



EB-2012-0153

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 Northern
Ontario Wires Inc. for an order approving or fixing just and
reasonable rates and other charges for the distribution of
electricity to be effective May 1, 2013.

BEFORE: **Paula Conboy**
 Presiding Member

Jerry Farrell
Member

DECISION ON INFORMATION WITHDRAWAL REQUEST
August 2, 2013

Northern Ontario Wires Inc. ("NOW") filed a complete application (the "Application") with the Ontario Energy Board (the "Board") on December 18, 2012 under section 78 of the *Ontario Energy Board Act, 1998*, seeking approval for changes to the rates that NOW charges for electricity distribution to be effective May 1, 2013.

Details on the various procedural steps which followed are available on the Board's website.

In accordance with Procedural Order No. 3, dated April 25, 2013, the Board made provision for parties to make submissions on NOW's confidentiality request with respect to the Strategic Financial Plan that NOW filed as its response to a supplementary interrogatory 5-SEC-12s prepared by the School Energy Coalition ("SEC"). NOW had previously referred to, and relied on, the filed document in its response to Board staff's interrogatory 5-Staff-24. In its reply submission, NOW stated that if the Board decided

that the document should not be afforded confidential treatment, NOW would request that the information be withdrawn from the record in accordance with section 5.1.12 of the Board's *Practice Direction on Confidential Filings* ("the Practice Direction").

On June 27, 2013, the Board issued its Decision and Rate Order denying NOW's request that the Strategic Financial Plan be held in confidence and stating that NOW's Strategic Financial Plan will form part of the public record to this proceeding. In its Decision and Rate Order, the Board also made provision for parties to make submissions on NOW's request that the Strategic Financial Plan be withdrawn from the record in this proceeding.

The Board received submissions from NOW and SEC on July 5, 2013.

In its submission, NOW stated that the Strategic Financial Plan was filed voluntarily by NOW in response to interrogatory 5-SEC-12s on the basis that it be granted confidential status. NOW further cited section 5.1.12 of the Practice Direction which provides a 5-day window of opportunity for parties that have produced documents on a confidential basis to withdraw the document from the record in the event that confidential status is not granted:

5.1.12. Where the Board has ordered that information that is the subject of a confidentiality request be placed on the public record or disclosed to another party, in whole or in part, the person who filed the information will, subject to section 5.1.13, have a period of 5 business days in which it may request that the information be withdrawn. Such request shall be made in writing to the Board Secretary or, where the request is made during an oral hearing, directly to the Board.¹

NOW further stated that the Practice Direction specifies that a request to remove a document from the record cannot be made if the document had been produced as a result of a Board order:

5.1.13. The ability to request the withdrawal of information under section 5.1.12 does not apply to information that was required to be produced by an order of the Board.²

¹ The Board's *Practice Direction on Confidential Filings*, page 9

² The Board's *Practice Direction on Confidential Filings*, page 9

NOW submitted that from these two sections of Practice Direction it is clear that a document filed voluntarily on a confidential basis could be withdrawn on request of the producing party within 5 days of the order denying confidential status without further justification; only if there was an earlier order requiring production of the document would such a withdrawal request fail.

NOW further submitted that in order to facilitate the application process, NOW filed material requested through the interrogatory process without conceding its relevance or the requesting the party's ability to compel the production of the document. In NOW's view the ability to produce documents on a confidential basis in the first instance and automatic ability to withdraw such documents under section 5.1.12 would avoid delaying the application process.

NOW finally submits that the issue of the production of the Strategic Financial Plan has been rendered moot by virtue of the settlement.

In its submission, SEC submitted that the Board should deny NOW's request. SEC explained that the Board should only allow a party to withdraw a document that had been ordered to be placed on the public record if the document is clearly not relevant to the determination of the issues in the proceeding and the document was produced by that party in addition to any requirements. SEC stated that the Strategic Financial Plan had not met these requirements and it is clear the information is relevant to the proceeding.

SEC stated that NOW relied on the Strategic Financial Plan to explain the increase in the principal balance for its long term debt from 2012 to 2013, as described in its response to interrogatory 5-Staff-24. In order to understand the response to that interrogatory, SEC specifically requested the Strategic Financial Plan in supplementary interrogatory 5-SEC-12s. SEC further stated that since NOW did not dispute the relevance of the interrogatory, the Board would have followed its normal practice and ordered its production.

SEC submitted that the Strategic Financial Plan is needed to remain on the record in this proceeding since intervenors have relied in part upon that document in entering into the Settlement Agreement. As such, it would be inappropriate that a portion of the evidence relevant to this proceeding be withdrawn from the record after the Decision in this proceeding had been released.

Board Findings

The Board denies the request of NOW for permission to withdraw the Strategic Financial Plan from the record for the reasons that follow. The Board does not accept in this regard that NOW did not concede the relevance of the Strategic Financial Plan. To the contrary, NOW referred to, and relied on, the document in its response to interrogatory 5-Staff-24. The matter in issue at the time of the filing was the proposed long-term debt component of NOW's capital structure. The document was accordingly material in that it was of consequence to the determination of the matter in issue at that time; moreover, the document had probative value at that time in that it had a tendency to support the proposed long-term debt component and was so proffered by NOW. The Board accordingly finds that document was relevant when NOW filed it and it remains so today. To say otherwise is to say NOW knowingly filed an irrelevant response to a Board staff interrogatory and thus failed to respond to the interrogatory, without saying so, such that parties were invited to rely on the response and thereby on the document itself. SEC's submission makes this very point using other words. The achievement of a settlement subsequent to the filing is not germane to the Board's finding of relevance for the purposes of section 5.1.12 of the Practice Direction.

The Board acknowledges the fact that NOW's intention to avoid any delay of the application process by filing the document on a confidential basis. However, the Board does not agree that a document, which has been referred to and relied upon in a response to one interrogatory and subsequently filed in response to a supplemental interrogatory can be withdrawn on request of the producing party without further justification. The key issues are relevance and materiality: if the document is relevant to the proceeding and its probative value exceeds any potential prejudice (for example the difficulty in preparing the document), then generally it belongs on the record.

For these reasons, the Board finds that the Strategic Financial Plan will remain on the public record of this proceeding and the Board so orders.

THE BOARD ORDERS THAT:

1. The Strategic Financial Plan filed by NOW as its response to SEC's supplementary interrogatory 5-SEC-12s shall remain on the public record of this proceeding in its entirety.

DATED at Toronto, August 2, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary