

July 25, 2014

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VIA E-MAIL

01626.00018

Ms. Kirsten Walli
Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street
P.O. Box 2319
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

Re: EB-2013-0416

I am counsel to The City of Hamilton ("Hamilton") in this matter. In that capacity I have received a letter dated July 24, 2014 from Ms. Varjadic, in her capacity as counsel to Hydro One Networks Inc. ("HONI").

In my capacity as counsel to Hamilton, I executed a Confidentiality Declaration and Undertaking ("Undertaking") in order to receive materials filed by HONI for which it claims confidential treatment. In her letter of July 24, 2014 Ms. Varjadic objects to the Board's acceptance of my Undertaking, and asks that the Board deny me access to any confidential filings.

By this letter, I ask that the Board dismiss Ms. Varjadic's objection, accept my Undertaking, and permit me access to the confidential filings.

Ms. Varjadic's objection should be rejected for three reasons, as follows:

1. it misstates the nature and extent of Hamilton's intervention in HONI's application;
2. it constitutes an unwarranted, and inappropriate, attack on my personal integrity; and
3. it violates the principles underlying the Board's rules for the treatment of confidential material.

I will deal with each of these, in order, below.

I. The Nature of Hamilton's Intervention

Ms. Varjadic implies that Hamilton's only interest in the application "relates to the cost allocation model". That is wrong. Hamilton's intervention is based on its concern for the rates charged to it as part of HONI's streetlighting class. In its letter of intervention, dated February 17, 2014, Hamilton indicated it was intervening because it was concerned about the increase in rates for the streetlighting class. It indicates that cost allocation was one of the issues it was interested in. It did not indicate it was the only issue it was interested in. In granting Hamilton intervention status, the Board did not limit it to any one issue.

Ms. Varjadic apparently does not understand that HONI's rates, for the streetlighting class, are a function of several factors, only one of which is HONI's cost allocation model. The cost allocation model only comes into play after other costs have been determined. These other costs include all of the costs addressed in the application.

The rates for the streetlighting class are a function of virtually every aspect of HONI's costs, including O&M costs and capital expenditures. To protect Hamilton's interests, I must be familiar with all of the evidence HONI has filed. For reasons of cost effectiveness, Hamilton has elected to rely, to this point in the proceeding, on other parties to take the lead in examining the broad range of HONI's forecast costs and expenditures. That does not mean that Hamilton is uninterested in those costs and expenditures, that it will not instruct me to cross-examine HONI's witnesses on those matters, or that it will not instruct me to submit an argument on those matters. It means nothing more than the fact that Hamilton has attempted to contain, to the extent possible, the costs of its intervention. HONI now seeks to take unfair advantage of Hamilton's attempt to control its costs. It should not be allowed to do so. Hamilton should not now be penalized for having acted responsibly by seeking to reduce the costs its residents will ultimately have to bear.

In order for Hamilton to protect the interests of its residents, with respect to the rates for streetlighting, it must understand all aspects of HONI's application. In order to do that, it must instruct its counsel to advise it on the implications of all of the evidence which HONI files. That would include any materials in respect for which HONI claims confidentiality. Counsel can provide that advice, and take the required instructions, without violating the Undertaking.

Ms. Varjadic's argument on this point is unfounded and should be dismissed.

II. The Integrity of Counsel

Ms. Varjadic argues that I should be denied access to the confidential material because doing so "reduces the chance of inadvertent disclosure of confidential information and avoids the chance of mistaken disclosure as has occurred in the past" (emphasis added). Ms. Varjadic does not do me, or the Board, the basic courtesy of describing what "mistaken disclosure" in the past she is referring to.

As the Board will be aware, I have, in my capacity as counsel to parties in many Board proceedings, and on many occasions, signed the Board's Undertaking. In no instance have I ever violated that Undertaking. For Ms. Varjadic to suggest that it is possible that I would do so is not just ill-founded, it is inappropriate.

The Undertaking I have signed is personal to me. Ms. Varjadic's expressed concern about disclosure of confidential information I would receive is, therefore, an implicit, if not explicit, suggestion that I would violate the Undertaking I have given. Rule 6.03(1) of The Law Society of Upper Canada's *Rules of Professional Conduct* requires that "A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice". The Commentary on that rule contains the following statement:

A lawyer should avoid ill-considered or uninformed criticism of incompetence, conduct, advice, or charges of other legal practitioners

Ms. Varjadic's suggestion that I would violate the Undertaking, particularly in the absence of any evidence that I have ever done so or that I would be capable of doing so, represents a violation of that Rule.

Ms. Varjadic's objection on the grounds of a risk of disclosure is unfounded and should be rejected.

III. The Principles Underlying the Board's Treatment of Requests for Confidentiality

The Board's "Practice Direction on Confidential Filings" ("Practice Direction") states that "The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception." When the Board acknowledges the need for such an "exception" and allows material to be received in confidence, it does so only in circumstances where the interests of the parties to a proceeding, and the interests of the constituencies that they represent, are not prejudiced. To protect against that prejudice, the Board has adopted the use of the Undertaking. The delivery of such an Undertaking protects the interests of the parties seeking confidential treatment for some material, protects the interests of the parties whose representatives file the Undertaking, and ensures the integrity of the Board's decision-making process by allowing an unfettered examination of all relevant evidence. It would be a violation of those principles to refuse to accept an Undertaking and deny access to confidential material except in the circumstance, for example, where the person who filed the Undertaking had, in the past, violated the Undertaking by disclosing, inadvertently or otherwise, confidential information. That is not the case here.

The principles the Board has developed for the treatment of confidential material do not allow the person seeking confidential treatment of material to decide who should get the material, and under what circumstances. In this case, Ms. Varjadic's letter is neither more nor less than an attempt by HONI to limit Hamilton's ability to protect its interests, and those of its residents.

Section 6.1.2 of the Practice Direction states that the Board will accept an Undertaking from counsel for a party "except where there are compelling reasons for not doing so". Ms. Varjadic has not come remotely close to demonstrating that such "compelling reasons" exist. On the contrary, there are compelling reasons, as set out above, why her objection should be dismissed.

Ms. Varjadic's attempt to deny me access to the confidential information is unfounded, inappropriate, and a violation of the principles established for the treatment of confidential material. Ms. Varjadic's objection should be dismissed.

Yours truly,

WeirFoulds LLP

A handwritten signature in black ink, appearing to read "Robert B. Warren", with a stylized flourish at the end.

Robert B. Warren

RBW/cmt

cc Rogers Partners LLP
Hydro One Networks Inc.
The City of Hamilton - Attention: Michael Kovacevic

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