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Ontario

BY EMAIL

January 14, 2019

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Hydro One Inc. and Orillia Power Distribution Inc.
School Energy Coalition Motion
OEB File No. EB-2018-0270

In accordance with Procedural Order No. 1, please find attached OEB staff's submission with respect to the School Energy Coalition's motion filed on January 7, 2019. OEB staff's submission has been sent to Hydro One Inc. and Orillia Power Distribution Inc. and to all other registered parties to this proceeding.

Yours truly,

Original Signed By

Andrew Bishop
Project Advisor, Supply & Infrastructure

Encl.

School Energy Coalition Motion

Hydro One Inc. and Orillia Power Distribution Inc.

EB-2018-0270

OEB Staff Submission

January 14, 2019

Introduction

The School Energy Coalition (SEC) has filed a motion to dismiss the application filed by Hydro One Networks Inc., Hydro One Inc. (Hydro One), and Orillia Power Distribution Corporation (OPDC) on September 26, 2018 (Second MAADs Application). The motion argues that the Second MAADs application is essentially the same as a previous MAADs application (EB-2016-0276, the Original MAADs Application), which the OEB denied in a decision dated April 12, 2018. The OEB also denied a motion to review (Motion to Review) the Original MAADs Application in a decision dated August 23, 2018. SEC argues that the Second MAADs Application seeks the exact same relief and requires a redetermination of the same issues that have already been determined by the OEB in the Original MAADs application. SEC therefore argues that the Second MAADs Application is, as a matter of law, *res judicata*, vexatious, and an abuse of process. SEC seeks an order dismissing the Second MAADs Application.

OEB staff offer the following comments on the motion materials filed by SEC.

The doctrine of *res judicata* and its applicability before the OEB

OEB staff have reviewed SEC's submission (filed on January 7, 2019), and largely agrees with its description of the doctrine of *res judicata* and abuse of process.

The doctrine of *res judicata* ("a matter already judged") essentially means that, once a dispute has been finally decided, it should not be litigated again. The purpose of the doctrine, as stated by the Supreme Court, is that "[a]n issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided."[1]

Three conditions must be met for *res judicata* to apply:

a) The same question has already been decided
b) The decision which is said to give rise to *res judicata* was final, and
c) The parties to the proceeding are the same.

The doctrine of *res judicata* applies to proceedings before administrative tribunals such as the OEB.[2]

[1] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, para. 18.
[2] *Ibid*., para. 22.

Even where these three conditions have been met, a tribunal is not required to apply *res judicata*. There are two instances in which a tribunal might decline to apply *res judicata,* even if the test is otherwise met. The first is where there has been a change in circumstances that might reasonably be expected to change the tribunal's decision. This situation is described by SEC in its submissions,[3] and generally speaking OEB staff agrees with SEC's description of this legal principle.

A separate, but related, reason that a tribunal might decline to apply *res judicata* even where the three conditions are met relates to the tribunal's control of its own process, and the requirement that parties be treated fairly. *Res judicata* is a discretionary remedy on the part of the tribunal; even where the three conditions are found to exist the tribunal has the discretion to allow the case to proceed. The British Columbia Court of Appeal noted: "[i]t must always be remembered that although the three requirements for issue estoppel [i.e. *res judicata*] must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case."[4] The Ontario Court of Appeal observed: "[t]he exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?"[5]

In other words, if a tribunal feels that a strict application of *res judicata* would produce an unjust result, it does not have to apply the doctrine, and it has the discretion to hear the application.

Submission

OEB staff notes that this submission addresses only the SEC motion to dismiss, and not the underlying merits of the Second MAADs application.

OEB staff submits that the three criteria in the test appear to have been met: the question before the Board has already been answered (the current application seeks

[3] SEC submission, January 7, paras. 30-32.
[4] *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 1998 Canlii 6467 (BC CA), para. 32
[5] *Schweneke v. Ontario* (2000), 2000 CanLII 5655 (ON CA), para. 43.

the same relief as the previous application), the previous decision was final, and the main parties to the proceeding are the same.

The questions before the OEB therefore are: 1) has there been a change in circumstances that would warrant re-hearing the matter?, and 2) would it be unjust to apply *res judicata*? If the answer to both of these related questions is "no", then the motion should be allowed and the application dismissed. If the answer to either question is "yes", then the motion should be dismissed and the OEB should proceed to hear the application on its merits.

There are a number of factors the OEB might consider in determining whether it is appropriate to apply *res judicata* in the current case. Although the relief sought in the current case is identical to the previous case, the evidence presented to support the application has been supplemented with a new section attempting to describe the potential rate impacts on Orillia customers after the end of the 10 year deferral period. Although it is true that this type of evidence could have been filed in the previous application, the OEB has the discretion to consider this new evidence in the context of a fresh proceeding if it chooses to do so. The OEB has not to date reviewed the new evidence provided in the Second MAADs application on its merits.

It should also be noted that Hydro One also has another section 86 (i.e. MAADs) application before the OEB: its proposed acquisition of Peterborough Distribution Inc.[6] The Peterborough application is very similar to the Orillia application. For example, in both cases, Hydro One is proposing a 1% reduction to current base distribution rates[7], and to "freeze" these rates for a five year period following closing of the transactions[8]. Further, both applications feature a guaranteed earnings sharing mechanism (ESM), applicable during years 6 through 10 of the deferred rebasing period, which Hydro One states provides protection to customers of both Orillia and Peterborough[9]. Most importantly, each application also incorporates an almost identical chapter entitled "Future Cost Structures" which seeks to illustrate the longer-term impact (i.e. post deferral period) of the acquisitions on the acquired utilities' revenue requirement. This is the key area of dispute in the Orillia applications, and will in all likelihood be an area of dispute in the Peterborough application as well.

If the current Orillia application is dismissed without a hearing, and the Peterborough application is ultimately approved (note that OEB staff takes on position at this point on

[6] EB-2018-0242.
[7] For OPDC, the 1% rate reduction applies to residential and general service customers. For PDI, the rate reduction applies to residential, general service, and large use rate classes.
[8] Hydro One indicates its intent to set rates for both utilities in accordance with the Price Cap Adjustment mechanism during years six through ten of the deferred rebasing period.
[9] The value of the guaranteed ESM is $1.8 million for Peterborough and $2.6 for Orillia.

the merits of the Peterborough application) this could result in different decisions from the OEB on essentially the same issues. Such an outcome may or may not be "unjust", but it would certainly be a sub-optimal result. Ideally applications that present the same issues and evidence to the OEB should be considered in a similar manner.[10]

All of which is respectfully submitted.

[10] The problematic nature of inconsistent results for similar applications is discussed, albeit in a different context, in *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77, paras. 27-28.