



EB-2013-0115

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

AND IN THE MATTER OF an application by Burlington Hydro Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.

PROCEDURAL ORDER NO. 4
March 19, 2014

Burlington Hydro Inc. (“Burlington Hydro”) filed a complete cost of service application with the Ontario Energy Board (the “Board”) on October 25, 2013 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, seeking approval for changes to the rates that Burlington Hydro charges for electricity distribution, to be effective May 1, 2014.

On March 11, 2014, the School Energy Coalition (“SEC”) filed a Notice of Motion (“Motion”). The Motion seeks the following relief:

1. 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.
2. Such further and other relief as the SEC may request and the Board may grant.

In response to SEC-5 Burlington Hydro referenced a benchmarking survey (“the Benchmarking Survey”) but stated that it was bound by contract to neither disclose the survey nor any details about it unless ordered by the Board.

On March 12, 2014, the Board issued Procedural Order No. 3 which, among other things, established an expedited schedule for Board staff and intervenors to file submissions on the Motion, for Burlington Hydro to file a response, and for SEC to file supporting material, if required, and a reply submission. The Board indicated that it would issue a decision on the Motion by the end of day Tuesday March 18, 2014. On March 14, 2014 Board staff submitted that SEC's request for the Benchmarking Survey is clearly within the scope of the current proceeding, as it pertains to Issue 2.1 of the Issues List and benchmarking is a core component of the Board's Renewed Regulatory Framework for Electricity Distributors (RRFE). Board staff submitted that Burlington Hydro should be required to produce the Benchmarking Survey and that the document should be designated as confidential on an interim basis in order to determine its relevance. Board staff also noted 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.

On March 17, 2014, Burlington Hydro submitted that the Board should consider the specific circumstances of this case. While acknowledging that the Board has the authority to order production of documents, despite the existence of a contractual obligation on the regulated utility to refrain from disclosure, Burlington Hydro submitted that the circumstances in this case were materially different from the examples cited by SEC and Board staff. Specifically, the Board should consider that:

- Burlington Hydro did not conduct the survey, but was only a participant;
- Burlington Hydro only became a participant and obtained copies of the survey as a result of entering into a contract preventing it from disclosing the details; and
- The survey is not central to the application; Burlington Hydro did not refer or rely on the survey in its application or interrogatory responses, except to be truthful about its participation in the survey.

Regarding the relevance of the information contained within the survey, Burlington Hydro submitted that, in its view, the Board's reliance on benchmarking as noted in the RRFE Report and the Scorecard Approach Report relates to Board initiated benchmarking. Burlington Hydro submitted that while third party benchmarking material may be useful, the Board's interest should not be taken as a carte blanche directive to produce all benchmarking material regardless of the circumstances.

Burlington Hydro submitted that, should such contractual obligations be consistently ignored by the Board, utilities would have their access to third party information, for any use, severely restricted.

On March 18, SEC noted the Board's past approach, wherein a document should be disclosed if it is relevant, and its probative value will outweigh any prejudicial effects. SEC submitted that the fact that Burlington Hydro did not rely on the Benchmarking Survey in preparing its application does not determine the relevance of the document. SEC further submitted that the Board's standard for ordering the production of evidence is not reliance but relevance, and that the Board takes a fairly broad view of relevance. SEC submitted that interrogatories allow for the provision of information in addition to that filed, and that the document is relevant to the proceeding in that the Issues List contains a specific question regarding performance benchmarking. SEC noted that, although Burlington Hydro had individually addressed the differences between this case and those cited in parties' submissions, it had not provided a single case where the relevant document was not produced due to a third party non-disclosure agreement.

In response to Burlington Hydro's submission that access to third party information would be restricted if contractual obligations are ignored, SEC suggested that the opposite is a more likely scenario, due to a clear signal from the Board that it will be relying on an outcomes-based approach that involves benchmarking in the regulation of electricity distribution rates. SEC submitted that the probative value of the document outweighs the potential prejudicial effects, in that such surveys allow the Board to properly determine key issues in this proceeding and that benchmarking is an accepted method to determine if the proposed rates meet the statutory requirement of being "just and reasonable". SEC submitted that this is important information, paid for by ratepayers, about Burlington Hydro's regulated costs and that its probative value outweighs any prejudicial effects.

Finding

Burlington Hydro shall immediately provide the Benchmarking Survey referred to in its response to 2.1-SEC-5 to qualifying parties that have executed a Declaration and Undertaking pursuant to s.6.1 of the Board's *Practice Direction on Confidential Filings* ("the *Practice Direction*").

Distributors cannot limit or exclude the Board's jurisdiction by private agreements amongst themselves or with third parties. The Board has often stated that distributors must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may be reasonably required to be produced as part of the regulatory process. The Board finds that benchmarking surveys fall squarely into that category particularly under the Board's Renewed Regulatory Framework for Electricity Distributors. Benchmarking information is also specifically important in addressing Issue 2.1 in the Board approved issues list.

The Benchmarking Survey will be treated as confidential on an interim basis, and will be included among the documents designated as the Proposed Confidential Material in Procedural Order No. 3. Parties may make submissions on the confidentiality status of the Proposed Confidential Material in accordance with the schedule set out in Procedural Order No. 3.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. Burlington Hydro shall immediately provide unredacted versions of the Benchmarking Survey referred to in its response to 2.1-SEC-5 to all qualified parties that have executed a Declaration and Undertaking pursuant to the Board's *Practice Direction*.
2. Parties shall make submissions on the confidentiality status of the Proposed Confidential Material and Burlington Hydro's proposal to retract the information if it is not afforded confidential status in accordance with the schedule established in Procedural Order No. 3.
3. Parties shall frame submissions related to the Proposed Confidential Material in a manner that will allow the submissions to be placed on the public record.

All filings to the Board must quote the file number, EB-2013-0115, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/service/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and

document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Martha McOuat at martha.mcouat@ontarioenergyboard.ca and Board Counsel, Ljuba Djurjevic at ljuba.djurjevic@ontarioenergyboard.ca.

ADDRESS

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DATED at Toronto, **March 19, 2014**

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary