J. Mark Rodger
T 416-367-6190
F 416-367-6749
mrodger@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada M5H 4E3
T 416.367.6000
F 416.367.6749
blg.com

Borden Ladner Gervais

May 2, 2018

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-2016-0276 - Notice of Motion

Enclosed is Orillia Power Distribution Corporation's Notice of Motion, filed in response to the Board's Decision and Order dated April 12, 2018, in the matter of Hydro One Inc.'s Application on October 11, 2016 under section 86(2)(b) of the *Ontario Energy Board Act, 1998, S.O.* 1998 c. 15 (Schedule B) (the "*Act*") requesting approval, among other things, to purchase all of the shares of Orillia Power.

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

Yours truly,

BORDEN LADNER GERVAIS LLP

Original signed by Jessica-Ann Buchta

Per:

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

Encl.

cc. Gayle Jackson, City of Orillia CAO
Greg Gee, Chair, Orillia Power Distribution Corporation
Charles Keizer, Torys LLP
Michael Engelberg, Hydro One Networks Inc.
Intervenors of Record

TOR01: 7385818: v1

EB-2016-0276

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 the Decision and Order issued in the within proceeding on April 12, 2018.

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

NOTICE OF MOTION

NOTICE OF MOTION

Orillia Power Distribution Corporation ("Orillia Power") will make a motion to the Ontario Energy Board (the "Board") on a date and at a time to be determined by the Board.

THE MOTION IS FOR:

1. A review and variance of the Board's Decision and Order dated April 12, 2018 (the "Decision") in the matter of Hydro One Inc.'s ("Hydro One") Application on October 11, 2016 under section 86(2)(b) of the *Ontario Energy Board Act, 1998, S.O.* 1998 c. 15 (Schedule B) (the "*Act*") requesting approval, among other things, to purchase all of the shares of Orillia Power (the "MAAD Application");

2. An order that Orillia Power has satisfied the "threshold test" referred to in Rule 43.01 of the OEB's Rules of Practice and Procedure;

3. An order or orders cancelling the Decision for failing to apply the standard as set out in the OEB Handbook to Electricity and Transmitter Consolidations (the "Handbook") that to demonstrate "no harm" applicants must show that there is a *reasonable expectation* based on underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they would otherwise have been;

4. An order or orders cancelling the Decision for improperly relying upon the materials, submissions, or evidence filed by Hydro One Networks Inc. ("HONI") in its distribution rate application bearing OEB File No. EB-2017-0049 (the "HONI Rate Application");

5. A declaration and an order that Orillia Power and Hydro One have met the "no harm" test as there is a reasonable expectation that the costs to serve acquired customers following the consolidation will be no higher than they would otherwise have been;

6. An declaration that Orillia Power and Hydro One have met the "no harm" test and an order that the MAAD Application be approved as the Board found that all other relevant factors to approve a consolidation have been met;

7. In the alternative, if the Board varies the Decision, and sends the matter back for re-consideration, then an order or orders that the Board issue its decision without consideration of the materials, submissions, or evidence in the HONI Rate Application; and

8. If the Board sends the matter back for re-consideration, than an order that the matter be dealt with on an expeditious basis given the MAAD Application was instituted in October 2016.

THE GROUNDS FOR THE MOTION ARE:

1. On October 11, 2016, Hydro One filed an amended application for, among other things, the approval of the purchase of all of the shares of Orillia Power pursuant to section 86(2)(b) of the *Act* and for the approval of related transactions and/or proposals.

Procedural History

2. The history of the proceeding is as follows:

   (a) The notice of hearing was issued on November 7, 2016;

   (b) On December 12, 2016, in Procedural Order No. 1, the Board approved the intervention requests of the School Energy Coalition ("SEC"), the Vulnerable Energy Consumers Coalition ("VECC"), the Consumers Council of Canada ("CCC"), and Mr. Frank Kehoe (altogether, the "Intervenors") and determined their eligibility to apply for an award of costs in the proceeding under the OEB's Practice Direction on Cost Awards;

   (c) Pursuant to Procedural Order No. 2, Board Staff and the Intervenors filed interrogatories which HONI filed responses to on January 20, 2017;

(d) In Procedural Order No. 5, the OEB made provision for the filing of the argument-in-chief, as well as submissions and reply submissions on the MAAD Application. Hydro One and Orillia Power each filed their argument-in-chief on April 7, 2017. Submissions were subsequently filed by the Intervenors and Board Staff and reply submissions were filed by Hydro One, HONI and Orillia Power on May 5, 2017;

(e) In submissions, but not in evidence, Board Staff, the SEC and the CCC submit that cost efficiencies claimed by Hydro One upon consolidation may not translate to lower rates for customers of an acquired entity. They cited as support for this submission the proposed rates contained in the evidence filed in the HONI Rate Application;

(f) None of the submissions by Board Staff, the SEC and the CCC for the proposition that the cost efficiencies claimed by Hydro One upon consolidation may not translate to lower rates for customers relied on the evidence filed on the MAAD Application before the OEB;

(g) The Board issued Procedural Order No. 6 on July 27, 2017, whereby it ordered that the MAAD Application be adjourned until the Board rendered its decision in the HONI Rate Application;

(h) Hydro One and Orillia Power brought motions to review and vary Procedural Order No. 6 on August 14 and August 16, 2017 respectively (the "Review Motions");

(i) The Review Motions were heard by a differently constituted panel of the Board (the "Review Panel"). The Review Panel determined that the threshold question of whether the matter should be reviewed had been met. The Board then granted the Review Motions and referred the matter back to the original Board panel for re-consideration (the "MAAD Panel");

(j) The Board issued Procedural Order No. 7 whereby it ordered Hydro One to file evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers. Procedural Order No. 7 did not order Hydro One or Orillia Power to provide submissions or comments on the HONI Rate Application and its applicability to the MAAD Application; and

(k) Hydro One provided submissions on the projected cost savings, realized through efficiencies during the 10 year deferral period and its expectations of overall cost structures following the deferred rebasing period and the effect on Orillia Power customers.

The Board changed its policy without notice

3. The Commission on the Reform of Ontario's Public Services, the Distribution Sector Review Panel and the Premiers Advisory Council on Government Assets have all recommended a reduction in the number of local distribution companies in Ontario and have endorsed consolidation.

4. The Board has recognized that consolidation can increase efficiency in the electricity distribution sector through the creation of economies of scale. As a result, customers can be served at a lower cost per customer.

5. The Board erred by making a fundamental change in the Board's policy on consolidation transactions as set out in the Handbook and prior OEB decisions. This change is a material deviation from the Board's ordinary practice in assessing consolidation transactions. The Board made this change without providing full and proper notice to Orillia Power, thereby denying Orillia Power procedural fairness to provide a full response.

(a) When considering entering into the proposed transaction and preparing the MAAD Application, Orillia Power relied on the Handbook and previous

Board decisions as accurately articulating the Board's approach to assessing consolidation transactions;

(b) The Board did not provide Orillia Power with any notice, either prior or during the course of the proceeding, of its intention to apply the "no harm" test in a manner other than as previously articulated and ordinarily applied;

(c) The Handbook directs that rate setting following consolidation will not be considered on a section 86 application. The Handbook provides "Rate-setting following a consolidation will not be addressed in an application for approval of a consolidation transaction unless there is a rate proposal that is an integral aspect of the consolidation e.g. a temporary rate reduction";

(d) By taking into account 2029 cost allocation and the "costs that acquired customers will have to pay following consolidation" the Board was indirectly referring to the future rates that customers would have to pay. The Board's reference at page 11 of its decision with respect to "price" denotes rates, not costs;

(e) The Board took into account rate setting by holding that it was entitled to consider pricing, costs and cost allocation that acquired customers *will have to pay* following an acquisition. Customers do not pay costs. Customers only pay rates;

(f) In its conclusion, on whether the application meets the "no harm test" the Board improperly inferred that the future rates to be paid by the acquired customers would be based on the same cost structures used to project the future cost savings in support of the application and as such that the test was not met; and

(g) This represents a new set of principles and practices to the "no harm" test as it now places the onus on the applicant to provide a forecast of costs to serve the customers of the utility to be acquired beyond the ten year deferral period,

including the general methodology of how costs will be allocated to those customers after the deferred period.

The Board erred in relying on evidence in the HONI Rate Application

6. The Board was wrong to consider and take notice of the materials in the HONI Rate Application and to rely upon them to inform its decision of the reasonable expectation that underlie the cost structures for an after acquired utility.

(a) The Board took "notice of the proposed rate increases" in the HONI Rate Application";

(b) The proposed rates submitted for approval in the HONI Rate Application are not relevant to this Application:

(i) The Board has previously decided that MAAD application under section 86 of the *Act* the applicant must show that there is a reasonable expectation based on underlying cost structures that the costs to serve customers following a consolidation will be no higher than they would otherwise have been [EB-2016-0025/ EB-2016-0360]. The Board has emphasized in its previous decisions that as part of a MAAD application, it will not make a determination regarding future rates. That is the proper subject of a future rate application;

(ii) On this Application, Hydro One has selected a deferred rebasing period of ten years and is committing to a guaranteed sharing of $3.4 million with Orillia Powers customers in years 11 and beyond. Any rates after the deferred rebasing period ends will be subject to OEB review and approval under future rate applications;

(iii) The proposed rates that will be approved under the HONI Rate Application for already-acquired LDC's (which may or may not be approved as proposed by Hydro One) are not relevant to the future

distribution rates of customers of Orillia Power in 2029 after the 10-year deferral period elapses. What is relevant is that the costs to serve OPDC's customers are not higher than they would have been in the absence of the transaction; and

(c) The Board was wrong to rely on or take notice of the evidence filed in another proceeding and not on the record on the MAAD Application as part of its decision-making on the MAAD Application.

7. The Board breached the rules of procedural fairness by relying on materials filed in another proceeding:

(a) Orillia Power is not a party to the HONI Rate Application; and

(b) Orillia Power had no ability to test that evidence through interrogatories or to file responding evidence (*Pfizer Co. Ltd. v. Deputy Minister of National Revenue,* [1977] 1 S.C.R. 456 *and Canadian National Ry. Co. v. Bell Telephone Co. of Canada*, [1939] S.C.R. 308).

8. The Board breached Orillia Power's right to procedural fairness by not giving notice to Orillia Power that it would consider as a central determinant of its MAAD Application, whether the outcome of the HONI Rate Application involving the acquisition of other distributors would be relied upon to provide relevant information about the effect of the acquisition on Orillia Power in 2029 and beyond.

(a) The Review Panel indicated that the MAAD Panel was in the best position to re-open the record if it becomes necessary to seek additional information or clarification. In particular, the Review Panel noted as a potential area of re-consideration the outcome of rate applications involving the acquisition of other distributors. Despite this, the Board only ordered Hydro One to provide evidence or submissions on its expectations of cost structures in 2029 following the deferred rebasing period. The Board did not order Hydro One or

Orillia Power to file additional evidence or submissions on the effect of other Hydro One rate applications on the MAAD Application.

The Board changed the standard to be met

9. The Board erred in deviating from the standard set by the Handbook that the applicant must show that there is a *reasonable expectation* based on the underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been. Instead, the Board applied a novel and higher standard that it must be *assured* that the underlying cost structures would be no greater than they would have been absent the acquisition. Hydro One had discharged its obligation under the *reasonable expectation* standard that the underlying costs would be reduced for Orillia Power customers.

The Board erred in ruling that Orillia Power and Hydro One failed to file further evidence

10. Hydro One and Orillia Power filed the requisite information for the Board to approve the MAAD Application.

    (a) The Filing Requirements in the Handbook provide that the applicant is to "provide a year over year comparative cost structure analysis for the proposed transaction comparing the costs of the utilities post transaction and in the absence of the transaction". Hydro One filed this information with the Board; and

    (b) There is no requirement in the Handbook, or otherwise, to provide electricity distribution prices at year 2029.

11. The Board was wrong to draw an adverse inference against Hydro One for not filing further evidence when Procedural Order No. 7 permitted Hydro One to file further submissions or further evidence. As an inquisitorial tribunal, had the Board required further evidence it could have ordered Hydro One to produce it.

12. The Board was wrong to draw an adverse inference against Hydro One and Orillia Power for not producing a forecast of costs and cost allocation beyond the ten year period (2029 and beyond).

The threshold test is satisfied

13. Orillia Power has met the threshold test set out under Rule 43.01 of the Board's Rules of Practice and Procedure. The grounds for the motion raise questions as to the correctness of the Decision.

14. Orillia Power relies upon:

    (a) Rules 40 through 42 the Board's *Rules of Practice and Procedure*; and

    (b) Such other and further grounds and material as counsel may advise and this tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion**:**

1. The Decision and Order dated April 12, 2018;

2. The record of this Proceeding, EB-2016-0276, including the previous decisions and orders;

3. The Submissions on this Application;

4. The Handbook to Electricity Distributor and Transmitter Consolidations (the "Handbook");

5. Written submissions, to be filed;

6. The decision of the Board dated December 8, 2016 in Enersource Hydro Mississauga Inc., Horizon Utilities Corporation & Power Stream Inc. bearing Board File No. EB-2016-0025/ EB-2016-0360; and

7. Such further and other documentary evidence as counsel to Orillia Power may advise and this tribunal may permit.

May 2, 2018

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide St. W.
Toronto, Ontario M5H4E3

J. Mark Rodger
Tel: (416) 367-6190
Fax: (416) 367-6749
mrodger@blg.com

Counsel for the Applicant,
Orillia Power Distribution Corporation

TO:

ONTARIO ENERGY BOARD
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Tel: (416) 481-1967
Fax: (416) 440-7656

AND TO:

TORYS LLP
79 Wellington Street West
30th Floor
Box 270, TD South Tower
Toronto ON M4P 1E4

Charles Keizer
Tel: (416) 865-7152

Counsel for the Applicant,
Hydro One Inc.

AND TO:

All Intervenors in EB-2016-0276