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BY EMAIL and RESS

March 3, 2014
Our File: EB20130174

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2013-0174– Veridian 2014 – SEC Confidentiality Submission

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No. 4, these are SEC's submissions with respect to Veridian Connections Inc's ("Veridian") request for confidentiality treatment.

In summary, SEC's position is that:

- The two benchmarking surveys are responsive to the Board's new approach to regulation of distributors, as set out in the RRFE. The participation by the Applicant in the surveys was therefore appropriate and timely. However, because they are a crucial element in understanding the outcomes being delivered by the Applicant, and others, it is in the public interest that the surveys in full be placed on the public record. This is consistent with the Board's strong preference for transparency over secrecy.

- None of the illustrative "harms" described by the Applicant as potentially arising out of public disclosure of the surveys is supported by any evidence. Further, even if factually possible, there is no reasonable likelihood that the "harms" will materialize, nor do they outweigh the public interest in having them surveys available for public scrutiny.

- The actions of the Applicant in agreeing with the survey provider, not only to keep the benchmarking surveys confidential, but to hide their very existence from the Applicant's regulator, were inappropriate and should not be countenanced by the Board.

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Background

The Applicant seeks an order from the Board treating two sets of documents as confidential under the Practice Direction:

1. [redacted] (the "Management Salary Survey"). The Survey Report provides compensation information broken down only by position title, while the Addendum Report breaks down the position title by utility geographic location, number of employees, number of customers, and revenue

2. [redacted] As the Board found in Procedural Order No.4, Volume II "provides contextual background for conclusions reached….and is therefore clearly relevant."[1]

General Comments

SEC submits that neither of the two surveys should be accorded confidentiality treatment.

The starting point is the Board's strong goal of transparency, a hallmark of its regulatory philosophy. The Board's recognizes that confidentiality is an exception. Its general policy is that information should be available for inspection by the public, and its proceedings should be "open, transparent and accessible".[2] To be treated as confidential pursuant to the *Practice Direction on Confidential Filings*(the "*Practice Direction*"), "the onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case."[3] Further, any harms alleged by the Applicant cannot be speculative, and must outweigh the public interest in providing the documents on the public record.

This is particularly important with respect to the documents in question. The Board has recognized the importance of benchmarking.[4]The *Report of the Board: Renewed Regulatory Framework for Electricity Distributors*: *A Performance-Based Approach* ("RRFE") provides that benchmarking will be an increasingly important part of rate regulation of electricity distributors.[5] The Approved Issues List in this proceeding, and every other cost of service proceeding for May 1, 2014 rates, includes a specific issue on the topic.[6] Benchmarking is an important way for the

[1] *Procedural Order No.4*, (EB-2013-0174), dated February 25 2014 at p. 3
[2] *Practice Direction on Confidential Filings* at p. 2
[3] *Practice Direction on Confidential Filings* at p. 2
[4] Veridian rightly concedes this. Veridian Letter dated Feb 26, 2014 at p.1
[5] *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach,* dated October 18 2012, at p.56, 59
[6] "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?" [emphasis added]

Board to determine if rates are "just and reasonable". SEC has long been a proponent of this approach, and strongly supports the Board's increasing emphasis in this area.

SEC submits that the Board is not just *encouraging* utilities to conduct benchmarking exercises, but making it effectively a requirement. SEC submits it would not be in the public interest for the Board to on one hand focus on benchmarking, and then on the other hand not allow the public to see the results of these studies.

Finally, these surveys are being paid for *entirely* by ratepayers, and deal only with entities regulated by this Board. Both the Utility Performance Survey and Management Salary Surveyare made up of information gathered exclusively from Ontario utilities regulated by the Board, about their regulated costs, and paid for out of their regulated rates.

Specific Issues Raised by Veridian

1. Public disclosure of Benchmarking Documents could harm the distribution industry

Veridian argues that if the information were publicly disclosed, "participating distributors *may* not wish to continue participating."[7] [emphasis added] SEC submits that this a purely speculative risk, and one which in any case will not actually materialize, given the Board's expectations regarding benchmarking. Veridian, like any other utility who participates in these surveys, should be commended for doing so, and it is indeed an appropriate activity of the distributors' industry association to manage and promote these initiatives.[8] Collective action by the industry, through their association, to improve their outcomes through benchmarking of various facets of their operations and costs, is precisely what the Board has been promoting. SEC expects that going forward more - not less - utilities will be undertaking benchmarking initiatives.

2. Public disclosure could potentially result in a significant final loss to [redacted]

Veridian provides no evidence to support this allegation, and SEC does not agree that there will in fact be any material loss to [redacted] from the public disclosure of the information. In fact, SEC would expect that an order requiring disclosure will instead send a strong message to other distributors that, through [redacted] or another entity, benchmarking is an expectation of the Board, and a good utility management practice. The more information of this sort is made public, the more utilities will be driven to excel through the expectations of their customers. Conversely, hiding the benchmarking information undermines the Board's RRFE direction.

Regardless, even if [redacted] would suffer some financial loss, the public interest in producing this important information, paid by ratepayers, comparing Board regulated utilities, must outweigh any potential harm.

It is understandable that some utilities – especially those who are lagging behind their peers in some areas – will resist benchmarking. However, the Board has made clear that benchmarking is going to happen. If [redacted] does not do it, likely the Board or ratepayer groups will do it (and in either such case the information will be made public). In SEC's view the industry would prefer to maintain oversight of this activity, and if done properly that is exactly the right answer.

[7]Veridian Letter dated Feb 26, 2014 at p.1

[8]The MEARIE Group is the "sister company" to the Electricity Distributors Association ("EDA").http://secure2.eda-on.ca/imis15/MG/Careers/Who_is_MEARIE.aspx

Further, it is by making benchmarking results public that utilities reluctant to participate will be motivated to do so. Their customers, their municipal shareholders, and their boards of directors will see the benchmarking results of other LDCs, and ask why their LDC is not included. For [redacted], this can only be good, because it would increase participation, both increasing revenues and improving the quality of the results.

3. Other participating utilities have not consented to the data being shared, andit is generally not publically available.

LDCs cannot limit or exclude the Board's jurisdiction and policies by private agreement amongst themselves or with their service providers. As the Board has said in the past, utilities "must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may reasonably be required to be produced as part of the regulatory process."[9] This information falls squarely into that category.

Further, SEC does not agree with Veridian's position, that the Utility Performance Survey contains a "great deal of this data is not publically available". The data that seems to be the input to the studies are information that is available either from the annual *Yearbook of Electricity Distributors*, or if not there, would be information that would in the regular course be publicly disclosed during a cost of service rate application

With respect to the Management Salary Survey, it is true that at the level the utilities provide it to [redacted] it is not publically available, nor should it be. But, that highly granular information is not contained in the survey results, and will not be disclosed if the report is made public. What is contained in the Management Salary Survey is aggregate compensation data from 50 Ontario utilities. It does not reveal individual data from any utility or individual. For specific market segment breakdowns, the survey itself has a minimum data requirement, to ensure it does not reveal specific utility or individual compensation information.[10]

The Board has rejected similar claims of confidentiality of management compensation studies conducted by [redacted] in the past. In [redacted] the Board ordered [redacted] to place on the public record the 2012 version of Management Salary Survey at issue in this proceeding:

> 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.[11] [emphasis added]

[9] [redacted]

4. Public Disclosure Will Reveal [redacted] Approach and Methodology to Benchmarking

Veridian argues that public disclosure of the benchmarking reports will reveal [redacted] proprietary approach and will give "others an unfair competitive advantage".[12]

SEC submits it is an overreach for Veridian to state that the document is truly proprietary. [redacted] has collected information that is either publically available, or regularly disclosed in the regulatory process, and compared that information against other publicly available or regularity disclosed information. It has also taken that information and aggregated (in the case of Management Salary Survey) and separated it by geography, revenue, customer or utility size. The ratios used are common metrics in the industry.

From time to time benchmarking specialists with unique, proprietary algorithms do studies that would be of interest to the Board. In those rare cases, it might be appropriate for the Board to consider maintaining the secrecy of those algorithms that the specialists have developed at considerable cost, while still maximizing transparency.

That, however, is not the case here. There is nothing unusual or specialized about the benchmarking surveys, and [redacted] would not in any way be harmed by their disclosure.

Summary

SEC submits the Board should not accord confidentiality treatment to either the Utility Performance Survey or the Management Salary Survey, but should instead allow them to be open to public scrutiny. Benchmarking information is of increasing importance to the Board in its exercise of its rate-making authority. The public interest is best served by having both surveys in full on the public record.

Broader Concerns

SEC is concerned that increasingly regulated entities are entering into confidentiality agreements with third-parties that prohibit disclosure of benchmarking studies and other important information.

Veridian only provided copies of the benchmarking information after SEC had filed a Motion to require production, and for [redacted], only after an order by the Board. They were bound by a confidentiality agreement, as are the other participants. SEC has already filed a similar motion in in EB-2013-0159 (Oakville Hydro)[13] and will likely file another in EB-2013-0115 (Burlington Hydro).[14]

These confidentiality agreements do not just to limit disclosure of the information unless ordered to by law, but purport to prohibit utilities from even disclosing the ***existence*** of the information to anyone, including the Board. Both the Utility Performance Survey and the Management Salary

[12]Veridian Letter dated Feb 26, 2014 at p.1
[13] See SEC Notice of Motion filed on February 27th, 2014 in EB-2013-0159 (Oakville Hydro).
[14]See Response to Interrogatory 2.1-SEC-5 in EB-2013-0115 (Burlington Hydro): "Burlington Hydro participates in a benchmarking survey and is bound by contract to neither disclose the survey nor any details about it unless ordered to do so by the Board."

Survey confidentiality agreements (available on [redacted] website)contains the following clause:

> The obligations of confidentiality set out in this policy are subject to the requirements of applicable law.However, LDCs may not disclose the existence or results of the [redacted] to any regulatory body (or other person) unless compelled by law to do so, and if an LDC is compelled by law to make such a disclosure, it will give The [redacted] as much notice in advance as possible of the disclosure and the reasons the disclosure is legally required. In such circumstances, the LDC will take such steps as The [redacted] reasonably requests, or will co-operate with respect to any steps The [redacted] reasonably wishes to take, to contest or limit the scope of the disclosure.[15] [emphasis added]

Utilities signing this agreement are putting themselves in an untenable position. On the one hand, they are binding themselves to a legal contract to [redacted] to keep the survey secret. At the same time, they have an ongoing obligation to be forthright and truthful to their regulator. As the Board has said, regarding a utility's obligation to disclose:

> The Company has an affirmative obligation to provide the Board with the best possible evidence and it is not incumbent on the intervenors to ensure, through cross examination of the Company's witnesses, that the record is adequate and complete. The company cannot shirk its responsibility as a regulated entity by submitting evidence that is vague and incomplete.[16] [emphasis added]

A utility bound by an agreement like the one above cannot satisfy both competing obligations. With the RRFE's increasing focus on benchmarking, SEC is concerned that utilities, in their applications and in interrogatory responses, may not provide the Board with the information they would have provided if not bound by such an agreement. A regulated entity's obligation to provide full disclosure of all relevant information to its regulator, either directly if ordered to,due to a Board approved application filing guidelines, or if sought by Board Staff or an intervenor through a Board ordered process such as interrogatories[17] or technical conference, must be

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[15] [redacted]

[16] *Decision with Reasons*(RP-1999-0001), dated June 29, 2000 at para 4.5. Most recently cited in *Decision and Order* (EB-2011-0210), dated October 24 2012 at p.38

[17] The Rules of Practice do not allow a utility to provide an incomplete or misleading answer, for example to hide the existence of a study due to a contractual agreement to do so:

> "29.01 Subject to **Rule 29.02**, where interrogatories have been directed and served on a party, that party shall:
>
> (a) provide a **full and adequate response***[emphasis added]*to each interrogatory…
>
> …..
>
> 29.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:
>
> (a) where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;
>
> (b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response; or
>
> (c) otherwise explaining why such a response cannot be given.

paramount to any contractual obligation to a third-party. Conversely, the [redacted] terms expressly seek to make the contractual obligation override the LDC's obligations to the Board.

SEC requests the Board send a strong message to utilities that entering into such agreements is not appropriate.

All of which is respectfully submitted.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Intervenors (by email)

A party may request that all or any part of a response to an interrogatory be held in confidence by the Board in accordance with **Rule 10**."