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March 7, 2017

Delivered by Courier and Email and RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: E.L.K. Energy Inc. (“E.L.K.”) Service Area Amendment Application
Board File No. EB-2016-0155**

E.L.K. is writing to file an objection to the “Sur-Reply” filed by Hydro One Networks Inc. on March 3, 2017.

The Ontario Energy Board’s procedural orders in the above noted matter gave E.L.K. the right to file argument-in-chief, then for Hydro One and OEB staff to file responding submissions, and for E.L.K. to file reply submissions. The Board’s procedural orders did not give Hydro One the right to file a sur-reply.

While the OEB rules of procedure do not expressly address when the tribunal may grant leave to file a sur-reply, analogous rules of civil procedure provide guidance on when sur-reply may be permitted. In the case of pleadings, the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, do not provide for the delivery of a Sur-Reply and Rule 25.01(5) states that “[N]o pleading subsequent to a reply shall be delivered without the consent of the opposite party or leave of the court”.

In this matter, Hydro One did not seek consent from E.L.K. nor did Hydro One seek leave from the OEB prior to filing its “Sur-Reply”. For this reason alone, the Board should reject Hydro One’s “Sur-Reply”.

In addition, Hydro One’s “Sur-Reply” raises matters which Hydro One could reasonably have anticipated and pleaded in its submissions. For example, Hydro One claimed in its submissions that a long-term load transfer would be created if the Board approves the service area amendment application.¹ Prior to these submissions Hydro One never raised this issue, and Hydro One failed to cite evidence to support its assertion that the M7 feeder would be used by E.L.K. to supply Sellick directly. In reply submissions, E.L.K. refuted Hydro One and pointed to evidence on the record that the customer would in-fact be connected to E.L.K.’s existing Clark St. feeder (i.e. the

¹ Section 3.0 of Hydro One’s Final Submissions dated February 24, 2017.

same feeder that the existing pole is being used to provide tension relief for).² Footnote number 21 of the E.L.K. reply cites the source of this evidence on the record. Contrary to the assertion of Hydro One, no “new evidence” was introduced in reply. At paragraph 5 of its “Sur-Reply”, Hydro One attempts to address its failure to cite evidence to support its original submissions. This is simply not a proper use of a sur-reply.

While E.L.K. understands that Hydro One may be upset by E.L.K.’s request for the Board to exercise its discretion to award costs against Hydro One in this matter, E.L.K. does not believe that this merits the sur-reply filed by Hydro One. Clearly, Hydro One objects to E.L.K.’s request for costs. Ultimately, it will be for the Board to assess the actual behaviour of the parties throughout this process to determine whether or not there are “special circumstances” sufficient to merit a cost award pursuant to Section 3.07 of the *Practice Direction on Cost Awards*.

It is worth mentioning that if costs are capped at the OEB’s standard tariff in accordance with the *Practice Direction on Cost Awards*, it would only represent a partial recovery of costs for E.L.K. since E.L.K. would still be paying the difference between the OEB’s tariff and the costs actually incurred for external legal and consulting support.

I will conclude by noting that yesterday afternoon I received an unrelated email from Mr. Ken Thoman of Sellick Equipment in which he asked:

“What is your best guess as to when a ruling may be handed down from the OEB? I am getting to a critical time when power delays will now have major impact on my construction schedule.”

In light of the customer’s clear time constraints, E.L.K. is attempting to not add further delays or complications to this matter. Consequently, E.L.K. has limited this letter to a simple procedural objection asking that the “Sur-Reply” be struck from the record in this proceeding rather than addressing, point by point, all of the allegations raised by Hydro One in its “Sur-Reply”.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A.D. Vellone

John A.D. Vellone

Cc: Mr. Michael Engelberg and Pasquale Catalano, Hydro One Networks Inc.
Mr. Ken Thoman, Project Manager, Sellick Equipment Limited

² E.L.K. Reply Submissions dated March 2, 2017 at Section 4.0 (pg. 5).