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November 2, 2015

Delivered by RESS, Email and Courier

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

Dear Ms. Walli:

Re: Board File No. EB-2015-0108
Waterloo North Hydro ("WNH")
Submission of WNH in respect of Procedural Order #2

We are writing on behalf of WNH in the above noted matter. Further to Procedural Order #2 in this proceeding, we have enclosed WNH's submissions concerning the issue of the use of the term 'privilege'.

Yours very truly,

BORDEN LADNER GERVAIS LLP
Per:

Original signed by James K. Little

James K. Little
Encl.

cc: Chris Amos, Waterloo North Hydro
Parties in EB-2015-0108

EB-2015-0108 / EB-2015-0073

Submissions of

Waterloo North Hydro Inc. and Guelph Hydro Electric Systems Inc.

Regarding Procedural Order 2 dated October 28, 2015

November 2, 2015

DELIVERED: NOVEMBER 2, 2015

1. Waterloo North Hydro Inc. and Guelph Hydro Electric Systems Inc. (respectively, "**WNH**" and "**Guelph Hydro**", or collectively the "**Applicants**") are pleased to present these joint written submissions pursuant to Procedural Order No. 2 dated October 28, 2015 concerning the issue of the use of the term "privilege" in the settlement proposals filed with the Ontario Energy Board (the "**OEB**") for WNH on October 1, 2015 under EB-2015-0108 and for Guelph Hydro on September 24, 2015 (updated on October 20, 2015) under EB-2015-0073.

A. Settlement Conferences are both Confidential and Privileged.

2. The Applicants submit that ADR (settlement) conferences are both confidential and privileged. This is important as it encourages candid and at times very frank discussions during settlement which would not occur if the guarantees of confidentiality and privilege were missing.

3. Sections 29.09 and 29.10 of the OEB's *Rules of Practice and Procedure* (the "Rules") state:

> 29.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.
>
> 29.10 Admissions, concessions, offers to settle and related discussions shall not be admissible in any proceeding without the consent of the affected parties.

4. Section 29.09 speaks to confidentiality. Section 29.10 speaks to privilege.

5. The rule relating to confidentiality includes an important qualification. It applies in general terms, "except as may be agreed."

6. These two rules are repeated (albeit, not verbatim) again in the Practice Direction governing settlement conferences, at page 5, which provides:

> "Everyone who attends a settlement conference must treat omissions, concessions, offers to settle and related discussions as confidential and must not reveal any such information outside the conference. In addition, admissions,

> concessions, offers to settle and related discussions will not be admitted in any Board proceeding without the consent of parties who are affected. Where necessary to support the rationale for a settlement proposal, factual information and evidence may be disclosed to the Board.

7. The failure to include the qualification "except as may be agreed" in the Practice Direction is likely an unintentional oversight. In any event, the OEB's Rules should govern in the event of such a conflict or inconsistency with the Practice Direction. The Applicants note that there are other unintentional drafting errors in the Practice Direction. For example, page 3 of the Practice Direction provides:

> "This Practice Direction describes and supplements Rules 31 and 32 of the Board's *Rules of Practice and Procedure*."

8. The reference should likely be to Rules 29 and 30 of the OEB's Rules.

B. The inclusion of "privileged" in the Settlement Agreement

9. While the Applicants believe that settlement conferences are both confidential and privileged, the Applicants were unable to reach agreement with all of the parties to the Settlement Proposal on this basis.

10. The Applicants do not have the unilateral right to impose its views on other parties. The Settlement Proposal language before the OEB reflects a compromise position that all parties to the settlement were able to agree upon.

11. While not an ideal outcome, the Applicants did take note of the fact that the Rules contemplated exactly this scenario with "except as may be agreed."

C. The Proper Zone of Confidentiality and Privilege

12. The Applicants believe that the OEB would also benefit from an exploration of the substantive issue that is likely underlying this topic. These are the views of the Applicants and are in no way reflective of any discussions which took place as part of settlement or otherwise.

13. The Applicants note that both Rule 29.09 and the Practice Direction as it relates to confidentiality apply to everyone who "attends" a settlement conference, and prohibits disclosure of such information "outside of the conference."

14. Strictly interpreted, this would imply that the individuals attending (i.e. those physically present or present by phone) at a settlement conference would be prohibited from disclosing any confidential information to individuals who did not attend the settlement conference. This interpretation is supported by Rules 29.07 and 29.08 of the Rules, which require that individuals attending a settlement conference must be authorized to settle all issues or otherwise identify any limitations on their authority at the outset of the settlement conference.

15. However, the Applicants also understand that OEB staff and some other parties do, on occasion, disclose information to persons outside of the physical settlement conference room.

16. The problem is, if you allow disclosure outside of the physical settlement room, it becomes entirely unclear:

    a. who is in the "zone of settlement confidentiality and privilege" for the purposes of compliance with Section 29.09 and 29.10 of the Rules;

    b. whether they were properly informed of their obligations of confidentiality and privilege pursuant to the Rules (by contrast, a moderator typically reads these requirements aloud to those that attend a settlement conference); and

    c. what remedies, if any, are available should someone breach settlement confidentiality or settlement privilege.

17. The Applicants have considered two possible solutions to this problem:

    a. It appears that OEB staff and other parties are interpreting 29.09 and 29.10 so as to apply to an attending party and its Representatives[1] (whether or not attending in person), including individuals who are not physically present. If this is the OEB's

[1] "Representatives" means a persons' directors, officers, employees, auditors, consultants, advisors (including economic and legal advisors), contractors and agents and those of its affiliates, but for greater clarity excluding any panel member of the Ontario Energy Board.

intent, then one solution is to amend the Practice Direction to make the intent explicit. It could also be done on a case by case basis in the settlement proposals (since Rule 29.09 expressly contemplates "except as may be agreed"). But what happens if one party in the settlement does not agree?

b. The OEB could also amend the Practice Direction to adopt, or adapt, the process it uses to create an enforceable "zone of confidentiality" in the Practice Direction on Confidential Filings for settlement purposes. The existing process for Confidential Information: (a) clearly defines who is in the "zone of confidentiality"; (b) ensures that each individual is properly informed of their obligations of confidentiality; and (c) creates enforceable remedies should someone breach confidentiality.

18. Finally, the Applicants have had an opportunity to review the submissions of the School Energy Coalition ("**SEC**") which were circulated on November 1, 2015. If it would assist the OEB, the Applicants are willing to accept the proposed wording attached to the SEC submissions as an amendment to their respective settlement proposals, provided all of the other parties to the respective settlement proposal agree. For clarity, the Applicants are willing to adopt this proposed language without necessarily agreeing to or otherwise adopting all of SEC's submissions in support of that wording (which given the short timeframes involved, the Applicants have not had due time to fully consider).

All of which is respectfully submitted this 2nd day of November, 2015.

Original signed by James K. Little
JAMES K. LITTLE