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BY E-MAIL

January 26, 2015

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

Dear Ms. Walli:

Re: Toronto Hydro-Electric System Limited
Application for Rates
Board File Number EB-2014-0116

In accordance with Procedural Order No. 6 issued on January 16, 2015, please find attached Board staff's submission on the School Energy Coalition (SEC) Motion and the Canadian Electricity Association (CEA) Cross Motion.

Yours truly,

Original Signed By

Martin Davies
Project Advisor, Electricity Rates & Accounting

Attachment

cc: Parties to EB-2014-0116 proceeding

2015 ELECTRICITY DISTRIBUTION RATES

Toronto Hydro-Electric System Limited

EB-2014-0116

STAFF SUBMISSION ON THE SCHOOL ENERGY COALITION (SEC) MOTION AND THE CANADIAN ELECTRICITY ASSOCIATION (CEA) CROSS MOTION

January 26, 2015

NATURE OF THE MOTIONS

1. On December 19, 2014, the School Energy Coalition (SEC) filed a Notice of Motion with the Board requesting an order requiring Toronto Hydro-Electric System Limited (THESL) to provide a full and adequate response to interrogatory 1B-SEC-8 and more specifically to produce benchmarking documents that THESL has participated in through the Canadian Electricity Association (CEA) (the SEC Motion).

2. On January 10, 2015, CEA filed a late intervention request with respect to the SEC Motion on the basis that the SEC Motion seeks to compel the disclosure and reproduction by THESL effectively of confidential benchmarking data and reports and data models owned by CEA. In Procedural Order No. 5, the Board, among other things, approved CEA's intervention request.

3. On January 14, 2015, CEA delivered a Notice of Constitutional Question pursuant to the Board's *Rules of Practice and Procedure* and section 109 of the *Courts of Justice Act.*

4. CEA stated that the legal basis for the Notice is that as the copyright owner of the benchmarking reports and data models (the CEA Property), pursuant to section 3(1) of the Copyright Act, CEA has "[t]he sole right to produce or reproduce" the CEA Property "or any substantial part thereof in any material form whatever … and to authorize any such acts."

5. CEA further stated that Section 27(1) of the Copyright Act further 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 to do."

6. CEA argued that as an agent of the provincial Crown, the Board is bound by the Copyright Act (*Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91, at para. 48). CEA concluded that, in accordance with the Copyright Act, consent from the CEA is required prior to the Board issuing an Order to compel the disclosure of copyrighted material owned by the CEA.

7. CEA submitted that the Board does not have the power to override the Copyright Act. It stated that the Board's authority to compel disclosure of documents is derived from the following provisions under provincial legislation:

    (a) Section 21(1) of the *Ontario Energy Board Act*, *1998* (the OEB Act) provides that the Board "may at any time on its motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act."

    (b) Section 5.4(1) of the *Statutory Powers Procedure Act* (SPPA) provides that "[if] the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for, (a) the exchange of documents" or "(e) any other form of disclosure."

    (c) Section 12(1) of the SPPA provides that "[a] tribunal may require any person, including a party, by summons … (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal."

8. CEA further noted that the Board has adopted Rule 14.01 in its Rules of Practice and Procedure, which provides that "[a] party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document 24 hours before using it in the proceeding, unless the Board directs otherwise."

9. CEA submitted that the Board's authority to make orders for the disclosure of documents is explicitly limited by the terms of its enabling legislation. Section 5.4(1.1) of the SPPA 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."

10. CEA argued that furthermore, 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 federal legislation, the provincial legislation is inoperative to the extent of any inconsistency.

11. CEA submitted that pursuant to section 3(1) of the Copyright Act, it must consent to the reproduction, and hence disclosure (on a confidential or public basis), of the CEA Property. Therefore, in accordance with the doctrine of federal paramountcy, an order of the Board under section 21(1) of the OEB Act, and sections 5.4 and 12(1) of the SPPA to compel disclosure of the CEA Property without CEA's consent would result in an incompatible operational effect with section 3(1) of the Copyright Act and would be constitutionally invalid.

12. On January 16, 2015, the Board issued Procedural Order No. 6 which directed CEA to file with the Board any materials related to the SEC Motion by January 21, 2015 with parties wishing to make any submissions on the CEA SEC Motion materials to do so by January 26, 2015.

13. On January 21, 2015, CEA filed its Responding Motion and Cross Motion Record (cross motion) in response to Procedural Order No. 6. In the cross motion CEA reiterated its opposition to the SEC Motion on two grounds, which were similar to those outlined in the Notice of Constitutional Question:

14. The first was that CEA is the copyright owner of 7 of the 8 reports at issue and without its consent CEA submitted that THESL may not copy these reports for SEC and the Board may not authorize or compel THESL to copy these reports. SEC's requested relief would result in the infringement of the CEA's copyright under the federal Copyright Act*.* CEA argued that no defences to claims of infringement of the CEA's copyright exist in this case and importantly, 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. CEA concluded that the Board's powers to order production of documents do not override statutory rights conferred by Parliament under the federal Copyright Act*.*

15. CEA argued that none of the exceptions or user rights with respect to copyright infringement is present in this proceeding with respect to the "fair dealing" criteria pursuant to section 29 of the Copyright Act*,* which states that "[f]air dealing for the purpose of research, private study, education parody or satire does not infringe copyright."

16. CEA submitted that the test for fair dealing involves two steps, which are (i) to determine whether the dealing is for the allowable purpose of, for example

"research," as in CEA view, it is inconceivable that the relief sought by SEC can be characterized as private study, education, parody or satire, and (ii) to assess whether or not the dealing is "fair," which involves consideration of six factors: (1) the purpose of the dealing, (2) the character of the dealing, (3) the amount of dealing, (4) alternatives to the dealing, (5) the nature of the work used and (6) the effect of the dealing on the work.

17. CEA argued that while the Supreme Court of Canada has stated that the term "research" should be given a broad interpretation, it did not go so far as to suggest that the use of confidential, proprietary documents in a regulatory proceeding should be included as "research." CEA further submitted that the fair dealing user right cannot be interpreted as being available to the provincial Crown, or a board created under provincial legislation, because other provisions of the Copyright Act specifically grant the Crown rights to use copyrighted works without infringing them. CEA therefore concluded that reading the Copyright Act as a whole, it is apparent that Parliament's intention was to address government rights specifically and not wrap them in the fair dealing user right.

18. The second ground is that 6 of the 8 reports at issue are confidential and should not be ordered disclosed to SEC or the Board in the specific circumstances of the current proceeding. CEA submitted that although copies of the material at issue are in THESL's possession, the SEC Motion is effectively a motion to compel the production of confidential (i.e. CEA) materials. CEA submitted that the Board has acknowledged previously 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 third parties results from the disclosure. CEA argued that in the present case some of the CEA materials are clearly irrelevant and there would be material prejudice and undue burden to the CEA resulting from their disclosure.

19. Furthermore, CEA argued that the SEC Motion should be denied on public policy grounds because granting of the relief requested would have what it characterized as a chilling effect on the improvements for which Canadian power utilities strive by effectively precluding the national benchmarking and data analysis that CEA member utilities rely upon to improve their economic efficiency, performance and customer service standards. CEA stated that compelling THESL to provide the CEA

materials would result in it and perhaps other Ontario members of the CEA no longer having access to the CEA`s future benchmarking activities. CEA submitted that such an outcome would be inconsistent with the objective in section 1(1) of the OEB Act to promote economic efficiency and cost effectiveness in the transmission, distribution, sale and demand management of electricity in Ontario.

20. CEA requested that in the event the Board was to grant the SEC Motion, the Board would also issue an Order that the CEA Property be treated as confidential.

21. CEA stated that should the Board order that the CEA Property be copied or disclosed to SEC, in whole or in part, either publicly or on a confidential basis, it intended to exercise its right of appeal under section 33 of the OEB Act and accordingly further requested 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(s) or other review.

ISSUES

Board staff submits that there are six issues which need to be determined in considering the SEC motion and the CEA cross motion.

I. Are the eight benchmarking surveys relevant to matters in this proceeding?

II. Is there copyright attached to the benchmarking surveys, and if so can the Board order production based on the exception of "fair dealing"?

III. Does the Board have constitutional authority, under either or both the OEB Act the SPPA, to order that THESL disclose and produce to the SEC the benchmarking surveys over which the CEA claims copyright?

IV. If there is no copyright and the Board orders that the benchmarking surveys be produced, should the documents be treated as confidential or placed on the public record?

V. Are there public policy reasons that would prevent the Board from making an order for production of the benchmarking surveys?

VI. In the event that the Board makes an Order for production, what is the test for a stay of the Order?

ARGUMENT

I. The Relevance of Benchmarking Surveys

22. The benchmarking surveys at issue are numerous. On January 14, 2015, THESL, with the consent of the CEA, provided the names of the benchmarking surveys which THESL participated in and the dates of the surveys. The CEA set out in its cross motion that four of the surveys are Public Attitudes Research Reports, three are Service Continuity Data on Distribution System Performance in Electrical Utilities Reports and one is a Multi-Client Budget Benchmark Report. Board staff notes that THESL did not produce or rely on any of these benchmarking surveys in its application and the request for production arises from a broad interrogatory made by SEC.

23. Board staff submits that the onus is on SEC to establish relevance of the documents. Based on the description provided by the CEA for the four Public Attitudes Research Reports it is not clear to staff that these documents contain information that is relevant to the proceeding before the Board. As such Board staff does not support SEC's motion for production of these four documents.

24. Board staff however does take the position that the other four reports relating to service continuity data on distribution system performance are likely relevant to the matters at issue in this proceeding. Board staff submits that SEC's request for these four benchmarking surveys appears to be within the scope of the current proceeding, as it pertains to Issue 2.2 of the Issues List. For the purpose of this submission Board staff refers to these four reports in the remainder of this submission as the benchmarking surveys.

25. Benchmarking is a core component of how the Board regulates the energy sector 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]

26. 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:

(a) 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 processes[2].

27. Board staff submits that the benchmarking surveys may be relevant and material to issues in the proceeding and therefore ought to be produced.

II. Is there copyright attached to the benchmarking surveys, and if so can the Board order production based on the exception of "fair dealing"?

28. The issue of copyright was raised in this proceeding in the context of the CEA's request to intervene and its refusal to produce its consent to THESL to produce certain benchmarking surveys in its possession. In its cross motion the CEA alleges that any order for production of the benchmarking surveys would amount to copyright infringement. Not having been given an opportunity to review the documents Board staff cannot determine if the information contained in the benchmarking surveys is protected by copyright. As such Board staff makes the following submission.

29. 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

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[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_RRFE_20121018.pdf

[2] *Report of the Board on Performance Measurement for Electricity Distributors: A Scorecard Approach, March 5, 2014, page i*
http://www.ontarioenergyboard.ca/oeb/_Documents/EB-2010-0379/Report_of_the_Board_Scorecard_20140305.pdf

obtaining a just reward for the creator:[3] In this proceeding the "works of the arts and intellects" are the benchmarking surveys and the "creator" is the third party author of the Benchmarking survey.

30. 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."

31. The seminal Canadian authority on fair dealing is CCH Canadian in which the Supreme Court of Canada established a two-part test for fair dealing:

> (a) the acts in question must be for a protected purpose (such as research); and
> (b) the acts in question must also be "fair" in all the circumstances.

32. In CCH Canada, photocopying of case law and texts done by or on behalf of lawyers was confirmed to be "research." 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.

33. 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 research[4]. The concept of research is therefore very broad.

34. Board staff agrees with the submission of the CEA that even if the information can be considered as research, to qualify as fair dealing, the copying activities must also be fair in the circumstances. The Supreme Court of Canada in CCH Canadian

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

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

identified six factors that should be considered in assessing fairness (these are not necessarily exhaustive):

a) the purpose of the dealing;
b) the character of the dealing;
c) the amount of the dealing;
d) whether there are reasonable alternatives to the dealing;
e) the nature of the work; and
f) the effect of the dealing on the work.

Board staff addresses each of the above criteria below:

a) Purpose of the Dealing

Board staff submits that the purpose of the copying in this proceeding is being done in support of the administration of justice and/or “in the public interest.” If production obligations could be fettered by reason of copyright law, Board staff submits that this would impact not only proceedings before the Board but all litigation and administrative proceedings in the country.

b. Character of the Dealing

The CEA argues in paragraph 56 b) of its submission that “ in CCH Canadian the Supreme Court held that it may be relevant to consider the custom or practice in the industry to determine whether or not the character of the dealing is fair.” Board staff agrees with this submission and notes that it is precisely for this reason the Board allows for the production of documents on a confidential basis in appropriate circumstances. Board staff submits that the Board could order that the copies be confidential thereby ensuring the distribution of copies to be discrete. Board staff submits that this discretion supports a finding of fairness in relation to the character of the dealing. The Board has in its discretion the ability to make an order for discrete distribution of the benchmarking surveys and that copies be made for the parties and the Board’s use in the proceeding.

c. Amount of the Dealing

As noted above, Board staff submits that the Board could order that the benchmarking reports be treated as confidential if production is ordered to allow the parties to make submissions on relevance and confidentiality. In so doing, Board staff submits that the Board can then determine if there are any benchmarking reports in their entirety or portions of which may be determined to be irrelevant. This would then allow the Board, in Board staff's submission to ensure that any production order is fair.

d. Reasonable Alternatives

Board staff is not aware of any other reasonable alternative to ordering production of the benchmarking surveys. Board staff acknowledges that the CEA has stated that it "has developed policies to enable its members to provide benchmarking data in regulatory settings in a manner that does not violate the CEA's copyright ".[5] However the CEA has not produced any such data to date.

e. Nature of the Work

Although Board staff has not had an opportunity to review the benchmarking surveys, based on the submissions of the CEA, the benchmarking surveys appear to be commercial documents that may contain commercially sensitive information that CEA would prefer be maintained in confidence. Board staff submits that if this is the case then the Board could determine that the benchmarking surveys be treated as confidential however, the commercially sensitive nature of the work is not in itself a reason to not produce the documents.

f. Effect of the Dealing on the Work

CEA asserts that any production order will have a negative effect on its ability to receive information from third parties to produce future versions of these types of surverys. Board staff submits that this argument needs to be weighed against the need to allow production of documents in support of the administration of justice and/or of the "public interest." Board staff further notes that the CEA Data Collection and Sharing Policy, attached as Exhibit D to the Affidavit of Bradley Francis at para 2.5 it states:

> 2.5 Confidential information does not include information that:
>
> 2.5.1 is required to be disclosed by law or a regulatory agency having jurisdiction, provided, however, that the CEA member will, to the extent that it is not legally

[5] Affidavit of Francis Bradley sworn January 15, 2015 at Para 33

prohibited from doing so, give the CEA member who provided the information prompt written notice of any such required disclosure.

35. Board staff therefore submits that the CEA itself has contemplated disclosing the information in regulatory proceedings and states, in its own policy, that where a regulatory agency has jurisdiction the CEA will disclose the information and the information will not be treated as confidential. Board staff notes that the CEA makes reference to this policy in paragraph 35 of its cross motion, however Board staff disagrees with the CEA that the fact that the "exception has never been applied" is not a sufficient justification for not producing the documents.

36. Board staff notes that the Board could limit any negative impact by limiting the production of the document to those who are parties to the regulatory proceeding and that have signed a Declaration and Undertaking with respect to the treatment of confidential information.

37. Board staff submits that for the reasons set out above an order for production on a confidential basis would amount to fair dealing as it would properly balance the interests of the CEA and its constituents with the public interest of having on open and transparent process.

III. Does the Board have constitutional authority, under either or both the OEB Act or the SPPA to order that THESL disclose and produce to the SEC the benchmarking surveys over which the CEA claims copyright

38. The CEA has asserted that the Board has no constitutional authority to order production of the Documents because:

    (a) the Board's power to order production of documents is subject to and limited by the Copyright Act; and

    (b) in any event, "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 federal legislation, the provincial legislation is inoperative to the extent of any inconsistency".

39. As to argument (i), the CEA relies on the case *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.*[6] (**"***Warner*

[6] *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd*., [1997] CCTD No. 53

Music") to the effect that the OEB, as a provincial tribunal, is bound by the federal Copyright Act. As to position (ii), the CEA argues that the Copyright Act is constitutionally paramount to any provincial legislation, including the OEB Act and the SPPA.

40. Board staff submits that a provincial law can be inoperative due to paramountcy either because it is in operational conflict with a federal law, or because it frustrates the purpose of a federal law. In either case, the party asserting paramountcy has the burden of meeting the high standard required to invoke the doctrine of paramountcy.

41. Board staff submits that the "inconsistency" between two enactments for the purpose of the paramountcy doctrine is narrowly defined. Two enactments – one federal and the other provincial – will be determined to be inconsistent in either of two situations:

(a) where it is impossible to comply simultaneously with both enactments, in the sense that compliance with one would result in a breach of the other; or

(b) the provincial enactment displaces or frustrates Parliament's legislative purposeunderlying the federal enactment.[7]

42. Board staff submits that the party that relies on the doctrine of federal paramountcy to invalidate or render inapplicable a provincial enactment on the basis of paramountcy bears the onus of demonstrating that the two enactments are inconsistent in either of the respects listed above

The first aspect of inconsistency: compliance with one enactment requires breach of the second

43. An important feature of the Copyright Act is that it does not *prohibit* the copying by one person of works in which another person holds copyright, or create any offences. Instead, Part IV of the Copyright Act provides civil remedies where the copyright held by someone is violated. These remedies include injunction, damages, accounts and delivery up of offending copies.

[7] *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd*., [1997] CCTD No. 53

44. Board staff submits that compliance with an order of the Board made under the OEB Act or the SPPA to produce the documents in question would not entail, require or produce a breach of the Copyright Act under the first aspect of the paramountcy doctrine.

The second aspect of inconsistency: frustration of legislative purpose

45. Even if the OEB Act and the SPPA are not inconsistent with the Copyright Act the OEB Act and or the SPPA may still be invalid if the operation of one can be said to frustrate the legislative purpose behind the Copyright Act. This is a difficult area and Board staff submits that the Board, in considering this question must (i) determine what the essential legislative purpose of the Copyright Act is; and (ii) must determine the degree of incompatibility that will amount to an impermissible frustration of that legislative purpose. In this case, the question would be whether an order for production of the benchmarking surveys would frustrate the purpose of the Copyright Act.

What are the essential functions and purpose of the Copyright Act?

46. In *Théberge v. Galerie d'Art du Petit Champlain Inc.,*[8] the Supreme Court discussed the essential function and purpose of the Copyright Act in Canadian law:

(a) The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)...

(b) The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature.

47. The CEA submits that the benchmarking surverys are essential to allow Canadian utilities to evaluate their performance and customer service standards and thus provide economic efficiencies that they could not otherwise succeed in attaining. It also argues that the collection and production of the documents is “part of a commercial endeavour pursuant to which CEA generate revenues” and is the CEA’s “stock in trade”.

[8] *Théberge v. Galerie d'Art du Petit Champlain inc*., [2002] 2 SCR 336 at paras 30 - 31

48. The nature and use of the benchmarking surveys are explained in the Affidavit of Francis Bradley sworn January 15, 2015 as follows:

(a) In order to produce the CEA Report, CEA collects confidential CEA Data from participating members. It then analyzes this data using the CEA Data Models, which is comprised of CEA intellectual property, including methodology, data sets, modelling and analytical metrics that have been developed and are owned by CEA as part of its commercial endeavour. CEA is continually adding value to the CEA Data Models through system upgrades and integrating additional research considered valuable to its members. Members participate on a fee-for-service basis that provides them with access to the CEA Report, as well as the CEA Data Models, which allow them to analyze the data further. The CEA Report is also available for sale to the public and can be purchased through the CEA website. This report provides composite measures only. Under no circumstances is company specific data included in the CEA Report, nor is such data for sale in any form.

49. Board staff submits that since the production of the benchmarking surveys sought by the SEC is not for the purpose of exploitation of the commercial value of the benchmarking surveys by either the Board or the SEC an order for production of the benchmarking surveys would not frustrate the essential purpose of the Copyright Act discussed above. Further Board staff submits that if by granting confidentiality to the production of the documents the Board would limit the concern of the CEA that it will suffer commercial harm through the public distribution of the benchmarking surveys.

50. Further, if the Board determines that production of the benchmarking surveys may frustrate the intent of the Copyright Act, Board staff submits that the Board could attach conditions to an order for production, such as those found in the Board's *Practice Direction on Confidential Filings*, (the Practice Direction) to address the CEA concern and any inconsistency arguments.

IV. If there is no copyright and the Board orders that the benchmarking surveys be produced should the documents be treated as confidential or placed on the public record?

51. The CEA submits that although the SEC motion is structured as a motion to compel THESL to copy and disclose the benchmarking surveys, it is actually a motion to produce third-party materials of the CEA. Board staff disagrees. The benchmarking surveys are clearly in the possession and control of THESL and the SEC motion is

not a motion to compel the CEA to produce the benchmarking surveys. That being said, Board staff does recognize that THESL has agreed with the CEA not to disclose the information in the benchmarking surveys.

52. 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.[9]

53. Accordingly, Board staff submits that THESL'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 Practice Direction and as applied by the Board in past proceedings.

54. 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.

55. In the Board's decision in Oakville the Board denied the request for confidentiality of a MEARIE Benchmarking Report and in its Decision and Order[10] stated:

> As set out in the Board's Practice Direction, it is the Board's general policy that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board's view that its proceedings should be open, transparent and accessible. The Practice Direction seeks to balance these objectives with the need to protect information that has been properly designated as confidential. In short, placing materials on the public record is the rule and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate why confidentiality is appropriate.

[9] EB-2011-0140 ; EB-2012-0031; EB-2011-0123; EB-2013-0174; EB-2011-0099
[10] EB-2013-0115; EB-2013-0159; EB-2013-0174 Decision and Order of the Board on Confidentiality dated May 29, 2014

> The Board recognizes that the distributors have non-disclosure agreements with MEARIE. However, as noted by this Board in previous decisions, applicants must be cognizant of the fact that it is up to the Board to determine confidentiality and that when regulated entities enter into confidentiality agreements with third parties that extend to the provision of information and documents, the utility knows or ought to know that they may reasonably be required to produce the documents as part of the regulatory process[11].
>
> The Board is not persuaded that disclosure of the MEARIE Benchmarking Report will result in reduced distributor participation in such studies. As clearly articulated in the Board's RRFE report, the Board is increasing its reliance on the use of benchmarking in setting distributors rates. Participation in benchmarking studies is driven by the objective of management to better run their business. The Board finds that publication of the benchmarking studies will not have a dampening effect on the value that benchmarking information provides to utilities.

56. Board staff submits that while it is the Board's general policy that all records should be open for inspection by any person unless disclosure of the record is prohibited by law, based on the facts of this case, and the specific nature of the information contained in the benchmarking surveys that the production of these benchmarking surveys on a confidential basis is appropriate.

VII. Are there public policy reasons that would prevent the Board from making an order for production of the benchmarking surveys?

57. The CEA submits that it is contrary to the public interest and the objectives of the OEB Act to compel disclosure to the public or intervenors as it would "preclude national benchmarking exercises". [12]Board staff disagrees. Board staff submits that as a matter of public policy the economic interests of copyright owners do not outweigh the rules of practice and procedure as set out in the OEB Act and the SPPA which are designed to allow tribunals to adjudicate disputes fairly and to provide for disclosure of copies of relevant documents.

[11] EB-2011-0123, EB-2011-0140, EB-2011-0099
[12] CEA Cross Motion at para 86

58. Board staff further submits that production/disclosure provisions found in the SPPA and the OEB Act are necessary for the determination of regulatory issues (in this instance just and reasonable rates for the distribution of electricity by a monopoly distributor) in the public interest. Board staff submits that in regulatory proceedings one of the key principles is that there is an obligation on parties to produce all relevant documents to opposing parties as it is a necessary component for the proper functioning of the Board's adjudicative process.

VI. If the Board does make an Order for production what is the test for a stay of an Order of the Board?

59. The test to be applied in considering a stay application is comprised of three parts. At each stage, the onus is on the CEA. First, the CEA must demonstrate a serious question to be tried. Second, the CEA must convince the Board that it will suffer irreparable harm if the stay is not granted. Third, the CEA must establish that on the balance of convenience, the stay should be granted. The following sets out the test to be applied in such an event.[13]

60. Board staff requests that if the CEA subsequently requests a "stay" then the Board allow Board staff and the parties to make submissions on that request.

Order Sought

61. Board staff requests that the Board grant the Motion brought by SEC and order THESL to provide a full and adequate response to interrogatory 1B-SEC-8 and more specifically to produce the benchmarking documents that THESL has participated in through the CEA. Board staff submits that as the nature of the documents is not known it would be appropriate for the Board to order the production of the benchmarking reports on a confidential basis in order to determine the relevance and possible confidential nature of the benchmarking reports.

- *All of which is respectfully submitted* -

[13] *RJR-MacDonaldInc.v.Canada(Attorney General)*,[1994] 1 S.C.R. 311 (S.C.C.) at pages 348-349