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BY EMAIL and RESS

June 22, 2016
Our File No. 20160025

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2016-0025 – MergeCo – SEC Comments on Issues List, Confidentiality

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1, this letter constitutes SEC's comments on the Issues List proposed by the Applicants, and the claims for confidential treatment or other exclusion of certain information.

Issues List

The Issues List proposed by the Applicants appears to proceed from the assumption that the policies of the Board relating to distributor consolidation are to be applied as if binding on this Board panel, and there are no issues as to whether they should be applied in this case.

SEC submits that the Board is legally obligated to put its mind to whether its non-binding policies relating to distributor consolidation should be applied, either in whole or in part, to the proposed transactions.[1] That inquiry must include the provision of information by the Applicants

[1] See for example, Decision and Order on Notice of Motion to Review and Vary (EB-2014-0155), July 31 2014, p.7; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, para 66; *Jackson v. Ontario (Minister of Natural Resources)*, 2009 ONCA 846, para 51

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via discovery that will allow the appropriateness of the policies to be addressed, and then a consideration by the Board based on the evidence, and the submissions of the parties, as to whether the factual and public interest assumptions embedded in those policies are fully applicable to these transactions.

This is particularly important since the Board did not consider the cost and rate implications of the impending consolidation in the rate applications of the Applicants (Powerstream EB-2015-0003, Enersource EB-2012-0033 and subsequent IRMs, and Horizon EB-2014-0002 and subsequent annual update), as well as Hydro One Brampton Networks Inc. (EB-2014-0083 and subsequent IRM) In the case of two of those Applicants, the merger was not known at the time of the last cost of service, so the Board could not have considered it. However, in the case of Horizon, the Board established rates for years after 2016 based on costs that now are likely to be too high.

In the case of Powerstream, the Board did know that the merger was pending, but refused to consider the impacts of the merger on the costs and rates going forward.[2] It did so partially on the basis that the merger negotiations had not concluded, and that the information now available in this proceeding was needed to "fully assess the likely cost impacts of a MAADs transaction"[3]

In SEC's submission, it cannot be the case that a rate regulator can refuse to deal with known costs in either of the only two proceedings in which those costs may be materially relevant, and create a situation in which the true costs of the utility are never considered in setting rates.

SEC therefore submits that the following issue should be added to the Issues List:

1. To what extent, if any, is it appropriate and in the public interest for the Board to apply its policies as set forth in its 2015 *Report – Rate-Making Associated with Distributor Consolidation,* and its 2016 *Handbook for Electricity Distributor and Transmitter Consolidations,* to the proposed transactions? In particular, and without limiting the generality of the foregoing:

    a. Is the proposed deferred rebasing period appropriate?

    b. How should rates be established each year during the deferred rebasing period? To what extent, if any, should rates during the deferred rebasing period continue to be set on cost forecasts that are no longer correct?

    c. What are the forecast cost benefits of the consolidation, and are those forecasts reasonable? To what extent, if any, should LDCco expect and forecast a reduction in its borrowing and other financing costs? To what extent, if any, are there additional cost benefits available – whether due to forecasting or operational or strategic

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[2] *Decision on Threshold Question and Procedural Order No.5* (EB-2015-0003), October 6, 2015
[3] *Ibid,* p.7

changes to the Applicants' proposals - that are not included in the LDCco forecasts?

d. Is the proposal of the Applicants for the sharing of the cost benefits of the consolidation between the customers and the shareholders appropriate, both as to amounts, timing, and risks? Does the proposed earnings sharing mechanism adequately share the cost benefits of the consolidation with the customers during the period to which it is proposed to apply? What other mechanism(s) should be considered by the Board to ensure a reasonable sharing of the benefits of the consolidation between the customers and the shareholders?

e. How should any proposed incremental capital spending during the deferred rebasing period be recovered in rates, and when, and should an ICM or ACM or any other capital recovery mechanism be allowed?

f. What annual reporting of revenues, costs, and return on equity should be required?

g. What cost risks, if any, will arise during the deferred rebasing period, and what mechanisms should be considered to minimize those risks, or reduce the exposure of the customers to those risks either during or after the deferred rebasing period?

h. Is the "no-harm test" an appropriate overarching test for the Board to apply to the proposed transactions? What other test or tests should be considered by the Board in the context of this specific consolidation?

SEC notes that it has added the eight sub-bullets to provide additional detail, and assist the Board and the parties in scoping the full nature of the proposed issue. SEC believes that all of the sub-bullets are contained in the main body of the issue, and that if it were approved without the sub-bullets, the scope would be the same.

SEC also believes that, in light of the Settlement Agreement and subsequent order in the Horizon Custom IR EB-2014-0002, it is appropriate to add the following additional issue:

2. Will the Settlement Agreement and Board order in EB-2014-0002 continue to apply to LDCco? If so, how should LDCco comply with Horizon's commitments, and the Board's order, in that Settlement Agreement, for example with respect to earnings sharing, capital variance account, and other provisions?

Confidentiality of Information

SEC has not reviewed the redacted parts of the pre-filed evidence. The Board will be aware that, as a matter of general policy, SEC in most cases opposes utility attempts to claim confidential treatment on the basis of commercial sensitivity. In this case, SEC relies on the Board's review to limit the redactions purportedly justified by commercial sensitivity.

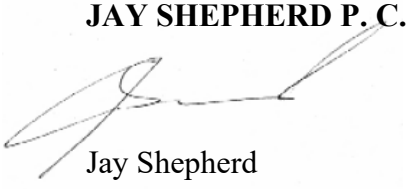
SEC does have two comments on the confidentiality claims, both items that the Applicants have not provided to the Board at all, confidentially or otherwise.

First, the Applicants claim that Schedules 3.9, 3.10. and 3.11 to the Merger Participation Agreement are "out of scope", and therefore advise the Board that they have unilaterally decided not to provide that information. They provide no reason why these Schedules should in fact be considered out of scope. Those Schedules are a list of the specific approvals, consents and waivers required to carry out the proposed transactions. Thus, they are relevant and material, and should be disclosed. SEC, like the Board not having even seen the documents, cannot comment on whether the contents should be confidential. On the face of it, they would appear to be public in nature, but until we see the contents we cannot say that with any certainty. However, what is clear is that the nature of any approvals, consents and waivers, and any conditions that may be attached to them, are in no way out of scope in this proceeding.

Second, the bulk of the information in Appendices B, C, and D of the Merger Participation Agreement is actually contained in related documents, the three Confidential Disclosure Letters. Those letters, which do not appear to have been provided to the Board, are incorporated by reference into the MPA, are in law a part of that agreement, and therefore should have been filed. It should not be within the discretion of an Applicant to put one part of an agreement on a separate piece of paper, and then claim secrecy on the erroneous theory that it is no longer part of the agreement. The three Confidential Disclosure Letters should be filed with the Board, and then, if the Applicants wish to claim confidential treatment, they can follow the normal procedures to do so.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties