



ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION

Oakville Hydro Electricity
Distribution Inc.

EB-2013-0159

April 9, 2014

Background

Oakville Hydro Electricity Distribution Inc. (“Oakville Hydro”) filed a cost of service application with the Ontario Energy Board (the “Board”) on October 1, 2013 under section 78 of the *Ontario Energy Board Act, 1998*, seeking approval for changes to the rates that Oakville Hydro charges for electricity distribution, to be effective May 1, 2014.

Oakville Hydro filed its interrogatory responses with the Board on February 21, 2014. On February 27, 2014 the School Energy Coalition (“SEC”) filed a Notice of Motion (“Motion”). The Motion sought an order requiring Oakville Hydro to provide full and adequate responses to Interrogatory 2.1-SEC-3 by producing copies of two surveys/studies.

The Board issued Procedural Order No. 3 on February 28, 2014 which established a schedule for parties to make submissions on the Motion.

On March 4, 2014 the Canadian Electricity Association (CEA) filed a letter requesting intervenor status in order that it could make submissions on the Motion. The CEA indicated that it is the owner of copyright of benchmarking reports and data models that could be disclosed as a result of granting the Motion. The CEA also specified that, if granted intervenor status, it would make submissions on the Motion. The CEA filed its response to the SEC Motion on March 24, 2014.

On April 2, 2013 SEC filed a letter indicating that it was no longer seeking an order requiring disclosure of the benchmarking survey and material prepared by the CEA. While withdrawing the Motion with regard to the CEA survey and material, SEC confirmed that it is still seeking disclosure of the second benchmarking study/survey in which Oakville Hydro participated.

On April 3, 2014, the Board issued Procedural Order No. 6 where it ordered Oakville Hydro to provide the outstanding study referenced in response to 2.1-SEC-3.

The Board declared the study to be confidential on an interim basis. Oakville Hydro was directed to provide the confidential information directly to a requesting party that had executed a Declaration and Undertaking.

Oakville Hydro filed the benchmarking survey in question on April 7, 2014.

Submission

Board staff submits the following arguments with respect to why the benchmarking survey filed in response to Interrogatory 2.1 SEC 3, and declared confidential on an interim basis should be made public:

1. Benchmarking is a core component of how the Board regulates the energy sector and this was reaffirmed in the Board’s Renewed Regulatory Framework for Electricity Distributors (RRFE).

2. The public interest in disclosing the Benchmarking survey outweighs any private right of confidentiality.

Benchmarking is a core component of the Board's RRFE

The Benchmarking survey consists of two volumes: The first volume ("Volume I") aggregates the data reported for individual LDCs to provide benchmarks specific to Oakville Hydro. The second volume ("Volume II") provides data collected from identified individual participant LDCs.

Board staff submits that SEC's request for the Benchmarking survey is clearly within the scope of the current proceeding, as it pertains to Issue 2.1 of the Issues List.

In its "*Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach*" (RRFE) the Board stated that, "(b)enchmarking will become increasingly important, as comparison among distributors is one means of analyzing whether a given distributor is as efficient as possible" and that "benchmarking will be necessary to support the Board's renewed regulatory framework policies".¹

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

The Board remains committed to continuous improvement within the electricity sector. Individual distributors achieve continuous improvement through their ongoing efforts to improve services and/or processes that are valued by their customers. Over time and collectively, distributors will advance continuous improvement in the sector through achievement of benchmark performance on valued services and/or processes².

Confidentiality

In refusing to produce the Benchmarking survey Oakville Hydro stated in an e-mail sent to SEC (and attached as Appendix D to the SEC Motion) that it:

¹ *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach*, October 18, 2012, pages 56, 59
http://www.ontarioenergyboard.ca/oeb/ Documents/Documents/Report_Renewed_Regulatory_Framework_RRF_E_20121018.pdf

² *Report of the Board on Performance Measurement for Electricity Distributors: A Scorecard Approach*, March 5, 2015, page i
http://www.ontarioenergyboard.ca/oeb/ Documents/EB-2010-0379/Report_of_the_Board_Scorecard_20140305.pdf

“...participated in certain industry surveys in 2013. As a participant, Oakville Hydro was required to agree to the confidentiality policy of the third parties conducting the surveys. Under the terms of the confidentiality policy of the third party conducting one of the one of the surveys, Oakville Hydro is not permitted to disclose the existence or results of the survey to any regulatory body or other person unless compelled by law to do so. Under the terms of the confidentiality policy of the third party conducting the second survey Oakville Hydro is not permitted to disclose its participation in the study or the results of the study.”

Board staff recognizes Oakville Hydro’s argument that it has agreed with a third party not to disclose the information in the Benchmarking survey. However Board staff submits that it has been the position of the Board in past proceedings that utilities must be cognizant of the Board’s view of the importance of benchmarking when entering into confidentiality agreements with third parties. Board staff submits that this is particularly pertinent when the utility knows or ought to know the information in question may reasonably be required to be produced as part of the regulatory process.³

Accordingly, Board staff submits that Oakville Hydro’s confidentiality agreement with a third party is not a valid reason to order that the document be treated as confidential. An exception would apply only if the information itself meets the criteria for confidentiality as set out in the Board’s Practice Direction on Confidentiality (the “Practice Direction”) and as applied by the Board in past proceedings.

The approach that underlies the Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidential treatment to demonstrate to the satisfaction of the Board that confidentiality is warranted in any given case. One of the factors that the Board may consider in addressing confidentiality of filings made with the Board is the potential harm that could result from the disclosure of the information including any prejudice to any person’s competitive position.

Board staff submits that the public interest in making the document public in this proceeding outweighs any potential harm.

Copyright

The issue of copyright was raised in this proceeding in the context of the CEA’s request to intervene and its refusal to produce a report, prior to SEC withdrawing its Motion for production. Copyright has also been raised in a letter filed in this proceeding by AMPCO on April 8, 2014. While Board staff acknowledges that the issue of copyright infringement has not been directly raised as an issue in relation to the Benchmarking survey, in light of the submissions on the record concerning copyright Board staff makes the following brief submission.

³ EB-2011-0140 ; EB-2012-0031; EB-2011-0123; EB-2013-0174; EB-2011-0099

First, Board staff agrees with the position of AMPCO that “as a matter of public policy the economic interests of copyright owners simply do not apply when the rules of practice and procedure, designed to allow courts and tribunals to adjudicate disputes fairly, provide for disclosure of copies of relevant documents.”

Second, if copyright is presumed, Board staff submits that the purpose of copyright has been expressed by the Supreme Court of Canada in *Law Society of Upper Canada v. CCH Canadian Ltd* (“*CCH Canadian*”) as being to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator:⁴ In this proceeding the “works of the arts and intellects” is the Benchmarking survey and the “creator” is the third party author of the Benchmarking survey.

The exceptions to copyright infringement are set out in Section 29 of the *Copyright Act*, R.S.C. 1985, c. C-42. One such exception is: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”

The Supreme Court of Canada in *CCH Canadian* stated that to balance the rights of creators and users properly, the defence of fair dealing should not be interpreted restrictively. In this and subsequent cases, the Supreme Court of Canada confirmed that “research” should be given a broad interpretation. In Board staff’s submission this would include the use of documents in a regulatory proceeding.

In *CCH Canadian*, photocopying of case law and texts done by or on behalf of lawyers was confirmed to be “research.” Recently, in another case the Supreme Court of Canada concluded that when a music service (like iTunes) provides a streamed sample of music to consumers over the Internet for consumers to preview music prior to purchasing music, those activities amount to copying of the sampled music for the purpose of research⁵. The concept of research is therefore very broad.

With respect to the issue of “fair dealing” Board staff submits that that there is nothing truly proprietary in the information in the Benchmarking survey. Board staff has reviewed the information and notes that most of the information is already publicly available. The aggregation and comparison of the information provided in the Benchmarking survey does not in itself attract copyright.

Board staff therefore submits that it is in the public interest that the Benchmarking survey be placed on the public record.

- All of which is respectfully submitted -

⁴ *Law Society of Upper Canada v. CCH Canadian Ltd.* (2004), 30 C.P.R. (4th) 1 (S.C.C.) at pp. 17, 18.

⁵ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36