Nova Scotia Energy Board

3rd Floor, 1601 Lower Water Street
Halifax, Nova Scotia B3J 3P6

Mailing Address
PO Box 1692, Unit M
Halifax, Nova Scotia B3J 3S3

TEL 902-424-1332
FAX 902-424-3919
TF 1-833-809-0040

board@novascotia.ca
nserbt.ca/nseb

June 24, 2026

James.gogan@mcinnescooper.com

James R. Gogan
McInnes Cooper
1969 Upper Water Street, Ste 1300
Halifax, NS B3J 3R7

Dear Mr. Gogan:

M12780 - EOne 2027-2031 DSM Plan Application - Confidentiality Request NSEB IR 17, Attachment 2, Mercer Compensation Review

BACKGROUND

This letter addresses Efficiency One's (E1) request that the Mercer Compensation Review (Mercer Report) it filed in this proceeding be held in confidence by the Board (i.e., filed as Board only confidential) The request was considered by the Board panel of Stephen T. McGrath, K.C., Chair; Steven M. Murphy, MBA, P.Eng., Member; and Darlene Willcott, LL.B.

On March 21, 2026, E1 applied for approval of its Demand Side Management (DSM) Resource Plan and Purchase Agreement for 2027-31. A Hearing Order was issued by the Board on April 7, 2026, establishing timelines for the hearing scheduled to commence on August 4, 2026. Information Requests (IRs) to E1 were due on May 7, 2028, and its responses were due on May 28, 2026.

In IR-17(a)(ix) Board staff asked E1 to provide a copy of the subject matter expert reports related to proposed annual compensation changes in the 2027 - 2031 Preferred DSM Plan. In response, E1 provided, as Board-only confidential, the Mercer Report as Attachment 2. There were no objections to E1's request for confidentiality.

Following the request to treat the filing as Board-only confidential, the Board, in a letter to E1 dated June 10, 2026, asked E1 to explain why it should not follow the same rationale set out in a previous Board decision (M10431) where the Board found that the public interest outweighs the argument for keeping information "Board Confidential," including the executive team's reasonable expectation of privacy as it relates to compensation.

E1, in its response on June 16, 2026, maintained its position that the Mercer Report qualifies for Board Confidential treatment under Rule 12 of the *Board Regulatory Rules*. It stated that the Mercer Report contains sensitive compensation data which would result in a breach of privacy and cause serious competitive harm in the recruitment and retention of qualified personnel. Second, the report constitutes sensitive commercial and financial information within the meaning of Rule 12(2), the disclosure of which could be expected to cause material harm to E1's competitive position in the labour market.

Based on this, E1 requested that the Board issue an order pursuant to Rule 12(11)(a) of the *Board Regulatory Rules* that the Mercer be held in confidence by the Board. In the alternative, E1 proposed that a redacted version of the Mercer Report could be provided to intervenors on a confidential basis, with the unredacted version only being available to the Board.

The Board finds that the Mercer Report should be treated as General Confidential and made available to the Intervenor representatives who have signed the approved Confidentiality Undertaking.

LEGAL FRAMEWORK

(a) Confidentiality

E1's request for confidentiality is made under s. 12 of the *Board Regulatory Rules*, which states:

Confidential documents

12 **(1)** Subject to Rule 12(2), all documents filed in respect of an application shall be placed on the public record.

(2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.

(3) The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

(4) Any request for confidentiality shall

(a) include a summary of the nature of the information in the document;

(b) state

(i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, and
(ii) any objection to placing an abridged version of the document on the public record, and the reasons for such an objection; and

(c) be filed with the Board and served on the parties.

(5) Where a party has made a request under Rule 12(2), the document shall be held in confidence unless the Board orders otherwise.

(6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.

(7) An objection shall state the reasons

(a) why the party requires disclosure of the document; and

(b) why disclosure would be in the public interest.

(8) The party claiming confidentiality will have an opportunity to reply to any objection.

(9) The Board may decide the issue with or without a hearing. Where the Board holds a hearing, the Board may direct that the hearing be held in the absence of the public.

(10) In ruling on a request for confidentiality the Board shall consider

(a) whether the document may disclose matters involving public security;

(b) whether the document may disclose sensitive financial, commercial or personal matters in relation to which the desirability of avoiding disclosure in the interest of any person affected outweighs the desirability of adhering to the principle that documents be available to the public; or

(c) such other matters as the Board deems appropriate.

(11) The Board may

(a) order that the document be held in confidence by the Board;

(b) order that the document be placed on the public record;

(c) order that an abridged version of the document be placed on the public record;

(d) order that the document be made available to a party to the proceeding, who has a good faith interest in accessing the confidential information and who would not otherwise be in conflict of interest, on such terms as the Board considers appropriate, including the signing of a confidentiality undertaking in a form approved by the Board;

(e) order that the document be withdrawn; and

(f) make any other order the Board may deem to be in the public interest.

(12) Where the Board rejects a claim for confidentiality, the party claiming confidentiality may, within seven (7) days of receiving the Board's decision, or such other time as the Board may allow, notify the Board in writing that

(a) if the party is an applicant, the application is withdrawn; or

(b) if the party is an intervenor, the intervention is withdrawn.

(13) Where a party provides written notice to the Board pursuant to Rule 12(12), if the document is on file with the Board, the Board shall immediately return the documents for which confidentiality was claimed. [Emphasis added]

As noted under s. 12(3), E1, as the party claiming confidentiality, has the burden of satisfying the Board that the Mercer Report should be held in confidence.

Analysis and Findings

The main issue relates to E1's request that the Mercer Report should not be disclosed to the intervenors in this matter and should be viewed by the Board only ("Board Confidential)."

It is typical in proceedings before the Board, including this proceeding, that confidential evidence may be accessed by parties who have agreed to sign a Confidentiality Undertaking. The confidentiality undertaking process is designed to permit all parties who are not in a conflict, and who have an interest in the proceedings, full access to documentation, provided they adhere to the terms set out in the Confidentiality Undertaking. The Board views the Confidentiality Undertaking as a mechanism to ensure interested parties have full disclosure while at the same time protecting the public interest and/or ratepayers.

E1 has not raised any concerns about the form of the Confidentiality Undertaking. Rather, E1 rejects the proposition that the intervenors should have access to any part of the Mercer Report.

E1 states that "the Mercer Report contains sensitive compensation data from which the remuneration of specific, identifiable individuals can be ascertained." E1 submits that the disclosure of this information, including on a General Confidential basis to intervenors, would constitute a breach of the reasonable privacy expectations of those individuals and would expose E1 to serious competitive harm in the recruitment and retention of qualified personnel.

E1 further states that the Mercer Report contains sensitive commercial and financial information within the meaning of Rule 12(2), and that the disclosure of which could reasonably be expected to cause material harm to E1's competitive position in the labour market and to its ability to attract and retain the specialized workforce necessary to deliver its DSM mandate.

Although E1 advanced several arguments to support its position that the Mercer Report should not be disclosed to intervenors (even subject to a confidentiality undertaking), it has not suggested that the information is not relevant to this proceeding. E1's operating costs, including the amount it pays its employees, form part of the amount that NS Power's customers will eventually pay for any demand-side management plan approved by the Board in this proceeding. The information is therefore relevant.

E1 argued that there was no demonstrated public concern over the Mercer Report in this proceeding because none of the intervenors objected to its claim for Board only confidentiality. The Board has difficulty with the suggestion that its ability to ensure that relevant information in the proceeding is appropriately classified as public, confidential or Board only confidential depends on having a party in a proceeding object to how it is classified in first instance by the party who filed the information. As the Board has noted in the past, the "open courts" principle applies to its processes and there is a public interest in ensuring that information filed in Board proceedings is as opening and transparently available. While neither confidential nor Board-only confidential information are made publicly available, this is still an exception to the general rule that all information in Board proceedings will be publicly available. Furthermore, the distinction between confidential and Board-only confidential is important. The circumstances in which even parties to a proceeding may not have access to relevant information should be even more exceptional. Additionally, consistency across Board proceedings is important. In recent cases involving both NS Power and Eastward Energy, similar information as set out in the Mercer Report was accessible to intervenors who had signed confidentiality undertakings.

E1 also argued there was no demonstrated legislative concern. In this regard, E1 noted that the disclosure of executive compensation is required to be set out in a report under s. 64B of the *Public Utilities Act* when NS Power files a general rate application, but there is no similar provision relating to the approval of a demand-side management plan. This argument confuses the purpose of s. 64B with the Board's authority to require that relevant information about employee compensation be provided by regulated entities. Section 64B does not provide the Board with that authority. The Board's authority to request such information rests in other provisions of the *Public Utilities Act*, such as its general supervisory authority (s. 18) and its authority to require financial information (s. 34). Section 64B requires the production of a specific report as part of a mechanism to limit the amount of executive compensation that NS Power may include in the rates it charges to its customers. The Board notes that both ss. 18 and 34 expressly apply to E1, by virtue of s. 79G(2) of the *Public Utilities Act*.

Furthermore, the Board is also guided by s. 79L(4) of the *Public Utilities Act* which states:

> **79L(4)** The Energy Board shall approve an application pursuant to this Section if, in addition to any other matters considered appropriate by the Energy Board, it is satisfied that the application, including the proposed demand-side management that is the subject of the application, <u>is in the best interests of Nova Scotia Power Incorporated's customers and satisfies the requirements in Section 79I</u>. [Emphasis added.]

The Board has a duty to ensure that the demand-side management plan is in the best interests of Nova Scotia Power's customers. In ensuring that the Board meets its obligations, Nova Scotia Power's customers would have an interest in knowing whether E1's executives are appropriately compensated and that it is properly incented to act in the best interests of ratepayers.

E1 further argues that that the relief sought is warranted under the criteria set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 (*Sierra Club*) as codified in Rule 12(10). It states that maintaining strict Board Confidential treatment protects the privacy of identifiable individuals and E1's commercial interests.

The Board agrees with E1 that Rule 12 is, in effect, a codification of the criteria set out by the Supreme Court in *Sierra Club* such that confidentiality orders are permitted as an exception to the open courts principle, but only when certain criteria are met, these being that:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

On the first point, E1 submits that disclosure of the Mercer Report, even on a general confidential basis, would reveal the specific compensation of identifiable executives and expose E1 to competitive harm in recruiting and retaining talent. These comments are quite speculative. As noted, the Board has required other regulated entities to provide similar information and there is no evidence that such harm has resulted. In the public sector, such information is routinely disclosed in various “sunshine lists” without any apparent impact on public sector recruitment or retention. Indeed, unlike these sunshine lists, the information in the Mercer Report does not appear to specifically name individuals or salaries, but appears to focus on positions and salary bands (although the Board appreciates it may be possible to infer or approximate a salary for a specific individual if other information outside of the report is known, particularly in the higher bands where there are fewer people in those positions).

On the second point, E1 submits the salutary effects of maintaining Board Confidential treatment — protecting individual privacy and E1's commercial interests — outweigh the deleterious effects in the circumstances of this case. It argues public interest in broader disclosure is substantially lower than it was in the Board’s decision on a similar issue in NS Power’s general rate application in Matter M10431 because there have been no intervenor objections in this case, executive compensation is not as much of an issue as it was in the NS Power case, the legislation does not specifically require it, and E1 undertakes both regulated and non-regulated activities. The first three of these points were addressed above. As for the fact that E1 may engage in unregulated activities, E1’s point in making this submission is not clear. Whether salaries paid to its employees are too high or too low is still relevant, even if some of an employee’s time is spent on regulated activities. Indeed, in such a case more specific information might be necessary to ensure that the employee’s salary is properly allocated to regulated and unregulated activities and not charged to NS Power’s customers.

The Board finds that the Mercer Report must be disclosed to intervenors who have filed confidentiality undertakings. As such, the Mercer Report will not be available to the general public. It will only be made available to the intervenors who have signed a Confidentiality Undertaking. In the Board’s opinion, this satisfies the test set out in *Sierra Club*. Even if the Board accepted E1’s argument that there is a serious risk to an important interest, including a commercial interest, the alternative measure of it being available only to intervenors who have provided a confidentiality undertaking protects that risk.

Disclosing the compensation data only to the intervenors will not, in the Board’s opinion, cause material harm to E1’s competitive position. The intervenors have signed a Confidentiality Undertaking, and the Board has no reason to believe they will not adhere to the terms of that Confidentiality Undertaking.

Therefore, the Board concludes that the public interest outweighs E1’s arguments for keeping the Mercer Report “Board Confidential.

CONCLUSION

Pursuant to Board Regulatory Rule 12, E1 requested confidential or partially confidential treatment of certain documentation filed in this matter. After considering the reasons provided by E1 in its letter of June 16, 2026, the Board denies the request. Accordingly, the

Board orders that the Mercer Report be made available immediately to the intervenors who have signed confidentiality undertaking.

Yours very truly,

Stephen T. McGrath, K.C.
Chair

Steven M. Murphy, MBA, P.Eng.
Member

Darlene Willcott, LL.B.
Member

c. Intervenors