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BY EMAIL and RESS

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Our File No. 20100008

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2010-0008 – CME and CCC Motions for Production

We are counsel for the School Energy Coalition. Pursuant to Procedural Orders #10 and #11, the following are the submissions of SEC with respect to the motions by CME and CCC to require production of certain evidence. As the issues are common to both, these submissions apply to both motions

These submissions deal with two issues. First, we discuss whether the material being sought is privileged. Second, we provide our recommendation to the Board as to how to deal with the claim of privilege procedurally.

We note that our submissions do not touch on whether the documents being sought are material to the issues before the Board. That appears to be self-evident, and it does not appear to us that materiality is in dispute.

Privilege

The claim being made by the Applicant in this case is a bit unusual. Usually the issue of document production in the Board's proceedings is centred around relevance and materiality, and, once those thresholds have been met, the question of confidentiality. Confidentiality has consistently been found by the Board not to be a reason to deny production, and in fact the Board's Practice Direction on Confidential Filings is entirely based on that concept. The Board

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sees confidentiality as resulting in protections on public disclosure, not denial of access by the parties or the Board.

Privilege is entirely different from confidentiality. The concept of privilege is driven by the need to allow parties to litigation to speak openly with their counsel about how they will conduct the litigation. If information is privileged, it cannot ever be disclosed to parties or the judge, because of its potential prejudicial effect. Thus, it is conceptually dissimilar from confidentiality. It is, instead, about protecting the integrity of the adversarial process.

From a technical point of view, we do not believe it is appropriate for privilege to apply, in the normal sense, in a proceeding before this Board. While rate applications sometimes in practice have indicia of an adversarial activity, they are in fact not litigation. Most of the time, the parties before the Board understand that, despite their different perspectives on the issues, they all have a common goal – assisting the Board to reach a decision of "just and reasonable rates". They are not supposed to be adversarial, and when – lawyers being lawyers – they go too far in that direction, the Board is careful to rein them in.

But, as is so often the case, this situation is not black and white. Even if it is inappropriate to apply privilege to Board proceedings as if they were litigation in court, the underlying reason for privilege – the ability to instruct counsel through open and frank discussion – still has practical application here. It is not in anyone's interest to prevent utilities from having open discussions with their counsel about things like ADR compromises and the like.

It is therefore submitted that the Board, in determining what should be disclosed, should assess through a review of the document (on which point, more below) which statements therein, if any, are legitimately about the conduct of the proceeding in an adversarial sense, as opposed to the rationale for changes, the impacts on customer groups, etc.

Recommended Response to the Motions

In proceedings before the Board, it has become a relatively common practice for intervenors to seek internal documents presented to Boards of Directors and senior management dealing with business planning, budgets and forecasts, and corporate strategy, and those documents are generally produced either voluntarily or pursuant to a decision of the Board panel.

What the Board has found in practice, it is submitted, is that these types of documents can be very instructive, both in understanding the weaknesses of the Applicant's positions, but also in supporting the Applicant's underlying rationale and decision-making process. Often the quality of the information convinces parties and the Board that lines of inquiry they were planning to pursue will be fruitless, but that other lines of inquiry should be pursued.

Against that backdrop of the high value of this type of information, we suggest that the Board assess what should be disclosed in these documents as follows:

1. ***ADR positions.*** Where the document specifically refers to possible compromises in ADR, or negotiating limits, or things like that, in general we believe that those statements should be redacted and not disclosed. There is an argument that, in this proceeding, since the ADR has

already finished, no harm is possible. We think that, on balance, it is better to accord discussions on ADR positions a full privilege-like protection, to avoid any potential for prejudice.

2. ***Positions of other parties.*** As much as it would be very interesting to see the Applicant's analysis of what positions the parties will take, in our view it is not appropriate for this category of information to be disclosed. We do, however, note that there is a difference between the positions of parties, and the reactions of customers. For example, a statement that the Application or a component of it is going to hurt tenants particularly hard (and how to deal with that) should not be accorded any protection. A statement that VECC may react strongly to that part of the Application would be redacted, however.

3. ***Issue Analysis***. In general, we do not believe that an issues analysis provided to one's Board of Directors should be considered privileged. The tradeoffs that a utility makes in coming up with a budget to present to the OEB are a critical aspect of the reasonableness review. Much of what is being considered in a rate hearing is about priorities, and the difficult task of drawing lines between acceptable and unacceptable spending levels. The Board is assisted by the justifications provided to the Applicant's Board of Directors for where management wants to draw those lines. There may be exceptions, such as where an issues analysis is really about the ADR position planned, but in most cases issues analysis should not be protected.

4. ***Regulatory Risks and Strategy.*** This is the most difficult to assess, because the activity seems on its face to be very much like planning for conventional litigation. On the other hand, one can legitimately wonder why a utility would have any strategy other than "Tell the Board the whole story, and let the Board decide." On balance, we believe that utilities should not have a strategy of, for example, downplaying specific issues so that the Board does not focus on them, or emphasizing other favourable items beyond their real importance. If utilities believe that such comments in their internal documents may ultimately see the light of day, they will be less likely to make them, and less likely to develop or implement strategies of that type. Therefore, unless there are exceptional circumstances we believe that material on regulatory risks and strategy should not be considered privileged.

These represent the four categories that Applicant's counsel has referred to in the September 21st letter. If there are additional categories, we believe the same approach and general principles should apply.

There remains the question of who should do this review of the document. In our submission, if information should in fact be afforded a privilege-like protection, not only should the other parties not see it, but neither should the Board panel hearing the Application. The essence of privilege is that privileged information cannot form part of the decision-making process.

The solution we propose is that a single decision-maker who is not on the Board panel be given the responsibility to review the document, redact the comments that should be accorded protection, and present it to the Board. While that decision-maker could be another Board member, another alternative would be to give it to a Staff member (someone not otherwise involved in the proceeding) to determine under delegated authority.

Since the parties cannot see the documents to make submissions on which should be redacted, and what disclosed, the Applicant should not be entitled to make submissions either (the "*audi alteram partem*" principle – i.e. the legal obligation to hear both sides). The documents should simply be provided to the decision-maker unmarked, and should be redacted and filed by that independent person.

Conclusion

We hope these submissions are of assistance to the Board.

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)