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OEB File No. EB-2021-0312

February 1, 2022

Delivered by RESS and Email

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

Dear Ms. Marconi:

Re: North Bay Hydro Distribution Limited and Espanola Regional Hydro Distribution Corporation Application to Amalgamate (EB-2021-0312)

We are counsel to North Bay Hydro Distribution Limited (“NBHDL”) and Espanola Regional Hydro Distribution Corporation (“ERHDC”, and together with NBHDL the “Applicants”) in respect of the above noted matter.

We are writing in response of the Notice of Motion filed by Donald D. Rennick on January 31, 2022 (the “**Notice of Motion**”).

NBHDL submits that the motion should be heard in writing. NBHDL opposes all of the relief sought in the Notice of Motion for the reasons that follow:

1. The Notice of Motion seeks to open matters that are clearly out of scope of the matters at issue in this Application and should be denied on this basis. Specifically, the Notice of Motion seeks to open and revisit factual matters that related to the transaction that was approved by the OEB in Phase 1 in its Decision and Order dated August 22, 2019 (EB-2019-0015).

Pursuant to OEB’s Decision on Issues List issued January 28, 2022 the OEB ruled that:

“Given that Phase 1 of this transaction has been approved by the OEB in the MAADs Decision, the OEB will only consider issues that are specific to Phase 2 of the transaction and the current application before the OEB. In order to assist parties to focus their participation, the OEB has established an issues list. The OEB will only consider issues set out in the approved Issues List which is attached as Schedule B.”

The Applicants submit that the OEB should deny the motion on the basis that it deals with issues that are not relevant to the matters at issue in this Application.

2. The Notice of Motion is premature in that it predates the written discovery process which can be used to elicit relevant evidence and should be denied on this basis. Pursuant to Procedural Order No. 1, interrogatories are due to be filed on February 7, 2022 and responses on February 15, 2022. The Notice of Motion is predicated on a number of factual assumptions that are simply not true. Following a proper discovery of evidence that is relevant to the matters at issue in this Application, the Applicant submits there would be no need to interfere with the business judgement of NBHDL or otherwise to make the orders sought in the Notice of Motion.
3. The Notice of Motion is evidence of an established pattern of behaviour exhibited by Mr. Rennick where he (offensively) alleges various improprieties and then seeks to replace the judgement and decisions of the proper decision making bodies with his own personal judgement and views on what decisions are best. The OEB should deny this motion in favour of the well established principle that quasi-judicial tribunals will generally show deference to the business judgement exercised by the boards of NBHDL and its affiliates.

This pattern of behaviour was evident in the *Decision and Order on Motion* issued October 21, 2021 in EB-2021-0251 and the subsequent *Decision on Motion* issued December 13, 2021 in EB-2021-0299, where the OEB Commissioners found that:

“The grounds of the motion amount to a request for a rehearing of the evidence in the rate application with a view to urging a different result based on the motion applicant’s view of the weight of the evidence and his disagreement with the exercise of discretion by the hearing panel.”¹

and:

“The applicant's current motion, similar to the original motion dismissed by the OEB in October, seeks to replace the OEB’s judgment as to the appropriate resolution of the outstanding issues in the September Decision with the applicant’s own positions on those issues. There are no new facts or errors of law that have been raised in this current motion to justify such a substitution. As well, some facts or conclusions are misstated by the applicant in his Notice of Motion of November 10, 2021.”²

and:

“The applicant has now attempted to re-argue the September Decision twice, and both motions have been dismissed. The OEB does not expect to receive further motions to review from the applicant related to the issues dealt with in the September, October, or the current Decision. The OEB cautions that a further motion by the applicant raising the same issues determined in the previous decisions

¹ *Decision and Order on Motion* issued October 21, 2021 in EB-2021-0251 at page 6.

² *Decision on Motion* issued December 13, 2021 in EB-2021-0299 at page 2.

may engage the exercise of the OEB's powers to direct the applicant to pay the OEB's costs pursuant to the provisions of the Ontario Energy Board Act 1998.”³

Pursuant to Section 134 of the Ontario *Business Corporations Act*, the directors and officers of NBHDL and its affiliates are legally responsible for making decisions that are in the best interests of the corporation in accordance with a legally mandated standard of care. In considering what is the best interests of the corporation, the Supreme Court of Canada has ruled that directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.⁴

In addition, there exists a strong body of case law that demonstrates that courts must defer, rather than intervene, to the business judgement of directors who are in the best position to take into account the diverse interests of the corporation and its stakeholders as long as the business decision lies within the range of reasonable alternatives.⁵ The boards of NBHDL and its affiliates should not be subject to the microscopic examination of Mr. Rennick, who is not in a position to make decisions on behalf of the boards of NBHDL and its affiliates, and the motion should be denied.

4. The OEB should deny the request to adjust the timelines set out in Procedural Order No. 1. The motion raises matters that are, for the reasons set out above, both frivolous and vexatious. Mr. Rennick should not be rewarded with a delay in the proceeding (which is likely his ultimate objective). The Applicants have endeavored to make these submissions promptly so that the OEB can rule on this motion without altering the timelines set out in Procedural Order No. 1.
5. Finally, in the alternative to the points raised above, it is not at all clear that the OEB has the legal authority to grant the relief sought in the motion. This is not an Application that involves the setting of rates, which is to be interpreted broadly and extends well beyond a strict construction of the task – see for example *Toronto Hydro-Electric System Limited v. Ontario Energy Board*.⁶ Rather, this is an application for leave to amalgamate and related relief – which is more analogous to the situation in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*.⁷ Prior to granting the requested relief, the OEB would need to be clear about the legal basis upon which it believes it can make the order sought.

³ Ibid.

⁴ *BCE Inc. v 1976 Debentureholders* 2008 SCC 69 at para 40.

⁵ See *Peoples Department Stores Inc. (Trustee of) v Wise*, [2004] 3 S.C.R. 461 and *Maple Leaf Foods Inc. v Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A).

⁶ *Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284.

⁷ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4.

For the reasons discussed above, NBHDL submits that the OEB should deny Mr. Rennick's motion. If you have any questions or concerns, please do not hesitate to contact me.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:



John Vellone

cc: Melissa Casson, Vice President of Finance, NBHDL
Matt Payne, President and Chief Executive Officer, NBHDL
Ted Doherty, School Energy Coalition
Fred Zheng, School Energy Coalition
Jay Shepherd, School Energy Coalition
Donald Rennick, Independent Participant