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August 28, 2013

VIA RESS, EMAIL AND COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

RE: Applications by Hydro One Inc., Norfolk Power Distribution Inc. and Hydro One Networks Inc.
EB-2013-0196, EB-2013-0187 and EB-2013-0198

We have been retained by Hydro One Inc. and Hydro One Networks Inc. ("**Hydro One**") in respect of the above-noted proceeding. Pursuant to Procedural Order No. 2, as amended by Procedural Order No. 4, please find enclosed Hydro One's Reply Submissions on Relevance.

Please amend the distribution list for this proceeding to include the following:

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Please contact the undersigned if you have any questions in relation to the foregoing.

Yours truly,

McCarthy Tétrault LLP

Signed in the Original

Gordon M. Nettleton

GMN/ha
Enclosures

EB-2013-0196
EB-2013-0187
EB-2013-0198

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Sch. B, as amended.

AND IN THE MATTER OF an application by Hydro One Inc. for leave to purchase all of the issued and outstanding shares of Norfolk Power Inc. under section 86(2)(b) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application by Norfolk Power Distribution Inc. for leave to dispose of its distribution system to Hydro One Networks Inc. under section 86(1)(a) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application by Hydro One Networks Inc. seeking to include a rate rider in the 2013 Ontario Energy Board approved rate schedule of Norfolk Power Distribution Inc. to give effect to a 1% reduction relative to 2012 base electricity delivery rates (exclusive of rate riders) under section 78 of the *Ontario Energy Board Act, 1998*.

HYDRO ONE REPLY SUBMISSIONS ON RELEVANCE

I. INTRODUCTION

1. These submissions are made on behalf of Hydro One Inc. and Hydro One Networks Inc. ("**Hydro One**") in response to Procedural Order No. 2, wherein the Board set out, *inter alia,* a deadline for Hydro One and Norfolk Power Distribution Inc. (collectively, the "**Applicants**") to file submissions responding to parties' submissions on the Applicants' claims for confidentiality and/or relevance.[1]

2. On August 21, 2013, submissions were filed by Essex Powerlines Corporation, Bluewater Power Distribution Corporation and Niagara-on-the-Lake Hydro Inc. ("**EBN**") as well as by Board Staff and the School Energy Coalition. Pursuant to Procedural Order No. 2, Hydro One makes these submissions in response to the submissions of EBN and Board Staff.

3. Hydro One is concerned that in making submissions in respect of disclosure and relevance in this proceeding, parties have not focused on the "no harm" test which must be applied in applications under section 86 of the *Ontario Energy Board Act, 1998* (the

[1] The initial August 21, 2013, deadline was extended to August 28, 2013, by Procedural Order No. 4, issued August 13, 2013.

"**Act**"). In light of this, Hydro One is concerned with the scope of the process that lies ahead if the information which is not currently on the public record and which Hydro One submits is irrelevant to a determination under section 86 of the Act, is placed on the public record such that parties can file interrogatories in relation to it. In other words, Hydro One's primary concern, in making these submissions, is with the implications of the expansion of the evidentiary record to include information which is clearly irrelevant to the test to be applied to applications filed under section 86 of the Act.

4. Hydro One observes that submissions filed have equated the information contained in a share purchase agreement with the information needed for an analysis under the Board's "no harm" test, which parties agree is the test applicable to section 86 applications. Hydro One submits that this approach is not only incorrect, but could have implications on the scope of the proceeding and resultant evidentiary record in both this proceeding and future section 86 proceedings.

5. For the reasons explained below, Hydro One believes that guidance from the Board in respect of determining relevance is necessary at the outset of this proceeding. Hydro One submits that relevance should be assessed in relation to the analysis to be conducted under the "no harm" test, which considers simply whether a proposed transaction would have an adverse effect relative to the status quo of the applicants, with regard to the Board's statutory objectives.

6. The Board's decision in respect of relevance and confidentiality will inform parties as to the scope and nature of the information that is relevant as this proceeding moves into the interrogatory phase. The Board's decision will also determine the scope of information that applicants in a section 86 proceeding are expected to disclose and make public, not only to ratepayers and the Board but also to future competitors that an entity may face in future asset disposition and transfer transactions.

7. These submissions will begin with a discussion of the Board's criteria for applications under section 86 of the Act, before turning to the specific points made in the EBN and Board Staff submissions.

II. THE BOARD'S CRITERIA IN AN APPLICATION UNDER SECTION 86 OF THE ACT

Section 86 and the "no harm" test

8. Section 86 of the Act provides that, *inter alia,* a distributor shall not, without obtaining leave of the Board, sell, lease, or otherwise dispose of its distribution system.[2] The "no harm" test derived from RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257

[2] Section 86(1)(a), *Ontario Energy Board Act, 1998*.

(the "**Combined Proceeding**") considers whether a proposed transaction would have an adverse effect relative to the status quo of the applicants, with regard to the Board's statutory objectives as set out in section 1 of the Act. In concluding in the Combined Proceeding that the "no harm" test is the proper test for applications under s. 86, the Board stated:

> The Board believes that the "no harm" test is the appropriate test. It provides greater certainty and, most importantly, in the context of share acquisition and amalgamation applications it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act. **The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by the parties.** In that sense, in section 86 applications of this nature the Board equates "protecting the interests of consumers" with ensuring that there is "no harm to consumers".
>
> **The Board has therefore considered the question of the scope of the issues to be addressed in these Applications by reference to the "no harm" test.**[3] [emphasis added]

9. The test in an application under section 86, therefore, is whether harm may occur to the ratepayers of the applicants in consideration of prices and the adequacy, reliability and quality of electricity service.[4] The test must also encompass consideration of the Board's objective of promoting economic efficiency and cost effectiveness in the generation, transmission and distribution of electricity and to facilitate the maintenance of a financially viable electricity industry.[5]

10. It is important to note that when the Board determined, in the Combined Proceeding, that the no harm test is the appropriate test under s. 86 of the Act, it also considered alternatives. In particular, the Board heard submissions arguing that the test to be applied is the "best deal" test, under which the Board would be called upon to determine whether or not consumers would be better off with the status quo or with other options that were considered by the seller. The Board rejected this option. The result is that section 86 proceedings are not concerned with the oversight of whether, as between two transacting parties, sound business judgment has been exercised.

[3] RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257 at pg. 6.

[4] *Ontario Energy Board Act, 1998,* s. 1(1) 1.

[5] *Ontario Energy Board Act, 1998,* s. 1(1) 2.

Relevance and the "no harm" test

11. "Relevance," the Board has stated, "can only be determined in the context of the substantive issue to be decided by the Board."[6] In this proceeding, therefore, relevance must be assessed with regard to the analysis to be undertaken pursuant to the "no harm" test. As detailed below, submissions in this proceeding have incorrectly considered relevance from the perspective of assessing the soundness of the business transaction, rather than from that of the "no harm" test.

III. EBN SUBMISSIONS AND THE "NO HARM" TEST

Share purchase agreements and the "no harm" test

12. The EBN submissions state that it is "established by the SPA that the schedules [to the SPA] are *prima facie* relevant."[7] EBN further asserts that "the fact that the information and documents have been included in a Schedule to the SPA makes them *prima facie* relevant."[8]

13. Hydro One does not agree. The SPA embodies the business arrangement between the Applicants. In contrast, the "no harm" test does not assess the business arrangement between parties but instead looks as to whether the subject transaction will have an adverse effect relative to the status quo. All information included as part of an SPA is not, therefore, automatically relevant to the "no harm" test.

14. It is to entirely misunderstand both the "no harm" test and the purpose of a share purchase agreement to conclude, as EBN concludes, that "the SPA is not supportive"[9] of any arguments on the part of the Applicants that certain information in the SPA is not relevant. A share purchase agreement will, by nature, have information relevant to the business arrangement between seller and purchaser. Not all this information will be relevant to the Board's consideration of whether the transaction will have an adverse effect relative to the status quo.

The material contracts and environmental disclosures in the share purchase agreement, and the relevance of these to the "no harm" test

15. The EBN submissions assert that "[t]o allow an applicant to avoid producing part of what is clearly a relevant agreement, namely the SPA, when the agreement itself identifies the

[6] Decision and Order (June 8, 2011) in EB-2010-0184 at para. 26.

[7] EBN submissions dated August 21, 2013 at pg. 3.

[8] EBN submissions dated August 21, 2013 at pg. 3.

[9] EBN submissions dated August 21, 2013 at pg. 5.

documents as being material, is counter intuitive."[10] The argument is that because the contracts are included as material contracts to the share purchase agreement, they are *prima facie* relevant.

16. Hydro One does not agree. It is common practice for a seller's material obligations to be included as a schedule to a share purchase agreement. The seller's obligations are important and relevant to the purchaser, who will be taking on these obligations once the transaction has concluded. It does not follow that these obligations are relevant to the Board's "no harm" test.[11] Moreover, the pre-existing obligations of Norfolk Power Distribution Inc. ("**Norfolk**") are not new; they have been considered in Norfolk's past rate applications and reflected in its revenue requirement, and are therefore not relevant to a determination under the "no harm" test.

17. EBN makes similar submissions in respect of the environmental disclosure and permitted encumbrances schedules to the SPA. EBN argues that environmental liabilities must be relevant because there are environmental reports in existence which identify what "could be" significant liabilities.[12] As is true of material contracts, environmental liabilities are relevant to a purchaser; they are not automatically relevant to the "no harm" analysis.

18. Importantly, the evidence on the record in this proceeding indicates that the contracts and environmental disclosure included as schedules to the SPA are not relevant to the Board's analysis under s. 86. More specifically, the audited financial statements of Norfolk are silent in respect of these contracts and environmental disclosure items. If environmental risks or contractual obligations were of such significance as to warrant the Board's consideration in a section 86 application, these risks or obligations would be disclosed in Norfolk's audited financial statements. But even then, it would not automatically follow that they would qualify as being relevant to the "no harm" test.

The need for guidance on relevance prior to the interrogatory stage

19. The EBN submissions assert that intervenors should be allowed "to consider each of the documents and all of the information" in the Schedules to the SPA and to ask interrogatories in respect of this information.[13] Rather than limiting intervenors'

[10] EBN submissions dated August 21, 2013 at pg. 5.

[11] The SPA defines a "Material Contract" as "any Contract for the supply of goods or services which has a value exceeding Fifty Thousand Dollars ($50,000.00) in annual payments excluding any collective bargaining agreements or other employment related agreements." There is no reason to draw the conclusion that each and every contract exceeding $50,000 will be relevant to a determination under the "no harm" test.

[12] EBN submissions dated August 21, 2013, at pg. 5.

[13] EBN submissions dated August 21, 2013, at pg. 4.

questions to matters within the scope of the no harm test, EBN would expand the scope of interrogatories to include essentially anything related to the SPA.

20. Hydro One submits that to proceed in the above manner will lead to an inefficient section 86 proceeding, wherein parties will pose a significant number of out-of-scope interrogatories related to the SPA instead of to the no-harm test. As further explained below, Hydro One is concerned that the scope of the evidentiary record in future proceedings will be difficult to define and determine, and that the efficiency of all similar section 86 proceedings will be negatively affected as a result.

IV. BOARD STAFF SUBMISSIONS

21. Board Staff writes in its submission of August 21, 2013, that the SPA "is a document which is critical to the assessment of the current applications and, to the extent that information in it is not found by the Board to be confidential, the placing of the document on the public record is the rule."[14]

22. Hydro One notes that it appears that Board Staff's view has been one where confidentiality and disclosure take precedence over a determination of relevance. Hydro One does not agree, and submits that the confidential disclosure of the schedules to the SPA has been sufficient to enable parties to recognize that the information not currently on the public record is irrelevant to a determination of whether harm would be sustained to ratepayers if the transaction proceeds. As mentioned, Norfolk's pre-existing obligations have been considered in Norfolk's past rate applications and built into its revenue requirement. Also as discussed, if the information currently not on the public record were relevant to an assessment under the "no harm" test, the information would inevitably be referenced in Norfolk's audited financial statements. That they are not so referenced raises, again, significant doubt as to the merit of placing the information in question on the public record and thereby permitting parties to engage in the Board's discovery process through interrogatories in respect of this information.

V. THE IMPLICATIONS OF EXPANDING THE SCOPE OF THE EVIDENTIARY RECORD IN A SECTION 86 PROCEEDING

23. Expanding the evidentiary record in a section 86 proceeding to matters outside the "no-harm" test would have a number of implications. As mentioned, the efficiency of proceedings would be reduced, and future proceedings could easily become "fishing expeditions" as parties are permitted to seek disclosure of, and ask interrogatories about, matters which fall outside the scope of a section 86 proceeding.

[14] Board Staff submissions of August 21, 2013, at pg. 3.

24. Moreover, armed with the knowledge that all information in a share purchase agreement will be placed on the public record by the Board, parties will no longer file share purchase agreements with the Board given that the section 86 application requirements require only that legal documents implementing the transaction be "listed".[15] Also possible is that parties will simply draft share purchase agreements to exclude any items they do not wish to have placed on the public record.

25. Finally, expanding the scope of the evidentiary record to include all information relating to the SPA ignores the fact that as noted in Norfolk's submissions of July 25, 2013, a comprehensive MAAD application is already on the public record. The Application, as filed by the Applicants, already provides more than enough information to inform parties, provide a basis for interrogatories, and fully address the "no harm" test.

VI. CONCLUSION

26. Based on the foregoing, Hydro One submits that the Board should carefully consider the decision it makes in respect of relevance at this stage of the proceeding, as its decision will have implications for this as well as future section 86 proceedings. It is submitted that relevance should be assessed directly in relation to the analysis to be conducted under the "no harm" test. To expand the scope of the proceeding and evidentiary record beyond this, it is submitted, would be out of line with the Board's practice. It would also result in an inefficient and cumbersome process each time an application is made under s. 86, at a time when there could be more of these applications going forward.

ALL OF WHICH IS RESPECTFULLY SUBMITTED DATED THIS 28TH DAY OF AUGUST 2013

Gordon M. Nettleton
Counsel to Hydro One Inc. and Hydro One Networks Inc.

Signed in the Original

[15] Item 1.5.2 of the Board's Application Form for Applications under Section 86 of the *Ontario Energy Board Act, 1998,* reads at page 3, "Please list all legal documents (including those currently in draft form if not yet executed) to be used to implement the proposed transaction."