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### **BY EMAIL and RESS**

April 13, 2017  
Our File No. 20160105

Ontario Energy Board  
2300 Yonge Street  
27<sup>th</sup> Floor  
Toronto, Ontario  
M4P 1E4

### **Attn: Kirsten Walli, Board Secretary**

Dear Ms. Walli:

### **Re: EB-2016-0105 – Thunder Bay Hydro – New Evidence**

We are counsel for the School Energy Coalition. We have received the letter from counsel to the Applicant, dated April 6<sup>th</sup> but actually delivered to parties on April 7<sup>th</sup>, disclosing for the first time that the Applicant intends to lead a surprise new expert witness at the oral hearing next week.

We have sought since then to arrange for further details, and discovery, but the Applicant has not been willing to make those arrangements. We are therefore writing to ask the Board to direct appropriate steps relating to this evidence, in advance of the oral hearing. Any proper steps would, in our view, also require a delay in the date of the oral hearing.

### **Background**

On April 7, 2017 the Applicant, through counsel, advised that the Applicant “has retained Mr. Yury Tsimberg of Kinectrics to review and opine on the Thunder Bay Hydro distribution system plan.” The letter attaches a document purporting to be an “opinion letter dated March 24, 2017”.

Kinectrics prepared an Asset Condition Assessment that is on the record in this proceeding, but Mr. Tsimberg was not the author of that report. He did have a role in approving that report for submission to Thunder Bay Hydro. The details of that role are not on the record, and are not known to the parties other than the Applicant.

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To the best of our knowledge, neither Mr. Tsimberg nor Kinectrics played any role in the development of the distribution system plan, and they are certainly not the authors of that plan.

It would appear that, at this late stage in the process, Mr. Tsimberg is being proposed as an independent expert reviewer of the DSP and its reasonableness. Details of the scope of that engagement are not known.

### **Expert Report**

The letter that purports to be Mr. Tsimberg's report on the DSP, does not, in our view meet the requirements of Rule 13 of the Rules of Practice and Procedure, in at least the following respects:

- It does not provide information on the instructions to the expert, other than "producing the report in favour of the TBH's DSP" (which does not sound very much like instructions to an independent expert), and "instructed by TBH to provide expert testimony at their OEB hearing particularly as it relates to reasonableness of the capital investment levels requested under System Renewal category based on the findings of the Kinectrics 2016 ACA study" (which appears limited to oral evidence, rather than a written report).
- There is no information on the steps taken to do the work, the research done, the analysis, the connection between the DSP and the ACA, comparisons with third party capital program standards, sources of technical information or conclusions, or any of the other necessary elements of an independent review of a capital plan. Indeed, the brief letter provides almost no information on what the expert did to form his opinion.
- There is no information on the scope of the expert's evidence, particularly as it relates to the Kinectrics ACA. Since Mr. Tsimberg was not the author of that report, he would normally not be qualified to provide the expert evidence based on that report unless one of the various exceptions applies. In this case, his involvement in its production may be sufficient if the ACA is only collateral information supporting his opinion on the DSP. Certainly more information is required to determine the proper scope of his evidence.
- A full CV is not provided. The information that is provided is less than is normally appropriate where expert evidence is being offered.

We note that, in fact, it appears the intention is that the expert evidence will only be given in the oral hearing, as evidenced by the future tense used on para. 4 and para. 5 of the March 24, 2017 letter from Mr. Tsimberg. All of that letter suggests that it is not itself evidence, but the expert plans to offer his evidence solely in the hearing room.

SEC submits that, if the Applicant seeks to provide expert evidence in support of their capital spending plan, they should be directed by the Board to file a proper report from the expert that forms the basis of the expert's evidence, and that report should comply with Rule 13.

## **Discovery**

The rules of natural justice, and the Board's longstanding practices, require that parties have an opportunity for discovery of evidence to be presented in a case, and that is particularly important where the evidence purports to be expert evidence. Parties cannot be expected to cross-examine an expert on the fly, and intervenors and OEB Staff would be prejudiced if they were required to do so, as the Applicant appears to propose.

Further, cross-examination of experts that is not based on a thorough review of a full expert's report, with prior discovery on that report, is not helpful to the Board. It is wasteful of the Board's time and resources, and provides a poor evidentiary record for the Board to base its decision.

It is unusual for the Board to be faced with expert evidence filed at the last minute, but it has happened in the past. An example is EB-2015-0072, where the Applicant Grimsby Power sought permission from the Board to file expert evidence relating to its PILs situation. The request was filed on June 27, 2016, nine days before the hearing, which had been scheduled for July 6, 2016.

In that case, the Board required the Applicant to file the evidence on June 29<sup>th</sup>, and gave the parties one week to review it. The previous oral hearing day, July 6<sup>th</sup>, was then scheduled for a transcribed technical conference in lieu of interrogatories. The Applicant was given a short turnaround for undertakings from the technical conference (July 8<sup>th</sup>), and the oral hearing was pushed back a week to July 13<sup>th</sup>.

SEC submits that a similar process could be used here. The Applicant could file a proper expert report, and the intervenors and OEB staff could be given a week to review it. Then, a transcribed technical conference could be used to shorten the time frame for discovery, with the oral hearing following a week to ten days later. Assuming the Applicant's expert is able to file a proper report next week, it is not unreasonable to think that the oral hearing could proceed in the first week of May.

In the alternative, SEC believes a more conventional interrogatory and response process is also appropriate in this case, for example to save the Applicant the travel costs associated with another trip for the technical conference. That would still allow a hearing May 11<sup>th</sup> or 12<sup>th</sup> (CAMPUT being May 8-10 in Vancouver).

We are aware that the Applicant is opposed to a delay. However, we note that the Applicant had the letter from Mr. Tsimberg on March 24<sup>th</sup>, but did not provide notice to the parties until April 7<sup>th</sup>, two weeks later. Had the Applicant provided notice of its intent to file expert evidence on March 24<sup>th</sup>, when it knew, and if it had followed that up by filing a proper expert report promptly, the Board could have already ordered a process of the type described above, and the April 20<sup>th</sup> planned hearing date would not be in jeopardy.

The fact that a delay may now be necessary is therefore entirely the result of the Applicant's delays.

**Conclusion**

SEC therefore requests that the Board direct the following:

- Filing of a proper expert report from Mr. Tsimberg, compliant in all respects with Rule 13 of the Rules of Practice.
- A process for discovery of the expert evidence through either a transcribed technical conference, or interrogatories.
- An oral hearing during early May, driven by the time to complete the first two steps.

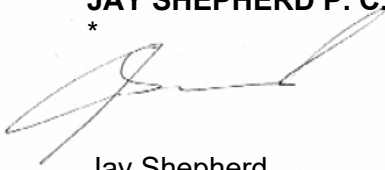
SEC has not filed a formal motion about this, given the time frames until the scheduled oral hearing. If the Board prefers that we do so, we will, but we felt that it would be more efficient to raise the issue in a letter, so that the Board has notice of these issues immediately, and can take control of the process without any further delay.

All of which is respectfully submitted.

Yours very truly,

**JAY SHEPHERD P. C.**

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Jay Shepherd

cc: Wayne McNally, SEC (email)  
Interested Parties