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VIA COURIER

May 25, 2006
Our File No. 2040109

Ontario Energy Board
2300 Yonge Street
26th Floor
Toronto, Ontario
M4P 1E4

Attn: John Zych, Board Secretary

Dear Mr. Zych:

Re: Comments of the SEC on the Proposed New Practice Direction on Confidential Filings and Related Proposed Amendments to the Board's Rules of Practice and Procedure (EB-2006-0084)

Please find enclosed three hard copies of the Comments of the School Energy Coalition on the proposed Practice Direction and amendments to the Board's Rules of Practice and Procedure.

Yours very truly,
SHIBLEY RIGHTON LLP

Jay Shepherd

EB-2006-0084

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

AND IN THE MATTER OF a Proposed New Practice Direction on Confidential Filings and Related Proposed Amendments to the Board's Rules of Practice and Procedure.

COMMENTS OF THE

SCHOOL ENERGY COALITION

1. Introduction and Purpose

No comments.

2. Application

While it makes good sense that this Practice Direction does not apply to internal handling of confidential documents, the Board may wish to consider promulgating some general statements about its internal rules. Obviously you want to avoid anything that then commits you to specific internal procedures. But, for those who are filing confidential documents, it may be fair to let them know, for example, that in general the Board's internal procedures are at least as stringent as those in this Practice Direction.

See also comments under Section 4.1.4.

3. Definitions and Interpretation

3.1.1. For the definition of "document" or "record", you may want to include expressly a) notes and extracts, and b) copies. These inclusions are standard in commercial confidentiality provisions.

For the definition of "proceeding", I am concerned that this may not include the Board's consultations and other policy processes. They have traditionally not been included under the definition of "proceeding", but probably should be here. For example, I suspect this would not include the Cost Allocation Technical Group, nor many similar processes.

On a related point, obviously this Practice Direction cannot cover utility consultations, even if they are preparatory to a hearing. However, you may want to provide that it does apply if the

utility sponsoring a consultation process opts into these provisions. I don't know whether you would get much uptake, but any utility that did opt in would then simplify the issue in any subsequent hearing. For example, if Enbridge tables confidential documents to parties as part of its CIS consulation, and opts into the rules in this Practice Direction, then the shift from consultation to rate hearing can be seamless.

3.3.1 I wonder whether this is a good idea. At most, I would suggest that letting a delegatee decide issues of confidentiality can be stated as a default in the absence of a specific Board order. Better, I think, would be a statement that the management committee will decide in the case of each delegation whether the delegatee will have this set of powers as well. Often, it would be neither necessary nor appropriate.

4. **When Request for Confidentiality is Not Required**

4.1 This section should include RRR materials. If it is left in 4.2, then there is no procedure to allow access to this information. While that may be suitable most of the time, the Board should retain the discretion to make determinations on confidentiality and access with respect to all information before it. There is no logical distinction between information filed with an expectation of confidentiality under RRR or under a template or filing guideline.

4.1.4 The reference in this to Section 5.1.8 imports the confusion inherent in that section, and expands that confusion. In 5.1.8, an applicant seeks confidentiality, and a person seeking access either objects to that confidentiality, or seeks access on terms. It is not clear here whether a party seeking access can or must object to confidentiality, or can accept confidentiality but still require access.

This issue of principle is inherent throughout the draft Practice Direction, so I might as well just deal with it once.

It seems to me that there are three issues involved in these situations:

- ***Relevance and Materiality.*** A person seeking to have evidence filed, or to use something already filed, must show that the evidence needs to be on the record or available so that the Board can do its job. In the case of this section 4, this is not an issue, since by definition this is prescribed information and must be filed. In fact, section 4 only applies to something that has been filed. There may be circumstances in which a party wants to use something filed for one purpose (e.g. RRR) for another purpose (e.g. a rate hearing), but conceptually that is more like the Section 5/6 situation. The fact that the Board already has the information is largely irrelevant, since the party still has to show that the information should be filed in the rate hearing.

  In either case, it seems to me that the question of whether something should be filed is preliminary to the issue of confidentiality. Whether a document is subsequently found to be confidential or not, the Board must first assess whether it needs to see it, or have it available as evidence in a particular proceeding, independent of its confidential status. In

my view, it would be useful if that principle is stated in this Practice Direction somewhere. I suggest that Section 2 might be a good spot, and that a wording like the following might be appropriate:

"Before a determination is made as to the confidentiality of, or access to, any document or record, the Board must first determine whether that document or record is relevant and material to the matter before it. That determination must be made without regard to the potential confidential status of the document, as the Board must have before it all relevant and material evidence available to it. This Practice Direction does not deal with the determination of relevance or materiality. Throughout, it is assumed that any document or record in issue has already been determined to be relevant and material, and therefore must be before the Board."

- ***Confidential Status of Information.*** This Practice Direction proceeds from the premise that whether information is confidential is the first item of business, and access to it need only be determined after confidentiality has been decided. This is intuitive, but may be procedurally misleading. The problem is that if the decision on access is deferred, those who wish to make submissions on confidential status are denied the ability to do so, because they have not yet been given access and so do not know the contents. This creates an inherent unfairness, since the applicant/document owner does have knowledge, and makes submissions with that foundation, while anyone else making submissions has to do so completely blind. There have been numerous examples where the fact that information is not confidential only became apparent once parties saw it, and were able to point to other places where the same information was already public.

  An alternate way of looking at this, which may be preferable, is that the real question is one of whether a document goes on the public record. Access for legitimate parties to the proceeding is not an issue at all. If that were the approach, the Board's first step would be to provide access to the document in question to those who are debating its confidentiality. Those parties, with the document in front of them, then make submissions about whether the document should be put on the public record, ie. whether it is confidential.

  The basic principle supporting this approach is that documents should not be in evidence unless the parties to the proceeding can see that evidence. Secret evidence is not an acceptable practice at the OEB. It offends the principles of natural justice ("*audi alteram partem*", at least), and undermines the credibility and reputation of the Board. On that basis, this Practice Direction should proceed from the premise that all documents that are relevant and material will be made available to the parties to the proceeding. If confidential, the documents will be kept out of the public record, and parties with access will be bound to maintain confidentiality.

- ***Access to Confidential Information.*** As noted above, parties needing to see the evidence in order to participate in the proceeding at hand must have access to it, confidential or

not. The question is only the terms of that access.

4.2 See comments under 4.1 above.

5. General Process for Confidentiality in Matters Before the Board

5.1.5 You could just remove this provision altogether. There should be no circumstances in which it is impossible to describe the document at all, and in fact the cover letter required would do that in any case. Some non-confidential descriptions might be sparse, but something is always possible. By leaving this in, you run the risk that filers will seek to make it the norm, and transparency will suffer as a result.

5.1.6 As noted under 4.1.4 above, the unredacted document should be provided to all parties to the proceeding that need it and want to make submissions on its confidential status. To deny access would be unfair. I note the procedure followed in the Enbridge 2006 rates case, where a particular document was provided to the parties in the hearing room, and they together went through it to identify what, if anything, should be treated as confidential. They then made confidential in camera submissions to the Board, and the Board ruled on what, specifically, was confidential. This harmed no-one, but produced the right result, efficiently and with full procedural safeguards. A similar procedure could be established for the stage in which confidentiality of the document or its particular parts is being debated.

What this implies, then, is that the requirement that the unredacted version be "kept confidential" until the Board determines confidentiality should be clarified to ensure that the parties have access to it in the meantime. In my opinion, the better approach would be to provide that the Declaration and Undertaking automatically applies to the document as soon as confidentiality is claimed, and the Board in deciding confidentiality thereafter either affirms that application, removes it, or limits it. (You would have to include a provision to allow objections to access, as discussed in section 6 below, but that would be the exception rather than the rule, and in any case quite a different issue.)

5.1.8 I have commented earlier on these points, and I will be more specific here:

(a) This is fine, as long as the party has the document in hand to make these submissions.
(b) As noted earlier, this is about the relevance and materiality of the confidential component of the document. This is not a confidentiality issue.
(c) This assumes confidentiality, and so is out of place in this section. Terms of access are and should be a separate issue.

As you can see, I think this part of the process should be limited to determining what in the document, if anything, is confidential.

5.1.11 I think (b) causes a problem, for the reasons I've given earlier. A different wording might work, such as "order that all or any part of the document not be included in the public

record of the proceeding on the grounds of confidentiality". This would also imply a need for a revised (d) such as "order that the access to all or any part of the document by parties to the proceeding be subject to such arrangements as the Board may determine to maintain confidentiality, provided that unless the Board orders otherwise those arrangements shall be as set out in Part 6, and (e) saying "make any other order that the Board finds to be in the public interest".

5.1.13 I have a lot of difficulty with this provision, for two reasons. First, as a matter of general principle if the document is relevant and material, no party should be allowed to decide unilaterally that it will not be evidence. The Board should simply insist on it. Second, most of the time confidential documents are filed because another party asked for them in an IR or cross-examination. This provision as written allows the applicant to refuse to provide the information despite the Board's order that it do so. This is not right.

5.1.14 This should be expanded to cover any appeal or review by any party, not just the party who requested confidentiality.

6. **Arrangements as to Confidentiality**

The words "in most cases" should be removed.

This section deals with the terms of access for parties to a proceeding to maintain confidentiality, but I think there is another aspect that needs to be dealt with. There are often situations in which a document is confidential, the parties will still get to see it, but the owner of the document is concerned with access by one specific party, e.g. a competitor.

I therefore suggest that Section 6 be restructured to provide for a procedure for seeking access, and objections to access. The following would be the components of that procedure:

- Basic principle that counsel, experts and consultants of all parties prima facie get access to confidential documents as long as they sign the Declaration and Undertaking and abide by any other orders of the Board to maintain confidentiality.

- Ability of owner of document to object to any specific individual having access on the grounds that the potential for harm to the document owner outweighs the need of the individual to have access. This would typically be because the individual works for a competitor or has some other special problem that needs to be addressed. For example, if School Energy Coalition has retained Todd Williams as an expert, and Todd is also doing work for Direct Energy in another matter, Enbridge might object to letting Todd have access to a document that could provide competitive information to Direct.

- Ability of the person seeking access to reply as to a) their need for the document in the proceeding, and b) any procedures they can put in place to minimize the potential for harm to the document owner.

- Principle that the Board will decide based on balancing the potential harm against the need for access to the document, always trying to maximize access and thus the transparency and integrity of its processes.

The section would then go on to deal with the procedures for people who do have access.

6.1.2 Why are employees or directors excluded? This would not always be appropriate, so perhaps it is useful to add "Unless otherwise ordered by the Board" to make clear that exceptions can be made.

6.1.4 I wonder whether it is practical to require the Board Secretary to control the documents? It may be preferable to leave this in the hands of the person filing the document, at least in the first instance, and provide that the Board Secretary may provide the document to parties that have not received it directly from the document owner.

7. ADR Conferences

7.1.2 In general, I have a problem with the second sentence here. If factual information or documents (other than settlement proposals, offers, etc.) are sufficiently relevant that they are tabled at the ADR, generally they should be sufficiently relevant to be evidence in the proceeding. You don't want a situation where parties can seek to induce a settlement by putting forth "facts" in ADR, then denying those facts in the hearing. This has happened in the past. You may wish to provide that, if a fact or document is disclosed during ADR, and any party wishes to have it placed in evidence, it can apply to a separate member of the Board (not the hearing panel) for an order to that effect, and the member can determine whether the document should fairly be protected under the sanctity of the ADR process. Of course, even if the document is to be filed, the normal confidentiality rules would apply if there is, for example, commercially sensitive information in it. This would be rare.

10. Electronic Information

This is, in my view, an unnecessary restriction given current technology, and a restriction that would make proceedings more cumbersome. It is no longer common to include such a restriction in commercial confidentiality provisions, and most companies today routinely exchange confidential information through email with appropriate protections. In my technology practice, almost every one of my clients is outside of the GTA (Ottawa, Waterloo, Hong Kong, wherever), and we email confidential information back and forth all the time. The small level of risk is heavily outweighed by the efficiency of email communication.

Appendix C – Types of Records that Have Previously Been Held Confidential

4. This should be restricted to competitive commercial enterprises, and should specifically exclude regulated entities. There is no compelling reason why tax information of a regulated entity should be confidential. Its release does not prejudice the entity (particularly since the tax

calculation is routinely required in rate filings in any case), and on the other side the value of being able to check utility statements against an original source document is substantial.

Appendix D – Declaration and Undertaking

3. The prohibition against reproduction is both unnecessary and cumbersome. Parties routinely copy documents so that they can annotate a copy and keep a clean original, for example, or so that counsel and expert can both review it at the same time, or so that it can be carried more easily in electronic format from one location to another (such as a hearing room). Normal commercial practice is that the same rules apply to reproductions of any sort as to the original documents provided. This make particular sense here, where notes, transcripts, arguments, cross-examination questions, etc., may all refer to the confidential information, and will therefore have to be kept confidential in any case. Allowing reproduction, coupled with a requirement to keep the copies confidential as well, follows from that.

4. The normal commercial wording is "I will use my best efforts to protect the Confidential Information from unauthorized access." It is also now common to add "I will protect the Confidential Information with procedures and actions no less stringent than those I apply in protecting my own confidential information."

5. I have a big problem with the requirement to return or destroy all confidential information at the end of the proceeding. This is also no longer common commercial practice, except in very limited applications. The issue here is that the confidential information includes not just the original document, but also my work product stemming from that document. It includes, for example, my handwritten notes, my cross-examination script, any spreadsheets or other calculations I had done (as I often do). It would even include the unredacted version of my final argument, so that I would not even be allowed to have the arguments I made in the proceeding. The original document we can always ask for again. Our notes, spreadsheets, and other work product, once destroyed, are simply gone. We can never get them back.

I also think this is unnecessary. Once we have access to the confidential information, we have to maintain its confidentiality. Whether we have that obligation for one month, or five years, should not be an issue for the Board or for the owner of the confidential information. We have the same obligation no matter how long it is. In fact, it is more likely that we will want to destroy the material, or return it, to shorten the period of the obligation rather than the other way around.

But notes, spreadsheets, and other such documents are of great value in future proceedings where the same issues, or similar ones, arise. Rather than re-invent the wheel, we go right back to work we have done previously, and adapt it to the current situation. To do otherwise would be wasteful, and would risk inconsistent Board decisions from one year to the next.

Therefore, I suggest that one of the following two options be used instead:

- As long as a signatory has confidential information, they must maintain its

confidentiality. They have the right at any time to return the material, or certify its destruction, to end that obligation. If they do not, it continues until they do or until the owner of the information seeks its return and demonstrates that there are no reasonable circumstances in which the signatory would need access to it in the future. (If you want the control to be a little tighter, you could require a certificate from the signatory at least annually that the information is still being kept confidential.)

- Alternatively, to the existing two options in the Declaration a third option could be added. We could be required to return the confidential information to the Board, but at our option we can put it in a sealed envelope with the appropriate labelling, and the Board would retain it rather than destroy it. Then, if similar issues come up in a future hearing, we can ask the Board for our sealed envelope back, and thus have access to the information once again.

I hope this input is useful.