

EB-2013-0115
Burlington Hydro Inc.

Procedural Order #3 provides for submissions with respect to the continued confidential treatment and proposed withdrawal of the following information:

- Portions of a compensation study summary filed in response to 4.1-SEC-9 (the “Study”);
- The wage increase Burlington Hydro Inc. forecasts for its unionized workforce after the expiry of the current collective agreement, filed in response to 4.2-SEC-17; and
- The benchmarking survey filed in response to Procedural Order No. 4 (the “Survey”).

Only Board Staff and the School Energy Coalition (“SEC”) made submissions with respect to the continued confidential treatment and proposed withdrawal of documents. Neither Energy Probe nor the Vulnerable Energy Consumers Coalition filed any submissions pursuant to Procedural Order #3.

CONFIDENTIAL TREATMENT OF RESPONSE 4.2-SEC-17

Both Board Staff and SEC made submissions in support of a finding that the wage increase information filed in response to interrogatory 4.2-SEC-17 should remain confidential. Accordingly Burlington Hydro does not believe it is necessary to make further submissions with respect to the continued confidential treatment of that information, as all parties either actively support such treatment or have remained silent on the issue.

CONFIDENTIAL TREATMENT OF THE STUDY AND THE SURVEY

Both Board Staff and SEC made submissions to the effect that the Study and the Survey should not be afforded confidential treatment.

What follows are Burlington Hydro’s submissions in support of the continued confidential treatment of the Study and the Survey.

Public disclosure of either the Study or the Survey could potentially harm the distribution industry. The Study and the Survey were prepared by their respective authors as a product to assist distributors in ascertaining how they are performing relative to their peers. It is beneficial to customers and stakeholders in that it encourages the identification and adoption of industry best practices. If either the Study or the Survey were publicly disclosed, participating distributors (and in the case of the Study, other companies) may not wish to continue participating, having been assured that their information, including information that is not normally filed with the Board, would remain confidential. Without the participation of numerous distributors (and in the

case of the Study, other companies) and full and forthright disclosure of all results, the Survey and the Study will be of little value.

Further, under the Board's Renewed Regulatory Framework for Electricity, benchmarking is encouraged. If the Board wants distributors to engage in benchmarking initiatives, beyond the benchmarking initiatives of the Board, distributors should be given the security of knowing that their benchmarking data will be treated confidentially. Removing that security risks inadvertently compromising the Board's benchmarking objectives under the RRFE.

Burlington Hydro urges the Board to recognize, through the continued confidential treatment of the Study and the Survey, that continued access to third party information and analysis such as that represented by the Study and the Survey entirely depends on third parties actually being incented to collect such information and provide analysis of that information. That incentive comes in the form of being able to recover the costs of collecting that information and providing the related analysis (and in some cases to earn a profit for doing so) by being able to charge customers for their work. While it may be the case that, *ex post facto*, the Board can compel such information and analysis to be produced on the public record regardless of the terms imposed by third parties on their work product, the natural effect is for such third parties to refrain from such ventures in the future, since their work product will be at risk of being provided to the world at large through documentary production in OEB proceedings without the corresponding and necessary financial recovery.

Similarly public disclosure of the Study or the Survey could potentially result in a significant financial loss to their respective authors as a result of its effect on participation. Collecting and providing information such as that which is contained in the Study and the Survey is a revenue source for their respective authors that could end if distributors were to stop participating because there was no assurance that their confidential information will continue to remain confidential.

The Study and the Survey contain data that relates to the performance of other distributors (and, in the case of the Study, other companies) who have in no way consented for their data to be shared. A great deal of this data is not publicly available.

If either the Study or the Survey are made public some LDCs (and, in the case of the Survey, other companies) may not be encouraged to participate because they feel they can obtain the information for free, which further dilutes the survey and implicitly penalizes those LDCs who spend the time and money to participate – both could lead to the dilution of document' value.

The Study and the Survey show their respective authors' unique approach, methodology and organization of information that they require participants to treat confidentially; not only is the information confidential, in each case the approach is proprietary and valuable to their respective authors. Making the Study or the Survey public would give competitors an unfair

competitive advantage, in that they would be able to co-opt the author's proprietary approach in competing to provide similar information and analysis to the market.

Burlington Hydro repeats and relies on its submissions dated March 17, 2014 with respect the reasons why it should not have been compelled to disclose the Survey in the first instance; in particular that:

- Burlington Hydro did not conduct the survey;
- Burlington Hydro was only a participant of the survey; and
- 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.

In Burlington Hydro's respectful submission, if it is the case that the Board will not give effect to a non-disclosure agreement between a utility and a 3rd party with respect to information that the utility only has in its possession as a result of that non-disclosure agreement, the Board should nevertheless limit the breach of the non-disclosure agreement by limiting the circulation of the information by providing for its confidential treatment. Burlington Hydro did not seek the non-disclosure commitment; it was required to agree to non-disclosure as a condition of access.

To that end Burlington Hydro notes that in compelling production of similar information the Board has provided for the confidential treatment of the information within the record. In EB-2012-0031, a Hydro One Networks Inc. Transmission Application, the Board compelled the production of a Canadian Electricity Alliance (CEA) survey, and provided for its confidential treatment on the record.¹

For all of these reasons, Burlington Hydro requests that the Study and the Survey be treated confidentially on a permanent basis.

WITHDRAWAL OF INFORMATION IF CONFIDENTIALITY IS NOT AFFORDED

With respect to the wage increase information at 4.2-SEC-17, all parties either support confidential treatment or are silent on the issue, such that Burlington Hydro does not believe it is necessary for further submissions including submissions on possible withdrawal of the information.

¹ EB-2012-0031, Transcript, Motion Hearing, October 23, 2012, page 29. Burlington Hydro notes that the CEA subsequently notified the Board that it would be appealing the production order despite the confidential treatment. Subsequent to that notice, HONI and SEC (the party that had sought production of the survey) agreed that, in the context of a settlement that settled all issues which the survey touched upon, the survey was no longer necessary for the public record and could be withdrawn along with all references to the survey in the original evidence. (See EB-2012-0031, letter from HONI dated November 2, 2012).

With respect to the Survey, Burlington Hydro acknowledges that the Survey was ordered for production by the Board and, that as such, in the normal course, the ability to request withdrawal would not be automatically afforded under section 5.1.12 of the Practice Direction on Confidential Filings as a result of section 5.1.13. However Burlington Hydro would respectfully suggest that such is only the case on the presumption that the order compelling production was made on the basis of a finding that the document was relevant and that the probative value of the information outweighed the potential prejudice in having it produced. In the present case Burlington Hydro respectfully submits that the Board could not and did not make any specific findings about the probative value of the Survey as compared to the prejudicial effects of placing it on the record, since the Board did not view the Survey as part of the production motion, nor was it made privy to any of the details of the Survey. Accordingly Burlington Hydro submits that it would be appropriate for the Board to entertain a request for withdrawal in such a case.

In addition to the submissions that Burlington Hydro has already made with respect to the prejudice that will ensue should the Survey be made public, Burlington Hydro further notes that no part of the Survey was integrated into or referred to in its application; there is no evidence from Burlington Hydro on the applicability of the Survey as an appropriate benchmark of Burlington Hydro against its appropriate peers, since Burlington Hydro did not rely on (nor was it permitted by the terms of the contract to rely on) the Survey in its application.

In order for the Survey to be used appropriately in this application Burlington Hydro would have to spend undue amount of time and effort to ensure that the Survey results are properly and accurately reflected in Burlington Hydro's application, including any necessary contextual commentary to explain the Survey results, and including a review of the circumstances of the proposed peer group. This would likely be impossible to do, however, since Burlington Hydro does not have the available resources to undertake such a task, nor does it have access to the various participant utilities in order to ensure the Survey's results are appropriately contextualized. While this is a prejudicial effect that can be largely avoided if the Survey is afforded confidential treatment, the availability of the Survey on the public record without an appropriate response from Burlington Hydro (a response Burlington Hydro could not undertake to provide in any adequate way) would be prejudicial.

Accordingly Burlington Hydro requests that, having now had the opportunity to review the Survey and weigh its probative value against the prejudice that will ensue from what Burlington Hydro would call its "incomplete" use in the proceeding, the Board entertain a request for withdrawal in the event the Board determines that the Survey should not be afforded confidential treatment.

With respect to the Study, Burlington Hydro specifically asserted that it was placing the document on the record voluntarily on the condition that it remain confidential, and that it would seek to withdraw it if confidentiality was not afforded.

SEC suggests at page 4 of its submissions that Burlington Hydro should not be allowed to withdraw the Study because it is “central to the specific issues in the proceeding” and that Burlington Hydro “relied upon the information underlying the Compensation Summary Table as a basis for the reasonableness of its non-union staff compensation costs”. Board Staff does not appear to make specific submissions as to why the Study should not be allowed to withdraw it, although it appears to implicitly agree with SEC’s assertions.

In addition to the same concerns Burlington Hydro has raised with respect to the Survey and the prejudicial effect of its “incomplete” use on the public record, Burlington Hydro respectfully submits that the Study is not central to the specific issues in the proceeding, in that it is dated, having been completed in 2011, one year after the last rebasing.² The central issue with respect to compensation in this proceeding is the appropriate compensation in 2014; while there is some relevance to the historical benchmarking of its compensation, Burlington Hydro believes it is hyperbole to suggest that the details of a 2011 snapshot comparison of Burlington Hydro’s compensation against other utilities and companies is “central” to the determination of the reasonableness of its proposed 2014 compensation.

Under these circumstances Burlington Hydro respectfully submits that should the Board determine that the Study not remain confidential that Burlington Hydro be permitted to withdraw it, in order to avoid the prejudice that results from Burlington Hydro being compelled to place information it agreed to keep confidential on the record, prejudice which in its respectful submission outweighs the probative value of a Study which relates to 2011 when the central issue in the application is the proposed 2014 costs. Burlington Hydro acknowledges that, in the event it is allowed to withdraw the Study, the reference to the Study in the evidence would also necessarily have to be withdrawn from Exhibit 4, Tab 4, Schedule 1, page 2, lines 30-32.

In addition to these submissions, we attach a letter from The MEARIE Group in support of the continued confidential treatment of the Survey.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF APRIL, 2014

² Burlington Hydro notes that while the information is arguably dated, allowing the information on the record on a non-confidential basis would still reveal the author’s approach and methodology such that, in Burlington Hydro’s submission, confidentiality concerns are not similarly dated in this instance.



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April 10, 2014

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Sent by email: kfarmer@burlingtonhydro.com

Dear Ms. Farmer

Re: Disclosure of MEARIE Documents in Ontario Energy Board File No. EB-2013-0115

We would like to provide you with our comments regarding a survey report owned by MEARIE in light of a request by the Schools Energy Coalition ("SEC") for such materials in the context of Burlington Hydro's current rate application to the Ontario Energy Board. We wish to advise MEARIE has declined to waive its rights and expects and requires Burlington Hydro comply with the terms of its confidentiality agreement.

As well, it is Burlington's responsibility to take all steps to persuade the Board that MEARIE's materials be treated as confidential. We understand Burlington Hydro (through Procedural Order No. 4, dated March 19, 2014) was instructed to 'immediately provide the Benchmarking Survey' and has done so on an interim confidential basis. We continue to insist the materials be treated as confidential. This is an important issue for MEARIE both from its own commercial perspective (i.e. if the SEC motion is granted MEARIE will suffer a financial loss) and because the understanding of all the participants in the survey that led to the creation of the materials was that the materials and underlying data would be held confidentially.

MEARIE's position rests on three key principles:

1. MEARIE is the owner of copyright in both its reports, scorecards and data models. The SEC, Burlington Hydro and the Board would infringe on MEARIE's copyright in these materials contrary to the Federal *Copyright Act* by reproducing or authorizing the reproduction of these materials without the consent of MEARIE, which consent MEARIE has not granted.
2. Benchmarking is important for LDCs, but absent a regulatory requirement that LDCs participate in benchmarking, which does not currently exist, benchmarking relies on the cooperation of a sufficient number and diversity of participants. In this environment, forcing public disclosure in regulatory proceedings of the benchmarking data of all benchmarking participants without their

consent will lead to insufficient participation in the benchmarking to make it a useful tool. Private benchmarking is useful to LDCs for reasons other than regulatory review and they should not be effectively precluded from participating in benchmarking as a management tool. All this would be both an adverse public policy result and do damage to MEARIE.

3. The reason MEARIE is paid by LDCs to do surveys and produce benchmarking reports is because we add value to this exercise.

While MEARIE opposes disclosure of its materials in this proceeding, we are of the view this issue raises broader concerns than are confined to Burlington Hydro's rate application. MEARIE would welcome an opportunity for a wide ranging discussion about this issue with the Board and other stakeholders.

In the meantime, please convey to the Board, in addition to Burlington Hydro's continued opposition to disclosure and alternative request for confidentiality, if the Board orders MEARIE's materials disclosed publicly, Burlington Hydro request the Board delay for a reasonable period the implementation of such an order so that it can seek appropriate relief from the courts.

Yours truly



Andrea Dale
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The MEARIE Group