EB-2016-0025

IN THE MATTER OF Applications under section 86(1)(c) of the Ontario Energy Board Act, 1998 (Act) by Enersource Hydro Mississauga Inc. (Enersource), Horizon Utilities Corporation (Horizon), and PowerStream Inc. (PowerStream) for approval to amalgamate to form LDC Co. and for LDC Co. to amalgamate with Hydro One Brampton Networks Inc. (Hydro One Brampton) and continue as LDC Co.;

AND IN THE MATTER OF Applications under section 86(2)(a) of the Act requesting approval for Enersource Holdings Inc. to acquire the shares of Enersource and for LDC Co. to acquire shares of Collus PowerStream Utility Services Corp., currently owned by PowerStream;

AND IN THE MATTER OF an Application under section 86(2)(b) of the Act requesting approval for LDC Co. to acquire the shares of Hydro One Brampton Networks Inc.;

AND IN THE MATTER OF an Application under section 86(1)(a) of the Act requesting approval for the transfer of Hydro One Brampton's distribution system to LDC Co.; and

AND IN THE MATTER OF an Application under section 18 of the Act requesting approval for the transfer of the distribution licences and rate orders for each of Enersource, Horizon, PowerStream, and Hydro One Brampton to LDC Co.

REPLY SUBMISSION OF ENERSOURCE HYDRO MISSISSAUGA INC., HORIZON UTILITIES CORPORATION AND POWERSTREAM INC. ON THE DRAFT ISSUES LIST AND CONFIDENTIALITY

DELIVERED: TUESDAY, JUNE 28, 2016

INTRODUCTION:

Enersource Hydro Mississauga Inc., Horizon Utilities Corporation and PowerStream Inc. (the "Applicants") filed an application (the "MAADs Application" or the "Application") with the Ontario Energy Board ("OEB" or the "Board") on April 15, 2016 for a number of approvals under sections 18 and 86 of the *Ontario Energy Board Act, 1998* that are necessary to effect the amalgamation of the Applicants and the subsequent purchase and amalgamation of Hydro One Brampton Networks Inc. ("HOBNI"). The single electricity distributor that would result from the proposed transactions is referred to in the MAADS Application as LDC Co.

Certain information provided by the Applicants for the purposes of the MAADs Application was filed in confidence pursuant to the Board's *Rules of Practice and Procedure* and its *Practice Direction on Confidential Filings*. In the cover letter that accompanied the MAADs Application, the Applicants addressed the scope and confidentiality of information filed in support of the Application.[1]

By letter dated May 30, 2016, the Applicants filed a Draft Issues List for the MAADs Application with the Board. The Draft Issues List sets out a full and appropriate range of issues to allow due consideration of all of the factors that bear on the Board's ultimate decision regarding the MAADs Application. In particular, the development of the Draft Issues List was guided by the Board's *Handbook to Electricity Distributor and Transmitter Consolidations*[2] (the "Handbook") and its March 2015 *Report on Rate-Making Associated with Distributor Consolidation*[3] (the "2015 Report").

In Procedural Order No. 1 for this proceeding, the Board stated that OEB Staff and intervenors may file and serve submissions concerning the confidentiality requests and the Draft Issues List by June 22, 2106. The Board also stated that the Applicants shall file any reply submissions relating to the confidentiality requests and any responses to comments on the Draft Issues List by June 29, 2016.

The Applicants received filings made pursuant to Procedural Order No. 1 from the following:

(i) OEB Staff;
(ii) Association of Major Power Consumers in Ontario ("AMPCO");
(iii) Building Owners and Managers Association Toronto ("BOMA");
(iv) Consumers Council of Canada ("CCC");
(v) Electrical Contractors Association of Ontario ("ECAO");
(vi) School Energy Coalition ("SEC"); and
(vii) Vulnerable Energy Consumers Coalition ("VECC").

[1] Letter from the Applicants' counsel to the Board dated April 15, 2016; revised version filed on April 25, 2016.
[2] Handbook to Electricity Distributor and Transmitter Consolidations, January 19, 2016.
[3] EB-2014-0138 Report of the Board on Rate-Making Associated with Distributor Consolidation, March 26, 2015.

The Submission filed by OEB Staff does not propose any changes to the Draft Issues List,[4] but it addresses both the scope and confidentiality points made in the cover letter for the MAADs Application. SEC submits that certain issues should be added to those set out in the Draft Issues List and it also puts forward comments on the confidentiality requests. Letters filed by AMPCO, BOMA, CCC and VECC indicate the agreement of these intervenors with the submissions and comments made by SEC. ECAO proposes the addition of one issue to the Draft Issues List and its submissions do not address the Applicants' confidentiality requests.

In the submissions that follow, the Applicants will reply to the arguments and comments made by others, first, with respect to the Draft Issues List and, second, with respect to the confidentiality requests.

DRAFT ISSUES LIST:

Application of Board Policy

SEC submits that the Board is "legally obligated" to put its mind to whether its policies relating to distributor consolidation should be applied, in whole or in part, to the proposed transactions.[5] SEC goes on to assert that the Applicants must provide information, and "discovery" must occur, followed by the submissions of the parties, before the Board can decide whether its policies are "fully applicable" in this case.

The Applicants submit that it is incorrect and utterly impractical to suggest that, in an application made to the Board, there must be full "discovery", followed by submissions, before the Board can proceed to apply its policies in respect of that application. The Board of course has developed a wide range of guidelines applicable to proceedings before it, including (to name only a few of many examples) its Filing Requirements for Transmission and Distribution Applications, Electricity Distribution Rate Handbook and Conservation and Demand Management Guidelines, as well as the Handbook and the 2015 Report. The Board's guidelines are routinely and necessarily followed in Board proceedings without "discovery" and submissions for the purposes of determining whether they are "fully applicable" in each particular case.

As far as electricity distributor consolidation is concerned, the Board has provided guidance and direction regarding MAADs applications on a number of different occasions, including:

> (i) the August 2005 Decision issued by the Board in respect of three different section 86 applications that were combined (the "Combined Proceeding") for the purpose of addressing common issues largely

[4] OEB Staff Submission, page 3.
[5] SEC Submission, page 1.

relating to the scope of the issues the Board will consider in determining applications under section 86;[6]

(ii) the Board's July 2007 Report on Rate-Making Associated with Distributor Consolidation;[7]

(iii) the Hydro One/Norfolk Decision and Order, in which the Board indicated its expectation that the approach taken in the decision would inform parties contemplating future consolidation transactions;[8]

(iv) the 2015 Report; and

(v) the Handbook.

In the Handbook, the Board stated that it is committed to reducing regulatory barriers to consolidation and that, in order to facilitate both a thorough and timely review of requests for approval of transactions, it is providing guidance on the process for review of an application, the information the Board expects to receive in support of an application and the approach it will take in assessing the merits of a consolidation in meeting the public interest. The Board indicated that the purpose of the Handbook is to provide further clarity to applicants, investors, shareholders, and other stakeholders.

The Applicants submit that the Board should categorically reject submissions by intervenors that call on the Board to re-visit its policies regarding MAADs applications in this case. VECC, for example, expresses the view that the No Harm test is "likely not sufficient" to ensure an appropriate result in this case. The No Harm test, however, has been consistently applied by the Board in MAADs applications going back to the 2005 Decision in the Combined Proceeding.[9] If the Board were to re-open the applicability of the No Harm test in this proceeding, it would completely undermine the Handbook objective of providing clarity regarding MAADs applications to applicants, investors, shareholders and other stakeholders.

In its submissions about the application of Board policy in this proceeding, SEC contends that a "rate regulator" cannot "refuse to deal with known costs" and create a situation in which "the true costs of the utility are never considered in setting rates". Of course, the Board has very well-developed policies and procedures for fixing or approving just and reasonable rates for electricity distributors and the existing rates for each of the Applicants, and HOBNI, have been determined by the Board to be just and reasonable in decisions and orders that were made in accordance with the Board's rate-making policies and procedures. The Handbook quite appropriately distinguishes between rate-setting issues to be addressed in rate cases and the issues that arise in the context of a MAADs application. In this regard, the Handbook states as follows:

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[6] Decision in RP-2005-0018, EB-2005-0234, EB-2005-0254 and EB-2005-0257, August 31, 2005: see page 2.

[7] Report of the Board on Rate-making Associated with Distributor Consolidation, July 23, 2007.

[8] Decision and Order in EB-2013-0196, EB-2013-0187 and EB-2013-0198, July 3, 2014: see page 2.

[9] In addition to the other sources of Board policy guidance already cited in these submissions, see, for example, EB-2014-0344 Decision and Order, March 26, 2015 (Grimsby Power); EB-2014-0244 Decision and Order, March 12, 2015 (Haldimand County); and EB-2014-0217/EB-2014-0233 Decision and Order, October 30, 2014 (Cambridge and North Dumfries).

> Rate-setting following a consolidation will not be addressed in an application for approval of a consolidation transaction unless there is a rate proposal that is an integral aspect of the consolidation e.g. a temporary rate reduction. Rate-setting for the consolidated entity will be addressed in a separate rate application, in accordance with the rate setting policies established by the OEB.[10]

As recognized in a leading Canadian text on procedures of administrative tribunals, policy-making assists tribunals in their efforts to bring consistency to decision-making and, further, consistency is important on a number of grounds.[11] Consistency permits the rational development and arrangement of public affairs, it acts to prevent arbitrary decision-making and it fosters public confidence in the decision-making process; while inconsistency increases uncertainty and costs for participants and can cause financial and other hardships.[12]

The Applicants submit that, in order to maintain consistency in decision-making, the Board should not depart from its policy for MAADs applications unless, in the circumstances of a particular case, there are good reasons to do so. In a decision of the Ontario Workplace Safety and Insurance Appeals Tribunal, for example, the Tribunal said that, while particular policies were not binding on it, the policies should be followed unless there are good reasons to do otherwise.[13]

SEC's submissions offer no reason why, in the circumstances of this case, the Board should to decline to apply, in whole or in part, its policy for MAADs applications and, in particular, the policy set out in the Handbook. The Applicants submit that there is no such reason and that the Board panel hearing this case can and should exercise its discretion to determine that the policy set out in the Handbook is applicable in this proceeding.

EB-2014-0002 Settlement Agreement and Order

SEC also argues that an issue should be added to the Draft Issues List with regard to the Settlement Agreement and Board order in EB-2014-0002, which was the Custom Incentive Rate-setting proceeding for Horizon Utilities Corporation ("Horizon"). SEC proposes that, in this case, the Board consider whether the EB-2014-0002 Settlement Agreement and order will continue to apply to LDC Co and, if so, how LDC Co should comply with the Settlement Agreement and order.

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[10] Handbook, page 11.
[11] Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals*, Chapter 6, section 6.5A.
[12] *Ibid*. See also *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 105 D.L.R. (4th) 385, where the Supreme Court of Canada said that "As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law" and the Court accepted that administrative law is no exception to the rule in this regard.
[13] Decision No. 2078/03, 2004 ONWSIAT 2065 (CanLII) at para 36.

As indicated above, the Handbook makes clear that rate-setting following a consolidation will not be addressed in an application for approval of a consolidation transaction, unless there is a rate proposal that is an integral aspect of the consolidation. In this case, there is no new rate proposal that is an integral aspect of the consolidation proposed by the Applicants. To the contrary, the Applicants have requested that the rate orders of the predecessor distributors be transferred to LDC Co and the evidence filed in support of the application indicates that the Horizon rate zone will remain on Custom IR until the end of the IR term (2019)[14] and that issues relating to rate-making for LDC Co's service areas, including the treatment of any ESM, Capital Variance and Efficiency Adjustments, will be addressed in future rate applications.[15]

The Handbook sets out a number of rate-setting options for consolidating utilities during a deferred rebasing period.[16] One of the options applies to circumstances in which a utility on Custom IR merges with a utility on Price Cap Incentive Regulation (PCIR).[17] In this scenario, an option allowed by the Handbook is that the utility on PCIR continues on its current plan for the chosen deferred rebasing period and the utility on Custom IR, after the expiration of the Custom IR term, moves to PCIR for the remaining years of the chosen deferred rebasing period. The Applicants have exercised the option available to them in the Handbook by continuing the Horizon Custom IR plan in the Horizon rate zone until the end of its term. Accordingly, there is no issue in this proceeding about how the EB-2014-0002 Settlement Agreement and order apply to LDC Co. Any issue about how LDC Co should comply with the terms of the Horizon Custom IR plan is a matter for consideration in such future rate proceedings as are appropriate under the EB-2014-0002 Settlement Agreement and order during the remainder of the Custom IR term.

ECAO Argument

ECAO submits that the Board should consider whether the proposed consolidation promotes economic efficiency in the industry by fostering competitive, market-based pricing for electricity services. The Applicants submit, though, that ECAO's submission is simply another attempt to have the Board panel in this case re-write the No Harm test. The No Harm test, of course, considers whether the proposed transaction will have an adverse impact on the attainment of the Board's statutory objectives.[18] There is nothing in the No Harm test to require, or even suggest, that consideration be given to whether a proposed consolidation will "promote" economic efficiency in the industry by "fostering" competitive market-based pricing.

Moreover, the issue proposed by ECAO falls outside the scope of this proceeding according to the explicit words of the Handbook. Under the heading "Prices not related

[14] Exhibit B-7-1, page 1.
[15] Exhibit B-2-1, page 10.
[16] Handbook, page 15, Table 1 – Rate-Setting Options During the Deferred Rebasing Period.
[17] Table 1, *supra*, first row, second column. This option is also explicitly allowed in the 2015 Report, at pages 11-12.
[18] Handbook, page 4.

to a utility's own costs", the Handbook says that the Board's review of a MAADs application is limited to the components of the distribution business and the costs and services directly under a distributor's control.[19] By way of examples, the Handbook refers to certain pass-through costs that are not part of a utility's underlying costs to serve its customers: the Handbook says that the prices of these services are not considered by the Board in its review of a consolidation application.

Competitive market-based prices are, by definition, prices that are not related to a utility's own costs; they are determined by market conditions rather than by a utility's cost structure. Likewise, competitive market-based pricing is not within the Board's consideration of "costs and services that are directly under a distributor's control". The Applicants therefore submit that the issue proposed by ECAO is outside the scope of this proceeding.

CONFIDENTIALITY/SCOPE ARGUMENTS:

Only OEB Staff filed a detailed submission in respect of the Applicants' request for confidential treatment of a limited amount of material in the pre-filed evidence, and with respect to the Applicants' submission that certain items in the Merger Participation Agreement (MPA) are beyond the scope of this proceeding. None of the intervenors' counsel or consultants delivered the OEB's form of Declaration and Undertaking with respect to confidentiality, nor did any of those individuals request access to the information that is the subject of the confidentiality request.

The Applicants repeat and rely upon their previous submissions with respect to confidentiality for those items in respect of which they are maintaining their request for confidential treatment, and offer the following additional submissions in response to the OEB Staff submission (organized as presented by Staff) and to the SEC comments regarding the Confidential Disclosure Letters ("CDLs") related to the MPA. In general terms, the information in respect of which the Applicants seek confidential treatment is among the types of information that the OEB's *Practice Direction on Confidential Filings* (the Practice Direction), the *Freedom of Information and Protection of Privacy Act* (FIPPA), and the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) contemplate would be afforded such treatment.

1. Definitions in Section 1.1 of the MPA

All redacted definitions are used exclusively in redacted confidential provisions of the MPA. The Applicants submit that if a provision of the MPA is to be treated as confidential and a definition is used solely for purposes of that provision, it is reasonable and appropriate that the definition should be treated in a consistent manner and afforded the same degree of confidentiality.

[19] Handbook, page 10.

There is no justification for the placement of the definition on the public record, and its redaction does not impair the understanding of the public portion of the record, as it does not relate to anything that will form part of that public record. On the contrary, the inclusion of definitions related to redacted portions of the MPA may create confusion, as the appearance of the definitions on the public record may raise questions that cannot be answered publicly. The Applicants suggest that the inclusion or exclusion of the remaining definitions follow the final resolution regarding the confidentiality of the relevant provisions of the MPA. If the OEB determines that an MPA provision should be confidential, then the corresponding definition should also be kept in confidence.

2. Section 2.1(3) of the MPA – Language permitting transfer of equity interests among PowerStream Stakeholders

Section 2.1(3) deals with indirect transfers of equity among the PowerStream stakeholders. The purpose of the provision is to provide a possible means of financing a portion of the transaction. There are a number of financing options, including third party borrowing, sale of indirect equity to an institutional buyer, and an equity contribution from current stakeholders. The language in Section 2.1(3) provides an additional optional financing right. If a third party were aware of the specific terms associated with the rights described in this section, it may insist that the right be exercised in connection with financing negotiations, or may seek to impose covenants governing the exercise of the right. Accordingly, public disclosure of this provision may interfere with and prejudice negotiations with third parties.

3. Section 5.5 of the MPA – Interim Period Transfers/Issuances

A general objection has been raised in respect of the redacted portions of Section 5.5. Section 5.5 deals with a number of topics. We have categorized them below:

(i) <u>Permitted Transfers of Equity and Permitted Equity Issuances</u>

Sections 5.5(1), 5.5(4) and 5.5(5) address the possible transfer of minority interest to institutional purchasers and existing stakeholders. The purpose of these provisions is to provide a means of financing a portion of the transactions through equity transfers and issuances. The parties have a number of options for financing, including third party borrowing, sale of indirect equity to institutional buyers, and an equity contribution from existing stakeholders. Disclosure of the specific terms of these provisions to a third party financier may lead to insistence that the rights be exercised in connection with financing negotiations, or the imposition of covenants governing exercise of the relevant rights. Accordingly, public disclosure of this provision may interfere with and prejudice negotiations with third parties.

(ii) Transfer by indirect Stakeholder

Section 5.5(2) permits a transfer by a particular indirect shareholder of its equity interest in the transaction. The language is consistent with the rights the shareholder currently enjoys under its existing agreements. While the language is permissive, it does limit the class of permitted purchasers, and it also dictates the form and nature of the agreements which must be concluded in order to complete a sale. Disclosure of the restrictions could prejudice negotiations with third parties.

(iii) Contemplated Commercial Transactions

Sections 5.5(4)(b) and 5.5(4)(c) permit the conclusion of certain commercial transactions by a merger party upon designated terms. When the MPA was signed, each of the transactions was at an early stage of negotiation. Public disclosure of the terms and requirements of these sections could prejudice the ability of the specific merger party to negotiate and finalize the transactions.

4. Sections 7.1(1)(d), 7.1(3)(d) and 7.1(5(d) of the MPA – Indemnity for claims pertaining to Streetlight design.

The above sections describe a general head of indemnity for claims arising from streetlight design and design approval. No specific litigation or proceeding is referenced in the above sections. Accordingly, the Applicants will provide copies of these sections on the public record.

5. Appendix C, Section 2(16) of the MPA. Disclosure regarding Potential Litigation

The language redacted from Appendix C, Section 2(16) provides for a specific disclosure of a potential claim. While the disclosure was intended as a factual reference, litigation counsel may argue that the disclosure itself constitutes an admission against interest. Accordingly, public disclosure of the redacted language is inappropriate and could prejudice the disclosing party.

6. Appendix "C", section 2(23) and Schedule 2.1(3) of the MPA – PowerStream electricity generation facilities

The above documents provide a list of PowerStream's solar projects and solar generation facilities. The Applicants maintain that they are beyond the scope of this proceeding, but having considered the OEB Staff submission, the Applicants will provide these items on the public record.

7. Schedules 3.9, 3.10 and 3.11 – Enersource, Horizon Utilities and PowerStream Consents, Approvals and Waivers

These Schedules consist of lists of consents that will be required from other parties in order for the transactions to be completed. The Applicants maintain that they are beyond the scope of this proceeding, but having considered the OEB Staff submission in this regard, the Applicants will provide these Schedules on the public record.

8. Schedule 5.1(9)(A) of the MPA – PowerStream Solar Business – Services and Indemnity Agreement – Indicative Term Sheet

This document contains information related to the development and financing of solar projects by PowerStream. PowerStream's solar generation activities are operated as a separate business division of PowerStream, and this is a competitive business activity. Having considered the OEB Staff submission, the Applicants will provide this Schedule, but intend to provide it in confidence. Information regarding the manner in which PowerStream finances and operates its competitive electricity generation business, including PowerStream's pricing for those services provided by PowerStream, is commercially sensitive, and its disclosure on the public record may reasonably be expected to prejudice the competitive position of PowerStream, including causing losses to PowerStream in respect of this competitive activity. This is among the types of information that the OEB's Practice Direction, FIPPA and MFIPPA contemplate would be afforded such treatment.

9. Schedule 5.4(15) – Financing Commitment Letter

Schedule 5.4(15) describes the terms and conditions of credit facilities for the HOBNI acquisition and related operating facilities. As indicated previously, the financial institutions have provided these documents in confidence, and their disclosure may reasonably be expected to prejudice the competitive positions of both the institutions providing the financing, and the LDCs and their affiliates, in subsequent negotiations, whether related to the provision of financing to the parties to the transaction at hand, financing provided to other utilities (in the case of the financial institutions), or subsequent procurements of financing by LDC Co and its affiliates. For these reasons, the Applicants submit that confidentiality should be maintained for this Schedule.

10. Confidential Disclosure Letters

Section 1.7 of the Merger Agreement refers to CDLs as those documents which contain selected confidential disclosure items that would otherwise be set out in the Enersource Hydro Disclosure Schedule, the PowerStream Disclosure Schedule and the Horizon Disclosure Schedule, as applicable, including, without limitation, disclosures pursuant to Section 2(11)(i), Section 2(11)(j), Section 2(11)(l), Section 2(12)(d), Section 2(17)(f), Section 2(18)(a), Section 2(18)(b), Section 2(18)(c), 2(18)(d) and 2(18)(g) of the Representations and Warranties provided for in Appendix A to the Merger Participation Agreement.

The CDLs were drafted specifically to include information that is wholly confidential, commercially sensitive and/or personal in nature. The public disclosure of the information contained in the CDLs is likely expected to (i) prejudice the competitive positions of, and interfere with the future negotiations of the Applicants, their shareholders and affiliates; (ii) prejudice the competitive positions of, and interfere with the future negotiations of counterparties to agreements, contracts, work orders, and financing arrangements; (iii) breach the confidentiality provisions of agreements and contracts relied on by counterparties; (iv) prejudice the position of the Applicants with regards to potential litigation if redacted information that relates to potential litigation is publicly disclosed; and/or (v) identify individuals who may be pursuing a claim against the Applicants that has not been publicly disclosed. The Applicants are prepared to provide copies of the subject material in confidence to individuals who have executed and delivered the OEB's Form of Declaration and Undertaking regarding confidential material, subject to the Applicants' right to oppose any request for access to the confidential material.

The following sections of the CDLs contain confidential material constituting personal information:

> **Section 2(18)(a)** contains names of individuals that are classified as "contract staff", "temporary staff hired by hiring agencies" and "independent contractors".
>
> **Section 2(18)(g)** contains names of individuals that are classified as "independent contractors".

The Applicants request that the OEB order that that material is not to be provided to any person, regardless of whether that person has signed the OEB's Form of Declaration and Undertaking regarding confidential material.

CONCLUSION:

The Applicants therefore submit that the Board should decline to make any of the proposed additions to the Draft Issues List and that the Draft Issues List should be approved as filed.

With respect to the material discussed above in the context of confidentiality and scope, the Applicants have identified certain items that will be placed on the public record. They have also identified certain information as personal information, which should not be disclosed to any person regardless of their execution of the OEB's Declaration and Undertaking, and they ask that the OEB confirm that that information will be treated as such. Finally, the Applicants respectfully request that the OEB confirm that the balance of the documents discussed above will remain confidential. The Applicants reiterate that they are prepared to provide copies of the confidential material to individuals who have executed and delivered the OEB's Form of Declaration and Undertaking with respect to confidentiality, subject to the Applicants' right to object to the OEB's acceptance of a Declaration and Undertaking from any person.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28TH DAY OF JUNE, 2016.

BORDEN LADNER GERVAIS LLP
Per:

Original signed by James C. Sidlofsky

James C. Sidlofsky

AIRD & BERLIS LLP
Per:

Original signed by Frederick D. Cass

Frederick D. Cass