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**BY EMAIL AND RESS**

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Our File: EB20130115

Ontario Energy Board  
2300 Yonge Street  
27th Floor  
Toronto, Ontario  
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**Attn: Kirsten Walli, Board Secretary**

Dear Ms. Walli:

**Re: EB-2013-0115 – Burlington Hydro Inc. – SEC Reply**

We are counsel to the School Energy Coalition (“SEC”). Pursuant to Procedural Order No. 3, these are SEC’s reply submissions. SEC submits the Board should order Burlington Hydro Inc. (“Burlington Hydro”) to produce the requested benchmarking survey referred to in its response to interrogatory 2.1-SEC-5.

Burlington Hydro makes a number of arguments for why it should not have to produce the requested benchmarking survey, which it objected to in response to 2.1-SEC-5 on the sole basis that it was prohibited to by a contract it had entered into.<sup>1</sup> At the core of its submissions, Burlington Hydro does not really dispute the relevance of the survey, but “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 a survey in the absence of an examination of other factors”.<sup>2</sup>

The approach that the Board has taken in the past is that if the document is relevant, and its probative value will outweigh any prejudicial effects, then it should be disclosed.<sup>3</sup> The fact that Burlington Hydro only participated in the survey instead of conducting it<sup>4</sup>, that the survey is not a necessary requirement to resolving issue 2.1<sup>5</sup>, that it did not rely on the survey in its

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<sup>1</sup> Interrogatory 2.1-SEC-5

<sup>2</sup> Burlington Hydro Submission at para. 12

<sup>3</sup> *Decision and Order on Motion and Procedural Order No. 4* (“EB-2013-0053”) dated July 8, 2013 at p.4

<sup>4</sup> Burlington Hydro Submission at paras. 23, 35

<sup>5</sup> Burlington Hydro Submission at paras. 28, 39

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application<sup>6</sup>, and that it only participated in and received the results after it signed the confidentiality contract,<sup>7</sup> are all not a rationales for why the document is not relevant or that the prejudicial effects of disclosure outweighs its probative value.

### **Relevance**

Relevance is determined by the issues in the proceeding, not the contents of Burlington Hydro's application. There is an inherent asymmetry of information that exists between the Board (and intervenors) and regulated utilities. It is why the Board specifically provided intervenors with the opportunity to request "any relevant information and documentation from Burlington Hydro that is in addition to the evidence already filed [emphasis added]".<sup>8</sup> Just because Burlington Hydro did not rely on the survey in its application, does not mean it should not have to disclose it if asked in interrogatory. If reliance was the standard then the Board would never have a full picture of a utilities performance - just a one-sided view. This would not be in the public interest nor would it allow the Board to properly determine "just and reasonable" rates.

While Burlington Hydro spends a significant portion of its submissions reviewing and commenting on each Board decision cited by SEC and Board Staff<sup>9</sup>, it does not actually dispute the reasons for which they were relied upon – that the Board is not bound by a contractual arrangement between a regulated utility and a third-party.<sup>10</sup> Although each specific case has its own factual context, they are all examples of Board commenting on the general issue. In contrast, Burlington Hydro has not provided any Board decisions, and SEC is no aware of any, where a relevant document was not produced (as compared with being kept confidential) due to a third-party non-disclosure contractual arrangement.

In so far as in some of the cited cases the individual applicant had explicitly relied or referenced the information sought, it does not detract from the fact that information was relevant and had to produced. The Board's standard is *relevance* not reliance.<sup>11</sup> Even if in those cases relevance was determined because of the reliance, the present situation is considerably different. The Board Approved Issues List contains a specific question regarding Burlington Hydro's performance in performance benchmarking.

### **Probative Value versus Prejudicial Effect**

The only potential prejudicial effect that Burlington Hydro seems to point to in its submissions is that if contractual obligations with third-parties are ignored, then it (and other utilities) "would have its access to 3<sup>rd</sup>-party information, for any use, severely restricted".<sup>12</sup> This is purely speculative. With respect to benchmarking surveys, SEC expects the opposite is a more likely scenario. With the release of the *Renewed Regulatory Framework for Electricity* ("RRFE"), the Board has sent a clear signal that an outcomes based approach that involves benchmarking is

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<sup>6</sup> Burlington Hydro Submission at para. 27

<sup>7</sup> Burlington Hydro Submission at paras. 20, 34

<sup>8</sup> *Procedural Order No.2* at p.4

<sup>9</sup> Burlington Hydro Submission at paras. 35-83

<sup>10</sup> "While BHI acknowledges that the authority to order production of documents despite there being a contract obligation on a regulated utility to refrain from disclosure..." see Burlington Hydro Submission at para 84

<sup>11</sup> Further, the Board's view of reliance is wide not narrow, "[t]he Board also takes a fairly broad view of relevance for the purpose of ordering the production of evidence.[emphasis added]" see *Decision and Order on Motion* (EB-2007-0050), dated April 7 2008 at p.7

<sup>12</sup> Burlington Hydro Submission at para. 20

the direction it is taking with the regulation of electricity distribution rates.<sup>13</sup> SEC expects that going forward more - not less - utilities will be undertaking benchmarking initiatives.

Regardless, SEC submits probative value vastly exceeds these potential prejudicial effects. Benchmarking surveys allow the Board (and intervenors) to properly determine the key issues in this proceeding such as Issue 2.1, which requires the Board to make a finding on how Burlington Hydro's performances in the area of efficiency benchmarking. Benchmarking is also an accepted way to help the Board determine if the proposed rates meet the statutory requirement of being "just and reasonable".

Burlington Hydro participated in a benchmarking survey, in which it received a copy of the results, presumably for the purpose of benchmarking itself with other utilities. SEC submits it would not be in the public interest for the Board to on one hand focus on benchmarking, and then on the other hand allow utilities not to have to reveal the results of those activities to anyone. This is important information, paid for by ratepayers, about Burlington Hydro's regulated costs. Its probative value outweighs any prejudicial effects.

**Summary**

SEC submits that the Board should order Burlington Hydro to provide the 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.

All of which is respectfully submitted.

Yours very truly,  
**Jay Shepherd P.C.**

*Original signed by*

Mark Rubenstein

cc: Wayne McNally, SEC (by email)  
Applicant and Intervenors (by email)

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<sup>13</sup> *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, dated October 18 2012, at p.56, 59