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December 9, 2020

Delivered by Email & RESS

Ms. Christine Long, Registrar
Ontario Energy Board
P.O.Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Long:

**Re: Waterloo North Hydro Inc. 2021 Rates Application
Waterloo North Hydro Inc. (“WNH”) Reply Submissions on Confidentiality
Board File No. EB-2020-0059**

In accordance with Procedural Order No. 3 dated November 25, 2020, please find attached WNH's reply submissions on confidentiality in the above noted proceeding.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

A handwritten signature in black ink, appearing to read 'Flora Ho', is written over a horizontal line.

Flora Ho

cc: All Parties to EB-2020-0059

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended;

AND IN THE MATTER OF an Application by Waterloo North Hydro Inc. under Section 78 of the Act for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2021.

WATERLOO NORTH HYDRO INC.

REPLY SUBMISSIONS ON CONFIDENTIALITY

Filed: December 9, 2020

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Counsel to the Applicant

Introduction

1. Waterloo North Hydro Inc. (“**WNH**”) filed its responses to pre-settlement conference clarification questions on November 16, 2020 (“**Clarification Responses**”) concurrently with the settlement proposal (“**Settlement Proposal**”). In response to SEC-67 in the Clarification Responses and pursuant to the Ontario Energy Board’s (“**OEB**” or the “**Board**”) *Practice Direction on Confidential Filings*¹ (“**Practice Direction**”), Waterloo North Hydro Inc. (“**WNH**”) requested confidential treatment for the information contained in the following documents:
 - (i) Executive Incentive Program Overview
 - (ii) WNH Balanced Scorecard for 2016
 - (iii) Executive Total Compensation Salary Review
 - (iv) Executive Incentive Program S.M.A.R.T. Objective Guideline
 - (v) Executive Objectives Setting and Evaluation Form
 - (vi) Tool with Example(collectively, the “**Documents**”).
2. As set out in the Settlement Proposal, the parties to the proceeding have reached a complete settlement of all issues.
3. In Procedural Order No. 3², the Board ordered for OEB Staff and intervenors who wish to make written submissions on WNH’s confidentiality request to file submissions by December 2, 2020.
4. On December 2, 2020, WNH received OEB Staff’s written submissions on confidentiality (“**Staff Submissions**”). In its submissions, OEB Staff notes that the parties have filed a settlement proposal in this proceeding and have reached a complete settlement of all issues. OEB Staff also notes that there are no unsettled issues in relation to which the Documents may be relevant.

Settlement Privilege and Confidentiality

5. OEB Staff stated in Staff Submissions that “[...] that parties had access to unredacted versions of the Documents during the settlement discussions [...]”. WNH would like to express its disappointment over OEB Staff’s disregard for the fact that information exchanged during the settlement process is protected by settlement privilege and confidentiality and is provided on a without prejudice basis. At no point did OEB Staff seek a waiver of privilege or confidentiality

¹ Ontario Energy Board Practice Direction On Confidential Filings Revised October 28, 2016.

² EB-2020-0059 – Procedural Order No. 3, November 25, 2020.

from WNH prior to filing the Staff Submissions on the public record. Nor did OEB Staff confirm that the subject information could be used with prejudice to WNH's claim of confidentiality over the Documents.

The Confidentiality Claim Over the Documents

6. OEB Staff submits that although the content of the Documents likely has no remaining probative value to the issues in the proceeding, some of the Documents should be included, in whole or in part, on the public record to ensure that the evidentiary record includes the information that was available to, and considered by the parties in reaching settlement³.
7. As part of OEB Staff's submissions, they raised examples of documents filed by other utilities on the public record in their rate applications, including materials prepared by a compensation consultant with respect to the utility's executive incentive and compensation plans⁴.

Documents to be Disclosed on Public Record

8. At the time of filing the responses to pre-settlement clarification questions, which contained the Documents in question, WNH's focus was primarily directed towards filing the Settlement Proposal.
9. After reviewing OEB Staff's submissions, WNH is in agreement with the general principle that relevant Documents should be available, in whole or in part, on the public record unless a clear rationale for confidentiality is set out.
10. The fact that a Settlement Proposal has been filed does not derogate from the relevance of the information in the Documents from the matters at issue in this proceeding, in particular Issue 5.3.
11. For this reason, WNH has reviewed the Documents again with a view to narrowing its confidentiality claim as much as is reasonably possible. Following this exercise, WNH is in agreement with OEB Staff that the following documents may be placed on the public record:
 - (i) Executive Incentive Program Overview;
 - (ii) WNH Balanced Scorecard for 2016;
 - (iii) Executive Total Compensation Salary Review;
 - (iv) Executive Incentive Program S.M.A.R.T. Objective Guideline; and
 - (v) Tool with Example.

³ EB-2020-0059 – OEB Staff Submissions on Confidentiality, December 2, 2020 Page 2.

⁴ Ibid, Page 3.

12. However, WNH maintains its request for confidentiality of the *Executive Objectives Setting and Evaluation Form* for the reasons set out herein.

Reasons for Request for Confidentiality

WNH's Unique Factual Situation

13. WNH submits that its factual situation at this time is not applicable to other utilities. WNH's Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO") will both be retiring in 2021. Consequently, WNH will need to enter into the labour market in search of human resources talent to address this significant change in senior level executives. This imminent need is unique to WNH and the particular timing of this Application.
14. In the application and throughout the proceeding, WNH has emphasized the upcoming retirement of its CEO and CFO. For example:

At Exhibit 4:

"The Vice President of Finance and CFO is planning to retire at the end of 2020 and the President and CEO is scheduled to retire in 2021. Each of these positions will require an external executive search and therefore costs in 2020 and 2021 have been budgeted for these positions."⁵

In Interrogatory Response to 4-SEC-31:

"The CFO was scheduled to retire at the end of 2020 and the CEO to retire in 2021. There are funds provided in the 2020 budget for the planned executive search for a replacement CFO, however, due to COVID-19, the retirement of the CFO has been deferred to 2021. An amount of \$50,000 has been provided in the 2021 budget test year for the executive search for a replacement CEO."⁶

15. Due to the retirement of the CEO and CFO in 2021, WNH has a real need for an executive search for replacement of these two positions and it had prudently hired Marjorie Richards & Associates, (the "**Compensation Consultant**") to provide recommendations unique to WNH. This factual situation is not comparable to other utilities who do not need to enter into the labour market in the upcoming year to find a replacement for their CEO and CFO.
16. By disclosing WNH's executive compensation strategies at this time when they are planning an upcoming recruitment process would significantly prejudice WNH's position in recruiting potential candidates. Potential candidates could use this information to prejudice WNH's position in the hiring process. And third parties could use this same information to undermine WNH's compensation strategy when competing for the same talent.

⁵ EB-2020-0059, Exhibit 4, July 14, 2020, Page 11.

⁶ EB-2020-0059, Interrogatory Responses, 4-SEC-31, September 28, 2020, Page 341.

17. Notably, OEB Staff agrees with WNH that the *Executives Objectives Setting and Evaluation Form* could be treated as confidential as it could be used by a third party to design its own performance evaluation form for the CEO position⁷.

Compensation Consultant vs Mercer (Canada) Limited (“Mercer”) and Hay Group (“Hay”)

18. Arising from WNH’s unique need to fill important executive roles in 2021 is the necessity to engage a human resources expert for expert advice. WNH hired the Compensation Consultant, which has extensive experience in executive level human capital management, leadership development and operationalizing change solutions, to provide a tailor-made approach to derive a solution that best suits WNH’s needs.
19. WNH had hired the Compensation Consultant as they could provide a custom solution for WNH’s needs.
20. In its submissions, OEB Staff raised examples of compensation studies prepared by Mercer and Hay Group that were publically disclosed as reasons why the Documents should be disclosed.
21. WNH submits that this attempted comparison is misleading.
22. The following are the examples from Toronto Hydro Corporation (“**Toronto Hydro**”) and Oakville Hydro Corporation (“**Oakville Hydro**”) referenced by OEB Staff to support its submission. These studies have been summarized as follows:
- *Toronto Hydro Corporation Senior Executive Compensation Policies & Practices* prepared by Mercer for Toronto Hydro dated October 31, 2017⁸ - a benchmarking study that provided assessment of Toronto Hydro’s compensation for its senior executive positions relative to the market.
 - *Comparative Review of Senior Management Compensation* prepared by Hay for Oakville Hydro dated April 2006⁹ - a compensation study comparing Oakville Hydro’s senior management compensation and benefits to the market. Hay was retained to perform a review of Oakville Hydro’s compensation packages that were in effect at that time. Oakville Hydro had redacted employee compensation data from this compensation study.
 - *Compensation and Benefits Competitiveness* prepared by Mercer for Toronto Hydro dated May 31, 2007¹⁰ - a broad-based market pay review for positions within Toronto Hydro to assess its compensation and benefits programs’ competitiveness.

⁷ Ibid, Page 5.

⁸ EB-2018-0165, Interrogatory Responses, 1B-SEC-3, January 21, 2019, Page 1.

⁹ EB-2009-0271, Interrogatory Response to VECC, Appendix 6(c), filed December 8, 2009.

¹⁰ EB-2007-0680, Exhibit C2, Tab 1, Schedule 3, Compensation Study, filed August 2, 2007, updated October 25, 2007.

23. Mercer and Hay are consulting agencies that are commonly used amongst utilities for pension and benefits, compensation and benchmarking studies as well as provider for market salary projections¹¹. In fact, WNH also uses the Hay system to evaluate non-union and management positions' compensation.¹²
24. However, importantly, WNH submits that the compensation study examples referenced by OEB Staff prepared by Mercer and Hay are not analogous to the Documents prepared by the Compensation Consultant that were customized for WNH and were prepared and presented under different factual circumstances.
25. WNH maintains that the *Executives Objectives Setting and Evaluation Form* should be treated as confidential.
26. Finally, WNH has reached out to the Compensation Consultant in preparing these reply submissions and have obtained their consent to disclose the Documents as set out above and they have agreed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9TH DAY OF DECEMBER, 2020.

BORDEN LADNER GERVAIS LLP

Per:



Flora Ho

¹¹ For example, Hydro Ottawa Limited (EB-2019-0261 Exhibit 4, Attachment 1-1-12(G), July 6, 2020); London Hydro Inc. (EB-2016-0091 Exhibit 4, Appendix 4-7, August 26, 2016); Canadian Niagara Power Inc. (EB-2016-0061 Exhibit 4, Tab 4, Schedule 2, Appendix A, April 29, 2016); Algoma Power Inc. (EB-2019-0019 Exhibit 4 – Operating Expenses Page 54 of 94, May 17, 2019); Guelph Hydro Electric Systems Inc. (EB-2015-0073 Exhibit 4 Tab 3 Schedule 1 Page 41 of 101, April 24, 2015).

¹² EB-2020-0059, Exhibit 4, July 14, 2020, Page 47.