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March 4, 2013

DELIVERED BY RESS & COURIER

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: E.L.K. Energy Inc. (“E.L.K. Energy”) Reply Submissions in Respect of the Disclosure and Confidentiality of the MEARIE Management Salary Survey – EB-2011-0099

Pursuant to Procedural Order No. 4, this letter constitutes E.L.K. Energy’s reply submissions with respect to the disclosure of, and confidentiality claim with respect to, the MEARIE Management Salary Survey (the “Survey”).

These submissions are limited to replying to the submissions of EnWin Utilities Ltd. (“EnWin”) and the School Energy Coalition (“SEC”), the latter of which has the support of Energy Probe and AMPCO. In Procedural Order No. 4, the Board also provided for a submission from MEARIE in this matter. E.L.K. Energy received no submissions from any other party, including MEARIE, on this matter to date.

The Disclosure of the Survey

The Survey was delivered in response to AMPCO IR#17(b) in error. E.L.K. Energy greatly regrets the error.

The MEARIE Group claims copyright in the Survey. All thirty six pages of the Survey contain the “© 2012 The MEARIE Group” mark. Under the federal *Copyright Act*, “copyright” in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever and includes the sole right to produce, reproduce, perform or publish any translation of the work and to authorize any such acts.

The MEARIE Group has not, to-date, authorized the reproduction of its Survey by E.L.K. Energy to the OEB or, to E.L.K. Energy’s knowledge, by the OEB to anyone else.

In addition, the Survey is clearly marked on each page as “PRIVATE AND CONFIDENTIAL” and the cover page the Survey states that “[t]his document may not be reproduced / disclosed in whole or in part without the prior written consent of The MEARIE Group and Hay Group Limited.”

E.L.K. Energy did not have the prior written consent of The MEARIE Group or the Hay Group to release the Survey. As a result, in response to the AMPCO interrogatory access to the Survey should have been denied, and the Survey should not have been disclosed. E.L.K. Energy has taken the steps noted by the Board in Procedural Order No.4 in order to correct its inadvertent disclosure of the Survey. SEC has noted that a different version of a MEARIE management salary survey was disclosed in London Hydro’s 2013 Cost of Service distribution rate application (EB-2012-0146). E.L.K. Energy submits that that is not relevant to the matter at issue in the current proceeding. The matter before the Board is E.L.K. Energy’s inadvertent disclosure of the Survey in this proceeding – E.L.K. Energy is not aware of the basis for, or the circumstances surrounding, the apparent disclosure by London Hydro of a different version of the Survey.

E.L.K. Energy respectfully submits that the prejudice to E.L.K. Energy and to the owners of the Survey clearly outweighs the limited probative value the Survey may have in this Application.

Destruction and Deletion of the MEARIE Survey

In Procedural Order No. 4, the Board describes the first question as follows:

“The salary survey was filed in direct response to an interrogatory. In requesting an order removing the document from the record entirely, and to have parties destroy the copy of the document sent to them, E.L.K. is in effect providing a refusal to answer the interrogatory. In general, the test the Board must consider under such circumstances is whether the document is relevant to the issues in the proceeding, and whether its probative value is outweighed by any prejudice it might cause the applicant. The Board invites parties to file submissions on whether E.L.K.’s request to have the document removed from the record entirely, and whether it should order all copies that were circulated to be destroyed.”

Relevance and Probative Value

E.L.K. Energy submits that the information in the Survey is not directly relevant to its Application for several reasons.

First, E.L.K. Energy will not rely on the Survey as evidence in its Application to support the applied for management and executive salaries and benefits.

To the extent that any party wishes to challenge the reasonableness of the proposed management and executive salaries and benefits, E.L.K. Energy will defend its proposal without reference to or

reliance on the Survey that is the subject of these submissions. Accordingly, no party is disadvantaged by the removal of the Survey from the evidentiary record in this proceeding.

SEC describes the probative value of Survey at page 5 of its submissions as follows:

“The Survey is about compensation costs. Compensation makes up the bulk of the OM&A of most regulated entities and a significant component of the capital spending as well, so it is the single most critical component of driving rates. As such, managing compensation levels is a key factor in whether a utility is being well managed overall.”

E.L.K. Energy disagrees with SEC in this regard. Rather, E.L.K. agrees with the submissions of EnWin that the Survey has a limited probative value in this Application. Specifically:

- E.L.K. Energy is not relying on the Survey in defending its applied for compensation amounts.
- The Survey has no probative value in assessing the reasonableness of non-union or union compensation, which together account for almost 70% of overall compensation.
- Use of the Survey is not a necessary resource to assess the reasonableness of the applied for management compensation figures – the Board can and does often set rates without regard for salary surveys.
- The Board’s Filing Requirements for distribution rate applications already provide for comparisons with respect to employee compensation, both from year to year and from distributor to distributor. For example, Appendix 2-K to the Board’s Filing Requirements, required to be included (and in fact included) in the E.L.K. Application and those of all other distributors filing cost of service applications, contains data for items including executive, management, union and non-union salaries, benefits, pensions and post-retirement benefits and overtime for the last rebasing year (both as Board-approved and actual), two more historical years, and the Bridge Year and Test Year. This information is publicly available on the Board’s web site. It is open to parties to any rate proceeding to compare salary and benefit values across utilities. There is no need for the Survey.
- Moreover, the Survey material inadvertently filed does not provide information that is relevant to the Board’s consideration of compensation in cost of service applications. The Survey contains information on a multitude of management and executive positions, with salary and benefit ranges on a position-by-position basis, for approximately 50 Ontario electricity distributors. The Survey does not identify individuals or specific salaries; instead, salary ranges at a particular percentile are illustrated. E.L.K. Energy submits that the Board has not concerned itself with salary values for individual positions. Rather, the Board’s concern is with aggregate compensation amounts for groups of employees (executive, management, union and non-union). In fact, the Board has specifically stated

in Section 2.7.4 of its Filing Requirements (at p.30 of the June 28, 2012 version of the Filing Requirements) that:

“Where there are three or fewer employees in any category, the applicant should aggregate this category with the category to which it is most closely related. This higher level of aggregation should be continued, if required, to ensure that no category contains three or fewer employees.”

Additionally, even in the current proceeding, the Board has determined that salary information for specific individuals will not be required. At page 4 of its Decision and Order on Confidentiality issued Friday, March 1, 2013, the Board confirmed that it would not require salary information for E.L.K. Energy’s Director of Finance & Regulatory Affairs or the Manager of Finance & Regulatory Affairs to form part of the record in this proceeding, nor would it be made available to parties at all. E.L.K. Energy acknowledges that the key issue being considered by the Board was that the salary information constituted personal information related to identifiable individuals. However, the Board, in making its determination, noted the “limited materiality of the requested information to the application before the Board”. E.L.K. Energy submits that the Survey information is similarly not material to this proceeding, and a requirement that it be disclosed would be inconsistent with the Board’s Filing Requirements.

In any event, the limited probative value of the Survey does not outweigh the prejudice to the Applicant and others if the information is disclosed.

Prejudice from the disclosure of the Survey

E.L.K. Energy submits that there is a risk of prejudice to it, and potentially to others, if the Board does not permit the removal of the Survey from the evidentiary record in this proceeding.

MEARIE has demanded that E.L.K. Energy take all available steps to correct this disclosure and has reserved its rights in this regard. As noted above, E.L.K. Energy has taken the steps noted by the Board in Procedural Order No.4 in order to correct its inadvertent disclosure of the Survey, and continues to pursue its removal from the record through this submission. A claim in respect of the disclosure of this material, which as E.L.K. Energy has submitted is not relevant to this proceeding, will at a minimum result in significant cost to E.L.K. Energy, both monetarily and in utility time and resources, regardless of the outcome of a claim.

Confidentiality of the MEARIE Survey

MEARIE has advised E.L.K. Energy that having the Survey treated according to the Board’s confidential filing protocol is not sufficient, and that all copies held by the OEB and others must be immediately destroyed and contents of the Survey may not be used by anyone except

MEARIE and the subscribers to the Survey. Because of this, holding the Survey in confidence will not alleviate the risk of prejudice to E.L.K. Energy.

However, in the event the Board determines that it will not order that the Survey to be removed from the public record and otherwise destroyed, E.L.K. Energy submits in the alternative that the Survey must be held in strictest confidence, and in compliance with the Board's *Practice Direction on Confidential Filings* (the "Practice Direction"). This means that the Survey is to be provided only to counsel and individuals who have executed the Board's form of Declaration and Undertaking with respect to confidentiality, and that copies must be returned to the Board for destruction, or must be destroyed with confirmation of destruction provided to the Board, following the conclusion of this proceeding.

In this regard, E.L.K. Energy reiterates that MEARIE has claimed that the Survey has been kept confidential and that it has taken steps to protect the Survey from public disclosure. The fact that it was filed in error by E.L.K. Energy does not refute MEARIE's claim that it has consistently treated the Survey as confidential.

For all of the foregoing reasons, E.L.K. Energy respectfully submits that the Board should determine that the Survey shall not be placed on the record of this proceeding in any form, and that all copies in the possession of parties to this proceeding are to be destroyed. Alternatively, E.L.K. Energy submits that the Board should direct that the Survey be maintained in confidence in accordance with the Board's Practice Direction, and that all copies of the Survey in the possession of Intervenors counsel and/or consultants shall be returned to the Board for destruction or shall be destroyed and/or deleted from all computer systems, with certification of destruction and/or deletion, upon the conclusion of this proceeding.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Original signed by James C. Sidlofsky

James C. Sidlofsky
Counsel to E.L.K. Energy Inc.

JS/jadv

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