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BY EMAIL AND RESS

April 3, 2014
Our File: EB20130115

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2013-0115 – Burlington Hydro Inc. – Confidentiality Submission

We are counsel to the School Energy Coalition (“SEC”). Pursuant to Procedural Order No. 3, these are SEC’s submissions on the request by Burlington Hydro Inc. (the “Applicant” or “BHI”) for confidentiality treatment over certain information.

BHI seeks an order from the Board treating three pieces of information as confidential pursuant to the *Practice Direction on Confidential Filings* (the “*Practice Direction*”):

1. Portions of a compensation study summary filed in response to 4.1-SEC-9. (“Compensation Study Summary”).
2. The wage increase BHI forecasts for its unionized workforce after the expiry of the current collective agreement, filed in response to 4.2-SEC-17.
3. The benchmarking survey filed in response to Procedural Order No. 4 (“Benchmarking Survey”).

With respect to item number 2, the wage increase BHI has forecast for its unionized workforce after the expiry of the current collective agreement, SEC agrees that this information should be treated as confidential.

With respect to items 1 and 3, SEC objects to the claim of confidentiality for the reasons set out below. Further, SEC opposes BHI’s proposal to withdraw the information if confidentiality treatment is not granted.

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General Comments

A hallmark of the Board's regulatory philosophy is its strong goal of transparency. To accomplish this the Board recognizes that confidentiality is an exception. Its general policy is that information should be available for inspection by the public, and its proceedings should be "open, transparent and accessible".¹ To be treated as confidential pursuant to the *Practice Direction*, "the onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case."² Further, any harms alleged by the Applicant cannot be speculative, and must outweigh the public interest in providing the documents on the public record.

This is particularly important with respect to the documents in question. The Board has recognized the importance of benchmarking. The *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* ("RRFE") provides that benchmarking will be an increasingly important part of rate regulation of electricity distributors.³ The Approved Issues List in this proceeding, and every other cost of service proceeding for May 1, 2014 rates, includes a specific issue on the topic.⁴ Benchmarking is an important way for the Board to determine if rates are "just and reasonable". SEC has long been a proponent of this approach, and strongly supports the Board's increasing emphasis in this area.

SEC submits that the Board is not just *encouraging* utilities to conduct benchmarking exercises, but making it effectively a requirement. 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 not allow the public to see the results of these studies.

Compensation Study Summary

BHI is seeking confidentiality treatment over a parts of a 3 page summary document of a Compensation Review conducted by the Hay Consultants on its behalf. The summary compares BHI's compensation levels to other Ontario utilities and industrial firms. BHI is seeking confidentiality status on grounds that it is the Hay Group's proprietary work product and is key to their ongoing commercial success. SEC submits this information should not be accorded confidentiality treatment.

This is important benchmarking information that will allow the public to see how BHI's compensation compares to other utilities and other companies. The information contained in the document is not proprietary models, information about data collecting techniques or individual data points. It is high level information, aggregated by position category (Executive, Manager, and Professional/Admin) and by comparator category (24 utilities and 350 industrial market companies). Further, the document itself seems to have been created as a way for the Board to see the information without needing to review the underlying report which was produced in November 2011: "Hay Group has been asked to produce aggregate market tables for purposes of review by the OEB..".

¹ *Practice Direction on Confidential Filings* at p. 2

² *Practice Direction on Confidential Filings* at p. 2

³ *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, dated October 18 2012, at p.56, 59

⁴ "Does the applicant's performance in the areas of: (1) delivering on Board-approved plans from its most recent cost of service decision; (2) reliability performance; (3) service quality, and (4) **efficiency benchmarking**, support the application?" [emphasis added]

SEC submits this comparative benchmarking information is important information that should be placed on the public record.

Benchmarking Survey

The Benchmarking Survey filed in response to the Procedural Order No.4 is *The MEARIE Group's 2013 Utility Performance Management Survey* and contains two separate reports: i) *Volume I: Management Report*, and ii) *Volume II: Statistics and Ratios Report*. Volume I provides comparison between BHI and the 1st quartile, mean, and 3rd quartile statistics of the 27 other participating utilities. Volume II breaks down that information by 3 categories for utility size (number of customers) and provides each individual participant's statistics. Volume II provides the contextual background, specific utility information, and further refinement by providing benchmarking information by utility size. SEC submits this information should not be accorded confidentiality treatment.

While BHI has not set out any rationale for seeking confidentiality⁵, in anticipation of any rationale it does provide in its reply submissions, SEC makes the following comments:

- i) ***Public disclosure will have not have an adverse effect in utilities' participation in the survey.*** BHI, like any other utility who participates in these surveys, should be commended for doing so, and it is indeed an appropriate activity of the distributors' industry association to manage and promote these initiatives.⁶ Collective action by the industry, through their association, to improve their outcomes through benchmarking of various facets of their operations and costs, is precisely what the Board has been promoting. SEC expects that going forward more - not less - utilities will be undertaking benchmarking initiatives.

- ii) ***There will be no significant financial loss to the MEARIE Group.*** SEC does not believe there will in fact be any material loss to MEARIE from the public disclosure of the survey reports. In fact, SEC would expect that an order requiring disclosure will instead send a strong message to other distributors that, through MEARIE or another entity, benchmarking is an expectation of the Board, and a good utility management practice. The more information of this sort is made public, the more utilities will be driven to excel through the expectations of their customers. Conversely, hiding the benchmarking information undermines the Board's RRFE direction.

Further, SEC submits that none of the information is truly proprietary. MEARIE has collected information that is either publically available, or regularly disclosed in the regulatory process, and compared that information against other publicly available or regularly disclosed information.

Regardless, even if MEARIE would suffer some financial loss, the public interest in producing this important information, paid by ratepayers, comparing Board regulated utilities, must outweigh any potential harm.

⁵ Submissions of Burlington Hydro Inc. With Respect To The Notice of Motion Filed by the School Energy Coalition On March 11, 2014 at para 89

⁶ The MEARIE Group is the "sister company" to the Electricity Distributors Association ("EDA").
http://secure2.eda-on.ca/imis15/MG/Careers/Who_is_MEARIE.aspx

- iii) **Other LDCs whose information is contained the Volume II Report, have not consented to that information being disclosed.** LDCs cannot limit or exclude the Board's jurisdiction and policies by private agreement amongst themselves or with their service providers. As the Board has said in the past, utilities "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 reasonably be required to be produced as part of the regulatory process."⁷ This information falls squarely into that category. Further, most of the data that seems to be the input to the survey are information that is available either from the Annual Yearbook of Electricity Distributors, or if not there, would be information that would in the regular course be publicly disclosed during a cost of service rate application.

Insofar as BHI raises grounds for confidentiality that have not been discussed above, SEC reserves the right to reply.

Withdrawal Request

BHI is requesting that if the Board does not grant confidentiality treatment, it will "retract them". The Board has in the past stated in relation to a request to withdraw a document from the record that the, "key issues are relevance and materiality: if the document is relevant to the proceeding and its probative value exceeds any potential prejudice (for example the difficulty in preparing the document), then generally it belongs on the record."⁸ BHI has provided no rationale for why any of the documents should be withdrawn.

With respect to the Benchmarking Study, section 5.1.13 of the *Practice Direction* states that a request to withdraw information does not apply to information that was required to be produced by an order of the Board.⁹ The Benchmarking Study was required to be produced by the Board in Procedural Order No. 4 in response to SEC's motion, and thus it cannot be withdrawn. The rationale for this provision is obvious. The Board has already determined in making the order for BHI to produce the Benchmarking Survey that it is relevant and that the probative value outweighs any prejudicial effects.

With respect to the other information, it is clearly relevant to this proceeding and should be on the public record. Compensation benchmarking and union wage increase information are central to the specific issues in the proceeding and BHI's requested revenue requirement. BHI relied upon the information underlying the Compensation Summary Table as a basis for the reasonableness of its non-union staff compensation costs.¹⁰

⁷ *Procedural Order No. 4* at p. 4, *Decision on Phase I Partial Decision and Order: Production of Documents* (EB-2011-0140), dated June 14 2012, at p.3

⁸ *Decision on Information Withdrawal Request* (EB-2012-0153), dated August 2, 2013 at p.4

⁹ Section 5.1.13 of the *Practice Direction*: "The ability to request the withdrawal of information under section 5.1.12 does not apply to information that was required to be produced by an order of the Board."

¹⁰ "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 the Hay Group in 2011." See Ex.4/4/1/p.2

Summary

SEC submits the Board should not accord confidentiality treatment to either the Compensation Study Summary or the Benchmarking Survey, but should instead allow them to be open to public scrutiny. It should also deny BHI's request for the information to be withdrawn from the record if confidentiality is not ordered. Benchmarking information is of increasing importance to the Board in its exercise of its rate-making authority. The public interest is best served by having both documents in full on the public record.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

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