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March 24, 2014

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

Attention: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Intervention with respect to Board File EB-2013-0159

We act as counsel to Canadian Electricity Association ("CEA") in the above-captioned matter.

In accordance with Procedural Order No. 5, please find attached CEA's Responding Motion Record, Affidavit of Francis Bradley and Notice of Constitutional Question in response to School Energy Coalition's Notice of Motion dated February 29, 2014.

We would be pleased to file any further information the Board may require.

Yours very truly,

Goodmans LLP

Robert Malcolmson
RZM/pg

Attachments

Copy: Giovanna Dragic, OEB Staff
Mark Rubenstein, counsel to the SEC
James Sidlofsky, counsel to Oakville Hydro
Intervenors (by e-mail)

6310747

EB-2013-0159

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Oakville Hydro Electricity Distribution Inc. for an Order or Orders approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.

RESPONDING MOTION RECORD

(Re: School Energy Coalition's Notice of Motion dated February 29, 2014)

1. Founded in 1891, Canadian Electricity Association ("CEA") is the national forum and voice of the evolving electricity business in Canada. Its members include power utilities from across Canada, only some of which are located in Ontario. Oakville Hydro Electricity Distribution Inc. ("Oakville Hydro") is one such member. One of the services provided by CEA to its members is confidential benchmarking services; services which are sold to CEA member companies operating in Canada and abroad. The methodology, data sets and analytical metrics deployed by CEA in the production of these confidential benchmarking services are proprietary and protected by copyright pursuant to Canada's *Copyright Act*.

2. On February 29, 2014, the School Energy Coalition ("SEC") brought a motion (the "SEC Motion"), without notice to CEA, asking the Board for 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."

3. Oakville Hydro has advised CEA that in order to fully respond to Interrogatory 2.1-SEC-3 as currently drafted, it would be forced to disclose confidential benchmarking data provided to CEA by its members (the "CEA Data"), proprietary data models used by CEA to analyze such data (the "CEA Data Models") and the report prepared by CEA containing such analysis (the "CEA Report", collectively with the CEA Data and the CEA Data Models, the "CEA Property").

4. CEA is the exclusive owner of copyright in both the CEA Data Models and the CEA Report and has consistently treated this material in a confidential manner. The CEA Data Models and CEA Report analyze the confidential data of thirty-seven utilities, both international and Canadian. These utilities have entrusted CEA with their highly confidential and competitively sensitive CEA Data on the clear condition that such data will be treated in the strictest of confidence at all times.

5. Importantly, the SEC Motion does not provide any detailed rationale for its all-encompassing request for disclosure of CEA's copyright protected intellectual property, nor does it put forward any alternative suggestions that would balance SEC's apparent need for unfettered disclosure of confidential information from CEA, against CEA's legitimate commercial interest in protecting information that so clearly is its "stock in trade".

6. CEA is not a party to the proceeding before the Board. As such, the SEC Motion is asking the Board to compel the disclosure of confidential and copyrighted intellectual property owned by a third party.

7. In our submission and for the reasons set out herein, the SEC Motion should be denied. Granting the SEC Motion would have a chilling effect on the economic efficiencies that

Canadian utilities strive for by effectively precluding the national benchmarking and data analysis that utilities rely upon in evaluating their performance and their customer service standards. An order compelling disclosure would very likely act as a strong disincentive for utilities to participate in CEA benchmarking studies going forward. In CEA's submission, this would be inconsistent with the objective in section 1(1) of the *Ontario Energy Board Act, 1998*[1] (the "OEB Act") to promote economic efficiency and cost effectiveness in the transmission, distribution, sale and demand management of electricity in Ontario. Consequently, the SEC Motion is not in the public interest and should be denied.

8. Further, the Board is without jurisdiction to grant the relief requested by SEC. The Board has no express statutory power to compel the disclosure of copyrighted material owned by a third party, nor does the Board possess any inherent jurisdiction to do so. The Board is a creature of statute and can only act in accordance with the express powers granted to it by the provincial Legislature. Finally, the Board cannot override federal copyright law.

RELIEF SOUGHT

9. CEA seeks an order denying the SEC Motion with respect to disclosure of the CEA Property. Rather than granting the relief sought in the SEC Motion, CEA submits that Oakville Hydro and SEC should be required to enter into settlement discussions to consider whether a mutually acceptable resolution can be reached that respects CEA's copyright, confidentiality requirements and proprietary interests, while providing SEC adequate disclosure to relevant information to the extent that the Board determines that disclosure is

[1] S.O. 1998, Chapter 15, Schedule B.

warranted. Although it is not a party to the proceeding, CEA is willing to participate in such discussions.

10. Should the Board decline to grant the above-noted order and instead order that the CEA Property be disclosed either publicly or on a confidential basis, CEA intends to exercise its right of appeal under section 33 of the OEB Act and accordingly requests that the Board stay its decision with respect to disclosure of the CEA Property, in accordance with Rule 17.07 of the Board's *Rules of Practice and Procedure*, pending such appeal or other review.

SUPPORT FOR THE REQUESTED RELIEF

11. CEA relies on four grounds in support of its request for relief:

    a. First, CEA is the exclusive owner of copyright in both the CEA Data Models and the CEA Report. It would be a violation of CEA's copyright in these materials, contrary to the federal *Copyright Act*[2], for the Board to issue an order compelling or authorizing the reproduction of these materials without the consent of CEA, which consent CEA has not granted. Notably, the *Copyright Act* binds the provincial Crown and is paramount to any order of the Board in conflict or operationally incompatible with this federal statute. The Board's powers to order production of documents cannot override statutory rights conferred by Parliament under the federal *Copyright Act*.

[2] R.S.C. 1985, c. C-42.

b. Second, the confidential CEA Data sought by SEC relates to many CEA utility members, most located outside Ontario, and some even outside of Canada. The Board has no jurisdiction over these utilities and their data is not relevant to the present proceeding and should not be disclosed. On four separate occasions, other provincial utility boards facing similar disclosure requests have refused to compel disclosure of third party confidential or copyrighted material, instead holding that the parties must develop alternate means to address the issue at hand. Three of those four cases dealt with CEA material. For the record, CEA is prepared to engage in dialogue with Board staff and parties to this proceeding with the objective of providing non-proprietary data in a manner that assists the Board in developing an appropriate evidentiary record, while at the same time respecting CEA's rights under federal copyright law.

c. Third, the Board has acknowledged that ordering third parties to produce documents "is an unusual step to be taken only when the documents identified are clearly relevant and no prejudice or undue burden on the third parties results from the disclosure".[3] Moreover, the courts have held that compelling disclosure from a third party is an extraordinary and intrusive measure that must be balanced against the third party's right to privacy and confidentiality and the applicant must prove necessity for such disclosure. In our submission, even if it could be said that the Board had jurisdiction to order production in this case, which it does not, the SEC Motion fails to discharge its onus of proving that the CEA Property is clearly relevant and its

[3] *Toronto Hydro-Electric System Ltd. (Re)*, 2009 LNONOEB 46 ("*Toronto Hydro*"), at para. 29.

disclosure is necessary in order for it to meet its case, and that no prejudice or undue burden on third parties would result from such disclosure.

d. Fourth, it is contrary to the public interest and the objectives of the OEB Act to effectively preclude national benchmarking exercises by compelling disclosure to the public or intervenors. CEA members have strenuously objected to such disclosure requests in the past and in the current proceeding before the Board. CEA expects that its members may not continue to participate in benchmarking with Ontario utilities if the Board signals to the industry that it will issue orders compelling disclosure of third party confidential information.

COMPELLED DISCLOSURE WOULD BE A VIOLATION OF COPYRIGHT

12. The Supreme Court of Canada ("SCC") has held that the *Copyright Act* "creates *exclusive economic rights* for different categories of copyright owners in works or other protected subject matter, typically in the nature of a *statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent*."[4]

13. Pursuant to section 3(1) of the *Copyright Act*, CEA has the sole and exclusive economic right to authorize the reproduction, and hence the disclosure, of the CEA Data Models and CEA Report or any substantial part thereof. Section 27(1) of the *Copyright Act* provides that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of copyright has the right

[4] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, at para. 36 [emphasis added].

to do." Therefore, anyone who, without the legal authority to do so, reproduces or orders the reproduction of the CEA Data Models and/or the CEA Report without the consent of CEA would be committing primary or secondary copyright infringement.

14. The *Copyright Act* is binding on the Board and the rights granted to CEA therein are paramount to any order of the Board that is in conflict or operationally incompatible with this federal statute. A recent decision of the Federal Court of Appeal confirms that agents of the Crown must abide by federal copyright law. In a decision issued on April 3, 2013, the Federal Court of Appeal held that Parliament clearly intended to bind the federal and provincial Crowns by the express language of the *Copyright Act* and through logical inference.[5] In so doing, the *Access Copyright* case overruled any prior finding that federal and provincial governments and their agencies need not observe copyright. In our submission, the Board's ability to compel disclosure of a third party's copyrighted material must now be assessed in light of the *Access Copyright* case.

15. The *Copyright Act* is a federal statute; any order of the Board in conflict with the *Copyright Act* would be invalid since such order would be based on provincial legislation. The doctrine of federal paramountcy dictates that where there is an inconsistency, a conflict or an incompatible operational effect between validly enacted but overlapping provincial and

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[5] *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91, at para. 48 ("*Access Copyright*").

federal legislation, the provincial legislation is inoperative.[6] The SCC has described the doctrine as follows:

> According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers.[7]

16. An order under provincial legislation need not result in an operational conflict for the doctrine to apply. If the provincial order would "frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means"[8], such order is rendered inoperative by the doctrine of federal paramountcy.

17. As a matter of copyright law, CEA, as the copyright owner of the CEA Data Models and the CEA Report, has the right to refuse to reproduce or license this property or to license it on the basis that specific terms and conditions are adhered to. The Competition Tribunal has held that "[t]he right granted by Parliament to exclude others is fundamental to intellectual property rights"[9]; it allows the copyright owner "to refuse to license and it

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[6] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, at para. 11 ("*Rothmans*"); *Canadian Western Bank v. Alberta*, 2007 SCC 22, at para. 69 ("*Canadian Western Bank*"); *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, 2010 SCC 39, at paras. 62-66.

[7] *Ibid*, *Canadian Western Bank*, at para. 69.

[8] *Rothmans, supra* note 6, at para. 14.

[9] *The Director of Investigation and Research v. Warner Music Canada Ltd. et al.*, 1997 C.C.T.D. No. 53, 78 C.P.R. (3d) 321 ("*Warner Music*"), at para. 30; followed in *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, at para. 19, leave to appeal refused by the SCC.

places no limit on the sole and exclusive right to license."[10] Therefore, in the *Warner Music* case, the Competition Tribunal refused to order that a compulsory license be granted to BMG, where Warner Music had refused to license its musical works to BMG.

18. If the Board were to compel disclosure of the CEA Property (or any substantial part thereof), it would essentially be compelling CEA to reproduce or license its copyright material to a party or parties on terms CEA objects to, or would be forcing CEA to effectively license its property to SEC when it is under no legal obligation to do so. In our submission, the Board has no jurisdiction to override CEA's right as a copyright owner to refuse to reproduce or license the CEA Property.

19. It is a fundamental principle of federalism that provincial agencies do not have the authority to consider federal matters, unless such power has been expressly granted by Parliament.[11] The Board, like all other tribunals, is a creature of statute, imbued only with the jurisdiction and powers granted under its enabling legislation. In *Warner Music*, the Competition Tribunal accepted Warner Music's position that, unlike other provisions of the *Competition Act* that give the federal court the express power to override the *Copyright Act*, "nowhere in the [*Competition Act*] is the Tribunal given the power to override the simple exercise of intellectual property rights" and "any grant of such a power must be based on

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[10] *Ibid.*, *Warner Music*, at para. 32.

[11] *Reference re Securities Act*, 2011 SCC 66, at paras. 61-62 and *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, at paras. 52-55.

clear and unequivocal language."[12] Therefore, the Competition Tribunal held that it did not have the jurisdiction to override the *Copyright Act*.

20. If a federal tribunal such as the Competition Tribunal requires express power to override the *Copyright Act*, the Board, as a constitutionally inferior provincial tribunal, must also have express power based on clear and unequivocal language in order to override the *Copyright Act*. The Board's enabling provincial legislation, the OEB Act and the *Statutory Powers Procedure Act*[13] (the "SPPA"), are completely silent with respect to the *Copyright Act*. The Board's authority with respect to the disclosure of documents is derived solely from section 21(1) of the OEB Act and sections 5.4(1) and 12(1) of the SPPA.[14] This authority is explicitly limited by section 5.4(1.1) of the SPPA, which provides that "[t]he tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding." The *Copyright Act* clearly applies to the proceeding, given that the Board's jurisdiction to compel disclosure of copyright-protected material of a third party is in dispute.

21. Section 41.24 of the *Copyright Act* provides that the Federal Court has concurrent jurisdiction with provincial courts to enforce rights or obtain remedies under the *Copyright Act*. This jurisdiction cannot be delegated to a provincial tribunal in the absence of an express statutory provision.

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[12] *Warner Music, supra* note 9, at para. 26 and 31.

[13] R.S.O. 1990, Chapter S. 22.

[14] Rule 14.01 with respect to document disclosure has been adopted by the Board in its *Rules of Practice and Procedure*.

22. Unlike other federal or provincial tribunals that are expressly empowered by their enabling legislation with the powers, rights and privileges as are vested in a superior court of record for the production and inspection of documents[15], the Board has been granted no such powers, rights or privileges under the OEB Act or the SPPA. Thus, under no circumstances can the Board be interpreted as a court of competent jurisdiction under section 41.24 of the *Copyright Act*. Therefore, the Board does not have the jurisdiction to override CEA's exercise of its copyright in the CEA Property and to require CEA to either license or disclose such property to any person.

23. The SCC has consistently held that "copyright is a creature of statute, and the rights and remedies provided by the *Copyright Act* are exhaustive".[16] The *Copyright Act* describes the circumstances in which parties can use copyrighted material without the consent of the copyright owner and none of these exceptions or user rights is present in this case. Given that the *Copyright Act* is a complete statutory code, a provincial board cannot derogate from the rights created thereunder or create rights regarding the use of copyright material that the federal Parliament has so clearly withheld.

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[15] See, for example, section 11(3) of the *National Energy Board Act*, R.S.C. 1985, c. N-7, granting such powers to the National Energy Board; section 8(2) of the *Competition Tribunal Act*, R.S.C., 1985, c.19, granting such powers to the Competition Tribunal; section 16 of the *Broadcasting Act*, S.C. 1991, c. 11 and section 55 of the *Telecommunications Act*, S.C. 1993, C. 38, granting such powers to the Canadian Radio-television and Telecommunications Commission; and section 38 of the *Ontario Municipal Board Act*, R.S.O 1990, Chapter O.28, granting such powers to the Ontario Municipal Board.

[16] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at para. 82; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, at para. 9; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at para. 18; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373.

24. CEA has not granted its consent to the disclosure and reproduction of the CEA Data Models and the CEA Report or any substantial part thereof; a consent that is solely and exclusively within the authority of CEA to grant as the copyright owner of this material. An order of the Board compelling Oakville Hydro to disclose the CEA Property would be *ultra vires* the powers of the Board, would constitute an infringement of copyright in violation of the *Copyright Act* and would be inoperative. Therefore, the Board is required to uphold CEA's exclusive reproduction right under section 3 of the *Copyright Act* and may not issue any order that would be in conflict, or otherwise incompatible with, this exclusive federal statutory right.

COMPELLED DISCLOSURE WOULD RESULT IN BREACH OF CONFIDENTIALITY

25. The confidential CEA Data contained in the CEA Report sought by SEC relates to many CEA utility members, most located outside Ontario, and some even outside of Canada. As set out in the Bradley Affidavit, seventy percent of the utilities that participated in the CEA Report are located outside Ontario. The Board has no jurisdiction over these utilities and their data is not relevant to the present proceeding and should not be disclosed on a public or confidential basis.

26. The Bradley Affidavit confirms that CEA has never authorized the disclosure of the CEA Data Models or the CEA Report to any utility regulator in Canada, nor, to CEA's knowledge, have these materials been disclosed by CEA's members. Moreover, as described below, on four separate occasions, other provincial utility boards have recognized the proprietary nature of similar material and quite properly refused to compel disclosure of copyrighted third party documents, including CEA material. These boards

have recognized that protection of proprietary data that is used to benchmark utilities' performance and efficiency is in the public interest.

27. CEA is engaged in many benchmarking activities on behalf of electrical utilities. These activities are dependent on the participating organization providing to CEA considerable confidential data about their own operations. The provision of confidential information is premised on the basis that the information will not be shared with anyone except the participating utilities themselves. As described in the Bradley Affidavit, it took CEA many years to build trust among its members sufficient for them to share confidential information with CEA and each other.

28. Much of the data and metrics of each participating utility has not even been provided to each utility's own regulator. Forcing CEA members to disclose the data of other participating utilities would cause direct harm to those utilities and to the important practice of benchmarking in the electricity industry. In addition, as described in the Bradley Affidavit, the trust placed in the disclosing member and the CEA benchmarking process would be ruined and other utilities would be extremely reluctant to provide data to any future benchmarking program if the data provided could be subject to disclosure. Disclosure would have a chilling effect on industry participation in benchmarking analysis that is integral to measuring performance and yielding efficiencies that ultimately benefit consumers of electricity.

29. CEA's benchmarking studies, data sets, modelling and analytics are all part of a commercial endeavour pursuant to which CEA generates revenues, as described in the Bradley Affidavit. The intellectual property for which SEC seeks disclosure constitutes

CEA's "stock in trade". The Bradley Affidavit also explains that disclosure of this property will cause irreparable commercial harm to CEA because its customers will be much less likely to participate in CEA studies if the confidential outputs are subject to regulatory disclosure. If utilities do not participate in the analytical work that CEA undertakes, that work becomes less valuable to users, CEA's revenues are diminished and over time the materials that CEA offers for sale will no longer be commercially viable.

30. It is precisely because CEA's benchmarking outputs constitute its stock in trade that CEA attaches stringent terms and conditions of use that purchasers of CEA products must abide by. The consequences of a member failing to adhere to CEA's terms and conditions, as described below, are severe. If the Board compels disclosure of the CEA Property, the potential consequences include the following: (i) Oakville Hydro will no longer be entitled to receive future information from CEA about other Canadian utilities' benchmarking metrics and data; (ii) CEA will be required to seek its members' views about whether Oakville Hydro should be allowed to participate at all in future benchmarking activities; (iii) further CEA benchmarking on the metrics and data that are disclosed will have to be terminated. Thus, in addition to harming CEA's commercial interests and violating CEA's exclusive rights under the *Copyright Act*, an order requiring Oakville Hydro to disclose the CEA Property would put at risk the benefits Oakville Hydro and ratepayers gain from CEA benchmarking. This would not be in the public interest or in the interests of the electricity industry as a whole.

31. All participants in CEA studies participate according to terms of reference and abide by strict confidentiality requirements, as described in detail in the Bradley Affidavit. The

Terms of Reference for CEA's Service Continuity Committee, attached as Exhibit "A" to the Bradley Affidavit, provide that no member of the committee or CEA staff will distribute another utility's data or information of a confidential nature outside the committee without the prior written consent of that utility. This is reiterated in the CEA Data Collection and Sharing Policy, attached as Exhibit "B" to the Bradley Affidavit. While the CEA Data Collection and Sharing Policy contemplates that confidential information may exclude information that is required to be disclosed by law or a regulatory agency having jurisdiction, this is clearly not applicable to the case at hand, since as noted above, the Board does not, in our submission, have the jurisdiction to compel disclosure of copyrighted material belonging to a third party.

32. Indeed, the Board itself has previously ruled that a party cannot be held to a duty to disclose information that is not under its control:

> A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in *unless the information is privileged or not under its control.*[17] [emphasis added]

33. Therefore, should the Board order Oakville Hydro to disclose the CEA Property, the order would have to be subject to: (i) Oakville Hydro obtaining CEA's consent; and (ii) CEA obtaining the prior written consent of all thirty-seven Canadian and international utilities that participated in the CEA Report before this information can be disclosed on either a

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[17] *Westcoast Energy Inc. (Re)*, 2008 LNONOEB 62, at para. 45, followed in *Toronto Hydro*, *supra* note 3, at para. 20.

confidential or public basis. As set out in the Bradley Affidavit, such consent will likely not be forthcoming.

34. The confidentiality requirements that bind CEA and its customers are clearly of fundamental importance to those customers, as is evident from the Board's own record. In October 2012, at the request of SEC and without notice to CEA, the Board ordered Hydro One to disclose CEA's *Transmission COPE 2011 Comprehensive Annual Report* (the "COPE Order").[18] Other utilities that participated in the COPE report vehemently objected to its disclosure. In its October 25, 2012 submission, AltaLink Management Ltd. ("AltaLink") made the following arguments:

> The OEB order requires Hydro One to violate the binding confidentiality agreement all participating members have in relation to participating in the Transmission COPE. *Each and every member does not have the authority to release to any non-participating party any information or results associated with any other individual participating member. The importance of this confidential obligation cannot be understated.*
>
> …
>
> Members choose to participate in these benchmarking and data comparison initiatives under the clear agreement of confidentiality. *Confidentiality is critical to future participation. Members will no longer participate and share their performance results in such initiatives if they understand confidentiality agreements can be breached through regulatory processes in jurisdictions across Canada.* It is through the participation and sharing of such information that members seek to find opportunities to enhance their performance, to the benefit of customers and ratepayers. [emphasis added]

[18] EB-2012-0031 - Board Order of October 24, 2012 with respect to Hydro One Networks – Transmission Rate Application.

35. Similarly, NB Power in its October 25, 2012 submission stated as follows:

> NB Power has contributed information to this report with the agreement that the information was strictly confidential and shared with other T-COPE participants for their internal use only.
>
> *It is a clear violation of this confidentiality agreement for Hydro One to submit this report to the OEB.* [emphasis added]

36. As is evident from the letters from CEA's members attached hereto as Exhibit "A", the objections of participating utilities to the disclosure of the CEA Property in this proceeding is equally as strenuous, if not more so.

37. In the 2012 proceeding, CEA, SEC and Hydro One ended up reaching a Settlement Agreement, which provided that Hydro One would utilize alternate measures to support its application and the Board varied its order to no longer require production of the COPE report.[19] Thus, it was clearly not necessary for CEA's report to be either relied on or disclosed in the 2012 Hydro One application and, in our submission, the same is true of the case at hand.

38. CEA is fully aware that relevant and appropriate benchmarking data can be of benefit to regulators. It has therefore developed Policies for Benchmarking Data in Regulatory Settings, attached as Exhibit "C" to the Bradley Affidavit (the "BD/RS Policy"). The BD/RS Policy provides that "[a]ppropriate benchmarking performance information (which is accurate, verifiable, and verified and includes the proper consideration, caveats, standardized interpretations and collection methodologies) will be developed by CEA for

[19] EB-2012-0031, Ontario Energy Board Transcript of Hearing, 8 November 2012, Volume 1, at pp. 26-27.

use in Regulatory settings." The BD/RS Policy also provides that CEA and its members will work cooperatively with regulatory authorities to ensure that appropriate benchmarking indicators for assessing individual company performance will be developed and composite benchmarks deemed appropriate for regulatory environments will be produced. As set out in the Bradley Affidavit, these individual and composite benchmarks have consistently been relied upon by various provincial utilities boards and no such board has ever compelled disclosure of the CEA Data Models or the CEA Report.

OTHER PROVINCIAL UTILITY BOARDS HAVE REFUSED TO COMPEL DISCLOSURE

39. Other provincial utility boards have refused to compel disclosure of third party confidential or copyrighted material on four separate occasions, instead holding that the parties must develop an alternate means to address the issue at hand. In three of those four cases, the boards refused to compel the utility member to disclose CEA material.

40. In *AltaLink Management Ltd. (Re)*, the Alberta Energy and Utilities Board (the "Alberta Board") initially directed AltaLink to file all benchmarking information CEA collects from AltaLink and its peers. However, in response to AltaLink advising that as of 2006, CEA members are not authorized to release any CEA benchmarking data to external parties, the Alberta Board denied requests by two parties to compel such disclosure, instead noting as follows:

> Now that the CEA has restricted its member utilities from releasing any of the CEA's benchmarking data to external parties outside the utility, the Board recognizes that AltaLink is not in a position to fully comply with the Board's direction ….

Accordingly, the Alberta Board relieved AltaLink from complying with its direction and instead directed AltaLink to file its individual benchmarking information.[20]

41. Shortly thereafter, in *ENMAX Power Corp. (Re)*, the Alberta Board accepted the applicant's justification that it could not provide CEA statistics regarding planned and unplanned outages because CEA will not permit such disclosure.[21]

42. The Nova Scotia Utility and Review Board (the "Nova Scotia Board") has also refused to compel disclosure of CEA statistics on utilities beyond the applicant in question. In *Nova Scotia Power Incorporated (Re)*, the applicant refused to file the provincial numbers that compared its reliability indices to other Atlantic Canadian utilities because such data is provided to CEA on a confidential basis. The Nova Scotia Board ultimately did not require that the CEA data be filed and accepted the applicant's position that the party arguing for disclosure had provided no evidence that such data was needed to assess the application and that it was open to that party to file any such data which might be available in the public domain.[22]

43. Similarly, while not dealing with CEA material, in *ATCO Electric Ltd. (Re)*, the Alberta Board refused to compel the disclosure of copyrighted third party material. The Alberta Board had previously instructed ATCO to provide information to customers on forward prices. ATCO indicated that it relied on copyrighted, third party information to forecast

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[20] *AltaLink Management Ltd. (Re)*, [2007] A.E.U.B.D. No. 12, at paras. 598 to 607.

[21] *ENMAX Power Corp. (Re)*, [2007] A.E.U.B.D. No. 22, at paras. 18 to 20.

[22] *Nova Scotia Power Incorporated (Re)*, 2012 NSUARB 53, at paras.125-128.

future prices and such information could not be published. The Alberta Board accepted this argument and directed ATCO to develop a process to provide forward price information to appropriate customers and to communicate this process to the Alberta Board and interested parties.[23]

44. Therefore, with the exception of the COPE Order that was later varied, were the Board to compel disclosure of any of the CEA Property, that order would be the only of its kind. Given the Federal Court of Appeal's decision in the *Access Copyright* case, which was issued subsequent to the COPE Order, in our submission such an order, if issued by the Board, would be rendered inoperative.

SEC HAS NOT DISCHARGED ITS ONUS

45. Even if the Board were to have the jurisdiction to compel disclosure of a third party's copyright protected documents (which CEA asserts it does not), the courts have previously held that compelling disclosure from a third party is an extraordinary and intrusive invasion on the rights of a non-party that should only be exercised in the rarest of circumstances. The interests of the party seeking such disclosure must be balanced against the third party's right to privacy and confidentiality, especially where the non-party wishes to assert its proprietary rights. Indeed, the Board itself has acknowledged that ordering third parties to produce documents "is an unusual step to be taken only when the documents identified are

[23] *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 42, at paras. 186-193.

clearly relevant and no prejudice or undue burden on the third parties results from the disclosure".[24] In our submission, SEC has failed to discharge this onus.

46. In *Tetefsky v. General Motors Corp.*[25], the court denied a motion to compel a third party (JATO) to produce proprietary information, notwithstanding the plaintiffs' arguments that such information was needed in order for it to proceed with its action. JATO refused to disclose the information on several grounds, including that such information was confidential and subject to copyright protection and that its compelled disclosure would be a violation of copyright. JATO also refused to disclose the information on the basis that it is valuable property that may be used to harm its enterprise's goodwill and its clientele.

47. Notwithstanding that Rule 30.10 of the *Rules of Civil Procedure* explicitly provides for the production of documents from non-parties (we note that the Board's rules do not contain such an express provision), the court in *Tetefsky* noted that the threshold for granting such an order is high and should only be made in exceptional circumstances.[26] In making the determination of whether to order production from a non-party, the court may consider the following factors: (1) the importance of the document to the issues in the litigation; (2) whether production at the discovery stage as opposed to production at trial is necessary to avoid unfairness to the moving party; (3) whether the examination of the opposing party with respect to the issues to which the documents are relevant would be adequate to obtain the information in the document; (4) the availability of the document or its information

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[24] *Toronto Hydro supra* note 3.

[25] *Tetefsky v. General Motors Corp.*, 2010 ONSC 1675 (Ont. Sup. Ct.), affirmed [2011] O.J. No. 1390 (Ont. C.A.) ("*Tetefsky*").

[26] *Ibid.*, at para. 41.

from another source that is accessible to the moving party; (5) the relationship of the non-party from whom production is sought to the litigation and the parties to the litigation; and (6) the position of the non-party with respect to production (the "Stavro Test").[27] The Stavro Test has also been adopted by the Ontario Municipal Board and the Ontario Assessment Review Board in order to determine whether to order production from a non-party.[28]

48. The court in *Tetefsky* also held that in order to obtain the relief requested, which is extraordinary and intrusive on the rights of a non-party, the party seeking such disclosure must establish necessity.[29] Furthermore, even if necessity is established, the court "must balance the situation and the interests of the party seeking disclosure against the position and the interests of the non-party, including the non-party's interest in privacy and confidentiality, and the court must also weigh any public interest that would justify non-disclosure", so that the court will not impinge unnecessarily upon the property and privacy rights of non-parties.[30] The court also took into consideration that compelled disclosure

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[27] *Ibid.*, at para. 42, citing the test established by the Ontario Court of Appeal in *Ontario (Attorney General) v. Stavro, Re The Estate of Harold Edwin Ballard* (1995), 26 O.R. (3d) 39 (Ont. C.A.).

[28] *JDS Investments Ltd. v. Regional Assessment Commissioner, Region No. 15*, [1996] O.M.B.D. No. 1538; *Mississauga (City) Official Plan Amendment No. 20 (Re)*, [2002] O.M.B.D. No. 316; *Hammerson Canada Inc. v. Guelph (City)*, [2000] O.M.B.D. No. 1211; *Woodbine Entertainment Group v. Municipal Property Assessment Corp. Region No. 9*, [2007] O.A.R.B.D. No. 652.

[29] *Op cit.*, at para. 44.

[30] *Ibid.*, at para. 47.

would amount to an expropriation of JATO's property[31] and would be harmful to its "stock in trade" and goodwill.[32]

49. In refusing to compel production of the third party information in *Tetefsky*, the court held as follows:

> I appreciate that the court has the power and has exercised it to take away a non-party's rights of property and privacy, but, in my opinion, the exercise of the power to compel production must be rare when a non-party wishes to assert its property and privacy rights as opposed to objecting merely on the grounds that the information it has is irrelevant to the proceedings or on the grounds that it would simply be bothered or inconvenienced by producing the information.[33]

50. In our submission, SEC has failed to discharge its onus of proving that the CEA Property is clearly relevant and that disclosure of such material is necessary in order for it to meet its case. Instead, SEC simply argues that the Board and intervenors cannot answer Issue 2.1 in the Board's Approved Issues List with respect to Oakville Hydro's efficiency benchmarking without reviewing the studies and surveys it has conducted, and that a confidentiality agreement is not a valid reason for non-disclosure. Even if the Board were to determine that SEC has met this aspect of its onus, CEA submits that SEC has failed to prove that no prejudice or undue burden on third parties result from the disclosure. Compelled disclosure of the CEA Property would result in a violation of copyright and a breach of confidentiality, would be harmful to CEA's stock in trade and goodwill, and

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[31] *Ibid.*, at para. 48.

[32] *Ibid.*, at para. 52.

[33] *Ibid.*, at para. 51.

would be contrary to the public interest. In our submission, SEC has not proven that such an extraordinary and intrusive invasion on the rights of a non-party is justified in these circumstances, even if it could be said that the Board has the jurisdiction to issue such an order, which in this case it does not.

COMPELLED DISCLOSURE WOULD BE CONTRARY TO THE PUBLIC INTEREST

51. It is contrary to the public interest and the objectives of the OEB Act to effectively preclude national benchmarking exercises by compelling disclosure to the public or intervenors. As noted above, CEA members have strenuously objected to such disclosure requests, both in the past and in the current proceeding before the Board. As set out in the Bradley Affidavit, CEA expects that its members may not continue to participate in benchmarking with Ontario utilities if the data is subject to disclosure via orders of the Board.

52. Compelled disclosure of the CEA Property, even subject to a confidentiality undertaking, puts at risk CEA's entire benchmarking program. If disclosure of any of the CEA Property occurs and trust in CEA's confidentiality policies is lost, it is unlikely that electrical utility national benchmarking will be possible anymore. Such benchmarking helps improve utility productivity and performance, which in turn results in significant benefits to companies, shareholders and ratepayers.

53. As noted above, there are alternatives to compelling disclosure of the CEA Property, including but not limited to the filing of benchmarking data for the individual utility as well as composite benchmarks. CEA is willing to work with Board staff to ensure that relevant

and appropriate benchmarking data is provided to the Board, without either infringing CEA's copyright or breaching the confidentiality measures that bind CEA and its members.

54. For all of these reasons, CEA requests the relief cited above.

DOCUMENTARY EVIDENCE AND EVIDENCE RELIED UPON

55. CEA proposes to rely upon:

a. The affidavit of Francis Bradley, sworn March 21, 2014 (the "Bradley Affidavit") and the Exhibits attached thereto;

b. The letters from CEA's members attached hereto as Exhibit "A";

c. The authorities listed in Exhibit "B" attached hereto;

d. The Record in EB-2012-0031; and

e. Such further and other material as may be required and the Board may permit.

PROPOSED METHOD OF HEARING

56. CEA requests an oral hearing of this matter, given the importance of this matter and the effect that the Board's ruling on the SEC Motion will have on CEA and its members.

57. All of which is respectfully submitted.

Canadian Electricity Association

By its Counsel

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March 24, 2014

6306280.10

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Applicant Counsel	**James Sidlofsky** Partner Borden Ladner Gervais LLP 40 King Street West Suite 4100, Scotia Plaza Toronto ON M5H 3Y4 Tel: 416-367-6277 Fax: 416-361-2751 Email: jsidlofsky@blg.com **Bruce Bacon** Consultant Borden Ladner Gervais LLP 40 King Street West Suite 4100, Scotia Plaza Toronto ON M5H 3Y4 Tel: 416-367-6087 Fax: 416-3617366 Email: bbacon@blgcanada.com
INTERVENORS	
Association of Major Power Consumers in Ontario (AMPCO)	**Shelley Grice** Econalysis Consulting Services 34 King Street East Suite 630 Toronto ON M5C 2X8 Tel: 416-348-0193 Fax: 416-348-0641 Email: shelley.grice@rogers.com

Energy Probe Research Foundation	**Randy Aiken** Aiken & Associates 578 McNaugton Ave. W. Chatham ON N7L 4J6 Tel: 519-351-8624 Fax: 519-351-4331 Email: randy.aiken@sympatico.ca **David MacIntosh** Case Manager Energy Probe Research Foundation 225 Brunswick Avenue Toronto ON M5S 2M6 Tel: 416-964-9223 Ext: 235 Fax: 416-964-8239 Email: DavidMacIntosh@nextcity.com
HVAC Coalition	**Martin Luymes** Co-ordinator HVAC Coalition 2800 Skymark Avenue Building 1, Suite 201 Mississauga ON L4W 5A6 Tel: 905-602-4700 Ext: 235 Fax: 905-602-1197 Email: mluymes@hrai.ca **Jay Shepherd** Jay Shepherd Professional Corporation 2300 Yonge St. Suite 806 P.O. Box 2305 Toronto ON M4P 1E4 Tel: 416-483-3300 Fax: 416-483-3305 Email: jay.shepherd@canadianenergylawyers.com
School Energy Coalition	**Wayne McNally** SEC Coordinator Ontario Public School Boards' Association 439 University Avenue 18th Floor Toronto ON M5G 1Y8 Tel: 416-340-2540 Fax: 416-340-7571 Email: wmcnally@opsba.org

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Vulnerable Energy Consumers Coalition

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EXHIBIT "A"

LETTERS FROM CEA MEMBERS

ONTARIO POWER GENERATION

Andrew Barrett P.Eng., MBA
Vice President

Regulatory Affairs

700 University Avenue, Toronto, ON M5G 1X6

Tel: 416-592-4463 Fax: 416-592-8519
andrew.barrett @opg.com

March 21, 2014

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Motion by the Canadian Electricity Association - EB-2013-0159

The purpose of this letter is to express OPG's views with respect to the above-referenced Motion by the Canadian Electricity Association (CEA).

OPG is a member of the CEA and uses CEA benchmarking information in its business planning and target setting. Accordingly, OPG would be concerned if compelled disclosure of CEA information caused the members of the CEA to discontinue their participation in these benchmarking activities. Loss of this benchmarking information would have a negative impact on OPG's planning activities.

Please contact me if you have any questions regarding this submission.

Sincerely,

Andrew P Barrett
VP Regulatory Affairs

cc: Canadian Electricity Association

Énergie NB Power

March 20, 2014

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

Dear Ms. Walli:

Re: Board File No. EB-2013-0159

This letter is in regard to a matter before the Ontario Energy Board involving an application (EB-2013-0159) by Oakville Hydro Electricity Distribution Inc. for an Order or Orders approving just and reasonable electricity rates and other charges for electricity distribution to be effective May 1, 2014.

As part of the hearing process, the School Energy Coalition ("SEC") has filed a motion asking that Oakville Hydro include copies of two surveys/studies in its response to Interrogatory 2.1-SEC-3. The surveys/studies requested are those conducted by the Canadian Electricity Association ("CEA") to which the New Brunswick Power Corporation ("NB Power") is a long standing member.

NB Power objects to the disclosure of any survey/study conducted by CEA for two reasons;

a) any disclosure of surveys/studies, which are classified as confidential by CEA, would violate the understanding and promise of confidentiality under which NB Power had agreed to share information; and
b) the release of such surveys/studies may set precedence in future hearings in Ontario and across Canada and therefore bring to a stop all sharing of industry related information in the fear of more disclosures.

NB Power strongly supports the role of the CEA and the benefits that are derived as a result of a national forum and voice for the electricity industry in Canada. The release of confidential information can have many repercussions that are detrimental to the utility and customers. The loss of a confidential forum such as the CEA would be a set-back to the electricity industry in terms of potential progress in establishing best practices, innovative customer service, and the ability to deliver electricity at low and stable rates. NB Power is a corporation of the Crown and the standard service provider for electricity in New Brunswick so we rely on cost effective measures, such as our involvement with CEA, as an avenue to ensure we provide a reliable supply of electricity at the best cost.

We support the CEA's motion to not allow the release of the requested surveys/studies as requested in the SEC motion.

Sincerely,

Sherry Thomson
Vice President of Customer Service, Transmission and Distribution
NB Power Corporation

Manitoba Hydro

from the Office of the Vice-President

2014 03 20

Mr. Francis Bradley
Vice President Policy
Canadian Electric Association
275 Slater Street
Ottawa ON K1P 5H9

Dear Mr. Bradley:

SEC MOTION FOR INFORMATION DISCLOSURETO THE OEB

Manitoba Hydro, as a participant in the CEA's Public Attitude Research and Benchmarking Studies, strongly objects to public disclosure of the requested CEA Benchmarking information. Manitoba Hydro assigns significant value to the information gathered by the CEA as it is representative of the utility industry and provides an opportunity to benchmark our performance against those of our peers.

If this information were to become part of the public domain, utilities may be hesitant to participate in future benchmarking studies. Without adequate representation from the utility industry, the validity of future benchmarking studies is called into question and may result in the loss of valuable information for our utility.

We fully support the CEA's position to have this motion dismissed as it is not in the public interest.

Yours truly,

L Kuczek

Vice-President Customer Care & Energy Conservation

LJK/nkw

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Telephone / *N° de téléphone :* 204-360-4503 • Fax / *N° de télécopieur :* 204-360-6112

2000 – 10423 101 St NW, Edmonton, AB
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epcor.com

March 20, 2014

Canadian Electricity Association
275 Slater Street, Suite 1500
Ottawa, Ontario K1P 5H9

Attention: **Devin McCarthy**
Director, Transmission & Distribution
Canadian Electricity Association

Dear Mr. McCarthy:

Re: **EPCOR Distribution & Transmission Inc.**
Canadian Electricity Association Submission to the Ontario Energy Board

EPCOR Distribution & Transmission Inc. (EDTI) is writing to support the Canadian Electricity Association (CEA) submission to the Ontario Energy Board (OEB), requesting that the OEB deny the School Energy Coalition's (SEC's) Motion requesting that the OEB order Oakville Hydro Electricity Distribution Inc. to provide full and adequate response to Interrogatory 2.1-SEC-3 by producing copies of two [CEA] surveys/studies.

EDTI is an active member of the CEA and voluntarily participates in benchmark studies conducted by that organization.

As commonly acknowledged among utilities and regulators alike, "benchmarking" is a difficult and inherently imprecise exercise, given fundamental differences in the circumstances of each utility that drive performance and costs, including such things as climate, geography, age and type of facilities comprising the utility as well as system design, maintenance practices, historical investment levels and life cycle replacement cycles. EDTI uses the CEA aggregated benchmarking statistics as high level, directional indicators of performance, to assist EDTI in identifying aspects of its operations that might warrant further investigation from a performance perspective. However, given the fundamental differences among utilities, EDTI does not (and could not on any reasonable basis) use the benchmarking information as a tool by which to accurately measure its performance in a specific area.

With all of this in mind, EDTI provides its company-specific data to the CEA for benchmarking purposes on a confidential basis, on the condition that it will be aggregated with the data provided by other member utilities and only released publicly on such aggregated basis. The public release of the company-specific data provided to the CEA would in all likelihood significantly increase the administrative and regulatory burden for member utilities such as EDTI. Specifically, the utilities could easily find themselves being forced to spend excessive amounts of time and resources in the regulatory process addressing specific data points that are fundamentally not comparable among different utilities. The very real potential for this outcome would create a strong incentive for member utilities such as EDTI to withdraw their participation from the CEA benchmarking process, taking away any benefits that CEA benchmarking currently provides to Canadian utilities and their customers.

For these reasons, EDTI supports the CEA's request that the SEC motion be denied.

Sincerely,

John Elford
DVP, D&T Operations
EPCOR Distribution & Transmission Inc.

cc: Jay Baraniecki, EPCOR Distribution & Transmission Inc.
Jonathan M. Liteplo, Fasken Martineau DuMoulin LLP

ALTALINK | 2611– 3rd Avenue SE, Calgary, Alberta T2A 7W7 | www.altalink.ca

March 17, 2014

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

RE: EB-2013-0159 Oakville Hydro
School Energy Coalition (SEC) motion before the Ontario Energy Board (OEB) for an order requiring Oakville Hydro Electricity Distribution Inc. (Oakville Hydro) to provide confidential benchmarking analysis of the Canadian Electricity Association (CEA)

AltaLink Management Ltd. (AltaLink), a regulated transmission owner in Alberta, has been informed of the SEC's motion before the OEB for an order requiring Oakville Hydro to provide confidential benchmarking analysis of the CEA. In response to this motion, the CEA has been granted intervener status and has prepared a submission to which this letter is also attached. AltaLink has reviewed the CEA's submission to the OEB on this matter and fully supports the CEA's request that the SEC motion, to the extent it forces disclosure of confidential benchmarking data provided to the CEA by AltaLink, be denied.

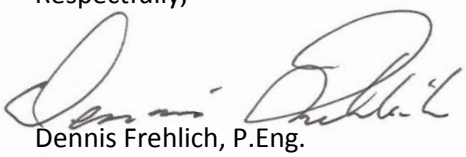
The SEC motion requires Oakville Hydro to violate the binding confidentiality agreement all participating CEA members have in relation to participating in the provision of confidential benchmarking data. No member has the authority to release to any non-participating party any information or results associated with any other individual participating member. The importance of this confidential obligation cannot be understated.

AltaLink brings to the OEB's attention a similar circumstance in Alberta where the Alberta Energy and Utilities Board (AEUB) requested and directed AltaLink to potentially breach CEA confidentiality provisions. In the AEUB's decision, *Decision 2007-012, page 107 to 108,* the AEUB respected the confidentiality provisions of AltaLink to the CEA and participating members.

AltaLink participates in the CEA benchmarking studies with the strict understanding and knowledge that any benchmarking data and information provided will not be disclosed to external parties and agrees with Item 6 of the CEA's submission that if this benchmarking information were so disclosed it would act as a strong disincentive for AltaLink to continue to participate in such surveys going forward. It is through the participation and sharing of such information that members seek to find opportunities to enhance their performance, to the benefit of customers and ratepayers.

Should you have any questions please contact the undersigned regarding this matter at (403) 267-3411 or by email at dennis.frehlich@altalink.ca.

Respectfully,



Dennis Frehlich, P.Eng.
Executive Vice President & Chief Operating Officer

cc Jim Burpee, President & CEO, Canadian Electricity Association
Mary Caputi, Director of Regulatory Affairs, Oakville Hydro
Scott Thon, President & Chief Executive Officer, AltaLink
Zora Lazic, Senior Vice President, Law, Regulatory & General Counsel, AltaLink

Brookfield

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March 19, 2014

Francis Bradley
Canadian Electricity Association
275 Slater Street, Suite 1500
Ottawa, Ontario K1P 5H9

Re: EB-2013-0159 – Application of Oakville Hydro Electricity Distribution Inc.,

Dear Mr. Bradley:

It has come to my attention that in the above-captioned case, intervenor the School Energy Coalition (the "SEC") has moved that the Ontario Energy Board compel the disclosure of confidential "details and copies of all performance efficiency benchmarking" in which the Applicant has participated. Such confidential "details and copies" appear to include information that CEA members, such as Brookfield Renewable Energy Group ("Brookfield"), has provided to the CEA on a confidential basis in order to support CEA's benchmarking efforts. I understand that the CEA is appearing before the OEB to oppose the SEC's request.

I am writing to support the CEA's efforts to oppose the SEC motion and protect confidential CEA benchmarking details from public disclosure. Brookfield's participation in the CEA's benchmarking efforts, and that of other electric industry companies, has been premised on the explicit understanding that their information would remain confidential. If that confidentiality was not given effect, but instead disclosure to third parties was compelled, the results could be deleterious.

Companies provide data about their own operations premised on the basis that the information will not be shared with anyone except the participating companies themselves (and, even then, behind a masked identification system that protects the identity of the participating company). As a consequence, weakened confidentiality could lead to decisions not to continue participation in future benchmarking.

Lessened industry participation, in turn, would undermine the benefits of benchmarking. Benchmarking against a full range of electric industry companies uncovers opportunities for enhanced performance, to the benefit of customers and ratepayers. That benefit erodes, however, as industry participation declines.

Brookfield therefore supports the CEA's efforts towards maintaining both the confidentiality that attends the benchmarking process and the value that confidential process brings to the customers and ratepayers of Ontario and, indeed, all of Canada.

Sincerely,

David A. Bono
Vice President of Legal Services -
Litigation, Regulatory & Compliance
Brookfield Renewable Energy Group

ATCO Electric

March 24, 2014

Canadian Electricity Association
275 Slater Street, Suite 1500
Ottawa, Ontario K1P 5H9

Dear Sir:

Re: Disclosure of Confidential Canadian Electric Association (CEA) Survey / Studies

Thank you for your recent correspondence relating to Oakville Hydro Electricity Distribution Inc.'s rate application and a motion from the School Energy Coalition seeking an order from the Ontario Energy Board to compel Oakville Hydro to disclose confidential surveys/studies prepared by the CEA.

As a member of the CEA who has previously provided confidential data for various CEA surveys and studies, ATCO Electric respectfully submits this data was provided on the basis that it would be maintained in accordance with strict confidentiality requirements. These confidentiality requirements have and continue to be extremely important to ATCO Electric. If this expectation of confidentiality was breached, it is expected that ATCO Electric would reconsider its participation in future similar initiatives. This would be unfortunate as it is through this participation and sharing of information that ATCO Electric finds opportunities to enhance its performance to the benefit of its ratepayers as well as its shareowner.

Should have any questions on the above, please do not hesitate to contact me.

Yours truly,

James Grattan, CA
Director, Regulatory
ATCO Electric Distribution Division

10035 - 105 Street, Edmonton, Alberta, Canada T5J 2V6
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Hydro Québec Distribution

Une division d'Hydro-Québec

March 20, 2014

Mr. Jim Burpee
President and Chief Executive Officer
CANADIAN ELECTRICITY ASSOCIATION
275 Slater Street, Suite 1500
Ottawa, Ontario
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Direction – Encadrement réseau et planification
Vice-présidence – Réseau de distribution
Hydro-Québec Distribution
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Tél. : 514 879-4100, poste 3662
Téléc. : 514 879-4870
Courriel : chartrand.denis.2@hydro.qc.ca

Subject: Protection of Confidentiality of Benchmarking Information from Hydro-Québec Distribution and produced with the CEA
File: *AND IN THE MATTER OF an Application by Oakville Hydro Electricity Distribution Inc. for an Order or Orders approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.*
Docket: EB-2013-0159

Mr. Burpee,

It has been brought to our attention that an intervener in the above mentioned Ontario Energy Board (OEB) file - the School Energy Coalition (SEC) – has asked the OEB to compel disclosure of Canadian Electricity Association (CEA) benchmarking analysis including confidential information provided by Hydro-Québec Distribution to CEA.

All CEA Benchmarking participants have established and abided by confidentiality rules, which have been managed by CEA. Under these rules, all data that are provided by Hydro-Québec Distribution to CEA are confidential. So are the Benchmarking Reports that follow.

All data that are given to CEA by Hydro-Québec Distribution and shared within all benchmarking participants are for their own internal use only. Therefore, all external use of Hydro-Québec Distribution data or other participants' data is strictly forbidden unless these members give their explicit agreement.

Hydro-Québec Distribution does not grant its agreement for making its data available in and reminds CEA that it provided this data under a strict confidentiality agreement.

Should the OEB grant the SEC's motion in this case, Hydro-Québec Distribution would reconsider its participation to CEA programs or benchmarking studies. Thus, if Hydro-Québec Distribution and other participants no longer participates in CEA benchmarking studies, it would have a significant impact on information sharing for the purpose of improving performance in broad range of activities – well beyond our reliability statistics to information shared through CEA's best practice work, the simple surveys and quick polls we undertake and even public attitudes research.

Hydro-Québec Distribution participated in CEA programs and benchmarking studies with the understanding and the expectation that these confidentiality rules would be guaranteed. Therefore, Hydro-Québec Distribution requests that CEA takes all means available to protect the confidentiality of Hydro-Québec Distribution information's and the Benchmarking data. Specifically, we ask you to make legal representations before the OEB and confirm to us that you will be taking the required actions to preserve the confidentiality of Hydro-Québec Distribution information's and the benchmarking data.

Best regards,

Denis Chartrand, ing.
Chef – Stratégie et encadrement du réseau

Hydro Québec
TransÉnergie

Une division d'Hydro-Québec

March 18, 2014

Mr. Jim Burpee
President and Chief Executive Officer
CANADIAN ELECTRICITY ASSOCIATION
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Direction – Commercialisation et Affaires réglementaires
Direction principale – Planification, Expertise et Affaires réglementaires
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Tél. : 514 879-4100, poste 4648
Téléc. : 514 879-4685
Courriel : clermont.sylvain@hydro.qc.ca

Subject: Protection of Confidentiality of Benchmarking Information from Hydro-Québec TransÉnergie and produced with the CEA
File: *AND IN THE MATTER OF an Application by Oakville Hydro Electricity Distribution Inc. for an Order or Orders approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.*
Docket: EB-2013-0159

Mr. Burpee,

It has been brought to our attention that an intervener in the above mentioned Ontario Energy Board (OEB) file - the School Energy Coalition (SEC) – has asked the OEB to compel disclosure of Canadian Electricity Association (CEA) benchmarking analysis including confidential information provided by Hydro-Québec TransÉnergie to CEA.

As stated in a formal letter sent by Hydro-Québec TransÉnergie to CEA, dated 24th October 2012, all CEA Benchmarking participants have established and abided by confidentiality rules, which have been managed by CEA. Under these rules, all data that are provided by Hydro-Québec TransÉnergie to CEA are confidential. So are the Benchmarking Reports that follow.

All data that are given to CEA by Hydro-Québec TransÉnergie and shared within all benchmarking participants are for their own internal use only. Therefore, all external use of Hydro-Québec TransÉnergie data or other participants' data is strictly forbidden unless these members give their explicit agreement.

Hydro-Québec TransÉnergie does not grant its agreement for making its data available and reminds CEA that it provided this data under a strict confidentiality agreement.

Should the OEB grant the SEC's motion in this case, Hydro-Québec TransÉnergie would reconsider its participation to CEA programs or benchmarking studies. Thus, if Hydro-Québec TransÉnergie and other participants no longer participates in CEA benchmarking studies, it would have a significant impact on information sharing for the purpose of improving performance in broad range of activities – well beyond our reliability statistics to information shared through CEA's best practice work, the simple surveys and quick polls we undertake and even public attitudes research.

Hydro-Québec TransÉnergie participated in CEA programs and benchmarking studies with the understanding and the expectation that these confidentiality rules would be guaranteed. Therefore, Hydro-Québec TransÉnergie requests that CEA takes all means available to protect the confidentiality of Hydro-Québec TransÉnergie information's and the Benchmarking data. Specifically, we ask you to make legal representations before the OEB and confirm to us that you will be taking the required actions to preserve the confidentiality of Hydro-Québec TransÉnergie information's and the benchmarking data.

Best regards,

Sylvain Clermont, ing.
Chef – Commercialisation des services de transport

SC/MCR/DT

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Robert N. Hemstock
Executive Vice-President
Regulatory and Legal Services
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rhemstock@enmax.com

March 17, 2014

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: EB-2013-0159 Oakville Hydro

ENMAX Corporation (ENMAX) is a vertically integrated utility operating within the province of Alberta. ENMAX has learned that the School Energy Coalition ("SEC") has brought a motion in the above-referenced proceeding asking the Ontario Energy Board ("Board") for an order requiring Oakville Hydro to provide two surveys/studies, the provision of which would disclose confidential benchmarking data provided to the Canadian Electricity Association ("CEA") by its members.

ENMAX is not a party in this proceeding, nor is it seeking standing before the Board; however, ENMAX is compelled to write to the Board since a decision to order the production of the two surveys/studies requested by the SEC would result in the release of ENMAX information. As part of its participation in the CEA benchmarking surveys, ENMAX provides the CEA with sensitive confidential information regarding its performance. ENMAX provides this information in order to assist in the identification of opportunities to improve economic efficiencies and reduce costs in the provision of utility services and products for the benefit of its customers. ENMAX has always understood that the data will, at all times, be held in the strictest confidence. Indeed, ENMAX, as do all participating members, signs a binding confidentiality agreement to this effect.

Should the Board make the order requested by the SEC, ENMAX would be forced to re-evaluate its participation in the benchmarking studies. Should the benchmarking studies no longer be undertaken, ENMAX respectfully submits that it would be to the detriment of the customers served by the participating members. Accordingly, ENMAX strongly opposes the issuance of the requested order.

Sincerely,

Robert N. Hemstock
Executive Vice-President
Regulatory and Legal Services
ENMAX Corporation

Cc: Jim Burpee, President and CEO, Canadian Electricity Association

BC hydro
FOR GENERATIONS

Janet Fraser
Chief Regulatory Officer
Phone: 604-623-4046
Fax: 604-623-4407
bchydroregulatorygroup@bchydro.com

Via email: bradley@electricity.ca

March 20, 2014

Canadian Electrical Association
#1500 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Attention: Francis Bradley

Dear Mr. Bradley:

RE: School Energy Coalition (SEC) Motion before the Ontario Energy Board (OEB) for an Order Requiring Oakville Hydro to Provide Canadian Electrical Association (CEA) Confidential Benchmarking Information

BC Hydro has reviewed the CEA's comments regarding the above-noted matter before the OEB in relation to the SEC's motion to compel the disclosure of certain CEA data and reports that includes information and data provided by BC Hydro to the CEA on a confidential basis. BC Hydro does not consent to the disclosure of its confidential information and data, and strongly supports the CEA's submission for the denial of the SEC motion.

BC Hydro, as a member of the CEA, participates in CEA studies and surveys with the understanding that non-public data and information provided by BC Hydro to the CEA will be treated by the CEA, and other members, as sensitive confidential information not to be shared with, or disclosed to, other third parties. Should the OEB make an order requiring Oakville Hydro to provide the CEA confidential benchmarking information, BC Hydro will need to re-evaluate its participation in such future studies and surveys.

For further information, please contact the undersigned.

Yours sincerely,

Janet Fraser
Chief Regulatory Officer

jf/ma

YUKON ENERGY

YUKON ENERGY CORPORATION
P.O. Box 5920
WHITEHORSE
YUKON Y1A 6S7
(867) 393-5300

March 24, 2014

Canadian Electricity Association
275 Slater Street, Suite 1500
Ottawa, Ontario K1P 5H9

Attention: Francis Bradley

Dear Mr. Bradley:

RE: School Energy Coalition (SEC) motion before the Ontario Energy Board (OEB) for an order requiring Oakville Hydro to provide confidential benchmarking analysis of the Canadian Electricity Association (CEA)

Yukon Energy Corporation has reviewed the CEA's comments and submission regarding the matter above and fully supports the CEA's request that the SEC motion, to the extent that it forces the disclosure of confidential benchmarking data provided to the CEA by Yukon Energy Corporation, be denied. Yukon Energy Corporation participates in the CEA benchmarking studies with the strict understanding and knowledge that any benchmarking data and information provided will not be disclosed to external parties and agrees with Item 6 of the CEA's submission that if this benchmarking information were so disclosed it would act as a strong disincentive for Yukon Energy Corporation to continue to participate in such surveys going forward.

Should you have any questions please contact the undersigned regarding this matter at (867) 393-5338 or by email at ed.mollard@yec.yk.ca.

Sincerely,

Ed Mollard
Chief Financial Officer
Yukon Energy Corporation

Hydro Ottawa Limited
3025 Albion Road North, PO Box 8700
Ottawa, Ontario K1G 3S4
Tel.: (613) 738-6400
Fax: (613) 738-6403
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HydroOttawa

March 24, 2014

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge St., 27th floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli,

Re: EB-2013-0159 Oakville Hydro

Hydro Ottawa Limited is an electricity distributor serving the municipalities of Ottawa and Casselman, Ontario. Hydro Ottawa has learned that the School Energy Coalition ("SEC") has brought a motion in the above-referenced proceeding asking the Ontario Energy Board ("Board") for an order requiring Oakville Hydro to provide two surveys/studies, the provision of which would disclose confidential benchmarking data provided to the Canadian Electricity Association ("CEA") by its members.

Hydro Ottawa is not a party in this proceeding, nor is it seeking standing before the Board; however, Hydro Ottawa is compelled to write to the Board since a decision to order the production of the two surveys/studies requested by SEC would result in the release of Hydro Ottawa information. As part of its participation in the CEA benchmarking survey, Hydro Ottawa provides the CEA with sensitive information regarding its performance. Hydro Ottawa provides this information in order to assist in the identification of opportunities to improve business processes and efficiencies and potentially reduce costs in the provision of utility services and products for the benefits of its customers. Hydro Ottawa has always understood that the data will, at all times, be held in the strictest confidence. Indeed, Hydro Ottawa, as do all participating members, sign a binding confidentiality agreement with the CEA to this effect.

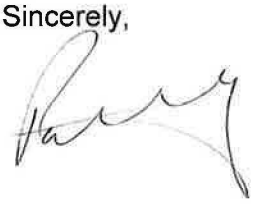
Should the Board make the order requested by SEC, Hydro Ottawa would be forced to re-evaluate its participation in the benchmarking studies. Secondly, should the Board make the order requested by SEC, Hydro Ottawa submits that other utilities will be reluctant to participate in benchmarking studies with Hydro Ottawa knowing that there is a high probability that confidential data will become public by means of the Ontario Energy Board. Hydro Ottawa respectfully submits that this would be to the detriment of its customers.

HydroOttawa

Additionally, if the Board were inclined to grant SEC's motion, Hydro Ottawa submits that SEC has not provided valid reasons and rationale for the production of the entire surveys/studies and the data for utilities other than Oakville Hydro. Paragraph 10 of SEC's motion states "SEC submits that the Board and intervenors cannot answer Issue 2.1, which specifically seeks to review Oakville Hydro performance in the area of efficiency benchmarking, without reviewing the studies and surveys that it has conducted." In paragraph 11, SEC indicates "understanding how Oakville Hydro performs against other utilities is an important way that parties can scrutinize the application and to determine if the proposed revenue requirement will lead to 'just and reasonable' rates." SEC's reasoning for the request is to evaluate Oakville Hydro and Oakville Hydro's performance. SEC has not provided any reasons or rationale why it must have the performance data of other utilities to determine 'just and reasonable' rates for Oakville Hydro. Hydro Ottawa submits that based upon the reasons and rationale given by SEC for the production of the studies, Oakville Hydro can fulfill SEC's request by providing a description of each metric that was compared to the other utilities, the industry average for each of those metrics, Oakville Hydro's relative position in comparison to the other utilities and any discussion and comment Oakville Hydro wishes to make. Hydro Ottawa respectfully submits that SEC's request can be fulfilled by extracting Oakville Hydro's data and results from the larger study.

In conclusion, Hydro Ottawa strongly opposes the request of SEC for the production of the entire surveys/studies because (1) as a result of such a decision, in the future, Hydro Ottawa foresees itself being unwelcome by other electric utilities in Canada and the U.S. in participating in quality benchmarking studies with them, all to the detriment of Hydro Ottawa's customers and (2) SEC has not provided valid reasons and rationale for the production of any data from utilities other than Oakville Hydro.

Sincerely,



Patrick J. Hoey
Director, Regulatory Affairs

Cc: Francis Bradley, Vice President, Policy Development, Canadian Electricity Association

EXHIBIT "B"

LIST OF AUTHORITIES

LEGISLATION

Copyright Act, R.S.C. 1985, c. C-42.

Section 3(1)
Section 27(1)
Section 41.24
Section 89

Ontario Energy Board Act, 1998, S.O. 1998, Chapter 15, Schedule B

Section 1(1)
Section 21(1)

Statutory Powers Procedure Act, R.S.O. 1990, Chapter S. 22

Section 5.4(1)
Section 5.4(1.1)
Section 12(1)

RULES

Ontario Energy Board Rules of Practice and Procedure

Rule 14.01

CASES

Toronto Hydro-Electric System Ltd. (Re), 2009 LNONOEB 46, at para. 29

Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, at para. 36

Manitoba v. Canadian Copyright Licensing Agency (Access Copyright), 2013 FCA 91, at para. 48

Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188, at paras. 11 and 14

Canadian Western Bank v. Alberta, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at para. 69

Quebec (Attorney General) v. Canadian Owners and Pilots Assn., [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536, at paras. 62-66

The Director of Investigation and Research v. Warner Music Canada Ltd. et al., 1997 CanLII 3725 (CT), at pp. 12, 15 and 17

Reference re Securities Act, 2011 SCC 66, at paras. 61-62

Fédération des producteurs de volailles du Québec v. Pelland, 2005 SCC 20, at paras. 52-55

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45, at para. 82

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, at para. 9

Théberge v. Galerie d'Art du Petit Champlain inc., 2002 SCC 34, at para. 5

Bishop v. Stevens, [1990] 2 S.C.R. 467, at p. 477

Compo Co. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357, at p. 373

Westcoast Energy Inc. (Re), 2008 LNONOEB 62, at para. 45

AltaLink Management Ltd. (Re), [2007] A.E.U.B.D. No. 12, at paras. 598 to 607

ENMAX Power Corp. (Re), [2007] A.E.U.B.D. No. 22, at paras. 18 to 20

Nova Scotia Power Incorporated (Re), 2012 NSUARB 53, at paras.125-128

ATCO Electric Ltd. (Re), [2003] A.E.U.B.D. No. 42, at paras. 186-193

Tetefsky v. General Motors Corp., 2010 ONSC 1675 (Ont. Sup. Ct.), affirmed [2011] O.J. No. 1390 (Ont. C.A.), at paras. 41, 42, 44, 47, 48, 51 and 52

JDS Investments Ltd. v. Regional Assessment Commissioner, Region No. 15, [1996] O.M.B.D. No. 1538

Mississauga (City) Official Plan Amendment No. 20 (Re), [2002] O.M.B.D. No. 316

Hammerson Canada Inc. v. Guelph (City), [2000] O.M.B.D. No. 1211

Woodbine Entertainment Group v. Municipal Property Assessment Corp. Region No. 9, [2007] O.A.R.B.D. No. 652