

BY EMAIL

June 12, 2019

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

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: PUC Distribution Inc.
2019 IRM Rate Application
OEB Staff Submission on Confidentiality
OEB File No. EB-2018-0219**

In accordance with Procedural Order No. 4, please find attached OEB staff's submission in the above proceeding.

PUC Distribution Inc. is reminded that its Reply Submission is due by June 17, 2019.

Yours truly,

Original Signed By

Georgette Vlahos
Advisor, Incentive Rate-setting & Accounting

Encl.

ONTARIO ENERGY BOARD

STAFF SUBMISSION ON CONFIDENTIALITY

2019 ELECTRICITY DISTRIBUTION RATES

PUC Distribution Inc.

EB-2018-0219

June 12, 2019

OEB Staff Submission on Confidentiality
PUC Distribution Inc.
2019 IRM Rate Application
EB-2018-0219

PUC Distribution Inc. (PUC Distribution) filed an incentive rate-setting mechanism (IRM) application with the Ontario Energy Board (OEB) on January 31, 2019 seeking approval for changes to its electricity distribution rates to be effective May 1, 2019. As part of the IRM application PUC Distribution requested OEB approval to recover incremental capital to implement a smart grid project, Sault Smart Grid (SSG Project). The total estimated SSG project cost is \$34,389,046 with 22% (\$7,655,053) for Phase 1 to be in-service in 2019, and 78% (\$26,733,992) for Phase 2 to be in-service in 2020.

PUC Distribution has applied for and signed an agreement with Natural Resources Canada (NRCan) Smart Grid Program for a total of \$11,807,000 in funding (\$2,628,256 for 2019, \$9,178,744 for 2020). PUC Distribution has indicated that this NRCan funding is conditional pending OEB approval of the SSG Project.

In this proceeding, PUC Distribution has requested to recover a revenue requirement for 2019 in the amount of \$510,533 for the Phase 1 implementation of the SSG Project in the amount of \$4,552,714.¹

On May 31, 2019, PUC Distribution filed its responses to OEB staff and intervenor interrogatories on the ICM portion of the application, i.e. the SSG Project. In the cover letter (May 31 Letter)² accompanying the responses, PUC Distribution stated that it filed the following documents in confidence pursuant to the OEB's *Practice Direction on Confidential Filings* (Practice Direction)³:

1. Appendix 9 - Letter of Intent between PUC and Energizing, LLC (now named Infrastructure Energy LLC) (LOI)
2. Appendix 11 - Amendment to Letter of Intent in No. 1 above (LOI Amendment)
3. Appendix 13 - Current working draft version of the main Project Agreement between PUC Distribution and Project Co. (SSG, Inc.) (Draft Project Agreement)
4. Appendix 12 - Schedule to Project Agreement in No. 3 above (Draft Project Agreement Schedule).

¹ PUC's smart grid project has been split into two phases: Phase 1 is expected to be completed in 2019 and Phase 2 is expected to complete in 2020. PUC has requested ICM funding in this application for Phase 1.

² EB-2018-0219, Interrogatory Responses

³ OEB Practice Direction on Confidential Filings, October 28, 2018 (Practice Direction)

PUC Distribution stated that public disclosure of the above-noted documents (Documents) “could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, and be injurious to the financial interest of (Infrastructure Energy)”. Infrastructure Energy LLC (IE) is a counterparty to the agreements contained in the Documents and, according to the May 31 letter, IE engages in competitive business activities, including the development of smart grid initiatives across North America.

PUC Distribution stated that the Documents cost a considerable amount of money to draft and develop and that public disclosure of the Documents would allow IE’s competitors to gain access to valuable confidential information leading to competitive advantage in future potential projects.

OEB staff does not agree that all of the Documents should be treated as confidential in their entirety, and will address each document individually further in this submission. OEB staff believes that the agreements that make up the Documents have a potential impact on ratepayers and should be produced, either in their entirety or with redactions of information properly designated as confidential. OEB staff is of the view that PUC Distribution has not made reasonable efforts to limit the redacted information, and instead, has requested confidential treatment of entire documents even when not necessary, as will be discussed further below.

OEB Practice Direction on Confidentiality

The OEB’s general policy is that all evidence should be on the public record and should be open for inspection by any person unless disclosure of the record is prohibited by law. The OEB’s Practice Direction seeks to balance the objectives of transparency and accessibility with the need to protect information that has been properly designated as confidential. The approach that underlies the Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception and the onus is on the party requesting confidentiality to demonstrate that confidential treatment is warranted in any given case.

Appendix A to the Practice Direction sets out some of the factors that the OEB may consider in addressing the confidentiality of filings such as:

- The potential harm that could result from the disclosure of the information, including :
 - Prejudice to any person’s competitive position
 - Whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations

- Whether the information could interfere significantly with negotiations being carried out by a party
- Whether the disclosure would be likely to produce a significant loss or gain to any person
- Whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the OEB
 - Whether the type of information in question was previously held confidential by the OEB
 - Whether the information is required by legislation to be kept confidential

Appendix B of the Practice Direction contains an illustrative list of the types of information previously assessed or maintained by the OEB as confidential and includes third party information as described in section 17(1) of *Freedom of Information and Protection of Privacy Act* (FIPPA), R.S.O. 1990, c.F.31. The factors generally considered by the OEB Practice Direction (Appendix A) are consistent with FIPPA requirements with respect to third party information.

OEB staff understands PUC Distribution's request for confidential treatment of the Documents is on the basis that it is third party information, disclosure of which is allegedly prejudicial to IE, and therefore section 17(1) of FIPPA is the applicable to the analysis of whether the Documents should be treated as confidential.

Test for Exemption under Section 17 of FIPPA

Section 17 (1) of FIPPA provides that an 'institution' shall not disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; or
- ...
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.⁴

For section 17(1) to apply, the party seeking confidential treatment of a record (document) must satisfy each part of the following three-part test:

⁴ FIPPA, section 17(1)(a) and (c). The legislation applicable to municipal government (including municipally-owned electricity distribution companies) is the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M.56 (MFIPPA). Section 10 of MFIPPA is identical to section 17 of FIPPA with respect to disclosure of third party information.

1. The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. The information must have been supplied to PUC Distribution in confidence, either implicitly or explicitly; and
3. The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) and/or (c) of section 17(1) will occur.⁵

With respect to the first part of the test, OEB staff submits that the majority of the information in the Documents cannot be categorized as “trade secret or scientific, technical, commercial, financial or labour relations information”. In its May 31 Letter, PUC Distribution requests confidential treatment of the Documents in their entirety but fails to explain what type(s) of information, in its view, is contained in the Documents that should be protected from disclosure, i.e. whether it considers it “trade secret or scientific, technical, commercial, financial or labour relations information”.

The onus is on the requesting party to demonstrate that the information for which confidential treatment is sought falls within the section 17 exemption and there are many decisions of the Information and Privacy Commissioner (IPC) which established that the burden is on the ‘institution’ (PUC Distribution) and the affected party who has resisted disclosure.⁶ OEB staff submits that PUC Distribution has not provided sufficient evidence that the Documents, *in their entirety*, contain information that should be exempt from disclosure, nor has it made any effort to distinguish those parts of the Documents that contain information that could be disclosed and those for which it requests confidential treatment.

With respect to the second part of the test, OEB staff submits that the Documents were not ‘supplied to PUC Distribution’. There are numerous decisions of the IPC that have established that documents such as agreements and constituent records (schedules, appendices, etc.) that are negotiated between a public body and private businesses do not contain information “supplied” by the private business.⁷

⁵ The IPC’s “three-part test” for exemptions under section 17(1)(a)-(c) of FIPPA was established in Order 36, *Ontario (Ministry of Industry, Trade & Technology) Re* (1988) (Ont. Information & Privacy Comm.)

⁶ For example, Order 36, *Ontario (Ministry of Industry, Trade & Technology) Re* (1988) (Ont. Information & Privacy Comm.)

⁷ For example, PO-2632 *Ontario Power Generation, Re* (2008), 2008 CarswellOnt 11568 (Ont. Information & Privacy Comm.) at paras 161-163; PO-2226, *Ontario (Ministry of Enterprise, Opportunity and Innovation)* (2004) (Ont. Information & Privacy Comm.) ; PO-2384 *Ontario (Ministry of Natural Resources)* (2005) (Ont. Information & Privacy Comm.)

While the Documents are labelled as Confidential” and “Confidential and Proprietary Information”, such statements are not determinative of whether the subject document should be treated as confidential.

If IE may have had an expectation that the Documents would be treated as confidential in their entirety, such an expectation is not reasonable. PUC Distribution, a public utility, recovers its costs from ratepayers and is subject to public and regulatory scrutiny of its proposed expenditures, including all of the information underlying proposed investments.

The third part of the test is whether disclosure of the record gives rise to a ‘reasonable expectation’ that one of the harms specified in 17(1) (a) or (c) will occur. OEB staff submits that disclosure of the Documents does not give rise to a reasonable expectation that such disclosure will prejudice significantly the competitive position of IE, or result in undue loss to IE.

OEB staff submits that PUC Distribution has not provided any evidence that prejudice or harm to IE’s competitive position is likely to result from the disclosure of the Documents subject to appropriate redactions as will be discussed below.

In its May 31 Letter, PUC Distribution stated that public disclosure of the information in the Documents could be used to apply to similar construction or services projects as well as future potential smart grid projects or P3 type works with LDCs or others, allowing competitors to have a competitive advantage in such future potential projects.⁸

However, the mere allegation that competitors could copy the construction, services or P3 model discussed in the Documents is not convincing evidence of the likelihood that this would happen. There are numerous texts, precedents and other materials on P3 structures readily available in the public domain that anyone (or their lawyer) can easily access.

As indicated in a number of orders from the IPC that there must be “detailed and convincing evidence” of the prejudice alleged and, in OEB staff’s submission, no evidence has been filed explaining the type(s) of information that PUC/IE wishes to be treated as confidential and how a particular piece of information could result in harm to IE.

As indicated in a number of orders from the IPC on this issue, there must be “detailed and convincing evidence” of the alleged prejudice in order to benefit from the exemption

⁸ Interrogatory Responses, Page 2

under section 17(1) of FIPPA.⁹ The courts have also held that the IPC may reject assertions of harm that are not supported by evidence and because the third part of the test for an exemption under section 17(1) is not met.¹⁰

OEB staff submits that PUC Distribution's request for confidential treatment of the entirety of the Documents does not meet the three-part test for exempting third party documents from disclosure under section 17(1) of FIPPA.

Submissions on Individual Documents

Appendix 9 - Letter of Intent between PUC and Energizing, LLC (now named Infrastructure Energy LLC) (LOI)

OEB staff submits that the majority of the LOI contains standard provisions for such a document and public disclosure of the LOI would not significantly prejudice IE's competitive position. Furthermore, the LOI does not contain any information that is not already on the public record, either specifically or generally. The information contained in Exhibit A of the LOI deals with project ownership, financing, maintenance and other matters that are already disclosed in the application material and interrogatory responses on the public record of this proceeding. If there are *specific or unique provisions* in the LOI, disclosure of which would be prejudicial to IE, PUC Distribution can speak to those in its reply submission and, if the OEB is satisfied that portions of the document should be treated as confidential, then those particular portions could be redacted while the document as a whole is on the public record.

Appendix 11 - Amendment to Letter of Intent in No. 1 above (LOI Amendment)

OEB staff submits that most of the information in the LOI Amendment is already publicly available information in the application and interrogatory responses. OEB staff notes the following:

- The first 2 pages (cover letter) do contain some information that has not yet been publicly disclosed but is relevant to the proceeding, should be publicly available and does not result in prejudice or harm to IE
- Exhibit A (19 pages) contains mostly information that is on the public record, in

⁹ PO-2632 *Ontario Power Generation, Re* (2008), 2008 CarswellOnt 11568 (Ont. Information & Privacy Comm.) at para 228 and *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)

¹⁰ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.) and *Ontario First Nations Ltd. Partnership v. Ontario (Information & Privacy Commissioner)*, [2006] O.J. No. 1103 (Ont. Div. Ct.), at paragraph 11

terms of the participants in, and structure of the SSG Project, phasing of design and construction, role of the OEB; the majority of the document is in draft form and does not contain any specific information that should be treated as confidential

- Schedule A of the LOI Amendment consists of 6 pages of definitions which also do not contain any specific information that should be marked as confidential
- Schedule B (UDM System Design and Construction Specifications) contains some information that is already publicly available in the application and IRRs and the parts that are not yet disclosed should be publicly available and not treated as confidential
- Schedule C (Monthly Payment) is blank and therefore contains no confidential information
- Schedule D (7 pages) sets out some information which could be used by IE's competitors and may be considered for confidential treatment (subject to further submissions from PUC Distribution)
- Schedule E sets out project Deliverables and due dates which should be publicly disclosed

OEB staff submits that, if there are *particular provisions* in the LOI and attendant documents, disclosure of which would be prejudicial to IE, PUC Distribution can speak to those in its reply submission. If the OEB is satisfied that portions of the document should be treated as confidential, then those particular portions can be redacted and a redacted document filed on the public record of the proceeding.

Appendix 13 - Current working draft version of the main Project Agreement between PUC Distribution and Project Co. (SSG, Inc.) (Draft Project Agreement)

The Draft Project Agreement (58 pages) contains some notes and comments of other parties which may be considered confidential and redacted. Otherwise, the document contains very few specific provisions that could be considered for confidential treatment. If there are certain provisions, disclosure of which would be prejudicial to IE's (or other third parties') competitive positions, those should be addressed in PUC Distribution's reply submission. With the appropriate redactions of specific portions that could be treated as confidential, a redacted Draft Project Agreement could be filed on the public record of this proceeding.

Appendix 12 - Schedule to Project Agreement (Definitions)

Schedule 1 to the Project Agreement consists of 36 pages of definitions and it is difficult to understand how disclosure of this document could prejudice IE's competitive position.

OEB staff submits that this should be filed on the public record.

Conclusion

OEB staff does not support PUC Distribution's request for confidential treatment of all of the Documents in their entirety, as requested by PUC Distribution. There may be some parts of certain documents that could be redacted (as discussed above) but otherwise the entire, redacted documents should be placed on the public record of this proceeding.

The Practice Direction clearly indicates the OEB's expectation that parties will make every effort to limit the scope of their requests for confidentiality and to prepare **meaningful redacted documents or summaries** so as to maximize the information that is available on the public record.¹¹

Furthermore, as discussed above, a significant portion of the information within the Documents is already on the public record, in PUC Distribution's application material and interrogatory responses. As noted in the Practice Direction, information that is in the public domain will not be considered confidential.¹²

Other portions of the Documents contain some information that appears to be relevant to the OEB's determination of the ICM application but is not the type of information that is exempt from disclosure in accordance with the Practice Direction and FIPPA, and such information should therefore be publicly accessible.

All of which is respectfully submitted

¹¹ Practice Direction, section 5

¹² Practice Direction on Confidential Filings, October 28, 2018, Appendix A, Page 19