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BY EMAIL and RESS

August 13, 2014
Our File No. 20130187

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

Dear Ms. Walli:

Re: EB-2013-0187/96/98 – Hydro One Norfolk MAADs – SEC Costs Reply

We are counsel for the School Energy Coalition. The Applicants in this proceeding, by letter dated August 13, 2014, have objected to SEC's cost claim. This letter is SEC's reply to that objection.

The nature of the objection can be summarized in two assertions by the Applicants:

1. ***"No Harm Test."*** SEC, through interrogatories and then a motion, sought information that was irrelevant to the issues before the Board, because it went outside of the Applicant's interpretation of the "no harm" test.

2. **Broad Scope.** SEC worded its interrogatories to be too broad in scope, rather than focusing them more narrowly on specific information to be provided.

In these submissions, SEC will first provide some background comments, and then deal with each of these allegations in turn.

Background

SEC noted in its final argument that this case is important, not just because of the specific transaction, but because it is the first of a series of new acquisition proposals happening within the context of a new and quite different electricity distribution sector.

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The Board made a point of noting in its Decision with Reasons, at page 2, that it also was conscious of the unusual importance of this case, saying:

> *"Consolidation of the electricity distribution sector has been the subject of much discussion since the late 1990s when the sector was first restructured under the Energy Competition Act, 1998. More recently, the Ontario Distribution Sector Review Panel has issued a report entitled Renewing Ontario's Electricity Distribution Sector: Putting the Consumer First, which advocates consolidation of electricity distribution companies.*
>
> *Given this context, the Board is of the view that this proceeding has likely attracted significant attention from electricity distributors and Ontario municipalities. The Board is also aware that negotiations are currently taking place concerning other proposed consolidations of distributors. These negotiations will undoubtedly lead to other applications to the Board for approval of consolidations in the near future.*
>
> *The Board set out its policy on mergers and acquisitions in its decision in EB-2005-0234/0254/0257 (the "Combined Proceedings"). However, as discussed below, the current Applications contemplate consolidation transactions that are made in different circumstances and structured differently than was the case in the Combined Proceedings.*
>
> *In applying the Board's policy in this proceeding, the Board needs to take these differences into account in performing its analysis. The Board expects that its approach in this decision will inform parties contemplating future consolidation transactions."*

As a result, the Board took a more thorough and detailed look at the issues in this case than might otherwise have been the case, including reconsidering the applicability of the decision in the Combined Proceedings. Ultimately, in SEC's view, this decision largely supplants the Combined Proceedings as the Board's guidance for acquisitions. Two upcoming cases (EB-2014-0213 and EB-2014-0244), and perhaps others, will be assisted by this decision, but will also likely add interpretive comments to this developing policy guidance.

From the outset in this case, SEC made clear in this proceeding that several hundred of its member schools in many small towns around Ontario had suffered significant rate increases as a result of Hydro One acquisitions of distributors in the year or two after market opening. As the Board has noted, this all happened prior to the Combined Proceedings. SEC adopted a strategy in this case of seeking a fuller, more comprehensive interpretation of the "no-harm" test and, if that were not possible, to have it replaced with a test that protects the ratepayers more effectively. To do this, the SEC strategy included seeking full information on the underlying dynamics of the Applicants' proposal, including in particular the downstream impacts on ratepayers.

The Applicants have objected to the SEC strategy throughout this proceeding, stating on numerous occasions their view that they should be allowed approval without any significant review, through a simple and uncritical application of the words in the Combined Proceedings. SEC has never accepted this "*stare decisis*" approach to the Board's role in MAADs applications, and does not accept it now.

It appears to SEC that the intent of the Applicants' objection to costs in this case is to discourage intervenors like SEC from continuing to challenge MAADs applications that could harm ratepayers. Indeed, in the objection the Applicants say so in so many words:

> *"Since the Norfolk decision there have been new MAAD applications filed with the Board. A cost award reduction in this case would also serve as a strong caution for any party not to pursue the same strategy in these latest and/or future MAAD proceedings."*

SEC believes that it is the right and obligation of intervenors to oppose utility proposals that harm ratepayers, and to seek decisions from the Board that recognize those potential harms, and protect against them. Everything SEC did in this proceeding was consistent with this strategy.

"No Harm" Test

From the beginning of this proceeding, SEC took the position that if the "no harm" test, as proposed by the Applicants on their interpretation of the Combined Proceedings decision, allowed one group of ratepayers to be harmed at the expense of another group, then either a) that interpretation was incorrect, or b) the no harm test should be rejected.

SEC understands the decision to say that, to the extent that the effect of the acquisition would be to harm the NPDI ratepayers at the expense of the Hydro One ratepayers, through the process of rate harmonization, that would not be an acceptable result to the Board. SEC concludes that from the general approach of the decision, but also from the following two statements by the Board:

> *"Concerning the setting of future rates, it is the Board's expectation that at the time of rate rebasing HONI will propose rate classes for NPDI customers that reflect costs to serve the NPDI service area, as impacted by the productivity gains due to the consolidation." [page 14]*
>
> *"The Board therefore approves the Applications subject to the following conditions:*
> *…2. That with its first rates application that includes costs associated with NPDI's service area, HONI file a report with the Board delineating:*
> *a. The costs for NPDI's service area, tracked separately ;*
> *b. The savings achieved as a result of the acquisition; and*
> *c. The portion of NPDI's and HONI's costs that are incremental costs incurred in connection with the acquisition."[page 25]*

SEC concludes that the Board has interpreted the "no harm" test to include protecting ratepayers in acquired areas from large rate increases that benefit the legacy customers of the acquiror at their expense. While the way that protection is implemented is left to the Board panel considering any future rate applications, the principle that the customers of the acquired utility should have some of the benefits from the productivity gains in the transaction is, in our view, clearly stated.

SEC notes that, if SEC had not pursued its challenge of the Applicants' narrower interpretation of the "no harm" test, including asking tough questions about the Applicants' rate differential and

cost differential, the Board would not have had this issue placed squarely before it, and might not have reached the same conclusion.

In any case, even if the Board had completely rejected the submissions from SEC, and thrown the NPDI customers to the wolves, SEC undoubtedly had the right and obligation to protect its members by advancing these positions.

It is one thing to say that a strategy is so irrelevant it is frivolous. If SEC had engaged in a frivolous strategy, its costs should be reduced. It did not, and we doubt if even the Applicants are prepared to say that SEC's strategy of expanding or rejecting the "no harm" test was frivolous.

We do note that SEC also sought information on the purchase price, and on the valuation and other work done by the acquiror in establishing how much it should pay. SEC's concern was that the acquiror Hydro One may be engaging in predatory pricing. It was clear that EBN, the intervenor made up of other LDCs, was also concerned with the same issue.

The Board rejected SEC's and EBN's requests for that information as not being relevant to the decisions before the Board. The decision then considers a related issue, the impact on Hydro One, and accepts that cumulative impacts could be relevant, but only when they start to harm the acquiror, not as some future potential impact.

SEC continues to be concerned that the strategy of Hydro One in its acquisitions may be harmful to the industry as a whole, and thus to the ratepayers, but understands that the Board has not accepted, in this case, that proposed expansion of the "no harm" test.

However, it is clear that, while SEC and EBN were unsuccessful on that point, it was a legitimate point to raise. Costs are not based on success on every issue. Costs are reimbursement for responsible participation in the proceeding with the intent of assisting the Board. SEC submits that, on this issue as in all other aspects of the proceeding, SEC participated responsibly with a view to assisting the Board in interpreting its policies, and developing new policies, in the public interest.

Broad Scope

The Applicants have also complained that SEC's interrogatory questions were too broad in scope.

To the extent that this is simply a recasting of their first assertion – i.e. that SEC was seeking to challenge their interpretation of the "no harm" test – that is fully covered by our submissions above.

On the other hand, this second assertion by the Applicants could be in the nature of a "fishing expedition" complaint. That is, their concern may be that SEC asked for all documents relating to particular issues.

If that is the concern, SEC notes that this is a classic example of information asymmetry. The Applicants know what information they have that is relevant to the issues of concern to the intervenors. We ask questions using broad wording to ensure that we capture all possible forms in which that information could occur. Intervenors have no choice in that respect.

That was a particular concern in this case, because the Applicants adopted their own strategy of providing limited information on the record. This was most clearly seen when the Applicants refused to file the unredacted Share Purchase Agreement, even in confidence, despite clear Board policy requiring them to do so. It was not until the Board ordered them to so file, in Procedural Order #1, and then went through several other steps, culminating in Procedural Order #4, that they did so.

It is relevant, perhaps, to note that the Applicants complain "SEC engaged in conduct that tended to lengthen the proceeding unnecessarily", yet in fact the main factor lengthening the hearing was the resistance by the Applicants to filing information that was known to be both relevant, and non-confidential. The key document – the Share Purchase Agreement – was filed on April 26th with redactions, but was not filed in proper form until after the Board's September 27th decision on confidentiality. That delay was in large part because of resistance by the Applicants that was both contrary to Board policy, and unjustified.

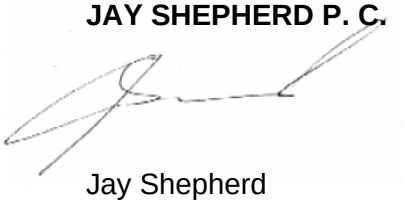
Conclusion

SEC submits that its strategy and actions in this proceeding constituted a responsible and reasonable approach to protect the interests of its members. At all times, SEC acted in the public interest with a view to assisting the Board. The case was an important one, and SEC's participation recognized that.

SEC was not successful in all of the submissions it took on the issues. That is true. However, that has never been grounds to reduce cost recovery. The issue is whether the level of participation was consistent with the issues, the importance of the case, and the impact on the intervenor's members, and whether the approach SEC took was responsible with a view to assisting the Board. In both cases, SEC submits that the Board should answer with a clear YES, and therefore should not reduce the cost recovery in this proceeding.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



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cc: Wayne McNally, SEC (email)
Interested Parties