



# **ONTARIO ENERGY BOARD**

## **BOARD STAFF SUBMISSION**

Burlington Hydro Inc.

EB-2013-0115

**April 3, 2014**

## Background

By way of letter dated February 27, 2014 Burlington Hydro Inc. ("Burlington Hydro") requested confidential treatment for its response to School Energy Coalition ("SEC") Interrogatory 9 ("4.1-SEC-9"), which asked for a copy of a compensation study conducted in November 2011. Burlington Hydro sought confidential treatment of the study on the grounds that it is proprietary work that is key to the third party consultant's ongoing commercial success.

Burlington Hydro also requested confidential treatment of its response to SEC Interrogatory 17 ("4.2-SEC-17") concerning a wage increase the Applicant was forecasting for its unionized workforce after the expiry of its current collective agreement on April 1, 2014. Burlington Hydro stated that this information warranted confidential treatment in order to preserve Burlington Hydro's bargaining position with respect to collective agreement negotiations commencing in the second quarter of 2014.

Burlington Hydro also indicated it would ask to withdraw these documents from the proceeding in the event that they were not treated as confidential.

In its response to 2.1-SEC 5, Burlington Hydro stated that it had participated in a benchmarking survey ("the Benchmarking Survey") and was bound by contract neither to disclose the survey nor any details about it "unless ordered to do so by the Board".

On March 11, 2014, SEC filed a Notice of Motion requesting Burlington Hydro "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."

On March 12, 2014, the Board issued Procedural Order No. 3, which designated as confidential, on an interim basis, Burlington Hydro's responses to 4.1-SEC-9 and 4.2-SEC-17 ("the Proposed Confidential Material"). The Procedural Order established an expedited schedule for parties to make submissions on SEC's Notice of Motion, as well as a separate schedule for parties' submissions on the confidentiality status of the Proposed Confidential Material and Burlington Hydro's proposal to retract the information if it is not accorded confidentiality status. Submissions on the Motion were filed by Board staff, Burlington Hydro and by SEC.

On March 19, 2014, the Board issued Procedural Order No. 4, requiring that Burlington Hydro immediately provide the Benchmarking Survey to qualifying parties that had executed a Declaration and Undertaking pursuant to s.6.1 of the Board's *Practice*

*Direction on Confidential Filings* (“the *Practice Direction*”). The Board determined that the Benchmarking Survey would be treated as confidential on an interim basis and would be included among the documents designated in Procedural Order No. 3 as the Proposed Confidential Material. Parties were invited to make submissions on the confidentiality status of the Benchmarking Survey in accordance with the schedule established in Procedural Order No. 3.

## **Submission**

Board staff notes that the Proposed Confidential Material consists of three separate documents, representing two different categories of confidential treatment. The first is a document generated internally by Burlington Hydro. The other two documents consist of studies conducted by third parties, which contain contractual provisions prohibiting disclosure.

The issue before the Board is whether these documents shall be permitted to be withdrawn from the record, remain on the record as a confidential filing, or be filed as part of the public record. Staff submits that one document should remain on the record as a confidential filing given its potential for interference with upcoming labour negotiations, but the other two should be disclosed as part of the public record given their significance to the proceeding. Staff’s views and reasoning are provided separately below.

### *1. Response to 4.2-SEC-17*

Burlington Hydro’s response to interrogatory 4.2-SEC-17 contains the company’s budgeted wage increase for its unionized workforce, effective upon the expiry of its collective agreements. In its letter of February 27, 2014, Burlington Hydro sought confidential treatment of this information to preserve its bargaining position with respect to collective agreement negotiations that will commence in the second quarter of 2014.

While the Board’s general policy as stated in its *Practice Direction* is that all evidence should be on the public record, the Board has also recognized that some information may be of a confidential nature and should be protected.

Appendix A of the *Practice Direction* outlines some of the factors that the Board may consider in addressing the confidentiality of filings, one of which is the potential harm that could result from the disclosure of the information, including, among other factors, “whether the information could interfere significantly with negotiations being carried out by a party”<sup>1</sup>.

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<sup>1</sup> *Practice Direction on Confidential Filings*, October 13, 2011, Appendix A, p. 17

Board staff submits that public disclosure of Burlington Hydro's targeted wage increase prior to negotiation of its collective agreements has the potential to have a negative impact on the course or outcome of these negotiations, and that this information should remain confidential.

Board staff notes that, in inviting submissions on Burlington Hydro's request to retract the Proposed Confidential Material in the event that the Board order that it be made public, the Board has specified the test to be considered in these circumstances: whether the document is relevant to the issues in the proceeding and whether its probative value is outweighed by any prejudice it might cause the applicant. Board staff submits that, while the targeted wage increase for unionized employees is clearly relevant to an examination of Burlington Hydro's forecast costs, the potential increased cost to ratepayers which could result from disclosure of this target in negotiations outweighs its probative value. Board staff submits that the response to 4.2-SEC-17 should remain confidential. Should the Board determine that it be made public then Board staff submits that Burlington be allowed to retract the information from the record.

## *2. Responses to 4.1-SEC-9 and 2.1-SEC-5*

The response to 4.1-SEC-9 contains a summary table to a Hay Group compensation study ("the Hay study") commissioned by Burlington Hydro. In filing a corrected version of this interrogatory response, Burlington Hydro stated that it is contractually bound not to disclose Hay Group's proprietary or commercially sensitive information. While Burlington Hydro had obtained permission to file the summary table on a confidential basis, it was not authorized to file any other information from the study either publicly or confidentially.

The final document at issue is the Benchmarking Survey referred to in the response to 2.1-SEC-5, which was the subject of SEC's Notice of Motion, and which the Board ordered to be provided through Procedural Order No. 4. The Benchmarking Survey consists of two volumes, the second of which ("Volume II") provides data collected from identified individual participant LDCs. The first volume ("Volume I") aggregates the data reported for individual LDCs to provide benchmarks specific to Burlington Hydro. In its response to interrogatory 4.2-SEC-5, Burlington Hydro states that it is bound by contract to neither disclose the survey nor any details about it unless ordered to do so by the Board.

Board staff recognizes Burlington Hydro's argument that it has agreed with the third parties not to disclose the information in these two documents. Further, Board staff accepts that the third parties have always intended that these documents not become part of the public record. However, Board staff submits the Board has consistently allowed this type of information to form part of the public record in the past.

Board staff has considered the findings of the Board in EB-2011-0099 wherein the Board had to make a very similar determination about both the production and confidential treatment of very similar information. In that case the Board was asked to remove a “salary survey” from the record. The Board determined that it was relevant to the proceeding and as such ordered that it remain on the record. In making this determination, the Board stated that:

E.L.K. relied on the salary survey to demonstrate the reasonableness of its management compensation costs in its Application and therefore must have itself considered this evidence to be relevant<sup>2</sup>.

Board staff submits that Burlington Hydro clearly relied on the Hay study to support its proposed compensation levels for management and non-union staff, as shown in the following reference from its evidence:

In order to ensure Burlington Hydro is remaining competitive in their compensation package for their non-union staff, a review is conducted at least every three years. The last review was conducted by Hay Group in November 2011<sup>3</sup>.

Regarding the Benchmarking Survey, Board staff acknowledges that Burlington Hydro distinguishes its use of the Benchmarking Survey from the salary survey in EB-2011-0099 in its submission on the SEC Notice of Motion:

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 the Board compelled its production on the record. Such is not the case in this Application; [Burlington Hydro] has not incorporated reliance on the [Benchmarking] Survey in this Application, instead respecting the contractual obligation not to disclose the [Benchmarking] Survey or its details.

Nevertheless, Board staff submits that, while there may not appear to be any direct references to the Benchmarking Survey in Burlington Hydro’s evidence, the document still provides valuable information regarding Burlington Hydro’s performance relative to other LDCs.

Board staff notes that in determining that the document should be produced pursuant to Procedural Order No. 4, the Board stated that benchmarking information is specifically

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<sup>2</sup> EB-2011-0099 Decision on Confidentiality, March 19, 2013, p. 4

<sup>3</sup> EB-2013-0115, Exhibit 4, Tab 4, Schedule 1, p. 2

important in addressing Issue 2.1 in the Board approved Issues List. Furthermore, the Board has used benchmarking for many years in its determination of rates, and this has been reaffirmed as part of the Board's Renewed Regulatory Framework for Electricity Distributors<sup>4</sup>. Under these circumstances, Board staff submits that the Benchmarking Survey is relevant to this proceeding.

Board staff further notes that nearly all of the information reported in the Benchmarking Survey is publicly available in the Board's Yearbooks of Electricity Distributors, or can be discovered through the individual distributors' cost of service applications.

Finally, Board staff submits that the overriding consideration whether a document shall become part of a public record is neither the terms of its copyright nor the preferences of the applicant, but the document's content and relevance to the matters at issue in the proceeding. In its Decision (EB-2011-0099) the Board stated:

... the fact that the party preparing a document wishes to have it kept confidential is not determinative. Nor does the fact that a document may be copyrighted prevent it from entering the public record. The Board has consistently allowed this type of information to form part of the public record in the past. There does not appear to be any serious concern relating to any of the considerations identified in ... the Practice Direction.

Board staff submits that the reasoning in EB-2011-0099 applies equally to this proceeding, and that both the Hay study and the Benchmarking Survey should be placed on the public record and should not be retracted.

*- All of which is respectfully submitted -*

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<sup>4</sup> *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach*, October 18, 2012, pages 56, 59