) already brought a motion to review and vary EB-2016-0276, which the OEB denied in OEB decision EB-2018-0171.
8. This application provides a response which is largely similar to the response that HONI provided in EB-2016-0276 in responses to the OEB’s request for submissions on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers. While HONI provides analysis purporting to show that it would be possible to set rates which are less than the rates it projects for OPDC absent the acquisition, HONI does not demonstrate that such rates would result from the methods by which the OEB typically allocates shared costs.⁴ HONI’s analysis falls short of demonstrating that OPDC customers are will not be harmed by the increase in rates arising from bearing their likely share of HONI’s Shared Costs.

THE LEGAL TEST

9. Under s 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, “A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.”
10. The common principles underlying the application of the abuse of process doctrine were outlined in *British Columbia (Workers' Compensation Board) v. Figliola* 2011 SCC 52, of which the two most pertinent are:
 - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
 - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).⁵

³ EB-2018-0171, Decision and Order at 10.

⁴ EB-2018-0270, Application, Exhibit A, Tab 4, Schedule 1, Page 7.

⁵ *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para 34.

11. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, Arbour J explained on behalf of the Supreme Court of Canada, that “Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.”⁶
12. The proper procedure for challenging the correctness of an OEB decision is set out in Rule 42.01(a) of the OEB’s *Rules of Practice and Procedure*. That rule states:

42.01 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; and
13. Implicitly, the procedure set out in this rule requires the applicant to launch challenges to the correctness of a decision in an incremental manner. The rules focuses on the error, change, new facts, or newly available evidence.
14. Restricting challenges to motions to review and vary promotes judicial economy because the OEB does not have to rehear and redecide the entire application, only the particular aspect of the prior decision which is called into question. It also promotes consistency and confidence in the administration of justice because any change in result must be justified on the basis of an error in fact, change in circumstances, new facts, or new evidence, rather than merely the different composition or inclination of the OEB. Restricting challenges to motions to review and vary also promotes finality, keeping utilities from pursuing rejected opportunities in the hopes that a differently composed board might offer a different decision.
15. On the basis of these three considerations – judicial economy, consistency, and finality - OEB should apply the doctrine of abuse of process to bar indirect challenges to its decisions through new applications seeking the same relief in support of the same transaction, as is being attempted in this application.

DATED AT OTTAWA, 11 JANUARY 2019

⁶ *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63 at para 37.