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**BY E-MAIL**

July 3, 2018

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Hydro One Inc.**
**Orillia Power Distribution Corporation**
**Motions to Review and Vary**
**OEB File No. EB-2018-0171**

In accordance with Procedural Order No. 1, please find attached the OEB staff submission with respect to Hydro One Inc. and Orillia Power Distribution Corporation's notices of motion to review and vary the EB-2016-0276 Decision and Order.

All materials that OEB staff will refer to at the motion hearing are noted in the submission and are from the *Handbook to Electricity Distributor and Transmitter Consolidations* and the record of the EB-2016-0276 and EB-2017-0320 proceedings. A compendium will be provided.

Hydro One, Orillia Power and all intervenors have been copied on this filing.

Yours truly,

*Original signed by*

Violet Binette
Project Advisor, Applications

Attach

# HYDRO ONE INC. AND
# ORILLIA POWER DISTRIBUTION CORPORATION
# MOTION TO REVIEW AND VARY
# DECISION AND ORDER (EB-2016-0276)
# EB-2018-0171

## Ontario Energy Board

## Staff Submission

## July 3, 2018

## Introduction

On May 2, 2018, Hydro One Inc. (Hydro One) and Orillia Power Distribution Corporation (Orillia Power) each filed a Notice of Motion to review the OEB's EB-2016-0276 Decision and Order, in which the OEB denied Hydro One's application to acquire the shares of Orillia Power (the Decision).

This is a summary of the position of OEB staff on the "threshold" question with respect to the motions brought by Hydro One and Orillia Power.

OEB staff submits that the threshold has not been met and that the motions should be dismissed without a hearing on the merits.

## Rule 43.01 – Motions to Review

Rule 43.01 of the OEB's *Rules of Practice and Procedure* states:

> In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The OEB has adopted the findings of the Natural Gas Electricity Interface Review Decision (NGEIR)[1] in its consideration of the threshold question on many occasions over the past several years, namely:

> Therefore, 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 raised 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 the 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.
>
> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.
>
> The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.
>
> In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

## Positions of the moving parties

There are two chief prongs to the applicants' arguments: 1) That the Board functionally changed its policy on considering merger, acquisition, amalgamation and divestiture

[1] Natural Gas Electricity Interface Review Decision EB-2006-0322/0338/0340, May 22, 2007.

(MAADs) applications and the no harm test without notice to the applicants, and they therefore had no opportunity to address the issues that the Board considered relevant (in other words they did not know the "case to be made"), and 2) In the alternative, the applicants have now filed fresh evidence that they believe satisfies the "new" OEB MAADs policy, and argue that the application should be approved on this basis.

The arguments of the applicants do not appear to meet the test under the Rules or as discussed in NGEIR and OEB staff submits that the threshold has not been met and the motions should be dismissed. OEB staff has attempted to limit its arguments purely to the threshold issue; however in order to discuss the threshold it is necessary to review the factual background to the proceeding. It is OEB staff's view that the moving parties' arguments are not supported by the record of the proceeding, and that the motion does not raise a legitimate question as to the correctness of the decision.

**The Applicants knew the "test to be met"**

The moving parties argue that the OEB effectively changed its policy on MAADs applications through the Decision, and that they therefore did not know the test they were expected to meet until after the record had closed.

The Decision does not stray from the OEB's policies regarding MAADs applications. The policy was, and is, the application of the no harm test. The "no harm" test considers whether the proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives in relation to electricity, as set out in section 1 of the OEB Act. As the OEB noted in the Decision, "If the proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the application."[2]

As Hydro One notes in its Notice of Motion, the only objective that appears to be contentious in this case is the one related to price: "To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." All of the objections to the application raised by parties related to prices, and in particular the prices that consumers in Orillia would pay after the end of the proposed 10 year deferral period. This was also the basis for the OEB's denial of the application.

The *Handbook to Electricity Distributor and Transmitter Consolidations* (the Handbook) is clear that temporary rate decreases, such as the 1% rate reduction offered during the first 5 years of the Orillia Power deferral period, do not demonstrate "no harm." The Handbook instead focusses on the achievement of reduced "underlying cost structures".[3] In support of its application Hydro One pointed to certain efficiencies and cost savings that would result from the acquisition; in particular approximately $3.9 million in annual OM&A savings, and a reduction of approximately $0.6 million in annual

[2] Decision and Order, EB-2016-0276, April 12, 2018, page 5. See also pp. 3-4 of the Handbook.
[3] Handbook, p. 7.

capital expenditures.[4] It argued that this demonstrated ongoing lower cost structures that would ultimately be passed on to all ratepayers through the rebasing process.[5]

In implementing the no harm policy, the OEB is certainly guided by its previous decisions. However, no two cases are alike and every case must be decided on its own facts and its own merits. In this light it is particularly important to consider the recent history of Hydro One's acquisitions of three utilities: Norfolk Power Distribution Inc., Haldimand County Hydro Inc. and Woodstock Hydro Services Inc. (collectively the "previously acquired utilities"). Hydro One sought and received approval under section 86(2) of the OEB Act to acquire the previously acquired utilities. The applications were broadly similar to each other, and broadly similar to the current application respecting Orillia Power. All three proposed a five year deferral period with a 1% reduction to rates for the first five years (for Orillia Power a 10 year rebasing was proposed with a 1% reduction in the first five years). All pointed to various cost savings and efficiencies that would be realized on account of the acquisition.

The five year deferral periods of all three of the previously acquired utilities expire during the test period of Hydro One distribution rate application that is currently before the OEB (EB-2017-0049). That application therefore includes the new proposed rates for the previously acquired utilities. In its final argument the School Energy Coalition (SEC) pointed out that, despite the apparent cost savings and efficiencies that Hydro One had promised in the MAADs applications, Hydro One was proposing sharp rate increases for the previously acquired utilities.

The OEB panel hearing the Orillia Power MAADs case was clearly concerned about this apparent contradiction, and rightly so. Although the Handbook speaks largely of cost structures, lower cost structures should be expected to ultimately lead to lower rates. If they do not then ratepayers are not being protected with respect to price as the OEB's objectives require.

The OEB therefore decided to adjourn the Orillia Power MAADs application pending the outcome of the Hydro One distribution case. The OEB recognized that the rates shown in the application were simply proposals that had not yet been tested by the parties, nor decided upon by the OEB. It was felt that the Orillia Power MAADs panel would be better able to assess why rates had risen in the face of apparent cost savings with the benefit of the full record from the distribution case.

The applicants brought a motion to review this adjournment decision. The reviewing panel granted the motion and referred the matter back to the MAADs panel. The reviewing panel determined that questions about the impacts and relevance of the distribution case were best dealt with by the MAADs panel, and that additional

[4] Hydro One AIC, April 7, 2017, p. 3.
[5] Hydro One AIC, April 7, 2017, p. 7.

information could be put on the record in the MAADs proceeding to address the MAADs panel's concerns.

In response to the decision of the motion panel, the MAADs panel issued Procedural Order No.7. After reviewing and quoting from the analysis of the reviewing panel, Procedural Order No.7 directed Hydro One to file evidence or submissions on what Hydro One expected the overall cost structures to be following the deferred rebasing period and the impact on Orillia Power customers. In response, Hydro One did not file any new evidence. Its submissions largely repeated the submissions it had made in its original argument in chief and reply argument.

After receiving this submission, the OEB determined that no further process was required, and it issued the Decision. The OEB determined that based on the record before it, it was not satisfied that the no harm test had been met. In particular it did not have sufficient confidence that the efficiencies identified by Hydro One would actually result in lower cost structures for Orillia Power customers after the end of the deferral period.

The OEB's clear concern was that Orillia Power's ratepayers would be faced with a situation similar to the ratepayers of the previously acquired utilities. Although the Hydro One distribution case is not yet completed, it appears clear from the evidence to date that, in spite of efficiencies that may have been realized, these efficiencies do not prevent significant rate hikes.[6] This is an obvious source of concern for the OEB.

The applicants had multiple opportunities to provide the OEB with the type of information it required to assess whether the no harm test was passed. The issue of potential large rate increases after the deferral period was first placed before the applicants in the final argument of SEC, and indeed Hydro One attempted to address the matter through its initial reply argument.[7] The OEB was not satisfied with this explanation: "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 the future rates for the customers of those acquired service areas would be reflective of the lower costs."[8] The OEB then adjourned the MAADs proceeding pending the outcome of the distribution case. The OEB's concerns were firmly before Hydro One from at least this time.

Hydro One and Orillia Power filed a motion to review the adjournment decision. Ultimately the motion was allowed on the basis that it would have been more appropriate for the original panel to re-open the record to hear and relevant information from the distribution case in the MAADs case. The reviewing panel specifically noted

[6] Hydro One Reply Argument, May 5, 2017, Attachment 1
[7] SEC Final Argument, April 21, 2017; Hydro One Reply Argument, May 5, 2017, pp. 2-6.
[8] EB-2016-0276, Procedural Order No. 6, p. 4.

that the original panel could allow for more evidence on "the overall cost structures following the deferral period and their effect on the customers of the acquired utility."[9] The case was then sent back to the original panel.

In Procedural Order No. 7, the original panel repeated the findings of the reviewing panel, and allowed the applicants to file further evidence or submissions on what they expect the "overall cost structures to be following the deferred rebasing period and the impact on Orillia Power customers."[10]

OEB staff disagrees with the applicants' assertion that the test for a MAADs approval was changed by the Decision. The test is, and always has been, no harm. No two cases are alike, however, and the OEB is well within its rights to consider each case based on its particular facts and context. To the extent that the OEB considered different factors in the Orillia Power case than in some previous case, this was driven by the context and facts that were before it.

The OEB also offered the applicants ample opportunity to provide the type of evidence that would satisfy it that Orillia Power's customers would not see the large rate increases that Hydro One is proposing for some of its recently acquired customers in its distribution case. The OEB clearly wanted to see how the acquisition would impact customers at the end of the deferral period, and the applicants did not supply sufficient information.

**The new evidence could have been filed in the original proceeding**

The affidavit filed by Hydro One appears to include the type of information that would have assisted the OEB. However, there is no reason that this information could not have been filed in the proceeding. Rule 42.01 establishes that a ground for a motion can be "facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time." As described above, it is OEB staff's position that this information could have been put in the record previously.

**Conclusion**

OEB staff therefore submits that the Decision does not alter the test under section 86(2) of the OEB Act. The OEB gave the applicants several opportunities to provide the information it required to make a determination, but they did not do so. The premise behind the motions therefore fails. The information provided in the affidavit, and the motions should be dismissed at the threshold stage.

**All of which is respectfully submitted**

[9] EB-2017-0320, Decision and Order, January 4, 2018, p. 9.
[10] EB-2016-0276, Procedural Order No. 7, pp. 2-3.