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NON-CONFIDENTIAL

BY RESS and EMAIL

January 20, 2011
Our File No. 20100142

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2010-0142 – Toronto Hydro 2011 Rates

We are counsel for the School Energy Coalition. Pursuant to Procedural Orders #4 and #6, these are SEC's submissions with respect to the claim for confidentiality of the supplier contract and the Business Plan. These documents were requested from the Applicant on January 7th, but were only provided to SEC today. Thus, these submissions are being filed as soon as possible after receipt of the relevant material.

Although we do not believe this letter contains any confidential material, we are providing it to the Board and to the Applicant only, until such time as the Board confirms that nothing in this letter should be treated as confidential. For that reason, it has not been filed on RESS, and it has been marked Confidential above.

Supplier Contract

SEC requested the supplier contracts – of which one sample was provided – in order to review and identify specific potential concerns in those documents. We have reviewed the one provided, including Appendices A and B, and have determined that it uses a standard

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commercial form, and we have not seen in it any of the contractual provisions of which we were concerned. While other parties may, of course, have use for it in the hearing process, we have concluded, having reviewed it, that we do not. Aside from Schedule C, it does not appear to have any confidential information in it that we can identify.

With respect to Schedule C to that document, it contains considerably more detail than we had expected. That detail does not relate to the initial reasons for our request (see above).

However, we have noted that some of the price and ratio figures in this document are directly comparable (although at different dollar and percentage amounts) to figures the Applicant uses for internal purposes. Therefore, it may be useful to the Board to have those market-related prices and ratios as a reference point in considering the reasonableness of some of the Applicant's proposed OM&A calculations.

Given that Schedule C is obviously highly confidential, but still has potential value for the Board, we believe that limiting its circulation as proposed by the Applicant is appropriate.

Business Plan

The Business Plan is quite different. The Applicant's rationale for confidentiality appears to be twofold:

- First, the Business Plan includes information relating to unregulated activities of the Applicant's corporate group.
- Second, the Business Plan contains forward-looking statements that have not been publicly disclosed, and therefore Ontario securities laws require that it be kept confidential.

We start from the premise that the Board, consistent with its longstanding policy, wishes to ensure that all, or as much as possible, of any evidence in a proceeding before it will be publicly available. One of the key mandates of the Board is transparency, and every piece of "secret" information on which its decisions are based erodes that transparency. Thus, the heavy onus is on the Applicant to demonstrate, not that it is convenient for a document to be confidential, but that it is necessary, and there is no way around it. This, in our view, correctly characterizes the Board's consistent policy with respect to making information publicly available.

On the first of the Applicant's rationales provided, it is submitted that the "unregulated activities" are in fact an immaterial part of the document and the information contained in it. As a practical matter, the current and forecast revenues from unregulated activities, as disclosed on page 69, are less than 1% of the total revenues of the corporate group. Further, the unregulated activities are ones that the Applicant and its parent publicly acknowledge, so there is nothing here that needs to be confidential.

More important than that, the actual references to unregulated activities are very few, and therefore could be redacted. For example, all pages up to page 48 are 100% related to the utility, and in fact many of them are headed up "Modernize our Utility". The others are mostly headed up "Focus on Customer Service", also an obvious reference to utility operations. Pages 50 to 60, while nominally about the parent company, are actually entirely about the impacts of the regulated activities of the Applicant. The only reference to unregulated activities is one bullet on page 54. Pages 61-66 are about the scorecard, and do not relate to unregulated activities. Page 69 and page 83 have three lines relating to unregulated activities. Page 70 contains one "unregulated" bullet, but none of the information in it is in fact confidential. Pages 72, 73 and 81 contain a small amount of information on unregulated activities, but it is not significant. The rest of pages 67 through 84 contain nothing relating to unregulated activities.

While in our view virtually everything that is included relating to unregulated activities is non-sensitive and could be made public, the small number of redactions required would not make the document unusable. Therefore, if the Board does not agree that all information can be public, the filing of a redacted version with the unregulated data removed, and confidential treatment for the unredacted version, is a reasonable alternative. Making it all secret because of small amounts of unregulated information is not, in our view, appropriate.

By way of example, we would expect that some parties will want to explore with the Applicant the meaning of the first bullet on page 27, and how that has affected the presentation of the Application and characterization of specific expenditures. That discussion, in our view, should be done in public. This is precisely the transparency that the Board delivers, and should deliver.

Similarly, the political issues raised by the Applicant on page 23 beg the question of the amounts included in the test year budget to pursue those issues. That, again, is a discussion that is properly public. The Applicant's ratepayers have a right to know this stuff.

We could go on with numerous similar examples. The point is a simple one. 99% of the use of this document in this proceeding can be public, supporting the Board's policy of transparency. This can be achieved with a small number of relatively insignificant redactions, or by simply leaving the information on regulated activities in the public document.

The Applicant's second point relates to forward-looking information. Leaving aside the Pro Forma Financial Statements to 2015, on pages 85-88, we have the following comments:

1. In general, we believe that the claim by the Applicant of securities law obligations is incorrect. The Applicant is a regulated entity that has its rates set on a forward test year basis. It is a requirement of that regulatory process that forward-looking information be made public, and that is regularly done. There is nothing in the information in this Business Plan that is different from information that is filed in a normal rate case. Unless the Applicant is claiming that all information in every rate case relating to the Test Year and

beyond is confidential, the argument that in a forward test year rate case this particular forward-looking information cannot be provided is, at a general level, simply untenable.

2. The document, on page 2, contains the standard disclaimer used in press releases and similar documents that contain forward-looking information. If the document is confidential due to securities laws, why does it need the disclaimer?

3. The Ontario Securities Act and related regulations and policies require, not that forward-looking information be kept confidential, but rather that it be readily available and disseminated to everyone, so that market participants do not have information advantages over each other due to preferential access to forecasts, etc. Making information such as this public through the Board's website provides all market players with exactly equal access to the information. In the event that the Applicant is concerned that some market participants will not look at the Board's website (which would be surprising if they are investing in the debt of a regulated utility), the Applicant can file a disclosure document with the OSC pointing market participants to the OEB website.

SEC is very concerned that utilities appear to be seeking increased confidentiality based on material having forward-looking information. This is not, in our view, the law in Ontario, and we believe that if the Board is considering acceding to the requests of this Applicant, and others, in this regard, it should invite parties to present their legal arguments with respect to the securities law limitations on rate case disclosures. We believe the Board would conclude that this rationale for confidentiality is unfounded.

Our comments are different with respect to pages 85 through 88 of the Business Plan, the Pro Forma Financial Statements. This is very useful information from a regulatory point of view, but it is unusual and, particularly with respect to the ratios and interest coverage forecasts, potentially of significant interest to the Applicant's current and potential debt-holders. We agree that this is not like the rest of the Business Plan, and not like normal regulatory information.

The best approach to these four pages, in our view, would be for the Applicant to file these four pages, along with the appropriate disclaimer, with the securities regulator, attached to a press release saying this information was filed with the Ontario Energy Board and is publicly available. No-one would be prejudiced, and all of the Board's activities could be fully transparent.

If the Board does not agree with that solution, then in our submission these four pages should be given confidential status, then excluded from the redacted version of the document, but included in the unredacted version.

Conclusion

Based in the foregoing, it is our submission that

- Schedule C to the supplier contract should be given confidential status in full, with the special limitation proposed by the Applicant.

- The Business Plan should not be treated as confidential. The one part that is sensitive, pages 85-88, should be filed in the appropriate manner with the Ontario Securities Commission so that it can be a public document in this proceeding. In the alternative, it is submitted that the document should be confidential, but that a non-confidential version should be prepared with the limited redactions we have proposed.

All of which is respectfully submitted.

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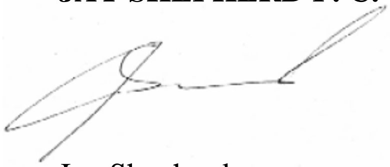
Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested parties (email)