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December 12, 2017

Delivered by Email, RESS & Courier

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Board File No. EB-2017-0320 – Reply Argument

Enclosed is Orillia Power Distribution Corporation's reply argument to the submissions of Ontario Energy Board Staff and the Intervenor, the School Energy Coalition, filed in response to Orillia Power's motion to vary Procedural Order No. 6 in EB-2016-0276.

An electronic copy of this cover letter and the reply argument will be filed through the Ontario Energy Board's Regulatory Electronic System (RESS) concurrently.

Yours truly,

BORDEN LADNER GERVAIS LLP

Original signed by J. Mark Rodger

J. Mark Rodger
Incorporated Partner*
*Jonathan Rodger Professional Corporation

Encl.

Copy to: All Intervenors of record in EB-2017-0320, EB-2016-0276

TOR01: 7186601: v1

EB-2017-0320

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 2016 Board-approved rate schedules of Orillia Power Distribution Corporation to give effect to a 1% reduction relative to 2016 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 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 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 Procedural Order No. 6 issued in the within proceeding on July 27, 2017.

AND IN THE MATTER OF sections 8 and 40 of the *OEB Rules of Practice and Procedure*.

REPLY ARGUMENT
ORILLIA POWER DISTRIBUTION CORPORATION

December 12, 2017

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REPLY ARGUMENT
ORILLIA POWER DISTRIBUTION CORPORATION

DELIVERED DECEMBER 12, 2017

I. INTRODUCTION

1. Orillia Power Distribution Corporation ("Orillia Power") replies to the submissions of Ontario Energy Board ("OEB") Staff and the Intervenor, the School Energy Coalition ("SEC"), filed in response to Orillia Power's motion to vary Procedural Order No. 6 in EB-2016-0276 (the "Motion") by which the OEB ordered that the underlying consolidation application (the "Application") be held in abeyance pending the release of the OEB's decision on Hydro One Networks Inc. ("Hydro One" or "HONI")'s electricity distribution rate application in EB-2017-0049 (the "HONI Rate Application").

2. Orillia Power's submissions are structured in four parts:

   (a) The threshold test for a motion to vary under Rule 40 of the *OEB Rules of Practice and Procedure*;

   (b) Orillia Power meets the threshold test to vary Procedural Order No. 6 as the OEB committed an error in staying the Application;

   (c) The merits of the Motion and prejudice caused by the stay of the Application; and

   (d) Relief sought.

II. THRESHOLD TEST

3. Rule 42.01 provides that on a motion to review, the applicant must establish that there are grounds to question the "correctness" of the order or decision. The *OEB Rules of Practice and Procedure* set out as examples of such grounds: errors in fact, change in circumstances, new facts, or facts that were not previously in the record. However, the use of the word "include" in Rule 42.01 means that the list of grounds is not closed.

4. Orillia Power submits that Rule 42.01 is met where the OEB has committed an error. Rule 42.01 is not limited to errors of fact or misapprehension of evidence. Rule 42.01 also applies to errors of procedural fairness and questions of mixed fact and law.

5. Rule 42.01 must be read in conjunction with section 33 of the *Ontario Energy Board Act, 1998,* SO 1998, c 15, Sched B. ("*OEB Act*") which provides that an appeal lies from an Order of the OEB to the Divisional Court only on questions of law or jurisdiction. Were Rule 42.01 to be interpreted to only apply to factual errors or misapprehensions of justice, then parties would have no recourse or review for errors of mixed fact and law. That was surely not the intention.

III. ORILLIA POWER MEETS THE THRESHOLD TEST

6. By ordering that the Application "be held in abeyance" until further notice, the OEB has, on its own motion, stayed the Application proceedings.

7. In staying the Application, the OEB has committed an error:

   (a) The OEB made the decision on its own motion, without asking for submissions or evidence from the parties to the proceeding, thus violating the rules of procedural fairness;

   (b) The decision does not meet the threshold for a stay of proceedings under the *Statutory Powers and Procedures Act*, RSO 1990 c. S. 22 ("*SPPA*"); and

   (c) The decision causes prejudice to the parties.

A. The OEB committed an error by not affording the parties procedural fairness

8. While the OEB has the power to control its own process, this power does not extend to making decisions without affording the parties the minimal level of procedural fairness. The OEB has a longstanding practice of ensuring that affected parties have a fair opportunity to be heard.[1]

[1] *Great Lakes Power Ltd.*, 2008 CarswellOnt 8947 para. 48

9. The OEB failed to give notice to the parties that it intended to stay the proceeding. The OEB should have requested submissions from the parties on whether it was appropriate to stay the Application.[2]

10. In making the decision to stay the Application, the OEB relied on evidence outside of the record in this proceeding, namely evidence filed in the HONI Rate Application. The parties had no opportunity to test that evidence through interrogatories or to file responding evidence.

11. The evidence from the HONI Rate Application is irrelevant to the issues on this Application.

12. SEC attempts to shoehorn this evidence into this Application on the basis of the rule of evidence of "similar fact evidence." SEC is wrong to submit that the evidence pertaining to a different proceeding type, involving different parties qualifies as "similar fact evidence"[3] which should be considered by the OEB as it might be probative[4] to the Application.

13. SEC has misapprehended the content and the policy of the similar fact rule of evidence. Similar fact evidence is an exception to the general exclusionary rule prohibiting a party from leading evidence of the bad character of the opposite party.[5] Similar fact evidence is admissible only if it is relevant to a material issue in the case and the probative value of the evidence outweighs its prejudicial effect.[6]

14. The evidence is not relevant to the Application as the OEB has previously held that mergers, acquisitions, amalgamations and divestiture ("MAAD") applications under s. 86

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[2] See for example *Tribute Resources Inc. v 2195002 Ontario Inc.*, 2012 ONSC 25 where the OEB requested submissions on whether the proceeding should be stayed until the Court of Appeal's decision on the Appeal.
[3] SEC Submissions dated November 27, 2017 [SEC] at p 8.
[4] SEC at p 8.
[5] John Sopinka, The Law of Evidence in Canada, Markham, Ont. : LexisNexis Butterworths, 2014 p. 672 at s. 11.4. [Sopinka].
[6] Sopinka p. 680 at s.11.2.

of the *OEB Act* are largely about the effect of cost structures on the acquired entities, and not about the approval of future rates.[7]

15. The evidence in the HONI Rate Application involving Norfolk Power Distribution Inc., Haldimand County Hydro Inc., Woodstock Hydro Services Inc. (the "Acquired Entities") concerns the establishment of just and reasonable rates applicable to the Acquired Entities. This evidence will not assist the OEB in determining whether the Application will satisfy the OEB's no harm test. As OEB staff pointed out, Hydro One has created a new set of rate classes for the customers of the Acquired Entities, and Orillia Power customers are not members of this rate class.[8]

16. The rates of the Acquired Entities in 2021 are not relevant to, and will not affect the future rates of Orillia Power customers, because Orillia Power consolidation will not occur until the 10-year deferral period ends, which is well beyond the duration of the HONI Rate Application decision.[9] As noted by OEB Staff, to date, Hydro One has not indicated (either in the HONI Rate Application, or the Application) what its rate proposal for Orillia Power customers will be following the deferral period.[10]

17. Moreover, the communities that are the subject of the HONI Rate Application and the Application differ with respect to a number of metrics including: cost structures, location, population, and demographics, consequently evidence about these Acquired Entities is not relevant to the Application. OEB Staff made similar submissions on this issue, holding that the information from the HONI Rate Application is not necessary for the OEB to have prior to making its decision on the Application as Hydro One may well have different plans for Orillia Power.[11]

[7] Ontario Energy Board, Decision and Order, EB-2016-0025/EB-2016-0360 at pp.8, 12, 28.
[8] OEB Staff Submissions received November 24, 2017 [Staff] at p. 9.
[9] HONI Notice of Motion, EB-2016-0276 at p 4
[10] Staff at p.9.
[11] Staff at p 10.

18. Orillia Power further notes that SEC has not presented any evidence on the Application challenging a decrease in costs for Orillia Power customers following the proposed transaction.

B. The OEB erred in staying the proceeding

19. The *SPPA* provides that an administrative tribunal may stay one or more proceedings if the same or similar questions of fact, law, or policy are at issue. Section 9.1(1) reads as follows:

> 9.1 (1) If two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may,
>
> (a) combine the proceedings or any part of them, with the consent of the parties;
>
> (b) hear the proceedings at the same time, with the consent of the parties;
>
> (c) hear the proceedings one immediately after the other; or
>
> (d) stay one or more of the proceedings until after the determination of another one of them.

20. Administrative tribunals have accepted that the test for granting a stay is the same test as that set by the Courts, namely, a stay should only be granted in the clearest of cases (*Arzen v Ontario*[12]). In order to grant a stay the party seeking the stay would have to show that:

(a) continuing the action would cause substantial prejudice or injustice to the defendant; and

(b) the stay would not cause an injustice to the responding party, ie. the plaintiff.

21. No party in this Application requested the stay. No party in this Application filed evidence of any prejudice that would justify the OEB granting the stay. The only evidence filed on this motion with respect to any prejudice is the evidence from Orillia Power.

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[12] *Arzem v Otnario (Ministry of Community & Social Services)*, 2005 HRTO 11 at para. 101.

22. SEC's allegations in its submissions of harm to consumers or prejudice to consumers are made without any factual foundation on the motion. The SEC did not file evidence on the motion to lift the stay. The SEC cannot rely on evidence filed in another proceeding.

IV. PREJUDICE

23. SEC submits that Hydro One's past actions indicate a pattern of harm towards customers, which will inevitably occur again unless the OEB steps in.[13] Orillia Power has three submissions in response:

    (a) the no harm test does not contemplate rate-making;

    (b) the rate increases are not synonymous with harm; and

    (c) the OEB would not approve rates that would cause harm to customers.

24. First, the no harm test for the consolidation proceeding considers cost structures not distribution rates when determining whether the proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives, as set out in section 1 of the *OEB Act*. [14]

25. While the OEB has broad statutory objectives, in applying the no harm test the OEB has primarily focused its review on impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the electricity distribution sector.[15] The price of service assessment is not arrived at by comparing rates between consolidating distributors because the entities may have dissimilar service territories, each with a different customer mix resulting in differing rate class structure characteristics. Rather, in making its determination, the OEB will assess the underlying cost structures of the consolidating utilities.[16]

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[13] "That is what they intend - to harm those customers." SEC at p. 2; "The problem was one created by the Applicants, who will in fact harm the Orillia customers unless this Board stops them." SEC at p. 3.
[14] Ontario Energy Board, Handbook to Electricity Distributor and Transmitter Consolidations, dated January 16, 2016, ("Handbook") at p. 4.
[15] Handbook at p 6.
[16] Handbook at p. 6

26. Second, the implication that any rate increase harms the ratepayer cannot be true, otherwise the OEB would be countermanding its own mandate in every proceeding in which the OEB approves a rate increase. The *OEB Act* requires the OEB to set rates that are just and reasonable, and this metric forms the basis upon which rate applications are adjudicated by the Board, not the absence of an increase.

27. Regardless, rates are not the subject of a MAADs application. Evidence of cost structures are led during a MAADs application to satisfy the no harm test, whereas rates themselves are determined at a subsequent proceeding. In Orillia Power's case, distribution rates will not be determined until Year 11 following the closing of the proposed transaction.

28. Third, the HONI Rate Application is at an early stage, and none of the rates that Hydro One has submitted have been approved by the OEB. Ontario consumers can have confidence that the OEB would not approve future distribution rates that are inconsistent with its statutory objectives including, among other things, protecting customers with respect to price.

C. Operational Harm

29. SEC contends prejudice to Orillia Power arises not from the delay, but from the failure on Orillia Power's part to anticipate the rejection of the Application.[17] SEC mischaracterizes the prejudice: it arises from the stay of proceedings ordered by the OEB which places Orillia Power in a state of limbo. Orillia Power also rejects SEC's submission that the resulting harm is just an "inconvenience."[18]

30. As Mr. Hipgrave noted, the OEB has published guidelines with respect to the timelines associated with the processing of a MAADs application upon which Orillia Power relied:

[17] "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." SEC at p 6

[18] "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." SEC at p 5.

> MR. HIPGRAVE: Going back to my point about expected timelines for this transaction, we looked at the OEB guidelines of 130 days. Obviously we added a little bit of a buffer there. We projected six to nine months. So and we're between 180 and 270 days that this would likely take.[19]

31. It was reasonable for Orillia Power to anticipate a decision within 270 days of the submission, given that guidelines of the OEB suggest 130 days. It is not reasonable to expect an organization to plan for a delay of 400 days and counting:

> MR. HIPGRAVE: -- we are sitting at -- as of today we're approaching 400 days, so you can imagine the type of uncertainty that that puts upon the staff and how uncomfortable that makes them feel. Staff come to me on a regular basis. It's my job to keep them informed of what's going on. And I meet with them regularly to give updates on this whole process.
>
> PO number 6 comes out, I can't answer those questions any more. This never happened. That type of procedural order has never come out before, where all of a sudden the future of a merger or sale and purchase between Orillia Power and Hydro One is now dependent on some other case that's completely unrelated to this? Staff are looking at me and saying, what's next? I don't have answers for them anymore. We're at 400 days. Four hundred days.[20]
>
> **[…]**
>
> MR. HIPGRAVE: … And now, I mean, it's back to the drawing board. We've got to figure this out. We're at 400 days. We could be at 600. We could be at 700."[21]

32. The release of Procedural Order No. 6 was an unanticipated event which "erase[d] the finish line" for Orillia Power[22] creating significant uncertainty for the organization. Aside from the sheer amount of the delay, this situation has never arisen before, as Mr. Hipgrave noted in the above excerpt. SEC suggests that Orillia Power should have

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[19] EB-2017-0320 Cross Examination Conference Transcript dated November 10, 2017 ["Transcript] lines 10-14, p. 63.
[20] Transcript lines 1-15, p. 29.
[21] Transcript lines 12-15, p. 64.
[22] "MR. HIPGRAVE: PO No. 6 comes out, erases the finish line, gives us all this uncertainty." Transcript, lines 18-20, p 65.

implemented measures like retention bonuses,[23] but it is not reasonable to expect an organization to plan for an event which has never before occurred.

33. Not only has morale at Orillia Power been affected, but without an end date, the organization is having difficulty filling roles that become vacant in the normal course of business. As there is no security with respect to the future of the positions in the organization, it is difficult to recruit people for these positions. Orillia Power is making do with the staff complement it has; SEC contends that this situation is not optimum,[24] Orillia Power submits that it is unreasonable. Indeed, Mr. Shepherd has repeatedly expressed sympathy for Orillia Power's position,[25] which presumably he would not do were the situation overblown.

OEB Staff also recognize that the significant delay creates operational issues for Orillia Power.

> Given the significant delay that waiting for the distribution case would entail, and the potential operational issues being faced by Orillia Power in the interim, OEB staff suggests that the adjournment is not the optimal course.[26]

34. Moreover, the contention that Orillia Power should have anticipated the rejection of the Application is unsound. SEC submits that it is unreasonable for Orillia Power to have relied on the approval of the Application.[27] A utility does not submit an application with the expectation it will be rejected. Orillia Power believes in the soundness of its application and is entitled to anticipate that its complete application will be accepted, especially given that the evidence on the record is sufficient to respond to the requirements of the Application.

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[23] SEC at p. 13.
[24] "This is obviously not the optimum situation for Orillia Power." SEC at p. 14.
[25] "I'm trying to actually understand what you're doing because I accept that you're in a difficult position. I understand that." Transcript, lines 26-27, p. 65; "I have a lot of sympathy for you in that respect." Transcript at lines 17-18, p. 64.
[26] Staff at p. 10.
[27] "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." SEC at p. 5.

V. RELIEF SOUGHT

35. For all of the foregoing reasons, Orillia Power submits that the threshold test has been met, the Application satisfies the OEB's no harm test, and is consistent with the principles articulated by the OEB.

36. Orillia Power requests that the Motions be granted, the OEB lift the stay of the Application and issue a final decision on the Application.

All of which is respectfully submitted this 12th day of December, 2017.

Original signed by J. Mark Rodger

J. Mark Rodger

Counsel to the Applicant

Orillia Power Distribution Corporation