**BY EMAIL and RESS**

**Jay Shepherd**
jay@shepherdrubenstein.com
Direct: 416-804-2767

November 27, 2017
Our File No. 20170320

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

**Attn: Kirsten Walli, Board Secretary**

Dear Ms. Walli:

**Re: EB-2017-0320 – Hydro One/Orillia Motion for Review – SEC Submissions**

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1, this letter constitutes SEC's submissions with respect to both the threshold issue, and the determination of the Motions on the merits.

## Context

It is important to understand these Motions in context.

In three recent cases – Norfolk[1], Haldimand[2], and Woodstock[3] - Hydro One acquired small local distribution companies. In each of those cases, Hydro One said the same things:

a. We will reduce the rates for the acquired customers by 1%.
b. For a five year period, we will freeze those lower rates.
c. We will experience cost savings in serving those acquired customers (relative to the existing LDC) due to our existing operations adjacent to or surrounding that acquired service territory.

[1] EB-2013-0187/96/98
[2] EB-2014-0244
[3] EB-2014-0213

d. After a deferred rebasing period, we will reset rates in a manner we cannot predict at this time.
e. No harm will come to the acquired customers[4].

Hydro One has said precisely the same things in the Orillia MAADs proceeding (the "MAADs Proceeding").

In those previous three cases, SEC expressed concerns that, in the prior 80+ acquisitions by Hydro One, the ratepayers did in fact get harmed. At the end of the deferred rebasing period, rates shot up, and they continue to be very high.

The Board in each of the three cases responded by saying that a MAADs application is not the appropriate place to consider long term rates. In effect, the Board said they would rely on the Board panels in the subsequent section 78 applications by Hydro One to meet statutory objective number one, and ensure that the acquired customers were not harmed with respect to prices. By way of guidance for those subsequent panels, the Board made clear that after the deferred rebasing period the acquired customers should experience some of the benefit of the cost savings Hydro One claimed would occur.

Then, in EB-2017-0049 (the "Rates Proceeding"), Hydro One proposed dramatic increases in the rates for the acquired customers in Norfolk, Haldimand, and Woodstock. SEC argued in the MAADs Proceeding that this showed an identifiable pattern of behaviour in which Hydro One achieves cost savings, but the acquired customers don't get the benefit of those savings. They get a disbenefit. They are, in effect, victimized by the larger, less efficient acquirer, Hydro One. SEC argued that the MAADs Application should therefore be denied for failure to meet the "no harm" test.

The Board panel in the MAADs Proceeding was faced with a dilemma. The Applicant was arguing, as it has in the past, that the acquired Orillia customers would not be harmed. The same Applicant was arguing in the Rates Proceeding that, after an essentially identical course of conduct, they should be allowed to harm the acquired Norfolk, Haldimand and Woodstock customers.

A reasonable person could only conclude that the same fate awaits the Orillia customers, and that the position of Hydro One that the Orillia customers will not be harmed is untrue. That is what they intend - to harm those customers.

The starting point for the Board is thus the real possibility that the "no harm" test will not be met. The Board had to deal with that.

In that situation, the Board panel in the MAADs Proceeding had five choices:

a) Ignore, as Hydro One and Orillia Power proposed, the similar fact evidence that showed a clear pattern of conduct which would result in the Orillia customers being harmed.

[4] When asked whether Hydro One said these things, Ms. Richardson, who was involved in those applications, was instructed to refuse to answer: Tr. 52.

b) Accept, as SEC proposed, the pattern of conduct evidence that the Orillia customers might well be harmed, and therefore – the onus being on the Applicants to show that they meet the "no harm test" - deny the Application.

c) Proceed with a decision on the current Application on the assumption that the Board panel in EB-2017-0049 would deny the rate increases proposed for Norfolk, Haldimand and Woodstock, to the extent those increases would harm the acquired customers.

d) Re-open the evidentiary component of the MAADs Proceeding and seek evidence as to the expected fate of the Orillia customers after the deferred rebasing period.

e) Wait and see.

The first four choices have obvious legal and policy problems associated with them (although some could probably have been made to work).

The Board panel therefore opted for the fifth.

SEC believes that the Board selected the lesser of evils. The problem was one created by the Applicants, who will in fact harm the Orillia customers unless this Board stops them. The Board panel looked for the most efficient way to ensure that it meets its statutory objectives. None of the options were good ones, but the Board determined that a delay is better than

a) allowing the customers to be harmed;

b) refusing the Application on the basis of evidence that was not before this particular Board panel, and that therefore they had not reviewed fully;

c) assuming a result in another proceeding (denial of a utility proposal) on an issue that they know will be hotly disputed; or

d) engaging in a lengthy and potentially duplicative review of what happens to Orillia customers after the deferred rebased period, including risking inconsistent decisions between EB-2016-0272 and EB-2017-0049.

In our submission, the Board panel took the approach with the least problems.

## THRESHOLD TEST

### Threshold Test - General

While the technical basis for the Motions is not entirely clear, SEC agrees with OEB Staff that the essential arguments of the Applicants are two-fold, plus we believe there is implicitly a third:

1. ***Procedural Fairness***. The Applicants did not have an opportunity to argue the relevance and substance of the evidence in the Rates Proceeding. Procedural fairness is not one of the enumerated grounds, but is generally considered to be a proper ground for review if so demonstrated.

2. ***New Evidence.*** Delay will result in operational problems for Orillia Power, and evidence is required on that issue (Rule 42.01(a)(iv)).

3. ***Decision Was Wrong.*** In considering the Rates Proceeding evidence to be potentially relevant, the Board panel was wrong (not grounds for review unless an error of law).

SEC agrees with OEB Staff that "a motion to review is not a hearing *de novo*". The review panel's role is to see if there is an identifiable error, and then determine if the error is material, and affected the outcome.

**Threshold Test – Procedural Fairness**

The Applicants argue that they didn't have a chance to argue the relevance and substance of the evidence in the Rates Proceeding.

On the first part of that, SEC agrees with OEB Staff that the relevance of the evidence in the Rates Proceeding was raised and defended in the submissions for the MAADs Proceeding. It was the central theme of the SEC Submissions, and both Applicants provided reply submissions arguing that the evidence was not relevant.

The Applicants cannot fairly say that they didn't have a chance to deal with relevance. They did. They lost. The fact that a decision went against your position is not grounds for a motion for review. This does not meet the threshold test.

On the second part of the procedural fairness question, however, the Applicants argue (by implication, perhaps) that because they said the Rates Proceeding evidence was irrelevant, they didn't present submissions as to why, if that evidence is relevant, they should still get approval for their Application.

SEC submits that, while that is undoubtedly true, the Applicants were not denied procedural fairness. It is common practice to provide arguments in the alternative. "We submit X. If you find against us on X, we still believe we should prevail due to Y." Otherwise, arguments would go back and forth indefinitely, as parties tried sequential arguments to win, had them rejected, and then were granted a further opportunity to try more arguments.

The essence of the Applicants' position is that, once the Board had determined that the Rates Proceeding evidence might be relevant, the Board was somehow obligated to allow the Applicants to make further submissions with respect to that evidence. The Board could certainly have done that, but that course of action would only have made sense if it included considering additional evidence as to what would happen to Orillia customers after the deferred rebasing period[5], i.e. option (d) of the five available to the Board as described above. For the reasons noted earlier, that was probably not the best way to go.

Therefore, it is submitted that no matter how you look at the procedural fairness issue, the Applicants have not met the threshold test.

[5] If no additional evidence was required, the Applicants could simply have made further arguments in the alternative.

**Threshold Test – New Evidence**

The second ground for review is that the Board, in making its procedural decision, did not have evidence before it of the dire consequences of such a decision. On this theory, the Board was obligated to seek further evidence before deciding on a delay. The Applicants seem to be trying to shoehorn this in under the heading "facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time". The basic argument is that the Applicants didn't put the "dire consequences" evidence in because they had no way of knowing a lengthy delay was being contemplated.

As we note below in our discussion on the merits, the "dire consequences" turn out to be not so dire after all. They are more of an inconvenience, if anything.

However, more fundamental than that is that the "dire consequences", even if true, only exist because the Applicants assumed that the Board would approve the transaction, and would approve it within a given time frame.

It is not unreasonable for applicants before the Board to expect that the Board will meet its own target timelines, or be relatively close to them. While a prudent applicant would probably want to build in some flexibility, the Board has a fairly good track record for decision-making, so timing could legitimately be considered a fairly minor risk, and planned accordingly.

It is, however, completely unreasonable to assume that the Board will approve your application as proposed, and to allow yourself to face "dire consequences" if the approval does not happen. Aside from being disrespectful to the Board, it is neither good planning, nor good utility management.

The Applicants in this case filed an Application that they knew would be opposed by one or more parties. Any utility manager in that situation should have a plan for what happens if they win, and a back-up plan for what happens if they lose. As Mr. Hipgrave pointed out, *"I have to ensure, on a day to day basis, that the business is operating smoothly, and that's what we're doing"*[6].

Now that the Board has determined to await the outcome of the Rates Proceeding, Orillia Power has moved to do what they have to do, i.e. run the utility according to the actual circumstances they face.

Prior to that, however, they did not. As they freely admit, they assumed that the Board would approve the Application:

> *"MR. SHEPHERD: All right. So, then, the last thing I want to ask you about is you allowed employees to depart without replacing them. And I understand why people had some uncertainty and so left because -- or went on with their retirements. But you assumed, didn't you, that the Board would approve this transaction? True?*
> *MR. HIPGRAVE: Yes.*
> *MR. SHEPHERD: And why was that?*

[6] Tr. 66.

> *MR. RODGER: We've already addressed all those issues in the arguments before the Board.[7]" [emphasis added]*

After refusing to answer why they made the assumption, they went on later to refuse the key question – the backup plan:

> *"MR. SHEPHERD: <u>What was your plan if the Board said no?</u>*
> *MR. RODGER: <u>That's an irrelevant question.</u>*
> *MR. SHEPHERD: The uncertainty is admitted to exist whether it's approved or denied, right? You've said this uncertainty, this -- we don't know what the answer is -- has been going on a long time, but you could be in a situation where the Board had said no.*
> *MR. RODGER: Mr. Hipgrave has given his answer. The reasonable expectation is that the Board would comply with its own benchmark time lines <u>for an approval</u>, and we are far in excess of that. That was his evidence.*
> *MR. SHEPHERD: And so it has nothing to do with assuming that there would be an approval? <u>You assumed that there would be an approval, right</u>?*
> *MR. HIPGRAVE: <u>Yeah</u>."[8]*
> *[emphasis added]*

In our submission, if there really are "dire consequences", the only reason for them is that the Applicants made an unwise and imprudent assumption that the only possible outcome of the proceeding was approval. They therefore did not have a backup plan or, if they did, they have refused to tell the Board that they had one, which amounts to the same thing for evidentiary purposes.

The argument that there are negative consequences from delay devolves to: "We assumed unreasonably that you would decide in our favour. You now propose to decide in a different manner. We have no plan for that; therefore, you can't do it."[9]

In our submission, this is untenable. Regardless of whether the dire consequences will actually arise, this does not meet the threshold test[10].

---

[7] Tr. 27-8.
[8] Tr. 29-30.
[9] In another area of law, torts, there is the principle "*volenti non fit iniuria*", which translates as "voluntary assumption of risk". In essence, you can't claim that someone caused you harm if you yourself took actions knowing the risk of the harm, and voluntarily assuming that risk. The principle does not apply specifically here, but the concept is equally applicable by analogy. If you act on the assumption that an approval will come, knowing that there is a risk that it will not (whether because there is a denial, or there is a delay), you have assumed that risk. You should not later be allowed to claim that the results of the risk were the Board's fault. You accepted that risk when you assumed approval.
[10] We note that OEB Staff, at page 7 of their Submissions, appears to suggest that in addition to the operational consequences, there was also additional evidence necessary to show the benefits over the first ten years to the Orillia customers. SEC does not agree. The benefits were discussed in the Applications. The Richardson Affidavit is merely added detail, all available previously. The way to confirm that is to ask the question: "If the Richardson Affidavit was ALL of the additional evidence, would it form the basis for a motion to review?" The answer is clearly no.

**Threshold Test – Board's Decision is Wrong**

The real essence of the Motions is the underlying "You can't do that to me" feeling by Hydro One. They are unhappy because, from their point of view, they have faced this same argument – the spectre of rate increases after the deferred rebasing period – three times, and they "won" all three times. In each case, they were able to argue successfully that the Board should apply a strict "no rates discussed here" policy to MAADs applications.[11]

Thus, fundamental to the Motions is the idea that rates after the deferred rebasing period are irrelevant, and the Board panel in the MAADs Proceeding simply got it wrong in determining that those rates might be relevant.

There are two reasons why this argument should fail.

First, an allegation that the panel "simply got it wrong" is grounds for review only if there is an error of law, or if there is a manifest error of interpretation apparent on the record.

There is no error of law here. To the extent that there is any expectation that rates will not be considered in a MAADs Application, that is a non-binding policy. The legal requirement is found in the Board's Objective #1: "To protect the interests of consumers with respect to prices".

In this case, the policy would, if applied blindly, require the Board to ignore evidence related to Objective #1. That would be an error of law. The Board could determine that the evidence is not related to that objective, or that it would not be helpful. It cannot determine that the evidence is irrelevant because it is contrary to a non-binding policy.

Therefore, if what is being alleged is an error of law, the threshold test is not met. There was no error of law.

So, was there an error of interpretation apparent on the record? The answer again is clearly no.

In the three preceding cases, Hydro One didn't "win" on the rates point, in the sense of convincing the Board that eventual rate impacts don't matter. What the Board concluded in each case was that the more efficient place to deal with those impacts was in another proceeding. In fact, in each case the Board was clear that it is NOT appropriate to give customers a small rate reduction for a finite period, then whack them with large rate increases. In each case, the Board provided guidance to Hydro One that the acquired customers had to get some of the benefits of cost savings that were generated by the transaction.

In the MAADs Proceeding, the Board was now faced with Hydro One proposing in the Rates Proceeding to do precisely what the Board had previously told them was unacceptable: harm the acquired customers. This is not an error of interpretation, either of the policy or of the past decisions. It is a correct interpretation: <u>The "no harm" test means "no harm", not "no harm until later"</u>.

The only argument then remaining to the Applicants would be the argument that this Board can consider rates in the longer term, as part of the "no harm" test, but it cannot be influenced by the

[11] What we have called, in the past, the Wizard of Oz approach: "Pay no attention to the man behind the curtain".

evidence in the Rates Proceeding in doing so.

The use of the evidence in the Rates Proceeding in the MAADs Proceeding is part of an area of law relating to "similar fact evidence". While the rules in criminal and civil proceedings are not identical, for the purposes of this situation the key is that a finder of fact can take into consideration the actions of a party elsewhere that are similar to those alleged in the current case. The key determination of the relevance of those similar facts is the level of specificity and congruence. That is, to the extent that the party did exactly the same thing, in some detail, in a very similar situation, the finder of fact can consider that probative[12].

As is so often the case, the law follows common sense, just as the Board's evidentiary practices follow common sense. If Hydro One does something many times, exactly the same way, and there is a certain result, it is reasonable to at least consider that, this time, when they are doing that same thing, in the same way, the same result will also arise.

But in any case, the Board in the MAADs Proceeding did not decide that the evidence in the Rates Proceeding will be determinative. They did not even decide that they will be influenced by it in the end. All they have determined, as far as SEC can tell, is that the final result in the Rates Proceeding might be probative in determining, in the MAADs Proceeding, whether the Orillia customers will be harmed[13].

This is clearly not wrong. In our submission, the opposite might well be legally incorrect. That is, a determination today that, no matter what happens in the Rates Proceeding, it cannot assist the Board in the MAADs Proceeding, is more likely to be wrong in law, and it certainly would be bad policy.

Therefore, on the basic question of whether the evidence in the Rates Proceeding is irrelevant, the Board put its mind to it, and declined to make that determination. There is no error of interpretation or law on the face of the record, and the threshold question is not met.

**Threshold Test – Conclusion**

SEC therefore submits that the threshold test has not been met:

1. On the issue of procedural fairness, the Applicants did argue whether the Rates Proceeding evidence was relevant, and elected not to make any submissions on how the Rates Proceeding evidence should be interpreted if it was found to be relevant.

2. On the issue of evidence relating to operational consequences, those consequences – if any - only arise because the Applicant wrongly assumed that the Application would be approved. They should have had a backup plan, and they didn't.

[12] We have not cited case law here, but this part of the law of evidence is relatively trite law, and non-controversial.

[13] It might not be probative. The reliance of the Board panels in the previous cases on the panel in the section 78 could be proved right: the Norfolk, Haldimand and Woodstock customers could be protected against the proposed price increases. There is no way for the Board panel in the MAADs Proceeding to know at this point.

3. On the issue of whether the decision was "simply wrong", the Board is complying with its statutory mandate by ensuring that information necessary for the Board to "protect consumers with respect to prices" is available to the adjudicators.

SEC therefore submits that the Motions should be dismissed because they fail the threshold test.

## MERITS

### Merits – Introduction

SEC has nothing further to add on the Procedural Fairness grounds for review. We repeat our earlier submissions on this point.

This section of our submissions deals, therefore, with two things: the operational consequences of delay, and the relevance of the Rates Proceeding evidence. We will deal with the latter first.

### Merits – Relevance of Rates Proceeding Evidence

The relevance of any evidence, in any proceeding, must start with the question "what does the law say?"

In this case, the two key legal requirements are the two relevant statutory objectives in the Act[14]:

> ***"1** (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:*
>
> 1. *To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of service.*
> 2. *To promote economic efficiency and cost effectiveness in the …distribution…of electricity, and to facilitate the maintenance of a financially viable electricity industry." [emphasis added]*

For our purposes on these Motions, the main points are cost-effectiveness and protection with respect to prices.

We have underlined the mandatory nature of the objectives. Because most of the guidance associated with MAADs is in non-binding policy documents, it is important to keep firmly in mind that the Board is obligated to consider price protection and cost-effectiveness. Policy must be interpreted within that framework.

On the policy side, the Board's longstanding policy for MAADs is the "no harm" test. It is in essence a *laissez-faire* approach to mergers and acquisitions, in which the Board says: "We'll give you broad freedom to do what you want, utilities, as long as nothing you do hurts consumers."

[14] Section 1 of the Act.

One of the ways consumers can be harmed, of course, is with respect to prices. This gives rise to two problems. First, a MAADs application is a difficult situation in which to consider rates in any detail. Second, rates in the longer term are very hard to predict.

However, the Board has found a solution by tying two objectives – cost effectiveness and price protection – together. The Board has said, quite reasonably, that generally speaking when costs go down over time, the customers benefit. The underlying rate paradigm in Ontario is cost of service. Lower costs mean lower rates. Therefore, if it is possible to determine that there will be long term, sustainable cost reductions as a result of a merger or acquisition, in most cases the customers will ultimately benefit by way of lower prices.

Where this connection between lower costs and lower prices is in fact true, the Board can conclude that meeting Objective #2 implies meeting Objective #1, and thus the Board does not have to consider ongoing rate implications in a MAADs application. It can focus on cost effectiveness only.

On the other hand, where this connection is not true, the objectives are still in play, and still must guide the Board's actions. The Board cannot get out of it by saying there is an exemption for MAADs applications. There isn't.

The concern that was raised in the Norfolk, Haldimand and Woodstock cases was that lower costs would not result in lower prices for the acquired customers, and as a result those customers would not be "protected… with respect to prices". The Board responded to that by saying that it expected that the acquired customers would benefit from the cost reductions, and by directing Hydro One to demonstrate that to be the case in future rate cases.

Now, Hydro One has filed a rate application in which those very acquired customers are facing massive rate increases. Reluctantly, Hydro One has agreed that massive rate increases harm the customers[15]:

> *"MR. SHEPHERD: ..You'll agree that a 100 percent rate increase harms a customer? Is that right?*
> *MS. RICHARDSON: I wouldn't be happy if my rates increased 100 percent, yes."*

Customers don't pay costs; they pay rates. But Hydro One takes the position that reducing costs is enough, and is by itself a benefit to customers. That led to an interesting exchange with Ms. Richardson[16]:

> *"MR. SHEPHERD: I'm sorry. You're still not responding to my question. You said there's 70 percent reduction in cost structures. That's a benefit to the customers. My question is: How is that a benefit to the customers? Please explain.*
> *MS. RICHARDSON: It's a benefit to all the customers if the costs are down. If we were to put in a rate application and say that we're increasing our rates by 70 percent, are you telling me that that would not harm the customers?*

[15] Tr. 51.
[16] Tr.54-6. We have not included the entire exchange, which is much longer.

> *MR. SHEPHERD: Sorry, increasing rates or increasing cost structures?*
> *MS. RICHARDSON: No, increasing our cost structures. The cost structures form the rates. The cost structures form the rates. So if your revenue requirement is lower, that's a benefit to the customers. How those -- how those costs are eventually allocated to the customers of Orillia or any other customers are part of a section 78 application. They're not part of the MAAD application.*
> *MR. SHEPHERD: Didn't the Board tell you in the three previous applications that we're now -- the customers are now victimized in 0049 -- didn't the Board tell you that they expect you to ensure that the reductions in cost benefit the customers of the acquired utility? Isn't that what they told you?*
> *MS. RICHARDSON: They said they expected the costs -- that we'll provide them cost-based rates in the future. And we will do that. We will -- we have an upcoming distribution rate application where we have people who can speak to the cost for the acquired customers, because I think that's what you're referring to, and we can speak to all of the rate design and the cost allocation that's behind those rates. We stand by today that those customers of the previous acquired had benefit from consolidation and we'll stand by that the Orillia customers will benefit from them.*
> *But you're going to have to wait for the distribution rate application if you want to go down that road to see how the allocations are coming out. But these are -- as far as that the cost structures for all of the Board's policies have declined, which is a benefit to customers." [emphasis added]*

Here is the crux of the problem. Hydro One thinks that they can generate cost efficiencies through consolidations, but then allocate all of those efficiencies, and more, to the legacy customers. The acquired customers can be saddled with large rate increases, and somehow they are not harmed. Even though, of course, Hydro One admits that large rate increases harm the customers.

In fact, Hydro One has been clear in the MAADs Proceeding that they have delivered cost efficiencies for Norfolk, Haldimand and Woodstock[17]. They thus argue that the customers have not been harmed, because Hydro One delivered cost efficiencies. The fact that the acquired customers have large rate increases is not part of their equation.

The resulting situation is one in which the assumption in the policy – that lower costs to serve the Orillia customers will translate into lower prices for those customers – is not correct. As with Norfolk, Haldimand, and Woodstock, lower costs to serve the acquired customers do not translate into lower prices for those customers.

The Hydro One position disregards Objective #1 in the Act. Their position can only be correct if satisfying Objective #2 (cost effectiveness) is somehow deemed to be satisfying Objective #1 (price protection)[18]. The Board cannot, as a matter of law, deem that relationship. It is either true, or it is not. In the case of the acquired customers, it is not true. Cost reductions do not mean price protection.

[17] EB-2016-0276, Hydro One Reply Argument, p. 3-4.
[18] As Ms. Richardson proposes, and as the Hydro One Reply Argument proposes.

If the connection between costs and rates assumed by the MAADs policy (and Hydro One) is not true in this case, the Board panel in the MAADs Proceeding must find another way to meet Objective #1. It can basically do one of two things: look at the issue itself, or wait to see how the panel in the Rates Proceeding deals with it, and see whether that meets the Objective.

It cannot simply ignore the Objective, as Hydro One proposes. That would be an error of law.

Thus, if this Board on the Motions decides that the threshold test is met on the relevance question, in SEC's submission it has only two options.

On the one hand, it can accept that the Board in the MAADs Proceeding reached a reasonable conclusion on how to deal with Objective #1, and thus deny the Motions.

Alternatively, this panel can remit the matter back to the Board panel in the MAADs Proceeding, with a direction to re-open the evidentiary record and hear evidence related to protecting the Orillia customers with respect to price.

In SEC's submission, the Board panel in the MAADs Proceeding chose the right option, and this Board should deny the Motions.

**Merits – Operational Consequences**

SEC's threshold submission is that the actual cause of any operational consequences is imprudence on the part of the Applicants, and as a result the threshold test is not met. There is no error in the decision under review.

However, in the event that the Board considers the merits on this issue, SEC submits that in fact the operational consequences have been overblown. The tone of the affidavit – "Captain, she's gonna blow" – is not correct. As seen from the cross-examination, the most that could be said is that waiting for a decision is inconvenient, presenting management challenges that need to be addressed, and are in fact being addressed. Further, no irreparable harm to the utility is being alleged. The challenges that do exist can in fact be solved with expenditures that are not material in the context of the transaction.

There are two primary operational consequences cited in the Motion Record: the lease of new premises, and the loss of staff members.

The first problem is that the unregulated affiliate – a generation company – was sharing space with the regulated utility. As part of the deal, the generation company was supposed to move out and get their own place. A lease was signed in May (around the time submissions were being filed in the MAADs Proceeding), and after renovations they planned to move some time in the fall. That has now been delayed, and the move is planned for December. It seems there is a cost, although the cost is to the generation company, not the utility[19].

However, it turns out that they admit there is not even a cost there, as seen from the following exchange[20]:

[19] See Tr. 9-10.
[20] Tr. 11.

> *"MR. SHEPHERD: To the utility and to the generation company, there's no impact anymore after they've moved; right?*
> *MR. HIPGRAVE: Other than the ongoing costs of a -- of the facility that they will be occupying, yes.*
> *MR. SHEPHERD: Well, help me understand why that is a cost. You planned to move them anyway, so they're going to be moved. You're going to incur the same costs that you planned to incur if it had already been approved. So how is there an incremental cost associated with the delay in the proceeding?*
> *MR. HIPGRAVE: There is no -- not related directly to the delay in the proceeding."*

The bottom line appears to be that any minimal cost that this entails – perhaps a couple of months' rent[21] – is a cost of the generation company, and it has already been incurred. In addition, it was only incurred at all because the Applicants assumed the Board would approve the transaction, and forged ahead on that basis.

The second area is staffing. In the Motion materials, it appeared that there are five people lost or about to be lost due to resignation or retirement. The first was immediately prior to the signing of the deal, when the CEO left[22]. After he left, there were 33 employees in the utility[23]. Interestingly, there was no reduction at that time in utility personnel. Mr. Hipgrave, the new interim CEO, came from the generation company, so the loss of that FTE was not to the utility, but to the generator, which is not being sold.

Since then, three more have left, and one is going to leave in the late spring[24]. However, again those are not all utility employees. In fact, four of the five total employees were shared between the utility and the generation company. Thus, as Mr. Hipgrave admits[25], "We had a combined staff of 50. We've lost four employees, and another retirement is pending." It appears that, even though the generation company is not being sold, no attempts have been made to replace the lost FTEs for that company either.

It also appears that no concerted effort is being made to keep staff until the Board issues a decision. Although one staff member was convinced to stay until next spring[26], other staff members have left. No attempt has been made to pay retention bonuses, a common practice during corporate changes, or use any of the other techniques to keep people[27].

Hydro One, in their Motion materials, implied that Orillia Power has adopted a policy of not replacing staff when they leave. It turns out that is not the case, as evidenced by this exchange with Mr. Hipgrave[28]:

---

[21] See Tr. 10.
[22] Tr. 7.
[23] JT1.1.
[24] Tr. 7.
[25] Tr. 13.
[26] Tr. 8.
[27] Tr. 8.
[28] Tr. 64-5

> *"MR. SHEPHERD: So this statement [from the Hydro One Motion materials]:*
>
> *"OPDC, in anticipation of an acquisition, has not been replacing staff."*
>
> *Is that still true?*
> *MR. HIPGRAVE: As I said in my opening remarks when I corrected my affidavit -- not so much corrected, sorry, updated my affidavit, we have taken some actions, and as I -- with respect to an HR consultant that we brought in on a part-time basis, arrangements that I've made with a former executive -- retired executive assistant. It's a business. It needs to be run. On a day-by-day basis, I'm responsible to analyze the situation. If I need to bring in resources, I will. If I can defer or hand tasks off to existing employees, I will. There's no set policy that states I cannot hire ever. I've just got to deal with the situation with all the uncertainty that's been put upon us with PO No. 6.*
> *MR. SHEPHERD: So you heard Mr. Engelberg estimate it might be the end of next year before this is dealt with. If that were the case, do you have a plan for how to deal with -- how to operate the utility between now and then?*
> *MR. HIPGRAVE: The utility is operating right now. I meet with our board. I meet with our senior management team. And I'm consistently analyzing the situation.*
> *The HR example is a perfect one. Okay? That person left. We anticipated that the deal would close shortly, so tasks were distributed amongst existing staff. PO No. 6 comes out, erases the finish line, gives us all this uncertainty. So I've gone out and brought in an HR consultant, albeit on a temporary part-time basis for now, but that's an example of how you manage a business, and you adapt day by day to what's being -- what's occurring."*

This is obviously not the optimum situation for Orillia Power. On the other hand, they are managing, having lost part of the services of perhaps four employees, with part of another one to come in six months. One person, the CEO, was replaced from the generation company. Another person, HR, has been replaced by a contract person for now. A third person has a retired EA filling in. Other staff have been working a few extra hours to help out.

Would it be better if they had a decision tomorrow? Well, if it is an approval, yes. If it is a denial of the Applications, probably not.

But what the Applicants appear to be saying here is that they want the Board to push toward a definitive decision, rather than have these management challenges continue.

SEC submits that this is a situation in which the Board should maintain tight control over its own process. The timing of the MAADs Proceeding has not been ideal, but that is largely a function of the actions of Hydro One. The Board has determined that, in order to meet its statutory objectives, it must take longer still. It would certainly have been aware, when it made that procedural decision, that a further delay could generate consequences for the Applicants. On the other hand, it had to balance its statutory obligations with the timeliness of its process.

The Applicants are not required to continue with the MAADs Proceeding. They can withdraw their Applications, wait for the completion of the Rates Proceeding, then re-apply with evidence that takes the result of the Rates Proceeding – and the concerns of the Board with respect to

price protection - into account. In the meantime, they can stabilize the situation at Orillia Power, so that these operational consequences are dealt with according to a proper plan.

Instead, they are trying to push the Board to a resolution, a kind of "fish or cut bait" approach. This is not appropriate. The Board's delay is not capricious, and is not because the Board lacks diligence. It is precisely because the Board insists on being diligent.

SEC therefore submits that the operational consequences are insufficient to force the Board to a resolution of the Applications before it has been able to complete its responsibilities[29].

**Refusals**

Although not apparently grounds for the Motion to Review, Hydro One has alleged a number of things in their Motion Materials that were addressed in cross-examination. In each case, Hydro One refused to answer questions on these relevant matters, or admitted that the allegations were not supported by reliable evidence.

SEC therefore submits that the Board should not consider those allegations in reaching a decision on these Motions.

The key allegations in question are the following:

1. Orillia Power customers will save between $600 and $1800 each over the next ten years as a result of the proposed transactions.
    - It turns out, these figures start from the wrong rates[30], and are in any case only illustrative[31].
    - The calculations also used incorrect loss factors, and the person who swore to the figures wasn't able to answer questions on loss factors[32]. Instead, she simply admitted that Hydro One did not adjust for differences in loss factors.
    - They cannot be relied on.
2. Despite the Board's expressed concern over rates after the deferred rebasing period, Hydro One was unwilling to state what rate classes would apply to Orillia customers at that time[33]. They refuse to say what will happen to Orillia customers at that time[34].
3. Para. 11 of the Hydro One submissions alleges that Hydro One will get economies of scale from the Orillia acquisition. However, they refuse to answer questions on that allegation[35].
4. Para. 28 of the Hydro One submissions alleges that the decision in PO #6 of the MAADs Proceeding is hindering consolidation activities in the province[36]. They are not able (or

[29] We note that Orillia Power continues to experience an ROE well above the Board approved levels, so it this situation is not hurting it financially in any material way: Tr. 20. While the 2016 results appear to show a decline in ROE, that appears to be because of a change in accounting approach, and accrual of the departure tax. The Applicants are unwilling to talk about that, and refused questions in that area: Tr. 24, 26, 27.
[30] Tr. 38.
[31] Tr. 34.
[32] Tr. 36.
[33] Tr. 48.
[34] Tr. 51.
[35] Tr. 56.
[36] Tr. 57

perhaps not willing) to provide any support for that allegation, instead saying that the problem is that the Board doesn't have binding rules on MAADs applications.

In our submission, none of the above provide support for a Motion for Review.

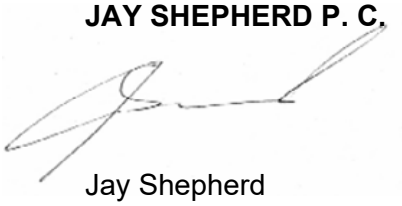
**Conclusions**

SEC therefore submits:

a. The Motions should be denied on the basis that they fail to meet the threshold test for any of the apparent grounds relied on.
b. In the alternative, if the threshold test is met with respect to the issue of the relevance of the Rates Proceeding evidence, the Board is still required to meet its objective with respect to price protection. Therefore, the Board's options are:
    i. Accept the procedural solution determined by the Board panel, and therefore deny the Motions; or
    ii. In the alternative, allow the Motions, and remit the matter back to the Board panel to hear evidence on how they can protect Orillia consumers with respect to prices.
c. Also in the alternative, if the threshold test is met with respect to operational consequences, the evidence shows that those consequences are being managed. Balancing those relatively minor consequences of additional delay with the Board's statutory mandate - protection of consumers with respect to price -, the latter should prevail.

All of which is respectfully submitted.

Yours very truly,
**JAY SHEPHERD P. C.**



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties