J. Mark Rodger
T 416-367-6190
F 416-361-7088
mrodger@blg.com

Borden Ladner Gervais LLP
Scotia Plaza, 40 King St W
Toronto, ON, Canada M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

Borden Ladner Gervais

July 25, 2013

DELIVERED BY RESS, COURIER AND E-MAIL

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

Dear Ms. Walli:

Re: Our Clients: Norfolk Power Distribution Inc. and Norfolk County (collectively, "Norfolk")
Norfolk Reply Submissions on Confidentiality/Redactions
OEB File No.: EB-2013-0196/EB-2013-0187/EB-2013-0198

What follows is Norfolk's reply to the submissions made by Board Staff, Essex Powerlines ("Essex") and School Energy Coalition ("Schools") (collectively the "Parties"). No submissions were filed by the Consumers Council of Canada, Horizon Utilities Corporation and the Vulnerable Energy Consumers Coalition, the other parties of record in this proceeding.

The Parties' submissions reveal a loss of perspective concerning the overall context within which the Application will be decided and advance incorrect interpretations of the Board's "no harm" test.

In determining applications under section 86 of the Act, the Board applies its "no harm" test. As Board Staff indicates in their July 19, 2013 submission, the "no harm" test consists "of a consideration as to whether the proposed transaction would have an **adverse effect relative to the status quo of the applicants and their customers** in relation to the Board's statutory objectives as set out in section 1 of the Act" (emphasis added). Norfolk agrees with this description of the test.

The Parties' submissions attempt to establish a link between the redacted information and the "no harm" test as a basis to justify production of the confidential/irrelevant information. The size and impact of the transaction before the Board must be kept in proper perspective in determining relevance and/or potential harm vs. probative value of disclosing the redacted information.

The Parties fail to acknowledge the fundamental reality that the Norfolk Power transaction will have a *de minimis* impact on the status quo of Hydro One and its customers. Hydro One's total

assets at the end of 2012 were $20,811M[1]. The purchase price paid for Norfolk Power Distribution Inc. as a ratio of HONI's total assets is 0.4% and less than 2% of HONI's Distribution net fixed assets.[2]

To suggest, as Schools does, that information such as the removal of liens, mortgages or other encumbrances, or personal details surrounding a former employee's employment with the utility, or utility bank account information has any semblance of relevance or impact on the status quo of HONI and its customers is not true and without merit. In Norfolk's view such requests for disclosure of the redacted information is simply a fishing expedition.

Similarly, Schools advances irrelevant considerations in an attempt to have the redacted materials produced. On multiple occasions Schools indicates that "the high price of this transaction will be a key issue in consideration of the "no harm" test"[3]. Norfolk submits that it will not. The Board itself was clear with respect to the role that price would play in its consideration of a MAADs application. Specifically, in its combined MAADs proceeding[4] in which the Board adopted the "no harm" test for MAADs applications, the Board considered submissions on the relevance of the purchase price payable in relation to the proposed transaction. At page 7 of its August 31, 2005 Decision in that proceeding[5], the Board made the following finding:

> "The Board is of the view that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company which adversely affects economic viability as any premium paid in excess of the book value of assets is not normally recoverable through rates. This position is in keeping with the 'no harm' test."

The impact of the transaction relative to Hydro One's financial status quo is far too small to be concerned with. By no reasonable standard can the Norfolk transaction price paid be considered a material issue relative to HONI's and its customer's status quo. To suggest otherwise is simply misconstruing and misapplying the Board's "no harm" test. This is another reason why the redacted information simply is not relevant and will contribute nothing to assist the Board in applying its "no harm" test.

Disclosing the redacted information would only introduce new risks to the status quo of Norfolk and its customers that do not exist presently.

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[1] Hydro One Annual Report 2012, page 51
[2] Section 1.4.4, MAAD application indicates that "the proposed transaction will not have a material impact on HONI's Distribution financial position."
[3] pages 2, 4 of School submission, July 19, 2013
[4] RP-2005-0018, EB-2005-0234, EB-2005-0254, EB-2005-0257
[5] http://www.ontarioenergyboard.ca/documents/cases/RP-2005-0018/decision_310805.pdf

Both historically and currently, Norfolk has no obligation to public disclose the redacted confidential information (including any information relating to an identifiable individual which would be protected as personal information under Ontario privacy laws such as the *Freedom of Information and Protection of Privacy Act*). Likewise, after the transaction closes the new owner will have no obligation to public disclose this same confidential information.

For Norfolk to be ordered to produce the redacted information at this time would result in exposing the utility to new risks during the current transition period: that being after the share purchase agreement has been duly approved by the Municipality of Norfolk County but before the transaction closes (which can only follow OEB approval).

Accordingly, any potential negative impacts to the status quo of Norfolk and its customers through the public disclosure of the redacted materials (which were identified and described in our July 12, 2013 submissions) need to be considered by the Board as part of its "no harm" consideration. In short, the release of such confidential information has the risk to negatively affect the status quo of Norfolk and its customers whereas keeping the information confidential maintains the status quo.

A MAADs application is different from a distribution rate application. The evidence supporting a MAADs application is different from the evidence supporting a distribution rate application.

The OEB approved the Settlement Agreement in Norfolk Power's latest cost of service distribution rate application on February 14, 2012. Accordingly, the Board and intervenors have already recently reviewed Norfolk's costs. There is no need to duplicate this review to matters such as what Schools refers to as the Material Contracts. There can be no benefit to reconsider these identical matters, such as the Material Contracts, in the current MAAD application. MAAD applications are not rate applications. They have a different focus and involve a different regulatory test.

We would also remind the Parties that the contemplated transaction under consideration by the Board is a share purchase. That is, HONI acquires the shares of Norfolk Power and thereby assumes all Material Contracts, property, employees, collective agreements etc. that currently belong to Norfolk. Once again, when the Board applies its "no harm" test, there can be no adverse impact to the status quo because the agreements and obligations already exist and simply get transferred - intact - from the current owner to the new owner. The information and obligations contained in the redacted materials are in effect today, they form part of Norfolk's existing and approved distribution revenue requirement, and they will continue under HONI ownership.

Moreover, the Board also considered the requests of ratepayer groups for details of the transaction process with respect to the sale of shares or assets of a distributor in its combined proceeding. At page 9 of its August 31, 2005 Decision, the Board made the following finding:

> "With respect to the claim that ratepayers have a right to 'an open and transparent process' for the sale of the shares or the assets of an electricity distributor, the Board has two observations. First, section 86 of the Act applies to distributors whether they are publicly or privately owned. Although the three Applications at issue involve utilities that are municipally-owned, not all distributors are publicly owned. As a result, any findings by the Board with respect to customers' process rights (in the sense of rights associated with the process leading up to the conclusion of a transaction) would apply to privately-owned companies. Further, the legislature has determined that distributors should be governed by the Ontario *Business Corporations Act* ("OBCA"). The OBCA contains provisions governing procedures and rights associated with, among other things, amalgamations and other significant corporate activities. Viewed from this perspective, the Board does not believe it is appropriate to open up corporate process issues to review. The Board does not believe it is appropriate to add an additional layer of corporate review by vesting process rights (again, in the sense of rights associated with the process leading up to the conclusion of a transaction) within customers of distribution companies. The content of such rights and the process by which they may be exercised is beyond the Board's objectives or role within the energy sector."

Schools' requests for access to the redacted information such as "the list of Material Contracts that were included in the Data Room that purchasers could access when considering their bids for the company"[6] represents an attempt to impose the additional layer of corporate process review specifically rejected by the Board as beyond the scope of a MAADs proceeding.

A comprehensive MAAD Application is already on the public record

The Application and supporting materials already filed on an unredacted basis provide more than enough information to inform the Parties and to fully address the "no harm" test.

The MAAD Application filed comprises hundreds of pages of information including the 57 page, unredacted version of the Share Purchase Agreement which describes in great detail all elements of the transaction. This Agreement includes extensive provisions which explain the mechanics of the transaction including the distribution rate reduction and five year distribution rate freeze, employment guarantees, representations and warranties, the covenants, environmental conditions and indemnities of vendor and purchaser, among others matters. Norfolk submits there is more than sufficient information already on the public record to fully explain the transaction and to discharge the "no harm" test in support of the relief sought.

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[6] Schools, page 3, July 19, 2013 submission

Finally, no Party has requested the unredacted information further to the Board's Practice Direction notwithstanding that almost 3 months have passed since the Application was filed with the Board.

In Procedural Order No. 1, the Board indicated that "Intervenors or Board staff wishing to file a submission on the Applicant's claims for confidentiality and/or relevance shall file such submission with the Board and serve it on the Applicants on or before July 19, 2013". Essex filed no such submissions. Instead Essex merely referenced subsection 5.1.6 of the Board's Practice Direction on Confidential Filings. No Party, including Essex, Board Staff or Schools requested that the Board allow access for purposes of making submissions. School's observation is not correct when it said that the Board did not follow its normal practice of allowing the intervenors to review the unredacted documents in order to make their submissions on the confidentially claim. The onus is on the Parties to request the information further to the subsection 5.1.6 of the Practice Direction and no Party has done so. In fact, no Party even filed an objection to the request for confidentiality, which is also contained in this same Practice Direction cited by Essex.

The appropriate time for Parties to make an objection and request the unredacted material was when the Parties first became aware of the filing – not when submissions on those redacted materials were due. Board Staff first became aware of the redacted filings when HONI filed the MAAD application on May 1, 2013 – almost three months ago. Essex and Schools have also been aware of the redacted filings for many weeks now given the dates of their respective intervention requests in early June.

The Parties had ample opportunity to request the redacted information but failed to do so. Given the significant amount of time that has passed since the Application was filed on May 1 (and given that we are now fast approaching the beginning of August), Norfolk submits there is no reasonable justification to cause further delay in this proceeding by now producing confidential/irrelevant and/or potentially prejudicial information only to incur additional expense and delay for an additional round of submissions and reply which easily could have been requested and completed weeks ago, and in the case of Board Staff, months ago.

Conclusion

The Board panel has in its possession the unredacted materials filed in confidence. The issue to be determined is given:

- the context of this MAAD Application including the scope of the "no harm" test,
- the *de minimis* size and impact of the transaction relative to the status quo of HONI and its customers,
- the volume of unredacted materials already filed on the public record, and

- the risk of harm to the status quo of Norfolk and its customers through disclosure,

that the Board conclude that the redacted materials continue to be held in confidence and not be subject to disclosure in order to permit the regulatory process to move forward in a timely and cost efficient manner.

Yours very truly,

BORDEN LADNER GERVAIS LLP

J. Mark Rodger
Incorporated Partner*
*Mark Rodger Professional Corporation

Copy to: Dennis Travale, Mayor, Norfolk County
Al Hays, Chairman, Norfolk Power
Jody McEachran, Norfolk Power
Michael Engelberg, Hydro One