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BY EMAIL and PERSONAL DELIVERY

February 25, 2013
Our File No. EB-2011-0099

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2011-0099 – E.L.K 2012 Rates – Disclosure of MEARIE Survey

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #4, these are SEC's submissions with respect to the disclosure of, and confidentiality claim with respect to, the MEARIE Management Salary Survey (the "Survey").

Based on the analysis below, SEC concludes as follows:

1. The Survey is not in fact a confidential document as a matter of law, as it is in the public domain, and was intended to be. It therefore should not be afforded any protection by way of confidentiality or otherwise by the Board.

2. The Survey is clearly relevant to the Application, and indeed to other rate applications before the Board. There is no material prejudice to the Applicant or any other person from its disclosure. Therefore, the Applicant cannot refuse to file it.

3. A document:

    a. paid for entirely by amounts recovered from ratepayers,
    b. relating solely to entities regulated by the Board, and

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c. having as its primary purpose comparisons of regulated costs for use in LDC rate applications,

should be a public document. The Survey is such a document.

Is the Survey Confidential?

The basic rule on the ability to claim a document as confidential is that the person purporting to have the right to make that claim (in this case, MEARIE) must have treated the document as confidential and protected it from public disclosure. It has long been the rule that, when a document enters the public domain – i.e. it becomes known to members of the public – it can no longer be the subject of a confidentiality claim. The British case generally cited as authority for this principle is ***Coco v. A N Clark [Engineers] Ltd. [1969] RPC 41***, a decision of Mr. Justice Megarry that is widely regarded as establishing the modern law of breach of confidence. This principle has been repeated in many cases, both in England and in Canada.

In this particular case, the Survey has not been protected from public disclosure. It was in fact placed on the public record by the Applicant in this proceeding.

There are several facts that should, in our submission, influence the Board's thinking as to whether the Survey should be considered confidential in the legal sense:

1. While MEARIE ensured that the document contains normal warnings against disclosure without consent, MEARIE also distributed the document to at least the 49 participating utilities, and presumably countless other entities (perhaps including the Board), within the Ontario electricity sector. In each of those organizations, numerous individuals would have access to the document. It is likely that hundreds, or more than hundreds, of individuals have already seen this document. Because of movement within the industry, it is virtually certain that individuals, including Board members, currently at the Board have seen either the Survey, or previous versions of the Survey. The greater the ambit of allowed disclosure, the less the author of a document is able to claim that they have protected confidentiality, or that they are prejudiced by any additional disclosure.

2. The Applicant referred to this specific document in their evidence, which is the reason that AMPCO sought its production in the first place. It was, in fact, predictable that a Survey purporting to describe the reasonableness of the Applicant's compensation policies would be sought on production. When AMPCO sought it, the Applicant, despite the warnings on the document, delivered it without objection. All of this suggests that the document was not treated as a confidential document within the Applicant's organization, and the confidentiality warnings on the document were not taken seriously.

3. In EB-2012-0146, the London Hydro 2013 rate case, London Hydro filed Exhibit 4, Appendix B to their application. Appendix 4B is entitled "The MEARIE Group: 2011/2012 Management Salary Survey". It appears to be a more detailed version of the Survey that is the subject of these submissions. While undated, it appears to be approximately a year earlier than the Survey. No confidentiality has been claimed on

this document, which has been on the public record since September. London Hydro has expressly relied on it in response to IR #4.0 SEC-13(d). The document appears to contain all of the information that is included in the Survey, plus considerable additional information.

4. MEARIE specifically worked with Board Staff in the development of the current Survey, as evidenced by the description of the Survey on their website (attached to these submissions). Further, the stated and public intention of the Survey was that it would be used in LDC rate applications. The specific words of MEARIE in this regard are as follows (from the attached excerpt):

   > *"The Ontario Energy Board (OEB) staff participated in a review of the new survey format, its elements and position benchmarks. The MEARIE Group put forth its position that the new survey be* ***recognized as an accepted market benchmark survey for the purposes of compensation evidence in LDC rate filings."*** *[their emphasis]*

In our submission, it is impossible to conclude from the above facts that MEARIE treated the Survey as confidential and sought to protect it from disclosure. It was, in fact, extensively and intentionally disclosed, and was intended for public use.

All of the above suggests that the Survey is not intrinsically qualified for confidential treatment.

In addition, the impact of inadvertent disclosure of the Survey in this proceeding has to be addressed as a separate question. That is an area of substantial activity in the law.

The era of electronic documents and inclusion of electronic documents in discovery has resulted in an explosion of interest in the waiver of confidentiality or privilege through inadvertent disclosure. For more than a decade this question has been the subject of extensive litigation, particularly in the United States.

Although there were principles of law before dealing with inadvertent disclosure, the problem was limited when it related only to the disclosure of paper documents. As more and more documents were electronic, and as a result disclosure included orders of magnitude more documents than in the past, the issue became more acute, and the conventional rule – loss of confidentiality and privilege through disclosure – was rethought.

It is not necessary to go through a detailed analysis of the history and development of this area of law, either in Canada or the US. What is clear is that the focus has been, not on loss of confidentiality, but waiver of privilege (i.e. solicitor-client, litigation, or work product privilege).

So, in the United States the result of this debate has been a new federal rule of evidence, Rule 502, implemented December 1, 2011, which provides that inadvertent disclosure is not always a waiver of privilege. While many state laws still provide that privilege is waived through disclosure, even inadvertent, the federal rule is now setting the standard in that area.

What is noteworthy is that U.S. Rule 502 does not apply to claims for confidentiality, only to claims of privilege (not applicable here). The old rule relating to the loss of confidentiality protection upon public disclosure continues to apply, with all of the nuances that already existed in that area.

The same is true in Canada. For example, the Mars Discovery District, an incubator for new technology companies, currently describes confidentiality as follows [from the Marsdd website]:

> *"Breach of confidence is the release or misuse of confidential information. It creates a legal cause of action, which means that the harmed party can sue. When an owner of confidential information believes there has been a breach of confidence they must generally prove the following in court:*
>
> 1. *The information was worthy of protection—the court will consider these factors:*
>   - *the extent to which the information is publicly available*
>   - *the extent to which it is known within the owner's business*
>   - *measures taken to maintain secrecy*
>   - *the value of the information, both to the proprietor and to others*
>   - *the outlay of money or labour involved in acquiring or developing the information*
>   - *the ease with which the information could be acquired or developed by others*
>   - *the degree to which the owner regards and treats the information as confidential*
>   - *the degree to which the recipient regards and treats the information as confidential*
> 2. *The recipient ought to have known that the information was confidential.*
> 3. *The information was misused to the detriment of the owner."*

This is a good summary of the current state of the law in Canada. It follows the seminal decision of ***Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574***, which described these standards. Many cases have followed the Lac case since that time.

We note that this summary of the Canadian position is consistent with the standard practice in commercial dealings in Canada. Confidentiality agreements in Canada almost universally include a clause that information ceases to be protected under the agreement when it enters the public domain, as long as it is not through any fault of the recipient of the information.

In fact, one of the few exceptions to this is the Board's own Declaration and Undertaking. The reason? The document has no external definition of confidential information at all. Information is confidential under the Declaration when the Board so determines. That is the only test within the Declaration.

However, the Board's Practice Direction on Confidential Filings says "Information that is in the public domain will not be considered confidential."

For all of these reasons, SEC submits that the Survey does not have the characteristics that would allow it to be considered confidential under the law.

Refusal of Interrogatory Response

The Applicant purports to withdraw its interrogatory response that included the Survey, and, as the Board has pointed out in Procedural Order #4, this is essentially an attempt to refuse to answer the interrogatory.

There are two issues here: is the Survey relevant to the Application, and, if so, would disclosure so prejudice the Applicant or some other person that its relevance should be overlooked?

We note that, in this context, the question is not whether the intervenors should be allowed the see the document. The primary question is whether the Board should be allowed to see the document. Once that is determined, the issue of whether intervenors should see it is not about confidentiality, but about *audi alteram partem*, the rules of natural justice, and the SPPA.

The Applicant seeks to prevent the Board from seeing the document.

The first part of the test, relevance, seems fairly straightforward. The Survey is about compensation costs. Compensation makes up the bulk of the OM&A of most regulated entities, and a significant component of the capital spending as well, so it is the single most critical component driving rates. As such, managing compensation levels is a key factor in whether a utility is being well-managed overall.

It therefore seems clear that, absent any prejudice, this is information that the Board should see. It would be difficult to understand how the Board can assess whether employee compensation, the biggest element in a utility's costs, is reasonable if available comparisons and empirical analysis of compensation levels are kept secret from the Board.

The second part of the test is prejudice. In this respect, there is clearly no prejudice to the Applicant. The Applicant sought to rely on the compensation Survey in their pre-filed evidence, which is the reason why it was sought in the first place. The Applicant cannot now argue that they are prejudiced because they have to produce a document on which they themselves relied.

What about prejudice to MEARIE? On the face of it, since the information contained in the document is not proprietary information of MEARIE, but information gathered from regulated entities, it is hard to see how MEARIE could be prejudiced. While the compilation and analysis was done by MEARIE, it is still almost entirely compilation. The Survey does not contain any unusual value added beyond the fact that information from many utilities is standardized, and aggregated in one place.

However, whether or not MEARIE could make a case that the information conceptually has some kind of proprietary aspect, the avowed purpose of the Survey prevents any proprietary aspect from being prejudicial. MEARIE told utilities that they should participate in the Survey so that they could use the results in their rate applications (see attachment). MEARIE cannot now state that use of the Survey in the manner they said was intended is prejudicial to MEARIE.

Interestingly, there is potential prejudice, but it is to the Board, not the Applicant or MEARIE. The Board will be aware that the Board's exercise of its jurisdiction to review compensation costs of regulated entities is currently under attack by Ontario Power Generation, the Power Workers' Union, and the Society of Energy Professionals at the Ontario Court of Appeal. A key aspect of that case is the ability of the Board to make decisions on reasonableness based on data before it like compensation studies. The Board has taken the position that such studies are a normal and important part of reviewing utility compensation.

If in the current case the Board allows the Survey to be withdrawn, that would be inconsistent with the Board's position in court that documents such as the Survey should be used to inform the Board's decisions on just and reasonable rates.

For all of the above reasons, It is therefore submitted that the Survey is clearly relevant, and there is no prejudice to any person from filing it in this proceeding.

Once those conclusions are reached, the only item left is whether all intervenors should be allowed to see it. As noted earlier, the fundamental principles of natural justice require that the evidence seen by the adjudicator be available to the parties as well, and especially so when one side already has it. The Board almost never makes an exception to that rule, and there does not appear to be any reason to do so in this case.

Should the Survey be Granted Confidential Treatment by the Board?

We have noted earlier that, in our submission, the Survey does not have the characteristics of a confidential document in any case, for the reasons discussed. As a matter of law, it is likely that the Survey would not be protected as confidential outside of the Board's processes.

Confidential treatment at the Board, however, is a determination of the Board, having regard to the provisions of the Practice Direction, and the policies and principles – such as transparency and public interest – that drive the Board's procedures. While the Board takes into account many of the same considerations as we have outlined above in our analysis of the law, it also takes into account more than that.

In this case, it is submitted that there are three additional elements that the Board should consider in reaching a conclusion that the Survey should be public:

1. MEARIE and its parent, the EDA, are entirely funded by regulated electricity distributors. As a result, essentially every dollar they get comes from the ratepayers, including all of the money to pay for this Survey. The ratepayers have, in effect, paid for this Survey to be done, as they likely have every prior year as far back as the annual compensation survey has been carried out.

2. All of the participants in the Survey are entities regulated by the Board, and all of the information gathered in the Survey is information about the costs of entities regulated by the Board. There are no significant unregulated interests here to be protected.

3. The purpose of the Survey was the comparison of costs between regulated entities, so that utility management could make better decisions. Indeed, as it turns out that purpose was the comparison of costs, not just so that management was informed, but so that the utility could use the Survey results to make their case in rate applications.

There is nothing wrong with any of these three facts. The industry should be encouraged to do exactly what they did. If they didn't do it through the EDA, or MEARIE, they should do it through some other organization, or it should be mandated by the Board. This kind of industry-wide information is invaluable to the industry, the Board, and other stakeholders.

What is wrong is to then seek to say "We'll carry out a survey, paid for by the ratepayers, so that LDCs can use it to buttress their rate applications, but the survey itself will be secret".

In our submission, in seeking to keep this Survey secret, the Applicant and MEARIE are misusing the concept of confidentiality. It is in the public interest for the Board to promulgate this information in as transparent a way as possible, so that all parties may benefit.

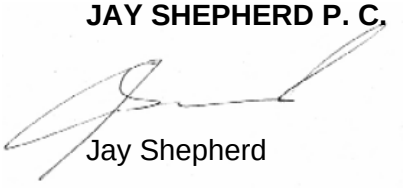
One other comment is appropriate on this point. The issue here is not just whether the Survey should be confidential in this particular proceeding. This matter is one of several rate cases currently under way in which the information contained in the Survey is highly relevant. A determination of confidentiality in this proceeding would allow the Survey's use in this proceeding, but would prevent parties from considering it in other rate proceedings. In each case, intervenors would have to seek production in that other proceeding, leading to a multiplicity of procedural actions that would be necessary, but also duplicative and unproductive. Conversely, making the document public will result in its availability to inform the Board and all parties in all proceedings in which it is relevant.

Conclusion

For the reasons discussed above, SEC believes that the Applicant is not justified in refusing to file the Survey. Once filed, the Survey does not have the intrinsic characteristics that would suggest it should be protected as confidential, and in any case the Board's policies and principles require that it be made public.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties

2012 MEARIE Management Salary Survey

In today's competitive talent market, LDCs are challenged with benchmarking salary pay bands against market conditions and internal total compensation programs - considering all elements of compensation including base pay, incentives, perquisites and other elements.

The MEARIE Group has undertaken an extensive review to update and enhance its long-standing *annual* **Management Salary Survey** *of Ontario's Local Distribution Companies*. Over the years, we have heard from our LDC survey participants that the format and its' information should be reflective of market driven compensation statistics and risk relative to market conditions. Participants have also voiced that the *Compensation Analysis* groupings and the *LDC Comparator by Districts* are not practical for today's compensation comparators and total compensation structures.

We strive to meet the evolving needs of our LDC membership and engaged third party expertise as part of the Management Salary Survey review process. **Marjorie Richards & Associates** was retained as our consultant to assist in the development of an enhanced, value-add LDC total compensation salary survey for 2012 and beyond. Through a competitive RFP process, we have partnered with **The Hay Group Limited**, a globally renowned compensation specialist, to assist in the development of the survey and to provide their expertise in collecting and analyzing the data.

To better understand the needs of the survey participants, our consultant worked with representatives from a broad demographic of the LDC sector (2 large, 2 medium and 2 small sized utilities). The Working Group was exceptionally valuable in providing input on the critical elements of the survey that would add the most value and provide timely and relevant market driven compensation benchmarks for the broader LDC sector.

The MEARIE Group is encouraging all LDCs to participate in the 2012 Total Compensation Management Salary survey. This year's survey will provide LDCs with market driven, competitive benchmark enhancements and improvements, a synopsis of which is listed below:

- A wider, comprehensive breakdown of benchmark Position Profiles, providing a ***greater scope within compensation family structures***
- Geography plays a key element in salary comparisons from a market compensation perspective - so LDCs will no longer be grouped by District. The new survey provides a ***provincial breakdown that better reflects the compensation and recruitment markets you are competing within***
- *Greater depth into incentives by position level*, and an analysis of ***Potential Total Cash versus Actual Total Cash***
- Assistance on identifying improvements by a group of LDC compensation experts ***representing the diversity of the sector***

- Hay Group will draw on their experience with other industry surveys, and develop a ***electronic data collection tool*** that is simple to understand and complete, accompanied by clear instructions for participants, and supported by Hay analysts who are available to answer questions from participants
- The Ontario Energy Board (OEB) staff participated in a review of the new survey format, its elements and position benchmarks. The MEARIE Group put forth its position that the new survey be ***recognized as an accepted market benchmark survey for the purposes of compensation evidence in LDC rate filings***
- Hay Group analysts will review each submission as it arrives for completeness and/or gaps in data. ***Hay Group will contact the LDC directly to clarify any data that appears to be an outlier or inconsistent with expected responses, and then each file will be audited*** before the data is added to the survey database
- As an added benefit to participating, the Hay Group will prepare an overview of ***market trends and compensation projections for the upcoming year,*** to assist LDCs in budget projections of market salary shifts
- To add further value the Hay Group will evaluate each of the survey benchmark positions using the Hay Group job evaluation methodology. This will provide additional ***support to participants in their job matching,*** help Hay Group review participant data for quality of match, and provide a foundation for presenting sector compensation trend lines (market value vs. Hay points) in addition to the current job match data, to ***further assist participants in interpreting the survey data***
- The survey will be prepared in two formats: a printed PDF version and an electronic excel version, for ***ease of use by the LDC in their analysis and reporting of the survey***
- The Hay Group will, *for an additional f*ee in consultation with the LDC, provide ***custom cuts of the analysis to assist LDC in specific compensation analysis and reporting***

A special thanks to the Working Group Participants who provided both their time and valuable insight which were instrumental in the development of enhanced survey:

- **Barb Cesarin,** HR Manager - Innisfil Hydro Distribution Systems Limited
- **Karen Davis,** Executive Assistant - Norfolk Power Distribution Inc.
- **Barb Gray.** VP Finance - PowerStream Inc.
- **Jane Hale-McDonald**, Director HR - Cambridge and North Dumfries Hydro Inc.
- **Brenda Schacht,** Vice President Human Resources - Cambridge and North Dumfries Hydro Inc./Horizon Utilities Inc.
- **Jennifer Smith,** Vice President Corporate Service - Burlington Hydro Inc

The survey has been developed to deliver market driven benchmarks specific to meet the needs and challenges of the Ontario LDC market and to assist LDC's when considering their annual compensation decisions and direction. We invite you to participate in this year's new 'improved' total compensation Management Salary Survey.