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BY EMAIL and RESS

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Our File No. 20130187

Ontario Energy Board
2300 Yonge Street
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2013-0187 – Hydro One/Norfolk MAADS – Confidentiality Claim

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1, these are SEC's submissions with respect to the Applicant's claim for confidentiality.

Context

SEC notes that the Board did not, in this case, follow its normal practice of allowing the intervenors who sign the Board's form of Declaration and Undertaking to review the unredacted documents in order to make their submissions on the confidentiality claim.

We are making our submissions without that review, but that does put us at a disadvantage, in two ways.

First, with respect to the issue of confidentiality itself, we are put in the position of having to accept the Applicant's characterization of the information.

An example may be relevant. In a recent case, EB-2011-0099, the Applicant claimed that a study by MEARIE relating to compensation within the distribution sector should receive confidential treatment. On the face of it, a compensation study might well contain confidential information. However, because we were able to see the study, we knew that there was nothing in it that disclosed individual employee information, or any other information that had a confidential nature.

There are many other examples like this. Certainly, there are some situations in which the type of document (an individual employment contract, for example), makes the nature of the information obvious. Where that is not the case, as in this Application, the intervenors are prevented from making full submissions on confidentiality if they are not able to review the unredacted documents

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Second, and more important in this case, the confidentiality claims here are coupled with claims that the information is not relevant to the issues in the proceeding.

It is difficult to understand how anyone can discuss relevance without looking at the information itself. The overall transaction is clearly relevant to the Board's decision in this matter, and more specifically the "no harm" test. The redacted information is part of the main agreement setting out the transaction. Therefore, prima facie it is relevant. The Applicant then seeks to characterize the specific information redacted, and say that the presumption it is relevant is rebutted. The intervenors, however, are prevented from making submissions in reply, because we can't look at the specific information.

In our submission, the effect of this is that the Board is legally required to ignore any submission by the Applicant that refers to, or relies upon particular knowledge of, the specific information in order to characterize it or argue against its relevance. The Board can, to remain compliant with the principles of natural justice and the SPPA, only consider the Applicant's arguments to the extent that they would be identical without knowledge of the details of the information. As those are the only arguments that the intervenors can respond to, those are also the only arguments the Board can consider.

The practical result, it is submitted, is that few of the Applicant's arguments as to relevance can be considered. As we note in our more detailed comments below, this means that in most cases the information must be treated as being relevant to the proceeding.

The Specific Claims

Schedule 3.1(l). This schedule is referred to in s. 3.1(l)(v), and purports to redact parts of a list of encumbrances that the Vendor must remove on closing. Since the high price of the transaction will be a key issue in consideration of the "no harm" test, intervenors and the Board will have to be concerned with the cost to the Vendor of removing encumbrances. Without looking at the redacted information, it is probably not possible to determine that cost. Therefore, in our submission this information is relevant.

Hydro One claims, in their submissions, that the information contains "personal information of a person who is not party to the proceeding". SEC believes the Board cannot consider this submission. This is especially true since there are items on the same list that are not redacted but contain such information, yet there is no explanation as to why the redacted information is somehow different. A church and a school and a warehouse, as well as others, are left unredacted. How are the redacted ones different? SEC has no way of knowing, and so cannot make submissions on this issue.

In the result, in our view this information is not confidential.

Schedule 3.1(n). This schedule is referred to in s. 3.1(n), and is simply a list of contracts that are either contracts for compensation of employees or contractors, contracts limiting the company's freedom to carry on business, or Material Contracts. The latter are also listed in Schedule 3.1(o), and also redacted.

This schedule is entirely redacted, all five pages. The Applicant is therefore alleging either that ALL of it is irrelevant, or ALL of it is confidential. Neither of these allegations can be correct.

With respect to relevance, the list includes all of the Material Contracts of the company. This is defined in s. 1.1(jjj), and excludes anything relating to employment. It does include all of the contracts that have annual commitments in excess of $50,000. Clearly the nature of the company's major contracts is relevant to the "no harm" test, especially given the claims by Hydro One as to the operational synergies that will arise in the future. These, at least, will be relevant, even before considering whether the compensation deals are relevant.

With respect to confidentiality, we can't see the actual information, but on the face of it this appears to be a list, not the terms of the contracts. So, for example, it would appear to include something like "Consulting Contract with Acme Contracting dated July 9, 2011". Assuming that to be true, we do not understand why these would be confidential. Some parts of the contract itself may be confidential, and if it were requested and relevant in interrogatories, there may be a reasonable claim to redact some of the terms. We are not yet at that point. Right now it is just a list, and there is no information on the record to show that the list is confidential. The fact that the company has a contract with Acme, or an employment contract with its President, or anything like that, is neither protected nor confidential information.

The submissions of Norfolk and Hydro One do not assist on this. In fact, the primary submission of Norfolk appears to relate solely to the contents of the contracts, rather than the list.

As a result, it is submitted that this information is relevant, and should not be confidential.

Schedule 3.1(o). This schedule, also completely redacted, is the list of Material Contracts referred to in s. 3.1(o). This is also the list of the Material Contracts that were included in the Data Room that purchasers could access when considering their bids for the company. Therefore, obviously they are relevant (and material) to the transaction, and thus prima facie relevant to the proceeding.

For the reasons set out under Schedule 3.1(n) above, in our view these documents should not be treated as confidential.

Schedule 3.1(r). Although labelled "Employees", this schedule is only referred to in s. 3.1(r), and appears to be limited to disputes with, claims by, and settlements with employees.

Generally, SEC agrees that this type of information, while sometimes relevant, is usually confidential, and with one exception SEC agrees that this schedule should be redacted.

One cannot miss the fact that the former President and CEO of the distributor, Brad Randall, is apparently no longer in that position, and is not referred to anywhere on the distributor's website. We can see that Mr. Randall was CEO as recently as a year ago, and perhaps even as recently as October. The explanation for his departure could be something simple, like retirement, but intervenors and the Board may well want to explore if the departure is related to this transaction. Certainly if the list in the schedule contains a lawsuit or settlement agreement with Mr. Randall, it may be something parties and the Board need to know.

Subject to that one exception, SEC believes that this schedule should be treated as confidential. As we have not seen the details of the schedule, we cannot comment on whether it includes items that are relevant to the proceeding.

Schedule 3.1(t). This schedule relates to environmental approvals (s. 3.1(t)(ii)) and, as referred to in s. 3.1(t)(vii), releases of environmental contaminants.

With respect to environmental approvals, SEC believes that generally this is a category of information that is not relevant to a MAADs application. However, since we can't see the list, we are not in a position to identify any approvals on the list that might be relevant. Therefore, prima facie SEC submits this part of the list is relevant. We note that neither Hydro One nor Norfolk have made a submission on this part of the list.

Environmental contamination is a different matter. Hydro One makes no submissions on this schedule at all, but Norfolk submits that investigations and reports relating to environmental contamination are irrelevant. The submissions do not give a reason for this conclusion. They just state the conclusion.

In our submission, any material environmental contamination requires a mitigation or remediation plan. Depending on what is on the list, the acquisition by Hydro One could actually benefit the ratepayers, by adding more expertise in this area. Not seeing the details, and not seeing any plan from Hydro One, this cannot be considered. In our view, the Board and the parties should have this information as part of consideration of the "no harm" test, and the balancing of the costs and benefits of the deal.

On the issue of confidentiality of this information, that is a different story. Norfolk in their submissions are concerned that making this information public could cause "frivolous litigation claims". With respect, SEC does not believe that this is a good argument. If people launch frivolous lawsuits, the courts are the right people to handle that. It is not a legitimate part of the Board's function to protect LDCs from perceived inadequacies in the judicial system.

We do, however, believe that if the list includes information on matters that are currently under investigation, those might be appropriate for confidential treatment. The purpose would be to allow the investigation to continue properly, and unimpeded. Without seeing the list, we don't know if there are any items in this category. Therefore, in our view all of the list must be presumed to be non-confidential.

Schedule 3.1(v). The redacted information is account numbers relating to the utility and/or its affiliates. Generally, SEC would see this information as both irrelevant and confidential.

However, we do note that at least some of this information is already on the public record, in EB-2011-0272, Exhibit 4/1/3, App. D. That information, already being public, therefore appears to be completely disqualified from confidential treatment in this proceeding.

Schedule 3.1(x). This is a list of encumbrances on the Applicant's real property that will continue after closing. Norfolk describes it as "material financing arrangements" between the distributor and third parties.

Hydro One does not make any substantive submissions on this schedule. Norfolk's submissions on relevance are limited to a simple declaration that this information is not relevant. No reasons are given.

As we have noted earlier, a significant issue in this proceeding is likely to be the very high price being paid, and how it will impact the ratepayers going forward. Information on existing debt, particularly where it is continuing after closing, will be relevant to the effective price being paid, and any increase in financial burdens on the ratepayers. Further, the Board has been given no reason from Norfolk or Hydro One why this is not relevant.

As to confidentiality, the fact that the schedule contains the names of individuals owed money by the distributor is not a justification for confidentiality. To the best of our knowledge, the Board has never treated the names of a distributor's creditors as confidential. It may be that some of the details within the financing agreements should be confidential, but we are not at that stage yet. This is just the names, and those should not be confidential.

Schedule 3.1(aa). This is a schedule of bank accounts and related information. While it is perhaps surprising that the schedule is fully redacted, given that information on some of the distributor's banking arrangements is already on the public record, in general SEC does not believe that this category of information is either relevant or public in nature. If specific banking arrangements of the distributor should become relevant to the proceeding, it will be because they are unique, and this list would not assist in that regard.

Schedule 5.2. This schedule relates to certain transactions the company is entitled to complete prior to closing without Hydro One's permission. No information is given on why the list of those transactions should be confidential. The only substantive submissions are those of Norfolk, and relate entirely to the contents of the contracts and transactions themselves, not the list.

This is a perfect example of a category in which SEC, unable to review the unredacted information, cannot make intelligible submissions. Depending on the nature of the transactions being allowed, they may be very relevant to the proceeding, or not at all. Similarly, they could contain sensitive information, or not.

For example, if the list includes "Payment of $1 million settlement to employee X", that may well be relevant, but almost certainly some redaction would be required for confidentiality. If the list includes "Acquisition of land for Hydro One service depot", that would be relevant, but probably not confidential. If the list includes "Sale of scrap lumber for $50,000", that is likely neither relevant nor public.

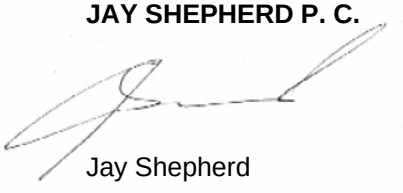
In our submission, absent any arguments from Norfolk on the reasons this list (as opposed to the agreements) should be confidential, the Board should hold that it is not confidential. If the Board, having reviewed the unredacted document, is concerned that some of it might need confidential treatment, then the Board should release the unredacted document to intervenors who sign the Declaration, so that submissions can be received from intervenors who have reviewed the document. The Board may receive none, because confidentiality may be obvious, but in our view it is important for the Board to satisfy the legal principle of hearing both sides before reaching a conclusion that accepts the Applicant's request.

Conclusion

With the exceptions noted above, SEC believes that the information redacted by the Applicant is relevant, and should not be accorded confidential treatment.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



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cc: Wayne McNally, SEC (email)
Interested Parties