



EB-2009-0332

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 Horizon
Utilities Corporation for an order approving the recovery of
certain amounts related to an unforeseen loss of revenue
to be effective January 1, 2010.

DECISION AND ORDER ON CONFIDENTIALITY ISSUES

Horizon Utilities Corporation (“Horizon,” or the “Applicant”) filed an application with the Ontario Energy Board (the “Board”) on September 3, 2009 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for the recovery of certain amounts related to an unforeseen loss of revenue from one of its Large Use customers (the “Subject Customer”), to be effective January 1, 2010.

The Board issued a Notice of Application and Hearing on September 29, 2009.

On October 23, 2009, the Board issued Procedural Order No. 1 granting the Consumers Council of Canada (“CCC”), Energy Probe, School Energy Coalition (“SEC”), Vulnerable Energy Consumers Coalition (“VECC”), and U.S. Steel Canada Inc. (“U.S. Steel Canada”) intervenor and cost eligibility status. Procedural Order No. 1 also established dates for the filing of interrogatories and responses to those interrogatories.

On November 5, 2009, the Board issued Procedural Order No. 2 clarifying that although U.S. Steel Canada had been granted intervenor status, it had not been granted eligibility for cost awards.

On November 27, 2009, the Board issued Procedural Order No. 3, granting Horizon's request for an extension for filing responses to the interrogatories from November 26, 2009 to December 1, 2009, and seeking submissions from parties by December 10, 2009 regarding the need for an oral hearing in this proceeding.

On December 1, 2009, Horizon filed its responses to the interrogatories. In so doing, it noted that it was filing certain responses in confidence, in accordance with the Board's *Practice Direction on Confidential Filings* (the "Practice Direction."), specifically:

Board Staff: #1; #2(a); #3; #4; #5; #6; #8(b); and 10(b) and (d)

CCC: #7

Energy Probe: #2(a)

SEC: #1; #4; #5; #14 and #15

U.S. Steel Canada: #4

VECC: #3(b) and (c); #4; #5(b); and #9

In accordance with section 5.1.5 of the Practice Direction, Horizon filed a cover letter requesting confidentiality which identified the interrogatory responses that were being filed in confidence, together with a description of the basis on which confidentiality was being claimed.

On December 17, 2009, the Board issued Notice of Hearing and Procedural Order No.4, which stated that, as an interim measure, the Board would allow any parties that wished to review the confidential documents to do so after signing a copy of the Board's Declaration and Undertaking, and filing it with the Board. The Board noted that a number of parties had already made submissions on whether or not the Board should ultimately treat the interrogatory responses as confidential in their responses to Procedural Order No. 3, but that parties who had not made such submissions, or wished to make additional submissions, could do so in accordance with the steps outlined in the Procedural Order. The Board stated that it would issue a decision on the confidentiality issues prior to the commencement of the oral hearing.

The Board further determined that it would hold a one-day oral hearing on this application on Thursday January 14, 2010.

On December 29, 2009, the Board received a letter from Horizon requesting a postponement in the date of the oral hearing to no earlier than January 28, 2010.

On January 5, 2010, the Board issued Procedural Order No. 5, which moved the date of the oral hearing to Thursday January 28, 2010, but left all other dates set out in Procedural Order No. 4 unchanged.

The Board received submissions on the confidentiality issues raised by Horizon from all intervenors in this proceeding as well as a reply submission from Horizon.

Board Findings

In making its findings in these matters, the Board is mindful of the framework within which all requests for confidential treatment must be assessed, set out in its Practice Direction:

The onus is on the person requesting confidential treatment to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case. It is also the expectation of the Board that parties will make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the commercial sensitivity of the information at issue or with any legislative obligations of confidentiality or non-disclosure, and to prepare meaningful redacted documents or summaries so as to maximize the information that is available on the public record. This will provide parties with a fair opportunity to present their cases and permit the Board to provide meaningful and well-documented reasons for its decisions.¹

The Board's general policy is that all records should be open for inspection by any person, reflecting the Board's view that its proceedings should be open, transparent and accessible. However, the Board recognizes that some of the information placed on the record in its processes may be of a confidential nature and should be protected as such. The Board's Decision in this matter seeks to strike the appropriate balance between the rights of parties involved in the proceeding to privacy for information which may result in specific direct harm to them if confidentiality is not maintained, and the rights of Horizon's ratepayers to have sufficient information to understand why the Board has made a decision which impacts the rates which they are paying.

Interrogatories for which no determination is required

In its January 6, 2010 reply submission, Horizon withdrew its request for confidential

¹ Practice Direction, page 6, Section 5.

treatment of its response to VECC#5b and placed this response on the public record. Accordingly, no determination is required by the Board on this confidentiality status of this interrogatory.

Interrogatories for which confidentiality will be maintained

The Board will uphold Horizon's request for confidential treatment of its responses to the following interrogatories in their entirety on the basis that they contain customer-specific information that is not already on the public record:

Board Staff: #2a, #3, #10d

SEC: #5, #14, #15

In making this finding, the Board notes the submission of U.S. Steel Canada that, in accordance with the principle of fair competition, it is inappropriate for any petitioner to provide, in the public domain, any information regarding any Large Use Customer, inclusive of the Subject Customer, that would not normally be publicly available. The Board is also mindful of intervenor concerns that the present application is entirely about the load reduction for the Subject Customer and the request for confidential treatment of the responses to some of these interrogatories effectively prevents the public from knowing most of the salient facts underlying any Board Decision. The Board is concerned with maintaining an appropriate balance between these two considerations. The Board notes that information about the Subject Customer has already been placed on the public record in Horizon's original application. However, the Board will maintain confidentiality related to customer specific information beyond that which is already on the public record as the Board believes that there is some risk that the disclosure of further information could produce specific direct harm to these customers.

Interrogatories for which confidentiality will be maintained in part

The Board will uphold Horizon's request for confidential treatment on portions of responses to the following interrogatories on the basis that the referenced portions of these responses contain customer specific information that is not already on the public record:

Board Staff: #6

VECC: #4

The response to Board Staff #6 will remain confidential with the exception of lines 12 to 15 of the response and the four lines of totals below Revised Table 3 which shall be placed on the public record.

The response to VECC #4 shall be placed on the public record with the exception of Updated Revised Table 3, which shall remain confidential save for the exception of the four lines of totals below the table.

Interrogatories for which confidentiality will not be maintained

The Board has determined that it will not grant confidential treatment to the following interrogatory responses:

Board Staff: #1; #4; #5; #8(b); and 10(b)

CCC: #7

Energy Probe: #2(a)

SEC: #1; #4

U.S. Steel Canada: #4

VECC: #3(b) and (c); and #9

The Board finds that Horizon's responses to Board Staff #1, #8b, and 10b, SEC #1 and #4 and VECC 3b and 3c, while containing information that relates to the Subject Customer, is either information that is already on the public record, or is related to clarifications of information already on the public record and accordingly does not meet the Board's confidentiality criteria. The Board finds that these responses are to be placed on the public record.

The Board notes that Horizon has made a request for confidential treatment of its responses to Board staff #4, #5, Energy Probe #2(a) and VECC #9 on the basis that these responses discuss Horizon's anticipated revenue deficiencies and the years in which Horizon will not reach its allowed return on equity due to the loss of revenue from the Subject Customer. Horizon stated that while an applicant may be required to publicly disclose information regarding such deficiencies in the context of a forward test year cost of service distribution rate application, such as the one it will file in 2011, an

applicant was not obligated to do so in an application such as this one. Horizon submitted that the public disclosure of its future oriented financial information, outside of the context of a forward test year cost of service application, could reasonably be expected to be prejudicial to Horizon's financial stakeholders including its shareholders, lenders, and rating agency, and this could cause undue economic loss and be injurious to Horizon.

The Board does not accept Horizon's submission that there is a distinction between the information which must be placed on the public record for a cost of service rate application and a non cost of service rate application, or that the difference in the type of rate application causes the disclosure of this type of information to be prejudicial to Horizon's financial stakeholders in one instance, but not the other. Both the present application by Horizon and a cost of service application seek a rate change, and in both cases, Horizon's ratepayers are entitled to information which will allow them to understand the basis for the applicant's proposal. Accordingly, these responses are to be placed on the public record.

Horizon's request for confidential treatment of its response to U.S. Steel Canada #4 is based on its response necessarily identifying the Subject Customer. The Board finds that the identity of the Subject Customer is evident, or can easily be determined from information already on the public record, and as such, cannot reasonably be expected to be maintained as confidential. In addition, the response to this interrogatory contains information that is already in the public domain. Appendix B of the Board's Practice Direction outlines considerations in determining requests for confidentiality and states that information that is in the public domain will not be considered confidential. Accordingly, this response is to be placed on the public record.

Horizon has requested confidential treatment for its response to CCC#7 on the basis that the deliberations of its Board of Directors should remain confidential. Horizon also noted that the material provided in response to the interrogatory includes information with respect to the Subject Customer and its public disclosure would necessarily identify the Subject Customer. In addition, Horizon submitted that as the Board of Directors of an *Ontario Business Corporations Act* corporation, its Board is under no obligation to

conduct its meetings in public and a requirement that it publicly disclose the information requested in this interrogatory would have the effect of opening its meetings and its deliberations to the public, contrary to principles of corporate law.

CCC submitted that there was nothing inherently confidential about the material that was submitted to Horizon's Board of Directors, discussed in this response.

The Board accepts this distinction. While the Board is in agreement with Horizon that the deliberations of its Board of Directors should remain confidential, it is of the view that the information presented to Horizon's Board of Directors is either information already available to the public as it is information taken from other applications Horizon made to this Board² or it is information about this application which clearly must be made public as it identifies the potential rate impact of the application. The Board has already found that the identity of the Subject Customer cannot be held as confidential. The Board finds that this response should be placed on the public record.

Horizon will have a period of five business days in which it may make a written request to the Board that the information be withdrawn³, which request the Board will consider promptly. Horizon may also, within a period of five business days, advise that it intends to appeal or seek a review of the decision to place the information on the public record⁴. If Horizon indicates that it intends to appeal, the Board will not place the information on the public record until the appeal or review has been concluded or the time for filing an appeal or review has expired without an appeal or review having been commenced. In the absence of an indication the Board will deal with the information in the manner set out in this Decision.

In order to protect the confidentiality of information specific to the Subject Customer, the Board will hold the January 28, 2010 oral hearing entirely *in camera* as per Section 6.2 of the Practice Direction. This approach has been supported by the Applicant and not challenged by any intervenor. However, upon completion of the oral hearing, the Board

² Smart Meter Funding Adder application, EB-2009-0158 and LRAM/SSM Rate Rider application, EB-2009-0192.

³ Practice Direction, Section 5.1.12

⁴ Practice Direction, Section 5.1.14. **Please note that while 5.1.12 gives the Board discretion to deny a request for a withdrawal, section 5.1.14, the appeal section, requires the Board wait for the appeal to be heard or the time for appeal to expire before the documents can appear on the public record.

will establish a process to determine which portions of the transcript can subsequently be made public on the basis of the approach to confidentiality issues in this proceeding outlined in this Decision.

THE BOARD ORDERS THAT:

1. Horizon's request for confidential treatment of its response to the following interrogatories is granted:

Board Staff: #2a, #3, #10d

SEC: #5, #14, #15

2. Horizon's request for confidential treatment of its response to Board staff #6 is granted with the exception of lines 12 to 15 of the response, and the four lines of totals below Revised Table 3 which shall be placed on the public record.

3. Horizon's request for confidential treatment of its response to VECC #4 is granted with respect to Updated Revised Table 3 save for the four lines of totals below the table.

4. Horizon's request for confidential treatment of its responses to the following interrogatories is denied:

Board Staff: #1; #4; #5; #8(b); and 10(b)

CCC: #7

Energy Probe: #2(a)

SEC: #1; #4

U.S. Steel Canada: #4

VECC: #3(b) and (c); and #9

5. The entirety of the oral hearing scheduled January 28, 2010 will be held *in camera*, and upon completion of the oral hearing, the Board will establish a process to determine which portions of the transcript can subsequently be made public on the basis of the approach to confidentiality issues in this proceeding outlined in this Decision.

ISSUED at Toronto, January 18, 2010

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary