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Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
26th Floor, Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: PowerStream Inc. (EB-2015-0003)
Custom IR EDR Application**

We are counsel to PowerStream Inc. ("PowerStream"), the Applicant in the above-captioned matter. In accordance with Procedural Order No. 3, issued on Friday, September 18, 2015, please find accompanying this letter PowerStream's submission on the Board's threshold question as to what, if any, consideration should be given by the OEB to the announced merger between PowerStream, Enersource Hydro Mississauga Inc., Horizon Utilities Corporation and Hydro One Brampton Networks Inc. as part of its review of PowerStream's 2016-2020 Custom IR Distribution Rate Application.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by James C. Sidlofsky

James C. Sidlofsky

cc: Colin Macdonald, PowerStream
Intervenors of record

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 PowerStream Inc. for an Order approving rates and other service charges for the distribution of electricity for the years 2016 through 2020;

**POWERSTREAM INC. SUBMISSION ON THE THRESHOLD
QUESTION ON THE PROPOSED ISSUES LIST**

DELIVERED: SEPTEMBER 23, 2015

INTRODUCTION

1. As the Board noted in Procedural Order No. 3, on September 16, 2015, as directed by Procedural Order No. 1, OEB staff filed a letter with the OEB which attached an agreed upon Draft Issues List containing non-disputed issues. OEB staff's letter noted that there was one disputed issue related to the announced merger between PowerStream, Enersource Hydro Mississauga Inc., Horizon Utilities Corporation and Hydro One Brampton Networks Inc.
2. The Board advised that it considers that the proposed merger is a threshold question related to this Application, and that it would find it useful to receive submissions from parties on the threshold question as to what, if any, consideration should be given by the OEB to the announced merger between PowerStream, Enersource Hydro Mississauga Inc., Horizon Utilities Corporation and Hydro One Brampton Networks Inc. as part of its review of the Application. The Board directed interested parties to explain to the Board why they believe the issue of the merger is in scope or out of scope in this proceeding.
3. PowerStream submits that the potential consolidation of PowerStream with the other three utilities mentioned by the Board is out of scope of this Custom IR Application for the reasons discussed below, and most notably for the reason that it is not consistent with the policies articulated by the Board in its 2015 Report on *Rate-Making Associated with Distributor Consolidation* (the "2015 Report")¹.

¹ EB-2014-0138, Report of the Board, *Rate-Making Associated with Distributor Consolidation*, March 26, 2015, available at: http://www.ontarioenergyboard.ca/oeb/_Documents/EB-2014-0138/Board_Report_MAADs_Ratemaking_20150326.pdf

4. PowerStream also notes that on Friday, September 18, 2015, SEC filed a Notice of Motion for an order seeking further information related to the potential consolidation. The Board has not established a process for dealing with that motion, and PowerStream anticipates that it will have an opportunity to make submissions on that motion if it proceeds. However, at this time PowerStream submits that if the Board determines that the potential consolidation is out of scope of this Application, then the motion must be rejected, as the material sought by SEC will not be relevant to the current proceeding. It is particularly noteworthy that in its Motion, SEC has not once mentioned the Board's policy regarding consolidation. This is of course convenient for SEC but of little assistance to the Board in making a fair determination on the threshold issue which intertwines with the Motion.

BACKGROUND:

- **The PowerStream 2016-2020 Custom IR Rate Case**

5. Following an extensive and, in PowerStream's view at least, constructive consultation with intervenors, the current Application was filed on May 22, 2015.
6. Since the filing of the Application, there has been a formal round of interrogatories on the Application, and a transcribed Technical Conference with responses to 14 undertakings given therein.
7. The Parties to the proceeding have reached agreement on an Issues List, with one exception. As Board Staff advise in their letter of September 16th:

"There is one disputed issue which is not contained on the attached list. This is Issue 1.4. Intervenors wish this issue to be included on the Approved Issues List, while PowerStream is opposed to its inclusion.

Should the OEB determine that this issue be included on the Approved Issues List, intervenors propose the wording below:

'1.4 Have the impacts of the announced merger between PowerStream, Enersource Hydro Mississauga Inc., Horizon Utilities Inc. and Hydro One Brampton Networks Inc. been adequately included in this Application to set rates for PowerStream's customers?'

OEB staff as an alternative would propose the following wording:

'1.4 What consideration should be given to the announced merger between PowerStream, Enersource Hydro Mississauga Inc., Horizon Utilities Inc, and Hydro One Brampton Networks Inc.'"²

8. PowerStream cannot accept the inclusion of either version of Issue 1.4 on the Issues List. Among the reasons discussed below, PowerStream respectfully submits that the inclusion of any issue of this kind would be inconsistent with Provincial objectives and Board policies with respect to distributor consolidations and electricity distribution rate making related thereto.

- **The Potential Consolidation**

9. On April 16, 2015, the Provincial Government announced the planned consolidation of Enersource Hydro Mississauga Inc. ("Enersource"), Horizon Utilities Corporation ("Horizon Utilities"), PowerStream and Hydro One Brampton Networks Inc. ("HOBNI"). If this consolidation proceeds, it will involve a two-step process: i) the amalgamation of Enersource, Horizon Utilities and PowerStream; and ii) the acquisition of HOBNI.
10. Since that time, certain information has been published that contemplates merger-related savings over time. The precise quantum of savings and the timeframe over which they may be realized cannot be specified at this time. Moreover, notwithstanding the April announcements by the Provincial Government and the LDCs, there is currently no transaction. Negotiations are continuing, and review and approval of the transactions by the Provincial Government and the Enersource, Horizon Utilities and PowerStream shareholders has not been completed.
11. PowerStream respectfully submits that, even if a consolidation is approved, it will not be within the scope of the current Application, nor should it be.

THE INTERVENORS' VERSION OF ISSUE 1.4

12. PowerStream submits that inclusion of the rate impacts of the potential merger as an issue in this rate proceeding would be inappropriate, on several levels.

² The Board Staff letter is available at:
http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/496007/view/OEBStaff_PowerStream_ProposedIssuesList_20150916.PDF

13. As SEC notes, the Motion and the threshold issue are intertwined. PowerStream has not been afforded an opportunity, as would typically be the Board's practice, to reply to Board Staff and Intervenor submissions on whether consolidation-related information is in scope in this rate proceeding – all submissions are due on the same date – but PowerStream anticipates that the Intervenor's submissions will be the same as, or similar to, those submissions SEC is making in its Motion. PowerStream has had an opportunity to review the Board Staff submission, as it was filed earlier today, and PowerStream can confirm that it supports the following Board Staff conclusions, as set out at page 3 of the submission:

“OEB staff notes that no application has been filed with the OEB for the proposed merger. While there have been public announcements, the specific details of the merger are as yet not known. For this reason, it is OEB staff's view that the merger is outside the scope of the current application and accordingly no consideration should be given to it at this time. It is further noted that MAADs policy is intended to encourage consolidation by allowing a utility to keep savings for a period of time. OEB staff is of the view that should the impacts of the potential merger on the current application be accepted as an issue in this application, such an approach would not be in accordance with the MAADs policy outlined in the Report.”

14. The general themes of the Intervenor's submissions are expected to be as follows:
- The merger will likely occur;
 - The merger will lead to savings in capital and OM&A costs;
 - The savings should be part of setting rates in this rate application;
 - Unless the savings are incorporated in the rates application, the rates cannot be just and reasonable;
 - Even if the Board determines that the rates should be set on a standalone basis, details of the merger and its effect on PowerStream's customers are relevant for determining:
 - the appropriateness of the proposed Custom IR plan's 'annual adjustments' or 'reopening and plan terminations';
 - the baseline for any measures such as earnings sharing and capital spending variance provisions; and
 - cost and savings allocations to PowerStream's customer groups.

15. PowerStream's submissions below follow these general themes as well other themes that may be advanced.
 - ***Intervenors: The merger will likely occur***
16. SEC (and presumably other Intervenors) appears to want to treat the merger as a forecast like any other cost item, and wants the Board to accept that the merger will occur. This is not a forecast like any other. A merger is a binary proposition – it will either occur or it will not.
17. Any consolidation will be subject to shareholder and Board approval, and it would be entirely inappropriate to prejudge the various provincial, municipal and Board approvals or their timelines.
18. In the event that the consolidation does not take place, PowerStream will still require updated rates, and it has presented a complete case to the Board in support of its requests for the 2016-2020 Custom IR term. Of particular note is the critical need for capital improvements in the PowerStream service area over the next five years.
 - ***Intervenors: The merger will lead to savings in capital and OM&A costs***
19. Should the consolidation proceed, there will likely be savings. That is the one of the fundamental desired outcomes of a consolidation, and the Board recognizes that savings, through measures such as increased efficiencies, should be available to the consolidated entity to offset the costs associated with the transaction – this is in keeping with the Board's policy on rate-making related to consolidation.
 - ***Intervenors: The savings should therefore be part of setting rates in this rate application***
20. Other than the potential aggregate savings and transaction costs for the consolidated LDC, there is no other probative evidence to inform rate setting in PowerStream's rates proceeding. Savings and transaction costs are not the kind of estimates that could be the basis for scrutiny by parties and the Board in the rates proceeding. They were not developed for rate making purposes; they were developed for the totally different purpose of determining feasibility.

21. To be of any probative value in the current proceeding, evidence on the impact of the merger on PowerStream's rates would have to await the filing of a "MAADs" application with the Board for the approval of the potential consolidation; the Board's decision on the MAADs application; and a forecast of impacts for PowerStream (both costs and potential savings) in a rate setting context. A decision on a possible MAADs application will not likely be forthcoming until well into the spring of 2016 and this rates proceeding would likely not be completed until the end of 2016. By that time, the current evidence in PowerStream's application would likely be viewed by intervenors as stale, giving rise to more delays and more costs. Whether or not the Intervenors' dispute over the Issues List and the filing of the Motion are attempts to derail the rates proceeding, they will have precisely that effect.
22. Moreover, as a matter of policy, even if the portions of costs and savings attributable to what will become a PowerStream rate zone (if the consolidation were to proceed) could be estimated, the inclusion of savings in the PowerStream revenue requirement in the current proceeding runs counter to both Provincial Government expectations and Board policy. The Provincial Government has explicitly encouraged consolidation, and long-standing Board policy, articulated as recently as March of this year, recognizes that consolidated distributors should be allowed additional time to offset their transaction costs before the net transaction-related savings are passed on to rate payers. Parties to prospective consolidations rely on policies such as these in determining whether to pursue consolidation transactions. These policy issues will be discussed further below.
 - ***Intervenors: Unless the savings are incorporated in the rates application, the rates cannot be just and reasonable***
23. Because of the announcement of the potential merger, Intervenors apparently want the savings now, notwithstanding that the Board's policy provides for customers to receive consolidation-related savings after the consolidated entity has had an opportunity to offset its transaction-related costs. This apparent position of the Intervenors is entirely contrary to Board Policy. PowerStream cautions that the Board should be particularly conscious of the ramifications of including the merger issue in the rates proceeding.
24. PowerStream anticipates that the following events would take place if the Board were to determine that the potential consolidation was in scope in this proceeding: First,

consolidation-related information would be made relevant by including Issue 1.4; second, demands will be made for volumes of consolidation-related material for the record in this rates proceeding (this is already happening, as is clear from SEC's questions during the Technical Conference and from the SEC Motion); and third, demands will be made to offset PowerStream's forecasted revenue requirements for the 2016-2020 Custom IR period (these are already the subject of hundreds of interrogatories and supported by thousands of pages of evidence) by potential cost savings. PowerStream submits that any matters related to a merger should be considered in a MAADs application, should the transaction progress to that stage.

25. In its 2015 Report, the Board states the following:

"The purpose of this policy is to allow the net savings of a consolidation to accrue to a distributor's shareholder(s) for an extended period. The OEB recognized that providing a reasonable opportunity to use savings to at least offset the costs of a MAADs transaction is an important factor in a utility's consideration of the merits of a given consolidation initiative. The five-year period was selected based on a review of practice in other jurisdictions, and taking into consideration the fact that the maximum duration of any rate plan for distributors at the time was three years."³

26. The Board's objective in its consolidation policy is quite clear. The Board recognizes that providing a reasonable opportunity to use savings to at least offset the costs of a consolidation is an important factor in a utility's consideration of the merits of a given consolidation initiative.

27. The regulatory contract is implicit if not explicit in the Board's 2015 Report. The Board states:

"The Ontario Energy Board's renewed regulatory framework is a comprehensive performance based approach to regulation. The framework sets expectations that electricity distributors will seek out efficiencies to increase productivity and manage costs."⁴

28. The Board also states:

"The Report of the Ontario Distribution Sector Review Panel, issued in December 2012, set out a vision for consolidation resulting in the less costly and more efficient delivery of

³ EB-2014-0138, Report of the Board, *Rate-Making Associated with Distributor Consolidation*, March 26, 2015, Page 5

⁴ *Ibid.*, Page 3

electricity, with a predicted cost savings of \$1.2 billion over the next ten years. When the Minister of Energy responded to the Panel's report, he indicated that he expected that the sector would find ways to achieve those savings through more efficient service delivery, including negotiated consolidations. This view was carried forward in the government's December 2013 Long Term Energy Plan ("LTEP"), where it is stated that the government expects electricity distributors to pursue innovative partnerships and transformative initiatives that will result in savings for electricity ratepayers."⁵

29. If the merger issue is included, clearly PowerStream will be prejudiced by circumstances around timing, and this would be unfair. This cannot and should not be held against PowerStream. The preparation for this rate application began early in 2014. PowerStream held meetings with stakeholders in 2014 and 2015, prior to the April 2015 announcement of the potential merger. Inclusion of the merger issue not only would add another level of complexity to reaching a final agreement and approval by the affected stakeholders in this case, but it would put at risk its very occurrence.
30. The OEB Act, and the Board itself, allow distributors to seek approval of updated distribution rates in order to meet changing needs with respect to its operating and capital requirements. PowerStream's current rates do not allow it to meet its needs for the coming five-year period. That application process is at risk of being derailed by a potential merger. PowerStream submits that distributors should be permitted to initiate consolidation discussions, and to enter into consolidations, at any time. Their ability to have rates adjusted to meet their needs should not be impaired by those potential consolidations.
31. Moreover, the repercussions would be much broader than in the instant case as it will be seen by the wider distributor sector as an additional barrier to consolidation. Since 2007, when the Board issued its original report on rate-making associated with distributor consolidation, parties considering consolidations have known that they will be allowed time to reduce costs and create efficiencies, with customers ultimately benefiting at the time of the consolidated distributor's next rebasing when those savings are passed on in rates. Requiring a distributor to pass anticipated savings on to customers (a) when there is no consolidation at this time; and (b) not in 5-10 years, in keeping with Board policy, but immediately, is entirely inconsistent with the Board's stated objectives in its consolidation policy, as well as with the Provincial Government's expectations.

⁵ *Ibid.*, Page 3

- ***Intervenors: Even if the Board determines that the rates be set on a standalone basis, details of the merger and its effect on PowerStream's customers are relevant for determining:***
 - ***the appropriateness of the proposed Custom IR plan's 'annual adjustments' or 'reopening and plan terminations'***
 - ***the baseline for any earnings sharing, capital spending variance provisions, etc.***
 - ***cost and savings allocations to PowerStream's customer groups***
32. The regulatory requirements for mergers are set out in the Board's 2015 Report. The Board states:
- "The OEB also notes that despite the ability for consolidated entities to extend the rate re-basing period, all other regulatory requirements, including the requirement to file Distribution System Plans every five years remain in effect.
- The OEB will continue to make use of its monitoring tools, available through distributor's annual reporting requirements, to determine whether the results of MAADs transactions for consumers and the industry warrant additional consumer protection measures. If so, future changes to the policy may be considered."⁶
33. If rates were set prior to a merger, as is the case with Horizon Utilities' 2015-2019 Custom IR proceeding, the matters being raised by intervenors could not have been pursued. PowerStream should not be subjected to different requirements than those espoused by the Board itself in the 2015 Report simply because of the timing of the PowerStream Application.

The 2009 PowerStream/Barrie Hydro consolidation

34. As noted above, PowerStream has not been provided the opportunity to reply to the Board Staff and Intervenor submissions. As a result, PowerStream is in the position of having to speculate as to the potential Intervenor submissions. In anticipation that Intervenors may argue that the 2009 PowerStream/Barrie consolidation case⁷ serves as a precedent, PowerStream submits that the two cases are absolutely distinguishable for the reasons set out below.
35. On October 10, 2008 PowerStream had filed a rebasing application for new rates to be effective May 1, 2009. On October 10, 2008 a MAADs application was filed for Board

⁶ *Ibid.*, Page 6

⁷ EB-2008-0335

approval of PowerStream's purchase of then Barrie Hydro Distribution. The MAADs application was approved by the Board on December 15, 2008.

36. The issue that arose at that time was whether the savings and costs associated with the approved merger should be an issue for the rates proceeding. The Board's 2007 Report⁸ became the pivotal document in the discussion and Board consideration. The Board panel in that case commented as follows:

"The Board is concerned that the Report did not contemplate the situation we find ourselves in. We are of the view that the Board in this Report assumed, rightly or wrongly, that consolidated entities, electing a extended deferral period of up to five years would be under some form of incentive regulation, either second generation or third generation.

Notwithstanding our concern, the Board is prepared to approve the rate rebasing proposal advanced by the applicants in this case, provided it is understood that in the cost of service hearing, parties will be free to introduce evidence that the costs as filed may not be the real costs and may not reflect actual costs. Parties may, in fact, take advantage of certain evidence introduced in this proceeding, regarding cost reductions not revealed in the application as originally filed."⁹

37. The Board-approved Issues List in the PowerStream rebasing proceeding contained the following preamble:

"It is understood that the cost and benefits attributable to PowerStream Inc. (for PowerStream ED-2004-0420 Rate Zone) related to the merger with Barrie Hydro Distribution Inc. are included in the scope of the specific issues listed below to the extent that they relate to the 2009 test year. This includes allocation of shared costs between PowerStream ED-2004-0420 and Barrie Hydro Distribution Inc. for the test year."

38. The matter of savings and transaction costs was settled by the Parties and subsequently approved. The Settlement Proposal contained a similar preamble to that set out in the Issues List.
39. As the Board is well aware, it is a basic tenet of administrative law that the decisions of one panel of the Board cannot bind another. That said, prior decisions do inform the Board if the circumstances are the same or even similar and cases are not distinguishable. The circumstances in the current case are not the same. There are at

⁸ Report of the Board, *Rate-Making Policies Associated with Distributor Consolidation*, July 23, 2007

⁹ EB-2008-0335, Decision Transcript Volume 1, December 15, 2008, Page 198

least two reasons that the 2009 case and the instant case are distinguishable, and in important ways.

40. First, as noted above, there was a MAADs application before the Board and in fact the MAADs application was approved when the Board rendered its decision on the inclusion of the impacts of the Barrie Hydro purchase. In the instant case, not only there is no MAADs application but there is no certainty as to whether the planned merger will occur.
41. Second, the Board panel in the Barrie purchase case noted its concern that the Board's 2007 Report did not contemplate the situation in which it found itself and expressed the view that the deferred period would be under some form of incentive regulation, either second generation or third generation and not under cost of service rebasing. The issuance of the Board's RRFE Report since that time and the Board's 2015 Report address these matters. Under the RRFE all rate making methodologies are incentive oriented, and applied. In the 2015 Report the Board sets out the specific post-merger regulatory requirements for a distributor, quoted earlier, and these are the requirements that ought to govern. PowerStream will be on a form of incentive regulation – Custom Incentive Regulation – if the consolidation takes place.

BOARD STAFF'S ALTERNATIVE PHRASING OF ISSUE 1.4

42. As noted previously, Board Staff had suggested the following alternative to the Intervenors' version of Issue 1.4:

1.4 What consideration should be given to the announced merger between PowerStream, Enersource Hydro Mississauga Inc., Horizon Utilities Inc, and Hydro One Brampton Networks Inc.

43. For the reasons set out below, PowerStream submits that this is not an acceptable approach.
44. Board Staff's alternative wording moves the debate about whether the consolidation-related information is in scope over to the Settlement Conference and any potential hearing. With respect, this does not assist in resolving the matter. The dispute among parties will simply persist at the Settlement Conference and in the hearing.

45. Whether the Board opted for the Intervenor's suggested wording or Staff's alternative wording, the Board can expect that there will not be common ground for any discussion at the Settlement Conference and the matter will have to proceed to a hearing.

CONCLUSION

46. It is PowerStream's strong belief that no version of Issue 1.4 – whether the Intervenor version, the Staff version or any other version – should be placed on the Issues List, and that this matter should be disposed of by the Board at this time, prior to the Settlement Conference and any potential hearing on unsettled issues.
47. As noted previously, the Board has not established a process for dealing with the SEC motion. PowerStream anticipates that it will have an opportunity to make submissions on that Motion if it proceeds, and it intends to make submissions on that Motion. However, PowerStream submits that if the Board determines that the potential consolidation is out of scope of this Application, then the motion must be rejected, as the material sought by SEC will not be relevant to the current proceeding. PowerStream will provide submissions on the SEC motion in accordance with any directions from the Board in that regard.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF SEPTEMBER, 2015

BORDEN LADNER GERVAIS LLP

Per:

Original signed by James C. Sidlofsky

James C. Sidlofsky
Counsel to PowerStream Inc.