

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 ORILLIA POWER

(Pursuant to Procedural Order No. 1)

July 3, 2018

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I. INTRODUCTION

1. Orillia Power makes these submissions on the threshold issue pursuant to Procedural Order No. 1 in EB-2018-0171. Orillia Power's submissions are as follows:

- (a) The threshold test for a motion to vary under Rule 40 of the *OEB Rules of Practice and Procedure* includes any error that materially impacts on the Decision, including one of procedural fairness;
- (b) Orillia Power meets the threshold test to vary the OEB's EB-2016-0276 Decision and Order (the "Decision").

II. THRESHOLD TEST

2. This motion meets the threshold test and the Order of the Board should be reviewed.

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. The list is not exhaustive. The use of the word "include" in Rule 42.01 means that the list of grounds is not closed. The OEB can allow a motion to review for other grounds.

4. Orillia Power submits that Rule 42.01 is met where there is an identifiable error in the decision and that the error is material and relevant to the outcome of the decision. The OEB's decision in Natural Gas Electricity Interface Review ("NGEIR Review Decision") provides useful guidance on when the threshold test is met:

(...) the grounds must "raise a question as to the correctness of the order or decision." In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of correctness of the decision, the Board agrees with the parties who argued that **there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.** (emphasis added)

III. ORILLIA POWER MEETS THE TRESHOLD TEST

5. The OEB committed two identifiable errors in its Decision that materially affect the outcome:

- (a) Without notice to the parties, the OEB erred by making a fundamental change in its policy on consolidation transactions as set out in the Handbook (defined below) and in prior OEB decisions by taking into account future rates after consolidation, as opposed to future costs;
- (b) The OEB was wrong to consider and take notice of materials filed by Hydro One Networks Inc. (“HONI”) in its distribution rate application under OEB File No. EB-2017-0049 (the “HONI Rate Application”).

A. **Material Error of Changing Policy Without Notice**

6. It is a fundamental principle of procedural fairness that a party is entitled to know the case that it has to meet. Orillia Power relied upon the OEB’s Handbook to Electricity Distributor and Transmitter Consolidations (January 19, 2016) (the “Handbook”) in preparing its evidence and submissions on the application.

7. In the case of an application for approval of a consolidation transaction, the Handbook provides guidance on the standard a distribution company must meet to demonstrate that the “no harm” is satisfied:

The “no harm” test considers 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. The OEB will consider whether the “no harm” test is satisfied based on an assessment of the cumulative effect of the transaction on attainment of its statutory objectives. If the proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the application¹

8. Further in the context of discussing cost as a factor that the OEB will consider in reviewing a proposed transaction, the Handbook, provides in part, as follows:

¹ Handbook at page 4.

As distribution rates are based on a distributor's current and projected costs, it is important for the OEB to consider the impact of a transaction on the **cost structure** of consolidating entities both now and in the future ...

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 otherwise would have been.**² (emphasis added)

9. However, with respect to whether rates are to be considered as part of the "no harm" test, the Handbook provides, in part, as follows:

Rate setting following 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.³ (emphasis added)

(...)

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 otherwise would have been.⁴ (emphasis added)

10. The Handbook's guidance on these issues is confirmed by OEB jurisprudence dealing with consolidation transactions:⁵

- (a) In Hydro One/Norfolk Power Distribution (EB-2013-0196) the OEB held: "In accordance with the 2007 Report, the Board's decision will not consider future rates at this time."⁶
- (b) In Hydro One/Haldimand County Hydro Inc. (EB-2014-0244) the OEB held: "Future Panels of the OEB will be guided in their decision in setting rates by

² Handbook at p. 6-7.

³ Handbook at p. 11.

⁴ Handbook at p. 7.

⁵ See also, Decision and Order EB-2016-0025 December 8, 2016 at p. 12.

⁶ OEB Decision and Order EB-2013-0196 July 3, 2014 at p. 16.

these expectations and the realities of rate setting environment at the time of rebasing.”⁷

11. Despite stating in its decision that its intention was to apply the no harm test in accordance with the Handbook, the OEB did not do so. The Decision reflects a fundamental change in the OEB’s policy on consolidation transactions relative to the Handbook and prior decisions. The relevant parts of the Decision demonstrate that the OEB relied on future rates as opposed to future costs in arriving at its decision to deny the application. When referencing “the costs that acquired customers will have to pay” the OEB was clearly considering future rates, contrary to the guidance provided in the Handbook:

Although the Handbook states that “rate setting” following a consolidation will not be considered as part of section 86 application, **that does not mean the OEB will not consider the costs that acquired customers will have to pay following an acquisition** (both in the short terms and the long term”.⁸ (emphasis added)

(...)

It is the OEB’s expectation that **future rates** paid by acquired the acquired customers will be based on the same cost structures used to project the future cost savings in support of this application.

Hydro One has not demonstrated that is reasonable to expect that the underlying cost structures to serve the customers of Orillia Power will be no higher than they would have been, nor that they will **underpin future rates paid by these customers.**⁹ (emphasis added)

12. The Decision further demands a forecast beyond a ten year period.¹⁰ This is above and beyond what is expected of applicants under the Handbook and turns the exercise of providing forecasts into pure speculation.

13. The OEB misapplied the standard of proof. The Handbook mandates that the applicant demonstrate that there is a “reasonable expectation” that underlying cost structures will be no

⁷ Decision and Order EB-2014-0244 March 12, 2015 at p. 2.

⁸ Decision at p. 12.

⁹ Decision at p. 20.

¹⁰ Decision at p. 13

higher than they would otherwise have been. The Decision goes further by demanding that the Board be “assured” that the underlying cost structures would be no greater.¹¹

14. By changing the standard and applicable test to be met, the OEB failed in its duty of procedural fairness to the Orillia Power.

B. Material Error of Relying Upon Extrinsic Evidence

15. The OEB erred by relying on irrelevant evidence from the HONI Rate Application. The OEB states in its decision “(...) the experience of the three acquired utilities in Hydro One’s current distribution rates case is **informative**. (...) this panel **takes notice** of the proposed rate increases (for the three previously acquired utilities in the distribution rates proceeding)”.¹²

16. The OEB’s reliance on the HONI Rate Application was one of the grounds to review and vary the earlier Decision under EB 2017-0320. When granting the motion to review and referring the matter back to the original panel on the MAAD Application (the “Original Panel”), the OEB raised as a potential issue to be explored the relevance of the information in the HONI Rate Application. However, the Original Panel in Procedural Order No. 7 opted not to seek any submissions on the relevance of the HONI Rate Application.¹³ It was reasonable for Orillia Power to rely on Procedural Order No. 7 as defining the issues to be determined by the Board and as such Orillia Power did not make submissions on the relevance of the HONI Rate Application.

17. The OEB erred in relying on this extrinsic evidence without giving the parties an opportunity to make submissions on it. Having had a second opportunity to seek submissions from the parties, the OEB failed to do so. In light of the silence in Procedural Order No. 7 on the relevance of the evidence from the HONI Rate Application to the MAAD Application, it was within the legitimate expectations of the parties that they did not have to make submission on this extrinsic evidence.

IV. CONCLUSION AND RELIEF SOUGHT

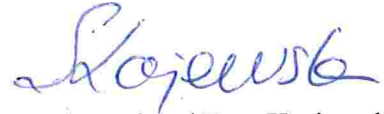
¹¹ Decision at p. 13.

¹² Decision at p. 12-13.

¹³ Procedural Order No. 7 dated February 5, 2018 EB-2016-0276

18. Orillia Power respectfully requests an order that the threshold question has been met and that the matter as to the correctness of the OEB's decision be referred to a panel for an oral hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

A handwritten signature in blue ink, appearing to read "Krajewska".

J. Mark Rodger/ Ewa Krajewska
Counsel for Orillia Power Distribution Corporation