



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

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 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*.

BEFORE: Paula Conboy
Presiding Member

Ken Quesnelle
Member

Ellen Fry
Member

DECISION ON CONFIDENTIALITY REQUEST

and

PROCEDURAL ORDER NO. 5

September 27, 2013

Hydro One Networks Inc. (“HONI”) and Norfolk Power Distribution Inc. (“NPDI”), both licensed electricity distributors, and Hydro One Inc., HONI’s parent company (the “Applicants”), filed related applications dated April 26, 2013 with the Ontario Energy Board (the “Board”). Specifically:

1. Hydro One Inc. applied 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* (the “Act”) – Board file number: **EB-2013-0196**;
2. NPDI applied for leave to dispose of its distribution system to HONI under section 86(1)(a) of the Act – Board file number: **EB-2013-0187**; and
3. HONI applied for inclusion of a rate rider in the 2013 Board approved rate schedule of NPDI to give effect to a 1% reduction relative to 2012 base electricity delivery rates (exclusive of rate riders) under section 78 of the Act – Board file number: **EB-2013-0198**.

Pursuant to its authority under section 21(5) of the Act, the Board decided to consider these applications together in a consolidated proceeding and issued its Notice of Applications and Hearing on May 31, 2013.

As part of their pre-filed evidence, the Applicants filed the Share Purchase Agreement for the transaction referred to in item 1 above, (the “SPA”). Certain information was redacted from the Schedules to the SPA based on the Applicants’ assertion that the information is not relevant to the proceeding, and/or that the information is confidential.

The Board issued Procedural Order No. 1 on July 3, 2013 in which the Board ordered the Applicants to file a complete and un-redacted version of the SPA with the Board in accordance with the Board’s Practice Direction on Confidential Filings (the “Practice Direction”), and made provision for submissions on the Applicants’ claims for confidentiality and relevance. The Board received submissions from the Applicants, Essex Powerlines Corporation, School Energy Coalition (“SEC”) and Board staff.

Most of these parties argued that it was not possible to make full submissions without viewing the information that the Applicants redacted.

After reviewing the un-redacted version of the SPA and considering the submissions, the Board issued Procedural Order No. 2 on August 1, 2013. In Procedural Order No. 2 the Board ordered the Applicants to produce a version of the SPA where only portions of the originally redacted information, as specified by the Board, would remain redacted (the “Confidential Version”). The Board further ordered the Applicants to provide the Confidential Version of the SPA to those qualified counsel and external consultants that executed the Board’s form of confidentiality Declaration and Undertaking, to enable them to make further submissions.

The Board received written submissions from counsel for Essex Powerlines Corporation, Bluewater Power Distribution Corporation, and Niagara-on-the Lake Hydro Inc. (“EBN”), counsel for SEC and Board staff. Counsel for Norfolk County and NPDI (“Norfolk”) and counsel for Hydro One Inc. and HONI (“Hydro One”) filed reply submissions.

RELEVANCE

It is the Applicants’ position that the redacted information is not relevant to the current proceeding. The Applicants submitted that the Board applies the “no harm test” in determining applications under section 86 of the Act and submitted that relevance should be assessed in relation to the analysis to be conducted under the “no harm” test. It is the Applicants’ position that the redacted information is not relevant to the “no harm test”.

EBN submitted that it is premature for the Applicants to seek to exclude the information in question as not relevant. It is EBN’s position that “the fact that the information and the documents have been included in a Schedule to the SPA makes them *prima facie* relevant”. EBN also submitted that parties can raise the issue of relevance at the interrogatory stage of the proceeding.

SEC submitted that the Applicants’ position on confidentiality and relevance is an attempt to seek a ruling on the scope of the “no harm” test. SEC indicated its desire to make submissions on the scope of the “no harm” test if the Board considered this to be helpful.

The Board finds that it is premature to make a decision on the relevance of the information contained in the SPA at this stage of the proceeding. As submitted by the Applicants, the “no harm” test is the test that the Board will apply in making its decision in this proceeding. Relevance needs to be determined in relation to the “no harm” test.

Given the fundamental importance of the “no harm” test to this proceeding, the Board expects that in making their submissions, some or all of the parties, and also potentially Board staff, will wish to make submissions concerning the “no harm” test and its application in this case. It would be inappropriate to make a determination of relevance until the Board has considered and applied the “no harm” test, after having the benefit of the submissions on this issue.

The Board will therefore consider at this point only whether the information which the Applicants seek to have excluded from the public record should be treated as confidential. In doing so, the Board will be guided by the principles in the Practice Direction.

CONFIDENTIALITY

No objections were filed with the Board concerning confidential treatment of the redactions made in producing the Confidential Version of the SPA in accordance with Procedural Order No. 2.

The Applicants submitted that additional information should be redacted as confidential from the following Schedules of the SPA: 3.1(L), 3.1(N), 3.1(O), 3.1(R), 3.1(T) 3.1(X), 3.1(AA), 5.2 and 6.9.

EBN submitted that the Confidential Version of the SPA should be placed on the public record in its entirety. EBN submitted that the Board has a general policy in favour of open, transparent and accessible proceedings. EBN made a distinction between the content of the documents identified in the Confidential Version, some of which could possibly be considered confidential, and the information in the Confidential Version that merely references the title, nature etc. of the documents.

Board staff submitted that the Confidential Version of the SPA should be placed on the public record with two exceptions. These are discussed below. SEC supported Board staff's submission.

The Board will address the relevant Schedules to the SPA individually.

Schedule 3.1(L) – Real Property, Leased Property and Easements

Names of property owners and their addresses under the heading "Easements/Right of Ways" are proposed to be redacted by the Applicants based on the view that disclosure of the information will result in the personal information of a person who is not a party to this proceeding being made public. In Procedural Order No. 2, the Board allowed the names of the individuals to remain redacted. Section 4.3.1 of the Practice Direction provides that subject to limited exceptions, the Board is prohibited from releasing personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Both names and the addresses of identifiable individuals are considered personal information under FIPPA. Accordingly, the Board finds that the names of the individuals should remain redacted and in those instances

where an address is provided and the address relates to the residence of a specific individual, the Board finds that such address should also remain confidential and should therefore be redacted.

Schedule 3.1(N) – Contracts and Commitments

Norfolk seeks the redaction of the entire Schedule. In Norfolk's view, disclosure of the redacted information can "cause harm to other parties' competitive positions; impede or diminish the ability of NPDI and its affiliates to fulfill existing confidentiality obligations including obligations to not disclose the existence of the agreement; and interfere with NPDI's ability to negotiate extensions or new agreements with third parties due to a loss of faith in NPDI's commitment to treat the material as confidential". However, Hydro One is seeking only redaction of certain employee and service contract information. The Board notes that Hydro One, as the proposed new owner of NPDI, is seeking the redaction of significantly less information than NPDI itself.

In Procedural Order No. 2, the Board allowed the names of the individuals and dates to remain redacted from the contracts that are the subject of the Hydro One submissions. As indicated above, Section 4.3.1 of the Practice Direction provides that subject to limited exceptions, the Board is prohibited from releasing personal information, as that phrase is defined in FIPPA. The Board finds the names of the individuals and the dates are information about identifiable individuals and accordingly are personal information as defined under FIPPA. Accordingly, as specified in Procedural Order No. 2, this information should remain redacted.

In addition, Appendix A of the Practice Direction indicates that the Board may consider whether information is financial or commercial material that is consistently treated in a confidential manner by the person providing it to the Board. Accordingly, the Board will take into account any relevant non-disclosure agreements. All information in the Confidential Version of this Schedule that is not redacted as personal information as outlined above should be fully disclosed *except* in those instances where:

- (a) Norfolk Power Inc., Norfolk Energy Inc. or NPDI, as applicable, has entered into an agreement that includes a specific obligation to not disclose the existence of the agreement, and
- (b) The agreement does not include a clause allowing disclosure of the existence of the agreement where such disclosure is required by a regulatory authority, and/or

- (c) The agreement provides that a party may seek the consent of the other party to disclose the existence of the agreement and Norfolk Power Inc., Norfolk Energy Inc. or NPDI, as applicable, has not received such consent.

The circumstances provided in (a), (b) and (c) shall collectively be referenced as the “Non-Disclosure Agreement Exceptions”

Schedule 3.1(O) – Material Contracts

For the same reason as provided for the proposed redactions in Schedule 3.1 (N), Norfolk seeks the redaction of the entire Schedule. However, Hydro One requests that only the first bullet of this Schedule be redacted because it contains personal information of a person who is not a party to this proceeding. As for Schedule 3.1(N), the Board notes that Hydro One, as the proposed new owner of NPDI, is seeking the redaction of significantly less information than NPDI itself.

In Procedural Order No. 2, the Board allowed the name of the individual and the document date in the first bullet of this Schedule to remain redacted. The Board finds that the name of the individual and the date should remain redacted as the Board considers this to be personal information as discussed under Schedule 3.1(L). For the same reasons as indicated for Schedule 3.1(N), all information in the Confidential Version of this Schedule should be fully disclosed *except* where Norfolk Power Inc., Norfolk Energy Inc. or NPDI, as applicable, has determined that the Non-Disclosure Agreement Exceptions apply.

Schedule 3.1(R) – Employees

The Applicants seek the redaction of the entire Schedule, which concerns employee leaves and benefits and a workplace issue. Norfolk submitted that disclosure of the redacted information will result in the disclosure of personal information about individual disability leaves, maternity leaves and workplace-related employee issues. Similarly, Hydro One submitted that the information should be redacted because it contains personal employee and litigation information which could identify the individual through job title or date.

In Procedural Order No. 2, the Board allowed position titles and dates in items 1, 2 and 3 of this Schedule to remain redacted. The Board finds that this information should remain redacted as it considers it to be personal information as defined under FIPPA.

However, the Board does not agree that any additional information should be redacted. In the Board's view, the unredacted material in the Confidential Version of this Schedule does not contain information about an identifiable individual as contemplated by FIPPA. Accordingly, the entire Confidential Version of this Schedule should be disclosed.

Schedule 3.1(T) – Environmental Disclosure

Norfolk seeks the redaction of the entire Schedule. Norfolk describes the information redacted in this Schedule as a “listing of environmental reports that identify the result of environmental investigations and potential environmental concerns at specific addresses”. Norfolk submitted that this information has been consistently treated in a confidential manner by NPDI and its affiliates. Norfolk further submitted that disclosure of this information can “raise undue and/or unwarranted concerns or result in frivolous litigation claims being commenced by adjacent property owners who may see a report identifying a potential environmental issue on a property adjacent to their own in a context where there is no legal obligation to publically disclose such information, potentially resulting in needless expenditure of time and financial resources by the utility and/or the municipality”. Board staff submitted that the information under bullets 1, 6, 9 and 10 of Schedule 3.1(T) appear to relate to matters that are either currently under investigation or subject to further testing and should be redacted to allow the investigations or testing to continue confidentially. SEC supported Board staff's submission. EBN submitted that there is nothing of a confidential nature in the Schedule and that without disclosure, parties will not be in a position to make enquiries about the need for and the nature of the documentation identified.

The Board finds that the information in this Schedule warrants confidential treatment. In reaching this decision, the Board considered item (b) in Appendix A of the Practice Direction. Appendix A of the Practice Direction provides a list of factors that the Board may consider when addressing confidentiality requests, one of which [i.e. item (b)] is whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the Board. It is clear from Norfolk's submission that the information in this Schedule is of a commercial or technical nature and has been consistently treated in a confidential manner by NPDI and its affiliates. This schedule will, therefore be redacted in its entirety.

Schedule 3.1(V) – Taxes

The Applicants seek redaction of Canada Revenue Agency Account/Business Numbers from this Schedule. Norfolk submitted that disclosure of the redacted information can

expose NPDI and Norfolk Energy Inc. to the risk of fraud through the disclosure of Canada Revenue Agency information. In Procedural Order No. 2, the Board allowed Canada Revenue Agency Account/Business Numbers to remain redacted.

Appendix A of the Practice Direction, paragraph (h), indicates that the Board may consider whether the type of information in question was previously held confidential by the Board. Appendix B of the Practice Direction, item 4, indicates that the Board has previously treated as confidential “information from a tax return or information gathered for the purpose of determining tax liability or collecting a tax”. Although the information in question may not fall precisely into the description of item 4, the Board considers that to treat it confidential is appropriate in order to be consistent with the approach indicated in this item. Accordingly, the Board finds that this information should remain redacted.

Schedule 3.1(X) - Permitted Encumbrances

Norfolk describes the redacted information as a list of permitted encumbrances on NPDI’s assets and a listing of financing arrangements between NPDI and third parties. The Applicants seek redaction of the entire Schedule. In Norfolk’s view, disclosure of the redacted information can “cause harm to other parties’ competitive positions; impede or diminish the ability of NPDI and its affiliates to fulfill existing confidentiality obligations including obligations to not disclose the existence of the agreement; and interfere with NPDI’s ability to negotiate extensions or new agreements with third parties due to a loss of faith in NPDI’s commitment to treat the material as confidential”. Hydro One submits that the information should be redacted because it contains information on financing agreement between NPDI and third parties.

In the Board’s view, while the content of the agreements may be confidential, that does not necessarily mean that the fact that they exist should be confidential. The Board finds that the information in this Schedule should be fully disclosed *except* where the Non-Disclosure Agreement Exceptions apply.

Schedule 3.1(AA) - Bank Accounts

The Applicants seek redaction of the entire Schedule. Norfolk submitted that disclosure of the redacted information can expose NPDI and Norfolk Energy Inc. to the risk of fraud through the disclosure of bank account and bank transit information. Hydro One submitted that the information is consistently treated in the business community as confidential. Similarly, Board staff submitted that the information in this Schedule, including the signing authorities for the company, is financial material that is consistently treated as confidential by the business community and by the Board.

In Procedural Order No. 2, the Board allowed only bank account numbers to remain redacted. However, based on the submissions that this is commercial information that is consistently treated in the business community in a confidential manner, the Board is guided by item (b), Appendix A of the Practice Direction (described under Schedule 3.1T), and Board finds that the information in this Schedule qualifies for confidential treatment. This Schedule, therefore, should be redacted in its entirety.

Schedule 5.2 – Permitted Dispositions

The Applicants seek redaction of the first bullet in this Schedule on the basis that it contains personal information of a person who is not a party to this proceeding. In Procedural Order No. 2, the Board allowed the name of the individual to remain redacted. For the same reason as indicated for information in Schedule 3.1(L), the Board finds that both the name of the individual and the address of that individual should be redacted as this is personal information.

Schedule 6.9 – Form of Pole Purchase Agreement

The Applicants initially redacted this Schedule in its entirety. The redaction of this Schedule was not permitted in Procedural Order No. 2. However, the Applicants did not include this Schedule in the Confidential Version of the SPA and the Board notes that the Applicants did not make submissions to argue why, in their view, the Schedule should be confidential. The Board notes that Hydro One has not requested that this agreement be treated confidentially. The Board finds that nothing in this Schedule is of a confidential nature given that it is the type of information that the Board would normally expect to be produced in a rate hearing and that it is not the type of information that would normally be protected by disclosure by FIPPA or the principles in the Practice Direction. This Schedule should therefore be public.

HEARING

The Applicants requested that the Board proceed with this matter by way of a written hearing. In its letter requesting intervenor status, SEC submitted that it is premature to determine the type of the hearing until interrogatories are answered. No other party commented on the type of the hearing. The Board has decided to proceed with this matter by way of a written hearing and considers it necessary to make provision for the following matters related to this proceeding at this time.

THE BOARD ORDERS THAT:

1. The Applicants shall immediately file with the Board and serve on the other parties a copy of the SPA which reflects the redactions allowed by the Board in this Decision.
2. Intervenors or Board staff wishing information or material from either of the Applicants that is in addition to the Applicants' pre-filed evidence, and that is relevant to the proceeding, shall request it by written interrogatories filed with the Board and served on other parties on or before **October 11, 2013**. Where possible, the questions should specifically reference the pre-filed evidence.
3. Each of the Applicants shall file complete responses to the interrogatories with the Board and serve them on the other parties on or before **October 25, 2013**.
4. Intervenors or Board staff wishing to file evidence shall file their evidence with the Board and serve it on each Applicant and the intervenors on or before **November 4, 2013**.

Depending whether intervenors or Board staff file evidence, the schedule for this proceeding will take one of the following two paths:

Procedural Steps	Deadline if No Intervenor or Board Staff Evidence	Deadline if Intervenor or Board Staff Evidence Filed
Interrogatories on Board staff and intervenor evidence shall be filed with the Board and served on the parties	N/A	November 18, 2013
Responses to interrogatories on Board staff and intervenor evidence shall be filed with the Board and served on the parties on or before	N/A	December 2, 2013
The Applicants shall file any written submission with the Board and serve it on the intervenors	November 8, 2013	December 16, 2013
Intervenors or Board staff wishing to file a written submission, shall file their submission with the Board and serve it on the Applicants and the intervenors	November 22, 2013	January 3, 2014
If the Applicants wish to file a written reply submission, they shall file their reply submission with the Board and serve it on the other parties	December 6, 2013	January 17, 2014

All filings to the Board must quote file numbers, **EB-2013-0196**, **EB-2013-0187** or **EB-2013-0198**, be made electronically through the Board's web portal at

www.pes.ontarioenergyboard.ca/eservice/ in searchable/unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Gona Jaff at gona.jaff@ontarioenergyboard.ca and Board Counsel, Kristi Sebalj at kristi.sebalj@ontarioenergyboard.ca.

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DATED at Toronto September 27, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary