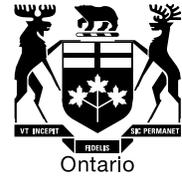


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BY E-MAIL

August 31, 2015

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: PowerStream Inc.
Application for Rates
Board File Number EB-2015-0003**

In accordance with Procedural Order No. 2 issued on August 17, 2015, please find attached the Ontario Energy Board staff submission on confidentiality issues that have been raised in this proceeding.

Original Signed By

Martin Davies
Project Advisor, Electricity Rates & Accounting

Attachment

cc: Parties to EB-2015-0003

**ONTARIO ENERGY BOARD STAFF
SUBMISSION**

POWERSTREAM INC.

EB-2015-0003

Confidentiality Issues

August 31, 2015

Background

PowerStream Inc (PowerStream) filed a letter dated June 26, 2015 requesting that certain documents filed with its application be treated as confidential. The documents are as follows:

1. Assumed Union Wage Increases – includes assumptions as to the 2016-2020 percentage increases in wages for PowerStream employees who are members of the Power Workers Union.
2. Management Report and “Statistics and Ratios” portions of the MEARIE 2014 Utility Performance Management Survey.
3. PowerStream Inc. – 2015-2020 Budget/Financial Outlook – Board of Directors Presentation, December 12, 2014.
4. Compensation Surveys:
 - a. MEARIE 2014 Management Salary Survey
 - b. Conference Board of Canada 2015 Compensation Planning Outlook
 - c. Toronto Board of Trade – Executive Compensation Report 2013-2014.

On August 17, 2015, the OEB issued Procedural Order No. 2 in which it determined that the Assumed Union Wage Increase documents would be granted confidential status as the OEB has previously approved requests of this kind.

The OEB also determined that the other three categories of documents, namely the MEARIE Utility Performance Management Survey, the Board of Directors Presentation, December 12, 2014 and the Compensation Surveys (collectively the Proposed Confidential Material) would be the subject of submissions.

Request for Confidentiality

PowerStream submitted that the Proposed Confidential Material should be treated as confidential for the following reasons:

1. “Management Report” portion of the MEARIE 2014 Utility Performance Management Survey based on 2013 data (referred to in Appendix B-1 to the PowerStream response to SEC Interrogatory F-SEC-11) and (in Appendix B-2) the “Statistics and Ratios” portion of the survey.

PowerStream submitted that the parties preparing these surveys are engaged in competitive businesses and the disclosure of the terms of the surveys could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, and be injurious to the financial interests of those parties since it would enable their competitors to ascertain the survey methodology used by those parties. The parties preparing the surveys have requested that they be kept in confidence.

PowerStream argued that the disclosure of information related to the survey participants could also reasonably be expected to result in survey participants no longer participating in surveys of this kind, as their participation has been premised on the understanding that their information would remain confidential.

2. The 2015-2020 Budget/Financial Outlook – Board of Directors Presentation, December 12, 2014.

Powerstream submitted that these documents include commercially sensitive information related to both regulated and unregulated business activities carried on by PowerStream, including activities related to PowerStream's involvement in renewable generation activities.

As with the MEARIE documents referenced above PowerStream argued that the disclosure of this information could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, and be injurious to the financial interest of PowerStream. It would enable PowerStream's competitors in competitive businesses to determine the extent of PowerStream's activities in those businesses.

PowerStream noted that the maintenance of confidentiality in respect of this document would be consistent with the OEB's treatment of business planning material in other applications, including (for example) Horizon Utilities Corporation's 2011 Cost of Service Application (EB- 2010-0131), in which the OEB made the following finding in response to a request for public disclosure of a Horizon Utilities business plan:

"The Board finds that the business plan material should be confidential, as it has found in other cases. While the Board is interested in having as much information as possible on the public record, the Board relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed. The Board recognizes that some of that information, such as business plans, are of a confidential nature and should be protected as such. The Board notes that it has previously held business plans

to be confidential. As such, Horizon had a reasonable expectation that this document would be maintained as confidential.”

3. MEARIE 2014 Management Salary Survey , Conference Board of Canada 2015 Compensation Planning and the Toronto Board of Trade – Executive Compensation Report 2013-2014.

PowerStream submitted that as with the other utility benchmarking reports discussed above, the parties preparing these surveys are engaged in competitive businesses and as such, for the reasons set out above, the documents should be treated as confidential.

The issue before the OEB is whether the Proposed Confidential Material should be filed as part of the public record. OEB Staff submits in these circumstances, confidential treatment is warranted for the reasons discussed below.

ISSUES

OEB staff submits that there are two issues to consider when determining the appropriate treatment of the Proposed Confidential Material:

- I. Is the Proposed Confidential Material relevant to matters in this proceeding?
- II. Should the Proposed Confidential Material be placed on the public record or be treated as confidential?

ARGUMENT

I. The Relevance of the Proposed Confidential Material

Submission

OEB staff submits that the Proposed Confidential Material is relevant to the matters at issue in this proceeding.

Benchmarking is a core component of how the OEB regulates the energy sector. In its *“Report of the OEB: Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach”* (RRFE) the OEB stated that:

“(b)enchmarking will become increasingly important, as comparison among distributors is one means of analyzing whether a given distributor is as efficient as possible” and that “benchmarking will be necessary to support the OEB’s renewed regulatory framework policies”.¹

The OEB has most recently stated its commitment to benchmarking in its *Report of the OEB on Performance Measurement for Electricity Distributors: A Scorecard Approach* issued on March 5, 2014 which stated that:

“The OEB remains committed to continuous improvement within the electricity sector. Individual distributors achieve continuous improvement through their ongoing efforts to improve services and/or processes that are valued by their customers. Over time and collectively, distributors will advance continuous improvement in the sector through achievement of benchmark performance on valued services and/or processes”².

II. Should the Proposed Confidential Material be placed on the public record or be treated as confidential?

Submission

The OEB’s general policy as stated in its *Practice Direction on Confidential Filings*² (Practice Direction) is that all evidence should be on the public record. The OEB has also recognized that some information may be of a confidential nature and should be protected.

The OEB has dealt with requests for confidentiality for similar documents in other proceedings. In the EB-2013-0115, EB-2013-0159, EB-2013-0174 (Combined Decision), the OEB was asked to treat a MEARIE Benchmarking Report as well as certain Compensation surveys as confidential. After considering submissions from all of the parties to the proceedings and OEB staff, the OEB made the following finding:

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

¹ Ontario Energy Board *Report of the Board Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach (RRFE Report)*, pgs 56 and 59

² *Practice Direction on Confidential Filings*, October 13, 2011, Appendix A, p. 17

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 OEB accordingly denied the request for confidentiality on the basis that:³

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.

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 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.

A similar type of issue also arose in the Toronto Hydro proceeding (EB-2014-0116) where the OEB was asked to treat certain benchmarking documents as confidential.

³ EB-2013-0115; EB-2013-0159; EB-2013-0174 Decision and Order of the OEB on Confidentiality dated May 29, 2014

However, in the Toronto Hydro proceeding the third party who authored the benchmarking reports, the Canadian Electricity Association (CEA), intervened and asserted copyright over the documents. The CEA submitted that the benchmarking data provided to CEA by its members as well as proprietary and confidential data models used by CEA to analyze such data was protected by copyright and was confidential.

The OEB determined that it was not necessary to determine if copyright applies as even if it did, the fair dealing exception to copyright infringement was established:

The OEB finds that Toronto Hydro can provide copies of the reports without there being an infringement of the Copyright Act, based on the fair dealing exception. Copies will not be placed on the OEB website nor will they be further reproduced in any way by the parties as this would affect the financial interests of the CEA. Documents will be returned and destroyed as is in keeping with the OEB's treatment of confidential documents.

In striving to find a balance between the general public interest in transparency and openness, and the need to protect the CEA's competitive position, the OEB is satisfied that in these circumstances, confidential treatment of the reports is warranted.⁴

OEB staff submits that the fair dealing analysis is the appropriate analysis to consider in this case with respect to whether or not the Proposed Confidential Material should be placed on the public record.

In the Toronto Hydro proceeding, the parties and OEB staff put forward the same test to be considered for fair dealing. The test for fair dealing involves two steps, which are (i) to determine whether the dealing is for the allowable purpose of, for example "research," as in the CEA's view, it was inconceivable that the relief sought by SEC could be characterized as private study, education, parody or satire, and (ii) to assess whether or not the dealing is "fair," which involved the consideration of six factors: (1) the purpose of the dealing, (2) the character of the dealing, (3) the amount of dealing, (4) alternatives to the dealing, (5) the nature of the work and (6) the effect of the dealing on the work.

OEB staff submits that the same analysis for confidential treatment can be applied in this case

In striving to find a balance between the general public interest in transparency and openness, and the need to protect the third party's competitive position, OEB staff submits that in these circumstances, confidential treatment of the reports is warranted.

⁴ EB-2014-0116 Decision and Order on Notice of Motion, February 11, 2015 page 9

OEB staff submits that the OEB should treat the Proposed Confidential Material as confidential and ensure that there will not be public dissemination of the information supplied by PowerStream given the circumstances of this case. The OEB has consistently maintained that the utilities it regulates may be required to provide benchmarking reports for consideration as the OEB makes its determinations. However there is merit in treating this information as confidential, unless a compelling case can be made that it is necessary that it be placed on the public record. Further, OEB staff notes that the Toronto Hydro decision on confidentiality was subsequent to the Combined Decision and that this approach appeared to be effective in dealing with the concerns of parties in that proceeding. Given these circumstances, OEB staff sees merit in this approach.

Finally, OEB staff will address the manner in which the confidential documents should be placed on the record of this proceeding in the event the OEB finds that the documents should be afforded confidential treatment.

OEB staff submits that it is the expectation that parties will make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the commercial sensitivity of the information at issue or with any legislative obligations of confidentiality or non-disclosure, and to prepare meaningful redacted documents or summaries so as to maximize the information that is available on the public record. This is intended to provide parties with a fair opportunity to present their cases and permit the OEB to provide meaningful and well-documented reasons for its decisions.

OEB staff submits that PowerStream has not provided satisfactory explanations for why entire documents should be held confidential, nor has it provided redacted copies of the documents. Given OEB staff's review of the subject documents, OEB staff submits that PowerStream should be directed to provide redacted copies. For example, with respect to the benchmarking materials, the specific rankings of the studies' participants (other than PowerStream) should not be on the public record. However, much of the other information contained in the Proposed Confidential Material could be made public. OEB staff submits that PowerStream should be directed to re-file the subject documents in a redacted form that is based on maximizing transparency.

-All of which is respectfully submitted-