



EB-2011-0099

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

AND IN THE MATTER OF an application by E.L.K. Energy
Inc. for an order approving just and reasonable rates and
other charges for electricity distribution to be effective
October 1, 2012.

BEFORE: Paula Conboy
Presiding Member

DECISION ON CONFIDENTIALITY
March 19, 2013

E.L.K. Energy Inc. ("E.L.K.") filed an application with the Ontario Energy Board (the "Board") on October 24, 2012 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that E.L.K. charges for electricity distribution, to be effective October 1, 2012.

In Procedural Order No. 4 the Board invited submissions on E.L.K.'s request to remove the response to AMPCO IR No. 17(b), i.e. the MEARIE salary survey (the "salary survey") from the record of this proceeding.

The Board asked parties to frame their submissions as follows:

It appears that there are two issues. The salary survey was filed in direct response to an interrogatory. In requesting an order removing the document from the record entirely, and to have parties destroy the copy of the document sent to them, E.L.K. is in effect providing a refusal to answer the interrogatory. In general, the test the Board must consider under such circumstances is whether the document is relevant to the issues in the proceeding, and whether its probative value is outweighed by any prejudice it might cause the applicant. The Board invites parties to file submissions on whether E.L.K.'s request to have the document

removed from the record entirely, and whether it should order all copies that were circulated to be destroyed.

The second issue is, in the event that the Board does not order the document removed from the record and all circulated copies destroyed, should the salary survey be treated as confidential? If so, what rules should govern access to the document?

The Board received submissions from the School Energy Coalition ("SEC"), EnWin Utilities Ltd. ("Enwin"), Energy Probe Research Foundation ("Energy Probe") and the Association of Major Power Consumers in Ontario ("AMPCO") on February 25, 2013 and a reply submission from E.L.K. on March 4, 2013. Energy Probe and AMPCO supported SEC's submission.

Submissions

Issue 1: Should the salary survey be removed from the record entirely having considered the salary survey's relevance to the issues in the proceeding and whether its probative value may be outweighed by any prejudice it might cause E.L.K. and; should the Board order the destruction of all copies that were circulated?

SEC submitted that E.L.K. cannot refuse to file the salary survey since it is clearly relevant to the Application and to other rate applications before the Board, noting that there is no material prejudice to E.L.K. or any other person from its disclosure. SEC argued that evidence pertaining to compensation is relevant since compensation is the single most critical component driving rates and the management of compensation is indicative of how well a utility is being managed. SEC asserted that there is no prejudice to E.L.K. since it cannot argue prejudice concerning material that it sought to rely on in the first place. With respect to the MEARIE Group ("MEARIE"), SEC saw no prejudice to it since the information contained in the survey is not proprietary to MEARIE, and even if it were, this is offset by the fact that MEARIE told the participating utilities that they could use the results in their rate applications. SEC noted that a MEARIE management salary survey was filed on the public record in the London Hydro's 2013 rates application (EB-2012-0146). Referencing a case currently before the Ontario Court of Appeal¹ concerning the use of such documents as salary surveys to inform its decision-making, SEC noted that a Board decision approving the removal of the salary survey would be inconsistent with the position it is taking in that case.

¹ *Ontario Power Generation et. al. v. Ontario Energy Board*, Court File No. C55633

EnWin argued that that the onus is on the intervenors requesting the salary survey to make their case. In that E.L.K. owns the information, EnWin submitted that E.L.K. should only be compelled to disclose the information if it is necessary for the Board's determination of reasonable rates. EnWin disputed the relevance of the requested information and argued that there is alternative information on the record sufficient for the Board's deliberations in setting reasonable rates. EnWin quoted from a number of sources regarding the need for relevance and the balancing of interests when it comes compelling a regulated utility to disclose information.

E.L.K indicated that the salary survey was filed in error. The company also submitted that MEARIE claims copyright in the salary survey and to date has not authorized the reproduction of its salary survey by E.L.K.

With respect to the treatment of a MEARIE management salary survey filed in the London Hydro's 2013 rates application (EB-2012-0146) , E.L.K. stated that it is not aware of the basis for, or the circumstances surrounding, the apparent disclosure by London Hydro of a different version of the survey. Regardless, E.L.K argued that the treatment is not relevant to the matter at issue in this proceeding. E.L.K. repeated that there is a risk of prejudice to it and others if the Board denies removal of the salary survey from the evidentiary record. A claim by MEARIE in respect of the disclosure of the salary survey would result in significant cost to E.L.K. both monetarily and in time and resources.

E.K.L. submitted that the prejudice to E.L.K. and MEARIE, the owners of the salary survey, outweighs the limited probative value the salary survey may have in this Application. E.L.K. agreed with EnWin and questioned the relevance of the information in the salary survey since it did not rely on the salary survey to support the applied for management and executive salaries and benefits. E.L.K. indicated that in any case it would defend its proposals without reference to the salary survey. E.L.K disputed SEC's characterization of the relative importance of the salary information contained in the survey and offered alternative sources of near- equivalent information. E.L.K. submitted that, similar to the Board's decision regarding AMPCO IR. No. 17(I), the Board should view the information as immaterial because the focus of the salary survey is on a multitude of positions rather than at an aggregated level as required by the Filing Requirements.

For the reasons given, E.L.K concluded that the Board should determine that the salary survey not be placed on the record of this proceeding in any form and that all copies in possession of parties to the proceeding be destroyed.

Board Findings

Is the Salary Survey Relevant to the Proceeding?

The Board finds that the salary survey is relevant to the Application and the setting of just and reasonable rates.

E.L.K. relied on the salary survey to demonstrate the reasonableness of its management compensation costs in its Application² and therefore must have itself considered this evidence to be relevant. Indeed it seems that one of the reasons that the salary survey was prepared in the first place was to be used as evidence in LDC rate filings before the Board.³ Salaries are a significant component of the revenue requirement. Benchmarking is a tool commonly used by the Board to determine the reasonableness of costs. The Board has relied on precisely this type of salary benchmarking data to set rates in other proceedings.⁴ There can be little question that the salary survey is relevant to this proceeding.

The Board is not convinced that any prejudice attendant on allowing the salary survey into evidence outweighs its probative value. In relying on and specifically referencing the salary survey in its pre-filed evidence, the Applicant must have realized that a party would likely ask to see it. Whether the Applicant had filed the document in error or not, it is entirely possible that the Board would have ordered its production. As a matter of general regulatory practice, it would not normally be open to an applicant to rely on a document but then refuse to produce it. A similar, more detailed MEARIE salary survey was recently filed in a London Hydro rates case (EB-2012-0146), apparently without controversy. As noted above, MEARIE itself appears to have contemplated that the salary survey would be used to support rate filings.

The Board therefore finds that the salary survey is relevant to the proceeding, and that it will be placed on the official record.

² Exhibit 4-Tab2 Schedule 6 p.1

³ See attachment to SEC submission dated February 25, 2013

⁴ See, for example, the Board's decision in Hydro One Networks Inc.'s 2010 Transmission rates case, EB-2010-0002.

Issue 2: In the event the Board determines that the salary survey is to remain on the record, should the salary survey be treated as confidential and what rules should govern access to the document?

SEC submitted that a document, such as the salary survey, paid for entirely by amounts recovered from ratepayers, relating solely to entities regulated by the Board, and having as its primary purpose comparisons of regulated costs for use in LDC rate applications should be a public document. In SEC's submission the salary 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.

SEC cited *Coco v. A N Clark [Engineers] Ltd. [1969] RPC 41*, a decision of Mr. Justice Megarry, for the basic rule on the ability to claim a document as confidential: 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 and 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. SEC submitted that since MEARIE circulated the survey to 49 participating utilities, E.L.K. referred to it in its evidence, a similar survey forms part of the public evidence without contention in London Hydro's 2013 rates application (EB-2012-0146) and MEARIE worked with the Board in the development of the salary survey, it is impossible to conclude that MEARIE treated the salary survey as confidential as a matter of law.

SEC submitted that there also are other reasons related to the Board practices, policies and principles which support SEC's position that the salary survey should form part of the public record. These included that MEARIE and its parent, the EDA, are entirely funded by regulated electricity distributors, all of the gathered information pertains to the costs of entities regulated by the Board, the purpose of the survey is a comparison of costs to promote better managerial decisions as well as support E.L.K.'s Application.

In the event that the Board denies E.L.K.'s request that the salary survey be removed from the record of this proceeding, E.L.K submitted that the salary survey should be treated with the strictest confidence and in compliance with the Board's *Practice Direction on Confidential Filings*.

Board Findings*Should the Salary Survey be kept Confidential?*

It is the Board's general practice that all documents should be part of the public record unless there is a good reason for affording them confidential treatment. The onus rests with the party seeking confidential treatment. The Board's *Practice Direction on Confidential Filings* provides some general guidance on the types of information the Board may consider confidential.

The salary survey contains aggregated data on management salary and other compensation levels from 49 Ontario LDCs. The results are presented in a way that does not reveal the individual data from any LDC, nor does it reveal the compensation of any individual employee.

The Applicant's chief argument for keeping the salary survey confidential is that MEARIE has not consented to its release, and that MEARIE has always intended this document to be kept off of the record. This is difficult to reconcile with the fact that MEARIE appears to have intended that the salary survey be used to support rate filings, and the fact that a similar survey was filed on the public record in the London Hydro case.

Regardless, 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. There does not appear to be any serious concern relating to any of the considerations identified in Appendix B or Appendix C of the Practice Direction.

The Board therefore finds that the salary survey will form part of the public record to this proceeding. The Board's interim decision to treat the salary survey as confidential is rescinded.

DATED at Toronto, **March 19, 2013**

ONTARIO ENERGY BOARD

Original Signed By

Paula Conboy
Presiding Member