BY EMAIL and RESS

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November 25, 2019
Our File No. 20180242

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Christine Long, Registrar and Board Secretary

Dear Ms. Long;

Re: EB-2018-0242/270 – Hydro One/Peterborough/Orillia MAADs – Oral Hearing

We are counsel for the School Energy Coalition. We are in receipt of the letter dated November 25, 2019 from counsel for the Applicant Hydro One in the Orillia case, and provide in this letter responses to the Applicants' concerns for the assistance of the Board.

Specific Responses

1. Hydro One says:

> *"Hydro One is concerned that SEC's proposed scope of inquiry set out in its November 4, 2019 letter is an attempt to extend the scope of the hearing beyond the consideration of the particular applications currently before the OEB in this proceeding.*

SEC has made no secret of the fact that it believes that, until Hydro One gets its house in order with respect to cost-effective distribution service delivery (a longstanding and well-recognized problem), it should not be acquiring additional distributors, and the Board should refuse approval of any further acquisitions until that condition is satisfied. In every case, the customers of those distributors have been harmed. This has been central to our positions in past cases, and continues to be central to the current cases: Don't let Hydro One continue to harm acquired customers.

That having been said, SEC does not propose that any of the hearing in these proceedings be about applications other than the ones before the Board. Some of the Applicant's actions in other cases may be relevant to the Board in the current applications (see below), but those other cases are not before the Board, and there is no value to anyone to seek to re-litigate them. It would just be a waste of everyone's time.

2. Hydro One says:

> *"[I]t is essential for the OEB to clearly define the scope in advance of the hearing and limit the scope to specific issues where the OEB — <u>not SEC</u> — has determined the record to be incomplete, or where the OEB has determined that it would be assisted by hearing additional evidence." [emphasis added]*

The obvious answer to this is that the Board sought submissions with respect to exactly those issues, and SEC responded to the Board's request. Is it now Hydro One's view that, if the Board (to Hydro One's surprise) agrees with SEC, it is not exercising its own independent judgment?

The more nuanced response to this, however, is that the Board has legal obligations, for example under the Statutory Powers Procedure Act. While the Board has a broad latitude to determine the form of its adjudicative processes, it has generally followed a practice that, if customer groups and other intervenors have legitimate reasons to think the record is not complete, and/or that additional evidence is required, the Board will ensure that there is an opportunity to provide the Board panel with the fullest possible record.

This is consistent with "*audi alteram partem*", and with the principle that the Board's processes should at all times be transparent and inclusive. The Board has fairly consistently refused to use procedural discretion to limit the voice of the customer when the customer sought to be heard.

3. Hydro One says:

> *"[T]he proper scope of the proceeding is whether the costs related to the status quo and the cost to serve following the deferral period, together with Hydro One's cost allocation and rate design, results in no harm.*
>
> *[T]he OEB needs to reiterate that what is relevant is the cost structures arising from the Orillia transaction and the proposal that Hydro One has made with respect to Year 11 following the deferred rebasing period."*

There is more than a little irony in this, given that it relies on the proposition that, in EB-2016-0276, the Board already determined all other issues related to the no harm test, and everything else, in the Orillia acquisition. When SEC in its Orillia motion challenged the current Orillia application on the basis that it was just a rehash of that previous case, Hydro One was strident in its claim that the current application (which it pointedly referred to as the "New MAAD Application") is a completely new application, reliant on new evidence.

Hydro One therefore implies that this Board panel should be bound by previous decisions of the Board with respect to components of the current application, but should consider itself seized with a re-determination of certain other components of the application based on new evidence. This is, one would think, like a (late) Motion for Review, but not so structured.

The necessary implication of Hydro One's argument is that this Board panel cannot deal with:

- Rate impacts during the deferred rebasing period;
- Reliability issues;
- Customer service issues;
- Conditions of approval

even though SEC and others have raised issues about these components of approval.

SEC in its November 4th letter provided a number of specific questions it wished to address in the oral hearing on these issues. Hydro One's letter does not address any of those questions, but instead just proposes to wipe them all out as if they were irrelevant. SEC believes it would be contrary to the Board's longstanding practices, and contrary to good regulatory policy, to make an *a priori* determination that specific issues that are relevant and are of concern to ratepayers are out of scope.

4. Hydro One says:

> *"SEC asserts that the OEB should not consider the onus that Hydro One must discharge to show no harm. SEC seems to be proposing a new standard of review for MAADs application. SEC asserts this because its intention appears to be the pursuit of a broad range of inquiry that is tangential to the Orillia transaction."*

SEC said nothing of the sort.

SEC said that, because the Board does not normally decide cases based on onus, SEC would ignore that aspect of the evidentiary record in making submissions on issues to be dealt with in an oral hearing. This is, in fact, to the benefit of Hydro One, since excluding issues of onus can only benefit the Applicant, on whom the onus falls.

In the alternative, Hydro One may be asserting that it has already proved its case, and met its onus, on certain aspects of the current application. If it believes that to be true, it should so state in writing (well in advance of the hearing), together with a detailed list of all aspects of the case on which it claims it has "already won".

5. Hydro One says:

> *"In arguing that the OEB should not constrain the scope of the hearing, it is apparent that SEC's strategy is to try to turn the current proceeding into a broad general inquiry on all past, present and future consolidation transactions by Hydro One in an effort to promote the adjudication of any transaction Hydro One has or will undertake. SEC wants to dwell on transactions that have occurred in the past and ask questions about "the 70+ previous acquisitions"*

> *made by Hydro One (which implicitly refers to transactions going back almost 20 years), which are also not relevant to the current proceeding. None of these relate to the current transaction or the current proposal."*

SEC has two comments on this, other than those set forth above.

First, it is well accepted that similar fact evidence is relevant if an adjudicator is trying to determine past or future behaviour of a person as a matter of fact. If a person (such as a utility) has done something bad in the past (e.g. harmed customers), then it is relevant to the current adjudicator to assess whether the same conditions as those that may have caused the previous harm are present in the current case. To refuse to consider that would be an error of law but, more important, poor adjudicative policy.

Second, SEC does not propose to re-litigate those previous 70+ cases. Those customers have already been harmed. They cannot be saved, no matter what happens in the current case. SEC has already told the hundreds of affected schools that there is no short term solution to their bad situation. What is done is done. They have been harmed, and the regulatory process has no tools to fix that.

While the decision in this case may tangentially benefit the customers in Norfolk, Haldimand and Woodstock (whose new rates have not been set, and therefore may be influenced by the Board's re-assessment of the proposal the Board already rejected once for them), this case is fundamentally about Orillia and Peterborough customers. They are the ones that have not yet been harmed by Hydro One.

6. Hydro One says:

> *"As noted below, in EB-2013-0187 the OEB found that it would not require Hydro One to respond to inquiries related to Hydro One's past acquisitions and mergers."*

The Board also said, in EB-2013-0187, that Hydro One would not harm the acquired customers. Then, in EB-2017-0049, the Board saw that Hydro One would in fact harm those customers, and stepped in to stop Hydro One from doing so. This five-year-old decision of the Board that Hydro One's behaviour to past customers is not relevant, aside from not being binding on this Board panel as a matter of law, has clearly been superseded by the Board's decision in EB-2017-0049.

7. Hydro One says:

> *"Hydro One also notes that SEC's submission also made various assertions relating to credibility of the Applicants' and the respective witnesses' credibility. SEC's submission does the Applicants' witnesses a disservice. The Applicants' witnesses are professional people doing their best to fulfill their obligations to the OEB and the OEB's process. They have been forthright in their testimony and done their best to respond fully and properly to the many questions posed to them in the Technical Conference. SEC may not agree with the positions of the Applicants or like the responses received since they may not advance SEC's ultimate objective, but there is nothing about the testimony of the*

> *witnesses that justifies SEC's view that the credibility of the witnesses is or should be in question."*

This is an unusual submission, in two ways.

First, SEC has been publicly and loudly vocal for more than a decade on the fact that the main benefit utility witnesses have is that, in almost every case, they are honest professionals just trying to tell the truth. SEC counsel have for years emphasized that in their annual presentations for the OEB's summer distribution applications seminar: *"This is your big advantage. Everybody trusts you, including your customers and their representatives. Don't lose this advantage through spin, or tactics."*

Second, as a matter of well accepted law one of the purposes of an oral hearing is for the adjudicators to assess witness credibility. SEC has never seen any party – utility, intervenor, or OEB Staff – argue that their witnesses are immune from challenges to their credibility. That is not the law, and the Applicants know that full well.

SEC in fact intends to challenge the credibility of certain Hydro One witnesses. SEC intends to demonstrate that, perhaps in their desire to support approval of the transactions in this proceeding and be good corporate employees, some witnesses have withheld information from this Board panel, and have presented information with spin, and have deliberately used carefully chosen words, all of which have the effect of misleading the Board.

Any suggestion by the Applicants that SEC cannot challenge the credibility of their witnesses is wrong and contrary to law. Hold us to a high standard, certainly, just as we would ourselves, but don't purport to take witness credibility out of scope.

General Submission

There are only two possible reasons for the Applicant's submission of November 25th.

First, it could simply be a continuation of their strategy of limiting the information the Board has before it in considering the Hydro One applications. SEC has discussed this in its November 4th letter (page 3), and continues to believe that this is Hydro One's core strategy: "Don't look over here. This information is not interesting."

If that is the case, the Board should reject this in the strongest possible terms. The tendency of some applicants (not just Hydro One in these specific cases), who already have an information asymmetry, to limit the information the Board sees should be vigorously rejected.

Second, it could be more tactical. When SEC received the Applicant's letter of November 25th, it was already engaged in what was expected to be a solid week (and perhaps weekend) preparing for a hearing of two matters over three days. SEC was already hampered by not knowing what witness panels will be presented by the Applicants. Raising issues of scope hampers preparation a lot more. How do you prepare cross-examination materials, and a hearing plan, and a cross-examination script, if you don't even know the scope of the hearing?

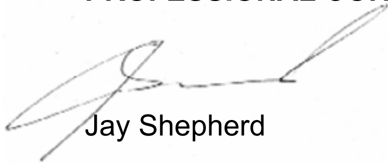
SEC therefore makes two requests of the Board in this regard:

1. Please require Hydro One, Orillia and Peterborough to provide details of the composition of their witness panels, together with the evidence for which each witness panel will be responsible, no later than November 26, 2019.

2. If the Board does not make a definitive decision on scope of the hearing, or if the Applicants do not provide their detailed witness panel information, by November 26th, please delay the hearing for one week, to December 9-11, to allow intervenors a reasonable time to prepare for what will likely be a complicated hearing.

All of which is respectfully submitted.

Yours very truly,
SHEPHERD RUBENSTEIN
PROFESSIONAL CORPORATION



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties