



EB-2016-0025

**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.**

**DECISION ON ISSUES LIST
June 30, 2016**

Enersource Hydro Mississauga Inc. (Enersource), Horizon Utilities Corporation (Horizon), and PowerStream Inc. (PowerStream), (collectively, the applicants) filed a complete 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

An application is also made under section 18 of the Act requesting approval for the transfer of the distribution licences and rate orders for each of the applicants and Hydro One Brampton to LDC Co.

A Notice of Application and Hearing was issued on May 16, 2016.

The OEB provided an opportunity for intervenors and OEB staff to file submissions on the applicants' confidentiality requests and on the applicants' draft issues list. The OEB received submissions from AMPCO, BOMA, CCC, ECAO, SEC, VECC and OEB staff. This Decision relates solely to the Issues List and a decision on the confidentiality requests will follow at a later date.

Decision on Issues List

SEC submitted that the OEB is legally obligated to consider whether its non-binding policies relating to a distributor consolidation should be applied, either in whole or in part, to the proposed transactions. SEC submitted two additional issues 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...

The suggested issue by SEC continued with eight sub issues to provide additional detail in scoping the proposed issue. SEC asserts that “discovery” must occur, followed by the submissions of the parties, before the OEB can decide whether its policies are “fully applicable” in this case.

In support of its submission SEC referred to a Decision and Order of the OEB on a Notice of Motion to Review and Vary in EB-2014-0155. The Motion was for a review and variance of the Decision in an applicant's cost of service proceeding in which the OEB determined that “in the absence of previous direction by the Board to undertake a lead/lag study; the Board does not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application.”¹ SEC submitted that the OEB fettered its discretion by binding its ability to determine an appropriate WCA percentage of any number but 13% in the absence of a lead/lag study.

In making its Decision on the Notice of Motion to Review and Vary, the OEB referred to a decision of the Federal Court of Appeal in *Thamotharem v. Canada (Minister of Citizenship and Immigration)* wherein the Court stated:

¹ Decision and Order on Notice of Motion to Review and Vary, EB-2014-0155, page 2.

Nonetheless while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered[.]²

The second issue raised by SEC relates to the settlement agreement and subsequent order in the Horizon EB-2014-0002 rate proceeding. SEC submitted the following issue should be added:

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

AMPCO, BOMA, CCC, VECC filed submissions agreeing with SEC's suggested additions to the draft issues list.

ECAO requested that the OEB add the following issue to the issues list:

Does the proposed consolidation, and its impact on the cost structure of the consolidating entities, promote economic efficiency in the electricity industry by fostering competitive, market-based pricing for electricity services?

OEB staff submitted no changes to the proposed issue list.

In their reply submission, the applicants submitted that the OEB should reject the submissions of SEC and the other intervenors that call on the OEB to revisit its own policies regarding mergers, acquisitions, and divestitures (MAADs) applications. The applicants submitted that, in order to maintain consistent decision-making, the OEB should not depart from its policy for MAADs application unless, in the circumstances of a particular case, there are good reasons to do so.

² Federal Court of Appeal Decision in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 20007 FCA 198 at para 66, quoted in SEC Submission, May 12, 2014, page 7.

The applicants also referred to the 2016 *Handbook for Electricity Distributor and Transmitter Consolidations* (Handbook) and noted 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. The applicants noted that they have requested that the rate orders of the predecessor distributors to be transferred to LDC Co. and the evidence filed in support of the application indicates that Horizon will remain on Custom IR until the end of the IR term and that issues relating to rate-making for LDC Co.'s service areas, including the treatment of any ESM, capital variance and efficiency adjustments, would be addressed in future rate applications.

The applicants also submitted that the suggested issue proposed by the ECAO falls outside of the scope of this proceeding.

OEB Findings

The OEB has determined that there is no need for a stand-alone issue regarding the applicability of the OEB's policies with respect to MAADs and rate making pertaining to MAADs provided in the , 2015 *Report – Rate-Making Associated with Distributor Consolidation* and the Handbook.

The OEB has provided considerable guidance and direction regarding MAADs applications 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 relating to the scope of the issues the Board will consider in determining applications under section 86;
- ii. The Board's July 2007 Report on Rate-Making Associated with Distributor Consolidation;
- iii. The 2015 Report; and
- iv. The Handbook³.

³ EB-2005-0234 EB-2005-0254 EB-2005-0257 (Combined Decision); EB2007-0028 Rate Making Policies Associated with Distributor Consolidation, 2007; EB-2014-0138 Report of the Board Rate-Making Associated with Distributor Consolidation March 26 , 2016 ; 2016 Handbook for Electricity Distributor and Transmitter Consolidations

This level of information and guidance regarding the process for review of an application and the information the OEB expects to receive ensures that the OEB has the information it needs order to properly consider and assess the application.

With respect to SEC's argument that the OEB is legally obligated to put its mind to whether or not policies relating to distributor consolidation should be applied, the OEB observes that the extent to which and the manner in which its policies are applied is always determined based on the specifics of the applications before it. Thee OEB does not in assessing applications require a specific issue regarding the applicability of the OEB's policies. The OEB sees no reason to depart from this approach in this case.

With respect to the second issue raised by SEC, the OEB is of the view that the question of the fulfillment of the settlement agreement that was accepted by the OEB in Horizon EB-2014-0002 need not be established as an issue. The applicants' have a proposal regarding the continuation of rates for each of the consolidating entities as part of the deferral of rebasing. The extent to which that proposal allows for the implementation of this settlement agreement can be the subject of discovery and argument as part of the deferral of rebasing issue.

EACO has requested a specific issue dealing with the impact of the proposed consolidation on the competitiveness of electricity services stating that the merger may lead to less competition and therefore result in an increase in LDC costs. As part of its review of the proposed consolidation, the OEB will consider both the costs and benefits resulting from the proposed transaction. As a result, the issue raised by EACO is more appropriately dealt with in that context. The OEB does not find that a separate issue as suggested by EACO is necessary.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Issues List attached as Schedule A is approved.

All filings to the OEB must quote the file number, EB-2016-0025, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at

<http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Judith Fernandes at Judith.Fernandes@ontarioenergyboard.ca and Maureen Helt at Maureen.Helt@ontarioenergyboard.ca.

ADDRESS

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DATED at Toronto, **June 30, 2016**

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

**Schedule A – OEB Approved Issues List
EB-2016-0025**

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Price, Cost Effectiveness and Economic Efficiency:

1. Does the proposed consolidation protect the interests of consumers with respect to price?
2. Have the applicants clearly identified the specific number of years for which they have chosen to defer the rebasing?
3. If the applicants have identified a deferred rebasing period greater than five years, have they identified an Earnings Sharing Mechanism (ESM), and does it follow the form set out in the OEB's 2015 Report – Rate-Making Associated with Distributor Consolidation and the OEB's 2016 Handbook to Electricity Distributor and Transmitter Consolidations?
4. Does the ESM, as defined in the application, achieve the objective of protecting customer interests during the deferred rebasing period?

Reliability and Quality of Electricity Service:

5. Does the proposed consolidation protect the interests of consumers with respect to adequacy, reliability, and quality of electricity service?

Financial Viability:

6. Does the proposed consolidation maintain the financial viability of the consolidated entity in the delivery of the ongoing investment and maintenance of the distribution system?
7. What is the effect of the consolidation on the cost structures of the consolidating distributors?
8. What is the impact of the purchase price, including any premium paid above the historic (book) value of the assets involved on the financial viability of the purchasing entities?
9. What is the impact of the financing of incremental costs (transaction and integration costs) on the consolidating entities?