February 25, 2013

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4
Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: ELK Energy Rate Application
EB-2011-0099
Submissions on Disclosure

On February 15, 2013, the Board issued Procedural Order No. 4 ("PO4") in which it invited parties in the proceeding to make submissions on two points related to a document that ELK Energy seeks to remove from the record following its accidental disclosure during the interrogatory response phase of the proceeding.

Framework

The Board has examined the issue of disclosure relatively recently in a Westcoast Energy proceeding (EB-2008-0304) and a Toronto Hydro proceeding (EB-2009-0308). These cases are discussed in relation to the Duty to Disclose in the article "Developments in Public Utility Law" written by Gordon Kaiser and Bob Heggie, which appeared in the book their co-edited, *Energy Law & Policy*. In pages 155-163, the authors quote extensively from Board decisions in making their case for the importance of disclosure.

Just as the Board has done in PO4, Kaiser and Heggie remind us that while "a publicly regulated corporation is under a general duty to disclose" information, the duty is not absolute. In the Board's "Rules of Practice and Procedure", the Board has recognized the limitation by inviting distributors to provide reasons under s. 29.02(a) why the information being requested is not relevant. If the information is not relevant to what is being requested by the applicant, then the information is out of scope and not subject to a production order by the Board.

The principle that information that is not relevant will not be compelled from an applicant is central to the fairness of a proceeding. Applications brought before the Board are not invitations to engage in fishing expeditions. As the Supreme Court of Canada affirmed clear in the *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* [2006] 1 S.C.R. 140 decision, ratepayers are not owners of a utility's assets. While the focus of

that proceeding was land and buildings, there is a clear nexus between ownership of physical property and ownership of intellectual property. The knowledge, information and reports in the possession of a utility are not owned by the utility's ratepayers. The ratepayers have no right to the information absent some other legal basis. The importance of fair dealing with regulated utilities is articulated by James Bonbright and others in their book *Principles of Public Utility Rates:*

> "While these owners were held subject to rate regulation if engaged in a business "affected with the public interest," they were also held entitled to protection against regulation so stringent as to violate the injunctions of the Fifth and Fourteenth Amendments against the taking of property "without just compensation" or "without due process of law. In its famous dictum in *Smyth v. Ames* (1898), the Supreme Court established the fair-value rule as setting the normal limit below which rates, if imposed by legislative or commission fiat, would be held 'confiscatory.'"

True, the focus of the quote is on the fair return standard, but the principle at the core of the comment is that the public interest, while critical to the regulatory compact, is not a sufficient basis to compel a utility to do more or accept less than is justifiable with reference to their corporate interests, not just the interests of ratepayers.

As the Board and the Ontario Court of Appeal made clear in the *THESL v. OEB* (2010 ONCA 284) dividends case, there must be a balancing of interests, not merely a capitulation to any one set of interests, be they the interests of the utility bringing its application or the inquiring intervenor community on behalf of ratepayers.

ELK Energy Case

In the case at hand, it is not clear why the information being requested by AMPCO is relevant. Presumably, the Board is expecting that AMPCO and other parties seeking the information requested by AMPCO will make their case in submissions to be filed today. It is EnWin's position that the burden is very much on those seeking the information to raise a *prima facie* case in favour of disclosure of the information. For as the case law and the regulatory principles demonstrate, it is not enough simply to request the information and leave it to the applicant to prove the negative of why the information is not relevant.

Respectfully, EnWin submits that what is relevant in this case is ensuring that ELK Energy charges sufficient but not excessive rates, in other words, reasonable rates. The reasonableness of the rates is measured in large part on their capacity to fund the activities that will produce the outcomes that are expected by the Board, ratepayers, investors of equity, investors of debt, and other members of the public, including neighbouring LDCs.

As the Board as noted in PO4, the information in question is a salary survey. A salary survey is but one way to illustrate the reasonableness of but one category of LDC expenses. It is not the only way. It is not a necessary way. As the Board's minimum filing requirements and experience in other rate applications demonstrates, the Board can and often does set rates without regard for salary surveys.

Therefore, the burden on those seeking the information is to show why the information provided through the application and other interrogatory responses and technical conference exchanges does not put the Board in a position to ascertain whether ELK Energy's salary expenses are reasonable.

Based on EnWin's review of the ELK Energy application, particularly Exhibit 4-2-6, the evidence on salaries and employee compensation more broadly provides a basis to evaluate the information in question. Indeed the Board has taken the initiative to ensure that all LDCs file information using the standard template included in the ELK Energy application. This enables the Board and other stakeholders to perform industry-wide comparisons. Intervenors are free to file their own evidence and often take the step of requesting that the applicant go out and perform a comparison with other LDCs.

It has not been made clear by the requesting parties why performing a comparison using those charts would not be a sufficient alternative to the current request.

Conclusion

Respectfully, the intervenor(s) requesting the salary survey ought to have an uphill climb to gain access to the information that ELK Energy is declining to disclose. The utility owns the information and can only be compelled to disclose it if that disclosure is necessary to enable the Board to determine reasonable rates.

EnWin notes the alternative information that is on the record regarding salaries and other compensation. EnWin also notes that the information on the record is in a format that is readily comparable to other LDCs (which is what a salary survey would do). EnWin further notes that intervenors, through their own efforts or through requests of ELK Energy, could bring the comparative information for LDCs into the record.

EnWin submits that the readily available alternative would allow ELK Energy to protect information that it owns while still facilitating its application through the presence of information that has been accepted by the Board in many other proceedings as sufficient to enable the Board to perform its balancing of utility and ratepayer interests.

EnWin encourages the Board to not compel the disclosure of information that is not necessary given the presence of a reasonable and readily available alternative source of information that has been provided in accordance with Board practice.

For this salary survey to be relevant, EnWin submits that it would have to contain information that, if included on the record, would put the Board in a position to make a different rate order than it would otherwise make. EnWin is skeptical that this information would lead to that result.

Yours very truly,

***ENWIN* Utilities Ltd.**

Per: Andrew J. Sasso

cc: ELK Energy and its Counsel
Intervenors of Record

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