PALIARE ROLAND

BARRISTERS

Richard P. Stephenson
T 416.646.4325 Asst 416.646.7419
F 416.646.4301
E richard.stephenson@paliareroland.com
www.paliareroland.com

File 94355

January 16, 2019

VIA COURIER and RESS FILING

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

Dear Ms. Walli,

Re: EB-2018-0270
Hydro One Inc. and Orillia Power Distribution Corporation
School Energy Coalition Motion

Attached please find the Submissions on behalf of the Power Workers' Union with respect to the above-noted matter.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Richard P. Stephenson
RS:pb

Attach.

ONTARIO ENERGY BOARD

IN THE MATTER OF an application made by Hydro One Inc. for leave to purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation, made pursuant to section 86(2)(b) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking to include a rate rider in the current Board-approved rate schedules of Orillia Power Distribution Corporation to give effect to a 1% reduction relative to their Base Distribution Delivery Rates (exclusive of rate riders), made pursuant to section 78 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its distribution system to Hydro One Networks Inc., made pursuant to section 86(1)(a) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking cancellation of its distribution licence, made pursuant to section 77(5) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc. seeking an order to amend its distribution licence, made pursuant to section 74 of the *Ontario Energy Board Act, 1998*, to serve the customers of the former Orillia Power Distribution Corporation.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its rate order to Hydro One Networks Inc., made pursuant to section 18 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc., seeking an order to amend the Specific Service Charges in Orillia Power Distribution Corporation's transferred rate order made pursuant to section 78 of the *Ontario Energy Board Act*.

SUBMISSIONS OF THE POWER WORKERS' UNION ON SEC MOTION TO DISMISS APPLICATION

1. The SEC's motion seeks an order dismissing Hydro One's application, without a hearing.

2. The relief sought in the motion is unusual. The motion seeks to deprive Hydro One of the right to have its application heard and determined on the merits, in the ordinary course. The very limited circumstances which justify the Board dismissing a proceeding do not exist here.

a. Except in exceptional circumstances an applicant to the Board is entitled to have its matter determined by the Board, on the merits after a hearing

3. Subject to specific exceptions, the Board is required to determine matters only after conducting a hearing. Section 21(2) of the *OEB Act* provides that:

> **Hearing upon notice**
>
> **21 (2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct.**

4. The Board has only a limited ability to determine matters without conducting a hearing. Specifically, pursuant to s. 21 (4) of the *OEB Act*:

> **(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,**
>
> > **(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or**
> >
> > **(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.**

5. Obviously, these circumstances are not applicable here.

6. The Board also has powers under the *SPPA* to dismiss an application without a hearing:

Disposition without hearing

4.1 If the parties consent, a proceeding may be disposed of by a decision of the tribunal given without a hearing, unless another Act or a regulation that applies to the proceeding provides otherwise.

Dismissal of proceeding without hearing

4.6 (1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

> **(a) the proceeding is frivolous, vexatious or is commenced in bad faith;**
>
> **(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or**
>
> **(c) some aspect of the statutory requirements for bringing the proceeding has not been met.**

Notice

(2) Before dismissing a proceeding under this section, a tribunal shall give notice of its intention to dismiss the proceeding to,

> **(a) all parties to the proceeding if the proceeding is being dismissed for reasons referred to in clause (1) (b); or**
>
> **(b) the party who commences the proceeding if the proceeding is being dismissed for any other reason.**

Same

(3) The notice of intention to dismiss a proceeding shall set out the reasons for the dismissal and inform the parties of their right to make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Right to make submissions

(4) A party who receives a notice under subsection (2) may make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Dismissal

(5) A tribunal shall not dismiss a proceeding under this section until it has given notice under subsection (2) and considered any submissions made under subsection (4).

Rules

(6) A tribunal shall not dismiss a proceeding under this section unless it has made rules under section 25.1 respecting the early dismissal of proceedings and those rules shall include,

(a) any of the grounds referred to in subsection (1) upon which a proceeding may be dismissed;

(b) the right of the parties who are entitled to receive notice under subsection (2) to make submissions with respect to the dismissal; and

(c) the time within which the submissions must be made.

Continuance of provisions in other statutes

(7) Despite section 32, nothing in this section shall prevent a tribunal from dismissing a proceeding on grounds other than those referred to in subsection (1) or without complying with subsections (2) to (6) if the tribunal dismisses the proceeding in accordance with the provisions of an Act that are in force on the day this section comes into force.

7. Not surprisingly, the statutory regime is echoed by the Board's own Rules of Practice and Procedure, which contemplate and deal with the circumstances where the Board may dismiss a proceeding without a hearing, specifically:

18. Dismissal Without a Hearing

18.01 The Board may propose to dismiss a proceeding without a hearing on the grounds that:

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

18.02 Where the Board proposes to dismiss a proceeding under Rule 18.01, it shall give notice of the proposed dismissal in accordance with the *Statutory Powers Procedure Act.*

18.03 A party wishing to make written submissions on the proposed dismissal shall do so within 10 calendar days of receiving the Board's notice under Rule 18.02.

18.04 Where a party who commenced a proceeding has not taken any steps with respect to the proceeding for more than one year from the date of filing, the Board may notify the party that the proceeding shall be dismissed unless the person, within 10 calendar days of receiving the Board's notice, shows cause why it should not be dismissed or advises the Board that the application or appeal is withdrawn.

8. The PWU does not dispute that the doctrines of *res judicata* and/or abuse of process are available to the Board, in appropriate circumstances. If it is appropriate to apply one of these doctrines then the Board would be entitled to conclude that an application is "frivolous or vexatious". However, the PWU agrees with Board Staff that, even where the technical requirements of the doctrines are met, their application in any specific case is at the discretion of the Board.

9. The PWU also submits that the nature of proceedings before the Board is relevant to the exercise of this discretion. Specifically, unlike most cases where *res judicata* or abuse of process have been employed, a MAADs application at the OEB is not a *lis inter parties,* with a dispute between individual (or even multiple) antagonists. Rather, it is a public interest regulatory proceeding, which is not adversarial in nature. As a consequence, one of the justifications for the application of the doctrines, i.e. the concept of "unfairness to the successful party in the prior proceeding," simply does not arise.[1]

b. The motion should be dismissed because the Hydro One's application does not raise the "same question" as the prior application

10. Board Staff appears to accept that the three prerequisites for the application of *res judicata* have been met. More particularly they seem to accept that the "same question" requirement has been met on the basis that the relief sought by Hydro One in this application is the same as that in the EB-2016-0276 proceeding.[2] The PWU

[1] The PWU acknowledges that the existence of a *lis inter parties* is not a prerequisite to use of these doctrines. However, it may be relevant to *how* the doctrines are applied.

[2] Board Staff submission, p. 2-3

submits that focussing on the relief sought by Hydro One is too narrow. Rather, it is necessary to look at the application as a whole.

11. The PWU submits that *res judicata* and abuse of process do not apply in this case because there is a material difference in the application under consideration for the Board in this matter than was the case in the EB-2016-0276 proceeding. Specifically, embedded in the current application is a specific proposal by Hydro One that OPDC customers will be exposed to a lower cost structure, even in year 11 post-transaction (i.e. the first year of re-basing and harmonization).[3]

12. This proposal is not, contrary to SEC's suggestion, merely new "evidence". Rather, the PWU understands that Exhibit A, Tab 4, Schedule 1 contains a commitment, based upon its confidence as to the underlying cost structures, that Hydro One will ensure that the aggregate shared costs allocated to ODPC customers will be such that the aggregate costs recovered in rates from ODPC customers will not exceed those under the "Status Quo" (i.e. non-amalgamation) scenario. This commitment specifically addresses the flaw that the Board found with Hydro One's prior application.

13. The issue for the Board in this application is to determine whether Hydro One's commitment is sufficient to address the concerns identified by the Board in the prior proceeding. On the face of it, there is no reason to believe why the commitment would not do so. However, it is only upon the hearing of the application (on the merits) will the

[3] See Ex. A, Tab 4, Schedule 1, pp. 8-9

Board be able to fully test the application, and the evidence in support of it, and draw a final conclusion.[4]

14. On this basis, it is submitted that the current application cannot be said to be the "same as" the prior application. As a consequence, the mischief that the *res judicata* and abuse of process doctrines seek to avoid, are simply not present. In the result, the motion should be dismissed.

c. In the alternative, Hydro One's commitment is a "change of circumstance"

15. In the event the Board does not agree that Hydro One's commitment regarding post-rebasing costs is such that the current application no longer deals with the "same question", the PWU submits that it is a "change of circumstances" which renders inapplicable the doctrines of *res judicata* or abuse of process.[5]

16. Logically, there are two distinct ways that a change of circumstances can arise. The first is a change to the underlying facts giving rise to the application. The second is a change to the manner in which the application seeks to deal with those facts. This case deals with the second kind of change.

17. As noted above, the "change of circumstances" here is the existence of the commitment of Hydro One regarding year 11, post-rebasing costs. The fact that the Board rejected an application made in the absence of such a commitment does not

[4] The SEC suggests that the Board should give no heed to Hydro One's commitment on the basis that the decision of one panel of the Board cannot bind a future panel (suggesting that Hydro One might not be held to this commitment by a future panel). While technically correct, this is an issue which is ever present in every issue of every case. Insofar as the Board wishes to formalize Hydro One's commitment, it may be appropriate to make it a condition of the its approval of the transaction.

[5] The PWU adopts the submission of Board Staff with respect to the applicability of the "change of circumstances" exception to the application of *res judicata* and/or abuse of process.

mean that the Board will not find favour with an application featuring that commitment. Hydro One (and the Board) is entitled to a hearing to determine the answer to that question.

d. Residual Discretion

18. As noted by Board Staff, the Board has a residual discretion not to apply discretionary doctrines like *res judicata* or abuse of process where it would be inappropriate to do so. Board Staff correctly notes that the existence of Hydro One's Peterborough application (EB-2018-0242) creates such a circumstance. Unlike the prior Orillia application, the pending Peterborough application does raise the "same question" as this application. As a consequence, there is a risk of injustice (and inconsistent decisions) if the Board were to approve Hydro One's Peterborough transaction while refusing to even give Hydro One a hearing on an essentially identical transaction in the present case.

19. The PWU submits this risk favours the dismissal of the motion, and a determination of this application on the merits, after a hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.