



EB-2018-0014

**Alectra Utilities Corporation
Guelph Hydro Electric Systems Inc.**

**Application for approvals to amalgamate
Alectra Utilities Corporation and Guelph Hydro Electric Systems Inc. and
continue operations as Alectra Utilities Corporation**

**SUPPLEMENTARY DECISION ON CONFIDENTIALITY AND
PROCEDURAL ORDER NO. 3
August 7, 2018**

Alectra Utilities Corporation (Alectra Utilities) and Guelph Hydro Electric Systems Inc. (Guelph Hydro) filed an application with the Ontario Energy Board (OEB) on March 8, 2018 under sections 18, 74 and 86 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B for approval to amalgamate and continue operations as Alectra Utilities.

The applicants requested confidential treatment for parts of the responses to certain interrogatories.¹ They argued that the redacted information shows the specific functional areas or initiatives from which potential synergy savings may be achieved, which information has not been communicated to all staff that may be impacted by the changes. They further argued that disclosure of the redacted information could interfere with ongoing and future collective bargaining with their labour unions, the Power Workers' Union (PWU) and International Brotherhood of Electrical Workers, Local 636 (IBEW), both of which are intervenors in this proceeding. They asked that PWU and IBEW not have access to the redacted information even if the unions sign a Declaration and Undertaking pursuant to the OEB's *Practice Direction on Confidential Filings*.

In its Decision on Confidentiality and Procedural Order No. 2, the OEB accepted that the information in question is confidential, and invited submissions on the applicants' request that the information be withheld from the unions even if they signed the

¹ B-Staff-7(b), B-Staff-10(a), and B-Staff-12.

Declaration and Undertaking. The unions both objected to the request. PWU argued that the information would need to be disclosed to the unions during collective bargaining in any event, pursuant to provincial labour relations legislation. PWU added that, even if the OEB accepted that the information were truly confidential, it would be sufficient to treat the unions the same as other intervenors and allow them to view the information as long as they signed the Declaration and Undertaking. PWU submitted that for the OEB to deny access to the information despite the Declaration and Undertaking would suggest that the OEB considered there to be a real risk that PWU's counsel would breach the Declaration and Undertaking. That assumption is unwarranted, PWU argued, and it ignores that lawyers are capable of "compartmentalizing" information (i.e., not using it for any purpose other than the one for which it was obtained). IBEW raised similar concerns, and added that without access to the redacted information its ability to make submissions on the impacts of the proposed amalgamation would be impaired.

The applicants responded that the question of whether the information would need to be divulged in the collective bargaining process should be determined in that process, in accordance with the applicable labour relations regime, rather than by the OEB. Nevertheless, "as a good faith effort to resolve the issue while protecting the Applicants' legitimate interests", the applicants proposed a compromise solution whereby the unions' counsel would be given access to the confidential portions of the interrogatory responses, "provided such individuals (i) are external to and at arms-length from PWU or IBEW, as applicable, and (ii) are not and will not be involved in any collective bargaining-related activities on their behalf, whether current or future." The applicants noted that this proposed compromise is similar to what the OEB accepted in the most recent Ontario Power Generation Inc. (OPG) payment amounts case (EB-2016-0152).

Although the OEB had not provided an opportunity for any further submissions from the unions, IBEW wrote to the OEB to advise that it does not consent to the compromise, arguing that "counsel would be placed in a position where they would not be able to provide full information to their client or seek instructions."

In the OEB's view, the compromise proposed by the applicants is reasonable. It is consistent with the solution adopted by the OEB in the OPG case, where the OEB explained:

The objective of the OEB's decision on this issue is to give ratepayers the highest degree of confidence in the OEB's processes and treatment of highly sensitive information. It addresses what the OEB considers to be a reasonable concern of OPG in respect of this information. It is

not intended to question [PWU counsel's] integrity or to suggest that [PWU counsel] have not complied with previous undertakings.

The same reasons apply here. The applicants have expressed legitimate concerns about how disclosure of the information in question to the unions might interfere with collective bargaining. While the unions may be right that the information will need to be shared with them in the context of collective bargaining, that is a determination best left for the collective bargaining process, by the appropriate authority under the governing labour relations legislation, not one for the OEB to make in this amalgamation case. Moreover, while the Declaration and Undertaking would, on its face, prevent the use of the information in the course of collective bargaining (or in any other matter other than this proceeding), additional protection is warranted in light of the sensitivity of the information. The OEB reiterates what was said in the OPG case: by endorsing the proposed compromise, the OEB does not mean to question anyone's integrity. Nevertheless, ratepayers and other stakeholders might reasonably wonder whether anyone could truly compartmentalize the information; that is, whether the Declaration and Undertaking would eliminate the risk of harm. As the Divisional Court said in *Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, (1993), 13 O.R. (3d) 531, where counsel's undertaking was found to be insufficient to allow access to confidential information:

The solicitors say they would honour their undertaking and I have no doubt that they would make their very best efforts to do so. The difficulty is that circumstances might render compliance impossible. The solicitors could not disabuse their minds of any significant information during the subsequent proceedings. They could not compartmentalize their minds so as to screen out what has been disclosed by the access and what has been acquired elsewhere: see *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at p. 1261, 77 D.L.R. (4th) 249. Furthermore, there would remain the perception of a possibility of non-compliance with the undertaking.

For these reasons, the OEB finds that the information in question will only be disclosed to counsel to the unions if they provide an affidavit similar to the one required in the OPG case, in addition to the Declaration and Undertaking.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Representatives for the PWU and IBEW who wish to gain access to the confidential information provided in response to interrogatories B-Staff-7(b), B-Staff-10(a), and B-Staff-12 shall, in addition to filing the OEB's Declaration and Undertaking, also file an affidavit affirming that they are external to and at arms-

length from PWU or the IBEW, as applicable, and are not and will not be involved in any collective bargaining related activities on their behalf.

All filings to the OEB must quote the file number, **EB-2018-0014** and be made electronically in searchable/unrestricted PDF format through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.oeb.ca/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Saleh Lavaee at Saleh.Lavaee@oeb.ca and OEB Counsel, Ian Richler at Ian.Richler@oeb.ca.

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DATED at Toronto, **August 7, 2018**

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary