

**Ontario Energy
Board**
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

**Commission de l'énergie
de l'Ontario**
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273



BY E-MAIL

January 31, 2017

Richard P. Stephenson
Paliare Roland Rosenberg Rothstein LLP
115 Wellington Street West, 35th Floor,
Toronto, Ontario
M5V 3H1

Dear Mr. Stephenson:

**Re: Power Workers' Union objections regarding filing of affidavit
File No. EB-2016-0152**

In its letter dated October 27, 2016, OPG requested confidential treatment for information related to collective bargaining strategies that was provided in response to certain interrogatories and attachments to interrogatories¹. In regards to granting access to these documents, OPG requested the following:

Given the participation in this proceeding of OPG's two labour unions, the Power Workers' Union ("PWU") and the Society of Energy Professionals ("Society"), OPG has a particular concern with the possibility of certain confidential information, which has the potential to interfere with collective bargaining negotiations, being disclosed to either the PWU or the Society. While OPG has ensured that any such information has been marked as confidential and would be redacted from the public record, this information would in the normal course be available to those who file a Declaration and Undertaking. OPG understands that the Board typically accepts Declarations and Undertakings from counsel, experts or consultants to a party. If Declarations

¹ Interrogatory responses containing information relating to labour relations and collective bargaining include: L-04.3-2 AMPCO 045, L-06.6-1 Staff 147, L-06.6-1 Staff 157, L-06.6-1 Staff 149, L-06.6-1 Staff 160, L-06.6-2 AMPCO 122, L-06.6-2 AMPCO 145, L-06.6-3 CME 005, L-06.6-13 PWU 016, L-06.6-15 SEC 070, L-06.6-15 SEC 072, L-06.6-15 SEC 079 and L-06.6-19 SEP 013. The attachments include: L-06.6-1 Staff 147 (2 Attachments), L-06.6-1 Staff 157 (2 Attachments) and L-06.6-15 SEC 074 (2 Attachments).

and Undertakings are filed on behalf of PWU or Society in this proceeding, OPG asks that the Board ensure it only accepts such Declarations and Undertakings from counsel, experts or consultants that are external to and at arms-length from PWU or the Society, as applicable, and that such individuals are not and will not be involved in any collective bargaining-related activities on their behalf. If the Board is not satisfied that the counsel, expert or consultant is external to the PWU or the Society, or that they have no involvement in collective bargaining-related activities, then OPG would request that OPG's labour-related confidential information, identified below, be withheld from those individuals notwithstanding their filing of a Declaration and Undertaking in this proceeding. [Emphasis Added]

In Procedural Order No. 4, dated November 4, 2016, the OEB granted OPG's request for limited access to the noted information and stated:

The OEB grants OPG's request for limited access to the Collective Bargaining Documentation. Accordingly, as an interim measure and while the OEB is considering OPG's request, the OEB requires that representatives for the PWU and the Society that wish to gain full access to the Collective Bargaining Documentation, must in addition to filing the OEB's Declaration and Undertaking, also file an affidavit affirming that they are external to and at arms-length from PWU or the Society, as applicable, and are not and will not be involved in any collective bargaining-related activities on their behalf.

The above requirement only applies to representatives of the PWU and the Society, and only in respect of information that OPG believes could interfere with collective bargaining negotiations.

Under cover of letter dated November 14, 2016, you submitted affidavits in the form ordered by the OEB for the two consultants representing the PWU in this proceeding, but objected to filing an affidavit in your capacity as counsel to the PWU. You state that the requirement for counsel to file such an affidavit is unnecessary and inappropriate and request that the OEB reconsider its requirement as it relates to counsel. Specifically you state:

Although I am not typically retained by the PWU in respect of its collective bargaining activities with OPG (and I am not presently engaged to do so), I cannot preclude that I will be requested to do so in the future. If that were to occur, the provisions of the Board's Declaration and Undertaking would prohibit my use or disclosure of any confidential information obtaining in this proceeding in that engagement.

The Declaration and Undertaking fully protects OPG's legitimate interests, and at the same time respects (a) the PWU's right to engage the counsel of its choice in

future matters, and (b) the public interest that that any restriction on public access to Board proceedings be as minimal as possible. Nothing more is required.

In your letter you also submit that the OEB has not imposed similar requirements in any other context and that counsel and consultants executing the undertaking may well represent clients engaged in future commercial dealings with the utility in question. You further submit that the requirement for the filing of an affidavit amounts to an indication by the OEB that you will not abide by the terms of your undertaking.

The OEB has carefully considered your objection and for the reasons set out below has determined that it will not exempt counsel from the requirement to file an affidavit. The OEB however clarifies that the restrictions with respect to involvement in future collective bargaining negotiations only applies to negotiations concerning the years covered by this application.

The OEB observes that the requirement to file an affidavit in the form requested by the OEB is consistent with the principle applied to you as counsel to the PWU in the last OPG proceeding (EB-2013-0321). Because the issue arose in the last proceeding during the oral hearing phase of the proceeding, you spoke to the issue on the record. In this proceeding, the matter arose prior to the oral hearing phase, and therefore the OEB asked you to confirm your position by way of affidavit.

In the previous proceeding you affirmed on the record that you would not be involved in collective bargaining matters on behalf of the PWU as it relates to OPG. Specifically the transcript reads as follows:

MS. LONG: Mr. Stephenson, can I just clarify here?
Are you asking for relief with respect to yourself solely or the consultants as well?

MR. STEPHENSON: All three.

MS. LONG: All three?

MR. STEPHENSON: Yes.

MS. LONG: Thank you.

MS. HARE: And since we've interrupted you, let me ask the one question that we think is relevant. Will you or your other two consultants have any role to play in the future negotiations of the contract with PWU and OPG?

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MR. STEPHENSON: No. No.

MS. HARE: Okay. Thank you.

MR. STEPHENSON: Needless to say, the consultants do Energy Board work. They don't have anything to do with the union. And as you know, the consultants are both from Elenchus. They're a firm that has a long history at this tribunal. They're not -- and these are people that have executed these undertakings on many occasions in the past over many years, as I have.

I personally, while I'm counsel to the PWU in a variety of capacities, I don't do -- I don't have any involvement in collective bargaining. For what it's worth, none of the lawyers have any role in collective bargaining. It's just, that's just the nature of it. [Emphasis Added]

....

MR. SMITH: I may be able to be of assistance at this point. Until Mr. Stephenson indicated in direct response to the Chair's question, we did not know that the consultants played no role in bargaining, and indeed it would have been my submission that Mr. Stephenson be permitted access to the material precisely because we don't have any concerns about his integrity at all. I've had a number of cases with Mr. Stephenson and I know him personally and professionally. I don't have any concerns and OPG doesn't.

Obviously we have a concern given the relationship and the ongoing collective bargaining, which is a distinctly adversarial one. But if my friend is indicating on the record, as he is, that the consultants similarly play no role and will play no role, then we don't have the concern that was identified. So if the material is restricted to those three individuals, that's fine....² [Emphasis Added]

You have advised that you are unwilling to swear the affidavit. Your position has changed since the time of the last application, since you have now stated that you may indeed engage in labour negotiations on behalf of the PWU against OPG.

² Motion Hearing Transcript, dated May 9, 2014, EB-2013-0321, pages 6-8.

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Labour negotiations between OPG and the PWU have historically been difficult and labour costs represent a significant portion of the costs the OEB is asked to approve in this application.

The OEB has reviewed the information that is the subject of OPG's request and is of the view that it is not appropriate for PWU's counsel (or its representatives) who have access to this information to also be able to be involved in collective bargaining negotiations of behalf of the PWU for the period covered by the application.

The objective of the OEB's decision on this issue is to give ratepayers the highest degree of confidence in the OEB's processes and treatment of highly sensitive information. It addresses what the OEB considers to be a reasonable concern of OPG in respect of this information. It is not intended to question your integrity or to suggest that you have not complied with previous undertakings.

While the OEB's Declaration and Undertaking does under normal circumstances offer the adequate protections you have noted, in this particular instance, the OEB believes the additional protection is warranted.

The OEB notes that regardless of whether you choose to swear the required affidavit, PWU will have access to the information in question via the two PWU representatives who have confirmed that they will not engage in collective bargaining.

Yours truly,

Original Signed By

Kirsten Walli
Board Secretary

c. All parties in EB-2016-0152