



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 CONFIDENTIALITY REQUEST and
PROCEDURAL ORDER NO. 3
August 12, 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, 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.; and
- 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. Procedural order no. 1 was issued on June 15, 2016. A decision on the applicant's proposed issues list was issued on June 30, 2016. Procedural order no. 2 was issued on July 29, 2016.

The OEB provided an opportunity for intervenors and OEB staff to file submissions on the applicants' confidentiality requests. The OEB received submissions from AMPCO, BOMA, CCC, ECAO, SEC, VECC and OEB staff. This Decision relates solely to the confidentiality requested by the applicants.

Claim that Documents are "Out of Scope" and Request for Confidentiality for Documents

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

The applicants claim that certain documents in the Merger Purchase Agreement (MPA) and the Share Purchase Agreement (SPA) are out of scope and will not be provided; the applicants further sought to request confidential treatment for another set of documents whose contents are relevant to the proceeding but which would be reasonably expected to harm parties if disclosed publicly.

1. Documents Claimed to be "Out of Scope"

The applicants' claim that documents which are out of scope fall into three categories:

- I. 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;
- II. Documents related to negotiations and the extent of due diligence; and
- III. 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.

OEB staff reviewed the documents listed in the applicants' letter of April 15, 2015. OEB staff agrees that for item II, above, documents related to negotiating strategies and the extent of due diligence are out of scope. The OEB agrees that these items need not be produced.

OEB staff also agrees that personal information as set out in item III above, should not be provided to any person. The OEB also agrees that personal information should not be produced.

With respect to documents related to the amalgamation of the competitive services affiliates of the applicants (i.e. item I, above), OEB staff submitted that it was not clear why some documents listed in this category are out of scope, specifically:

- a. 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.

- b. 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.

- c. 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 submitted that this information appears to be relevant to the transaction and should be public. SEC submitted that schedules 3.9, 3.10 and 3.11 of the MPA, which are a list of specific approvals, consents and waivers required to carry out the proposed transactions, are relevant and material and within scope in this proceeding.

- d. 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.

Having considered OEB staff's and SEC's submissions, the applicants submitted that it will provide copies of Appendix "C", section 2(23) of the MPA and schedule 2.1(3), of the MPA and schedules 3.9, 3.10, 3.11, 5.1(9)(A) of the MPA. The applicants filed this material on June 30, 2016. The OEB notes that in filing schedule 5.1(9)(A), the applicants requested that this document be treated as confidential. The OEB agrees with the applicants that upon producing schedule 5.1(9)(a) the schedule should be treated as confidential.

2. Documents for which Confidentiality is Requested

The applicants requested confidentiality for the following:

- a. Certain definitions in section 1.1 of 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;

OEB staff objects to those definitions which relate to material that to documents for which confidentiality is sought. In its reply, the applicants submitted that if the OEB determines that a section of the MPA should be confidential, then the corresponding definition should also be kept in confidence.

- b. Section 2.1(3) of the MPA. This section of the MPA addresses the manner in which certain shareholders may adjust their allocations of shares among themselves. The applicants' say that the public disclosure of this information may reasonably be expected to 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.

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. The applicants also submitted that section 2.1(3) and certain parts of section 5.5 of the MPA should remain confidential as public disclosure of these provisions may interfere with and prejudice negotiations.

- c. Section 5.1(10) of the MPA deals with the restatement of certain promissory notes. The applicants take the position that the terms of the restatements have not yet been finalized, and the public disclosure of this provision of the MPA may reasonably be expected to prejudice the competitive positions of, and interfere with the negotiations of the note holders with respect to the finalization of the restatements of the notes.

No submissions were made by OEB staff or the intervenors on this section.

- d. Section 5.5 of the MPA. The redacted portions of this section 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. The applicants' state 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 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.

- e. Section 7.1(1)(d), section 7.1(3)(d) and section 7.1(5)(d) of the MPA. The applicants state that these sections relate to matters that may be the subject of potential litigation, and their disclosure could reasonably be expected to adversely affect the parties' positions in any such litigation.

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.

In reply, the applicants submitted that they will withdraw their claim for confidentiality of sections 7.1(1)d, 7.1(3)(d), 7.1(5)(d) of the MPA. The applicants filed these sections on June 30, 2016.

- f. Appendix "A", section 2(18)(b). This section addresses certain employment-related matters. The applicants take the position that its public disclosure, and disclosure of the material to which it relates, can reasonably be expected to prejudice the bargaining positions of LDC Co and its employees.

No submissions were made by OEB staff or the intervenors on this section.

- g. Appendix "A", section 2(35). The redacted information relates to the amounts that may be spent on solar projects. The applicants take the position that this information is beyond the scope of this proceeding and the disclosure of which may reasonably be expected to prejudice the competitive position of PowerStream.

No submissions were made by OEB staff or the intervenors on this section.

- h. Appendix "C", section 2(16). The redacted information relates to potential litigation. 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 submitted that 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.

The applicants submitted that public disclosure of the redacted language in Appendix "C", section 2(16) of the MPA is inappropriate and could prejudice the disclosing party.

- i. Appendix "B", section 2(24), Appendix "C", section 2(24) and Appendix "D", section 2(24). These sections deal with real property matters in respect of Enersource, PowerStream and Horizon Utilities, respectively. The sections include listings of

easements held by each of the utilities, and the Applicants have redacted information from those lists pertaining to identifiable individuals. That information constitutes personal information and will not be released in any form.

No submissions were made by OEB staff or the intervenors on this section.

- j. 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 HOBNI will be made available, and the terms under which the funds will be made available. The financial institutions have provided these documents in confidence, and the applicants state that disclosure may reasonably be expected to prejudice the competitive positions of both the institutions providing the financing and the LDCs and their parent corporations in subsequent negotiations for the provision of financing to the parties to this proceeding or other utilities (in the case of the financial institutions) and in subsequent procurements of financing by the LDCs (and subsequently LDC Co) and their parent corporation(s).

OEB staff submitted 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.

In reply, the applicants state that confidentiality should be maintained for schedule 5.4(15) as financial institutions have provided financing commitment letters in confidence.

SEC submitted that information contained in Appendices “B”, “C”, and “D” of the MPA is contained in three Confidential Disclosure Letters (CDLs), which have not been filed as part of the application. SEC submitted that these letters are incorporated by reference into the MPA, are in law a part of that agreement, and therefore should have been filed.

AMPCO, BOMA, CCC, and VECC filed submissions agreeing with SEC’s submissions.

The applicants also submitted that they are prepared to provide copies of the CDLs 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. However, the

applicants requested that sections of the CDLs containing personal information not be provided to any person.

Findings

The OEB's general policy is that all evidence should be on the public record and should be open for inspection by any person unless disclosure of the record is prohibited by law. The Practice Direction seeks to balance the objectives of transparency and accessibility with the need to protect information that has been properly designated as confidential. In considering these principles, the OEB finds that the documents referred to in paragraphs (b), (d), (e), (h) and (j) noted above are ones for which the claim for confidentiality is denied as these documents either have a potential impact on ratepayers or go to the heart of the business transaction and should be produced. The OEB agrees with the applicants for the reasons provided that paragraphs (c), (f), (g) and (i) are to be treated as confidential. With respect to paragraph (a) above, the definitions relating to those items have determined to be confidential shall also be treated as confidential.

The OEB agrees that CDLs should be produced and agrees with the applicants request to treat these documents as confidential. The OEB also agrees that the sections of the CDLs containing personal information do not need to be provided.

Procedural Matters

On August 8, 2016, the applicants filed a letter indicating that one of the counsels representing them is scheduled to appear in Divisional Court on September 29, 2016, and therefore the applicants request that the date of the oral reply submission for the applicants be changed to accommodate the scheduling conflict.

The OEB will reschedule the oral reply submission of the applicants originally scheduled for September 29, 2016 to September 30, 2016 to accommodate the scheduling conflict.

The OEB considers it necessary to make provision for the following matters related to this proceeding.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. OEB Staff and Intervenor shall file with the OEB and serve the applicants with a list of the topics they will be asking questions on at the technical conference on or before **August 17, 2016**.
2. The applicants shall make their oral reply submissions to the OEB on **September 30, 2016 beginning at 12:00 p.m.**, in the North Hearing Room at 2300 Yonge Street, 25th Floor, Toronto.

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, **August 12, 2016**

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary