



EB-2012-0064

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Toronto Hydro-Electric System Limited for an order approving just and reasonable rates and other charges for electricity distribution to be effective June 1, 2012, May 1, 2013 and May 1, 2014.

DECISION AND ORDER ON CONFIDENTIALITY
November 26, 2012

Toronto Hydro-Electric System Limited (“THESL”) filed an application with the Ontario Energy Board on May 10, 2012, under section 78 of the *Ontario Energy Board Act*, 1998, and the Board’s Incentive Regulation Mechanism framework seeking approval for changes to the rates that THESL charges for electricity distribution, to be effective June 1, 2012, May 1, 2013 and May 1, 2014.

The Board in the present Decision and Order makes a determination on a matter of confidentiality that has arisen in this proceeding.

Background

On October 5, 2012, as part of its response to interrogatories, THESL stated that Consumers Council of Canada interrogatory 19 (“CCC IR #19”) requested certain information, specifically the costs of five studies, that THESL considered confidential. THESL accordingly requested that this information and the response to this interrogatory be treated confidentially as it included the terms of commercially sensitive, negotiated agreements with third parties in a competitive market.

THESL submitted that the disclosure of this information could negatively affect LDCs' future negotiations. THESL stated that it had provided a partial response to this interrogatory on a non-confidential basis and provided the Board with its complete response in accordance with the Board's *Rules of Practice and Procedure* in its Practice Direction on Confidential Filings (the "Practice Direction"). THESL asked that the Board limit circulation of this response to counsel who sign the Board's Declaration of Undertaking. THESL also noted that should any party wish to cross-examine, or otherwise address this document in any other way during this proceeding, it requested that these proceedings be conducted *in camera*, and any submissions or other written material pertaining to these documents be filed in confidence, all in accordance with the Practice Direction.

In Procedural Order No. 3, with respect to CCC IR #19, as an interim measure, the Board allowed any external counsel for the intervenors wishing to review the confidential document to do so after signing a copy of the Board's Declaration and Undertaking with respect to confidential documents, and filing it with the Board and serving it on THESL.

Procedural Order No. 3 further established that intervenors and Board staff objecting to THESL's request for confidential treatment of the interrogatory response were to file their submissions by November 14, 2012 with THESL to file any reply submission by November 16, 2012.

The Board received one submission on this matter from the School Energy Coalition ("SEC") which opposed THESL's request. SEC noted that THESL sought confidentiality treatment for the costs of each of the five studies referenced in the non-confidential version of the interrogatory response and submitted that this information should be placed on the public record and not afforded confidentiality treatment.

SEC argued that THESL had not met the burden outlined in the Practice Direction as THESL has not shown why the total cost of each study is commercial sensitive information that would create harm for future negotiations. SEC submitted that THESL could not simply assert that this was the case, but had to provide cogent reasons for it. SEC further noted that THESL is not being asked to provide the specific contracts, but simply the total cost of each study. SEC also argued that THESL had not provided any reasons as to why this information is different than any other third party cost information that it has to provide in the course of any application before the Board.

SEC argued that the Board's EB-2010-0144 Decision regarding what it saw as a similar confidentiality claim by Waterloo North Hydro had determined that the applicant had not met the threshold for confidentiality treatment established in the Practice Direction.

In its reply submission, THESL acknowledged that confidentiality should be the exception, not the rule, but stated that in making its request for confidential treatment of the material in question, its objective was to maintain its competitive position in arriving at financial arrangements with third party consultants, the benefits of which THESL argued ultimately accrue to ratepayers.

THESL submitted that it was merely asking that the costs of five studies prepared by external consultants operating in a specialized, niche practice area be kept confidential, that this request sought the minimal level of commercial protection, and if granted would result in an isolated and narrow redaction from the public record.

THESL argued that the requested protection of the confidential information does not erode or curtail the level of scrutiny that intervenors may appropriately apply to the confidential information, as in the event the Board were to grant THESL's request intervenors would have access to the confidential information through their counsel and would have the opportunity to explore any and all relevant issues in respect of that information through the normal hearing processes.

THESL submitted that in any event its request for confidentiality was appropriate. THESL argued that its request was very narrow in contrast to the significantly broader request in the Board Decision cited by SEC. THESL noted that in that application, the applicant had requested that the names of all its third party vendors be treated as confidential along with other information. THESL concluded that the decision cited by SEC was entirely distinguishable on the facts and did not support SEC's assertions.

Second, THESL argued that public disclosure of the information would reveal a commercially-sensitive terms of the respective contracts which was the price. THESL noted that the Practice Direction states that the Board will consider the potential harm that could result from the disclosure of the information, including prejudice to any person's competitive position, and whether disclosure could interfere significantly with contractual arrangements being carried out by a party. THESL noted that the consultants who prepared these reports operate in a specialized area with few competitors and the effect of disclosing the price of these reports in such a small market

could therefore prejudice both THESL's and the consultants' competitive positions in contractual arrangements.

Board Findings

THESL's request for confidential treatment of the cost of the five studies filed as part of its response to CCC IR #19 is denied.

In making this finding, the Board notes that as set out in the Practice Direction, it is the Board's policy that all evidence should be on the public record unless reasons warrant otherwise. This reflects the Board's view that proceedings should be open, transparent and accessible. The Practice Direction seeks to balance these objectives with the need to protect information properly designated as confidential.

The Board finds that THESL has not met the criteria outlined in Appendix A of the Practice Direction in order for confidential treatment to be granted. This is because the information for which THESL is claiming confidentiality is the price of sole sourced contracts. There was no competitive bidding process involved in the awarding of these contracts, nor is there any information provided in the interrogatory response as to the details or specific pricing components of these contracts. In the absence of such factors, the Board finds that THESL has not demonstrated that there would be harm arising from the disclosure of the information for which confidentiality has been claimed

THE BOARD ORDERS THAT:

1. THESL's request for confidential treatment of the cost of the five studies filed as part of its response to CCC IR #19 is denied.

ISSUED at Toronto, November 26, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary