



**EB-2013-0115**  
**EB-2013-0159**  
**EB-2013-0174**

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

**AND IN THE MATTER OF** applications by Burlington Hydro Inc., Oakville Hydro Electricity Distribution Inc., and Veridian Connections Inc. for orders approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.

**DECISION AND ORDER ON CONFIDENTIALITY**  
**May 29, 2014**

Pursuant to section 21 (5) of the *Ontario Energy Board Act, 1998*, the Board has combined its Decision on Confidentiality relating to requests for confidential treatment of certain documents in three separate cost of service proceedings. The three proceedings are Burlington Hydro Inc. ("Burlington Hydro", EB-2013-0115), Oakville Hydro Electricity Distribution Inc. ("Oakville Hydro", EB-2013-0159) and Veridian Connections Inc. ("Veridian", EB-2013-0174). The Board has decided to proceed with one Decision as there are similar issues and similar documents for which confidentiality is being claimed.

**Background to Confidentiality Requests**

In each of the three proceedings, the School Energy Coalition ("SEC") filed Notices of Motion asking the Board to require the distributors to provide full and adequate responses to certain interrogatories by producing copies of certain documents and surveys.

All documents were filed on a confidential basis.

*Burlington Hydro*

In the Burlington Hydro proceeding, SEC filed a Notice of Motion seeking 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 a benchmarking survey prepared by MEARIE (the “MEARIE Benchmarking Report”). In accordance with Procedural Order No. 4, Burlington Hydro filed the MEARIE Benchmarking Report on a confidential basis.

Burlington Hydro also requested confidential treatment for a compensation study conducted in November, 2011 that SEC requested in interrogatory 4.1-SEC-9 (the “Hay Study”); and the forecast wage increase for Burlington Hydro’s unionized workforce after the expiry of its current collective agreements in response to interrogatory 4.2-SEC-17.

*Oakville Hydro*

In the Oakville Hydro proceeding, SEC’s Notice of Motion sought an order requiring Oakville Hydro to provide a full and adequate response to interrogatory 2.1-SEC-3, by producing copies of two surveys/studies. The first is the MEARIE Benchmarking Report. The second document sought contained a benchmarking report and data models prepared by the Canadian Electricity Association (“CEA”), (the “CEA Report”). The MEARIE Benchmarking Report was filed with the Board on a confidential basis in accordance with Procedural Order No 6.

In order to be permitted to make submissions on the Motion, the CEA filed a letter requesting intervenor status. The CEA indicated that it is the owner of copyright of the CEA Report and data models that could be disclosed if the Motion were granted. SEC and the CEA subsequently determined that the CEA Report and data models did not address the issues SEC was pursuing. As a result, SEC withdrew its request for disclosure. Therefore a decision on the CEA Report and data models is not required. However, SEC’s request for the MEARIE Benchmarking Report remains outstanding.

Oakville Hydro also requested confidential treatment of another document, the PeopleFirst Salary Survey, filed in response to interrogatory 4.2-Staff-29.

*Veridian*

Veridian requested confidential treatment of the MEARIE Benchmarking Report and the MEARIE Management Salary Survey filed in response to interrogatories 2.1-SEC-2 and 4.2-SEC-11 .

**Organization of the Decision**

The Board received submissions from SEC and Board staff as well as reply submissions from the affected distributors on whether the confidentiality claims in each proceeding should be accepted.

The Board will first address the MEARIE Benchmarking Report. The Board will then address the outstanding confidentiality claims in the Burlington Hydro, Oakville Hydro and Veridian proceedings.

**Request for Confidential Treatment of the MEARIE Benchmarking Report**

The individual parties' positions were consistent in all three cases. In both the Burlington Hydro and Veridian cases, MEARIE filed a letter as part of the applicant's reply submissions opposing placing the MEARIE Benchmarking Report on the public record.

In all three proceedings, Board staff and SEC opposed the confidential treatment of the MEARIE Benchmarking Report. The following summarizes the arguments raised by Burlington Hydro, Oakville Hydro and Veridian in favour of confidential treatment and the collective submissions of Board staff and SEC opposing confidential treatment.

**Summary of Arguments – Confidential Treatment of the MEARIE Benchmarking Report***Effect on Participation*

In opposing public disclosure of the MEARIE Benchmarking Report, submissions were made by MEARIE in both the Burlington and Veridian proceedings in the form of a letter attached to the Responding submission of the utility. In the event the report was made

public, MEARIE submitted that distributors may not wish to continue participating in benchmarking activities, having been assured that their information would remain confidential. Without the participation of numerous distributors in such surveys, the results would then be of limited value. It was further noted that private benchmarking is useful to distributors for reasons other than regulatory review and the threat of public disclosure should not effectively preclude distributors from participating in benchmarking as a management tool. It was further submitted that removing the “security” of confidentiality risks inadvertently compromising the Board’s benchmarking objectives under the Renewed Regulatory Framework for Electricity Distributors (“RRFE”) <sup>1</sup> because fewer distributors would be willing to participate in benchmarking activities.

SEC argued that the risk of distributors declining to participate in benchmarking if the MEARIE Benchmarking Report was made public is a speculative risk. In SEC’s submission, distributors should be commended for participating in benchmarking activities, given the Board’s expectations regarding benchmarking as part of its RRFE. SEC stated that it expected that the Board’s expectations would result in more participation in benchmarking activities rather than less.

#### *Economic and Financial Impact to MEARIE*

Distributors submitted that continued access to benchmarking information is entirely dependent on third parties being financially incented to collect and analyze such information. They argued that public disclosure of this benchmarking information, despite the fact that it may contain confidentiality agreements, would cause third parties such as MEARIE to refrain from conducting these studies, as their work product would be publicly disseminated without the corresponding and necessary financial recovery. Further, distributors submitted that publicly revealing MEARIE’s approach, methodology and organization of information would give competitors an unfair competitive advantage, in that they would be able to co-opt MEARIE’s proprietary approach in competing to provide similar information and analysis to the market. MEARIE added that, as specialists with respect to the material, they are paid to add value to the preparation of benchmarking surveys and reports. The distributors argued that the reduction in revenue source would be exacerbated through the decreased participation of distributors who provided their data in the survey on the understanding that they would remain confidential.

---

<sup>1</sup> *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach*, October 18, 2012, pages 56,59

SEC noted that no evidence of potential financial loss had been presented. SEC argued that an order from the Board requiring disclosure would send a strong signal to distributors regarding the importance of benchmarking, thus encouraging participation and resulting in revenues for MEARIE. As benchmarking becomes more prevalent, it would be to MEARIE's advantage through their relationship with the industry to maintain oversight of this activity. SEC further submitted that, even if MEARIE suffered some financial loss, the public interest in producing this information, paid for by ratepayers, comparing Board regulated utilities, outweighs any potential harm.

#### *Availability of Data Used in Benchmarking*

Both Board Staff and SEC noted that the data collected in the Benchmarking Report appeared to be the same as data that is publicly available through the annual Yearbook of Electricity Distributors or that would normally be publicly disclosed during distributors' cost of service rate applications. Distributors replied that a "great deal" of the information contained in the MEARIE Benchmarking Report is not publicly available.

#### *Data Protected by Federal Copyright Law*

MEARIE submitted that it was the owner of copyright in both their reports and models, and that reproduction of these materials without their consent would infringe on their copyright, contrary to the *Copyright Act*.

Board staff submitted that, as a matter of public policy, the economic interests of copyright owners do not apply when the rules of practice and procedure provide for disclosure of copies of relevant documents. The Association of Major Power Consumers of Ontario filed a letter with the Board on April 8, 2014 making a similar submission. Board staff noted that an exception to the *Copyright Act* relates to "fair dealing for the purpose of research, private study, education, parody or satire"<sup>2</sup>. Further, Board staff noted that the Supreme Court has confirmed that the concept of "research" should be interpreted broadly; Board staff submitted that documents in a regulatory proceeding would be included in such an interpretation.

---

<sup>2</sup> *Copyright Act*, R.S.C. 1985, Section 29, c. C-42

---

Further, Board staff submitted that the overriding consideration of 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. Referencing the Board's Decision in (EB-2011-0099):

*... 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.*

### *Significance of Benchmarking to Regulatory Environment*

All parties were in agreement that the Board's increased reliance on benchmarking has been reaffirmed as part of its RRFE. Board staff argued that while there may not appear to be any direct references in the evidence to the confidential material, benchmarking information is specifically important in addressing Issue 2.1<sup>3</sup> in the Board approved Issues List and that the MEARIE Benchmarking Report provides valuable information regarding distributors' performance relative to their peers.

### *Agreements with MEARIE*

Board staff submitted that, while it recognized the distributors' argument that they have agreed with third parties not to disclose the information, the Board has consistently allowed this type of information to form part of the public record. Board staff noted that the overriding consideration whether a document should become part of the public record is its content and relevance to the proceeding. Given the Board's view of the importance of benchmarking, Board staff argued that distributors should be particularly cognizant of the likelihood that such information may reasonably be required to be produced as part of the regulatory process.

---

<sup>3</sup> Issue 2.1 on the Board's approved issues list is: 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?

SEC also noted that the confidentiality agreements in these cases raise broader concerns, insofar as distributors who enter into these types of agreements face a conflict between their obligations to third parties and their obligation to provide all relevant information to their regulator. SEC further noted that the Board's regulatory philosophy is based on a strong goal of transparency, and that the Practice Direction places the onus on the party requesting confidentiality to demonstrate that confidential treatment is warranted. SEC urged the Board to send a strong message to distributors that entering into such agreements is not appropriate.

### **Board Findings on Confidentiality of the MEARIE Benchmarking Report**

The request for confidentiality of the MEARIE Benchmarking Report is denied.

As set out in the Board's *Practice Direction on Confidential Filings*, it is the Board's general policy that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board's view that its proceedings should be open, transparent and accessible. The Practice Direction seeks to balance these objectives with the need to protect information that has been properly designated as confidential. In short, placing materials on the public record is the rule and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate why confidentiality is appropriate.

The Board recognizes that the distributors have non-disclosure agreements with MEARIE. However, as noted by this Board in previous decisions, applicants must be cognizant of the fact that it is up to the Board to determine confidentiality and that when regulated entities enter into confidentiality agreements with third parties that extend to the provision of information and documents, the utility knows or ought to know that they may reasonably be required to produce the documents as part of the regulatory process<sup>4</sup>.

The Board is not persuaded that disclosure of the MEARIE Benchmarking Report will result in reduced distributor participation in such studies. As clearly articulated in the Board's RRFE report, the Board is increasing its reliance on the use of benchmarking in

---

<sup>4</sup> EB-2011-0123, EB-2011-0140, EB-2011-0099

---

setting distributors rates. Participation in benchmarking studies is driven by the objective of management to better run their business. The Board finds that publication of the benchmarking studies will not have a dampening effect on the value that benchmarking information provides to utilities.

The Board finds that MEARIE has not substantiated the claim that financial or economic loss would occur as a result of making the MEARIE Benchmarking Report public. Based on the submissions provided, the Board is not convinced that public disclosure of the report could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, or be injurious to the financial interest of MEARIE.

Further, the Board does not agree that there is anything in the MEARIE Benchmarking Report that reveals any unique and proprietary approach, methodology or organization of information that, as suggested by the distributors, would give MEARIE's potential competitors an advantage.

The Board agrees with Board Staff and SEC's submissions that most if not all the data is already publicly available or would be reasonably disclosed during distributors' cost of service rate applications. Simply stating that a "great deal" of the information contained in the MEARIE Benchmarking Report is not publicly available, does not discharge the distributors' onus that confidential treatment is warranted.

*Burlington Hydro – additional documents.*

Burlington Hydro requested confidential treatment of portions of its response to interrogatory 4.1-SEC-9 which contained a summary table ("Summary Table") from a compensation study commissioned by Burlington Hydro ("Hay Study"). Burlington Hydro submitted that it is contractually bound not to publicly disclose Hay Group's proprietary or commercially sensitive information. While Burlington Hydro obtained Hay Group's authorization to file the Summary Table on a confidential basis, the company submitted that the Hay Group would not permit Burlington Hydro to file any other information either publicly or confidentially. The Summary Table compares average salary information for Burlington Hydro's executive, manager and professional/administration groups to aggregated average data compiled from both an industrial market sample and a selected utilities sample. No individual salary information is provided.

---

Board staff submitted that Burlington Hydro had specifically relied on the Hay Study to support its proposed compensation levels for management and non-union staff. As such, the Summary Table is clearly relevant to the proceeding and should be placed on the public record nor should it be retracted. Board staff submitted that while Burlington Hydro may have agreed to not disclose the information, the Board has consistently allowed this type of information to form part of the public record in the past.

SEC took the position that the Summary Table contained important benchmarking information that will allow the public to see how Burlington Hydro's compensation compares to other utilities and other companies. SEC further argued that the information contained in the document is not proprietary models, information about data collecting techniques or individual data points. Rather it contains high level information, aggregated by position category and by comparator category. Finally, SEC argued that the document itself seemed 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.

Burlington Hydro argued that the Hay Study should remain confidential for the same reasons it set out for why the MEARIE Benchmarking Report should remain confidential.

Burlington Hydro argued that it had specifically asserted that it was placing the Summary Table on the record voluntarily on the condition that it remain confidential, and that it would seek to withdraw it if confidentiality was not afforded.

The Board finds that the Summary Table of the Hay Study is relevant to the proceeding, and that it will be placed on the public record. The Summary Table demonstrates the reasonableness of Burlington Hydro's compensation costs and is relevant to the application and the setting of just and reasonable rates. The Board has relied on precisely this type of salary benchmarking data to set rates in other proceedings. The Summary Table provides a high level aggregation of information and does not identify other participants' details. This information is of interest, not only to the Board and intervenors, but to the ratepayers at large who funded these studies. The Board finds that the probative value of this information outweighs any potential prejudice it might cause Burlington Hydro or any other party.

The Board is not persuaded that disclosure of the Summary Table will result in reduced distributor participation in such studies. As clearly articulated in the Board's RRFE report, the Board is increasing its reliance on the use of benchmarking in setting distributors rates. Further, there is nothing in the Summary Table that the Board finds reveals any unique and proprietary approach, methodology or organization of information that, as suggested by Burlington, would give the Hay Group's potential competitors an advantage.

The Board, therefore, orders the placement of the Hay Study Summary Table on the public record and will not allow Burlington Hydro to withdraw it.

Burlington Hydro also requested confidential treatment of the wage increase it forecasts for its unionized workforce after the expiry of the current collective agreement, filed in response to interrogatory 4.2-SEC-17. 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.

No one disputed that this information be held in confidence. Board staff submitted 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.

The Board finds that this information will remain confidential. While the Board's strong preference is to make information available on the public record, in this case, the Board concludes that the specific harm resulting from public disclosure could outweigh the benefit.

#### *Oakville Hydro – additional document*

With respect to the PeopleFirst Survey filed in response to 4.2-Staff-29, the document contains comparisons and recommendations for salary ranges and adjustments, incentive payments and benefits for Oakville Hydro and its affiliate. The Board did not seek submissions on whether the information should remain confidential as it contains information pertaining to individual compensation levels and is the type of information that the Board often deems to be confidential.

---

*Veridian – additional document*

With respect to the MEARIE Management Salary Survey, filed in response to interrogatory 4.2-SEC-11, the document contains aggregate comparative data for salary adjustments, compensation rates, incentive payments and benefits. An accompanying Survey Report Addendum compiles this data by region, revenues, customer base and number of employees. Individual LDC data is not included in the reports.

Veridian sought confidential treatment and SEC opposed. Both parties argued their positions on the same grounds as those presented for the MEARIE Benchmarking Report. The Board finds that confidential treatment of this information is not warranted.

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. The MEARIE Benchmarking Report be placed on the public record in each of EB-2013-0115, EB-2013-0159 and EB-2013-0174 on or before **June 30, 2014**;
2. The Hay Study Summary Table be placed on the public record in EB-2013-0115 on or before **June 30, 2014**;
3. Burlington Hydro's response to interrogatory 4.2-SEC-17 in EB-2013-0115 shall be treated as confidential;
4. Oakville Hydro's response to interrogatory 4.2-Staff-29 in EB-2013-0159 shall be treated as confidential;
5. The MEARIE Management Salary Survey be placed on the public record in EB-2013-0174 on or before **June 30, 2014**.

All filings to the Board must quote the file number, EB-2013-0115/EB-2013-0159/EB-2013-0174, 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.

**ADDRESS**

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27th Floor  
Toronto ON M4P 1E4  
Attention: Board Secretary

E-mail: [boardsec@ontarioenergyboard.ca](mailto:boardsec@ontarioenergyboard.ca)  
Tel: 1-888-632-6273 (Toll free)  
Fax: 416-440-7656

**DATED** at Toronto, **May 29, 2014**

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary