



EB-2010-0142

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Toronto
Hydro-Electric System Limited for an order approving
just and reasonable rates and other charges for
electricity distribution to be effective May 1, 2011.

BEFORE: Ken Quesnelle
Presiding Member

Marika Hare
Member

Karen Taylor
Member

DECISION AND ORDER ON CONFIDENTIALITY ISSUES

Toronto Hydro-Electric System Limited ("Toronto Hydro") filed an application, dated August 23, 2010, with the Ontario Energy Board under section 78 of the *Ontario Energy Board Act, S.O. 1998, c.15, Schedule B*, seeking approval for changes to the rates that Toronto Hydro charges for electricity distribution, to be effective May 1, 2011.

The Board in the present Decision makes determinations on two matters of confidentiality that have arisen in this proceeding. These are (i) confidentiality issues raised by Toronto Hydro in its letters of December 20, 2010, December 23, 2010 and January 6, 2011 and (ii) confidentiality issues raised by Toronto Hydro in its response to

the Smart Sub-metering Working Group (“SSMWG”) interrogatory #8 of January 7, 2011 and its letter of January 20, 2011.

(i) Confidentiality issues raised by Toronto Hydro in its letters of December 20, 2010, December 23, 2010 and January 6, 2011

Background

On December 20, 2010 Toronto Hydro filed updates to some of its interrogatory responses, including both corrections and additional documents. Toronto Hydro stated that it was providing the following additional documents in accordance with the Board’s *Rules of Practice and Procedure* and its *Practice Direction on Confidential Filings* (the “Practice Direction”):

- Toronto Hydro Corporation’s Business Plan 2011-2015 (the “Business Plan”) – referenced in Consumers Council of Canada 1, School Energy Coalition 6 and 37 part d), and Vulnerable Energy Consumers Coalition 5 part c);
- Redacted contract (the “Contract”) – referenced in response to School Energy Coalition 37 part f). Toronto Hydro noted that one representative contract was provided.

On December 23, 2010, Toronto Hydro filed a further letter related to this matter which provided the reasons why it was requesting confidential treatment of the above-referenced documents.

On January 6, 2011, Toronto Hydro filed with the Board an un-redacted version of Schedule C of the Contract. In so doing, Toronto Hydro stated that it wished to stress and underscore that the pricing information contained therein was highly commercially sensitive information and contractors who bid on Toronto Hydro work rely on its representations that such information will be received and kept in confidence. Toronto Hydro further stated that disclosure of the pricing information would reasonably be expected to prejudice the competitive positions and financial interests of both Toronto Hydro and its contractors by revealing prices that could be exploited by competitors. Accordingly, Toronto Hydro urged the Board to accept that the commercially sensitive pricing information contained in Schedule C be determined to be confidential and that any disclosure of this information be strictly limited to counsel who will execute the Board’s Declaration and Undertaking.

On January 12, 2011, the Board issued its Decision on Confidentiality and Procedural Order No. 4 (the “Confidentiality Decision”) which dealt, among other matters, with confidentiality issues raised by Toronto Hydro. The Board found that it would accept Toronto Hydro’s confidentiality claim regarding the Business Plan for the reasons outlined in the Confidentiality Decision. The Board also has established a process for the consideration of the confidentiality claims related to the Contract.

On January 12, 2011, the School Energy Coalition (“SEC”), an intervenor in the proceeding, filed a letter with the Board, which stated that SEC was bringing to the Board’s attention facts related to the Confidentiality Decision that were not referred to in the Confidentiality Decision and therefore may not have been known to the Board Panel at the time it made the Confidentiality Decision.

SEC submitted that in light of the additional facts referred to in its letter, none of which were referenced in the Confidentiality Decision, the practical effect of the Confidentiality Decision was that the Board had decided a material issue having given Toronto Hydro an opportunity to make submissions, but denying intervenors who actively sought to make submissions the same right. SEC submitted that this was contrary to the Board’s consistent practice of applying the principle *audi alteram partem* to matters before it.

On January 18, 2011, the Board issued Procedural Order No. 6 in which the Board stated that its Decision on Confidentiality and Procedural Order No. 4 had been based on the assumption that Toronto Hydro’s letter of December 23, 2010 had been distributed to all parties in the proceeding. However, SEC had stated in a January 12, 2011 letter to the Board that these submissions did not appear to have been copied to parties, or at least not to SEC. Procedural Order No. 6, accordingly, established a process allowing parties that wished to do so the opportunity to make submissions on the confidentiality issues related to the Business Plan.

The Board received submissions on these matters from Powerline Plus Limited (“Powerline”), Aecon Utilities, A division of Aecon Construction Group Inc.(“Aecon”), Entera Utility Contractors Co. Limited (“Entera”), and SEC. Toronto Hydro filed a reply submission.

The submissions of Powerline, Aecon and Entera all supported the position of Toronto Hydro regarding the confidentiality issues related to Schedule C of the contract arguing that the disclosure of this type of information would be prejudicial to both Toronto Hydro

and its suppliers. SEC agreed that limiting the circulation of Schedule C, as proposed by the Applicant, was appropriate.

SEC, however, took the position that the Business Plan represented a quite different situation. SEC noted that Toronto Hydro's rationale for confidentiality appeared to be twofold: (1) the Business Plan includes information relating to unregulated activities of the Applicant's corporate group, and (2) the Business Plan contains forward-looking statements that have not been publicly disclosed, and therefore Ontario securities law requires that it be kept confidential.

SEC argued that with respect to the information relating to unregulated activities of the Applicant's corporate group, these activities are in fact an immaterial part of the document and the information contained in it. SEC took the view that while 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. As such, SEC argued that if the Board did not agree that all information of this kind can be public, the filing of a redacted version with the unregulated data removed, and confidential treatment for the unredacted version would be a reasonable alternative.

SEC stated that with respect to the forward-looking statements, 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. SEC submitted that making information such as this public through the Board's website provides all market players with exactly equal access to the information.

SEC expressed the concern that utilities appear to be seeking increased confidentiality based on material having forward-looking information. SEC submitted that this was not the law in Ontario and that if the Board was considering acceding to the requests of Toronto Hydro 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. SEC argued that the Board would conclude that this rationale for confidentiality is unfounded.

SEC stated that its comments were different with respect to pages 85 through 88 of the Business Plan, the Pro Forma Financial Statements, which in its view was not like the

rest of the Business Plan and not like normal regulatory information. SEC noted that this was very useful information from a regulatory point of view, but unusual, and particularly with respect to the ratios and interest coverage forecast, potentially of significant interest to Toronto Hydro's current and potential debt-holders.

SEC submitted that the best approach to these four pages would be for Toronto Hydro to file them, along with the appropriate disclaimer with the securities regulator, attached to a press release stating that this information was filed with the Board and is publicly available. SEC argued that no one would be prejudiced and all of the Board's activities could be fully transparent. SEC further submitted that if the Board was not in agreement with this proposed solution, the four pages in question should be given confidentiality status and excluded from the redacted version, but included in the unredacted version.

Toronto Hydro submitted that with respect to the Business Plan, the Board's past practice in respect of this type of information should guide and inform the Board's treatment of the Business Plan in the present proceeding. The past practice was that this type of document met in its entirety, the Board's criteria for confidential treatment.

Board Findings

The Board notes that no parties opposed Toronto Hydro's proposal with respect to the confidentiality issues raised by the Contract. The Board approves Toronto Hydro's proposal with respect to the Contract.

With respect to the Business Plan, the Board finds that it will remain confidential. While the Board is interested in having as much information as possible on the public record, the Board relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed. The Board recognizes that some of that information, such as business plans, are of a confidential nature and should be protected as such. The Board also agrees with Toronto Hydro that the Board has previously held business plans to be confidential. As such, Toronto Hydro had a reasonable expectation that this document would be maintained as confidential.

Depending on whether and to what extent elements of the Business Plan become critical to this proceeding, the Board may deem it necessary to seek further submissions regarding whether any elements of the Business Plan may appropriately go on the public record, but at this stage the document shall remain confidential in its entirety.

(ii) Confidentiality issues raised by Toronto Hydro in its response to SSMWG interrogatory #8 and letter of January 20, 2011

Background

On January 20, 2011, Toronto Hydro filed a letter with the Board which noted that on January 7, 2011, it had filed a prior letter with the Board, along with responses to SSMWG and Vulnerable Energy Consumers Coalition (“VECC”) interrogatories. SSMWG interrogatory #8 asked that Toronto Hydro provide, subject to confidentiality, detailed meter costs for the Quadlogic meter. Toronto Hydro noted that it had stated in its January 7, 2011 letter that it intended to provide the requested information pursuant to the Board’s *Practice Direction on Confidential Filings*.

Toronto Hydro indicated that with its January 20, 2011 letter it was including an additional envelope marked “confidential” which contained the requested Quadlogic systems costs.

Toronto Hydro asked the Board to limit disclosure of this information to counsel who execute the Board’s Declaration and Undertaking, given the highly commercially sensitive nature of the information requested. Toronto Hydro stated that its suppliers have the right to have their commercially sensitive pricing information protected.

Toronto Hydro further stated that to disclose unit pricing, capital cost and installation cost per suite for Quadlogic equipment to anyone who signs the Declaration and Undertaking runs the risk of disclosing sensitive pricing information to direct competitors of its suppliers. Toronto Hydro also noted that in this proceeding, the Board has received submissions from other of its suppliers, such as PowerlinePlus Ltd., Aecon and Entera Utility Contractors which underscored the commercially sensitive nature of pricing. Toronto Hydro submitted that the same arguments applied to the suppliers of Quadlogic equipment as well.

On January 21, 2011, the Board issued Procedural Order No. 7 which requested submissions from parties on these matters.

The Board received no submissions from registered intervenors in this proceeding related to Toronto Hydro’s confidentiality claims regarding this interrogatory response. The Board did receive a submission from Trilliant Energy Services (“Trilliant”), which is

not a registered intervenor. Trilliant stated that it was a supplier of products and services to Toronto Hydro and asked that the Board accept its submission. The Board will accept this submission. Trilliant supported Toronto Hydro's requests.

Board Findings

The Board notes that no parties opposed Toronto Hydro's request regarding the confidential treatment of its response to SSMWG #8. The Board approves this request.

THE BOARD ORDERS THAT:

1. Toronto Hydro's request for confidential treatment of the following material filed in this proceeding is granted:

Toronto Hydro Corporation's Business Plan 2011-2015.

Contract – provided in response to SEC interrogatory # 37 part f).

Quadlogic systems costs provided in response to SSMWG interrogatory #8 dated January 7, 2011, as referenced in Toronto Hydro's letter of January 20, 2011.

2. Toronto Hydro's request that access to the following material be strictly limited to counsel who will execute the Board's Declaration and Undertaking is granted:

Schedule C of the contract.

Quadlogic systems costs provided in response to SSMWG interrogatory #8 dated January 7, 2011, as referenced in Toronto Hydro's letter of January 20, 2011.

3. Toronto Hydro shall provide all unredacted confidential materials to all parties that have executed a Declaration and Undertaking pursuant to the Board's Practice Direction on Confidential Filings, if it has not done so already. Where possible, parties shall frame cross examination questions related to the

confidential material in a manner that will allow the questions and responses to be placed on the public record.

4. To the extent possible, parties shall frame submissions related to the confidential material in a manner that will allow the submissions to be placed on the public record. If parties are not able to frame submissions in a manner that allows them to be placed on the public record, those submissions must be marked confidential.

5. Parties in receipt of confidential information shall, in accordance with the signed Declaration and Undertaking, either return the subject information to the Board and communicate to the Applicant that they have done so, or destroy the information and execute a Certificate of Destruction, following the closing of the record to this proceeding. The Certificate must be filed with the Board and a copy sent to the Applicant.

ISSUED at Toronto, February 7, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary