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**BY E-MAIL**

June 22, 2016

Attention: Ms. Kirsten Walli, OEB Secretary

Dear Ms. Walli:

**Re: Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, and  
PowerStream Inc.  
Application for approval to amalgamate to form LDC Co. and for LDC Co. to  
purchase and amalgamate with Hydro One Brampton Networks Inc.**

**OEB File Number EB-2016-0025**

In accordance with Procedural Order No. 1 issued on June 15, 2016, please find attached the OEB staff submission on the confidentiality requests that have been made in this proceeding.

Yours truly,

*Original Signed By*

Judith Fernandes  
Project Advisor

cc: Parties to EB-2016-0025

# **OEB STAFF SUBMISSION**

**Enersource Hydro Mississauga Inc., Horizon Utilities  
Corporation, and PowerStream Inc.**

**EB-2016-0025**

**Confidentiality  
Requests  
&  
Draft Issues List**

**June 22, 2016**

## **Background**

Enersource Hydro Mississauga Inc. (Enersource), Horizon Utilities Corporation (Horizon), and PowerStream Inc. (PowerStream), (collectively, the applicants) filed an application with the Ontario Energy Board (OEB) on April 18, 2016 under section 86 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B) (the Act) seeking approval of the following:

- a) Amalgamation of Enersource, Horizon, and PowerStream to form LDC Co.
- b) LDC Co. share purchase and amalgamation with Hydro One Brampton Networks Inc. (Hydro One Brampton) and continuing as LDC Co.
- c) Enersource Holdings Inc. share purchase of Enersource
- d) Transfer of PowerStream's existing shares of Collus PowerStream Utility Services Corp. to LDC Co.
- e) Transfer of Hydro One Brampton's distribution system to LDC Co.

The applicants are also asking for approval under section 18 of the Act for the transfer of the distribution licences and rate orders for each of the applicants and Hydro One Brampton to LDC Co.

The applicants, in a letter dated April 15, 2016, requested that the OEB treat certain information in the application as confidential. The applicants also informed the OEB that there is certain information that will not be produced at all on the basis that it is not relevant to the transaction at issue in the proceeding.

A Notice of Application and Hearing was issued on May 16, 2016. On May 30, 2016, the applicants filed a draft issues list.

The OEB issued a Procedural Order on June 15, 2016 requiring that intervenors and OEB staff file submissions on the draft issues list and the requests made for confidentiality by June 22, 2016. This is OEB staff's submission.

## **Draft Issues List**

OEB staff is not proposing any changes to the existing draft Issues List attached to Procedural Order No. 1.

## Scope and Confidentiality

The application includes the supporting material required by the Filing Requirements including the “final legal documents to be used to implement the proposed transaction”, as required by section 2.2.3. These include the Merger Participation Agreement (MPA), entered into among Enersource, Horizon and PowerStream and their parent corporations and the shareholders of those parent corporations; and the Share Purchase Agreement (SPA) entered into among Enersource, Horizon and PowerStream and Brampton Distribution Holdco Inc., the parent of Hydro One Brampton.

### 1. Scope

The applicants claim that certain documents in the MPA and SPA will not be provided as part of the application as they are out of scope of this proceeding and have stated that:

- (i) certain definitions in the MPA pertain to the consolidation of the applicants' holding companies and certain of their affiliates which the applicants say do not require OEB approval;
- (ii) documents related to the amalgamation of the competitive service affiliates of the LDCs are out of scope as that amalgamation does not require OEB approval;
- (iii) documents related to negotiations and the extent of due diligence; and
- (iv) personal information contained in certain sections of the MPA should not be provided to any person, regardless of whether that person has signed the OEB's Form of Declaration and Undertaking.

With respect to items (i) and (ii) above OEB staff agrees that the documents listed on these grounds are out of scope with the following exceptions:

- Appendix “C”, section 2(23) of the MPA – this section of the PowerStream Disclosure Schedule identifies electricity generating facilities developed by PowerStream. PowerStream's solar generation activities are operated as a separate business division of PowerStream, and the applicants state that those activities are beyond the scope of this application;

It is not clear to OEB staff why PowerStream's solar generation activities, which are operated as a separate business division but not by an affiliate, should be considered out of scope.

- Schedule 2.1(3) of the MPA – this Schedule provides a listing of PowerStream’s solar projects. PowerStream’s solar generation activities are operated as a separate business division of Powerstream;

For the same reasons set out above, it is not clear to OEB staff why this should be considered out of scope.

- Schedules 3.9, 3.10 and 3.11 of the MPA – Enersource, Horizon and PowerStream Consents, Approvals and Waivers. The applicants state that these Schedules consist of lists of consents that will be required from other parties in order for the transactions to be completed.

OEB staff submits that this information appears to be relevant to the transaction and should be public.

- Schedule 5.1(9)(A) of the MPA – this Schedule is a copy of PowerStream Solar Business – Services and Indemnity Agreement – Indicative Term Sheet – PowerStream’s solar generation activities are operated as a separate business division of PowerStream, and the applicants argue those activities are beyond the scope of this application.

For the same reasons set out above, OEB staff is of the view that PowerStream’s solar generation activities are in scope.

OEB staff has reviewed the documents listed in the applicants’ letter of April 15, 2016 and agrees that for items (iii) and (iv) above, documents related to negotiating strategies and the extent of due diligence are out of scope. The OEB has previously determined that the appropriate test to be used in considering a MAAD application is the no harm test. In applying the no harm test, the OEB has determined that the negotiating strategies of the parties to the transaction are beyond the scope of its review. The OEB will make its determination based on the impact of the proposed transaction by considering the effect of the final transaction in comparison to the status quo. The OEB will not consider negotiating strategies, nor positions taken leading up to the final transaction<sup>1</sup>. OEB staff also agrees that personal information should not be provided to any person.

With respect to information that is described as personal information, OEB staff refers to the OEB’s *Practice Direction on Confidential Filings* (Practice Direction),

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<sup>1</sup> EB-2014- 0213 Hydro One Inc., Hydro One Networks Inc. and Woodstock Hydro Services Inc. Decision and Order September 11, 2015

specifically section 4.3.1 which provides that subject to limited exceptions, the OEB is prohibited from releasing personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*. OEB staff therefore agrees with respect to the applicants' claims related to personal information.

## **2. Confidentiality**

The applicants filed certain material in confidence pursuant to the OEB's *Rules of Practice and Procedure* and the Practice Direction.

The request for confidentiality relates to certain information contained in the MPA, filed as part of the application.

The applicants say that certain identified information is personal, commercially sensitive and may reasonably be expected to prejudice the competitive positions of, and interfere with future negotiations of LDC Co.'s direct and indirect shareholders with respect to their shares of LDC Co., its holding company and/or the holding company's shareholders.

The OEB's general policy as stated in its Practice Direction is that all evidence should be on the public record. The OEB has also recognized that some information may be of a confidential nature and should be protected.

As set out in the Practice Direction, it is the OEB'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 OEB'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.<sup>2</sup>

OEB staff submits that while the practice of the OEB is to have much information as possible on the public record, the OEB relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed. OEB staff submits that some of that information, such as information which, if disclosed, could

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<sup>2</sup> EB-2013-0115; EB-2013-0159; EB-2013-0174 Decision and Order of the OEB on Confidentiality dated May 29, 2014

interfere with commercial negotiations are of a confidential nature and should be protected as such.

OEB staff has carefully reviewed the requests made and submits that it is appropriate for the OEB to treat the requested information as confidential with the following exceptions:

- The applicants have requested that certain definitions in section 1.1 of the MPA be treated as confidential as they pertain to material that is either out of scope or is being filed in confidence. OEB staff does not object to those definitions which relate to material that is out of scope but disagrees with the redaction of those definitions which relate to documents for which confidentiality is sought.
- OEB staff disagrees with the request that Section 2.1(3) of the MPA be treated as confidential. The manner in which certain shareholders may adjust their allocations of shares among themselves is a matter of public interest and OEB staff does not believe that the disclosure of this information will prejudice the competitive positions of, and interfere with the future negotiations of LDC Co.'s direct and indirect shareholders with respect to their shares of LDC Co., its holding company and/or the holding company's shareholders.
- For the same reasons as set out above, OEB staff does not agree that the redacted portions of section 5.5 of the MPA be treated as confidential. The applicants claim that these sections address the manner in which the shareholders of the holding companies may deal with shares of the holding companies for the periods specified in that section. OEB staff does not agree that the public disclosure of this information may reasonably be expected to prejudice the competitive positions of, and interfere with the future negotiations of the holding companies' shareholders with respect to their shares of the holding companies.
- OEB staff disagrees that Section 7.1(1)(d), Section 7.1(3)(d) and Section 7.1(5)(d) of the MPA should be treated as confidential. While these sections relate to matters that may be the subject of potential litigation, OEB staff does not agree that their disclosure could reasonably be expected to adversely affect the parties' positions in any such litigation.
- Appendix "C", section 2(16). The redacted information relates to potential litigation, and the applicants state that its public disclosure may reasonably be expected to prejudice the position of PowerStream and its shareholders in that pending litigation. OEB staff does not agree that this information should be treated as

confidential. Matters relating to potential litigation do not in themselves warrant confidential treatment.

- Schedule 5.4(15). This Schedule to the MPA is a copy of the Financing Commitment Letter and related correspondence from two Canadian financial institutions that confirms that financing related to the purchase of Hydro One Brampton will be made available, and the terms under which the funds will be made available. OEB staff submits that while the financial institutions may have provided these documents in confidence, the OEB has in the past found that agreements with third parties to keep information confidential is not binding on the OEB.

*-All of which is respectfully submitted-*