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July 3, 2018

EMAIL & COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: EB-2018-0171 - Hydro One Networks Inc. - Motion to Review and Vary the Decision and Order – Submissions on Threshold Question

We are counsel to Hydro One Networks Inc. ("Hydro One") in the above-referenced matter.

In accordance with Procedural Order No. 1, issued by the Board on June 18, 2018, please find enclosed Hydro One's submissions on the threshold question, together with a compendium of the materials that it intends to rely upon at the oral hearing on the threshold question scheduled for July 10, 2018. These materials have been filed through the Board's Regulatory Electronic Submission System (RESS) and served on all parties.

Yours truly,

[Original signed by]

Charles Keizer

cc: All Parties

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

APPLICANT SUBMISSIONS ON THRESHOLD QUESTION

July 3, 2018

Pursuant to Procedural Order No. 1, these are Hydro One Network Inc.'s ("Hydro One") submissions on the application of the threshold test to Hydro One's motion.

The OEB has found that the purpose of the "threshold test" in Rule 45.01 is derived from Rule 44.01, which requires that a motion for review "raise a question as to the correctness of the order or decision" and that the issues raised have enough substance such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision. The review must be sought in relation to an "identifiable error" such that the moving party can show that the findings are contrary to the evidence, the panel failed to address a material issue or something of a similar nature. The alleged error must be material and relevant to the outcome of the decision.[1] As set out below, Hydro One's motion satisfies the threshold test.

The OEB rejected Hydro One's s. 86 application for the purchase of Orillia on the following basis:

1. The OEB was of the view that "it would have <u>been reasonable to see a forecast of costs to service Orillia customers beyond the ten year period and an explanation of the general methodology of how costs would be allocated to</u> Orillia ratepayers after the deferral period … In the absence of information to address that OEB concern, the OEB cannot reach the conclusion that there will be no harm."[2] (emphasis added)

2. Despite the test established in the Handbook, that "applicants must show that there is a <u>reasonable expectation</u> based on underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been" (emphasis added), the OEB indicated a need for certainty:

   > "Hydro One has failed to make the case that the OEB can be <u>assured</u> that the underlying cost structures would be no greater than they would have been absent the acquisition."[3] (emphasis added)

3. The OEB concluded that Hydro One had filed no new evidence and the Panel also took notice of Hydro One's distribution rate proceeding (EB-2017-0049) and in doing so formed an inference that was the basis for the OEB Panel's lack of confidence regarding the future rates.

The foregoing give rise to the following identifiable errors:

1. Departing from its Own Guidance without Notice of the Change

The OEB has significant control over its own procedures. However, the OEB must ensure that its procedures provide "the highest degree of procedural fairness."[4] As part of that duty, parties are entitled to "take into account the promises or regular practices of administrative decision-makers," such that "it will generally be

[1] Decision with Reasons, EB-2006-0322/0338/0340, May 22, 2007, pp. 17-18, Applicant's Compendium ("AC"), Tab 2.
[2] Decision, p. 13, AC, Tab 1.
[3] Decision, p. 13, AC, Tab 1.
[4] *Rogers Communication Partnership v. Ontario (Energy Board)*, 2016 ONSC 7810 at para. 16, AC, Tab 3.

unfair for [decision-makers] to act in contravention of representations as to procedure."[5] Both published guidelines and previous practice can give rise to legitimate expectations about the "procedural norms" to be applied by decision-makers.[6] Departure from these norms is inconsistent with the OEB's duty of fairness.

The OEB erred in imposing a version of the "no harm" test not ordinarily applied, without any notice to the parties. Hydro One properly interpreted the OEB guidance about the scope of the "no harm" test, which does not include considerations of future rate-setting.

Consideration of the interests of consumers with respect to the price of electricity service was the only element of the no harm test under consideration in EB-2016-0276 (the "Proceeding"). The OEB's ordinary practice when considering price in the context of the no harm test is to assess whether there is a reasonable expectation based on "underlying cost structures" that the costs to serve acquired customers will be no higher than they otherwise would have been in absence of the proposed acquisition. The OEB has consistently found and demonstrated that its consideration of cost structures does not involve a consideration of the allocation of costs and the resulting rates or rate-making after the rebasing period. Despite stating in the Orillia Decision that its intention was to apply the no harm test in accordance with its ordinary practice based on the OEB's Handbook, the OEB did not do so.

In the Orillia Decision, the OEB established a new set of principles and practices for applying the "no harm" test as to pricing[7] that an applicant must provide: (i) a forecast of costs to serve the customers of the acquired utility *beyond the ten year deferral period*, (ii) *the general methodology of how costs will be allocated* to those customers *after the deferral period* such that the underlying cost structures will be no higher than they otherwise would have been and (iii) *that future rates paid* by the acquired customers *will be based on the same cost structures* used to project the future cost savings in support of the application.

Unlike the Orillia Decision, the Handbook and the OEB's prior decisions provide that the allocation of costs following the deferred rebasing period, (i) is squarely within the OEB's rate-making function, and (ii) is a matter that will remain fully within the OEB's discretion to consider at such future time when the rate-making function following the deferred rebasing period is to be carried out. The OEB has previously, consistently and unambiguously reserved rate-making aspects for a separate proceeding, during which it will consider the consolidated utility's proposal for cost allocation and rate harmonization. This is because the determination of those future rates is a matter in the discretion of a future OEB panel presiding over a future rate application. As

[5] *Baker v. Canada (Minister of Citizenship & Immigration*, [1999] 2 S.C.R. 817 at para. 26, AC, Tab 4.
[6] *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264 at para. 97, AC, Tab 5.
[7] Decision, pp. 12-13, AC, Tab 1.

a result, the Decision unexpectedly and materially altered the established criteria for assessing the impact on price as part of the no harm test.

The Panel provided no guidance for the requirement to show the general cost allocation methodology after the deferred rebasing period, which is purely a rate-related matter. Rather, the Orillia Decision is the only guidance, and it was issued long after the opportunity had passed for Hydro One to respond to these fundamental deviations from the OEB's ordinary practice in applying the "no harm" test.

As stated in the Orillia Decision, the OEB Panel sought to be "assured" that the underlying cost structures will ultimately be no greater than they would have been absent the acquisition. However, at no time has the OEB's application of the no harm test required a commitment to a cost allocation methodology such that it is an "assured" fact. The OEB provided no notice of a requirement for such a commitment.

Hydro One did file further submissions (as permitted and requested by Procedural Order No. 7, which called for evidence or submissions). In its submissions, Hydro One confirmed the projected cost savings for the initial 10-year period (a 60% reduction from status quo costs) and submitted that these same savings were "expected to persist beyond the extended deferred rebasing period." The submissions identified a number of areas in which expected savings were expected to continue into the future, including capital expenditure requirements and sustained operational efficiencies, and also commented that the long-term benefits could be even higher given that the continuation of the Orillia Power status quo could present even larger economic hurdles. As a result, Hydro One submitted that it was able to "definitively state that the overall cost structures to serve the Orillia area … will be lower following the deferred rebasing period in comparison to the status quo."[8] In the absence of notice from the Board as to the need for the general cost allocation methodology and rates in Year 11, Hydro One's further submissions sufficiently and reasonably responded to Procedural Order No. 7.

Without the OEB's advance guidance, the only basis for Hydro One to understand the OEB's request was the established policy and practice best articulated in the Handbook and through prior OEB decisions. With appropriate advance guidance, Hydro One could have provided evidence in accordance with that guidance. The new criteria for the no harm test articulated in the Orillia Decision give rise to new facts that previously could not be placed in evidence. Those facts are set out in Hydro One's proposed cost allocation methodology, provided in the Affidavit of Joanne Richardson filed in support of this motion.

[8] Hydro One, Submissions in Response to Procedural Order No. 7, EB-2016-0276, February 15, 2018, pp. 1-4, AC, Tab 6.

2. Precluding the determination by the OEB Panel in Year 11 which is most appropriately placed to consider cost allocation

The ultimate determination in Year 11 as to the cost allocation methodology and the extent those costs are allocated to the acquired customers, consistent with the savings giving rise to the cost structure, are matters that are fully in the discretion of a future OEB panel responsible for the rebasing application in Year 11. Hydro One has no power to allocate costs on the acquired customers at the end of the deferral period. That authority rests with the OEB alone. The allocation of costs is an element of rate making to be determined by the OEB based upon the costs and facts giving rise to cost allocation at that time. This is the reason that the established OEB practice defers the consideration of rates to a future panel. In establishing the methodology of cost allocation as a no harm criterion and the expectation that such methodology to be the basis for setting rates after the deferred rebasing period, the OEB Panel in the Orillia Decision put themselves in the position of the OEB Panel 11 years hence. This effectively precluded the hearing of the issue by the future OEB Panel best able to set rates based on the relevant facts in Year 11 and denied the consolidation today on the lack of cost allocation methodology evidence that would properly be a Hydro One proposal in Year 11 that the then OEB Panel could either accept, reject or vary.

3. Reliance on circumstances which were not facts and were irrelevant.

Given that the OEB Panel concluded that Hydro One had filed no new evidence in response to Procedural Order No. 7 and the Panel took notice of Hydro One's distribution rate proceeding, the only stated basis for the OEB Panel's lack of confidence regarding the future rates is the inference it erroneously drew from taking notice of Hydro One's distribution rate proposals in EB-2017-0049. In doing so, the Panel effectively prejudged and rejected the Year 11 rebasing application without a factual basis. By taking notice of Hydro One's rate proposal for three unrelated service areas in an unrelated rate proceeding, the OEB Panel has done nothing more than take notice of a proposal and not a fact. There was no fact on which to make a decision. It was simply a rate request which the Panel hearing EB-2017-0049 could reject, accept or vary. This is not a proper factual foundation to infer cost in Year 11 and to deny the application.

The panel in the motion proceeding (EB-2017-0320) granted the motions varying Procedural Order No. 6 in the Proceeding, in part, on the finding that the moving parties did not have an opportunity to thoroughly explore the relevance of the distribution rate application (EB-2017-0049) to the MAAD application before the procedural order was issued. Although the motion Panel agreed that the relevance of that information was at issue, it did not determine this issue. Moreover, in issuing Procedural Order No. 7, the OEB Panel in EB-2016-0276 opted not to seek submissions on this issue. Despite relevance still being at issue, the OEB panel, in reaching its Decision, without hearing submissions, took notice of the rates proposed by Hydro One in EB-2017-0049.

Not only does the OEB Panel have no factual foundation for its inference, the information in any event is irrelevant. The distribution rate application in EB-2017-0049 pertains to the 2018-2022 period, but Orillia ratepayers would not be consolidated into Hydro One's distribution rate classes until Year 11 and long after setting rates in EB-2017-0049. Furthermore, the distribution rate application provides no information that would assist the OEB in determining whether the acquired Orillia customers will be harmed.[9]

4. Providing no notice of the consideration of evidence from another Proceeding[10]

Even if the materials from the rate application were relevant and probative – which Hydro One disputes – the OEB still erred in relying on those materials in the current proceeding without providing notice to Hydro One. Although section 21(6.1) of the OEB Act permits the OEB to consider evidence from other proceedings without consent, it does not permit the OEB to consider such evidence without notice to the parties. To the contrary, the OEB has recognized that it cannot blindside parties by making decisions based on evidence that the parties would not expect the OEB to consider within a specific proceeding. As the OEB stated in its 2006 "*Report with Respect to Decision-Making Processes at the OEB*," parties to OEB proceedings have the "right to know and answer the case they have to meet. This involves a requirement that a decision maker not base his or her decision on facts which are not on the record and parties have the opportunity to respond to legal and policy arguments that are considered by the decision-maker."[11] In the current case, by relying on extraneous evidence without notice, the OEB denied Hydro One the "right to know and answer the case [it had] to meet." As such, the OEB breached its duty of fairness.

Conclusion

Based on the foregoing, Hydro One's motion for review gives rise to identifiable errors and raises questions as to correctness of the Orillia Decision. By altering the no harm test to include the provision of a cost allocation methodology without advance guidance, Hydro One was precluded from being responsive in making an alternative proposal as set out in support of the motion. Furthermore, to do the foregoing, together with the reliance on circumstances which were not factual or relevant, the OEB Panel erred in denying the application notwithstanding there was sufficient evidence to satisfy the no harm test as it is ordinarily applied. All of the foregoing errors are material in that they have led the OEB to reject Hydro One's Section 86 application, thereby preventing the parties from completing their planned transaction.

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[9] Hydro One, Submission on Motion to Review and Vary Procedural Order No. 6, EB-2017-0320, August 14, 2017, AC, Tab 7.

[10] Orillia Power Distribution Company was not a party to that proceeding.

[11] OEB, *Report with Respect to Decision-Making Processes at the OEB*, September 2006, p. 26, AC, Tab 8.