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 ORILLIA POWER

January 16, 2019

I. OVERVIEW

1. Orillia Power Distribution Corporation ("Orillia Power") responds to the motion brought by the School Energy Coalition ("SEC") to dismiss the new application brought by Hydro One Inc. ("Hydro One") to acquire all the outstanding shares of Orillia (the "New MAAD Application") on the basis of the doctrines of *res judicata* or abuse of process.

2. Orillia Power supports the submissions made by Hydro One and the submissions made by the staff at the Ontario Energy Board ("OEB") that the doctrines of *res judicata* and issue estoppel do not prevent the OEB from hearing the application. To the contrary, it is consistent with the OEB's statutory and policy objectives to hear the New MAAD Application and the OEB would be improperly avoiding its statutory obligations if it failed to do so.

3. The New MAAD Application includes new evidence on Orillia Power's future revenue requirements beyond the 10-year deferral period, how costs would be allocated beyond the 10-year deferral period, and other new information showing that the Corporation's customers would benefit from the transaction (the "New Evidence").[1]

4. This New Evidence has never before been considered by the OEB on its merits – it has never been tested or evaluated by the OEB or members of the public. As such, it is not being "re-litigated".

5. At law, the OEB has the obligation to hear this application. It would be an error for the OEB to mechanically transplant the doctrine of *res judicata* from the judicial context to the administrative context without considering the larger statutory and policy context of its decision-making function.

6. Hearing the New MAAD Application is consistent with the OEB's section 1 statutory and policy objectives and its mandate under s. 86(2) of the *Ontario Energy Board Act, 1998* (the "*Act*"). In particular, the OEB is mandated under section 86(2) to review and approve the consolidation of any distributors. Reducing the number of local distribution

[1] Hydro One's submissions at paragraph 21 provide a detailed overview of the New Evidence.

companies (LDCs) and consolidating LDCs has been a public policy objective of the last decade.[2] This objective is consistent with the OEB's statutory purpose which provides that the OEB is, among other things, "to promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry."[3]

7. Pursuant to this policy of voluntary consolidation, Hydro One and Orillia Power entered into a share purchase agreement more than two years ago that is subject to OEB regulatory approval (the "Transaction").[4] The OEB decided that the Transaction meets all but one of the criteria of the "No Harm Test". However, the OEB did not approve the original application as the OEB did not have evidence relating to the underlying cost structures beyond the 10 year rebasing period, which the Board requested.

8. On the New MAAD Application, there has been a change of circumstance in that Hydro One has filed the New Evidence that is responsive to the OEB's concerns.

9. *Res judicata* and issue estoppel are remedies that are available to administrative tribunals only in very rare and limited circumstances. Even if all the criteria of *res judicata* are met, which Orillia Power denies they are in this case, the OEB retains residual discretion to control its own process and to hear the application where there has been a change of circumstance.[5]

10. If a simple analogy would be of assistance, then the New MAAD Application is akin to filing a new application for a license after the original application was rejected because of a missing requirement such as an indemnity or a bond. It would be inconsistent with the principles of administrative decision-making if an applicant only had one chance to apply

[2] OEB Handbook to Electricity Distributor and Transmitter Consolidations
[3] Section 2 (5.) of the *Ontario Energy Board Act*;
[4] Section 86(1) of the *Ontario Energy Board Act*;
[5] *Danyluk v Ainsworth Technologies*, [2001] 2 SCR 260 at para. 62-63; **Tab 1**.

for approval of a license and could not remedy a deficit in the application by submitting a new application with the missing information.

11. In this case, the OEB did not approve the original application because it did not have evidence with respect to the underlying cost structures after the ten year rebasing period. That evidence has now been submitted to the OEB in the New MAAD Application.

12. To apply the doctrine of *res judicata* as strictly as the SEC suggests would in effect defeat the statutory purpose of section 86(2) and section 1 of the *Act*.

13. Orillia Power's submissions are structured as follows:

(a) Orillia Power provides a summary of the procedural history of this matter. This procedural history is important as it demonstrates why it is in the interests of the parties and the public for this matter to be heard by the OEB;

(b) It is in the interests of justice that the application be heard. The legislative and policy directives mandate that the OEB consider consolidations and not dismiss applications on narrow technical grounds. Hydro One has now submitted the New Evidence that the OEB has requested in order to approve the Transaction.

II. PROCEDURAL HISTORY

14. The procedural history is important to the determination of this motion as it demonstrates what issues were and were not decided by the OEB and why it is in the interests of justice and the parties for this application to proceed.

15. On September 26, 2016 (more than two years ago), Hydro One Inc. ("Hydro One") filed an application with the OEB seeking approval under section 86(2) of the *Ontario Energy Board Act, 1998*, to purchase all of the shares or Orillia Power (the "MAAD Application").

16. In reply submissions (after discovery and evidence had been completed), the SEC brought up for the first time Hydro One Network Inc. ("HONI") distribution rate application under OEB File No. EB-2017-0049 the ("Dx Proceedings") and implied that

the distribution rates in that application should be considered by the OEB in the MAAD Proceeding.

17. In Procedural Order No. 6, the OEB decided to hold the MAAD Application in abeyance until a decision had been rendered in the Dx Proceedings.[6]

18. Hydro One and Orillia Power successfully challenged Procedural Order No. 6. By decision dated January 4, 2018, a differently constituted panel of the OEB granted Hydro One and Orillia Power's motion to review Procedural Order No. 6 and remitted the matter back to the panel in the MAAD Proceeding.[7] On the motion for review, the OEB staff agreed with Hydro One and Orillia Power that the evidence in the Dx Proceedings was not relevant to the MAAD Application.

19. In the MAAD Application, the Board then issued Procedural Order No. 7. This order requested that Hydro One file "evidence or submissions" on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers.[8]

20. Procedural Order No. 7 is notable for the absence of any request that the parties provide submissions with respect to the relevance of the Dx Proceedings.

21. Hydro One and Orillia Power filed submissions responsive to Procedural Order No. 7 on February 15, 2018.

22. In its decision, the OEB notes that Hydro One and Orillia Power did not file any evidence on the forecast of cost savings beyond the 10 year rebasing period.

    (a) At page 10 – the Board writes:

[6] Procedural Order No. 6 in EB-0276 dated July 27, 2017; **Tab 2.**
[7] Decision and Order, EB 2017-0320 dated January 4, 2018; **Tab 3** The reviewing panel noted in granting the motion that Orillia Power and H1 "did not have the opportunity to thoroughly explore the relevant of the distribution rate application to the MAAD application before the Procedural Order was issued, particularly considering that the rate application was not filed until after the discovery process for the MAAD application was completed" (Decision at p. 9).
[8] Procedural Order No. 7, EB 2016-0276 dated February 5, 2018. (emphasis added); **Tab 4.**

In Procedural Order No. 7, the OEB 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.

No new evidence was filed. Submissions were filed by Hydro One and Orillia Power. Hydro One submitted that, based on the projected Hydro One cost savings forecast for the 10 year period following the transaction, Hydro One can definitely state that the overall cost structures to serve the Orillia area will be lower following the deferred rebasing period in comparison to the status quo. Hydro One submitted that at the time of rebasing, Hydro One will adhere to the cost allocation and rate design principles, in place at such time in the future, ensuring that the costs allocated to Orillia Power customers fairly and accurately reflect the new lower cost structure to serve all customers.

(b) At page 13 – the Board writes:

… the OEB provided Hydro One with the opportunity to file further evidence on what it expects the overall cost structure to be following the deferral period and to explain the impact on Orillia's customers. Hydro One did not file further evidence. Hydro One's submissions simply restated its expectation that based on the projected Hydro One cost savings forecast for the 10 year period following the transaction, the overall cost structures to serve the Orillia area will be lower following the deferred rebasing period in comparison to the status quo. The OEB is of the view that it would have been reasonable to see a forecast of costs to service Orillia customers beyond the ten year period and an explanation of the general methodology of how costs would be allocated to Orillia ratepayers after the deferral period. Hydro One takes the position that this information is not known. The OEB recognizes that any forecast of cost structures and cost allocation 10 years out would include various assumptions and could not be expected to be 100% accurate. However, the OEB has highlighted its concern and its need to better understand the implications of how Orillia customers will be impacted by the consolidation beyond the ten year period. In the absence of information to address that OEB concern, the OEB cannot reach the conclusion that there will be no harm. (emphasis added)

23. The Board highlighted in its decision "its need to better understand the implications of how Orillia customers will be impacted by the consolidation beyond the ten year (deferred rebasing) period".[9]

24. In its Decision, the OEB found that Hydro One and Orillia Power met all but one of the elements of the no harm test.

25. Hydro One and Orillia Power brought a motion to review and vary the Decision. The Board denied the motion at the threshold stage and therefore did not consider the evidence on the impact of the consolidation beyond the ten year deferred rebasing period.

III. DISCRETION TO HEAR APPLICATION

26. The leading case on issue estoppel and *res judicata* in the administrative law context – *Danyluk* acknowledges that these doctrines must be applied with greater flexibility in the administrative law context than the judicial context.[1] In particular, where the exercising tribunal is exercising an administrative or statutory function, these doctrines must give way to the tribunal's statutory mandate. By analogy, it is useful to consider how the doctrine of *functus officio* has been applied in the administrative law context. In one of the leading treatises on administrative law, *Judicial Review of Administrative Action in Canada*, the authors, Brown and Evans, write that a pragmatic and functional analysis should be carried out in order to ascertain whether the doctrine of analogous doctrine of *functus officio* should be applied in the context of a particular type of decision-making process.

27. That is, one must weigh "any unfairness to the individual that might arise as a result of the reopening, against the public harm that might be caused by preventing the agency from discharging its statutory mandate if it could not reopen." In addition, the Court must consider "the statutory mandate, the breadth of the discretion conferred on the decision-maker, and the availability of other relief, such as a right of appeal".[10] In other words,

[9] EB-2016-0276, Decision and Order dated April 12, 2018, at p. 13; **Tab 5.**
[1] *Danyluk*, *supra*.
[10] *Judicial Review of Administrative Action in Canada*, at section 12:6221; **Tab 6.**

the task for the Court is to determine whether "the benefits of finality and certainty in decision-making outweigh those of responsiveness to changing circumstances, new information and second thoughts".[11]

28. A tribunal retains the discretion to achieve fairness according to the circumstances of each case.[12] A tribunal is the master of its own process and may decide that it is in the interests of fairness according to the circumstances of the case that a matter be heard.

29. In this case, the statutory mandate, the discretion afforded to the OEB weigh in favour of having the OEB proceed to hear the New MAAD Application:

(a) The OEB has the statutory mandate under section 86(2) to approve the consolidation of distributors. There is nothing in section 86(2) or the *Act* in general that precludes the parties from bringing an application for approval based on new evidence. The principle of *res judicata* should not be applied where there are indications in the enabling statute that a new application can be made *in order to enable the tribunal to discharge the function committed to it by enabling legislation.*[13]

(b) The policy directives of the OEB are in favour of consolidation;

(c) There is no harm caused to any of the parties by having the New Evidence reviewed on its merits. The New Evidence has never before been tested or considered. There is no decision on the New Evidence;

(d) The OEB is not a tribunal like a professional disciplinary college where having a matter re-opened causes prejudice to a member who has already gone through the adjudication process and therefore where the doctrine of *res judicata* should arguably be more rigorously applied. The OEB is a tribunal that approves or denies applications based on a set of criteria and the public interest;

[11] *Judicial Review of Administrative Action in Canada*, at section 12:6221; **Tab 6**
[12] *British Columbia (Minister of Forests) v Bugbusters Pest Management Inc.* (1998), 7 Admin LR (3d) 209; **Tab 7**
[13] *Davidson v 1167648 Alberta Ltd.*, 2007 ABCA 364 at para. 15 and 16; **Tab 8**

(e) There has been a change of circumstances. The OEB has requested that Hydro One produce evidence on the underlying cost structures after the ten year re-basing period. Hydro One has now submitted this New Evidence;

(f) There is evidence on this application that if the Transaction is not approved that the current rates are not sufficient to sustain Orillia Power's distribution operations over the long term.[14] Orillia Power estimates that it will seek the approval from the OEB to increase rates by 2-4% annually over the next 10 year period.

(g) The delay in approving the Transaction on its merits has caused uncertainty and stress on the employees of Orillia Power.

30. There has been a change of circumstances that necessitates that the OEB hear this application. The SEC cannot state that Hydro One and Orillia Power should have filed the evidence on the original application. It is only recently that the OEB has requested that Hydro One file evidence with respect to the underlying costs after the ten year re-basing period. Hydro One has seen responded to the OEB's request and has filed this evidence on the New MAAD Application. It is only fair to the parties that this New Evidence be adjudicated on its merits.

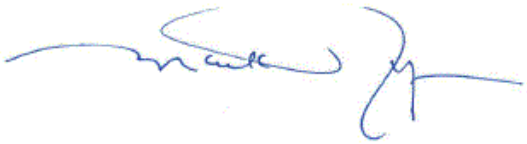
31. Hearing this application does not place an undue burden on the OEB or the parties since the residual issue to be determined is narrow. The OEB has already determined that the Transaction meets all of the other requirements of the no harm test. The only issue to be determined is whether the New Evidence demonstrates that the underlying costs will be lower after the re-basing period than they would have been without consolidation.

32. Orillia Power agrees with the staff's submissions that it would undoubtedly be unfair if the OEB approves the Peterborough transaction, which has similar terms to this transaction, while allowing this transaction to be defeated based on narrow procedural grounds. Such an outcome does injustice to the democratically elected Orillia City

[14] New MAAD Application, Exhibit A, Tab 4, Schedule 1, p. 11

Council who approved the sale transaction, to Orillia ratepayers and taxpayers, and is inconsistent with the statutory objectives of the OEB.

All of which is respectfully submitted,



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