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April 17, 2017

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON
M4P 1E4

Attention: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2016-0105 – Thunder Bay Hydro – Tsimberg Expert Report

Thunder Bay Hydro (“**TBH**”) is writing to respond to the School Energy Coalition’s (“**SEC**”) letter dated April 13, 2017 and the Vulnerable Energy Consumers Coalition (“**VECC**”) letter dated April 17, 2017 objecting to the expert report of Yury Tsimberg dated March 24, 2017 (the “**Tsimberg Report**”).

TBH submits that the OEB should accept the Tsimberg Report into evidence and reject the request for an adjournment of the hearing for the following reasons:

1. The Tsimberg Report meets all of the requirements for an expert report under Rule 13A of the Ontario Energy Board’s Rules of Practice and Procedure;
2. The opinion expressed in the Tsimberg Report is based upon the analysis and methodology that informed the Kinectrics Asset Condition Assessment (the “ACA”) which is already included on the record at Exhibit 2, Appendix 2-B (Distribution System Plan), Appendix C (Kinectrics Asset Condition Assessment) and has been the subject of written discovery by all of the parties;
3. There is no prejudice to SEC or VECC from having the Tsimberg Report filed and being able to cross-examine Mr. Tsimberg on his report during the oral hearing – the Tsimberg Report provides sufficient notice of Mr. Tsimberg’s opinion for the intervenors to know Mr. Tsimberg’s opinion to be able to cross-examine on it; and
4. There is prejudice to TBH if the Tsimberg Report is not accepted into evidence.

The Tsimberg Report meets the requirements under Rule 13A

Rule 13A of the Rules of Practice and Procedure sets out that the expert evidence must contain the following:

1. The expert's name, business name and address, and area of expertise;
2. The expert's qualifications, including his educational and professional experience;
3. The instructions provided to the expert in relation to the proceeding;
4. The specific information upon which the expert's evidence is based;
5. In the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement; and
6. An acknowledgment of the expert's duty (Form A).

The expert's name and area of expertise are described at paragraphs 1 and 2 of the report and in Mr. Tsimberg's resume that is attached to his report. Mr. Tsimberg is director of Asset Management at Kinectrics Inc. ("**Kinectrics**").

The expert's qualifications are contained in paragraph 2 and in his resume.

The instructions Mr. Tsimberg received are summarized at paragraph 3 of the Tsimberg Report. Mr. Tsimberg has been asked to provide his opinion on the reasonableness of the capital investments levels TBH is requesting based on the ACA study conducted by Kinectrics.

SEC has taken one sentence out of paragraph 4 of the Expert Report out of context in order to make an unsubstantiated allegation that Mr. Tsimberg is somehow not independent. TBH objects to this unsubstantiated allegation. Mr. Tsimberg is a well-known and highly regarded expert in asset management. He was retained specifically because of his independence to TBH and his expertise across the industry. TBH notes that rather than providing a glowing review of TBH's DSP, Mr. Tsimberg at paragraph 7 of the Tsimberg Report provides feedback on what TBH could have improved upon in its DSP.

Mr. Tsimberg identifies the information upon which his report is based at paragraph 4. TBH hired Kinectrics in 2015 to perform the ACA study to evaluate TBH's distribution assets. A copy of this ACA is already on the evidentiary record in this proceeding. Mr. Tsimberg's opinion is based upon this ACA, his understanding of the Kinectrics methodology that went into performing the ACA and producing the ACA as well as his general experience and knowledge as detailed in paragraph 4.

Mr. Tsimberg signed the acknowledgment of expert duty and confirmed his obligations under Rule 13A at paragraph 5.

Mr. Tsimberg's opinion is contained in paragraphs 6 and 7 of his report. Mr. Tsimberg's opinion is informative to the Board, which must assess and determine the issues in dispute. In its decision in EB-2014-0002, the OEB found it very helpful that an independent third party review was conducted of Horizon Utilities' DSP. Not everyone is a technical expert, and Mr. Tsimberg can assist the panel by providing independent insights into a complicated area like distribution system planning and asset management.

The Tsimberg Report also meets all the requirements for the filing of expert evidence at common law being that the opinion is necessary to assist the trier of fact and that the witness has the requisite qualifications to give opinion evidence on the subject.¹

SEC submits that Mr. Tsimberg does not indicate whether or not he was involved in the ACA study that Kinectrics conducted for TBH. It is clear on the evidence that Mr. Tsimberg both reviewed and approved the ACA study (his signature is clear at page iii of the ACA). Mr. Tsimberg did have direct involvement in the ACA. It is not a requirement that Mr. Tsimberg, as an expert witness, must have been the author of the ACA (it was authored by another resource at Kinectrics). Rather, what is required is that he has expertise in an area that is relevant to the proceedings and be able to provide assistance to the tribunal on that matter. Mr. Tsimberg clearly indicates in his report that he has considerable expertise in conducting ACA studies and in advising utilities on preparing their distribution system plans.

SEC objects to the Tsimberg Report on the basis that Mr. Tsimberg does not disclose the research he has done to complete his review. This is simply not the case. The Kinectrics ACA is and has been on the evidentiary record since the Application was filed. Mr. Tsimberg will be providing evidence on this methodology and how or whether the investment levels TBH is requesting under the DSP are consistent with the findings in the ACA study. Such evidence does not require a formal methodology to be presented. Both the ACA and the DCP are filed with the tribunal. The SEC and the VECC will be in a position to cross-examine Mr. Tsimberg on his opinion.

SEC appears to object to Mr. Tsimberg's report on the basis that he will only elaborate on his report in oral testimony (see for example, "which appears limited to oral evidence, rather than a written report"). There is nothing improper in proceeding this way. An expert report is not evidence in and of itself. The expert report gives notice to the parties of what the expert will testify to and his or her instructions. The expert's testimony, tested under cross-examination, is the substance of the opinion.

TBH provided sufficient notice to the parties of this evidence based on the nature of the evidence and the fact that all the underlying documents have already been disclosed to all the parties.

There is no prejudice to SEC or VECC

There is no prejudice to SEC or VECC in having this matter proceed as scheduled.

There is nothing in the OEB Rules of Practice and Procedure that mandates discovery of an expert prior to the hearing of a matter. Indeed, even the rules of natural justice do not provide for such an outcome.

As just one example, in Ontario *Rules of Civil Procedure*, the discovery of an expert prior to trial is **strictly prohibited**.²

¹ *R v Mohan*, [1994] 2 SCR 9.

² Rule 31.10(1) provides: The court may grant leave, on such terms respecting costs and other matters are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, **other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation**.

The purpose of the rules of natural justice is for the parties to know the case they are to meet by providing adequate notice and to have the opportunity to be heard.

The Tsimberg Report gives the SEC and VECC sufficient notice of Mr. Tsimberg's opinion for the intervenors to know Mr. Tsimberg's opinion and be able to cross-examine on it.

The documents underlying Mr. Tsimberg's opinion, being the ACA have been on the evidentiary record in the beginning of this proceeding. All of the parties had an opportunity to seek discovery on the ACA.

While SEC complains in its letter that it does not know the assumptions underlying Mr. Tsimberg's report, this is false. The assumptions underlying Mr. Tsimberg's report are those assumptions contained in the ACA report.

The case of Grimsby Power (EB-2015-0072) cited by SEC in support of its request for a transcribed technical conference is distinguishable. In that case, Grimsby Power filed an expert report from KPMG Inc. on whether the benefits of certain non-capital carry forwards held by the LDC should flow to shareholders or customers. The report was almost fifteen pages long and dealt with tax and accounting issues and presented much new evidence on the record. Here the Tsimberg Report deals with documents that have already been filed in the proceeding and Mr. Tsimberg will give further oral testimony on these documents.

Response to VECC's comments about settlement

In its letter objecting to filing the Tsimberg Report, VECC alleges that TBH has acted improperly by filing the Tsimberg Report after the settlement conference. This allegation is unfounded and prejudicial to TBH. VECC writes: "there is significant difference between using knowledge gained in negotiations to prepare for a hearing and preparing new evidence to counter revealed positions of parties." TBH cannot defend itself against such an allegation of improper conduct without waiving settlement privilege. TBH can only state at this point that it has not in any way taken advantage of information gained at the settlement conference in order to prepare for this hearing and that such an allegation is spurious.

Moreover, as stated above, there is nothing in the OEB Rules of Practice and Procedure that prevents parties from filing evidence after a settlement conference. Similarly, the Ontario *Rules of Civil Procedure* do not prevent the parties from filing expert evidence after the conduct of mediation.

Conclusion

TBH requests that the OEB dismiss SEC's and the VECC's requests that the Tsimberg Report not be admitted. In the present Application, TBH holds the burden of proof. If the Board were to reject the Tsimberg Report, it would undermine TBH's ability to discharge its burden of proof in its Application. TBH would be severely prejudiced as a result.

The TBH respectfully requests that the hearing proceed as scheduled on April 20, 2017.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original filed by John A.D. Vellone

John A.D. Vellone

CC: Intervenors of record in EB-2016-0105