

James C. Sidlofsky  
T (416) 367-6277  
F (416) 361-2751  
jsidlofsky@blg.com

Borden Ladner Gervais LLP  
Scotia Plaza, 40 King Street W  
Toronto, ON, Canada M5H 3Y4  
T 416.367.6000  
F 416.367.6749  
blg.com



July 27, 2016

**Delivered by RESS and Courier**

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

Dear Ms. Walli:

**Re: Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, PowerStream Inc. (collectively, the “Applicants”) – Application under Section 86 of the *Ontario Energy Board Act, 1998* – Board File No. EB-2016-0025**

We, together with Aird & Berlis LLP, are counsel to the Applicants in the above-captioned matter. In accordance with Procedural Order No. 1, please find accompanying this letter the Applicants’ responses to OEB Staff and Intervenor interrogatories.

A limited number of responses, or portions thereof, are being filed in confidence. The grounds for the confidentiality requests are set out below. Please note that in the case of Interrogatory MUN-CCC-11, in which CCC has requested copies of material provided to municipal councils regarding the consolidation, presentations from counsel to the Horizon Utilities shareholders will not be produced, as they were presented to the shareholders *in camera* and are subject to solicitor-client privilege.

This letter also discusses redactions from the Business Plan being filed in response to OEB Staff interrogatory B-Staff-1. The redactions relate to matters that are beyond the scope of this proceeding, and the grounds for the redactions follow the discussion on confidentiality below. Unredacted versions of the Business Plan will not be provided.

**CONFIDENTIALITY:**

The Applicants are filing certain material in confidence in this proceeding, pursuant to the OEB’s Rules of Practice and Procedure (the “Rules”) and its Practice Direction on Confidential Filings (the “Practice Direction”). The redactions are minimal; they are based on the applicable provisions of the Rules and the Practice Direction; they are contemplated by the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and the *Municipal Freedom of Information and Protection of Privacy Act* (“MFIPPA”); and they are, in the Applicants’ submission, reasonable. The items in respect of which the Applicants request confidential treatment, and the grounds for each of the requests, are set out below. The Applicants may make further

submissions in this regard. The Applicants are prepared to provide copies of the subject material to individuals who have executed and delivered the OEB's Form of Declaration and Undertaking regarding confidential material, subject to the Applicants' right to object to the OEB's acceptance of a Declaration and Undertaking from any person.

The Applicants will deliver to the OEB unredacted copies of the material in respect of which confidentiality is claimed.

- B-Staff-7(a) – Table 1

In this part of the interrogatory, OEB Staff have asked the Applicants to “identify the specific operational areas/functions where the planned payroll and non-payroll reductions will occur.”

The Applicants have prepared a table (referred to in the response as Table 1) in response to that request, but the Applicants request that Table 1 be maintained in confidence. The information about payroll-related reductions in specific operational areas is not presented on an employee-specific basis; rather, it is aggregated by operational area/function. However, its public disclosure may reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization, in that it may create unfounded speculation about continued employment within those operational areas/functions. Final decisions about staffing within the various operational areas/functions have not yet been made. The OEB's Practice Direction recognizes that these are among the factors that the Board will take into consideration when addressing the confidentiality of filings. They are also addressed in section 17(1) of FIPPA and section 10 of MFIPPA, and the Practice Direction (at Appendix B) indicates that third party information as described in section 17(1) of FIPPA is among the types of information previously assessed or maintained by the OEB as confidential. Additionally, both FIPPA (for example, at clauses 18(1)(f) and (g) of FIPPA) and MFIPPA (for example, at clauses 11(1)(f) and (g) of MFIPPA) provide for the refusal to disclose information containing plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public; and information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

- B-AMPCO-6(c)

In this part of the interrogatory, AMPCO has requested the total number of FTEs in various employee categories for LDC Co. for the years 2016 to 2025.

The Applicants have provided the requested information, but the Applicants request that the response be maintained in confidence. As discussed in the context of Interrogatory B-Staff-7(a) – Table 1, decisions regarding staffing in the consolidated entity have not been finalized. The public disclosure of the information may reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization, in that it may create unfounded speculation about continued employment within these employment categories. The OEB's Practice Direction recognizes that these are among the factors that the Board will take into consideration when addressing the confidentiality of filings. They are also addressed in sections 17(1) and 18(1)(f) and (g) of FIPPA and sections 10 and 11(f) and (g) of MFIPPA, and the Practice Direction (at Appendix B) indicates that third party information as described in section 17(1) of FIPPA is among the types of information previously assessed or maintained by the OEB as confidential.

- B-BOMA-8(f)

In this part of the interrogatory, BOMA has requested information on the functions and staff included within sustainability and innovation.

The Applicants have prepared a table in response to that request, but the Applicants request that the response be maintained in confidence. Decisions regarding staffing in each of the functional areas of the consolidated entity have not been finalized. The public disclosure of the table may reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization, in that it may create unfounded speculation about continued employment within those operational areas/functions. The OEB's Practice Direction recognizes that these are among the factors that the Board will take into consideration when addressing the confidentiality of filings. They are also addressed in sections 17(1) and 18(1)(f) and (g) of FIPPA and sections 10 and 11(f) and (g) of MFIPPA, and the Practice Direction (at Appendix B) indicates that third party information as described in section 17(1) of FIPPA is among the types of information previously assessed or maintained by the OEB as confidential.

- B-SEC-27 – Business Case Model

In this interrogatory, SEC has requested a copy of the financial model referred to, in live Excel format.

The financial Business Case Model is a proprietary and confidential Deloitte Work Product. Accompanying the Applicants' response is a copy of a document from Deloitte that sets out the basis upon which Deloitte has allowed access to the model. This document includes restrictions on disclosure of the model. The restrictions are subject to exceptions, which allow disclosure as required by, among other things, law and regulatory authority. In the event of any such disclosure, the persons to whom the model is disclosed are to be informed of the confidential nature of the Deloitte Work Product and that the Deloitte Work Product is provided subject to the terms set out in the Deloitte document.

The Applicants are prepared to file the live financial Business Case Model in confidence and subject to the terms of the Deloitte document, with password protection. Such password protection will allow the model to be run and saved (under a new name) with different inputs or scenarios, but it will not allow Deloitte's underlying model itself to be over-written. The Applicants request confidentiality for the entire financial Business Case Model. The confidentiality request is made because the model is a proprietary and confidential work product of Deloitte and because the Applicants were given access to the model on the basis that it is to be treated as confidential. Public disclosure of the model could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, and be injurious to the financial interest of Deloitte, because it would allow public access to Deloitte's proprietary and confidential work product. The OEB's Practice Direction recognizes that these are among the factors that the Board will take into consideration when addressing the confidentiality of filings. They are also addressed in section 17(1) of FIPPA and section 10 of MFIPPA, and the Practice Direction (at Appendix B) indicates that third party information as described in section 17(1) of FIPPA is among the types of information previously assessed or maintained by the OEB as confidential. Public disclosure would also be detrimental to the Applicants, because it would prejudice their ability to gain access to important third party work product that is proprietary and confidential.

Accordingly, the Applicants are prepared to provide access to Deloitte's live model, with password protection, to representatives of intervenors who have signed, first, an acknowledgement confirming their agreement that such access is subject to the terms set out in the Deloitte document and, second, a confidentiality declaration and undertaking under the Board's Practice Direction. Given the Board's usual practice that members of Board Staff do not sign the confidentiality declaration and undertaking, should any member of Board Staff seek access to the live Deloitte model, the Applicants are prepared to provide access to those members of Board staff who have signed an acknowledgement confirming their agreement that such access is subject to the terms set out in the Deloitte document.

- B-VECC-1(a)

In this Interrogatory, VECC has requested a copy of the smart meter service agreement which will continue to be used in the Brampton service territory.

The Applicants are prepared to file this agreement in confidence. The agreement is between HOBNI and 437967 Ontario Limited, operating as Savage Data Systems. 437967 Ontario Limited is a corporation which is engaged in competitive businesses. The disclosure of the terms of the agreement could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, and be injurious to the financial interest of 437967 Ontario Limited since it would enable its competitors to ascertain the scope and pricing of services provided by 437967 Ontario Limited. The OEB's Practice Direction recognizes that these are among the factors that the Board will take into consideration when addressing the confidentiality of filings. They are also addressed in section 17(1) of FIPPA, and the Practice Direction indicates (at Appendix B of the Practice Direction) that third party information as described in subsection 17(1) of FIPPA is among the types of information previously assessed or maintained by the OEB as confidential. Finally, these factors are also addressed in section 10 of MFIPPA. The Applicants have requested 437967 Ontario Limited's consent to the placement of the agreement on the public record, and 437967 Ontario Limited has requested that the document be kept in confidence.

- MUN-CCC-11

In this Interrogatory, CCC has requested copies of material provided to municipal councils regarding the consolidation.

Material presented to municipal councils in the PowerStream and Enersource service areas was placed on the public record in those municipalities, and is being provided in response to the Interrogatory without any request for confidentiality. Certain material presented to municipal councils in the Horizon Utilities service areas was presented *in camera*, and the Applicants are prepared to produce that material in confidence.

Appendix B of the Board's Practice Direction indicates that the factors the Board may consider in addressing confidentiality of filings include matters relating to FIPPA and FIPPA exemptions. Section 17(1) of FIPPA sets out grounds for non-disclosure of a record that reveals commercial or financial information (among other things) supplied in confidence explicitly or implicitly. The *in camera* material presented to municipal councils in the Horizon Utilities service areas reveals commercial and financial information and was explicitly supplied in confidence. The grounds for non-disclosure set out in section 17(1) of FIPPA include circumstances in which disclosure could reasonably be expected to result in similar information no longer being supplied where it is in the public interest that similar information continue to be so supplied. It is in the public interest that

the *in camera* process for presentation of information to municipal councils be respected and that the confidentiality of information presented in this manner be maintained so as not to undermine confidence in, and reliance on, the *in camera* process followed by municipal councils. Accordingly, the request for confidentiality by the Applicants is within the grounds set out in section 17(1) because a requirement that the *in camera* material be publicly disclosed could compromise reliance on the *in camera* process and thus result in similar *in camera* information no longer being supplied to municipal councils where it is in the public interest that similar information continue to be so supplied.

Notwithstanding the foregoing, presentations from counsel and/or experts retained by counsel to the Horizon Utilities shareholders will not be produced in any manner, as they were presented to the shareholders *in camera* and are subject to solicitor-client privilege. Additionally, material that is beyond the scope of this proceeding, including, without limitation, information related to matters such as due diligence and/or public consultation, will not be produced. Finally, the Applicants confirm that material is being produced in response to this Interrogatory without prejudice to the Applicants' right to argue that the answers and the materials relate to matters that are beyond the scope of this proceeding; that they are not relevant to the decision the OEB is required to make; that they should not be considered by the OEB; and that they should not form part of the record. The reasons why the shareholders approved the proposed transactions, and the material that was before them when they made their decisions, are outside the scope of this proceeding.

## **REDACTIONS FROM THE BUSINESS PLAN**

The Applicants have provided a redacted version of the Business Plan in response to Interrogatory B-Staff-1. In general terms, the redactions pertain to matters that are beyond the scope of this proceeding. More specifically, the redactions can be categorized as follows:

- Matters that pertain to non-regulated activities being carried on by LDC Co affiliates; potential future LDC Co expansion activity and potential future monetization of shareholder interests in LDC Co.

The OEB's *Handbook to Electricity Distributor and Transmitter Consolidations* (the "Handbook") states that "The application of the 'no harm' test is limited to the effect of the proposed transaction before the OEB when considered in light of the OEB's statutory objectives." Potential future consolidation activities and/or potential future transactions by the shareholders of LDC Co are not relevant to the proposed transaction before the OEB. Similarly, current or potential future activities being carried on or that may be carried on by affiliates of the Applicants are not relevant to this Application, as the consolidation of affiliates carrying on competitive activities is not before the OEB for approval.

This category includes redactions at the following pages:

- pp.17-18 – options for financing potential future growth, and potential future monetization of Holdco shareholder interests;
- pp.51, 56 and 57 – references to consolidation-related agreements (for the holding companies and the competitive energy services affiliates) that do not involve the consolidating distributors;

- p.63 – potential future competitive activities;
  - p.67 – potential future consolidation activity and potential future competitive activities;
  - p.90 – potential future consolidation activity and potential future monetization of Holdco shareholder interests; and
  - p.94 – options for financing potential future growth, and potential future monetization of Holdco shareholder interests.
- Matters that were and/or remain the subject of negotiation and that relate to the “how” and “why” of the transaction, to pre-application consultation and to the extent of due diligence.

As discussed previously, at pages 9-10 of the Handbook, the OEB states (in part) that “As set out in the Combined Proceeding decision, and confirmed in recent decisions, the question for the OEB is neither the why nor the how of the proposed transaction. The application of the ‘no harm’ test is limited to the effect of the proposed transaction before the OEB when considered in light of the OEB’s statutory objectives.” The OEB advised that among the types of information that should not be filed, as they are not considered relevant to the proceeding, include:

- Draft share purchase agreements and other draft confidential agreements and documents utilized in the course of the negotiation process;
- Negotiating strategies or conduct of the parties involved in the transaction; and
- Details of public consultation prior to the filing of the application.

This category includes redactions at the following pages:

- pp.19, 25-27, 51, 56-60, 62 and 88 – discussion of relative valuations, the Unanimous Shareholders’ Agreement and the LDC Amalgamation Agreement; these remain the subject of ongoing negotiation;
- p.84 – discussion of benefits to specific shareholders – the Applicants have provided information on benefits to shareholders generally and to rate payers. Information on benefits to specific shareholders were the subject of negotiation among the parties and are not relevant to the Application;
- pp.99-100 – discussion of risks to achievement of 100% of synergies and potential rejection of future ICM applications; the Applicants’ shareholders have determined to proceed with the consolidation notwithstanding the potential that all projected synergies will not be achieved and the potential that future ICM applications will not be approved. Discussions of those risks, considered in the course of determining whether to proceed with the consolidation, are not relevant to the Application;

- pp.107-108 – discussion of communications plans and public communication process – the OEB has clearly indicated that this is beyond the scope of this proceeding; and
- pp.109-110 and any related due diligence reviews (which may also be subject to solicitor-client privilege) – discussion of due diligence – the OEB has clearly indicated that matters related to the extent of due diligence are beyond the scope of this proceeding.
- Information, including discussions of potential corporate structures that are not being pursued, that have been superseded by information in the Application.

The OEB indicates on page 9 of the Handbook that it “determined in the Combined Proceeding decision that it is not the OEB’s role to determine whether another transaction, whether real or potential, can have a more positive effect than the transaction that has been placed before the OEB.” As discussed above, the OEB advised that among the types of information that should not be filed, as they are not considered relevant to the proceeding, include “draft share purchase agreements and other draft confidential agreements and documents utilized in the course of the negotiation process.”

Certain portions of the Business Plan, which predates by five months the execution of the Merger Participation Agreement and the Share Purchase Agreement, have been superseded by the consolidation proposed in the Application, and the Applicants submit that those portions of the Business Plan should be treated in the same manner as draft share purchase agreements, draft confidential agreements, and documents utilized in the course of the negotiation process.

This category includes redactions at the following pages:

- pp.10-11, 89-90 – discussion of the potential Limited Partnership structure for LDC Co; that structure is not being pursued in this Application;
- pp.20-24, 52-56, 60-61 – summaries of the Share Purchase Agreement and the Merger Participation Agreement as of August 5, 2015; the final forms of these agreements were executed in March of 2016, and discussions of August 2015 drafts of those agreements are not relevant to this Application;
- pp.51-52, 88-89 – discussion of merger steps – the final form of these steps for the purposes of this Application are set out and discussed in detail in the Application. A version of the steps discussion that includes a potential Limited Partnership structure is not relevant to this Application; and
- Section 6, Appendix C – this is a September 3, 2015 draft of a PowerStream Solar Business – Services and Indemnity Agreement Indicative Term Sheet. That draft has been superseded by the form of the document contained in Schedule 5.1(9)(A) of the Merger Participation Agreement. The Applicants have advised that they are prepared to provide that Schedule in confidence, and it is anticipated that the OEB will address that matter in its Decision on Confidentiality and Scope. The draft document will not be provided.

- Matters relating to the promotion of conservation.

At page 10 of the Handbook, the OEB states:

“As previously discussed, the OEB’s performance-based regulation, which includes performance monitoring and reporting based on standards, combined with the regulatory instruments of codes and licences, establishes a framework for success in achieving public policy requirements. A utility that does not meet established performance expectations is subject to corrective action by the OEB. Given these means for ensuring that public policy objectives are met by all regulated entities, the OEB is satisfied that the “no harm” test will be met for these objectives following a consolidation and there is no need or merit in further detailed consideration as part of a consolidation transaction. For these reasons, no evidence is required to be filed for these issues.”

Accordingly, the Applicants have redacted those portions of the Business Plan that address CDM. This includes redactions at pages 73-74 and 79.

- Matters that are subject to solicitor-client privilege. The OEB consistently protects material of this kind from disclosure.

This category includes redactions at the following pages and of the following Appendices to the Business Plan:

- pp.90, 94 – references to Appendices that are subject to solicitor-client privilege and are not being produced; and
- Appendices 6-D, 6-E and 6-I to the Business Plan.

The balance of the Business Plan is being produced on the public record for the purpose of responding to this interrogatory. However, the Applicants submit that their filing of this document should not be taken as an acknowledgement of the relevance of the balance of the document, in whole or in part, to this Application.

Yours very truly,

**BORDEN LADNER GERVAIS LLP**

Per:

*Original signed by James C. Sidlofsky*

James C. Sidlofsky

Encls.

cc: G. DeJulio, Enersource  
I. Butany-DeSouza, Horizon Utilities  
C. Macdonald, PowerStream  
Intervenors of Record