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December 22, 2016

Delivered by Email & RESS

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Board File No. EB-2016-0276
Hydro One Networks Inc. MAAD Application to purchase the shares of
Orillia Power Corporation**

We are counsel to the City of Orillia (Orillia) in the above noted matter.

Mr. Makuch requested intervenor status in this proceeding as counsel to Mr. Kehoe in his individual capacity, and to the Orillia Water Light and Power Commission (the Commission). Mr. Makuch asserts that Mr. Kehoe is the vice-chair of the Commission.

Orillia did not object to the granting of intervenor status to Mr. Kehoe as an individual. Orillia did object, however, to the granting of intervenor status to the Commission. Contrary to Mr. Makuch's assertions regarding the status of the Commission and the ownership of the Orillia Power electricity distribution system, the Commission has not existed since it was dissolved by By-law 2000-146 over 16 years ago. More particularly, there has not been a Commission, and Mr. Kehoe has not been its vice-chair, since prior to November 1, 2000.

In Procedural Order No.1, issued on December 12, 2016, the Board directed Mr. Makuch to "file with the OEB any evidence relevant to the existence of the Orillia Water Light and Power Commission, including evidence relevant to the validity of By-Law 2000-146 of the City of Orillia dated October 16, 2000" by December 19, 2016 (that was extended to December 22, 2016 by Procedural Order No. 2). The Board advised that "Once that evidence has been filed, the OEB will determine if it has sufficient information on which to decide whether or not to grant the intervention request or whether further information or process is required."

We received a submission from Mr. Makuch on December 19th that includes extracts from what purports to be an opinion prepared by another solicitor, Mr. W.D. Russell, two years before the enactment of the *Electricity Act, 1998* (Electricity Act) and four years before the dissolution of the Commission. We have received interrogatories, but no further submissions, from Mr. Makuch since the 19th, notwithstanding the extension of the deadline to today's date. From the brief extracts provided by Mr. Makuch, Mr. Russell appears to discuss the requirements for the dissolution of the Commission. This is done, however, with no regard for the provisions of the Electricity Act and the legislative regime surrounding electricity restructuring in Ontario. The

Russell extracts predate the Electricity Act by a number of years. However, the balance of the Makuch submission also ignores the Electricity Act and the restructuring of electricity distribution in Ontario in the later 1990s. For example, among other matters:

- Mr. Makuch has ignored the fact that the Electricity Act prohibits the generation, transmission, distribution or retailing of electricity, directly or indirectly, by a municipal corporation except through a corporation incorporated under the *Business Corporations Act* pursuant to section 142 of the Electricity Act; and
- he has ignored section 145 of the Electricity Act in its entirety. That section deals with transfers of employees, assets, liabilities, rights and obligations of the municipal corporation, or of a commission or other body through which the municipal corporation generates, transmits, distributes or retails electricity, to a corporation incorporated pursuant to section 142 for a purpose associated with the generation, transmission, distribution or retailing of electricity by the corporation incorporated pursuant to section 142. Subsections 142(3) – (5) provide that:
 - (3) “A transfer by-law is binding on the transferee, the transferor and all other persons.
 - (4) Subsection (3) applies despite any general or special Act or any rule of law, including an Act or rule of law that requires notice or registration of transfers.
 - (5) A transfer by-law does not require the consent of the transferor, the transferee or any other person.

In short, Mr. Makuch has presented no evidence to support the assertion that the Commission exists, and no evidence to support his assertions regarding the ownership of the Orillia Power distribution system. The Commission was validly dissolved and the assets were validly transferred over 16 years ago.

We acknowledge that the Board intends to determine if it has sufficient information on which to decide whether or not to grant the intervention request or whether further information or process is required. We do not wish to assume that the Board will provide for reply submissions from the Applicants, but Orillia respectfully submits that the assertions being made by Mr. Makuch demand a response, and Orillia is concerned that if this matter is not addressed and the Commission’s intervention request is not disposed of promptly, Orillia will be forced to incur additional time, resources and costs if it is required to respond to interrogatories from the Commission. Accordingly, Orillia has prepared the attached reply submission for the Board’s consideration. We ask that it be accepted by the Board.

Yours truly,

BORDEN LADNER GERVAIS LLP



J. Mark Rodger
Incorporated Partner*
*Mark Rodger Professional Corporation

Encl.

Copy to: Gayle Jackson, City of Orillia

**Hydro One Inc.
Orillia Power Distribution Corporation
Hydro One Networks Inc.**

**Application for approval to purchase Orillia Power
Distribution Corporation**

**City of Orillia Response to Stanley Makuch Submission of December 19, 2016
regarding the Orillia Light Water and Power Commission**

Delivered December 22, 2016

This is the response of the City of Orillia (Orillia) to the submission of Mr. Makuch regarding the status of the Orillia Light Water and Power Commission (Commission).

Overview

Mr. Makuch's submission is untenable at law, as it ignores the provisions of the *Electricity Act, 1998 (Act)*, which required Orillia to cause a corporation to be created for the purpose of carrying on electricity-related activities including electricity distribution (s.142 Corporation). Those provisions expressly prohibited the former Commission from carrying on any electricity activities after November 7, 2000, and expressly authorized Orillia to make by-laws transferring the employees, assets, liabilities, rights and obligations of the Commission to the s.142 Corporation (transfer by-law), despite any general or special Act or any rule of law, and without the consent of any person.

The *Electricity Act, 1998*

On November 7, 1998, section 142 of the *Act* came into force. It required Orillia (and all other municipal corporations that generated, transmitted, distributed or retailed electricity, directly or indirectly) to incorporate a s.142 Corporation for the purpose of those activities, no later than November 7, 2000. Section 141 of the *Act* clearly established that Orillia was required to pass a transfer by-law wherein the transferor was the Commission and the transferee was the s.142 Corporation.

Notably, section 144 of the *Act* expressly prohibited Orillia from carrying on electricity activities through the Commission after November 7, 2000:

144. After the second anniversary of the day section 142 comes into force, a municipal corporation shall not generate, transmit, distribute or retail electricity, directly or indirectly, except through a corporation incorporated under the *Business Corporations Act* pursuant to section 142.

141. (2) For the purposes of this Part, a municipal corporation generates, transmits, distributes or retails electricity indirectly if it carries on any of those activities through,

(a) a commission established under the Public Utilities Act or any other general or special Act. [emphasis added]

Pursuant to s.39 of the *Public Utilities Act*, the Commission was deemed to be a commission established under Part III of that Act, such that it was captured by s. 141 of the *Act*. Section 145 of the *Act* provided that Orillia was permitted to make a transfer by-law in order to comply with its obligations under ss. 142 and 144 of the *Act*. Orillia duly passed By-law Nos. 2000-144 and 2000-146 in accordance with the relevant provisions of the *Act*.

No Referendum Required

Section 145 of the *Act* expressly provides that a transfer by-law is binding on the Commission despite any other statute or rule of law, and that Orillia was not required to obtain the consent of any person in order to pass the transfer by-law:

145. (3) A transfer by-law is binding on the transferee, the transferor [the Commission as defined in s.141(1) of the *Act*] and all other persons.

(4) Subsection (3) applies despite any general or special Act or any rule of law, including an Act or rule of law that requires notice or registration of transfers.

(5) A transfer by-law does not require the consent of the transferor, the transferee or any other person. [emphasis added]

These provisions are a complete answer to the arguments made in Mr. Makuch's submission. Each of those arguments is addressed in greater detail below.

First, Mr. Makuch's submission is founded on excerpts of a legal opinion which purports to state a general rule of law. For the reasons set out below, these excerpts do not support Mr. Makuch's position, especially because the opinion in question was prepared in 1996, two years before the relevant provisions of the *Electricity Act* came into force. The excerpts are also unreliable in that they have been taken out of context and no information has been provided as to the reason the opinion was sought or provided.

Second, Mr. Makuch purports to rely on the provisions of the *Public Utilities Act*, while maintaining that it does not apply to the Commission. These positions are inherently contradictory and both cannot be maintained.

Firstly, if the *Public Utilities Act* does apply, Mr. Makuch has acknowledged that it was amended to remove the statutory requirement for a referendum before the dissolution of the Commission. However, even if there were such a statutory requirement, the transfer by-law would be valid nonetheless, pursuant to s.145(4) and (5) of the *Act*.

Secondly, s.156 of the *Act* provides additional certainty that the transfer to the s.142 Corporation does not violate the *Public Utilities Act*.

156. (1) A transfer by or pursuant to a transfer by-law,

(a) shall be deemed not to constitute,

[...]

(ii) a breach of any Act, regulation or municipal by-law [...]; and

(d) shall be deemed not to give rise to any estoppel. [emphasis added]

If the *Public Utilities Act* does not apply, any "general rule of law" requiring a referendum is also trumped by the express provisions of the *Act*. Even if such a rule of law exists, the transfer by-law required by the *Act* is clearly binding despite any rule of law (s. 145(4)).

Thirdly, Mr. Makuch's argument with respect to the purposes of the Commission is of no consequence, given that the *Act* clearly applies to the Commission and the requirement for Orillia to cease electricity activities through the Commission (see s.141 set out above).

Finally, it is clear that the requirements of the *Act* rendered the existence of the Commission moot. Section 158 granted Orillia the power to include provisions in the by-law that were considered "necessary or advisable" in connection with the required transfer. It is respectfully submitted that this would include the repeal of the by-law that created the Commission and that the Commission ceased to exist. Section 158 of the *Act* provides as follows:

A transfer by-law may contain provisions dealing with other matters not specifically referred to in this Part that the municipal council considers necessary or advisable in connection with a transfer.

For the foregoing reasons, it is Orillia's position that the Commission has been validly dissolved and no longer exists.

For the foregoing reasons, and those set out in our letter dated November 21, 2016, Orillia respectfully submits that there is no basis to grant intervenor status to the Commission, and that an oral hearing is unnecessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



J. Mark Rodger

December 22, 2016