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January 16, 2019

EMAIL & COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: EB-2018-0270 - Hydro One Networks Inc. – MAAD Application re OPDC – Hydro One Materials on SEC Motion

We are counsel to Hydro One Networks Inc. ("Hydro One") in the above-referenced matter.

In accordance with Procedural Order No. 1, issued by the Board on December 20, 2018, please find enclosed Hydro One's submissions on the motion filed by School Energy Coalition, together with a book of authorities. These materials have been filed through the Board's Regulatory Electronic Submission System (RESS) and copies served on all parties.

Yours truly,

for Charles Keizer

cc: All Parties

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 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.*

SUBMISSIONS OF HYDRO ONE NETWORKS INC.
(On School Energy Coalition Motion to dismiss Hydro One Networks Inc.'s Application under section 86(2)(b) of the *Ontario Energy Board Act, 1998*)

January 16, 2019

OVERVIEW

1. Hydro One Networks Inc. ("**HONI**") has filed a new application to acquire all outstanding shares of Orillia Power Distribution Corporation (the "**Corporation**") (the "**New MAAD Application**"). This application includes new evidence that is directly relevant to a central issue that the Board has found it must consider under Section 86(2)(b) of the *Ontario Energy Board Act* (the "**Act**") and its no harm test - the overall cost structure following the deferral period and an explanation of the impact on Orillia's customers.[1]

2. The new evidence filed by HONI includes information on the future revenue requirements of the Corporation beyond the 10-year deferral period, how costs would be allocated beyond the 10-year deferral period, and other new information showing that the Corporation's customers would benefit from the transaction. This is information that the Board said would be useful and material in deciding whether the transaction met the "no harm" test.[2]

3. In its motion, School Energy Coalition ("**SEC**") is asking for an order with severe consequences. It asks that, notwithstanding the right to bring an application under Section 86(2)(b) of the OEB Act, the New MAAD Application should be dismissed in its entirety, without considering, testing, and evaluating any of the new evidence. SEC relies on the doctrines of *res judicata* and abuse of process.

4. SEC's motion should not be granted.

5. First, the Board is a public body bound by statute. Section 86(2)(b) of the Act entitles an applicant to file and to have heard a new application where new evidence would assist the Board in fulfilling its objectives in s. 1(1) of the Act, as reflected in the Board's no harm test. That new evidence has been filed with the New MAAD Application. It would constitute an impermissible fettering of the Board's discretion if the Board fails to consider that evidence for irrelevant reasons, such as the fact that HONI filed an earlier, different application.

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[1] EB-2016-0276, Decision and Order, April 12, 2018 at p. 13, SEC's Book of Authorities and Motion Record ["SEC BOA"], Tab 2
[2] EB-2016-0276, Procedural Order No. 7, February 5 2018 at pp. 2-3, SEC BOA, Tab 6

6. Second, the doctrine of *res judicata* cannot prevent the Board from exercising its statutory duties under s. 1(1) and 86(2)(b) of the Act. Indeed, the policy underpinnings of *res judicata* are fundamentally inconsistent with the role of the Board in hearing s. 86(2)(b) applications. Even if *res judicata* could apply in this context, it cannot apply here because the issue in the New MAAD Application is different from the issue in HONI's first application. That is because a s. 86(2)(b) application is largely decided on the specific facts before the Board. When new evidence is introduced, which HONI has done, the facts change, as they have here. Therefore, the issue is not the same.

7. Third, SEC's motion challenges HONI's new evidence on its merits.[3] In doing so, SEC has raised a number of issues that the Board must consider in respect of the new evidence. These issues can be determined only if this application is heard and the evidence is tested and evaluated according to the established Board procedures for doing so. This illustrates precisely why the application must proceed.

8. Finally, the Supreme Court of Canada has ruled that the doctrine of abuse of process applies to administrative proceedings only in "the clearest of cases," which will be "extremely rare." This is because of "the harm to the public interest in the enforcement of the legislation if the proceedings [are] halted."[4] This harm of applying abuse of process in this case is great: if SEC's motion is granted, the ratepayers of Orillia will be denied the chance to have the new evidence tested and evaluated, and therefore denied the chance of learning whether the proposed transaction will actually benefit them.

9. For these reasons, which are discussed below after reviewing the relevant background, SEC's motion should be dismissed.

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[3] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at paras. 34-54
[4] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 120 ["*Blencoe*"], HONI's Book of Authorities ["HONI's BOA"], Tab 1

BACKGROUND

A. HONI's first application to acquire all outstanding shares of the Corporation

10. HONI filed an application on September 27, 2016 under s. 86(2)(b) of the Act for leave to acquire all outstanding shares of the Corporation, and for related relief (the "**First MAAD Application**").

11. On February 5, 2018, the Board issued Procedural Order No. 7 in the First MAAD Application. Procedural Order No. 7 required HONI to file "evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers."[5]

12. HONI filed submissions on February 15, 2018. They emphasized that if HONI were permitted to acquire all outstanding shares of the Corporation, the overall cost structures to serve the Orillia area would be lower following the deferred rebasing period in comparison to the status quo.[6] This is because, among other things, operating, maintenance and administration (OM&A) cost savings achieved in the initial 10-year period are expected to persist beyond the deferred rebasing period, capital costs are expected to be lower on an ongoing basis, distribution operations would become more efficient, administrative and back office efficiencies would be achieved, debt costs would decrease, and high-cost investments to improve the Corporation's assets would be recoverable from a larger rate-base.[7]

13. On April 12, 2018, the Board rejected the First MAAD Application (the "**Decision**").[8] The Board indicated that with the exception of outstanding questions about cost structures, the First MAAD Application met the "no harm" test.[9] However, on the question of cost structures, the Board "highlighted its concern and its need to better understand the implications of how Orillia

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[5] EB-2016-0276, Procedural Order No. 7, February 5, 2018 at p. 3, SEC BOA, Tab 6
[6] EB-2016-0276, Procedural Order No. 7, Submissions of HONI, February 15, 2018, HONI's BOA, Tab 2
[7] EB-2016-0276, Procedural Order No. 7, Submissions of HONI, February 15, 2018, HONI's BOA, Tab 2
[8] EB-2016-0276, Decision and Order, April 12, 2018, SEC BOA, Tab 2
[9] See Page 12 of the Decision, saying that the OEB accepts that the acquisition will lead to some savings on account of eliminating redundancies; Page 16 saying the Board is satisfied that the Corporation's quality and reliability of service would be maintained and that the requirement to report on reliability and quality of service would confirm to the OEB that any reduction in service quality would become apparent; and, Page 17 accepting that there will be no adverse impact on Hydro One's financial viability as a result of its proposals for financing the transaction: SEC BOA, Tab 2

customers will be impacted by the consolidation beyond the ten year (deferred rebasing) period."[10] In the absence of information to address that Board concern, the Board could not "reach the conclusion that there will be no harm."[11]

B. HONI's motion to review and vary the Decision

14. On May 2, 2018, HONI and the Corporation each filed notices of motion to review and vary the Decision.[12] HONI included with its notice of motion the Affidavit of Joanne Richardson, the Director of Major Projects and Partnerships in the Regulatory Affairs department at HONI (the "**Richardson Affidavit**"). The Richardson Affidavit contained extensive information about changes to the underlying cost structure for providing distribution service to the existing service territory of the Corporation beyond the 10-year deferral period if HONI were permitted to acquire the Corporation.[13]

15. The Richardson Affidavit explained that the Corporation's Year 11 revenue requirement for its Cost to Serve Status Quo scenario would be approximately $11.8 million. This conclusion was based on information derived from the Corporation's 2016 Audited Financial Statements, adjusted with an inflation factor.[14] On the other hand, the Richardson Affidavit explained that because of synergies and efficiency gains during the deferral period, the Corporation's Year 11 revenue requirement would be only $6.8 million if HONI were permitted to acquire the Corporation.[15] These synergies and savings, it was indicated, would continue following the expiry of the 10-year deferral period.

16. This $6.8 million Residual Cost to Serve did not reflect the costs that would be paid by the Corporation's customers for HONI's Shared Costs. HONI therefore committed to seek Board approval, in a rate proceeding after the expiry of the 10-year deferral period, to allocate Shared Costs to the acquired customers in the Corporation's service territory in an amount less than the difference between (a) the Year 11 revenue requirement under the Orillia Power Status Quo

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[10] EB-2016-0276, Decision and Order, April 12, 2018 at p. 13, SEC BOA, Tab 2
[11] EB-2016-0276, Decision and Order, April 12, 2018 at p. 13, SEC BOA, Tab 2
[12] EB-2018-0171, Notice of Motion of HONI, May 2, 2018, HONI's BOA, Tab 3
[13] EB-2016-0276, Affidavit of Joanne Richardson, sworn May 2, 2018, SEC BOA, Tab 7
[14] Richardson Affidavit at para. 4, SEC BOA, Tab 7
[15] Richardson Affidavit at para. 5, SEC BOA, Tab 7

Scenario plus Year 11 low-voltage ("**LV**") charges,[16] and (b) the Residual Cost to Serve Scenario.[17] This would ensure that the Corporation's customers would pay no more than they would have paid in the absence of the transaction.[18]

17. On August 23, 2018, the Board rejected HONI's motion to review and vary the Decision. Of particular significance is that the Board rejected the motion at the threshold stage; it did not consider the Richardson Affidavit on its merits. With respect to the Richardson Affidavit, the Board found that the "affidavit consists of information that could have been presented during the MAAD proceeding in response to Procedural Order No. 7" because the scenarios presented therein "appear[ed] to be based on the 2016 audited financial statements." Applying the Board's test under its Rules of Practice and Procedure, the Board concluded that the Richardson Affidavit did "not present new facts that have arisen or facts that could not have been discovered by reasonable diligence."[19]

18. As the Board has never considered the evidence in the Richardson Affidavit on its merits, this evidence (and the issues raised by it) has never been tested and evaluated through technical conferences, cross-examinations, and written interrogatories.

C. The New MAAD Application to acquire all outstanding shares of the Corporation

19. On September 26, 2018, HONI filed the New MAAD Application to acquire all outstanding shares of the Corporation. The evidence in the New MAAD Application includes new evidence that was not advanced in HONI's First MAAD Application. Like the evidence in Richardson Affidavit, this information has never been considered, tested, and evaluated by the Board or by members of the public.

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[16] The LV charge, which is an OEB-approved rate, reflects Hydro One's upstream distribution cost to serve embedded customers.
[17] Richardson Affidavit at para. 12, SEC BOA, Tab 7. The Richardson Affidavit used the following example: If the Year 11 LV charges are $0.8 million, and the Year 11 revenue requirements under the Orillia Power Status Quo scenario is $11.8 million (for a total of $12.6 million), then given the revenue requirement under the Residual Cost to Serve Scenario of $6.8 million, HONI would allocate Shared Costs to the acquired customers up to a maximum of $5.8 million).
[18] Richardson Affidavit at para. 12, SEC BOA, Tab 7
[19] EB-2016-0276, Decision and Order, April 12, 2018 at p. 13, SEC BOA, Tab 2

20. The new evidence filed by HONI directly responds to the concerns of the Board, being evidence on what HONI expects the overall cost structure to be following the deferral period and to explain the impact on Orillia's customers.[20] Accordingly, the New MAAD Application includes evidence on future cost structures of the Corporation beyond the ten-year deferral period, as well as an explanation as to how costs would, subject to Board approval in a future rate application, be allocated beyond the deferral period. It also includes other new evidence, not specifically addressed in the Decision, showing that the Corporation's customers would benefit from the transaction.

New evidence on future cost structures of the Corporation beyond the 10-year deferral period

21. The new evidence filed in the New MAAD Application includes a comparison between the Corporation's revenue requirement in Year 11 (after the 10-year deferral period) if (a) HONI were not permitted to acquire all outstanding shares of the Corporation, and (b) HONI were permitted to acquire all outstanding shares of the Corporation.[21] HONI determined that under scenario (a), the Corporation's revenue requirement would be $14.4 million (including Low Voltage charge) (the "**Status Quo Amount**"),[22] while under scenario (b), the Corporation's revenue requirement would be $7.3 million (the "**Residual Revenue Requirement**"), a reduction of $7.1 million.[23] These amounts were derived from the Corporation's 2017 financial statements.[24] The evidence also includes updates to reflect current variables to costs and other metrics.[25]

New evidence on how costs would be allocated beyond the 10-year deferral period

22. The New MAAD Application includes a commitment from HONI that, after the deferral period, it will charge acquired customers an amount of Shared Costs that would result in the total revenue requirements being between $8.3 million (the Residual Revenue Requirement plus the LV Charge) and $14.4 million (the Status Quo Amount). This evidence directly relates to a material issue which the Board has yet to consider in any proceeding to date: whether the forecast of the

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[20] Decision at p. 13, SEC BOA, Tab 2
[21] New MAAD Application, Exhibit A, Tab 4, Schedule 1, SEC BOA, Tab 10
[22] New MAAD Application, Exhibit A, Tab 4, Schedule 1 at p. 4, SEC BOA, Tab 10
[23] New MAAD Application, Exhibit A, Tab 4, Schedule 1 at p. 5, SEC BOA, Tab 10
[24] New MAAD Application, Exhibit A, Tab 4, Schedule 1 at p. 2, SEC BOA, Tab 10
[25] New MAAD Application, Exhibit A, Tab 1, Schedule 1 at p. 5, SEC BOA, Tab 10

Year 11 revenue requirement and the commitment, as described in the new evidence, to allocate costs after the deferral period (subject to Board approval in a future rate proceeding) are sufficient to provide a reasonable expectation of the overall cost structure following the deferral period and explain the impact on Orillia's customers. If the Board allows the New MAAD Application, the Board can appropriately test whether the acquired customers will be subject to revenue requirements that will be the same as, or significantly less than, if the transaction were not allowed. This evidence, and its impact on customers' rates, has never been considered, tested, or evaluated by the Board in any prior proceeding.

Other evidence showing that the Corporation's customers would benefit from the transaction

23. In addition, the New MAAD Application includes other new evidence not previously alluded to in the Decision showing that the acquired customers would enjoy lower rates as a result of the transaction. For example, HONI filed a May 2018 public statement from the Corporation wherein the Corporation stated that its current rates are not sufficient to sustain its electricity distribution operations over the long term. The Corporation included a message in its customers' bills advising them that:

> If the sale to Hydro One is not approved, [the Corporation] will be required to file for a distribution rate increase (known as a Cost of Service rate application) with the OEB at least twice over the next 10 years. It is estimated that distribution rates will increase by an average annual rate of 2-4% over the next 10-year period.[26]

24. This information, too, is new evidence not previously before the Board in the First MAAD Application. It relates directly to rates in the absence of the proposed transaction and to meeting the "no harm" test.

25. The New MAAD Application also lists other evidence showing that the acquired customers would benefit from the transaction. For example, HONI will incur capital expenditures with respect to the Corporation's assets during the 10-year deferral period. However, the revenue requirement impact of these expenditures will not be charged to customers during the deferral period.[27] This is a clear benefit to the Corporation's customers.

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[26] New MAAD Application, Exhibit A, Tab 4, Schedule 1 at p. 11, SEC BOA, Tab 10
[27] New MAAD Application, Exhibit A, Tab 4, Schedule 1 at pp. 10-11, SEC BOA, Tab 10

ARGUMENT

26. On October 16, 2018, SEC filed its motion seeking an order dismissing the New MAAD Application on the basis that it is *res judicata*, an abuse of process, and/or vexatious. SEC's motion is supported by its January 7, 2019 motion submissions, which are supported by Energy Probe's January 11, 2019 submissions and the Consumers Council of Canada's submissions of January 14, 2019. Based on SEC's factum, SEC no longer relies on the ground that the application is vexatious.[28]

27. SEC's motion should be dismissed for four reasons:

(a) Section 86(2)(b) of the Act entitles an applicant to file a new application where similar relief was not previously granted, and requires the Board to hear the new application unless there is a "statutory impediment" to doing so. No such impediment exists. If the Board declines to consider the New MAAD Application under these circumstances, that would constitute an impermissible fettering of the Board's discretion.

(b) The New MAAD Application cannot be barred by *res judicata* because the doctrine of *res judicata* cannot apply to exercises of statutory powers such as s. 86(2)(b) of the Act. Even if *res judicata* could apply under these circumstances (which is denied), it does not apply here because the issue in the First MAAD Application is different from the issue in the New MAAD Application.

(c) The New MAAD Application is based on evidence that has not been considered by the Board in any proceeding and raises issues not previously contemplated by the Board. These issues can be resolved only if the New MAAD Application is heard.

(d) The New MAAD Application is not an abuse of process. The Supreme Court of Canada has set an extremely high bar for a finding of abuse of process. The New MAAD Application comes nowhere near meeting this high standard.

28. For these reasons, discussed below, HONI asks that SEC's motion be dismissed.

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[28] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 23, footnote 31

A. HONI is entitled to submit a new application under s. 86(2)(b)

29. Section 86(2)(b) of the Act entitles an applicant to make a new application for relief similar to relief that has previously been denied. So long as the application contains new evidence that is relevant and material to the impact of the proposed transaction, the Board is required to consider the application. To find otherwise would constitute an impermissible fettering of the Board's discretion.

Section 86(2)(b) entitles HONI to file the New MAAD Application

30. In the absence of a "statutory impediment," the Board, like other statutory decision-makers, may receive new applications and make new orders when exercising its statutory powers.[29] Nothing in s. 86(2)(b), or any other provision of the Act, prohibits an applicant from making, and the Board from receiving, a new application with new evidence for approval of a transaction that has previously been denied. On the contrary, s. 86(2)(b) entitles a person to seek an order from the Board and does not impose any of the limitations proposed by SEC.

31. HONI's entitlement to submit the New MAAD Application is supported by decisions where the Board has invited applicants to submit new applications,[30] and in decisions of the courts. For example, in *Kurukkal v. Canada (Minister of Citizenship and Immigration)*,[31] the Federal Court allowed an application for judicial review of an assessment officer's decision to refuse to reconsider the applicant's permanent residency application after the applicant submitted additional evidence. The assessment officer had declined to consider the fresh evidence on the basis that he was *functus officio* (i.e., "having performed his office" and therefore of no further official authority).

32. In allowing the application for judicial review, the Court explained that while there is "always a benefit to finality in the decision-making process," the type of application at issue in that matter "is fundamentally different than, for example, a civil judgment or a tribunal decision

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[29] Sara Blake, *Administrative Law in Canada*, Toronto: LexisNexis, 2017 at pp. 148-149 ["Blake"], HONI's BOA, Tab 4; *Davidson v. Calgary (City)*, 2007 ABCA 364 at para. 23 ["*Davidson*"], HONI's BOA, Tab 5

[30] *Enbridge Gas Distribution Inc. (Re)*, 2014 LNONOEB 14 at para. 2, HONI's BOA, Tab 6; *Norfolk Power Distribution Inc. (Re)*, No. EB-2009-0238 at para. 64, HONI's BOA, Tab 7

[31] *Kurukkal v. Canada (Minister of Citizenship and Immigration)*, [2009] F.C.J. No. 866 (TD) ["*Kurukkal*"], HONI's BOA, Tab 8, varied on other grounds, 2010 FCA 230 at para. 5, HONI's BOA, Tab 9. See also *Sawatsky v. Norris and St. Thomas Psychiatric Hospital*, [1992] O.J. No. 1253 (SCJ) at para. 43, HONI's BOA, Tab 10

that resolves a dispute between two or more parties."[32] In a civil dispute, "the successful party or parties may rely on court or tribunal rulings in the conduct of their affairs." In contrast, in the proceeding at issue in that case, "there [was] no true *lis inter partes*, or live controversy or dispute, between parties […]."[33] In allowing the fresh evidence to be considered, the Court pointed to the "the need for flexibility and responsiveness to changing circumstances and new information."[34]

33. Similarly, in *Davidson*, the Alberta Court of Appeal overturned a decision of a chambers judge who had quashed the City of Calgary's decision to approve the subdivision of certain lands on the basis that the subdivision application was "essentially the same" as an application submitted in 2006. [35] Like the Court in *Kurukkal*, the Court of Appeal wrote that "[d]ecisions, such as subdivision approval, do not necessarily fit the adjudicative model of "Plaintiff versus Defendant" upon which principles such as finality of litigation largely rest."[36] The chambers judge therefore "erred in importing into her evaluation of the 2006 decision a consideration that the 2005 decision was being re-visited and the outcome changed."[37] Because the "2006 decision was made on a new application and there were no statutory impediments" to deciding a new application, "[t]he principles of *functus officio* and issue estoppel did not apply to prevent Calgary from granting the 2006 application."[38]

34. The same is true of applications under s. 86(2)(b) of the Act. They are not disputes between two or more parties where one party is trying to gain something at the expense of the others. They are applications for regulatory approvals. The Board is not tasked with determining which party should "win" but is instead tasked with determining whether the proposed transaction meets the public interest objectives in s. 1(1) of the Act. Further, as in *Kurukkal*, there is a need for flexibility and responsiveness to new information: if new evidence is advanced which indicates that customers could enjoy lower rates as a result of a proposed transaction, customers cannot be denied

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[32] *Kurukkal* at p. 68, HONI's BOA, Tab 8
[33] *Kurukkal* at p. 69, HONI's BOA, Tab 8
[34] *Kurukkal* at p. 74, HONI's BOA, Tab 8
[35] *Davidson* at p. 3, HONI's BOA, Tab 5
[36] *Davidson* at p. 17, HONI's BOA, Tab 5
[37] *Davidson* at p. 17, HONI's BOA, Tab 5
[38] *Davidson* at p. 23, HONI's BOA, Tab 5

the benefit of having the Board consider that new evidence in a new application that could potentially result in lower rates.

The New MAAD Application contains new evidence not previously before the Board

35. The New MAAD Application is also not the same as HONI's first application. It includes new evidence showing, among other things, that if HONI is permitted to acquire all of the outstanding shares of the Corporation, (a) the underlying cost structures to serve the Corporation's service territory will, after the deferral period, be reduced by approximately $7.1 million prior to an allocation of Shared Costs;[39] (b) the Shared Costs allocated to acquired customers post the deferral period would result in the total revenue requirements being between $8.3 million (the Residual Revenue Requirement plus the Low Voltage Charge) and $14.4 million (the Status Quo Amount), and (c) the Corporation's rates to serve its customers will increase if the transaction is not approved.[40] It also contains new evidence to update variables to costs and other metrics.[41]

36. This evidence is also highly relevant and material to the Board's determination under s. 86(2)(b). As the Board explained in the Decision, the appropriate test under s. 86(2)(b) is the "no harm" test. The Board "considers whether the no harm test is satisfied based on an assessment of the cumulative effect of the transaction on the attainment of its statutory objectives. If the proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the application."[42] When applying this test, the Board "has focused on the objectives that are of most direct relevance to the impact of the proposed transaction; namely, price, reliability and quality of electricity service to customers […]."[43]

37. The evidence described above, and other evidence in the New MAAD Application, plainly establishes that the proposed transaction will, at worst, have a neutral effect on the Corporation's customers and, at best, have a benefit by lowering future rate increases. Notwithstanding that this information is similar to evidence contained in the Richardson Affidavit, this information has never been considered by the Board. At no point, including in its decision on HONI's motion to

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[39] See above at paras. 21ff
[40] See above at paras. 21ff
[41] See above at paras. 21ff
[42] The Decision at p. 5, SEC BOA, Tab 2
[43] The Decision at pp. 5-6, SEC BOA, Tab 2

review and vary the Decision, did the Board ever consider the Richardson Affidavit on its merits. OEB staff confirms this in its submissions.[44]

Failing to consider the New MAAD Application because the First MAAD Application was denied would constitute an impermissible fettering of the Board's discretion

38. An administrative decision-maker "cannot fetter its discretion in such a way that it mechanically or blindly makes the determination without analyzing the particulars of the case and the relevant criteria." Rather, "[i]t is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear in every case."

39. In this case, the Board has the discretion, and a statutory duty, to determine whether to grant HONI leave to acquire all outstanding shares of the Corporation on the basis of the evidence contained in the New MAAD Application, and not on the basis of HONI's first application or on the basis of HONI's review and variance motion. The Board must make this determination having regard to the Board's objectives in s. 1(1) of the Act.

40. Failing to consider the evidence contained in the New MAAD Application because the First MAAD Application was rejected would impermissibly fetter the Board's discretion by preventing it from determining whether that evidence shows that the proposed transaction meets the "no harm" test. This would, in effect, rewrite s. 86(2)(b) to say that no application can be made if a different application seeking the same relief was previously rejected. This should not be permitted.

41. Indeed, the Board's power to receive and consider new applications under s. 86(2)(b), and to make different orders on new applications, is undisputed, and is affirmed by ss. 54(1) and 49-2 of Ontario's *Legislation Act, 2006*. Read together, they provide that the "[p]ower to make [documents under an Act] includes power to amend, revoke or replace them from time to time."[45] A decision or order of the Board is plainly a "document under an Act." Thus, if the Board has the authority to replace its previous orders from time to time – which it clearly does – it cannot be prevented from making *new* orders on *new* applications. That would be an improper fettering of

[44] EB-2018-0270, Submissions of OEB Staff, January 14, 2019 at p. 3
[45] *Legislation Act, 2006,* S.O. 2006, c. 21, Sch. F, ss. 54(1), 49-2

the Board's statutory authority, which "should not be fettered except by clear and express legislation."[46] No such legislation exists.

42. The Vulnerable Energy Consumers Coalition ("**VECC**") submits that, rather than filing a new application, HONI should have filed a motion to review and vary the Decision on the basis of the new evidence contained in the New MAAD Application.[47] That submission should be rejected. The Act provides a clear right to make applications under s. 86(2)(b), and there is no statutory impediment against doing so. Moreover, on a motion to review and vary, the Board applies the threshold test. This means that new and potentially relevant evidence showing benefits to ratepayers may not be considered by the Board on its merits if the evidence does not pass the threshold test. That would be contrary to the Board's objectives under s. 1(1) of the Act.

Conclusion: HONI may submit and have heard a new application under s. 86(2)(b)

43. HONI has submitted a fresh application with new evidence that was not previously considered by the Board. Because of that, there is no basis under s. 86(2)(b) for the Board to refuse to hear the New MAAD Application.

B. The New MAAD Application cannot be dismissed on the basis of *res judicata*

44. There are two reasons why the New MAAD Application cannot be dismissed on the basis of *res judicata*:

(a) First, *res judicata* cannot be used to foreclose the Board's exercise of its statutory powers and obligations under s. 1(1) and 86(2)(b) of the Act. This conclusion is clear from applicable legal authorities and from the policy rationale underlying the doctrine of *res judicata*.

(b) Second, even if *res judicata* could apply in this context (which is denied), it has been improperly applied by SEC, Energy Probe and the Consumers Council of Canada. Under the circumstances, *res judicata* cannot prevent the Board from considering the New MAAD Application.

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[46] *Treesann Management Inc. et al. v. Corporation of the Town of Richmond Hill*, 41 O.R. (3d) 625 (SCJ) at para. 5, HONI's BOA, Tab 12; varied on other grounds: [2000] O.J. No. 406, HONI's BOA, Tab 13
[47] EB-2018-0270, Submissions of Vulnerable Energy Coalition (Motion), January 11, 2019 at para. 14

1. The Board's exercise of its statutory duties cannot be prevented by the doctrine of res judicata

45. ***The applicability of res judicata in administrative proceedings***. SEC asserts that *res judicata* is fully applicable in administrative law proceedings. This is a mischaracterization of the law. The Federal Court of Appeal has expressed "real doubt as to the applicability of the principle of *res judicata* in administrative law."[48] *Res judicata* cannot "operate to defeat a statutory duty or right"[49] The applicability of *res judicata* in administrative proceedings has been addressed extensively in English administrative law, where it "plays a restricted role."[50] This is because "it must yield to two fundamental principles of public law: that jurisdiction cannot be exceeded; and that statutory duties cannot be fettered."[51]

46. ***Res judicata does not apply to exercises of the Board's statutory duties under ss. 1(1) and 86(2)(b) of the Act.*** Whatever restricted role *res judicata* may have in administrative law, it does not apply in the current context. The Board has a duty to exercise its statutory discretion and to make a decision on each matter that comes before it.[52] The "doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty."[53] As the Supreme Court of Canada explained in *St. Ann's Island Shooting And Fishing Club v. The King*, "there can be no estoppel in the face of an express provision of a statute."[54] This principle applies with particular force in "situations where powers have to be exercised in the public interest,"[55] such as in the New MAAD Application.

47. Under the Act, the Board must exercise its discretion and consider whether to grant HONI leave to acquire all of the outstanding shares of the Corporation. The Board must conduct that

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[48] *Deputy Minister of National Revenue for Customs and Excise v. Kelly Ltd.*, [1981] F.C.J. No. 143 (CA) at para. 6, HONI's BOA, Tab 14
[49] Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, Toronto: Carswell (Looseleaf) at s. 12.19B, HONI's BOA, Tab 15; William Wade, *Administrative Law*, Oxford: Oxford University Press, 2014 at p. 205 ["Wade"], HONI's BOA, Tab 16
[50] Wade at p. 201, HONI's BOA, Tab 16
[51] Wade at p. 201, HONI's BOA, Tab 16
[52] Wade at pp. 204-205, HONI's BOA, Tab 16; *Southend-On-Sea Corporation v Hodgson (Wickford) Ltd*, [1961] 2 All ER 46 at p. 4, HONI's BOA, Tab 17; *Malcolm v. Canada (Fisheries and Oceans)*, 2014 FCA 130 at para. 39, HONI's BOA, Tab 18; *St. Ann's Island Shooting And Fishing Club v. The King*, [1950] SCR 211 at p. 220 ["*St. Ann's*"] , HONI's BOA, Tab 19
[53] Wade at pp. 204-205, HONI's BOA, Tab 16; *Canada (Minister of Employment & Immigration) v. Lidder*, [1992] 2 F.C. 621 (TD) at para. 3, HONI's BOA, Tab 20
[54] *St. Ann's* at p. 220, HONI's BOA, Tab 19
[55] Wade at p. 205, HONI's BOA, Tab 16

assessment in view of its public interest objectives in s. 1(1) of the Act. The Board cannot exercise its discretion and make that determination without first considering the evidence in the New MAAD Application.

48. The Board has a framework to decide whether to grant leave under s. 86(2)(b) of the Act. This framework is set out in the *Handbook to Electricity Distributor and Transmitter Consolidations* and in s. 1(1) of the Act. The doctrine of estoppel cannot prevent the Board from performing its statutory duties and applying that decision-making framework to determine whether to grant the New MAAD Application.

49. ***The rationale underpinning res judicata is not applicable to a s.86(2)(b) application.*** Contrary to SEC's assertion, *res judicata* is not a "one size fits all" doctrine. Its appropriate application is tied to the legal rationale that underpins the doctrine. That rationale is based on finality and fairness. Because of the nature of an application under s.86(2)(b), the relief sought and the issues before the Board on such an application, the legal basis for *res judicata* is not applicable to an application under s.86(2)(b) of the Act.

50. SEC relies on issue estoppel in support of its *res judicata* argument. For issue estoppel to apply, the "question to be decided in the second proceeding must be the same question that has been decided in the first proceeding."[56] The role of issue estoppel in administrative proceedings is "not well settled."[57] Indeed, in *Danyluk v. Ainsworth Technologies Inc.*, the Supreme Court of Canada cautioned against a mechanical application of issue estoppel in administrative proceedings because the doctrine was "initially developed in the context of prior court proceedings," and there are "major differences" between court orders and administrative orders in terms of "their legal nature and the position within the state structure of the institutions that issue them."[58] The Court explained that "[t]here is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals."[59] Thus,

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[56] Donald Lange, *The Doctrine of Res Judicata in Canada*, Toronto: LexisNexis Canada at p. 27 ["Lange"], HONI's BOA, Tab 21; *R. v. Martin*, [2008] O.J. No. 1596 (SCJ) at para. 10, HONI's BOA, Tab 22
[57] *Alberta (Minister of Finance) v. Bang*, 2007 ABCA 344 at para. 17, HONI's BOA, Tab 23
[58] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 22 ["*Danyluk*"], HONI's BOA, Tab 24
[59] *Danyluk* at para. 22, HONI's BOA, Tab 24

the applicability of *res judicata* is highly contextual: it depends on the nature of the administrative tribunal in question and the type of order at issue.

51. But whatever role issue estoppel may play in administrative law, it cannot be used to bar the New MAAD Application. This is because the rationale for using estoppel – finality in litigation and preventing a person from being "twice vexed by the same cause"[60] (i.e., fairness) – do not apply in the context of an application under s. 86(2)(b) of the Act.

52. **Finality**. The First and New MAAD Applications are not litigation between parties. They are applications to determine whether HONI should be granted leave to acquire all outstanding shares of the Corporation in view of the Board's objectives in s. 1(1) of the Act. Prioritizing finality in this context is inconsistent with the need for administrative decision-makers such as the Board to make decisions that "reflect changing circumstances and evolving policy concerns in the field [they] govern."[61] Indeed, this is why tribunals are not bound by precedent.[62]

53. The application of *res judicata* as a procedural bar to applications under s. 86(2)(b) of the Act creates a risk that an applicant who has already been denied leave will never be able to make a fresh application. This would be the case even if new evidence is filed with the subsequent application showing a benefit to ratepayers, as it has been here. This would not be consistent with the Board's objectives under s. 1(1) of the Act, and would be contrary to the policy of facilitating consolidation in the distribution sector. It would create a risk that the Board may be bound by past decisions that are shown to be wrong when new evidence is introduced, as it has been here.[63]

54. The Board's decision on HONI's previous application under s. 86(2)(b) did not clarify the legal relationship between parties or put an end to a controversy between two parties. Rather, the Board made a determination, having regard to its statutory objectives. That is not a determination that creates the finality that *res judicata* is meant to promote.

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[60] Lange at p. 4, HONI's BOA, Tab 21
[61] Blake at p. 143, HONI's BOA, Tab 4
[62] Blake at p. 142-143, HONI's BOA, Tab 4
[63] Wade at pp. 204-205, HONI's BOA, Tab 16

55. **Fairness**. This second rationale for *res judicata* is simply not relevant in this context. The Application is not a dispute between two parties. There is no risk of a party being twice sued in connection with the same dispute. Rather, it is an application to determine whether HONI should be granted leave to acquire all of the outstanding shares of the Corporation. There is no party to protect from being "twice vexed."[64] The question is whether the proposed transaction would meet the "no harm" test and be consistent with the Board's objectives under s. 1(1) of the Act.

56. SEC characterizes the issue of fairness as that of fairness to customers. It argues that allowing successive applications is unfair because, "[w]hereas 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."[65] VECC makes a similar argument about the interests of the "public."[66]

57. These arguments are incompatible with the Board's statutory mandate. Under s. 1(1) of the Act, the Board must be guided by the interests of consumers as a whole, not the interests of a subset of consumers "who believe the proposed transaction is a detriment to them." Consumers as a whole would be prejudiced if new evidence emerged indicating that their rates would be lower as a result of a proposed transaction and the Board were prevented from considering, testing, and evaluating that evidence on its merits.

58. Therefore, the New MAAD Application, and the Board's consideration of the Application, cannot be barred by the doctrine of *res judicata.*

2. In any event, SEC has incorrectly applied res judicata

59. If *res judicata* did apply (which it does not), SEC has incorrectly applied *res judicata* by mischaracterizing the issues to be considered by the Board in the New MAAD Application relative to the First MAAD Application, and by misapplying the concept of a "change of circumstance".

60. In the context of an application to the Board under s. 86(2)(b) of the Act, the "question to be decided" in the second proceeding is not the same as the question decided in the first proceeding

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[64] Lange at p. 4, HONI's BOA, Tab 21
[65] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 60
[66] EB-2018-0270, Submissions of Vulnerable Energy Coalition (Motion), January 11, 2019 at para. 10

if new facts are adduced which relate to the impact of the proposed transaction. This is because the question at issue is ultimately a question of fact. When the facts change by the introduction of new, relevant, and material evidence, the question to be decided in the second proceeding is no longer the same as the question that was decided in the first proceeding.

61. SEC asserts that the issue in the New MAAD Application is the same as the issue in the First MAAD Application – "does the acquisition of OPDC by Hydro One meet the no harm test."[67] This is an incorrect characterization of the issue before the Board in the New MAAD Application. It is merely a restatement of the test that is applied in every s. 86(2)(b) application regardless of the underlying facts of that application. Accepting SEC's issue characterization would mean that no matter the nature of a transaction, the financial or cost consequences or the impacts on reliability factually underpinning a second MAAD application, that application would be barred because of *res judicata*. Because the characterized issue is overly broad, all applications would be barred where previously filed applications have been denied. This clearly is not the intent of the *res judicata* doctrine, even if it did apply. Applied in the manner proposed by SEC means that unsuccessful applicants are forever barred from transacting, no matter what the facts underpinning a new application may be.

62. The issue in the New MAAD Application is not the same as the issue in the previous one. As reflected in the Decision, the issue before the Board in the First MAAD Application was whether the Board could conclude that the transaction resulted in no harm in the absence of what HONI expects the overall cost structure to be following the deferral period and an explanation as to the impact on Orillia's customers. The new evidence raises new questions of fact which manifest themselves in an issue that the Board has not previously considered or ruled on – whether the ***new evidence*** is sufficient to enable the Board to make a ruling of no harm having regard to the overall cost structure following the deferral period and an explanation of the impact on Orillia's customers. The issues are not the same and the application of *res judicata* cannot occur.

63. Construing the issue in the New MAAD Application as proposed by SEC creates a fundamental unfairness not just to the applicant, but also to the acquired customers and the public

[67] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 26

interest in general. In the Decision, the Board ruled that the transaction in question was in the public interest, except for the issue identified in the Decision as set out above.[68] Now, when the opportunity is available for the Board to consider a different issue, which may give rise to a full finding of public interest, SEC seeks to preempt and deny that opportunity based on a doctrine that is not applicable to a s.86(2)(b) application and which has been misapplied by SEC.

64. SEC acknowledges that *res judicata* (as well as the doctrine of abuse of process) "should not prevent a second application where there has been a change in circumstances between applications."[69] Indeed, SEC quotes a passage from the Federal Court of Appeal's decision in *Kaloti v. Canada (Minister of Citizenship and Immigration)*, which clearly states that the doctrine of *res judicata* "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."[70]

65. As discussed at paragraph 36 of these submissions, the new evidence filed by HONI is highly relevant and material to the Board's determination under s. 86(2)(b) of the Act. It goes to the heart of the question of what price the Corporation's consumers will pay for electricity, price being one of "the objectives that are of most direct relevance to the impact of the proposed transaction."[71] Thus, even according to the authorities relied on by SEC, the doctrine of *res judicata* does not apply in this case.

66. However, SEC contradicts its own authorities. Instead of following *Kaloti* – which clearly states that *res judicata* does not apply where there has been a relevant change of circumstances – SEC adds a proposition that: there must be a "sufficient" change of circumstances.[72] SEC provides no legal basis for this proposition, and it fails to define what would constitute a "sufficient" change

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[68] See above at para. 13
[69] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 30
[70] *Kaloti v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 390 (CA) at para. 5 ["*Kaloti*"] , HONI's BOA, Tab 25 [emphasis added]. Although the court commented that "generally, *res judicata* has an application in public law," this is non-authoritative *obiter dicta*, as the Court ultimately decided "that it is not necessary in this case to resort to the doctrine of *res judicata*" (para. 14). Further, as discussed above, the application of the doctrine of *res judicata* to administrative proceedings is not well settled and has been seriously doubted by the Federal Court of Appeal.
[71] The Decision at pp. 5-6, SEC BOA, Tab 2
[72] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 33

of circumstances. Without any authority, it argues that even new evidence "responding to the criticisms of the First MAADs Decision" – which evidence has been submitted – would not constitute a sufficient change of circumstances. Further still, and directly contradicting the case law it cites, SEC "questions if there could ever be a change of circumstance that could ever warrant a second application."[73]

67. SEC takes the position that the new evidence should be disregarded because it is similar to the Richardson Affidavit and that the Board found that HONI did not pass the threshold test on the Review Motion on the basis that the information could have been presented in response to Procedural Order No.7. SEC wrongly asserts that because the Board "rejected this new evidence for purposes of a motion to review," it should not allow it for the purposes of a new application.

68. At no time did the Board consider the substance of the new evidence or reject it on that basis (as acknowledged by Board staff).[74] The consideration of the evidence contained in the Richardson Affidavit by the Board was related only to HONI's capability to provide that evidence in response to Procedural Order No. 7. SEC is inappropriately attempting to apply the threshold test the Board applies on a motion for review and variance to the consideration of new evidence made in a fresh application where that application is subject to a wholly different process and test, being no harm in respect of the public interest as reflected in the Board's statutory objectives.

69. SEC's argument is legally incorrect since "it is incompatible with other [statutory] provisions or with the object of the legislative enactment."[75] By SEC's reasoning, once an applicant is denied an order under s. 86(2)(b) and a motion to review, that applicant may never again apply for leave to acquire the same corporation, even if it can provide new evidence which shows that consumers would benefit from the proposed transaction, such as through lower cost structures which the Board can now test through the full hearing process. This result would be incompatible with s. 1(1) of the Act, which provides that the Board "shall" endeavour to "protect the interests of consumers with respect to prices." It is also incompatible with the language of s.

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[73] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 33, footnote 46
[74] EB-2018-0270, Submissions of OEB Staff, January 14, 2019 at p. 3
[75] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27, HONI's BOA, Tab 26

86(2)(b) of the Act, which does not impose any restrictions on a person's ability to make an application.

C. SEC's motion raises issues that require the New MAAD Application to be heard

70. As set out at paragraphs 39-54 of SEC's submissions, SEC directly challenges the merits of HONI's new evidence and thereby demonstrates that there clearly are issues not previously considered and that need to be considered by the Board. By its own admission, SEC engages in "a review of [HONI's] evidence" with a view to demonstrating its "deficiencies."[76] In the process, SEC raises evidentiary issues that can be resolved only if the New MAAD Application is heard and the new evidence is considered, tested, and evaluated according to the procedures designed for doing so.

Status quo "straw man" allegation

71. One issue raised by SEC is whether HONI's new evidence on the status quo revenue requirement of the Corporation beyond the 10-year deferral period (the Status Quo Amount) is a reasonable forecast or is deficient because it is a "straw man calculation", as asserted by SEC.[77] If SEC believes that the Status Quo Amount is false or misrepresented, as implied by its use of the term "straw man," then in the absence of a proceeding there is no basis for this assertion. SEC cannot say that the New MAAD Application should be dismissed because the Status Quo Amount is a "straw man," while at the same time evading the burden of proving this allegation.

Cost allocation methodology

72. Another issue raised by SEC concerns the nature of HONI's post deferral period commitment to cost allocation, and whether it is an appropriate cost allocation approach. SEC alleges that HONI's new evidence on how costs would be allocated beyond the 10-year deferral period is a "non-binding commitment, which […] is likely contrary to the Board's cost allocation principles."[78]

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[76] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 40
[77] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 42
[78] EB-2018-0270, Submissions of SEC (Motion), January 7, 2019 at para. 42

73. While HONI's evidence is that it intends to allocate costs to Orillia's customers based on the Board's approved cost allocation model, the extent to which HONI is or can be bound by its cost allocation approach is a question for the Board to determine after HONI's evidence on this issue has been tested. SEC is asking that the Board decide now – without the benefit of any of these procedures – that HONI's cost allocation methodology is flawed. This is not for the Board to decide on a preliminary motion.

74. Moreover, the Board has not received any submissions on how its cost allocation principles should apply to the new evidence, nor is that the purpose of this motion. Thus, it would be premature and inappropriate to make a ruling on this issue. If SEC wishes to challenge the new evidence based on the Board's cost allocation principles, it must do so in a proceeding designed for that purpose, namely, the very application which it now seeks to dismiss.

D. The New MAAD Application is not an abuse of process

75. SEC and the Vulnerable Energy Consumers Coalition assert that proceeding with the New MAAD Application would be an abuse of process. These submissions should be rejected for two reasons:

(a) HONI's submission of the New MAAD Application does not come anywhere close to meeting the high-bar for a finding of abuse of process.

(b) To the extent abuse of process applies to prevent relitigation in circumstances where the test for *res judicata* is not satisfied, then abuse of process is inapplicable for the same reasons as *res judicata*.

1. New MAAD Application does not meet the high bar for abuse of process

76. In *Blencoe v. British Columbia (Human Rights Commission)*, the Supreme Court of Canada ruled that, in order for there to be abuse of process in administrative proceedings, "the court must be satisfied that, 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted.'" For this to be the case, the proceeding must be

"tainted to such a degree that it amounts to one of the clearest of cases," which will be "extremely rare."[79] The New MAAD Application rises nowhere near this high standard.

77. On the contrary, applying the test from *Blencoe*, there would be great harm to the public interest in the enforcement of the Act if the New MAAD Application were halted. The Act requires the Board to "protect the interests of consumers with respect to prices" and to "promote economic efficiency and cost effectiveness" in the transmission and distribution of electricity.[80] One of the mechanisms the Legislature has created to enforce objectives is requiring the Board to receive and hear consolidation applications under s. 86(2)(b) of the Act. These applications require the Board to consider, test, and evaluate evidence on its merits to determine whether the proposed transaction will have will have an adverse effect on the attainment of the Board's statutory objectives.

78. Neither the Richardson Affidavit nor any of the new evidence in the New MAAD Application has ever been considered, tested, and evaluated by the Board on its merits. The Richardson Affidavit was considered by the Board only at the threshold stage, in HONI's motion to review and vary the Decision. It was never subjected to the procedures designed to test and evaluate evidence, such as technical conferences, the cross-examination of witnesses, and the filing of, and ability to respond to, interrogatories.

79. If SEC's motion is granted, this evidence will never be tested and evaluated by the Board, or by members of the public, as contemplated by the Legislature. The public will be denied the opportunity to learn which characterization of the evidence is correct, and whether the proposed transaction will result in a lower rate structure for Orillia ratepayers. This is precisely the kind of harm that the Supreme Court of Canada contemplated when it referred to "the harm to the public interest in the enforcement of the legislation if the proceedings were halted."

80. On the other side of the balance is "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead." There is no such damage in this case. In *Kaloti*, relied on by SEC, the Federal Court of Appeal ruled that the second application was fundamentally unfair because it "was not based on any new evidence."[81] The Court left open the

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[79] *Blencoe* at para. 120, HONI's BOA, Tab 1
[80] Act, s. 1(1)
[81] *Kaloti* at para. 8, HONI's BOA, Tab 25

possibility that "a new application could be made based on relevant and permissible new evidence" pertaining to the question at issue.[82] This applies squarely to the New MAAD Application: there is new evidence which has never been considered, tested, and evaluated by the Board (or by members of the public) and which is directly relevant the impact of the proposed transaction on electricity rates. The New MAAD Application is therefore not the same as the first one, so cannot be said to be "abusive."

81. Indeed, in the administrative law context, it cannot be an abuse of process to make a new application when the facts have changed. This is because, as a rule, administrators are free to make new decisions when the facts have changed. As the Federal Court of Appeal explained in *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, "[i]t is uncontroversial that as long as an administrator is acting *bona fide* and in accordance with its legislative mandate, an administrator can assert — where principled and warranted — that an earlier tribunal decision on its facts does not apply in a matter that has different facts."[83] It would be incoherent to say that an administrator can depart from past decisions when new facts arise but cannot receive new applications when new facts arise.

2. Abuse of process is inapplicable to prevent "relitigation" in these circumstances

82. That the New MAAD Application is not an abuse of process is further affirmed by the doctrine's policy grounds. In cases involving the purported relitigation of matters previously decided, abuse of process effectively operates as a form of estoppel.[84] Although a distinct doctrine, "[t]he policy grounds supporting abuse of process by relitigation" – finality and fairness – "are the same as the essential policy grounds supporting issue estoppel."[85]

83. It follows that abuse of process cannot operate to prevent HONI from submitting, and the Board from hearing, an application under s. 86(2)(b) of the Act that contains new evidence for the same reasons that other forms of estoppel cannot. Indeed, the application of abuse of process in this context would be an improper – indeed, abusive – application of that doctrine that would prevent a fair consideration of the New MAAD Application to the detriment of Orillia's ratepayers.

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[82] *Kaloti* at para. 8, HONI's BOA, Tab 25
[83] *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257 at para. 47, HONI's BOA, Tab 27
[84] *City of Toronto v. C.U.P.E*, [2003] 3 SCR 77 at para. 37 ["*C.U.P.E.*"] , HONI's BOA, Tab 28
[85] *C.U.P.E.* at para. 38, HONI's BOA, Tab 28

E. Conclusion

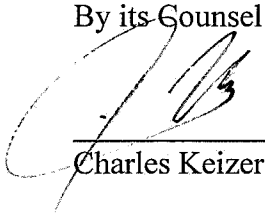
84. Through this motion, SEC is effectively asking to bypass the normal procedures for considering, testing, and evaluating key evidence. It is asking the Board to uncritically accept SEC's interpretation of evidentiary issues that are directly relevant to the ultimate question at issue and which, instead, should be raised and resolved in the course of the New MAAD Application. This is an inversion of the Board's process under s. 86(2)(b) of the Act. It impermissibly denies the public, and particularly the ratepayers of Orillia, the right of learning whether the proposed transaction actually meets the "no harm" test on the basis of the new evidence.

RELIEF REQUESTED

85. HONI respectfully requests that SEC's motion be dismissed.

All of which is respectfully submitted this 16th day of January, 2019.

HYDRO ONE NETWORKS INC.
By its Counsel Torys LLP



Charles Keizer / Jonathan Myers