BY EMAIL and RESS

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

December 14, 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

We are counsel for the School Energy Coalition. We are writing this letter to express our concern with respect to two aspects of the Reply Submissions of the Applicants Hydro One and Orillia Power.

While there are many aspects of the Reply Arguments that we believe are bad law, bad policy, and just plain wrong, there are only two that we believe should be raised as points of order to the Board:

- ***New and Far-Reaching Legal Arguments.*** The Applicants have presented two new and important legal arguments for the first time in reply, even though they are not referred to in their Notices of Motion, nor their initial submissions, and in neither case are they properly responsive to OEB Staff or SEC submissions. Those two legal arguments are the following:
    - ***Binding Precedent.*** The new proposition being presented is that prior decisions of the Board create a kind of "common law" that makes them binding on future Board panels. This was raised expressly by Hydro One (p.4), which says the

SEC assertion that policies and past decisions are "non-binding" is wrong[1]. Aside from the SEC assertion being well-settled law, this new Hydro One legal proposition would create far-reaching changes in how the Board regulates. If the Board is going to consider it, in our view it should be the subject of notice to stakeholders around the industry, and all (including SEC, of course) should have the opportunity to make submissions on the law as it stands today, and the policy and precedential bases for the law. ***Stare decisis*** at the OEB would be an enormous change.

- ***Restrictions on Board Control Over Its Own Process.*** Both Applicants have argued for the first time that the hearing panel has implemented an illegal "stay of proceedings" under the SPPA, and that is an error of law. Neither the word "stay", nor anything resembling this argument, appears in either Notice of Motion. It is not the basis for any of the grounds for seeking review. The Board has long been vigilant in guarding its right to control its own processes. While it is undoubtedly subject to the SPPA, it is a unique argument to propose that the Board cannot delay a proceeding because it amounts to an illegal stay. Many proceedings have been delayed at one time or another, as the Board assesses how best to exercise its statutory mandate given the evidence before it (or that it would like to see). To now say that, much like a criminal trial, a Board proceeding is subject to time limits and **cannot** be delayed would have significant impact on the Board and parties.

- ***New Evidence.*** Hydro One states in their Reply that "Hydro One will be filing new evidence for its current distribution application in December 2017", and then proceeds to attach an excerpt from that "evidence" (none of which has been filed). The apparent justification for this is that SEC "filed evidence" in its submissions before the hearing panel in this matter. We note that, no matter how many times Hydro One repeats that SEC "filed evidence", that will be no more true the first time they say it than the tenth time. SEC did not file evidence in its submissions. It drew the Board's attention to the evidence of Hydro One in a parallel proceeding[2]. In this case, Hydro One is now proposing to change its evidence on cost allocation for the formerly acquired territories, in ways that the Board cannot predict, to get rid of some of the embarrassing rate increases they were proposing for those communities[3]. It hasn't done it yet, so this

[1] Orillia Power says something similar at page 11 of its Reply Submissions, when it says that "Orillia Power…is entitled to anticipate that its complete application will be accepted" [emphasis added], because they believed they complied with Board policies and precedents. Entitlement to a particular result is a shocking overreach by a regulated utility.

[2] The statement of Orillia Power at p. 5 that "the parties had no opportunity to test that evidence through interrogatories or to file responding evidence" is particularly surprising. Since it is Hydro One's evidence, how would they "test" it? Did they not test it before they filed it? We note that the Board is specifically authorized in the OEB Act, and despite the SPPA, to rely on evidence in a parallel proceeding before the Board. Re-characterizing it as "SEC evidence" is nothing more than sophistry.

[3] Needless to say, this filing would be long past the deadline for filing new evidence in these Motions, but that is not the central basis of SEC's concern.

Board panel cannot see what they are filing, and cannot assess its legitimacy. The Board just has to take Hydro One's word for it[4].

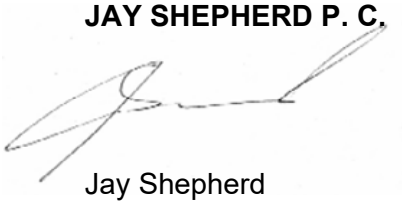
SEC therefore requests that:

- If the Board considers either of the novel new legal arguments proposed, all parties be given ample opportunity to provide submissions on those issues. At least in the case of the proposal to establish a new binding precedent rule, and perhaps also in the case of limiting Board control over process delays, SEC believes that the Board should ensure that it hears from all interested stakeholders before considering entering those uncharted waters.

- Until the Board sees all of the new evidence in EB-2017-0049 on rates for the Acquireds, it should not take account of any of that evidence. Once that evidence is filed, the Board then is in a position to assess whether that new evidence – before being reviewed and tested – is helpful to the Board in its decision on these Motions, and if so whether it is necessary to re-open the record on these Motions to deal with that new evidence.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties

[4] Much like Hydro One's constant repetition that they will not harm the Orillia customers, as if Hydro One rather than the Board got to make that decision.