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August 13, 2014

Delivered by Email and RESS Filing

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: OEB File No.: EB-2013-0196/EB-2013-0187/EB-2013-0198
Norfolk Power Inc. Response to the Cost Claim of the School Energy Coalition

We write on behalf of Norfolk Power Inc. ("**NPI**") to object to the costs claimed by the School Energy Coalition ("**SEC**") in connection with the above noted matter.

SEC submitted a Cost Claim for a total amount of $45,412.44. NPI submits that SEC's Cost award should be reduced by 30% or $13,623.73 of the amount claimed.

In this context, it is worth noting that SEC is claiming a total of:

- 51 hours combined ($18,980.61) for the preparation interrogatory questions and the review of responses; and

- 47 hours combined ($14,615.42) for the preparation and attended at the SEC motion to compel further and better interrogatory responses.

In short, $33,596.03 of a $45,412.44 cost claim relates directly to the SEC interrogatory strategy and the subsequent motion to compel further and better interrogatory responses. NPI submits that these amounts are excessive and that the Board should explore in more detail SEC's interrogatory strategy and how the SEC-specific interrogatories played into the motion to compel.

NPI's objections are based upon the following factors pursuant to Section 5.01 of the Board's Practice Direction on Cost Awards.

First, SEC failed to make reasonable efforts to ensure that its participation in the process, including its interrogatories and submissions, were focused on relevant and material issues. For example, SEC asked numerous interrogatories that were simply not within the scope of the Board's known and well-articulated "no harm" test.

Second, SEC engaged in conduct that tended to lengthen the proceeding unnecessarily, including bringing a motion to compel further and better responses to numerous interrogatories that simply were not relevant to the Board's "no harm" test. For example, in its motion SEC sought further and better responses to 51 interrogatories. The Board decided that many of these interrogatories did not require any further response. Specifically, the motion included 13 SEC-specific interrogatories, of which the Board directed further answers to only 3 of those SEC IRs. In other words, over 75% of the disputed SEC-specific IR's were effectively determined neither to be relevant nor helpful to the issues under consideration by the Board.

NPI submits that a tangible and meaningful cost award reduction is warranted in these circumstances which will also serve as a clear signal that asking irrelevant interrogatories and/or bringing a motion has potential financial consequences – particularly in the instant case when the regulatory test the OEB applies is clearly already known within the industry through previous Board decisions on identical issues.

Since the Norfolk decision there have been new MAAD applications filed with the Board. A cost award reduction in this case would also serve as a strong caution for any party not to pursue the same strategy at these latest and/or future MAAD proceedings.

We will limit the balance of our submissions to those aspects of SEC's advocacy in this proceeding which demonstrate a focus on issues that are clearly and without question outside of the scope of the Board's no-harm test.

The Board's Combined MAADs Decision

What is the relevance of the purchase price paid to the Board's "no harm" test?

What is the relevance of the process followed by the seller to the Board's "no harm" test?

These are two of the key questions that were asked and answered by the Board in the August 31, 2005 Combined MAADs Decision (RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257) (the "**Combined MAADs Decision**").

Specifically, at page7 of the Combined MAADs Decision, the Board determined that:

> "The Board is of the view that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company which adversely affects economic viability as any premium paid in excess of the book value of assets is not normally recoverable through rates. This position is in keeping with the "no harm" test.
>
> By contrast, the fact that the selling entity may have received "too low" a purchase price for the utility would not be relevant to the outcome of the proceeding on the basis of the "no harm" test. The fact that the seller could have received a higher price for the utility, even if true, would not lead to an adverse impact in the context of the objectives set out in section 1 of the Act."

And at pages 8-9 of the Combined MAADs Decision, the Board determined that:

"As a general matter, the conduct of the seller generally, including the extent of its due diligence or the degree of public consultation in relation to the transaction, would not be issues for the Board on share acquisition or amalgamation applications under section 86 of the Act. Based on the "no harm" test, the question for the Board is neither the why nor the how of the proposed transaction. Rather, the Board's concern is limited to the effect of the transaction when considered in light of the Board's objectives as identified in section 1 of the Act.

In order to argue that the process by which the seller negotiated the sale of the utility or carried out its due diligence should be relevant, it would have to be demonstrated that a flawed process leads to an impaired ability of the acquired utility to meet the obligations imposed on it by the Board. Based on the "no harm" test, it is not clear how a flawed decision-making process, even if it could be demonstrated, would in and of itself provide grounds to oppose the Applications. Certainly, it would not in and of itself be grounds for denying the Applications. The "no harm" test is substantive and addresses the effect of a proposed transaction. It is not a process test that addresses the rationale for, or the process underlying, the proposed transaction."

SEC's Conduct in this Proceeding

SEC is an experienced, professional intervenor which regularly participates in numerous Board proceedings. SEC certainly must have been aware of the above noted determinations of the Board in the Combined MAADs Decision. In fact Norfolk Power specifically referenced the Combined MAADs Decision in its Reply Submissions on Confidentiality dated July 25, 2013.

In this context, on August 5, 2013 as part of the SEC preliminary interrogatories in SEC-5, SEC asked (emphasis added):

> "*Please provide all memoranda, reports, analyses, valuations, business cases, or other documents in the possession of Norfolk, its shareholders, or Hydro One, that provide any analysis of the purchase price, or forecast the recovery of the purchase price over time in any way, or provide any analysis of how the purchaser will recover the purchase price.*"

In asking this interrogatory, SEC was aware that NPI's shareholder underwent a competitive request for proposals process prior to selecting Hydro One as the successful bidder.[1] As such SEC was aware that asking for such a broad scope of disclosure for "any analysis of the purchase price" in the possession of NPI and its shareholder would necessarily encompass all of the documentation prepared in connection with the competitive request for proposals process, including but not limited to comparisons of the purchase price against the price proposed any other potential bidders.

SEC did not attempt to qualify its request for information relating to the purchase price from NPI or its shareholder in any way. One would have expected that a request for information about the purchase price would be limited in scope to questions to assess whether the purchase price would create a financial burden on the acquiring company which adversely affects economic viability or

[1] See for instance, Sections 1.9.1 and 1.9.6 of the Section 86 Application Form.

confirming that any premium paid in excess of the book value of assets is not proposed to be recoverable through rate. SEC choose not to propose any such limitations.

This was not a one-time mistake, but rather part of a coordinated effort SEC mounted to obtain access to information that it knew or ought to have known was outside of the scope of the Board's "no harm" test.

On October 10, 2013, as part of the SEC second set of interrogatories, in SEC–8, SEC asked (emphasis added):

> "*Please provide a copy of the original RFP documents including all attachments.*"

This request ignores another key and central finding of the Combined MAADs Decision, that as a general matter, the conduct of the seller generally, would not be issues for the Board under Section 86. Based on the "no harm" test, the question for the Board is neither the why nor the how of the proposed transaction. Rather, the Board's concern is limited to the effect of the transaction when considered in light of the Board's objectives as identified in section 1 of the Act.

And again, in SEC – 18, SEC asked (emphasis added):

> "*Please provide any valuations of any of the assets, or the business as a whole, in the possession of NPDI, the County, or the Applicant.*"

Clearly the request for any valuation of the assets or the business as a whole in the possession of NPI or its shareholder necessarily probes into the rational for and the process underlying the proposed transaction, including internal valuations and the price(s) proposed any other potential bidders.

And in SEC-19, SEC asked:

> "*Please advise whether the former President of NPDI, Brad Randall, is under any confidentiality restrictions with respect to the proposed transactions, the RFP, or the negotiations that have led to the Share Purchase Agreement.*"

In this interrogatory, SEC is attempting determine if intervenors can gain access to information related to the RFP process and the negotiations that led to the Share Purchase Agreement, not from either of the Applicants, but from Mr. Randall himself.

SEC did not stop there. After the applicants rightly refused to answer each of the above noted interrogatories on the basis of the Board's clearly articulated "no harm" test in the Combined MAADs Decision, on October 31, 2013 SEC brought a motion to compel further and better interrogatory responses (the "**SEC Motion**").

The SEC Motion sought further and better responses to a total of 51 interrogatories. Tremendous effort and substantial costs were expended by the Applicants preparing for a lengthy oral hearing responding to numerous allegations.

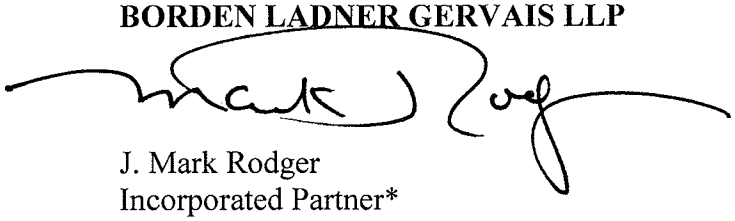
And what was the result of this process - the Board decided that many of these interrogatories did not require any further response. We would note that while the SEC Motion included a request for further and better responses to 13 interrogatories which SEC itself originally posed, the Board only directed further answers to only 3 of those SEC IRs. In other words, the vast majority of the disputed SEC IRs were effectively determined not to be relevant or helpful to the issues under consideration by the Board.

For all of these reasons, NPI submits SEC failed to make reasonable efforts to ensure that its participation in the process, including its interrogatories and submissions, were focused on relevant and material issues and SEC engaged in conduct that tended to lengthen the proceeding unnecessarily, including bringing a motion to compel further and better responses to numerous interrogatories that simply were not relevant to the Board's "no harm" test.

NPI submits that given all these circumstances, SEC be awarded 30% less than the Cost Claim it filed on August 7, 2014.

Yours truly,

BORDEN LADNER GERVAIS LLP



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