



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION ON CONFIDENTIALITY REQUESTS

EB-2016-0025

**ENERSOURCE HYDRO MISSISSAUGA INC.
HORIZON UTILITIES CORPORATION
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.**

BEFORE: Ken Quesnelle
Presiding Member and Vice-Chair

Christine Long
Vice-Chair

Cathy Spoel
Member

September 2, 2016

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1 INTRODUCTION

This is the Decision of the Ontario Energy Board (OEB) in response to:

- (a) Requests for confidentiality filed by Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, and PowerStream Inc. (the applicants) with respect to certain interrogatory responses and parts of responses provided by the applicants
- (b) A further request by the applicants that the OEB allow one portion of Schedule 5.4(15) of the Merger Participation Agreement (MPA) filed as part of the applicants' pre-filed evidence to remain confidential despite the OEB's earlier determination that this schedule be made public.

On July 27, 2016, the applicants filed in confidence a limited number of responses, and parts of responses to interrogatories from OEB Staff and intervenors.

The OEB issued a decision on confidentiality on August 12, 2016 determining that certain portions of the pre-filed evidence initially filed in confidence be made public. In accordance with this decision, on August 24, 2016, the applicants provided public unredacted versions of this information with the exception of one portion of MPA Schedule 5.4(15).

The OEB accepts the confidentiality requests made with respect to certain interrogatory responses. The OEB will also allow the identified portion of the response to MPA Schedule 5.4(15) to remain confidential.

2 BACKGROUND

2.1 Interrogatory Responses Filed in Confidence

The applicants filed certain responses to interrogatories in confidence, pursuant to the OEB's *Rules of Practice and Procedure* (Rules) and the *Practice Direction on Confidential Filings* (Practice Direction). The applicants submit that the redactions are minimal; they are based on the applicable provisions of the Rules and 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)¹.

The applicants requested confidentiality for the following:

1) B-Staff-7 (a) – Table 1

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

2) B-AMPCO -6(c)

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

3) B-BOMA – 8(f)

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

The applicants have provided the information requested through these interrogatories but request that the information be maintained in confidence, providing the following reasons for their confidentiality requests:

- Public disclosure of this 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 those

¹ Letter from counsel for the Applicants accompanying interrogatory responses dated July 27, 2016

operational areas/functions or employment categories; final decisions about staffing within the various operational areas/functions have not yet been made.

- The Practice Direction recognizes that these are among the factors that the OEB 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.

OEB Findings

The OEB finds that AMPCO 6 (c) and BOMA 8 (f) are not confidential and ought to be filed publicly. The information in these two interrogatory responses is categorized in such a way so as to not disclose any personal information. With respect to Staff -7(a) – Table 1, the OEB notes that this part of the interrogatory response asks the applicants to identify the specific operational areas/functions where the planned payroll and non-payroll reductions will occur. The OEB also finds that the information set out in Table 1 also does not include any personal information and as such should be made public.

4) B-SEC-27 – Business Case Model

SEC requested a copy of the financial model referred to, in live Excel format. The applicants state that the model is a proprietary and confidential Deloitte Work Product. The applicants state that the confidentiality request is made because the applicants were given access to the model on the basis that it is to be treated as confidential. The applicants argue that public disclosure would 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. Public disclosure of the model could also 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 applicants submit that the confidentiality request is addressed in section 17(1) of FIPPA and section 10 of MFIPPA, and the Practice Direction (at Appendix B) which 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.

OEB Findings

The OEB finds that the applicants are not required to file the business case model in excel format as the model is proprietary. The OEB agrees with the applicants that the business case model should be treated as confidential.

5) B-VECC-1(a)

VECC requested a copy of the smart meter service agreement between Hydro One Brampton Networks Inc. (Hydro One Brampton) and 437967 Ontario Limited, operating as Savage Data Systems. The applicants are prepared to file this agreement in confidence. The applicants submit that 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 applicants submit that the confidentiality request is addressed in section 17(1) of FIPPA and section 10 of MFIPPA, and the Practice Direction (at Appendix B) which 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.

OEB Findings

The OEB finds that the smart meter service requirement is not relevant to this proceeding. The OEB notes that the applicants have filed the agreement in confidence.

Accordingly, the applicants may wish to withdraw the document from the public record. Otherwise, it can remain filed in confidence.

6) MUN-CCC-11

CCC 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 proceedings, and was 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.

The applicants submit that 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 applicants argue disclosure of the in camera material 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.

The applicants also submitted that 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. The applicants further state that material produced in response to this interrogatory is 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.

OEB Findings

The OEB finds that the presentations made to the municipal counsel are not relevant to this proceeding and need not be produced. While the applicants may have filed the

documentation under the protection of confidentiality, as the Panel has determined the documents to be out of scope, the applicants may wish to request that the documents be removed from the public record.

7) B-Staff -1 – Redactions from Business Plan

The applicants provided a redacted version of the business plan in response to this interrogatory.

The applicants submit that the redactions pertain to matters that are beyond the scope of this proceeding –

- Matters pertaining to non-regulated activities of LDC Co. affiliates, potential future LDC Co expansion activity and potential future monetization of shareholder interests in LDC Co
- 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
- Information, including discussions of potential corporate structures that are not being pursued, and that have been superseded by information in the application
- Matters relating to the promotion of conservation
- Matters that are subject to solicitor-client privilege.

OEB Findings

The OEB has reviewed the grounds put forward by the applicants asking that the above redactions are beyond the scope of this proceeding. While matters that are out of scope are generally not required to be produced, in this case the OEB is of the view that it is more appropriate to have the applicants file the complete Business Plan, subject to the exception of redactions that are the subject of solicitor-client privilege, on the public record. The Panel will ensure that cross examination on parts of the document that are out of scope will not be permitted during the course of the hearing. Submissions should avoid referencing any material not in scope.

2.2 Schedule 5.4(15) to Merger Participation Agreement

Schedule 5.4(15) of the MPA was filed in confidence by the applicants as part of the pre-filed evidence. The schedule contains 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.

The applicants requested confidential treatment of this material stating that the financial institutions had provided these documents in confidence and disclosure may reasonably be expected to prejudice the competitive positions of both the institutions providing the financing and the applicants and their parent corporations in subsequent negotiations for the provision of financing and (in the case of the financial institutions) negotiations for the provision of financing to other utilities. In the August 12, 2016 Decision on Confidentiality, the OEB determined that this material be made public.

The applicants state that they advised representatives of the two financial institutions of the OEB's decision, and were asked to request that the OEB reconsider its decision with respect to one portion of the material – specifically, the pricing and fees sections found at page 2 of the Summary of Terms and Conditions of the Credit Facility, consisting of a pricing table and related text setting out the pricing for the services being provided to the applicants. The applicants submit that information is highly commercially sensitive, as prices and fees are negotiated individually with borrowers, and the release of this information can reasonably be expected to adversely affect the financial institutions' ability to negotiate pricing with other borrowers.

The applicants argue that there is no prejudice to the intervenors in keeping this information confidential. The applicants asked that the OEB review and vary its decision on confidentiality, as it pertains to the pricing and fees information for the credit facility, and that the OEB allow that information to remain confidential.

OEB Findings

The OEB agrees that the information set out on page 2 of the Summary of Terms and Conditions of the Credit Facility, consisting of the pricing for the services being provided to the applicants can remain confidential on the basis that it is commercially sensitive information.

3 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The requests for confidentiality made by the applicants with respect to certain interrogatory responses and the identified portion of the response to MPA Schedule 5.4(15) are granted.

DATED at Toronto September 2, 2016

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary