**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

**EB-2014-0116**

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

**AND IN THE MATTER OF** an application by Toronto Hydro-Electric System Limited for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2015 and for each following year effective January 1 through to December 31, 2019.

## DECISION AND ORDER ON NOTICE OF MOTION
## February 11, 2015

Toronto Hydro-Electric System Limited (Toronto Hydro) filed a Custom Incentive Rate (CIR) application (the Application) with the Ontario Energy Board (the OEB) on July 31, 2014 under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that Toronto Hydro charges for electricity distribution, to be effective May 1, 2015 and each year thereafter January 1 until December 31, 2019.

### Relief Sought

On December 19, 2014, the School Energy Coalition (SEC) brought a motion seeking an order requiring Toronto Hydro to provide a full and adequate response to interrogatory 1B-SEC 8 and specifically to produce 8 benchmarking reports that Toronto Hydro participated in through the Canadian Electricity Association (CEA). Toronto Hydro has objected to the production of the benchmarking reports, not on the basis of relevance, but rather because Toronto Hydro is unable to receive the consent of the

CEA to provide the documents. The CEA claims that the reports are subject to copyright and that the CEA owns the copyright of the CEA reports.

## The Process

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 Toronto Hydro of benchmarking data and reports and data models owned by CEA. In Procedural Order No. 5, the OEB, among other things, approved CEA's intervention request.

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

CEA states 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." CEA further states 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."

CEA also argues that pursuant to section 3(1) of the Copyright Act, it must consent to the reproduction, and therefore the disclosure (on a confidential or public basis), of the CEA Property. Therefore, in accordance with the doctrine of federal paramountcy, an order of the OEB under section 21(1) of the OEB Act, and sections 5.4 and 12(1) of the Statutory Powers Procedure Act 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.

## The Documents

Prior to filing its motion, SEC requested that Toronto Hydro provide the names and subject matter of the benchmarking reports in question. It was not until the OEB required Toronto Hydro to provide this information by way of Procedural Order that this information was disclosed. The OEB is of the view that the CEA could have provided its

consent to Toronto Hydro to provide this information much earlier in the process. The following documents were listed by Toronto Hydro as being responsive to interrogatory 1B-SEC 8:

(a) 2014 National Attitudes Report (Innovative Research Group Inc.);
(b) 2013 Public Attitudes Research Report (IPSOS Reid);
(c) 2012 Public Attitudes Research Report (IPSOS Reid);
(d) 2011 Public Attitudes Research Report (IPSOS Reid);
(e) 2014 Multi-Client Budget Benchmark Report (Information Technology) (the Gartner Report);
(f) 2013 Service Continuity Data on Distribution System Performance in Electrical Utilities (CEA);
(g) 2012 Annual Service Continuity Report on Distribution System Performance in Electrical Utilities (CEA); and
(h) 2011 Service Continuity Data on Distribution System Performance in Electrical Utilities (CEA).

It became clear during oral argument that the four National/Public Attitudes reports were not benchmarking studies and therefore were not responsive to the SEC interrogatory. As the reports are not benchmarking documents, the SEC has withdrawn its claim for them. The OEB is disappointed that valuable time was spent by the parties arguing this motion when in fact four of the documents are not benchmarking documents. It is the OEB's view that the CEA could have provided information related to the nature of the four reports much earlier in the process.

With respect to the four remaining documents, the CEA submitted that the benchmarking data provided to CEA by its members as well as proprietary and confidential data models used by CEA to analyze such data was protected by copyright and was confidential .The Panel heard arguments (both oral and written) on the following issues:

1. Are the documents relevant?
2. If so, does copyright apply?
3. Does the fair dealing exception to copyright infringement apply?
4. Does the doctrine of federal paramountcy apply?

5. Are there public policy reasons for not making an order for production and disclosure?
6. If the documents are ordered to be produced do they warrant confidential treatment?

## 1. Are the documents relevant?

The first question that the OEB must determine is whether the documents are relevant. Toronto Hydro has not disputed the relevance of the documents. SEC argues that the OEB's test in determining relevance should be considered broadly. The purpose of interrogatories is to test the evidence. The OEB has consistently stated that it finds benchmarking material to be useful. Benchmarking is a core component of how the OEB regulates the energy sector. In its "*Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach*" (RRFE) the OEB 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 OEB's renewed regulatory framework policies".[1]

The OEB 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 processes[2].

The OEB must consider the relevance of the following reports;

[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

1. 2014 Multi-Client Budget Benchmark Report (Information Technology) (the Gartner Report).

2. The draft 2013 Service Continuity Data on Distribution System Performance in Electrical Utilities (Draft Continuity Report)

3. Service Continuity reports for 2011, 2012 and 2013.

The OEB does consider the Gartner Report to be relevant. Toronto Hydro is seeking a significant amount of revenue in order to meet information technology (IT) costs. The OEB finds that benchmarking related to IT costs is relevant.

The OEB does not find the 2013 Draft Continuity Report to be relevant. The evidence shows that the draft report has been super-ceded by a final report. As a result, it is of limited value and need not be produced.

The OEB finds that the Service Continuity reports for 2011, 2012 and 2013 are relevant. These reports appear to contain benchmarking information related to an issue in this hearing. For the reasons stated above, the OEB considers the benchmarking information contained in these reports to be relevant.

## 2. Does Copyright apply?

AMPCO argued that as a matter of public policy, copyright does not prevent courts and tribunals from implementing and enforcing rules that require the production and exchange of relevant documents. Further AMPCO submitted that courts have recognized for decades the public interest in seeing disputes resolved fairly and on the facts. The OEB agrees that in this proceeding, before a statutory tribunal with a public interest mandate, the public interest to disclose weighs even more heavily than in a private dispute between litigants in court.

The OEB however does not find it necessary to determine if copyright applies as even if it did, the OEB has determined that the fair dealing exception to copyright infringement has been established.

Section 29 of the Copyright Act provides that a document produced in the context of fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

CEA argues 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 submits 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 concludes 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. The OEB disagrees with this argument.

The Copyright Act states at section 89 that "[n]o person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence." However, the Copyright Act is not a "complete code" of defences, exceptions and users' rights, as the CEA's own materials make very clear. The OEB finds the example provided by AMPCO in its submission a very persuasive argument in support of the principle that the Copyright Act is not a complete code. The six-part "fair dealing" test stated by the Supreme Court of Canada in *CCH Canadian Ltd. v.Law Society of Upper Canada* (CCH Canadian)[3] is *entirely* judge-made law. The Copyright Act itself simply mentions "fair dealing" for the purpose of research, private study, etc. as a defence and sets out *no* criteria to define what a "dealing" is, or what makes it "fair" or not.

## 3. Does the fair dealing exception to copyright infringement apply?

All parties and OEB staff put forward the same test to be considered for fair dealing. 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 the CEA's 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 the 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 and (6) the effect of the dealing on the work.

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

The purpose of copyright has been expressed by the Supreme Court of Canada in 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" are the benchmarking reports and the "creator" is the third party author of the benchmarking report.

The two part test for fair dealing is as follows:

(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.

The Supreme Court made it very clear that research is a broad concept and should be interpreted liberally. The OEB is required to make decisions in the public interest and to do so it must have access to all relevant information. The OEB has determined that the benchmarking reports are relevant and contain information that may assist the OEB in coming to its determinations. As such, the OEB finds that the proposed use of the reports constitutes research for the purposes of the parties making informed submissions and the OEB making an informed decision. The Supreme Court of Canada in CCH Canadian identified six factors that should be considered in assessing fairness.

a) the Purpose of the Dealing

The purpose of the dealing is to allow all parties to seek information and documents that are relevant to issues in the proceeding, and in the possession of the party to whom the interrogatory is addressed. Section 5.4(1) of the 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." As SEC submits, the Ontario Court of Appeal has confirmed that powers under section 5.4(1) do not mean disclosure in the narrow sense of word, but also include production of any relevant documents. The OEB has implemented rules regarding disclosure in its *Rules of Practice and Procedure,* including, most germane to this motion, provisions relating to interrogatories (Rules 26-27).

[4] *Law Society of Upper Canada v. CCH Canadian Ltd.* (, *supra*.

b) the Character of the Dealing

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. The OEB has in its discretion the ability to make an order for discrete distribution of the benchmarking reports and that copies be made for the parties and the OEB's use in the proceeding.

c) the Amount of the Dealing

The CEA concedes that it does not take issue with the production of the documents, but rather its objection is to the making of copies of the documents for use by the OEB and parties to the proceeding. The CEA advises that it does not object to the production of one copy of the documents to be placed at the OEB offices, but the CEA will not allow the making of copies to be used by the panel members or the intervenors participating in the case.

Fair dealing does mean that only the minimum number of copies required by parties and the OEB are to be made.

d) Alternatives

The OEB must balance the interests of copyright holders (the CEA) with the efficient running of a tribunal. To have one copy of a document available at the OEB office, or panel members passing a document back and forth during a hearing, is impractical and goes to the ability of parties and panel members to effectively participate in the proceeding. At a time when ratepayers are asking the OEB to be efficient in its processes, the method proposed by the CEA represents a step backward.

e) the Nature of the Work

The CEA submits that the benchmarking reports are commercial documents that may contain commercially sensitive information. The OEB recognizes this argument but takes the view that 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 surveys. OEB 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."

**Treatment of the Documents in keeping with the fair dealing principle**

The OEB finds that Toronto Hydro can provide copies of the reports without there being an infringement of the Copyright Act, based on the fair dealing exception. Copies will not be placed on the OEB website nor will they be further reproduced in any way by the parties as this would affect the financial interests of the CEA. Documents will be returned and destroyed as is in keeping with the OEB's treatment of confidential documents.

The OEB finds that the fair dealing exception to copyright infringement addresses the concerns of the CEA and provides a reasonable approach.

## 4. Does the doctrine of Federal Paramountcy apply?

The CEA filed a Notice of Constitutional Question wherein it alleged that the Copyright Act, as federal legislation is paramount to the provincial OEB Act and SPPA. As argued by the parties and accepted by the OEB, the party asserting paramountcy has the burden of meeting the high standard required to invoke the doctrine of paramountcy.

There are two ways in which a federal enactment can be paramount to a provincial enactment:

(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 purpose underlying the federal enactment.[5]

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

All parties agreed to the test noted above. It is the finding of the OEB that based upon the treatment of the documents, pursuant to the fair dealing exception, it is neither impossible to comply with both enactments simultaneously nor is there any frustration of the legislative purpose of the Copyright Act.

### 5. Are there public policy reasons for not making an order for production and disclosure?

CEA argues that the SEC Motion should be denied on public policy grounds because granting of the requested relief would have a chilling effect on the improvements for which Canadian power utilities strive. Disclosure would preclude the national benchmarking and data analysis that CEA member utilities rely upon to improve their economic efficiency, performance and customer service standards.

The OEB does not accept this argument. Benchmarking is becoming an increasingly important tool for regulators to assess the performance of those entities which they regulate. As such, utilities will be required to participate in benchmarking activities. Furthermore, the treatment of the reports, as ordered by the OEB ensures that there will not be public dissemination of the information supplied by utilities nor the corresponding conclusions. The OEB has consistently maintained that the utilities it regulates may be required to provide benchmarking reports for consideration as the OEB makes its determinations.

### Order of the OEB

The OEB will order production of the four reports but will do so on a confidential basis. The OEB recognizes that two of the reports are available for sale, and while the fact that those reports are publicly available for a price makes them “not confidential”, for practical purposes they will be treated as such. The OEB’s Practice Direction deals with the management and administrative issues associated with confidential documents. While the two documents may be available for purchase, the OEB finds that they should not be publicly disseminated through this proceeding and for the purposes of this application will be treated as confidential filings.

### 6. Is Confidential Treatment Warranted?

The OEB’s general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. The OEB’s view is that its

proceedings should be open, transparent and accessible. The OEB therefore generally places the information it receives on the public record. The OEB also relies on full and complete disclosure to ensure that its decisions are well-informed. The OEB recognizes that in order to do so some information may need to be filed in confidence. CEA takes the position that disclosing the benchmarking reports would prejudice its competitive position and would produce a significant economic loss to the CEA. If the reports were publicly available, the CEA would lose the ability to sell the reports for financial gain. As the OEB's Practice Direction indicates, competitive position and significant loss are two of the factors the OEB may consider in addressing the confidentiality of filings.

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In striving to find a balance between the general public interest in transparency and openness, and the need to protect the CEA's competitive position, the OEB is satisfied that in these circumstances, confidential treatment of the reports is warranted.

Toronto Hydro put forward a proposal whereby it would provide the reports with utility information redacted, (except Toronto Hydro). Put forward as a potential solution, this would result in parties being able to see Toronto Hydro's information, while protecting the identities of the comparison utilities. The OEB is rejecting this proposal. In order to consider the benchmarking material in any meaningful way, it is necessary to understand the entities against which Toronto Hydro is being compared.

## Stay

Parties to the motion indicated that in the event the CEA sought a stay of the OEB's order, parties requested the ability to make submissions. A stay of this order is not automatic. However the OEB has the discretion to order a stay. The OEB will not do so. The OEB has determined that based on the order that it has made, there is little if any harm to the CEA by ordering the confidential production of the benchmarking reports. This is especially important since a stay pending appeal could well require the OEB to delay Toronto Hydro's rate application.

## Costs for the CEA

In requesting intervenor status to participate in the hearing of this motion, the CEA requested and was denied cost eligibility. The CEA asked the OEB to re-consider its previous decision on the basis that the member distributors participating in the hearing of the motion were not participating in their role as distributors and therefore should not

be precluded from receiving costs on that basis. The CEA also argued that many of its members were situated outside of Ontario and the OEB's jurisdiction and therefore should also be allowed to recover costs. The OEB has considered these arguments, but will not reverse its original decision on cost eligibility. The arguments made do not represent new information that was not previously considered by the OEB in reaching its original decision. The OEB finds that the CEA in bringing its motion does so in the context of protecting its purely commercial business interests and as such should not seek to recover these costs from Toronto Hydro ratepayers.

**The BOARD ORDERS THAT:**

1. Toronto Hydro is directed to file with the OEB copies of the four benchmarking reports listed below, in accordance with the Practice Direction on Confidential Filings, no later than 4:45pm two business days subsequent to the issuance date of this Decision and Order:

    i. The 2014 Multi-Client Budget Benchmark Report (Information Technology) (Gartner Inc).

    ii. The 2011, 2012 and 2013 Service Continuity Data Reports on Distribution System Performance in Electrical Utilities (CEA)

All filings to the OEB must quote the file number, EB-2014-0116, and be made electronically through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, in searchable / unrestricted PDF format. Two paper copies must also be filed at the OEB's address . Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Martin Davies at Martin.Davies@ontarioenergyboard.ca and Board Counsel, Maureen Helt at Maureen.Helt@ontarioenergyboard.ca.

**DATED** at Toronto, February 11, 2015

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary