BY EMAIL and RESS

Mark Rubenstein
mark@shepherdrubenstein.com
Dir. 647-483-0113

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

July 3, 2018
Our File: EB20180171

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2018-0171 – Hydro One Inc./Orillia Power Motion to Review – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to the *Notice of Hearing and Procedural Order No. 1*, please find SEC's written submissions on the threshold question.

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Jay Shepherd, SR (by email)
Wayne McNally, SEC (by email)
Applicants and Intervenors (by email)

EB-2018-0171

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, *1998*, S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF motions by Hydro One Inc. and Orillia Power Distribution Corporation pursuant to Rule 8 and Rules 40 through 42 of the Ontario Energy Board's Rules of Practice and Procedure for an order or orders to vary the OEB's EB-2016-0276 Decision and Order dated April 12, 2018.

WRITTEN SUBMISSIONS OF THE SCHOOL ENERGY COALITION (Threshold Question)

July 3, 2018

SHEPHERD RUBENSTEIN
Professional Corporation
2200 Yonge Street, Suite 1302
Toronto, Ontario M4S 2C6

Jay Shepherd
jay@shepherdrubenstein.com
Mark Rubenstein
mark@shepherdrubenstein.com

Tel: 416-483-3300
Fax: 416-483-3305

Counsel for the School Energy Coalition

1 GROUNDS AND TEST

1.1 *Scope of These Submissions*

1.1.1 SEC was an active participant in the EB-2016-0276 proceeding. Pursuant to the *Notice of Hearing and Procedural Order No. 1*, SEC has limited its written submissions to five pages. As a result, we are not able to provide a full discussion of all of the legal and policy issues[1] that arise on this motion. Instead, we are providing a summary of our positions. Our full submissions will be presented to the Board at the oral hearing on July 10, 2018.

1.1.2 In summary, SEC submits the Board should deny the motion to review brought by Hydro One Inc. ("Hydro One") and Orillia Power Distribution Corporation ("Orillia" and collectively, the "Applicants") of the *Decision and Order* in EB-2016-0276 (the "MAADs Decision", rendered by the "MAADs Panel")[2] as it has not met the threshold test pursuant to Rule 43.01.[3]

1.2 *The NGEIR Threshold Test*

1.2.1 The oft-quoted threshold test for motions for review is principally set out in the Motion to Review Natural Gas Electricity Interface Review Decision (the "NGEIR Decision").[4]

1.2.2 To meet the threshold for a motion for review, the moving party must show two things:

(a) There is an issue as to the correctness of the decision under review. This must be an identifiable error[5], not just something with which the moving party disagrees. This is not a hearing de novo[6], and the motion is not an opportunity to re-argue the case.[7] A motion for review is heard on the merits only if there is an error identified specifically in the decision.

(b) The error, once identified, must be sufficient that, if it is corrected, the decision would be changed in a material way.[8] It is not enough that the decision contain an error. That error must be enough that a review on the merits "could result in the Board deciding that the decision should be varied, cancelled or suspended."[9]

1.2.3 The NGEIR Threshold Test has been followed by the Board in numerous motions to review[10], and appears to have been accepted by the Applicants in their motion notices.[11]

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[1] The Applicants have done so in their Notices of Motion which totals approximately 47 pages.
[2] *Decision and Order* (EB-2016-0276 – Hydro One/Orillia Power), April 12 2018
[3] Ontario Energy Board, *Rules of Practice of Procedure*, Rule 43.01
[4] *Decision with Reasons* (EB-2006-0322/338/340 - NGEIR Motion to Review), May 22 2007 ["*NGEIR*"]
[5] *NGEIR*, p.18
[6] *Decision with Reasons* (RP-2004-0167/EB-2005-0188 - Natural Resource Gas Ltd. Motion to Review), October 6 2005, p.7; *Grey Highlands (Municipality) v. Plateau Wind Inc*., 2012 ONSC 1001, para. 7
[7] *NGEIR*,,p.18
[8] *Ibid*
[9] *Ibid*
[10] See *Decision and Order* (EB-2014-0369 - Ontario Power Generation), January 28 2016, p.5-6; *Decision and Order on Motion to Review* (EB-2013-0193 - Milton Hydro Motion to Review), July 4 2013, p.4
[11] See Hydro One Networks Inc.'s *Notice of Motion*, p.23

1.2.4 Ultimately, a reviewing panel is not tasked with re-considering afresh the evidence and arguments to determine what decision they would have reached. Rather, it is a tasked with reviewing the decision to determine if it was unreasonable. As the Board has recently confirmed, the standard of review of a reviewing panel is that of reasonableness.[12]

1.3 ***Grounds for the Motion***

1.3.1 The Motions actually list seven headings under which they claim grounds to overturn the decision. However, the Board in the *The Notice of Hearing and Procedural Order No. 1,* lists five grounds, eliminating duplication and providing clarity.[13]

1.3.2 SEC submits that, when the Board reviews what actually happened in this proceeding, it is clear that the Board did not commit any of the errors alleged by the Applicants, and even if it did commit any of them, none of those errors if corrected would have resulted in a different decision.

2 WHAT ACTUALLY HAPPENED

2.1 ***The Initial Application and Hydro One Position***

2.1.1 Hydro One sought to avoid talking about the rate impacts to the Orillia customers after the deferred rebasing period. Intervenors pointed out that they had done the same thing in the three previous acquisitions, and those customers were now going to have high rate increases. Hydro One argued that the rates for those acquired utilities should be dealt with in its EB-2017-0049 distribution rates case, not the Orillia MAADs proceeding.

2.1.2 In Procedural Order No. 6, the Board responded by stating:

> The OEB granted its approval for Hydro One's acquisitions of Norfolk, Haldimand and Woodstock in recognition of evidence that Hydro One could serve the acquired entities at a lower cost. In granting those approvals the OEB established a clear expectation that the future rates for the customers of those acquired service areas would be reflective of the lower costs.
>
> Intervenors in this hearing have raised concerns with Hydro One's rate proposals and revenue requirements for those acquired service areas contained in its distribution rate application. Hydro One has responded that the evidence in its application for distribution rates indicates that it has served the acquired service areas at a lower cost as it had projected in its acquisition applications. Hydro One submitted that its rate making proposals are based on a cost allocation model consistent with the OEB's principles and it will defend its allocation proposals in that hearing.
>
> Hydro One's cost allocation proposals result in significant rate increases for certain customers within the acquired utility customer grouping. It is not apparent to the OEB that Hydro One's cost allocation proposal responds positively to the expectation that

[12] *Decision and Order* (EB-2016-0255 - Milton Hydro Motion to Review), February 22 2018, p.10
[13] *Notice of Hearing and Procedural Order No. 1*, p.1-2

the future rates for the customers of those acquired service areas would be reflective of the lower costs.

> The OEB has determined that Hydro One should defend its cost allocation proposal in its distribution rate application prior to the OEB determining if the Orillia acquisition is likely to cause harm to any of its current customers. The OEB's determinations in the Hydro One rate case will be determinative of how customers impacted by acquisitions are to be treated. [emphasis added][14]

2.2 ***The First Motion for Review***

2.2.1 Instead of defending its cost allocation proposal, Hydro One and Orillia brought a motion for review, to force the MAADs Panel to make a decision on the Orillia acquisition before the EB-2017-0049 distribution rate case was decided.

2.2.2 In its *Decision and Order* on the motion to review (the "Review Decision"), the Board (the "Review Panel") agreed with Hydro One and Orillia, and remitted the case back to the MAADs panel with directions:

> The OEB grants the motions and refers this matter back to the panel on the MAAD application for re-consideration. The OEB has determined that the panel in the MAAD proceeding is in the best position to continue hearing the MAAD application and to re-open the record if it becomes necessary to seek additional information or clarification in areas that are within the scope of the MAAD proceeding. These areas could include issues raised herein in the submissions of the moving and responding parties such as:
>
> > • whether the outcome of the rate application involving the acquisition of other distributors will provide relevant information about the effect of the acquisition on customers of Orillia Power
> > • the overall cost structures following the deferral period and their effect on the customers of the acquired utility
> > …. [emphasis added] [15]

2.2.3 Thus, the Review Panel specifically identified two key areas that it had determined were within the jurisdiction of, and properly considered by, the MAADs Panel.

2.3 ***Hydro One 'Evidence'***

2.3.1 In Procedural Order No. 7, the MAADs Panel determined that the information in the EB-2017-0049 case could be relevant.[16] On the second bullet above, the MAADs Panel copied the wording from the Review Decision, and invited Hydro One to file that additional evidence.[17]

2.3.2 Hydro One declined to do so.[18] Its 'new evidence' filed in response stubbornly insisted that cost structures and cost allocation are different (when clearly cost allocation is the method by which costs to serve are determined for any given group of customers), and declined to even

[14] *Procedural Order No. 6* (EB-2016-0276), July 27 2017, p.4
[15] *Decision and Order* (EB-2017-0320 - Hydro One/Orillia Power Motion to Review), January 4 2018, p.9
[16] *Procedural Order No. 7* (EB-2016-0276), February 5 2018
[17] *Ibid*, p.2-3
[18] *Decision and Order* (EB-2016-0276 – Hydro One/Orillia Power), April 12 2018, p.13

consider in that evidence how the Orillia customers would get the benefit of all or any portion of the 'lower cost structures'.[19]

2.4 ***Synthesis***

2.4.1 SEC submits that:

(a) Hydro One argued before the MAADs Panel that cost allocation and rates after the deferred rebasing period could only be considered for Norfolk, Haldimand and Woodstock by the panel hearing the EB-2017-0049 case. The MAADs Panel in Procedural Order No. 6 accepted that argument, but rather than defending their approach before the EB-2017-0049 panel, Hydro One brought a motion to review the procedural decision and won, forcing the MAADs Panel to decide that issue.

(b) The MAADs Panel, following the direction of the Review Panel to the letter, gave Hydro One every opportunity to show through evidence that cost allocation and rates would not harm the Orillia customers. Hydro One again declined to do so.

(c) Hydro One also had every opportunity to provide evidence to the EB-2017-0049 panel that their costs for the acquired would be lower than if they had not been acquired. The evidence continues to show that the costs for the acquired customers are higher than even the amounts they say the acquired would be paying.

2.4.2 The reason Hydro One did not take those opportunities to file evidence is that Hydro One cannot, in fact, serve Norfolk, Haldimand, Woodstock, Orillia, or most other Ontario towns at a lower cost than a local distribution company. Their cost structure, no matter how you slice it and dice it, is still higher.

3 RESPONSES TO EACH GROUND OF MOTION

3.1.1 Based on what actually happened, SEC submits that each of the grounds for the motion is either not an error by the MAADs Panel, or is not material.

3.1.2 ***Panel Changed the Policy without Warning***. The Board changes its policies, or its interpretation of existing policies, all the time. Previous decisions and policy documents such as the Handbook to Electricity Distributor and Transmitter Consolidations on are not binding on individual panels of the Board. Policies, and their interpretations, must evolve over time as the Board is presented with new information.[20] Even if the Board had changed its MAADs policy, that is not an error, and doing so is not a breach of procedural fairness.[21]

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[19] Procedural Order No.7 Submissions of Hydro One Inc. February 15 2018 (EB-2016-0276)

[20] *Decision on Issues List* (EB-2016-0025 – Enersource/Horizon/PowerStream MAADs), June 30 2016, p.5 ; *Thamotharem v. Canada* (Minister of Citizenship and Immigration), 2007 FCA 198, para 66; *Jackson v. Ontario (Minister of Natural Resources)*, 2009 ONCA 846, para 51

[21] Hydro One has not met the high threshold for a breach of reasonable expectations. See *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, para. 131

3.1.3 In any case, the "no harm" test is not a new policy, and has not in any way been changed. It continues to be based on the Board's statutory objectives, and has not been re-interpreted.

3.1.4 The only change that has taken place – if you can call it that – is that for the first time, the Board, in this case the MAADs Panel, had information before it that the deal structure proposed again and again by Hydro One, including in the proposed acquisition of Orillia, could harm customers. Instead of dismissing the application based on that information, the MAADs Panel invited Hydro One to file evidence that it would comply with the no harm test in the long term. It declined to do so. Once you specify the issue that needs to be addressed, and give them lots of opportunity to address it, they cannot complain that the Board relied on the record they had.

3.1.5 ***Relied on Irrelevant Evidence.*** Aside from the fact that the Review Panel made clear that the relevance of the EB-2017-0049 evidence was a decision for the MAADs Panel, relying on detailed facts that are on the record in another OEB proceeding is not an error. Hydro One was given ample opportunity to deal with that evidence, which, after all, was their evidence.

3.1.6 ***Changed Standard.*** As quoted in section 2.12 of these submissions, the Board has at all times accepted that rate impacts are based on a reasonable expectation. The fact that a different word was used in one place is, if an error at all, a minor one that would have no outcome on the proceeding.

3.1.7 ***Failed to Recognize Further Evidence.*** Hydro One did not, in fact, provide evidence to the MAADs Panel that its cost structures, and their impacts on the acquired customers, would be lower than if those customers had not been acquired. By refusing to accept that cost allocation is relevant, and by ignoring the rates to the previously acquired utilities, Hydro One sought to sidestep both the guidance of the First Review Panel, and the opportunity presented by the MAADs Panel. When you are invited to file evidence on X, and you instead file evidence on Y, you cannot complain that the Board did not consider your 'X evidence'.

3.1.8 ***New Reliance on Cost Allocation Methodology.*** It is in no way 'new' for the Board to treat its cost allocation model as a reasonable representation of the costs to serve – i.e. the cost structure – any particular group of customers. That is precisely why we have a cost allocation model.

3.1.9 Further, the Hydro One claim of an error fails to take into account that they had been warned several times in past cases that it is not enough to have lower cost structures; the acquired customers must see a benefit from those lower cost structures in their rates. Thus, the Board followed established policies and did exactly what they have been telegraphing for some years that they were going to do. There is no error in so doing.

Respectfully submitted on behalf of the School Energy Coalition, this 3rd day of July, 2018.

Original signed by

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Jay Shepherd/Mark Rubenstein
Counsel for the School Energy Coalition