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BY EMAIL and RESS

November 17, 2010
Our File No. 20100144

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

Dear Ms. Walli:

Re: EB-2010-0144 – Waterloo – Confidentiality Claim

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1 in this proceeding, these are SEC's submissions with respect to the claim of confidentiality by the Applicant. Our conclusion is that the material on which confidentiality is claimed should not be considered confidential, as the Applicant has not met the onus of showing that it meets any of the criteria the Board has set out for ordering confidentiality protection.

General

SEC notes that the issue is not whether the subject material should be disclosed to the intervenors or the Board. The intervenors and the Board see the material anyway, albeit under restrictions that make handling and referring to it somewhat more difficult.

In fact, the issue here is whether the subject material should be available to members of the public. On that point, the Board has a clear and strong policy of upholding the transparency of its processes, unless there is a compelling reason to limit that transparency. Thus, the Board has always been of the view that a party claiming confidentiality bears the onus of demonstrating that confidential treatment is justified.

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The Practice Direction on Confidential Filings sets out the Board's guidance on how this onus can be met.

We note that, in addition, the particular information that is the subject of the claim in this case is exactly the sort of information that should be as transparent as possible. The Applicant is a monopoly provider of distribution services that is spending ratepayer funds to procure goods and services. Public disclosure of to whom they pay the largest amounts, and on what basis, is an important way for the Board to ensure that proper practices are followed.

To use a mundane example, if the utility's widget supplier is owned by the brother-in-law of the CEO, it is unlikely that Board Staff or intervenors will know that. If anyone is to notice that, it will be members of the public viewing the publicly-available information.

On the other side of the same coin, the disclosure of this type of information means that members of the public see the extent to which the utility is hiring local businesses to provide its goods and services. As a locally owned utility with a local monopoly, this is information that the public in Waterloo, in this case, is entitled to know.

Therefore, absent a compelling reason why this utility is in a different position than others in the province, in our view the Applicant should do what every other LDC is required to do under the Filing Guidelines: provide a list over three years of who it paid the largest amounts to, how much it paid, for what goods or services, and on what procurement basis.

Factors in the Practice Direction

Against that general background, we then look to the factors in the Practice Direction to see if there is any justification for making an exception to the Board's transparency principle.

(a)(i) Prejudice to any person's competitive position

The Applicant claims that by releasing the supplier's name it may prejudice the supplier's future competitive position. This does not appear to be a sustainable argument.

All that is revealed in the subject tables is the total amounts paid. The tables do not include specific details, e.g. what is included in the contract, unit prices, quantities, etc.. Price is usually only one of multiple factors (including quality, experience, timing etc) that will be considered when a service provider is awarded a contract. This is not similar to disclosure of the entire contract, or the price list of the supplier, or items such

as that. The disclosure of a total amount does not provide competitively useful information.

We contrast disclosure of the names with disclosure of the overall cost of a service procured by the utility. This is information that is public as a matter of course, because the utility has rates set on a cost of service basis. Every possible supplier to the utility will be interested in what it is paying for particular goods and services. The fact that Acme Inc. is the company that is being paid for a service does not change that dynamic, or affect Acme Inc. in any particular way. This is simply a normal part of doing business with a rate regulated entity.

(a)(iii) Whether the information could interfere significantly with negotiations being carried out by the party

The Applicant claims the tendering or annual procurement process is predicated on the notion of confidentiality, and by releasing supplier names, they will be at a disadvantage during the next procurement process, since other possible suppliers will know the Applicant's pricing threshold.

SEC submits that this argument fails for four reasons.

First, the wording of the provision refers not to some future potential negotiation, but to actual and current negotiations that are *significantly* interfered with. There is no evidence provided by the Applicant that any of this is actually occurring, just a vague statement about the possibility that it might happen. That is not what this criterion addresses.

Second, even if the premise of the Applicant is correct, it is unclear to SEC how adding the names of the suppliers to the information already being provided will make any difference, compared to the list with the names of the suppliers redacted. No matter who is providing the product or service, all competitors know what is being paid for that service, and can bid accordingly in the future. This is unavoidable for a regulated entity, since their costs have to be reviewed publicly to set rates.

Third, far from disadvantaging the LDC, this can only help. The response of those bidding in the future is almost certainly to bid lower to win the work instead of the incumbent, not bid higher.

Fourth, not all contracts are let on a proper tender process with competitive bidding. Some are through quotes, which depending on the method that the Applicant uses might not even be an implicit bid process. Sole source contacts by definition do not lead to bids.

Thus, we believe the Applicant has not demonstrated how this disclosure will interfere with negotiations, and in fact the evidence appears to suggest that it will not.

(a)(iv) Whether the disclosure would be likely to produce a significant loss or gain to any person

For the reasons that SEC has raised above, we do not think that there is likely any significant gain or loss to any person resulting from this disclosure.

(b) Whether the information consists of trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the Board

The submission of the Applicant relating to section (b) does not provide any reasons why it should apply to this information. This is not intended to deal with information on procurement. It is intended to deal with intellectual property such as inventions, technical techniques or innovations, financial modeling methodologies, etc. For example, if the Applicant had developed a proprietary method of scoring bids in an RFP, it might claim that public disclosure would in effect give away its intellectual property.

Here, on the other hand, there is no intellectual property in this data. It is just names of suppliers.

(g) Any other matters relating to FIPPA and FIPPA exemptions.

The Applicant claims confidentiality based on FIPPA section 17(1), which is discussed in Appendix "F" of the Practice Direction. However, none of the Applicant's arguments relating to FIPPA are different from those considered above.

For the above reasons, SEC submits to the Board that the confidentiality over certain information claimed should not be granted.

Sincerely,
JAY SHEPHERD P.C.

Mark Rubenstein

cc: Rene Gatien, Waterloo North (by email)
Wayne McNally, SEC (by email)
Interested Parties (by email)