



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2018-0171

HYDRO ONE INC.

ORILLIA POWER DISTRIBUTION
CORPORATION

Motion to review and vary the Decision and Order on the
acquisition of Orillia Power Distribution Corporation
(EB-2016-0276)

BEFORE: Michael Janigan
Presiding Member

Christine Long
Vice Chair and Member

Allison Duff
Member

August 23, 2018

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1 INTRODUCTION AND SUMMARY

This is a Decision of the Ontario Energy Board (OEB) on motions filed by Hydro One Inc. (Hydro One) and Orillia Power Distribution Corporation (Orillia Power) to review and vary the OEB Decision and Order in which Hydro One's application to acquire Orillia Power was denied (the mergers, acquisitions, amalgamations and divestitures decision or the MAADs decision).¹

The MAADs decision was issued on April 12, 2018. Hydro One and Orillia Power filed Notices of Motion to review and vary the MAADs decision on May 2, 2018. The OEB decided that it would hear the motions together. The motions filed by Hydro One and Orillia Power stated that the MAADs panel²:

- a) Changed OEB policy on MAADs without notice
- b) Erred in relying on evidence filed in the Hydro One distribution rate application³
- c) Changed the standard to be met
- d) Erred in ruling that Hydro One failed to file further evidence requested by the OEB
- e) Considered new criteria

The OEB's *Rules of Practice and Procedure* provide that the OEB may, in respect of a motion filed, determine a threshold question of whether the matter should be reviewed before conducting any review on the merits of the motion. The OEB made provision for submissions and held an oral hearing on the threshold question.

For the reasons that follow, the OEB has determined that the Hydro One and Orillia Power motions to review fail the threshold test.

¹ EB-2016-0276.

² The OEB panel to the EB-2016-0276 MAADs application.

³ EB-2017-0049.

2 THE PROCESS

Hydro One and Orillia Power filed Notices of Motion to review and vary the MAADs decision on May 2, 2018. The OEB decided that it would hear the motions together and assigned file number EB-2018-0171. The Notice of Hearing and Procedural Order No. 1 relating to the motions was issued on June 18, 2018. The OEB adopted all parties to the MAADs proceeding as parties to the motion proceeding.

Procedural Order No. 1 made provision for an oral hearing of the submissions on the threshold question and for the OEB to ask questions. Hydro One, Orillia Power, OEB staff, School Energy Coalition (SEC) and Mr. Frank Kehoe filed written summaries of their positions and made submissions on the threshold question at the oral hearing held on July 10, 2018.

3 THE MAADS PROCEEDING

Hydro One filed the MAADs application on September 27, 2016 under section 86(2) of the *Ontario Energy Board Act, 1998* (the Act). The application was subsequently revised and filed on October 11, 2016. The application sought the OEB's approval to purchase all of the shares of Orillia Power and related approvals.

The OEB's 2015 Report⁴ permits consolidating distributors to defer rate rebasing for up to ten years from the closing of the merger transaction. As part of the share purchase, Hydro One proposed to defer rebasing for a period of ten years. Hydro One proposed that the 2016 base electricity distribution rates of Orillia Power's residential and general service classes be reduced by 1% and kept at this level for five years. Rates would be adjusted pursuant to the IRM formula (I-X) over the next five years. Hydro One also proposed an earnings sharing mechanism (ESM) in years six to ten of the deferred rebasing period. An ESM amount of \$3.4 million was guaranteed. The application stated that the transaction would eliminate duplication of effort and drive down cost structures for both Hydro One and Orillia Power service areas.

SEC submitted⁵ that the proposed acquisition should be denied, arguing that there were no cost savings evident for distributors previously acquired by Hydro One. SEC referred to the evidence on Norfolk Power Distribution Inc., Haldimand County Hydro and Woodstock Hydro Services Inc. in the concurrent Hydro One 2018-2022 distribution rate proceeding. Although the distribution rates application did not include Orillia Power (because the deferred rebasing period would not end until after the term of that application), SEC was concerned that if the MAADs application was approved, a similar fate would befall Orillia Power's customers once its deferred rebasing period ended. In its reply argument, Hydro One submitted that there is a reasonable expectation, based on underlying cost structures, that the costs to serve acquired Orillia Power customers following the consolidation will be no higher than they otherwise would have been.

Having reviewed the evidence and the submissions of parties, the MAADs panel issued Procedural Order No. 6, on July 27, 2017, in which it determined that the hearing of the MAADs application would be adjourned until a decision was rendered on Hydro One's distribution rate application. The MAADs panel found that Hydro One should defend its

⁴ EB-2014-0138, *Report of the Board - Rate-Making Associated with Distributor Consolidation*, March 26, 2015.

⁵ SEC Final Argument, April 21, 2017.

cost allocation proposal in the distribution rate application prior to determining if the Orillia Power acquisition was likely to cause harm to any of its customers.

Hydro One and Orillia Power each filed a Notice of Motion requesting a review and variance of Procedural Order No. 6. In a decision on the motions⁶ (motion review decision), issued on January 4, 2018, the OEB granted the motions and referred the matter back to the MAADs panel for re-consideration.

Procedural Order No. 7 of the MAADs proceeding was issued on February 5, 2018. The OEB determined that it would re-open the record of the MAADs application. The MAADs panel ordered Hydro One to file further material, in the form of evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the impact on Orillia Power customers. Submissions were filed by Hydro One and Orillia Power on February 15, 2018.

The MAADs decision, issued on April 12, 2018, denied Hydro One's application to acquire the shares of Orillia Power. The MAADs panel was not satisfied that the "no harm test", as described in the *Handbook to Electricity Distributor and Transmitter Consolidations* (Handbook), had been met⁷.

Both Hydro One and Orillia Power filed motions to review this decision.

⁶ EB-2017-0320.

⁷ 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 Act. These statutory objectives include the protection the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service and the promotion of economic efficiency and cost effectiveness (*Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, pp. 3-4).

4 THE THRESHOLD TEST

Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* requires anyone bringing a motion to review and vary an OEB order or decision to identify the grounds for the motion:

Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
 - (i) error in fact;
 - (ii) change in circumstances;
 - (iii) new facts that have arisen;
 - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Rule 43.01 of the *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.

Position of the Moving Parties

The moving parties submitted that their motions passed the threshold test described in Rule 43.01. Both applicants set out grounds that they allege raise a question of correctness of the MAADs decision and which therefore requires a review on the merits. The grounds advanced by the applicants are that the MAADs panel:

- a) Changed OEB policy regarding the no-harm test and erred both in departing from its own guidance and in not providing notice of the change
- b) Erred in relying on irrelevant evidence filed in the Hydro One distribution rate application⁸
- c) Changed the standard to be met, applying a higher standard that the OEB must be *assured* rather than there must be a *reasonable expectation* that underlying

⁸ EB-2017-0049.

cost structures would be no higher than they would be in the absence of the acquisition

- d) Erred in ruling that Hydro One failed to file further evidence requested by the OEB
- e) Considered new criteria, i.e. Hydro One's general cost allocation methodology which fetters and pre-empts the discretion of a future panel responsible for setting rates for the consolidated entity

The moving parties allege that the first three grounds result in breaches of procedural fairness. The final ground provides what, in their view, is the type of information that they now understand the OEB to require to make a proper assessment of whether the proposed acquisition meets the no harm test.

Positions of OEB Staff, Mr. Kehoe, and SEC

OEB staff, Mr. Kehoe and SEC submitted that the threshold test had not been met.

OEB staff submitted that the process was fair. Procedural Order No. 6 had explained why the OEB placed the Orillia case in abeyance. OEB staff also submitted that the MAADs policy, specifically the no harm test, has not changed. Although the OEB does not set rates in a MAADs application, OEB staff submitted that it does not mean that rates are irrelevant. OEB staff submitted that the MAADs panel was clear in having the expectation that lower cost structures should eventually lead to lower rates. OEB staff argued that the OEB's first objective is to consider price, and the only price customers will pay is the rate they will pay.

Mr. Kehoe, a residential customer of Orillia Power and former chair and board member of the former Orillia Water Light and Power, submitted that the merger would harm customers. Mr. Kehoe estimated that customers will receive \$400 dollar in savings during the first 10 years, but will have to pay \$2,000 in costs in years 10 to 20.

SEC submitted that the MAADs panel did not err. SEC argued that the applicants bear the burden of demonstrating that the transaction meets the no harm test. The OEB needs to ensure that customers are not harmed. If not, then the OEB is not meeting its statutory duty to protect customers with respect to price. Further, SEC submitted that because the applicants did not meet the onus of demonstrating that Orillia customers would not be harmed, the OEB was correct to deny the application on that basis.

Findings

Pursuant to Rule 43.01, a threshold determination must be made regarding whether the grounds raise a question as to the correctness of the order and whether the error is material and relevant to the outcome. The correctness of the decision may also be put in issue by new facts or facts that could not have been reasonably discovered at the time the decision was made.

In this case, there are a number of conclusions that the applicants urge the OEB to adopt to determine that there are grounds to doubt the correctness of the MAADs decision.

There is no challenge to the jurisdiction of the OEB in making the MAADs decision. Section 86 of the Act establishes that the OEB review a proposed share acquisition and approve the transaction if it is in the public interest. The MAADs decision applied the “no harm test” as set out in the Handbook in its assessment of the public interest.

The OEB has considered all of the grounds and has determined that both motions do not pass the threshold set out in Rule 43.01 to require a review on the merits. The OEB makes the following specific findings concerning the individual grounds relied upon by the moving parties.

a) Did the MAADs panel change OEB policy without notice and err in departing from its own guidance and not providing notice of the change?

Hydro One and Orillia Power maintain that the no harm test applied by the MAADs panel was inconsistent with the Handbook. They point to the sections of the Handbook that indicate that the no harm test is primarily directed to the impact on the underlying cost structures. For them, the MAADs panel changed policy by considering cost allocation and the effect on rates following the deferred rebasing period. They argued that cost allocation and rates are matters that must be dealt with by way of separate rate-setting applications following the deferred rebasing period,⁹ not in the MAADs proceeding.

⁹ The OEB provides “the opportunity for electricity distributors to defer rebasing for a period up to ten years following the closing of a consolidation transaction. This deferred rebasing period is intended to enable distributors to fully realize anticipated efficiency gains from the transaction and retain achieved savings for a period of time to help offset the costs of the transaction.” *Handbook to Electricity Distributor and Transmitter Consolidations*, pp. 8-9.

In their contention that a change of policy has taken place, Hydro One and Orillia Power have tried to differentiate regulatory terms that are inextricably linked. The OEB finds the applicants' attempt to distinguish prices from rates, and cost structures from cost allocation, to be insufficient grounds by which to conclude that the MAAD's decision changed policy or was in error.

The no harm test is a broad one. The Handbook's reference to cost structures was not intended to exclude considerations of cost allocation, diminish consideration of future rate impacts or constrain the application of the no harm test.

The Handbook states the expectation is that merged customers should enjoy lower costs per customer. The Handbook further emphasizes that the rate implications for customers of the acquired utility will be the primary consideration in applying the test.

While the rate implications to all customers will be considered for an acquisition, the primary consideration will be the expected impact on customers of the acquired utility.¹⁰

The Handbook also states that the OEB will consider whether the no harm test is satisfied "based on an assessment of the cumulative effect of the transaction on the attainment of its statutory objectives".¹¹ These objectives, of course include the protection of the interests of consumers with respect to prices.

The OEB finds that the MAADs panel's determination that future rate impacts (i.e. prices) are relevant to the no harm test is not inconsistent with the Handbook.

The moving parties also argued that the MAADs decision represents a new approach from prior guidance provided in MAADs decisions to date. They argued that prior decisions did not focus on rates or rate-setting expectations following the deferred rebasing period.

The OEB finds the MAADs panel inquiry was a reasonable, legitimate response to concerns raised by SEC regarding the proposed rates of previously acquired utilities by Hydro One, once the deferred rebasing period ended. Time had passed since those utilities were acquired. It bears repeating that no two cases are identical. This inquiry may have been more intensive in the information on rate impacts that was sought than previous MAADs examinations, but it was a not a departure from the overarching

¹⁰ *Handbook to Electricity Distributor and Transmitter Consolidations*, p. 7.

¹¹ *Handbook to Electricity Distributor and Transmitter Consolidations*, pp. 1, 4.

mandate to protect the public interest that is inherent in the making of MAADs decisions. The fact that the MAADs panel considered matters not raised in some previous cases does not amount to an error. Further, the OEB is entitled to seek information it considers relevant in carrying out its statutory duties and responsibilities.

The moving parties also argued that the MAADS panel erred in not providing notice given it changed policy and departed from prior guidance. The OEB addresses the submission regarding notice later in this Decision (see Question d).

b) Did the MAADs panel err in relying on irrelevant evidence filed in the Hydro One distribution rate application?

The moving parties argue that the MAADs panel based the potential for rate increases to Orillia Power customers on the Hydro One distribution rates application. The distribution rates application proposed rates for customers of three utilities acquired following the end of the deferred rebasing periods. And while section 21(6.1) of the Act permits consideration of this evidence, it was submitted that notice of an intention to rely on such evidence must precede its consideration.

The OEB finds that the MAADs panel did not improperly rely on evidence taken from the Hydro One distribution rates application. The MAADs panel was certainly aware of some of the record from that proceeding: it was discussed in SEC's argument and Hydro One's reply argument, and charts using data from the distribution case were filed in the MAADs proceeding as well. It can also be said that information from the distribution application was of concern to the MAADs panel, and provoked the inquiry from the MAADs panel regarding the implications for Orillia Power's customers following its deferred rebasing period. The MAADs panel's concern was based on the apparent disconnect between the cost savings that were promised to the customers of the three acquired utilities and the evidence provided in the application. The OEB finds it reasonable that the MAADs panel inquired whether future results would be potentially unfavourable to Orillia Power customers in applying the requisite no harm test. It does not imply the MAADs panel relied on the evidence, relevant or irrelevant, in another proceeding.

The MAADs panel indicated that it "was not satisfied" that no harm test had been met. There is no mention of the Hydro One distribution rates application in the MAADs decision's conclusion. The OEB concludes that although the MAADs panel was informed by the Hydro One distribution rates proceeding, its decision was based on the record that was before it in the MAADs case. Based on that record, the MAADs panel was not satisfied that the no harm test had been met.

The OEB finds that the MAADs panel did not err as it did not rely on irrelevant evidence.

c) Did the MAADs panel err by changing the standard to be met, applying a higher standard that the OEB must be assured rather than there must be a reasonable expectation that underlying cost structures would be no higher than would be in the absence of the acquisition?

Orillia Power submitted in its Notice of Motion that the MAADs panel applied a novel and higher standard by requiring that the OEB must be “assured” that underlying cost structures would be no greater than they would be in the absence of the acquisition rather than the Handbook’s requirement that there must only be a “reasonable expectation” that the post-acquisition cost structures would be no greater.

This ground was not argued at the oral hearing of submissions. In any event, there is no suggestion that the word “assured” in the same paragraph as “satisfied” had a material effect upon the MAADs decision result, or was intended to introduce a higher standard. To the contrary, the MAADs panel indicated that its “primary concern is that there is a reasonable expectation that underlying cost structures for the acquired utility are no higher than they would have been had the consolidation not occurred.”¹² [emphasis added]

d) Did the MAADs panel err in ruling that Hydro One failed to file further evidence as requested?

The moving parties submit that insufficient notice was given concerning the case they had to make to show no harm, prior to the MAADs decision. They note that the ability to file new evidence was only one of the options in the Order section of Procedural Order No. 7 as it indicated:

Hydro One Inc. shall file evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers...

Hydro One responded to Procedural Order No. 7 by filing a submission. The moving parties also allege that Procedural Order No. 7 only referenced cost structures following the deferral period and not issues associated with cost allocation and possible rate increases.

¹² EB-2016-0276, Decision and Order, April 12, 2018, p. 12.

Procedural Order No. 6, where the MAADs panel put the entire proceeding on hold, was the subject of a motion by the same moving parties. The motion review decision overturned Procedural Order No. 6 on the grounds that the MAADs panel would be able to obtain information about impacts on Orillia Power's customers in the MAADs proceeding itself, and it did not need to await the outcome of the Hydro One distribution rate case. The motion review decision specifically contemplated re-opening the record to obtain additional information.

Procedural Order No. 7, while not copying verbatim the language of Procedural Order No. 6, specifically noted that, in response to the motion review decision:

... the OEB has determined that it will re-open the record of the MAAD application as it wishes to receive further material in the form of evidence or submissions from Hydro One on what it expects the overall cost structures to be following the deferral period and the impact on Orillia Power customers. [emphasis added]

There was no new evidence provided in the MAADs proceeding, despite the opportunity to do so, to address the issue specifically referenced in Procedural Order No. 7, and the concern set out in Procedural Order No. 6. While Hydro One made submissions following the issuance of Procedural Order No. 7, they were largely to the effect that it intended to follow the OEB's Filing Requirements and Cost Allocation Model. It should have been clear to the applicants what was at issue. The OEB finds that adequate notice was provided to Hydro One in Procedural Order No. 6 and 7, prior to the issuance of the MAADs decision.

The OEB finds that the MAADs panel did not err as it provided the applicants with adequate notice of the type of information required.

e) Did the MAADs panel err by considering new criteria, i.e. Hydro One's general cost allocation methodology which fetters and pre-empts the discretion of a future panel responsible for setting rates for the consolidated entity?

Hydro One submitted that the OEB's consideration of rate impacts following the deferred rebasing period in a MAADs application means that the OEB would be fettered in setting rates at that time by any cost allocation methodology adopted in the merger application. Such methodology would be associated with the applicant's onus in showing that there will be no harm to customers of the acquired utility in terms of rate impacts.

It is the OEB's expectation that customers of the acquired utility will be no worse off as a result of the acquisition. This expectation arises whether there is evidence provided of the rate impacts following the deferred rebasing period or simple reliance on improved cost structures within the deferral period. In both circumstances, there will be an onus on the merged entity to explain why the rates are not congruent with the expectation of no harm. The rate setting panel, after the deferred rebasing period, is not "fettered" by the operative expectation in either case, and may set rates in accordance with the OEB statutory powers and objectives.

As noted herein, the MAADs decision does not depart from the established policy of the OEB with respect to merger applications and the practical considerations associated with meeting the no harm test applied in the MAADs proceeding do not fetter the discretion of a future panel.

Affidavit of Ms. Joanne Richardson

Hydro One submitted an affidavit in support of its motion. During the oral hearing of the motion, Hydro One took the position that the affidavit contained information that was new and not available at the time of Procedural Order No. 7. However, Hydro One did not submit that the affidavit provided grounds that raised a question as to correctness of the MAADs decision pursuant to Rule 42.01 (a) (iii) or (iv). Even if that argument had been made, the OEB is of the view that the affidavit consists of information that could have been presented during the MAADs proceeding in response to Procedural Order No. 7. The affidavit includes two scenarios of Orillia Power's status quo revenue requirement and cost to serve revenue requirement in Year 11. The scenarios appear to be based on 2016 audited financial statements and inflation factors added to the Year 10 forecasts. It does not present new facts that have arisen or facts that could not have been discovered by reasonable diligence. The affidavit does not assist the moving parties with meeting the threshold test required by Rule 43.01.

Conclusion

The OEB finds that the grounds for the applicants' motions to review and vary the MAADs decision dated April 12, 2018 do not show an identifiable error in the decision as the findings were reasonable and correct concerning the issues that form the grounds for these motions. As a result, the motions fail to satisfy the threshold set out in Rule 43.01 for a review on the merits and are dismissed.

5 COST AWARDS

The OEB's Notice of Hearing and Procedural Order No. 1 indicated that any party eligible for an award of costs in the EB-2016-0276 proceeding shall be eligible for costs in this proceeding.

The OEB finds that Hydro One Inc. and Orillia Power Distribution Corporation shall be equally responsible for the payment of approved cost claims. The OEB makes provision for the filing of cost claims in this Decision. In determining the amount of the cost award, the OEB will apply the principles set out in section 5 of the OEB's *Practice Direction on Cost Awards* and the maximum hourly rates set out in the OEB's Cost Awards Tariff.

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Hydro One Inc. and Orillia Power Distribution Corporation's motions to vary the OEB Decision and Order in EB-2016-02276 are denied.
2. Intervenors eligible for cost awards shall file with the OEB and forward to Hydro One Inc. and Orillia Power Distribution Corporation their respective cost claims by **September 6, 2018**.
3. Hydro One Inc. and Orillia Power Distribution Corporation shall file with the OEB and forward to intervenors any objections to the claimed costs by **September 17, 2018**.
4. Intervenors shall file with the OEB and forward to Hydro One Inc. and Orillia Power Distribution Corporation any responses to any objections for costs claimed by **September 24, 2018**.
5. Hydro One Inc. and Orillia Power Distribution Corporation shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file number, **EB-2018-0171**, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.oeb.ca/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a USB flash drive in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

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DATED at Toronto August 23, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary