



EB-2011-0099

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 E.L.K. Energy
Inc. for an order approving just and reasonable rates and
other charges for electricity distribution to be effective
October 1, 2012.

DECISION ON CONFIDENTIALITY AND ORDER

March 1, 2013

E.L.K. Energy Inc. ("E.L.K.") filed an application with the Ontario Energy Board (the "Board") on October 24, 2012 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that E.L.K. charges for electricity distribution, to be effective October 1, 2012.

E.L.K. filed interrogatory responses on January 30, 2013 at which time E.L.K. requested confidential treatment for two of the responses:

- SEC IR No.12 under exhibit 4: provides last three years of E.L.K. Solutions Inc. Financial Statements.
- AMPCO IR No.17(I) under exhibit 4: provides the current Salary/Benefits ("Salary costs") for the Director of Regulatory Affairs and Manager of Regulatory Affairs positions and;

E.L.K indicated that it was prepared to provide copies of the confidential material to parties' counsel and consultants upon execution of the Board's form of Declaration and Undertaking with respect to confidentiality, provided that they comply with the Board's

Practice Direction on Confidential Filings (“Practice Direction”) and subject to E.L.K.’s right to object to the Board’s acceptance of a Declaration and Undertaking from any person.

On February 8, 2013 the Board issued Procedural Order No. 3 which, among other things, provided for the filing of any submissions from intervenors and Board staff and of any reply submission from E.L.K. regarding E.L.K.’s request for the confidential treatment of the responses to AMPCO IR No.17(l) and SEC IR No.12. As an interim measure the Board also allowed any external counsel or external consultant for the intervenors that wished to review the confidential information filed in responses to do so after signing a copy of the Board’s Declaration and Undertaking with respect to confidential documents, and filing it with the Board and serving it on E.L.K.

Subsequently, on February 8, 2013 E.L.K. notified the Board that it would be unable to provide the [salary] values requested in AMPCO IR No.17(l) until the Board made a confidentiality determination. E.L.K. stated that that the requested information constituted personal information that was protected from disclosure under the Board’s Practice Direction¹ and Subsection 17(1) of the Freedom of Information and Protection of Privacy Act (“FIPPA”).

The Board did not receive any submissions from the intervenors or Board staff on the request for confidential treatment of SEC IR No.12 and AMPCO IR No.17(l).

SEC IR No.12

The response to SEC IR No.12 pertains to the last three years E.L.K. Solutions Inc. (E.L.K. Solutions) Financial Statements. E.L.K. requested that this information be afforded confidential treatment pursuant to Rules 10.01 and 10.02 of the Board’s Rules of Practice and Procedure and Sections 5.1.1 and 5.1.2 of the Board’s Practice. E.L.K. explained that E.L.K. Solutions is engaged in competitive business activities and the disclosure of the E.L.K. Solutions Financial Statements, which constitute commercially sensitive information, could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, and

¹ Practice Direction of Confidential Filings (revised October 13, 2011): Rule 9A.02 provides that “Neither the confidential, un-redacted version of the document nor the personal information contained in it will be provided to any other party, including a person from whom the Board has accepted a Declaration and Undertaking under the Practice Directions, unless the Board determines that either (a) the redacted information is not personal information, as that phrase is defined in the Freedom of Information and Protection of Privacy Act, or (b) the disclosure of the personal information would be in accordance with the Freedom of Information and Protection of Privacy Act.”

be injurious to the financial interest of E.L.K. Solutions. Such a disclosure would enable E.L.K. Solutions' competitors to determine the extent of E.L.K. Solutions' activities in those businesses. E.L.K. noted that the Board's Practice Direction recognizes that these are among the factors that the Board would take into consideration when addressing the confidentiality of filings. E.L.K. also indicated these factors are addressed in subsection 17(1) of FIPPA, noting that the Practice Direction, at Appendix C [sic], identifies third party information as described in subsection 17(1) of FIPPA as among the types of information previously assessed or maintained by the OEB as confidential. E.L.K. also pointed to Appendix "A" of the Practice Direction as setting out the Board's considerations in determining requests for confidentiality and listed the following:

- (a)(i) prejudice to any person's competitive position;
- (a)(iii) whether the information could interfere significantly with negotiations being carried out by a party;
- (a)(iv) whether the disclosure would be likely to produce a significant loss or gain to any person; and
- (g) any other matters relating to FIPPA and FIPPA exemptions.

With respect to item (g) above, E.L.K. referenced Appendix E of the Practice Direction that provides a summary of pertinent FIPPA provisions. E.L.K. indicated that the summary, in part, provides that:

- Under section 17(1), the Board must not, without the consent of the person to whom the information relates, disclose a record where:
- (a) the record reveals a trade secret or scientific, technical, commercial, financial or labour relations information;
 - (b) the record was supplied in confidence implicitly or explicitly; and
 - (c) disclosure of the record could reasonably be expected to have any of the following effects:
 - i. prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;
 - ...
 - iii. result in undue loss or gain to any person, group, committee or financial institution or agency;

Board Findings

Neither intervenors nor Board staff filed any objection to E.L.K.'s request that SEC IR No.12 be treated confidentially. The Board accepts E.L.K.'s assertion that public disclosure of E.L.K. Solutions' Financial Statements could be injurious to the financial interests of E.L.K. Solutions. The Board finds that it is appropriate to grant confidential

status to SEC IR No.12. External counsel or external consultant for intervenors who wish to obtain a copy of SEC IR No. 12 must sign a copy of the Board's Declaration and Undertaking with respect to confidential documents, file it with the Board, and serve it on E.L.K.

AMPCO IR No.17(I)

The response to AMPCO IR No.17(I) pertains to the current Salary costs for the Director of Regulatory Affairs and Manager of Regulatory Affairs positions. E.L.K. requested that this information be kept in confidence by the Board pursuant to Rules 10.01 and 10.02 of the Board's Rules of Practice and Procedure and Sections 5.1.1 and 5.1.2 of the Board's Practice. E.L.K. submitted that in the absence of any overriding formal disclosure requirements, the individual salary information is highly sensitive personal information relating to identifiable individuals, and its disclosure could reasonably be expected to expose them to pecuniary harm in the employment market as it could affect their competitive positions with other potential employers. E.L.K. also indicated that information of this kind is also protected from disclosure under Section 21 of FIPPA. As with E.L.K.'s explanation provided above under SEC IR No. 12, E.L.K. referenced sections of Appendices "A", "B" and "E" of the Practice Direction to support the claim for confidential treatment.

E.L.K. also noted that Appendix "B", lists personal records as an example of the types of information that the Board has previously held confidential. E.L.K. explained that municipally owned electricity distributors such as E.L.K. are not subject to disclosure requirements in respect of staff salaries, and the salary information requested in AMPCO IR No.17(I) has not been disclosed, nor is it required to be closed in any other forum. E.L.K. stated that although individuals' names are not provided with the positions, since there is only one person in each position, it would be possible to determine the salaries of identifiable individuals, both the previous and any future incumbent, by reference to their titles.

Board Findings

Neither intervenors nor Board staff filed any objection to E.L.K.'s request that AMPCO IR No. 17(I) be treated confidentially.

The Board concurs with E.L.K.'s reasoning that that identification of the salary costs associated with each of the Director of Regulatory Affairs and Manager of Regulatory Affairs positions is tantamount to disclosing the individual's salary, as there is only one

person in each of those positions. The Board views an individual's salary, that is not otherwise previously disclosed through other means, to be personal information under FIPPA.² Given the limited materiality of the requested information to the application before the Board, the Board is not inclined to seek the consent of the incumbent to allow this information to be included in the evidence. The Board finds that this specific information will not form part of the record of this proceeding, and will not be made available to parties at all.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. SEC IR No.12 will be treated as confidential. External counsel or external consultant for intervenors who wish to obtain a copy of SEC IR No. 12 must sign a copy of the Board's Declaration and Undertaking with respect to confidential documents, file it with the Board, and serve it on E.L.K. Following the end of the proceeding, parties in receipt of confidential information shall either return the subject information to the Board for destruction, or destroy the information and execute a Certificate of Destruction. The Certificate of Destruction, that is in Appendix D of the Practice Direction, must be filed with the Board.
2. The response to AMPCO IR No.17(I) will not form part of the record of this proceeding.

All filings to the Board must quote the file number, EB-2011-0099, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/service/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two

² *ibid*

paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

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

E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, **March 1, 2013**

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary