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VIA BOARD PORTAL AND COURIER

Kirsten Walli
Board Secretary,
Ontario Energy Board
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Attention: Board Secretary

Dear Ms. Walli:

Re: Your File No. EB-2010-0142 – DECISION ON CONFIDENTIALITY AND PROCEDURAL ORDER NO. 4 – APPLICATION FOR INTERVENER STATUS AND SUBMISSIONS ON CONFIDENTIALITY BY POWERLINE PLUS LTD.

1. Powerline Plus Ltd. ("Powerline") (i) applies for party status as an intervenor in this proceeding for the purpose of making submissions on the issue of the confidentiality of its pricing, as set out in the Board's Procedural Order No. 4; and, if party status is granted, (ii) provides its submissions in writing as to why the information in question should be kept confidential.

I. APPLICATION FOR PARTY STATUS:

2. Powerline was unaware at the beginning of this proceeding that any of its interests might be affected, and therefore, did not seek to participate at that time. Although the deadline for participation has passed, Powerline only learned very recently that important interests of the company might be adversely affected by the decision on confidentiality of the OEB, if that decision is to disclose confidential pricing information of Powerline. Accordingly, Powerline's making its application for intervener status at this time is reasonable, and does not arise from a lack of due diligence.

3. None of the other parties is prejudiced by the timing of this application. However, Powerline would be seriously prejudiced if its application for intervener status were to be denied, thereby preventing it from addressing the Board's treatment of the confidentiality of its information.

4. The pricing information at issue is the list of prices charged by Powerline to Toronto Hydro. Although Toronto Hydro and some of the other parties in this proceeding may have an interest in Powerline's pricing, the person with the greatest interest in the issue of its disclosure to the public is, clearly, Powerline itself. Therefore, there can be no issue that Powerline seeks intervener status for bona fide reasons, and has the necessary legally-recognized business interest in the confidentiality of its pricing to justify granting it intervener status.

5. For these reasons, Powerline respectfully submits that its application as a party intervener should be granted.

II. POWERLINE'S SUBMISSIONS ON CONFIDENTIALITY

6. Board Order No. 4, in paragraph 3, references the Board's Practice Direction on Confidential Filings. That Practice Direction, in paragraph 5.1.4, states that a request for confidentiality must include certain items, which are not included in these submissions. Powerline understands that Toronto Hydro has already made a request for confidentiality which contains the required items, and therefore, they need not be included with Powerline's submissions. Procedurally, these submissions of Powerline are in support of the request for confidentiality made by Toronto Hydro; they are not a new and separate request for confidentiality.

7. The Board's Practice Direction on Confidential Filings also notes, at the bottom of page 2, that the Practice Direction is subordinate to existing law and regulations, including the *Freedom of Information and Protection of Privacy Act ("FIPPA")*.

8. On page 3 of Procedural Order No. 4, in the second to last paragraph on that page, the Board asks for submissions from parties on two matters: first, whether confidentiality of Schedule C of the Contract should be maintained, and if so, whether the Board should accept Toronto Hydro's proposal that only counsel for various intervenors be permitted access to it.

9. In summary, Powerline's submissions on these two issues are: first, confidentiality must be maintained as a matter of law, and second, that only counsel for the various intervenors be permitted access to it, subject to the usual requirement that they not disclose the information to anyone. Powerline's reasons for making these submissions are set out in paragraphs which follow.

10. *FIPPA* is the legislative policy of the Province of Ontario with respect to both freedom of information and protection of privacy. This policy has remained essentially unchanged for many years, through provincial governments of all political parties. The policy has very specific provisions regarding protection of the privacy of third-party information, as set out in section 17:

Third party information

17. (1) A head shall refuse to disclose a record that reveals ... commercial, financial ... information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; ....

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; ....
[emphasis added]

11. Ontario Regulation 460, in section 1(1) states:

1. (1) The agencies, boards, commissions, corporations and other bodies listed in Column 1 of the Schedule are designated as institutions. R.R.O. 1990, Reg. 460, s. 1 (1).

(2) The person occupying the position listed in Column 2 of the Schedule opposite to each institution listed in Column 1 is designated as the head of that institution. R.R.O. 1990, Reg. 460, s. 1 (2).

12. This Schedule lists the Ontario Energy Board as number 88 in Column 1, and in Column 2 shows the Chair as the head of that institution for the purposes of *FIPPA*. Thus, the Board is bound to comply with *FIPPA*.

13. It is important to note that subsection (1) of section 17 begins with the words "A head shall refuse to disclose...". The language of the section is mandatory, not discretionary. Accordingly, the Board shall refuse to disclose any record in its possession that falls within the broad scope of the subsection. Powerline's confidential information at issue is captured by the language of the subsection.

14. *FIPPA* subsection 17 (1)(a) indicates that where disclosure of a record could reasonably be expected to prejudice significantly the competitive position of Powerline, or to interfere significantly with its contractual negotiations (not only with Toronto Hydro but with anyone) the OEB shall refuse to disclose that record. It would be difficult, in the entire world of commerce, to find any information the disclosure of which would be more prejudicial to one's competitive position than line by line unit pricing. Anyone with any experience with construction bidding and contracting would be absolutely aghast that anyone would even consider seriously for a moment the disclosure of such commercially sensitive information.

15. Toronto Hydro is a very large customer for any contractor. Its procurement staff are highly sophisticated in conducting bidding and tendering processes, resulting in extreme price competition, rock-bottom low prices and slim margins for the contractor. The disclosure of the prices ultimately contracted for would be highly prejudicial to Powerline, in at least three ways:

1. Actual or potential competitors of Powerline, by knowing its item by item prices, could, in future, match its prices exactly, and offer a minor non-price benefit to Toronto Hydro, thereby narrowly coming in under Powerline in its bid. Alternatively, such a competitor could match all of Powerline's prices except one or two, which it could price under Powerline by even a dollar, thereby having the lowest bid.

2. On the other hand, Powerline would not have the same information about all of its actual or potential competitors, and therefore, this unevenness of information would be highly prejudicial to Powerline's competitive position in the Toronto Hydro bidding an negotiation process. Powerline's competitors would have information with which to try to knock out a previously successful bidder, but the reverse would not be the case

3. Once the information is in the public domain, there is a high risk that other customers of Powerline would be able to discover that its pricing to Toronto Hydro is considerably lower than its pricing to customers with lower volumes and less competitive bidding processes. Nevertheless, as construction contracts contain "most-favored-nation" clauses, these other customers would seek pricing equal to that of Toronto Hydro. That would be highly prejudicial to Powerline's competitive position in its contractual negotiations with many of its other large customers.

16. Not only would it be reasonable to expect significant prejudice to Powerline, there is also a reasonable expectation that it would significantly prejudice Toronto Hydro. That is because once the OEB has ordered disclosure of such highly sensitive pricing information, it will then be clear to all future bidders that Toronto Hydro can no longer maintain the normal commercial confidentiality commonly found throughout the business world. This greatly increases the contracting risk of anyone contracting with Toronto Hydro, and, where there is increased risk, there will have to be a higher commercial return, commensurate with that risk.

17. If bidders know that a successful bid results in all of its competitors, and probably all of its existing customers learning its lowest possible prices, they will probably increase their bid prices to Toronto Hydro so as to avoid having to decrease their prices to many of their other customers. Toronto Hydro, and ultimately, all of its customers, will pay higher prices.

18. Flowing from Powerline's submissions in paragraphs 14 through 17 above, the prejudice created by the disclosure would be reasonably expected to result in undue loss to Powerline, and conversely, undue gain to its actual and potential competitors in future Toronto Hydro and other bidding processes.

19. Currently, Toronto Hydro's bidding process results in very effective price competition. Disclosure of the unit pricing of the successful bidder, but not of all of its actual or potential competitors, results in information asymmetry. Information asymmetry significantly distorts the "level playing field" essential to every competitive process. It would therefore result in less effective competition. That, in turn, would result in Toronto Hydro receiving either higher prices or reduced service levels, or both.

20. Going beyond *FIPPA*, the public interest in disclosure of such detailed information is small relative to the public interest in preserving the confidentiality of this information.

21. Detailed pricing is useful to the Board or to an intervener only if it can be compared to similarly detailed pricing of a competitor for the same items, at the same time. Neither the Board not an intervener can, at this time, and as part of this hearing, conduct an RFP or tendering process on various detailed prices to compare Powerline's actual unit prices to some hypothetical unit prices of a proxy bidder. Nor are the detailed prices important to the Board or an intervener if the global pricing is reasonable.

22. If Powerline makes a larger margin on some items and a smaller margin on others in a package of numerous items, it would be entirely artificial or hypothetical to suggest that the former are reasonable for rate setting purposes while the latter should be disallowed, as that is not how this or any other contract would be bid by anyone. Only the total price and quality of work of one contractor would be comparable to the total price and quality of work of another. In short, the information sought at the level of detail of unit pricing would be of little or no

practical use to the Board in carrying out its statutory duties. Thus, the information sought is both irrelevant and immaterial in this proceeding. Mere intervenor curiosity is not a reason for the disclosure of confidential information.

23. On the other hand, there is an expectation of confidentiality around such detailed pricing by anyone providing such information during the course of a bid or tender, for good commercial and, ultimately, public policy reasons.

24. Although the costs and the activities of competing construction companies are, in general, quite similar, there may well be important differences in individual unit costs. For example, Powerline may be successful in negotiating a better price than one or more of its competitors from an equipment supplier or subcontractor. Such better prices would be shared with Toronto Hydro to give Powerlines a competitive advantage. A competitor obtaining access to Powerline's detailed pricing could easily figure out the probable cause for such low pricing on that item, and work to eliminate that competitive advantage. While that may not affect this particular contract during its term, it could certainly affect any renewals, or new tenders.

25. Thus, disclosure would complicate, and weaken, the competitive effectiveness of Toronto Hydro's bidding and tendering processes. With weaker competition, over time, Toronto Hydro and its customers would tend to pay more for contracting services, rather than less. That effect of the OEB's hearing processes would be inconsistent with the legislative purpose of creating the OEB, and would not be in the public interest.

26. Weighing these two considerations against each other, the Board should conclude that the public interest in the disclosure of this detailed information in this proceeding is minimal, or even zero. The public interest in preserving its confidentiality is substantial and compelling.

All of Which Is Respectfully Submitted this 18th day of January, 2011 by

Andrew J. Roman
of Counsel to Powerline Plus Ltd.

c. All Parties (See Schedule "A" below)

5682742.2

SCHEDULE "A"

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