

IN THE MATTER OF the Ontario Energy Board Act 1998, Schedule B to the Energy Competition Act, 1998, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Burlington Hydro Inc. for an Order or Orders approving just and reasonable rates and other service charges for the distribution of electricity, effective as of May 1, 2014.

AND IN THE MATTER OF Rule 29 of the Board's Rules of Practice and Procedure.

**SUBMISSIONS OF BURLINGTON HYDRO INC.
WITH RESPECT TO
THE NOTICE OF MOTION FILED BY THE SCHOOL ENERGY COALITION ON
MARCH 11, 214**

OVERVIEW

The Motion

1. These are the submissions of Burlington Hydro Inc. ("BHI") in response to the Notice of Motion filed by the School Energy Coalition ("SEC") on March 11, 2014 (the "Motion"). The Motion seeks an order requiring BHI to produce copies of a benchmarking survey referenced in response to interrogatory 2.1-SEC-5 (the "Survey").
2. The Board issued Procedural Order #3 ("PO3") on March 12, 2013 providing an opportunity for SEC to file additional material in support of its Motion on or before March 13, 2014. SEC did not file additional material.
3. PO3 provided an opportunity for parties other than SEC to file submissions on the Motion on or before March 14, 2014. Board Staff filed a submission on the Motion on March 14, 2014.
4. BHI has not received any other material or submissions related to the Motion. Accordingly these submissions respond to the material filed within the Notice of Motion itself on March 11, 2014 and the submissions filed by Board Staff on March 14, 2014.
5. BHI notes that the single issue on the Motion is whether BHI should be compelled to produce copies of the Survey. As described by SEC in its Notice of Motion and as set out in the PO3, SEC is seeking:

An order requiring Burlington Hydro to provide a full and adequate response to interrogatory 2.1-SEC-5 and/or 2.1-SEC-4, by producing the benchmarking survey it participated in, and is referred to in the response to interrogatory 2.1-SEC-5.

SUMMARY OF THE POSITIONS OF THE PARTIES

Order Requested-SEC and Board Staff

6. Both SEC and Board Staff submit that the Board should compel BHI to produce copies for the record, with the issue of confidential treatment of those documents to be separately determined.

Order Requested-BHI

7. BHI submits that it would be inappropriate for the Board in the circumstances of this case to require BHI to produce copies of the Survey in this proceeding. Accordingly BHI submit that the Board should reject the relief requested by the Motion.

Relevance-SEC and Board Staff

8. Both SEC and Board Staff rely on the assertion that the Survey, insofar as it is described as a benchmarking survey, is relevant to the proceedings in terms of the Issues List, which includes Issue 2.1 that asks *inter alia*:

[d]oes the applicant's performance in the areas of. . .(4) efficiency benchmarking, support the application?

and further in relation to the *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, dated October 18 2012, (the "RRFE Report") with both SEC and Board Staff citing pages 56 and 59.

9. Board Staff additionally asserts the relevance of the Survey by reference to the *Report of the Board on Performance Measurement for Electricity Distributors: A Scorecard Approach* issued on March 5, 2014, (the "Scorecard Approach Report") citing page i).
10. Both SEC and Board Staff assert that as a result of the relevance of any benchmarking activity, the Survey, so described as a benchmarking study, is necessarily a document that should be produced by BHI regardless of any other circumstances including the existence of a non-disclosure agreement.

Relevance-BHI

11. BHI acknowledges that the Board is interested in benchmarking, that it is the Board's intent to make further use of benchmarking in setting rates, and that both the RRFE Report and the Scorecard Approach Report support the overall premise that the Board would like to use benchmarking results more aggressively in its rate making process.
12. BHI does not agree with SEC and Board Staff, however, that the mere existence of a benchmarking survey that includes a Board regulated utility as a participant that has been provided a copy of the survey is sufficient to ground an order compelling the production of the survey in the absence of an examination of other factors.
13. In BHI's view the thrust of the Board's two Reports relate to Board initiated benchmarking. While it may be the case that third party benchmarking material, when permissibly produced by the utility or another party, may be useful to the Board, the Board's interest as expressed in the two Reports should not be taken as a carte blanche directive to compel the production of any and all benchmarking information that the utility may by happenstance have in its possession regardless of the circumstances.

Inapplicability of a Confidentiality Agreement as a Valid Reason for Non-Disclosure-SEC and Board Staff

14. Both SEC and Board Staff cite examples in previous Board Decisions where the Board has not applied the terms of an existing Confidentiality Agreement.
15. In relation to the cited precedents, at page 3 of its submissions Board Staff does not purport to conclude anything other than as follows:

Board staff notes that in previous Board decisions, the Board has not accepted a party's confidentiality agreement with a third party as a basis for withholding documents or information.

16. SEC goes further in its submissions at paragraph 10 when it asserts that:

A contractual agreement between a utility and a third-party is not a valid reason for non-disclosure of relevant information.

17. Neither SEC nor Board Staff explicitly acknowledge any circumstance wherein the Board should apply the terms of a confidentiality agreement restricting the disclosure of documents by a regulated utility.

Inapplicability of a Confidentiality Agreement as a Valid Reason for Non-Disclosure-BHI

18. BHI acknowledges that there may be circumstances where the Board should not recognize the applicability of a contractual obligation to withhold material from the record.
19. BHI asserts, however, that whether the Board should or should not recognize the applicability of a contractual obligation to withhold material from the public record is dependent on the specific circumstances in each instance where a regulated utility seeks to uphold such a provision.
20. BHI believes it is self evident that, despite being a regulated utility, there should remain the opportunity for BHI to interact with 3rd parties and, if necessary, enter into contractual obligations that may limit the use of material that BHI may obtain from those 3rd parties in regulatory proceedings. It is one thing for BHI to explain to 3rd parties that there is a risk that such contractual obligations may be ignored by the Board; it is quite another to explain to 3rd parties, as it appears both SEC and Board Staff suggest, that such contractual obligations will always be ignored by the Board. Were the latter the case, BHI submits, BHI and other regulated utilities would have their access to 3rd party information, for any use, severely restricted.
21. In BHI's view the existence of such a contractual obligation must be examined in the circumstances as a whole when determining whether such a provision should be upheld.
22. In BHI's submission the circumstances surrounding the Survey are such that the Board should, in this case, refuse to grant an order compelling production.

THE NATURE OF THE SURVEY AND BHI'S (NON) USE OF THE SURVEY IN THIS APPLICATION

23. SEC asserts that the Board cannot answer issue 2.1, which specifically seeks to review BHI performance in the area of efficiency benchmarking, without reviewing the studies and surveys that BHI has conducted.
24. BHI respectfully submits that SEC has mischaracterized the nature of the Survey in its Notice of Motion by asserting that it falls within the category of studies of surveys that BHI has conducted.
25. As BHI notes in the response to interrogatory 2.1-SEC-5, BHI is merely a participant in the Survey. Asserting that BHI conducted the Survey is, BHI respectfully suggests, misleading, in that it inappropriately elevates BHI to something more than simply one of the participants to the Survey.

26. Furthermore, BHI is only a participant as a result of entering into a contract to neither disclose the Survey nor any details about it. Had BHI not entered into that contract, BHI would neither be a participant in the Survey nor would it have access to the Survey.
27. As a result of the contractual obligation to neither disclose the Survey nor any details about the survey, BHI has not, in its Application, referred to or relied on the Survey or any details of the Survey. The only reference in this proceeding to the Survey is in response to interrogatory 2.1-SEC-5, a reference that was made, not in order to rely on the substance of the Survey, but rather to be truthful to the Board about BHI's participation in the Survey and in the restrictions on the use of the Survey imposed on BHI.
28. With respect to the assertion by SEC that the Board cannot answer issue 2.1 without access to the Survey, BHI respectfully submits that assertion is incorrect.
29. The assertion suggests that the only benchmarking information that is available to the Board with respect to BHI is the Survey; that is simply not true. The Board collects and publishes its own benchmarking information with respect to the utilities that it regulates, information that is available to the Board and intervenors.¹
30. The suggestion that SEC is making is that had BHI not become a participant in the Survey that BHI's Application would be fatally flawed; that is simply not the case.
31. BHI's Application is complete. Details about the specific costs and cost drivers that underpin the application have been provided in both the Application and in interrogatory responses, both on a forecast and historical basis.
32. BHI respectfully submits that the inclusion of Issue 2.1 is not a catchall justification to require disclosure any and all benchmarking material that a utility may have in its possession, whether or not that material was relied upon by the utility in its application and without regard to the interests of the 3rd parties that produced the material in the first place.
33. In BHI's submission it is incumbent on the Board to review the circumstances of each case to determine whether an agreement to withhold disclosure of 3rd party material should be respected by the Board.

¹ See for example the *PRODUCTIVITY AND BENCHMARKING RESEARCH IN SUPPORT OF INCENTIVE RATE SETTING IN ONTARIO: FINAL REPORT TO THE ONTARIO ENERGY BOARD, Report of Pacific Economics Group Research LLC, 2013*

34. BHI respectfully submits that:

- a) the fact that BHI did not conduct the Survey but is in fact only a participant,
- b) the fact that BHI only became a participant in the Survey and obtained copies of the Survey as a result of entering into a contract that prevents BHI from disclosing the Survey or any details concerning the Survey, and
- c) the fact that BHI has not referred to or relied on the Survey in its Application or in its interrogatory responses except to be truthful concerning its participation in the Survey,

are all factors which should persuade the Board to refuse to require BHI to produce copies of the Survey on the record.

CASE LAW CITED BY SEC AND BOARD STAFF

35. What follows is an examination of each of the cases cited by SEC and Board Staff in support of an order compelling BHI to produce the Survey. In each case BHI examines the circumstances surrounding the issue in the decision, and sets out the material ways in which the circumstances are different than those in the present Motion.

36. While BHI relies on the specific analysis below, by way of initial summary, BHI notes that on examination of the cited cases 4 of the 5 Decisions relate to utilities that either specifically relied upon the material at issue in their Application or voluntarily put the material on the record; the issue of whether the Board should compel production of material that had never been relied upon or otherwise produced by the utility in its application was never addressed.

37. In the one remaining case (EB-2011-0140) the Board was not dealing with a single utility seeking to set rates; it was specifically engaged in disseminating to competing bidders for designation as the transmitter for the East West Tie the information collected by HONI (and GLPT) specific to the East West Tie.

EB-2011-0140 (The "East West Tie Proceeding") Decision on Phase 1 Partial Decision and Order: Production of Documents by Hydro One Networks Inc. ("HONI") (EB-2011-0140) dated June 14 2012 (The "EW TIE Decision")

38. Both SEC and Board Staff refer to the EW Tie Decision in their submissions.

39. SEC relies on the EW TIE Decision in support of the assertion at paragraph 10 of its Notice of Motion that a contractual agreement between a utility and a third-party is not a valid reason for non-disclosure of relevant information, and that the Board has on numerous occasions stated that it is not bound by confidentiality agreements between utilities and 3rd parties.

40. Board Staff relies on the HONI Decision in support of the assertion on page 3 of its submissions that, in previous Board decisions, the Board has not accepted a party's confidentiality agreement with a third party as a basis for withholding documents.
41. With respect, the information that HONI proposed should be omitted from the record in its entirety in the East West Tie Proceeding is materially different in nature than the Survey, as was the nature of the two proceedings.
42. The EW Tie Decision, insofar as it deals with a document that was the subject of an agreement to not disclose, dealt with one document, referred to as the *SNC Lavalin Study Estimates Report*. With respect to HONI's submissions on the non-disclosure of the document, the entirety of the submissions was as follows:

- b) *SNC Lavalin Study Estimates Report* - **study estimates** for various line options and associated breaker installations and line terminations for proposed East-West Tie line
- contains: engineering sketches; bill of major materials; assumptions; scope description; project schedule; cost estimate; work breakdown structure; analysis (contingency, risk, escalation)
 - prepared: May 19, 2010

Beyond the comments in (a) above, which also apply to this report, HONI cannot offer to provide a copy of this report because a confidentiality agreement between HONI and SNC Lavalin prohibits release of this report to third parties. (Emphasis added)²

43. The comments in (a) referred to in the submissions were as follows:

HONI respectfully recommends that this report not be filed in this proceeding, as the comprehensive and detailed nature of the information contained in this report could unintentionally skew the proposals by building on work previously completed by HONI. If this reduces the creativity and diversity of proposals, it could be inconsistent with the objectives of the designation process. Furthermore, it may also render it more difficult for the Board to differentiate and assess proponents based on the sophistication and merit of their filed plans.³

² EB-2011-0140, HONI Submission dated May 7, 2012, pages 1-2.

³ EB-2011-0140, HONI Submission dated May 7, 2012, page 1.

44. The Board fundamentally disagreed with HONI's assessment of the impact the *SNC Lavalin* Study Estimates Report on the designation process, noting that the entire East West Tie Designation process was
- ...best served by ensuring equal access to relevant information by all potential applicants. Moreover, this interest outweighs any potential difficulties that may arise in the Board's assessment of designation plans as a result of those applicants receiving comprehensive information relating to the development of the East-West Tie line.⁴
45. Accordingly, in BHI's view, the Board determined that disclosure of the *SNC Lavalin* Study Estimates Report was a critical aspect of putting all the potential designated transmitters, engaged in a proceeding with the singular goal of developing and presenting proposals for the East West Tie, on the same footing with respect to East West Tie specific information that HONI had already gathered.
46. Further, in BHI's respectful opinion, HONI did nothing more in its submissions with respect to the contractual obligation not to disclose the report than advise the Board that it "cannot offer to provide a copy of [the] report" because of the contract provision. HONI made no attempt in that proceeding to provide reasons why the Board should respect the contractual obligation.
47. In both these respects the circumstances with respect to BHI are distinguishable from the circumstances in the EW Tie Decision.
48. As noted elsewhere BHI is nothing more than a single participant in the Survey, the use of which was prohibited (which prohibition BHI has respected) for the purposes of BHI's Application.
49. By contrast the *SNC Lavalin* Study Estimates Report was specifically commissioned by HONI for the purposes of developing proposals for the East West Tie, and then a process was established to designate a transmitter for the East West Tie that included a process for ensuring that all the potential transmitters were given the same project specific data that HONI had in its possession.
50. Simply put, the East West Tie Proceeding was nothing like the rate setting application which BHI is currently engaged in, nor is the Survey a central piece of evidence commissioned specifically by BHI that goes to the core of the Application in the way that the *SNC Lavalin* Study Estimates Report did in the East West Tie Proceeding.

⁴ EB-2011-0140 (The "East West Tie Proceeding") Decision on Phase 1 Partial Decision and Order: Production of Documents by Hydro One Networks Inc. ("HONI") (EB-2011-0140) dated June 14 2012, pages 3-4.

51. BHI, having refrained from making use of the Survey in the Application, continues to actively support a finding of the Board that respects the operation of the contract restrictions in the proceeding, whereas HONI, having commissioned the *SNC Lavalin Study Estimates Report* for the specific purposes for which the East West Tie Proceeding was initiated, only notes for the Board that it had a contractual obligation not to offer to produce the document.
52. BHI respectfully submits that HONI was doing nothing more than both acknowledging that it had a contractual obligation and that the obligation could be relieved by the Board. It is not the case, BHI submits, that the EW Tie Decision stands for the principle that the Board should categorically ignore such contractual obligations.

EB-2012-0031 (Hydro One Networks Inc. (“HONI”))

Motion Hearing Transcript dated October 23 2012 (EB-2012-0031) (the “HONI Decision”)

53. Both SEC and Board Staff refer to the HONI Decision in their submissions.
54. SEC relies on the HONI Decision in support of the assertion at paragraph 10 of its Notice of Motion that a contractual agreement between a utility and a third-party is not a valid reason for non-disclosure of relevant information, and that the Board has on numerous occasions stated that it is not bound by confidentiality agreements between utilities and 3rd parties.
55. Board Staff relies on the HONI Decision in support of the assertion on page 3 of its submissions that, in previous Board decisions, the Board has not accepted a party’s confidentiality agreement with a third party as a basis for withholding documents.
56. With respect, a critical aspect of the HONI Decision that distinguishes it from the facts in BHI is the fact that HONI included the results of the CEA Survey noted in the HONI Decision within its application; the issue was characterized by the Board in the following way on page 28:

Hydro One seeks to rely on the results of this CEA survey for the proposition that its performance is better than average on 85 percent of the costs-related performance metrics examined in the CEA study. However, Hydro One has only provided its actual results and some information on the averages of the other utilities.
(Emphasis added)

57. As noted above and unlike the case in BHI, HONI sought to both rely on the CEA Survey to support its application while at the same time refuse to disclose parts

of the survey on the record in any capacity on the strength of certain confidentiality agreements with the CEA survey's author.

58. In BHI's case the Survey in question forms no part of the BHI Application that is before the Board.

59. SEC cites the following from page 28 of the HONI Decision:

We are somewhat surprised that Hydro One would agree to the confidentiality arrangements described by the company today. Hydro One is well aware of the Board's view of the importance of benchmarking.

60. The rest of the paragraph, however, connects the risk of disclosure to the proposed use of the information by HONI:

Hydro One must have had some level of expectation that it would be required to produce this information if it intended to rely upon it in its evidence.

61. This connection is, in BHI's respectful submission, important when considering a request from a utility in BHI's position.

62. In BHI's view a contractual agreement between the utility and a 3rd party that is respected by the utility such that the information is not used by the utility to, in the context of a rate application, support the requested rates in any way, should have its request that the contractual obligation be enforced seriously considered by the Board.

EB-2011-0123 (Guelph Hydro Electric Systems Inc.)

Decision on Confidentiality (EB-2011-0123), dated August 19, 2011 (the "Guelph Decision")

63. Both SEC and Board Staff refer to the Guelph Decision in their submissions.

64. SEC relies on the Guelph Decision in support of the assertion at paragraph 10 of its Notice of Motion that a contractual agreement between a utility and a third-party is not a valid reason for non-disclosure of relevant information, and that the Board has on numerous occasions stated that it is not bound by confidentiality agreements between utilities and 3rd parties.

65. Board Staff relies on the Guelph Decision in support of the assertion on page 3 of its submissions that, in previous Board decisions, the Board has not accepted a party's confidentiality agreement with a third party as a basis for withholding documents.

66. With respect, BHI notes that the Guelph Decision does not deal with a request by an LDC to refrain from disclosing material on the record at all. The Guelph Decision deals with the request for confidential treatment of documents relating to two issues specific to Guelph Hydro Electric Systems Inc. (the Guelph Specific IFRS Conversion Impact Assessment and the Guelph Hydro IFRS System Impact Discovery Analysis), documents:
- a) that were filed as part of the Application,
 - b) that were prepared for Guelph Hydro specifically,
 - c) the contents of which were central to the application,
 - d) the contents of which are not otherwise found in the evidence filed, and
 - e) the contents of which were required to ensure that the ratemaking process is transparent and meets the principle of fairness to all parties, notably ratepayers.⁵
67. BHI respectfully submits that none of these factors are present in its Application; the Survey was not only omitted from the BHI Application, it was not referred to or relied upon in the Application at all. The Survey is not a BHI specific document, BHI is simply one participant in the Survey. The Survey cannot be said to be central to the Application, as it is not included in the Application at all in any capacity. There are no claims in the Application that rely on the contents of the Survey.
68. So far as the Survey may contain information specific to BHI, such information, to the extent it is relevant to the Application, is already on the record in the Application at an appropriate level of detail; the rest of the information in the Survey is only in the hands of BHI as a result of the reliance by BHI, the other participants, and the author of the Survey on the confidentiality requirements imposed on participants.
69. The Guelph Decision does address contractual obligations between the LDC and third parties to an extent; however BHI does not agree with the bald assertion made by SEC that “a contractual agreement between a utility and a third-party is not a valid reason for non-disclosure of relevant information” can be drawn as the principle supported by the Guelph (or other cited) Decisions. While it may be the case that the Board is not itself bound by such agreements, and that under certain circumstances the Board may overrule an agreement not to disclose a document, the Board in the Guelph Decision only identifies, in BHI’s submission, the risk that the Board may not enforce confidentiality provisions entered into by utilities; it does not assert a certainty that such provisions will not be respected.⁶

⁵ These factors appear in pages 1 and 3 of the Decision on Confidentiality (EB-2011-0123), dated August 19, 2011.

⁶ Decision on Confidentiality (EB-2011-0123), dated August 19, 2011 pages 3 and 4 contain the Board’s decision, none of which asserts that the Board will categorically ignore the contractual

70. BHI further notes that despite the Board's findings in the Guelph Decision the Board extended the option to Guelph Hydro Electric Systems Inc. to request of the Board that it withdraw the documents from the record as a result of the Board's decision to withhold confidential status.⁷

EB-2013-0174 (Veridian Connections Inc.)

Procedural Order No.4 (EB-2013-0174), dated February 25 2014 (the "Veridian Decision")

71. Both SEC and Board Staff cite the Veridian Decision in their respective submissions.
72. SEC cites pages 2 and 3 of the Veridian Decision in support of the assertion at paragraph 13 of its Notice of Motion that the Board has in a previous proceeding required an LDC to produce information based on the same interrogatory, providing for the production on an interim confidential basis.
73. Board Staff relies on the Veridian Decision in support of the assertion at page 3 of its submission that, in previous Board decisions, the Board has not accepted a party's confidentiality agreement with a third party as a basis for withholding documents.
74. BHI respectfully submits that, having reviewed the Veridian Decision relied upon by both SEC and Board Staff, the facts are materially different such that the Veridian Decision does not in fact address the BHI facts.
75. In the Veridian Decision there were 2 interrogatories at issue, with a motion filed by SEC for production of what was referred to in the motion as the "Information".
76. On the same day the procedural order with respect to the motion underpinning the Veridian Decision was filed, Veridian Connection Inc. agreed to file the "Information" on a confidential basis.
77. It appears from the Veridian Decision that while Veridian's voluntary filing on a confidential basis satisfied the second of the two interrogatories, SEC continued the motion with respect to the first interrogatory on the basis that the "Information" that was filed with respect to the first interrogatory was not the

provisions between an LDC and 3rd parties; the Board's decision only warns utilities that the Board makes the final decision with respect to the treatment of documents.

⁷ Decision on Confidentiality (EB-2011-0123), dated August 19, 2011, page 4; note that Guelph Hydro Electric Systems Inc. did not make such a request.

“entire information requested”. The additional information sought on the truncated motion was referred to as the “requested information”.

78. The Board determined that:

The requested information includes the contextual background for conclusions reached in the information provided in response to Interrogatory 2.1-SEC-2 and is therefore clearly relevant. As this information is relevant to the proceeding, it must be produced.

The requested information will be treated at this time as confidential.⁸

79. Accordingly, in BHI’s view, the Veridian Decision did nothing more than require further material that provided contextual background for conclusions reached in information that Veridian Connections Inc. voluntarily placed on the record. In other words, similar to the HONI Decision, the Board determined that having put part of the “Information” on the record it would compel Veridian to complete the voluntary production.

80. Despite the assertion made by Board Staff in its submission, there is no indication in the Veridian Decision that the Board considered the impact of any obligation to a 3rd party with respect to confidentiality concerning the “Information” or the “requested information”; the Veridian Decision requires further disclosure on an interim confidential basis purely in relation to the information that was filed voluntarily. Any consideration of contractual obligations is at best implicit and superseded, BHI would suggest, by an interest in completing the voluntary provision of the Information.⁹

EB-2011-0099 (E.L.K. Energy Inc.)

81. This application is cited by Board Staff in support of the assertion that, in previous Board decisions, the Board has not accepted a party’s confidentiality agreement with a third party as a basis for withholding documents. Board Staff does not cite the specifics of the decision within EB-2011-0099 that it is referring to; BHI presumes that Board Staff is referring to the Decision on Confidentiality released March 19, 2013 (the “E.L.K. Decision”).

⁸ Procedural Order No.4 (EB-2013-0174), dated February 25 2014, page 3.

⁹ BHI notes that the submissions that were made in relation to the Veridian Decision were redacted, such that BHI is not able to read them in their entirety. Having said that BHI acknowledges that there is reference in the Veridian Submissions on the motion noting that Veridian was not permitted by contract to disclose what appears to be referred to in the Veridian Decision as the “requested information”; the Board does not, however, address this assertion in the Veridian Decision, presumably because Veridian had already voluntarily produced part of the material at issue.

82. With respect, there are facts that distinguish the E.L.K. Decision from the current situation such that, in this proceeding, the Board should treat BHI differently than E.L.K. In the E.L.K. Decision the Board specifically notes that E.L.K. relied on the document it was refusing to produce:

The Board is not convinced that any prejudice attendant on allowing the salary survey into evidence outweighs its probative value. In relying on and specifically referencing the salary survey in its pre-filed evidence, the Applicant must have realized that a party would likely ask to see it. Whether the Applicant had filed the document in error or not, it is entirely possible that the Board would have ordered its production. As a matter of general regulatory practice, it would not normally be open to an applicant to rely on a document but then refuse to produce it. A similar, more detailed MEARIE salary survey was recently filed in a London Hydro rates case (EB-2012-0146), apparently without controversy. As noted above, MEARIE itself appears to have contemplated that the salary survey would be used to support rate filings. (Emphasis added)¹⁰

83. E.L.K. specifically relied on, referred to and made use of the document at issue in that proceeding in its pre-filed application such that Board compelled its production on the record. Such is not the case in this Application; BHI has not incorporated reliance on the Survey in this Application, instead respecting the contractual obligation not to disclose the Survey or its details.

CONCLUSION

84. While BHI acknowledges that the Board has the authority to order production of documents despite there being a contractual obligation on a regulated utility to refrain from disclosure, BHI does not agree that the mere finding that the material may be relevant means that the Board should, in every case, refuse to enforce such obligations.

85. Each of the cases cited by SEC and Board Staff contain circumstances that in BHI's view are materially different than the circumstances in this proceeding.

86. For all of the reasons cited by BHI in these submissions, BHI respectfully submits that the Board should not order BHI to produce the Survey on the record in any capacity.

¹⁰ EB-2011-0099 on Confidentiality released March 19, 2013, p. 6.

Confidential Filing of the Survey if Production Ordered

87. SEC's Notice of Motion asserts at paragraph 14 in relation to the Survey that:

Burlington Hydro, like any other utility, has the ability to seek to have any document it is asked to produce be provided on a confidential basis pursuant to the Practice Direction on Confidential Filings.

88. The submissions of Board Staff at page 2 submit that:

... Burlington Hydro should be required to produce the Benchmarking Survey and that the document be designated as confidential on an interim basis. The Board can then invite further submissions from intervenors and Board Staff as to whether the document should be placed on the public record or designated as confidential on a permanent basis.

89. Accordingly, based on these submissions and the contents of PO3 BHI presumes that, in the event the Board compels BHI to produce copies of the Survey, the Board will provide for the filing of the Survey confidentially on an interim basis and that a procedural order regarding submissions on confidentiality will follow. As a result BHI has not included at this time any submissions on why, if compelled by the Board to produce copies of the Survey on the record, the Survey should remain confidential.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF MARCH 2014