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BY EMAIL and RESS

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March 1, 2019
Our File: EB20180270

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

Dear Ms. Walli:

Re: EB-2018-0270 – Hydro One/OPDC MAAD Application – SEC Reply Submissions

We are counsel to the School Energy Coalition ("SEC"). Enclosed, please find SEC's Reply Submissions and Supplementary 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 currently 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.*

REPLY SUBMISSIONS OF THE SCHOOL ENERGY COALITION
(Motion)

Overview

1. Pursuant to Procedural Order No. 2, these are the reply submissions of the School Energy Coalition ("SEC") on its motion to dismiss the second application brought by Hydro One and OPDC for approval from the Board of the purchase of OPDC by Hydro One.[1] SEC submits that the motion should be granted, as the application is *res judicata* and/or an abuse of process.

2. No intervenor who represents the interest of ratepayers opposed the motion. All those who filed submissions on the motion supported the dismissal of the application.[2] The only parties who oppose the motion are the Applicants and Hydro One's largest collective bargaining unit, the Power Workers Union ("PWU").[3]

3. The implication of Hydro One's argument in opposition to this motion is that as long as an applicant can offer some new evidence related to the issues that must be decided for approval of an application, it can always come back to the Board and force another panel to hear its request again. SEC states that this is not the law. In fact, this it is precisely why the doctrines of *res judicata* and abuse of process exist. They ensure that the integrity of the adjudicative process is not undermined.

4. SEC notes that the Applicants' arguments mask the underlying reality of the proceedings related to this transaction that came before this second application. Hydro One and OPDC tried to get approval for their proposed transaction, and after much back and forth in Procedural Orders No.6 and 7, the Board rejected it in its First MAADs Decision.[4] As was their right, they sought a review of the decision by way of motion under the Board's Rules, seeking to file as new evidence.[5] Again, the Board rejected the motion to review at threshold stage since there were no errors in the First MAADs

[1] Unless specified herein, all defined terms are the same as in Submissions of the School Energy Coalition, dated January 7 2019

[2] See the written submissions on the motion filed by the Vulnerable Energy Consumers Coalition, dated January 11 2019; Consumers Council of Canada, dated January 14 2018; Energy Probe Research Foundation, dated January 11 2019; and Frank Kehoe, dated January 18 2019

[3] See the Submissions of Hydro One Networks Inc, January 16 2019["Hydro One Submissions"]; Submissions of Orillia Power, January 16 2019 ["OPDC Submissions"] Submissions of the Power Workers' Union on SEC Motion To Dismiss the Application, January 16 2019 ["PWU Submissions"];

[4] EB-2016-0276, *Procedural Order No. 6*, July 27 2017, MRBA, Tab 4; EB-2016-0276, *Procedural Order No. 7*, February 5, 2018, MRBA, Tab 6; *Decision and Order* (EB-2016-0276 – Hydro One/OPDC), April 12 2018 ["*First MAADs Decision*"], p.1, MRBA, Tab 2

[5] *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

Decision.[6] This included finding that it should have been clear to the Applicants' what the Board had requested from it in Procedural Order No.7.[7] In addition, it found that the new evidence was not actually new, but was available to Hydro One during the First MAADs Proceeding.[8]

5. If Hydro One and OPDC are convinced that the Board keeps getting it wrong on their proposed transaction, then the appropriate avenue for redress is bring an appeal or judicial review to the Divisional Court.[9] They should not be able to keep asking the Board for approval in hope that, eventually, one panel agrees with them.

OEB Is Not Required to Hear the Second Application on The Merits

6. Hydro One's position that the *OEB Act* requires the Board to consider this second application through to the merits is wrong in law.

7. While SEC agrees that nothing in section 86(2) bars the Board from hearing a second application, it is also true that nothing requires the Board from hearing the second application through to the merits. The *OEB Act* simply provides that the Board shall grant or dismiss an application.[10] The doctrines of *res judicata* and abuse of process, when met, are a legal basis for the Board to dismiss an application without hearing the merits. In fact, with respect to abuse of process, that doctrine is explicitly incorporated into the Board's powers by way of section 23(1) of the *Statutory Powers Procedure Act*.[11]

8. It is important to emphasize the difference here between the positions of SEC and Hydro One. SEC is not claiming that the second application cannot be heard on the merits, but that it should not. What SEC argues and is supported by the law, is the doctrines of *res judicata* and abuse of process give the Board the discretion to reject the application without considering the merits, precisely because the Board has already considered them. Contrast to the Hydro One position, which

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[6] *Ibid*, p.12

[7] *Ibid*, p.10-11

[8] *Ibid*, p.12

[9] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched B ["*OEB Act*"], MRBA, Tab 1; *Judicial Review Procedure Act*, R.S.O. 1990, s.2(1), MRBA, Tab 9

[10] *OEB Act*,, s.82(6), MRBA, Tab 1

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

is that the Board is required to consider on the merits every application under section 86(2) for the same relief, regardless if it has previously rejected it. This is not what the *OEB Act* requires.

9. Hydro One's reliance on the Federal Court's decision in *Kurukkal*[12] is misplaced. First, the issue in *Kurukkal* was about the applicability of the doctrine of *functus officio,* not *res judicata.* Second, the relevant holding was overturned on appeal. The Federal Court of Appeal found that, while it was correct that *functus officio* did not bar reconsideration, it also did not mandate it either, and that was a decision appropriately left to the discretion of the administrative decision-maker (i.e. the immigration officer).[13] The immigration officer's task "at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider".[14] This is similar to what the Board is being asked to do on this motion, i.e. consider *if* it will hear the new application, or exercise its discretion to dismiss the application as *res judicata* and/or an abuse of process.

10. Similarly, in *Davidson*[15], the issue was not only that of *functus officio,* but also whether the Alberta *Municipal Government Act* barred the consideration of a second application. As noted above, the issue here is not whether this second application is prohibited by the *OEB Act* from being heard. It is if the doctrine of *res judicata* and abuse of process, which the Board <u>can</u> apply to a given fact situation, should be invoked to dismiss the second application at this stage. SEC submits it can and should.

Res Judicata Is Available

11. Hydro One makes the surprising argument, that *res judicata* cannot apply to a proceeding before the Board. This incorrect position is not supported by the case law, or by any other party.[16] SEC agrees with the unequivocal statement from Board Staff that, "the doctrine of *res judicata* applies to proceedings before administrative tribunals such as the OEB."[17] Hydro One's position goes much further than either of the other parties who support its ultimate position that the motion should be dismissed. For example, the PWU "does not dispute that the doctrines of res judicata

[12] *Kurukkal v. Canada (Minister of Citizenship and Immigration),* 2009 FC 695, para.68, Hydro One Networks Inc. Book of Authorities ["HONI BOA"], Tab 8

[13] *Kurukkal v. Canada (Minister of Citizenship and Immigration),* 2010 FCA 230, para. 5, HONI BOA, Tab 9

[14] *Ibid*

[15] *Davidson v. 1167648 Alberta Ltd*., 2007 ABCA 364, HONI BOA, Tab 5

[16] PWU Submissions, para. 8

[17] OEB Staff Submissions, January 14 2019 ["Board Staff Submissions"], p.1

and/or abuse of process are available to the Board". OPDC and the PWU both simply take issue with whether the Board should apply these doctrines in this case.[18]

12. Contrary to the outdated authorities referenced by Hydro One[19], while it may have been the Federal Court of Appeal's view in 1981 that there is doubt to its applicability of *res judicata* to administrative tribunals, there is no doubt that in 2019 it does apply.[20] The Supreme Court of Canada has spoken unequivocally on this question. The only issue is whether it should be applied on the facts of a given case.

13. Hydro One cites a number of authorities for the proposition that the doctrine cannot apply to preclude an exercise of statutory duty, or defeat an express statutory provision.[21] *Res judicata* does not defeat an express statutory provision, and that is not what SEC is proposing in this motion. The Board has discretion in the exercise of its authority under Section 86(2) of the *OEB Act*. It can grant or refuse an application. There is no positive obligation to approve an application if a set of condition precedents are met, nor is there an express obligation to consider any new application on its merits. As the Federal Court has said, "if the public official has a discretion, he or she may be bound by estoppel".[22] The entire point of the doctrines of *res judicata* and abuse of process by relitigation is that the adjudicator has already heard the matter and exercised its statutory authority.

14. The related argument made by Hydro One is also without merit. It says that if the Board finds that *res judicata* applies to applications under section 86(2) of the *OEB Act*, it "risks that an applicant who has already been denied leave will never be able to make a fresh application". As outlined in detail in SEC's submissions[23], the case law is clear that, in the administrative law context,

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[18] OPDC Submissions, para. 9

[19] Hydro One Submissions, para. 45 *citing Deputy Minister of National Revenue for Customs and Excise v. Kelly Ltd.*, [1981] F.C.J. No. 143 (CA) at para. 6, HONI BOA, Tab 14

[20] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460 ["*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

[21] Hydro One Submissions, para. 46

[22] *F. Hoffmann-La Roche AG v. The Commissioner of Patents*, 2003 FC 1381, para.45, Supplementary Book of Authorities of the School Energy Coalition ["SBA"], Tab 1

[23] Submissions of the School Energy Coalition, dated January 7 2019, para. 30-32

the doctrine is generally not applied when there has been a change of circumstances.[24] The factual situation here is that Hydro One has not demonstrated a genuine change of circumstances. It is not sufficient to simply file more evidence. If that were the threshold, then the doctrines could never apply, since an applicant could always file new material. To be a change of circumstances, new evidence must be evidence that either could not have been provided previously, or responds to the concerns raised in a previous decision.

15. Hydro One also argues that the animating principles of *res judicata* are not applicable, and so it should not be applied. SEC disagrees. The animating principles - finality and fairness - are not just applicable, their application to the fact situation would suggest that the motion should be granted.

16. ***Finality.*** Hydro One (and the PWU in part) argues that since MAAD applications are not traditional litigation between parties, they do not promote the goal of clarifying legal relationships that the principle of finality is meant to promote.[25] Besides compliance and enforcement proceedings initiated under Part VII.1 of the *OEB Act*, no Board proceedings are traditional *lis inter partes* litigation. But that does not mean that the principle of finality has no application. *Res judicata* has been applied to similar proceedings that are not traditional litigation, in some cases where there is only one party, an applicant.[26] Even the PWU recognizes that a *lis inter partes* is not a prerequisite to use these doctrines.[27]

17. The British Columbia Court of Appeal has explicitly rejected the very notion proposed by Hydro One, commenting that it "cannot agree that abuse of process and its related doctrines are restricted to a purely "litigation" context involving a *lis inter partes*."[28] In *Kurukkal,* on which Hydro One relies, the Federal Court did comment that the lack of a *lis inter partes* dispute was one reason why finality was not a relevant consideration in that specific case. The court said "[a] decision on an H&C application will likely only have a direct effect on the applicant or applicants themselves". That is clearly not the case here, where ratepayers are directly affected by the proposed transaction. Board

[24] *Kaloti*, para. 12, MRBA, Tab 19; *Baron v. Nova Scotia (Community Services)*, 2009 NSSC 122 ["*Baron*"], para. 5, MRBA, Tab 20; *McIntosh v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 11, para. 39, MRBA, Tab 28

[25] Hydro One Submissions, para. 52-54

[26] For example in *Baron res judicata* was applied even there was only a single applicant who applied for certain medical benefits to the Nova Scotia Department of Department of Community Services. See *Baron*, MRBA, Tab 20;

[27] PWU Submissions, footnote 1

[28] *Elsner v. British Columbia (Police Complaint Commissioner)*, 2018 BCCA 147, para. 86, MRBA, Tab 17

proceedings such as this one, the Second Review Proceeding, and the First MAADs Proceeding, involve multiple intervenors, including SEC, who are granted status because their members and constituents are directly affected by the application. It is clear from the arguments made in each of these proceedings that many of the intervenors are adverse, as in traditional litigation, to the Applicants. Indeed, the whole concept of the no harm test is that the utility could, absent action by the Board, harm customers, whose interests in these cases are adverse to the utility. SEC, as with other ratepayer groups, should not be "twice vexed" by the same issue.[29]

18. Hydro One's claim that applying the doctrine 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"[30] ignores the statutory scheme. The *Statutory Powers Procedure Act* provides broad powers for a tribunal to review and vary its decisions, and the Board through its Rules has implemented such a process which allows, in certain circumstances, for the ability to a party bringing such a motion to adduce new evidence.[31] Hydro One brought such a motion and filed new evidence. In the Second Review Decision, the Board ruled that Hydro One did not meet the requirements.[32]

19. If Hydro One is still unhappy with the result, the *OEB Act* provides for a mechanism for an appeal, and the *Judicial Review Procedures Act* allows for a judicial review, both to the Divisional Court.[33] As SEC has pointed out earlier, instead of following the routes of appeal and review provided by law, Hydro One and OPDC seek to go around the rules to file this second application, which is at its essence nothing more than a second motion for review of the First MAADs Decision, similar terms to the first one.

20. ***Fairness.*** Hydro One argues the rationale of fairness "is not relevant" in the context of this application.[34] Their circular argument is that customers would not be harmed if the Board decides that the new evidence demonstrates that they will not be harmed by the transaction.

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[29] Donald Lange, *The Doctrine of Res Judicata in Canada*, Toronto: LexisNexis Canada, p.4, HONI BOA, Tab 21

[30] Hydro One Submissions, para. 17

[31] *Statutory Powers Procedure Act, R.S.O. 1990,* c. S.22, s.21.2, SBA, Tab 2**;** Ontario Energy Board, *Rules of Practice and Procedure,* Rule 41-43, MRBA, Tab 29

[32] *Second Review Decision*, p.12-13, MRBA, Tab 8

[33] *OEB Act*, s.33(1), MRBA, Tab 1; *Judicial Review Procedure Act*, R.S.O. 1990, s.2(1), MRBA, Tab 9

[34] Hydro One Submissions, para. 55-58

21. With respect, Hydro One's argument misses the reality of Board decision-making. Rarely, if ever, do decisions lead to clear 'right' or 'wrong' answers, especially not those that involve forecasting costs 10 years into the future. Different panels may weigh the same evidence differently. To prevent such an outcome, in a motion to review, the Board has said on numerous occasions that the original panel's findings should be accorded deference.[35] The same deference should apply with respect to this motion. Thus, if the Board exercises its discretion not to apply *res judicata* in response to this motion, the Board should base that on a determination that there is a genuine change in circumstances justifying reconsideration of the issues the original panel already considered.

22. Hydro One also argues that to dismiss the application would constitute fettering of the Board's discretion.[36] The prohibition against the Board fettering its discretion has no application to this situation. If it did, then *res judicata* and abuse of process by relitigation could never apply to decisions of administrative decision-makers, since they are never strictly bound by their decisions. As discussed earlier, the courts have been clear that these doctrines do apply.

Res Judicata Applies On the Facts

23. ***Criteria Have Been Met.*** OEB Staff[37] agrees with SEC that the three requirements for *res judicata* have been made out.[38] The central parties are the same, the First MAADs Decision is final, and the issues are the same. The only disputed criteria, appears to be that of the issues being the same. Hydro One and the PWU argue that the issues the Board must consider, if it hears in this application, are different from that it considered in the First MAADs Application.

24. Hydro One takes the position that the "issue in the [Second] MAADs Applications is not the same as in the previous one".[39] SEC disagrees. The issue before the Board in the successive section 86(2) applications is exactly the same –is the 'no harm' test met? Hydro One claims the new issue is, "whether the *new evidence* is sufficient to enable the Board to make a ruling of no harm having

[35] *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

[36] Hydro One Submissions, para. 38-41

[37] Board Staff Submissions, p.2-3

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

[39] Hydro One Submissions, para. 61

regard to the overall cost structures following the deferral period, and explanation of its impact on Orillia's customers" [emphasis in the original].[40] The Board used similar language in denying the original application, finding that it was "not satisfied that a list of forecast cost savings from the acquisition automatically results in overall cost structures for the customers of the acquired utility that are no higher than they would be without the consolidation."[41] Regardless of the issue being the broader 'no harm' test or the narrower price component, the only difference Hydro One raises is the sufficiency of the new evidence.

25. OPDC and Hydro One both appear to want to have their cake at eat and too. In arguing that hearing the application will not place an undue burden on the Board or parties, OPDC claims the scope of the hearing is limited as the "only issue to be determined is whether the [n]ew [e]vidence demonstrates that the underlying costs will be lower after re-basing period than they would have been without consolidation".[42] SEC notes the Notice of Hearing places no such restriction. More importantly, either the First MAADs Decision precludes this application in full or it does not at all. OPDC cannot pick and choose the issues that it wants to be considered. That is what happens in a motion for review (which has already been tried and dismissed), but is not the case in an application for approval of transactions under the *OEB Act*. If the Board dismisses the current motion, then it must as a matter of law hear all elements of the new application, and it is open to parties to adduce new evidence in the normal course (filing evidence, asking interrogatories, through cross-examination) and make submissions on the conclusions the Board should draw from it, regardless of the findings in the First MAADs Decision.

26. ***No Change in Circumstances.*** The requirement for a change in circumstances is not met on the facts of this case. It is not sufficient for there to be just any new evidence filed in an application to have the same issue heard a second (or more) times by the Board. A change in circumstances sufficient to overcome the doctrine of *res judicata* and abuse of process requires more.

27. The fundamental task of the party seeking relief before this Board, or any other court or tribunal, is to martial sufficient evidence to meet a set of legal requirements (either statutory or common law). After a decision is rendered not to their liking, it is not open to a party simply to come

[40] *Ibid*

[41] *Second Review Decision,* p.13, MRBA, Tab 8

[42] OPDC Submission, para 31

forward again with any new evidence. If that were the case, there would never be finality in decision-making. The doctrines of *res judicata* and abuse of process guard against relitigation.

28. In the administrative law context, what is required for the initiating party to bring another application seeking the same relief is that there be a change of circumstances. But that change of circumstances cannot simply be *any* new evidence that was available to it at the time of the new proceeding. What is allowed is new evidence that was not available before the original decision-maker or new evidence that was available but directly addresses the specific concerns set out in the original decision. Hydro One's new evidence does not meet either requirement.

29. Hydro One confuses the concept of change of circumstance with that of new evidence. While new evidence may be a change of circumstance, not all new evidence will be. If it were the case, then the case law would talk about new evidence being the exception to *the res judicata* and abuse of doctrine and not change of circumstances. The case law does not say that. What the case law says is that new evidence that was not previously available[43], or evidence that directly addresses the issues raised in the previous decision[44], can be a change of circumstance.

30. Not only is the new evidence in the second application not new, it was information that could have been filed in the First MAADs Proceeding in response to specific Board request to do so. In the Second Review Decision, the Board found that the contents of Richardson Affidavit, which are essentially the same as the new evidence filed in the second application, not only was available to the Applicants in the First MAADs Proceeding, but "consist[ed] of information that could have been presented….in Response to Procedural No.7".[45]

31. But even if the Board finds that the new evidence was actually new, it must in order to constitute a change of circumstances, be responsive to the concerns expressed by the Board in the

[43] *Danyluk*, para. 80, MRBA, Tab 13; Toronto *(City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 ["*Toronto (City)*"], para. 52, MRBA, Tab 25; *Canam Enterprises Inc. v. Coles*, 51 O.R. (3d) 481, para. 33 MRBA, Tab 24; *Heer v. Canada (Minister of Citizenship and Immigration)*, [2013] I.A.D.D. No. 274, para. 8, MRBA, Tab 21

[44] *Kaloti*, para. 12, MRBA, Tab 19; *McIntosh v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 11, para. 23, 27, 39, MRBA, Tab 28

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

First MAADs Decision. As outlined in detail in SEC's submissions, a cursory review of that evidence shows *prima facia* it does not.[46]

32. The First MAADs Decision was clear that the Board was concerned that Hydro One did not file "[a] forecast [of] the cost to serve Orillia customers beyond the ten year period"[47] and an "explanation of the general methodology of how costs would be allocated to Orillia ratepayers after the deferral period". [48] In response, Hydro One filed, as it did in the First MAADs Proceeding, the residual cost to serve (i.e. incremental cost to Hydro One to serve Orillia customers). This is not the costs that Orillia customers would have to pay in rates if the transaction were approved. In respect to providing an explanation of the cost allocation methodology, Hydro One provided none, and simply made a non-binding, variable commitment that it will cap the allocation of shared costs to ensure customers end up no worse off than their Status Quo Straw Man scenario.[49] This is a proposal that on its face, is fundamentally counter to the Board's accepted rate-setting principles, and would provide an explicit cross-subsidy between Hydro One's existing ratepayers and those served currently by OPDC.[50]

33. What makes the abuse in the present case so clear is that it is not as if the First MAADs Decision was the first time either Applicant understood the concerns the Board had with the evidence before it, or the evidence the Board would need. As the Second Review Decision confirmed, after the issuances of Procedural Orders No. 6 and 7, it "should have been clear to the applicants what was at issue" and they had "adequate notice of the type of information required."[51] After being invited, Hydro One and OPDC simply chose not to file information to address the Board's concerns. The new evidence provided in this second application not only was available at that time, but *still* does not address the concerns of the Board in its decision denying approval of the transaction. It is as if Hydro One believes that if it keeps filing the same information, over and over again, the Board will eventually accept it despite prior rejections.

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[46] Submissions of the School Energy Coalition, January 7 2019, para. 30-54

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

[48] *Ibid*

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

[50] 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

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

34. In claiming that a change of circumstance has occurred, OPDC argues that "[i]t is only recently that the OEB had requested that Hydro One file evidence with respect to the underlying costs after the ten year re-basic period".[52] Thus, "SEC cannot state that Hydro One and Orillia Power should have filed evidence in the original application".[53] It is not SEC who says the Applicants should have filed evidence to address the issue in the First MAADs Proceeding. It is the Board who said so. It was the panel hearing that application whom in Procedural Order No. 7, gave the Applicants an opportunity to file this information, and guidance on what they wanted to see.[54] It is the Board who wrote in the First MAADs Decision that, by giving the Applicants this opportunity "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."[55] The Second Review Decision confirmed that the panel "did not err as it provided the applicants with adequate notice of the type of information required".[56]

35. The filing of same information using different words is neither new evidence, nor a change of circumstances that would support the Board exercising its discretion to not apply the doctrine of *res judicata* or abuse of process.

Application Is An Abuse of Process

36. SEC submits that the Applicants' second application is a clear case of an abuse of process by relitigation, a doctrine that is *broader* in scope and applies even where *res judicata* does not.[57]

37. Hydro One's reliance on the decision in *Blencoe*[58], for the proposition that the threshold for a finding of abuse of process is exceedingly high, confuses two different types of abuse of process. *Blencoe* was a case about an abuse of process due to delay, which involves very different

[52] OPDC Submissions, para. 30

[53] OPDC Submissions, para. 30

[54] EB-2016-0276, *Procedural Order No. 7*, February 5, 2018, p.3-4; MRBA, Tab 6

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

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

[57] *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)*, para. 37, MRBA, Tab 25

[58] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ["*Blencoe*"], para. 120, HONI BOA, Tab 1

considerations than that of an abuse of process by relitigation.[59] Delays in a proceeding which reach the level of abuse of process must meet a high threshold, since in that situation the party advancing the case never has their issue adjudicated. With relitigation, the abuse of process is that the applicant has already had their issue adjudicated on the merits, and should not be able to undermine the adjudicative process by attempting to do so again. Both are abuses of process, but the underlying rationale for each is different.

38. Regardless, this case is one in which the threshold in *Blencoe* is met. This is one of those "clearest of cases".[60] Abuse of process by relitigation is focused, not on the parties, but on the integrity of the adjudicative process. [61] This second application clearly undermines the integrity of the Board's adjudicative process. The Applicants, after ignoring the explicit concerns of the Board during the First MAADs Proceeding, should not have been surprised by their decision. The Applicants brought a motion to review, as is their right, and the Board upheld the First MAADs Decision.[62] Yet, the Applicants are back seeking a third panel to approve their transaction, filing the same evidence that was not only available to it during the First MAADs Proceeding, but does not even address the concerns the Board raised in its decision.

39. Proceeding further with this second application, risks all three harms that the Supreme Court identified with respect to undermining the integrity of the adjudicative process.[63] There is no assumption the relitigation will yield a more accurate result then the original proceeding, significant resources will be wasted, and if even there is a different result, the inconsistency itself will be demising the authority, credibility and aim of finality.[64]

40. Hydro One argues that, in the administrative law context, it cannot be an abuse of process if a new application has been made when the facts have changed.[65] It tries to draw an analogy with the Federal Court of Appeal's statement in *Bri-Chem Supply Ltd*[66] that "an earlier tribunal decision on its

[59] *Blencoe*, para.120, HONI BOA, Tab 1

[60] *Ibid*

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

[62] *Second Review Decision*, MRBA, Tab 8

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

[64] *Ibid*

[65] Hydro One Submissions, para. 81

[66] *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 25, HONI BOA, Tab 27

facts does not apply in a matter that has different facts."[67] The issue in *Bri-Cham* was nothing like the issue in this proceeding. It was the ability of a decision-maker to depart from binding precedent, not when it departs from a previous decision regarding the same parties raising the same issue. [68] It cannot be enough to avoid an abuse of process finding by creating new evidence that was not only available to a party in a previous proceeding, but also not even responsive to the specific issues that led a decision-maker to deny the previous application.

Impact of the Peterborough Applications

41. Board Staff raise Hydro One's current application before the Board in EB-2018-0242 for approval of the acquisition of Peterborough Distribution Inc. ("PDI") as an issue for the Board to consider in determining if it will exercise its discretion not to apply *res judicata* or abuse of process in this case. In that application, Hydro One proposes a similar approach to the allocation of costs after the end of the deferral period as it has in the second application (i.e. discretionary allocation not based on cost causality). Board Staff note that if SEC's motion is granted, and the Hydro One-PDI application is approved, it could result in different decisions of the Board that at the very least would be "sub-optimal".[69]

42. The fact that Hydro One has filed a similar approach in another application should have no bearing on this proceeding. The potential "sub-optimal"[70] inconsistency could occur regardless of the Board hearing this application on its merit or not, since the Board's decision in this proceeding not only cannot bind, but it cannot fetter, the Board's discretion in another proceeding involving a different transaction and different parties.

43. The possibility of two Board panels coming to different conclusions on similar facts, either in parallel or consecutively, is not new to the Board. If SEC had not filed this motion, the Board would still be faced with this application for Hydro One to acquire OPDC, and the other application for Hydro One to acquire PDI, having similar facts and principles at play, but being considered by different panels, and involving different parties.

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[67] *Ibid,* para. 47, HONI BOA, Tab 27

[68] *Ibid*

[69] Board Staff Submission, p.2-3

[70] *Ibid,* p.4

44. Further, if Hydro One and OPDC had not even filed this second application, the Board in the Hydro One - PDI case would still have to consider, and potentially be influenced by, the conclusions of the Board in the First MAADs Decision, just as the Board in that case considered the conclusions of other Board panels in the Norfolk, Woodstock, and Haldimand cases.[71]

45. Hydro One has an underlying problem: it has very high shared costs. Unless it can get that problem under control, every case in which it wants to acquire a lower cost distributor (and they are all lower cost) will raise the same issues. Hydro One has proposed one kind of solution in EB-2017-0049, and another in EB-2018-0242. The latter is basically the same solution that they provided on the Second Motion in this case. Customers of potential acquisition targets will always be concerned that they will end up being added to the long list of acquired customers with big rate increases. The fact that Hydro One has not proposed a viable answer to this concern as of yet, is not a good reason why the Board should continue to hear the Orillia case, again and again, ad infinitum.

Relief Sought

46. SEC requests the Board dismiss the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 1, 2019

Original signed by

Mark Rubenstein
Jay Shepherd
Counsel to the School Energy Coalition

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