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November 13, 2013

**Delivered by RESS and Courier**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: Confidentiality Responding Submissions  
EB-2012-0109 – Brantford Power Inc.  
Application to the Ontario Energy Board for Electricity Distribution  
Rates and Charges effective November 1, 2013**

We are writing on behalf of Brantford Power Inc. (“**BPI**”) to file these responding submissions on the confidentiality status of the Proposed Confidential Material (as such term is defined in Procedural Order No. 3) in the above noted matter.

On October 23, 2013 BPI requested that portions of the interrogatory responses to 4.0 Staff-19(a), 4.0 Staff-20 and 5.0 SEC-18 be held in confidence.

No party objected to BPI’s request for confidentiality in respect of 4.0 Staff-19(a) or 4.0 Staff-20. Board Staff agreed with BPI that this information should be treated as confidential and provided only to participants who have signed the Board’s Declaration and Confidentiality Undertaking in accordance with the Board’s *Practice Direction on Confidential Filings*.

Consequently, BPI will limit these submissions to responding to the objections of the School Energy Coalition (“**SEC**”) in respect of the RBC loan agreement filed in confidence in response to 5.0 SEC-18.

**5.0 SEC-18**

RBC is the third party that claims prejudice if the RBC Loan Agreement were to be disclosed on the public record.

BPI forwarded the submissions of SEC to RBC to obtain their reply to those assertions. RBC requested additional time to reply to these submissions, which BPI requested on their behalf and which the Board granted in its November 8, 2013 letter.

BPI also forwarded the Board's November 8, 2013 letter to RBC and recommended that RBC directly address in their reply the Board's request for an explanation of the basis for, or otherwise a validation of, the reasons enumerated in the original RBC letter supporting the request for confidential treatment of the entire RBC Loan Agreement.

RBC's responding submissions are shown in the letter attached hereto as Schedule "A".

For the reasons set out therein, RBC is maintaining its request for confidential treatment of the entire Loan Agreement. At Appendix "A" of the RBC response, RBC has provided a description of the specific types of information in the Loan Agreement which would be prejudicial to RBC if disclosed on the public record.

RBC has also provided in their response a copy of the RBC Loan Agreement with specific sensitive information identified by circling and sidebarring that information for the Board's attention (the "Sidebarrred Agreement"). The Sidebarrred Agreement will be filed with the Board in confidence pursuant to the *Practice Direction on Confidential Filings* pending the Boards determination on this confidentiality claim.

BPI submits that the additional information in the RBC response, including Appendix "A" and the Sidebarrred Agreement reflects a good-faith effort by RBC to provide the Board with further validation of the reasons enumerated in the original RBC letter together with a response to the concerns raised by SEC.

Recognizing this and in light of the RBC responding submissions, BPI continues to support RBC's request for confidential treatment of the entire agreement. However, should the Board reject this request, BPI would request in the alternative, confidential treatment of those portions of the agreement expressly identified by RBC as commercially sensitive in the Sidebarrred Agreement with the exception of the rate applicable to the RBC loan which is already a matter of public record.

Should you have any questions or require further information, please do not hesitate to contact me.

Yours Truly,

**BORDEN LADNER GERVAIS LLP**

*Original Signed by John A.D. Vellone*

John A.D. Vellone

cc. Paul Kwasnik, Brantford Power Inc.  
Heather Wyatt, Brantford Power Inc.  
Parties of record in EB-2012-0109

TOR01: 5396116: v1

**Schedule “A”  
RBC Letter**

Please see attached.



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November 12, 2013

John A.D. Vellone  
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Dear Mr. Vellone,

**Re: Brantford Power Rate Application**

This letter is in reply to the School Energy Board's ("**SEC**") objection to Royal Bank of Canada's ("**RBC**") request for confidentiality.

**RBC's Request for Confidentiality**

By way of overview, RBC's request for confidentiality was made to the Ontario Energy Board ("**OEB**") on October 22, 2013. The request was designed to cover a commercially sensitive Loan Agreement that exists between RBC and Brantford Power Inc. ("**BPI**").

Per the submission of October 22<sup>nd</sup>, the Loan Agreement contains proprietary and confidential information that is not material to the request for a rate hike but that could, if disclosed, seriously prejudice RBC's position in the market-place vis-à-vis (a) RBC customers, (b) prospective customers, and (c) other financial institutions. The Loan Agreement also contains references to agreements with third parties whose authorization to disclosure has not been obtained.

As a result, RBC strongly maintains its request for a confidentiality exemption.

## **OEB Staff Submission**

On November 1, 2013, the OEB received independent Staff advice which supports RBC's position. Staff advised that RBC's request for confidentiality was appropriate and that disclosure of the Loan Agreement could result in the prejudice that RBC has raised. Staff recommended that the request for confidentiality be granted. The relevant excerpt from the Staff Submission reads as follows:

Board Staff agrees that the proposed confidential material contains information or models that are proprietary to RBC, or information that could prejudice its competitive position or interfere significantly with its contractual or other negotiations.

In RBC's view, the OEB should be guided by this advice.

## **SEC's Objection & RBC's Reply**

SEC's objection sets out three bases why RBC's request should be refused.

First, at the top of page two of its objection, SEC has argued that disclosure of debt instruments like the Loan Agreement in question is a routine occurrence and should be ordered. Specifically, SEC has said that,

"The Loan Agreement is a category of information that is regularly provided by utilities without seeking confidential treatment."

As evidence thereof, SEC has attached examples of prior disclosures of debt instruments that were purportedly made by RBC and other financial institutions.

At Appendix "A" of its submission, notably, SEC has attached a copy of a debt instrument from Scotiabank. At Appendix "B" and "D", SEC has attached copies of debt instruments from Toronto Dominion Bank. At Appendix "C", SEC has attached a document which is said to be a debt instrument by RBC.

RBC has investigated the disclosure that is listed at Appendix "C". It would appear that this disclosure was made without the knowledge or consent of RBC. Specifically, Roger Quinn is the RBC account manager who has oversight of the relationship that is described in the document at Appendix "C". His name appears on the signature page at the back of the document. Mr. Quinn has confirmed for RBC that his and his superiors' consent was never sought nor received for the disclosure of this document.

If so, then the document at Appendix "C" of SEC's submission has entered the public domain without RBC's knowledge or consent. In which case, the document should not be relied on by SEC or by the OEB as evidence of prior consent or as evidence of a regular practice of disclosure by RBC.



As for the other debt instruments from Toronto Dominion Bank and Scotiabank that are listed in the appendices to SEC's submission, RBC has no knowledge of the circumstances under which these disclosures were made. In particular, RBC has no knowledge if, as with the RBC document at Appendix "C", the consent of these other financial institutions was ever sought before disclosure occurred. Significantly, SEC's submission does not speak to how these documents entered the public domain.

In the absence of any knowledge about whether these other financial institutions were even consulted before disclosure happened, the OEB should not place weight on the argument that disclosure of such instruments is voluntary, common, or accepted practice.

SEC has also claimed that the agreements which are attached in the appendices contain "similar standard clauses." The implication is that these agreements are not in fact unique or confidential. This statement is also untrue. The agreements that SEC has attached are very clearly unique to those clients. A comparison of the agreements at Appendix "A" and "B", for instance, reveals that the fees, the manner of calculating interest, and some of the general terms vary significantly.

The second basis for SEC's objection is essentially a restatement of the first ground. SEC has stated that,

[it] disagrees with the claim that the Loan Agreement contains "certain proprietary information" [...] The Loan Agreement does not provide information about the model RBC uses to determine who to lend to and on what terms- the core of any financial institution's lending model."

The Loan Agreement unquestionably contains general form and case specific proprietary information which, if made public, could be used by other financial institutions or by customers or prospective customers to negotiate or re-negotiate their loan agreements with RBC. At **Appendix "A"** of this document, we have listed the specific clauses in the agreement which could cause a prejudice if disclosed.

Third and finally, SEC states that the Loan Agreement is,

"[i]mportant because it contains information that will help Board and parties understand the reasonableness of BPI's proposed cost of debt."

This statement is misleading.

The OEB has a copy of the Loan Agreement on file, which Board members can review.

RBC is advised that SEC's lawyer has signed the requisite confidentiality agreement and is thus, similarly, entitled to review the Loan Agreement.

RBC is further advised that no other intervenor parties have signed the confidentiality agreement or asked to see the Loan Agreement. This last fact strongly suggests to us that the demand to see the Loan Agreement is not high. In which case, the risk of prejudice outweighs the benefit of disclosure.

## Conclusion


SEC is seeking information which is already available on a confidential basis and which will not materially affect the debate about, or outcome of, BPI's request for a rate hike, but which could cause significant prejudice to RBC if disclosed.

In support of its argument for disclosure, SEC has relied on precedents to argue that such disclosure occurs frequently and voluntarily. In the case of RBC, with respect to the precedent that is attached at Appendix "C", that submission is untrue, as is the submission that these agreements all contain "similar standard clauses". They are, in fact, individually quite different.

Ultimately, RBC urges the OEB to be guided by the independent advice of Staff, who concurred with RBC's view that disclosure could be prejudicial.

In light of the foregoing and in view of Staff's advice and RBC's earlier submission, SEC's objection should be dismissed and the request for confidentiality should be granted.

Yours very truly,



Paul West

Paul West

## -Appendix "A"-

The following information in the Loan Agreement should, in all circumstances, be redacted and remain confidential. A confidential copy of the Loan Agreement follows this Appendix. This copy should remain under seal and be viewed only by the OEB. The portions of the Loan Agreement which should be redacted are highlighted and/or circled. Disclosure of these clauses would provide competitive intelligence to RBC competitors and comparisons to other RBC clients:

- Base rates and loan spreads;
- Security;
- Financial covenants;
- Reporting Requirements, and the timelines wherein RBC expects receipt of such financial reporting;
- Noted General Covenants which identify other entities, and / or are specific to this client;
- Increased Costs clause – disclosure would provide competitive intelligence to competitors;
- Definitions which are highlighted as they could lead a competitor to deduct RBC financial covenants;
- BA Borrowing Conditions could provide competitors with competitive intelligence; and
- Compliance Certificate.