



EB-2012-0109

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 Brantford
Power Inc. for an order approving just and reasonable rates
and other charges for electricity distribution to be effective
November 1, 2013.

**DECISION ON CONFIDENTIALITY
and
PROCEDURAL ORDER NO. 4**

December 6, 2013

Brantford Power Inc. (“BPI”) filed a complete application (the “Application”) with the Ontario Energy Board (the “Board”) on August 15, 2013 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that BPI charges for electricity distribution, to be effective November 1, 2013.

In Procedural Order No. 1, issued on September 19, 2013, the Board granted intervenor status to The School Energy Coalition (“SEC”), Energy Probe Research Foundation (“Energy Probe”), Vulnerable Energy Consumers Coalition (“VECC”) and Brant County Power (“BCP”), as well as cost eligibility to SEC, Energy Probe and VECC. The Board also set dates for interrogatories and interrogatory responses. Procedural Order No. 2 was issued October 1, 2013, granting late intervenor status to the HVAC Coalition and setting a date for its interrogatories and BPI’s responses.

On October 23, 2013, BPI filed its responses to interrogatories, including a request for confidential treatment for three of its responses (“the Proposed Confidential Material”) in accordance with the Board’s *Practice Direction on Confidential Filings*. The Board issued Procedural Order #3, designating the material to be confidential on an interim

basis and making provision for submissions from Board staff and intervenors with respect to BPI's confidentiality request. Parties wishing to review the Proposed Confidential Material were permitted to do so after signing a copy of the Board's Declaration and Undertaking, filing it with the Board and serving it on BPI.

On November 1, 2013, Board staff filed its submission that the Proposed Confidential Material should be treated as confidential and provided only to participants that have signed the Board's Declaration and Confidentiality Undertaking in accordance with the *Practice Direction*. Two of the interrogatory responses, namely BPI's responses to interrogatories 4.0 Staff-19a) and 4.0 Staff-20 and related attachments, contained personal information as defined by the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), which cannot be released by the Board except in special circumstances. The remaining interrogatory response, 5.0 SEC-18 includes BPI's loan agreement with Royal Bank of Canada ("RBC"). Board staff submitted that the agreement contained information that is proprietary to RBC, or that could prejudice its competitive position or interfere with its contractual or other negotiations. For these reasons, Board staff submitted that the loan agreement should be treated as confidential.

SEC submitted that the Board has on numerous occasions stated that a confidentiality agreement between a regulated entity and a third party is not a valid basis, in and of itself, for the information to be given confidential treatment and that the onus is on the party seeking confidential treatment to demonstrate that confidential treatment is warranted. SEC disagreed that there would be any prejudice or commercial harm to RBC, stating that loan agreements are a category of information that is regularly provided by utilities without seeking confidential treatment. SEC attached five examples of loan agreements as appendices to its submissions, one of which was a loan agreement between RBC and another regulated utility. SEC stated that the loan agreement between RBC and BPI contains information that would help the Board and parties understand the reasonableness of BPI's proposed cost of debt and should be open to public scrutiny. In the alternative SEC submitted that should the Board determine that certain aspects of the agreement warrant confidential treatment, BPI should be required to produce a redacted version.

Energy Probe supported SEC's position.

BPI provided its reply submission on November 13, 2013, attaching a letter from RBC outlining RBC's reasons for the request for confidential treatment of the agreement. RBC stated that it had investigated the public disclosure of the specific RBC loan agreement example provided by SEC and determined that it had been provided without knowledge or consent of RBC. Under these circumstances, RBC submitted that the document could not be relied on by RBC or the Board as evidence of prior consent or of regular practice of disclosure. RBC also noted that, while SEC had asserted that all the agreements contained similar standard clauses, a comparison of the documents revealed that the fees, the manner of calculating interest and some of the general terms vary significantly. RBC attached a list of specific clauses in its agreement which could cause prejudice if disclosed. RBC also provided a separate copy of the loan agreement on a confidential basis with specific confidential information identified.

RBC submitted that its loan agreement with BPI had already been provided on a confidential basis, and was available for the Board and parties to understand and assess the reasonableness of BPI's cost of debt. RBC noted that no other parties besides SEC had signed the requisite confidentiality agreement, which suggested that the demand to see the document was not high and that public disclosure would not materially affect BPI's rate application.

BPI submitted that it continued to support RBC's request for confidentiality for the entire agreement, but requested confidential treatment of the portions of the agreement identified by RBC as commercially sensitive should the Board decide to reject the request.

Board Findings

The Board will grant BPI's request for confidentiality of its responses to the Board staff interrogatories containing information related to financial transactions related to identifiable individuals, specifically Interrogatories 4.0 Staff – 19 a) and 4.0 Staff – 20. The Board cannot release personal information, as that phrase is defined in FIPPA, except in special circumstances.

The Board will not grant BPI's request for confidential treatment of the RBC loan agreement, as filed in response to 5.0 SEC – 18. The Board's general policy is that all records should be open for inspection by any person unless disclosure is prohibited by

law, reflecting the Board's view that its proceedings should be open, transparent and accessible¹.

As stated in the *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities*, the onus is on the distributor that is making an application for rates to document the actual amount and cost of embedded long-term debt². In this case the Board finds that the material as filed, including BPI's prefiled evidence, its responses to interrogatories, the loan agreement with RBC and BPI's 2012 Audited Financial Statements provides insufficient information to allow the Board to make a determination regarding BPI's requested long term debt rate since they do not appear to provide third party verification of the cost of debt.

Further, the Board finds that the entire RBC Agreement is relevant to BPI's embedded cost of debt, in that it is of consequence to the determination of the cost of debt and that it provides supporting documentation to BPI's requested cost of debt. The Board has found in the past³ that if a document is relevant to a matter in issue and its probative value exceeds any unfair prejudice, then it generally belongs on the record.

BPI requested confidential treatment of those portions of the agreement expressly identified by RBC as commercially sensitive in the Sidebarred Agreement filed November 13, 2013. The Board is not convinced that the information identified by RBC is sufficiently more innovative or proprietary than similar agreements provided to date to the Board by other lenders to regulated utilities to override the Board's requirements for transparency and accessibility.

The Board will require further discovery related to the evidence filed, which can be more effectively conducted on the public record.

In accordance with section 10.05 of the Board's *Rules of Practice and Procedure* and section 5.1.12 of the *Practice Direction on Confidential Filings*, should BPI object to the Board's direction to place the RBC loan agreement on the public record, it may make its written request to the Board to withdraw the document within 5 business days of the issuance of this Decision and the Board will consider the request.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

¹ Practice Direction on Confidential Filings, October 13, 2011, p. 2

² Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, December 11, 2009, p. 53

³ Decision on Information Withdrawal Request, Northern Ontario Wires, August 2, 2013

THE BOARD ORDERS THAT:

1. The Board grants confidential status to BPI's responses to interrogatories 4.0 Staff -19 (a) and 4.0 Staff-20 and related attachments. To the extent possible, parties shall frame submissions related to the confidential material in a manner that will allow the submissions to be placed on the public record. If parties are not able to frame submissions in a manner that allows them to be placed on the public record, those submissions must be marked confidential.
2. Following the end of the proceeding, parties in receipt of confidential materials shall either return the subject information to the Board for destruction, or either destroy or expunge, as applicable, the information and execute a Certificate of Destruction. The Certificate of Destruction, that is Appendix D of the Practice Direction, must be filed with the Board.
3. The RBC loan agreement filed in response to 5.0 SEC – 18 shall be placed on the public record of this proceeding. BPI may request that the RBC loan agreement be withdrawn by filing its request with the Board and delivering a copy to all other parties on or before **December 13, 2013**. If BPI does not file an objection the subject document will be placed on the public record on or after **December 16, 2013**
4. Intervenors and Board staff who wish to ask supplementary questions that relate to the existing interrogatory responses filed by BPI shall file written supplemental interrogatories with the Board and deliver a copy to BPI on or before **December 16, 2013**. Where possible, the questions should reference the existing response and the pre-filed evidence.
5. BPI shall file with the Board complete responses to the supplemental interrogatories and deliver them to the intervenors no later than **January 13, 2014**.
6. A Settlement Conference will be convened on **January 28, 2014** starting at 9:30 a.m., in the **ADR Room** at 2300 Yonge Street, 25th floor, Toronto, with the objective of reaching a settlement among the parties on the issues. If necessary, the Settlement Conference will continue on **January 29, 2014**.
7. Any Settlement Proposal arising from the Settlement Conference shall be filed with the Board no later than **February 12, 2014**. In addition to outlining the terms

of any settlement, the Settlement Proposal should contain a list of any unsettled issues, identifying those issues that the parties believe must be dealt with by way of oral or written hearing.

All filings to the Board must quote the file number, EB-2012-0109, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/service/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. 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 <http://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, Martha McOuat at martha.mcouat@ontarioenergyboard.ca and Board Counsel, Ljuba Djurjevic at ljuba.djurjevic@ontarioenergyboard.ca.

ADDRESS

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DATED at Toronto, December 6, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary