

February 14, 2019

RESS, EMAIL & COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
PO Box 2319
2300 Yonge Street, 27th floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Toronto Hydro-Electric System Limited (“Toronto Hydro”)
Custom Incentive Rate-setting Application for 2020-2024 Electricity
Distribution Rates and Charges – Interrogatories Responses – Response to
Submissions on Confidentiality Request
Ontario Energy Board (“OEB”) File No. EB-2018-0165**

We are legal counsel to Toronto Hydro in this proceeding. Pursuant to the OEB’s Procedural Order No. 3, dated February 5, 2019, the purpose of this letter is to respond to the submissions regarding Toronto Hydro’s request for confidential treatment of certain information (the “**Confidentiality Request**”) in documents that were filed as part of the utility’s interrogatory responses on January 21, 2019.

Submissions were received from (i) OEB Staff by letter filed on February 11, (ii) Building Owners and Managers Association, Greater Toronto (“**BOMA**”) by letter filed on February 12, and (iii) the School Energy Coalition (“**SEC**”) by letter filed on February 13.

For the reasons set out in the Confidentiality Request and below, Toronto Hydro maintains that the information at issue should be afforded confidential treatment, with the exception of certain information contained in the retainer agreement with London Economics International (“**LEI**”) (as discussed below), pursuant to the OEB’s *Rules of Practice and Procedure and the Practice Direction on Confidential Filings* (“**Practice Direction**”).

I. Category 1. Proprietary Information of Third Parties

The Confidentiality Request covers certain proprietary information of third parties contained in the following documents:

- a) 1B-SEC-3, Appendix A: *Davies Consulting, 2016 Emergency Management Benchmark Study*;
- b) 1B-SEC-3, Appendix D: *Mercer (Canada) Limited, Toronto Hydro Corporation Senior Executive Compensation Policies & Practices*;
- c) 4A-SEC-90, Appendix A: *Letter from Toronto Hydro Corporation to the City Manager re Executive Compensation at City Agencies and Corporations*;
- d) 1B-Staff-9, Appendix P: *Unit Costs for UMS Group Benchmarking Study*.

BOMA objects to the Confidentiality Request as it relates to this information category. While it argues “the fact that the information is claimed to be proprietary... is not a reason for that information not to be disclosed in Board proceedings”¹, BOMA does not explain the basis for this assertion. Contrary to BOMA’s position, the OEB has in fact made prior determinations to protect the confidentiality of proprietary information pertaining to third parties, as discussed in OEB Staff’s submissions in support of this aspect of the Confidentiality Request.²

SEC endorses OEB Staff’s submissions, but also notes that “any identifiable proprietary information of a third-party utility who themselves are regulated by this Board... should not be accorded confidentiality treatment, regardless of any agreement between the third-party consultant, and that utility”.³ SEC does not explain why this approach is warranted or justified based on the Practice Direction or OEB precedents. In fact, the Practice Direction expressly recognizes the importance of protecting third party information and avoiding the infringement of existing contractual obligations.⁴

As stated in the Confidentiality Request, neither Toronto Hydro, nor its consultants, are authorized by the relevant third parties to publicly disclose the proprietary information in question. Disclosing such information on the public record would breach Toronto Hydro’s or its consultants’ obligations to the third parties, which could cause harm to the third parties and could adversely impact Toronto Hydro and/or its consultants’ ability to obtain or rely upon such information from these parties in the future.

II. Category 2: Commercially Sensitive and Proprietary Information of Consultants

The Confidentiality Request extends to certain commercially sensitive and proprietary information of Toronto Hydro’s consultants in the following documents:

- a) 1B-SEC-3, Appendix D: *Mercer (Canada) Limited, Toronto Hydro Corporation Senior Executive Compensation Policies & Practices*;
- b) 4A-SEC-90, Appendix A: *Letter from Toronto Hydro Corporation to the City Manager re Executive Compensation at City Agencies and Corporations*;
- c) 1B-CCC-8, various consultant retainer agreements filed as Appendices to the response.

¹ BOMA Submission dated February 12, 2019 (“**BOMA Submission**”), p. 3.

² OEB Staff Submission dated February 11, 2019 (“**Staff Submission**”), p. 3; also see EB-2017-0224/0255/0275, Decision on Confidentiality Request and Procedural No. 5 (May 25, 2018).

³ SEC Submission dated February 12, 2019 (“**SEC Submission**”).

⁴ See Practice Direction: Appendix A, part (a); Appendix B, part 5; and Appendix E.

With respect to item (c), BOMA does not appear to take a position (despite its stated objection regarding this category of information overall); and Staff has no concerns except with the LEI retainer agreement, which Staff submits should be re-filed with more targeted redactions.⁵ In this regard, Toronto Hydro hereby re-files the retainer (see **Appendix A** hereto for the public version) to reflect the targeted redaction of information that LEI considers to be commercially sensitive or that constitutes personal information about LEI's employees.

With respect to items (a) and (b), both BOMA and Staff object to the confidential treatment sought. BOMA questions the availability of "commercial sensitivity" as a ground for a confidentiality request.⁶ Respectfully, this argument is contrary in principle to the Practice Direction, which clearly recognizes commercial sensitivity as an appropriate consideration for assessing confidentiality requests.⁷ The fact that the consultants must rely on its proprietary and commercially sensitive information to carry on business only heightens the adverse impact that could result from public disclosure.

BOMA also states that "information which justifies, by way of benchmarking, the compensation of senior executives of publicly-owned utility, should be publicly available as a matter of principle".⁸ OEB Staff makes similar arguments in its submission, citing the EB-2016-0160 and EB-2016-0152 proceedings as examples in which compensation benchmarking information was placed on the public record.⁹ While there may be general public interest in the compensation benchmarking of utility companies, each confidentiality request must be assessed based on the relevant circumstances, including the specific information and interests of affected parties that are at stake. In this case, Toronto Hydro has been advised that Mercer considers the redacted information to be of substantial commercial value and sensitivity, and that there are important differences between this information versus what was publicly disclosed in the prior OEB proceedings cited by Staff. Mercer's position with respect to its confidential information is set out in the letter attached from Mercer's Counsel, attached as **Appendix B** hereto.

III. Category 6: Information related to Toronto Hydro's Affiliates and Non-rate Regulated Business Activities

The Confidentiality Request covers certain information related to its affiliates and non-rate regulated business in the following documents:

- 1A-CCC-1 Appendix A: *Toronto Hydro Corporation 2018-20 Corporate Business Plan*;
- 1B-SEC-9, Appendix A: *Internal Audit Report Summaries*.

OEB Staff raise no objection to the redactions in the public version of the documents and will not provide submissions regarding the redactions in the confidential version.¹⁰

⁵ Staff Submission, p. 4.

⁶ BOMA Submission, p.2.

⁷ See Practice Direction: Section 5; Appendix A, part (b); and Appendix E.

⁸ BOMA Submission, p. 2.


⁹ Staff Submission, pp. 3-4.

¹⁰ Staff Submission, pp. 5-6.

BOMA objects to the Confidentiality Request as it relates to this category of information overall.¹¹ Respectfully, BOMA's arguments appear to affirm Toronto Hydro's request (i.e., information relating to affiliates and non-regulated activities should be kept confidential) and do not explain why the Confidentiality Request ought to be denied. Toronto Hydro submits that there is no basis for denying this confidentiality request.

Please do not hesitate to contact me if you have any questions.

Yours truly,


for Charles Keizer

¹¹ BOMA Submission, p. 3.

Appendix 'A'

**1B-CCC-8 Appendix F
LEI Retainer Agreement (Redacted)**

BY EMAIL

CONFIDENTIAL — PRIVILEGED

April 18, 2017

London Economics International LLC
390 Bay Street, Suite 1702
Toronto, ON, M5H 2Y2

Re: Retainer Letter Agreement – Toronto Hydro-Electric System Limited – Alternate Control Room Study

Dear Mr. Goulding:

We represent Toronto Hydro-Electric System Limited (“THESL”) in connection with its planned 2020 Custom Incentive Rate application (the “Application”) to the Ontario Energy Board (the “Board”).

We confirm that, on behalf of and to assist us in providing legal advice to THESL in connection with the Application, Torys LLP (“Torys”) has agreed to retain London Economics International LLC (the “Consultant”) effective as of March 23, 2018 (the “Effective Date”) to provide consulting services as herein described. By signing back a copy of this letter, the Consultant agrees that this letter contains the agreed-upon terms and conditions of its retainer with Torys effective on the Effective Date, subject to amendment by written agreement between the parties (the “Retainer Agreement”).

1. No Conflict

The Consultant does not have any conflict of interest or other constraints on its ability to provide expert advice to THESL. You confirm that you are free to provide your services to Torys in connection with Torys’ representation of THESL in the Application. You agree that during this engagement you will not provide, directly or indirectly, any services to any other party in connection with the matters at issue in the THESL Application.

2. Consultant Expertise

The Consultant has been selected to provide consulting services to Torys in connection with the Application, namely by undertaking an independent study of comparator utilities with the alternate

control centers in other jurisdictions. The sponsors of the work of the Consultant and the persons who have the relevant expertise will be AJ Goulding, Amit Pinjani, and Ian Chow (the “Sponsors”).

3. Scope of Services and Work Product

The Consultant will:

- (a) collect the data required to undertake an analysis of comparator utilities with the alternate control centers in other jurisdictions (the “Study”);
- (b) if requested by Torys, produce a written report detailing the Study’s methodology, analysis performed and the ensuing findings and recommendations (the “Report”), which may be filed with the Board in the Application; and
- (c) if requested by Torys, provide support during the hearing of the Application and testify before the Board in the Application, in connection with the scope of the services provided hereunder (“Application Support” and, together with the Study and the Report, the “Services”).

4. Fees and Invoices

[REDACTED]	
■	[REDACTED]
■	[REDACTED]
■	[REDACTED]
■	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
[REDACTED]	

The Consultant shall direct all invoices relating to Services performed by it under this Retainer Agreement to THESL, to the attention of:

Andrew Sasso
Toronto Hydro Electric-System Limited
14 Carlton Street
Toronto, Ontario M5B 1K5

asasso@torontohydro.com

with a copy to Torys, to the attention of:

Mr. Charles Keizer
Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2
ckeizer@torys.com

Any disbursements for additional incidentals incurred by the Consultant in relation to this Retainer Agreement must be pre-approved by THESL in writing. THESL reserves the right to deduct any applicable non-resident withholding taxes from any amounts owing to the Consultant under this Retainer Agreement and remit such amounts to the applicable taxation authority.

5. Confidentiality

All work performed by the Consultant in connection with this Retainer Agreement, including all findings, opinions, and conclusions the Consultant reaches in relation to this Retainer Agreement, and any communications relating thereto, are strictly privileged and confidential and shall not be disclosed to any other person or party without the prior written consent of Torys or THESL. The Consultant agrees to designate all written communications and material accordingly. The Consultant further agrees to notify Torys in the event that the Consultant receives a request to disclose information relating to this matter, and agrees to cooperate with Torys, to the fullest extent permitted by law, to prevent or limit the disclosure of such material or otherwise preserve the privileged and confidential status of such material.

The Consultant agrees to hold in confidence: (a) all information provided to the Consultant, and (b) the Consultant's opinions to Torys and to THESL as they relate to the information, whether the information or opinions are documentary or oral (collectively, the "Confidential Information"). The Consultant will not disclose the Confidential Information to any person unless Torys or THESL authorizes you in writing to do so. All documents given to the Consultant in connection with this Retainer Agreement remain the property of Torys or of THESL and are held in trust the Consultant as an agent. The Consultant agrees to return these documents on request.

The Consultant will not refer to Torys or to THESL, directly or indirectly, in connection with the promotion of its services, without obtaining the prior written consent of Torys or THESL, as the case may be.

6. Intellectual Property

Nothing in this Retainer Agreement shall be deemed to transfer, license, assign, permit the use of, or otherwise convey an interest in whole or in part to the Consultant of any intellectual property belonging to THESL or any of its representatives or any third party whose intellectual property is in THESL's custody or control, and the use by the Consultant of any such intellectual property

shall be subject to the prior written approval of THESL.

Torys and THESL shall at all times have full rights and title to all works prepared, generated or created by the Consultant pursuant to this Retainer Agreement, including without limitation any reports or other documents created by the Consultant, and any related works, modifications or additions thereto (the “Work Product”), and may at all times take possession of or use any completed Work Product, notwithstanding any provision, express or implied, to the contrary. Without limiting the generality of the foregoing, THESL shall own all intellectual property rights in all Work Product, and the Consultant hereby waives and assigns to THESL any such rights, and agrees to give THESL and its representatives all assistance as may be reasonably required to perfect such rights including, without limitation, obtaining waiver of moral rights from any of the Consultant’s employees, partners or other representatives.

7. Termination

Torys may terminate this Retainer Agreement at any time on written notice to the Consultant. Torys will pay or will cause THESL to pay, for work performed up to the date of the notice of termination. Upon the termination or expiration of this Retainer Agreement, the Consultant shall return to Torys and delete any and all electronic copies the Consultant may have of all documents and materials in its possession relating to the Services or this Retainer Agreement, including all Confidential Information (defined above) and Work Product, whether completed or not.

8. Liability and Indemnification

[REDACTED]

- [REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]

9. Intellectual Property Protection

The Consultant expressly warrants that the manufacture, delivery, sale or use of the Consultant's Services will not infringe any Canadian or foreign patents, trademarks, copyrights, industrial design or other intellectual property rights and the Consultant shall indemnify and save THESL harmless from all claims, judgments, and decrees that may be entered against THESL or its representatives and against all damage, liability, costs, and expenses (including legal fees and other attendant costs and expenses) THESL incurs by reason of any infringement or claim thereof.

10. Limitation of Liability

[REDACTED]

11. Insurance

- (a) Unless otherwise specified in this Retainer Agreement, the Consultant shall, during the term of this Retainer Agreement, and at its own expense, maintain and keep in full force and effect:
 - i. commercial general liability insurance on an occurrence basis having a minimum inclusive coverage limit, including personal injury and property damage, of not less than two million dollars (\$2,000,000.00) per occurrence, which shall be extended to cover contractual liability, products and completed operations liability, owners/contractors protective liability and must also contain a cross liability clause and a severability of interest clause, and must name THESL and its affiliates as additional insureds; and
 - ii. errors and omissions insurance (professional liability) in the amount of not less than two million dollars (\$2,000,000.00).
- (b) All insurance coverages and limits required to be maintained by the Consultant shall be primary to any insurance maintained by THESL, which shall be excess and non-contributory. Prior to the commencement of the delivery of the Services, the Consultant shall deliver to THESL a certificate of insurance which evidences the Consultant's compliance with this Section, including the provision of a thirty (30) day prior written notice of cancellation, non-renewal or adverse material change, to THESL. The Consultant agrees that the insurance described herein does in no way limit the Consultant's liability pursuant to the indemnity provisions of this Retainer Agreement.

12. Independence

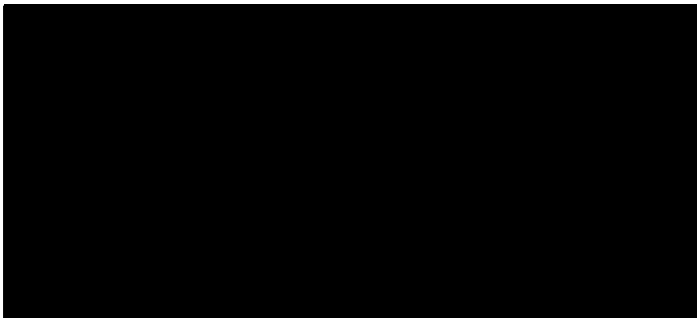
By entering into this Retainer Agreement, the Consultant acknowledges and agrees that the Sponsors have received a copy of Rule 13A of the Board's *Rules of Practice and Procedure* concerning expert evidence, and agree to accept the responsibilities that are or may be imposed on them by that rule with respect to testimony before the Board. A copy is attached as Schedule 'A' hereto.

13. Entire Agreement

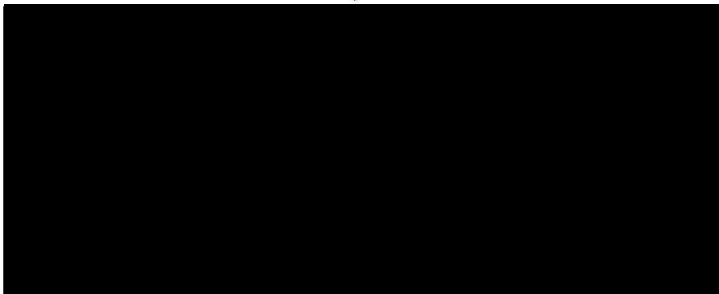
This Retainer Agreement, together with all Schedules attached hereto and any agreements and other documents to be delivered pursuant to this Retainer Agreement, constitute the complete agreement between Torys and the Consultant or their respective agents with respect to the subject matter hereof and supersedes any and all prior agreements and understandings. This Retainer Agreement may be amended only in a writing that refers to this Retainer Agreement and is signed by both parties.

Sincerely,

TORYS LLP



Accepted and agreed to by London Economics International LLC



SCHEDULE 'A'

Rule 13A of the Board's Rules of Practice and Procedure

13A. Expert Evidence

13A.01 A party may engage, and two or more parties may jointly engage, one or more experts to give evidence in a proceeding on issues that are relevant to the expert's area of expertise.

13A.02 An expert shall assist the Board impartially by giving evidence that is fair and objective.

13A.03 An expert's evidence shall, at a minimum, include the following:

- (a) the expert's name, business name and address, and general area of expertise;
- (b) the expert's qualifications, including the expert's relevant educational and professional experience in respect of each issue in the proceeding to which the expert's evidence relates;
- (c) the instructions provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;
- (d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research conducted, and a list of the documents relied on by the expert in preparing the evidence;
- (e) in the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement with the other expert's evidence; and
- (f) an acknowledgment of the expert's duty to the Board in **Form A** to these Rules, signed by the expert.

13A.04 In a proceeding where two or more parties have engaged experts, the Board may require two or more of the experts to:

- (a) in advance of the hearing, confer with each other for the purposes of, among others, narrowing issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing; and
- (b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the Board and others as permitted by the Board, and providing comments on the views of another expert on the same panel.

13A.05 The activities referred to in **Rule 13A.04** shall be conducted in accordance with such directions as may be given by the Board, including as to:

- (a) scope and timing;
- (b) the involvement of any expert engaged by the Board;
- (c) the costs associated with the conduct of the activities;

(d) the attendance or non-attendance of counsel for the parties, or of other persons, in respect of the activities referred to in paragraph (a) of **Rule 13A.04**; and

(e) any issues in relation to confidentiality.

13A.06 A party that engages an expert shall ensure that the expert is made aware of, and has agreed to accept, the responsibilities that are or may be imposed on the expert as set out in this **Rule 13A** and **Form A**¹.

¹ Form “A” (Acknowledgement of Expert’s Duty) to the Board’s *Rules of Practice and Procedure* requires the expert witness to acknowledge that it is his or her duty to provide evidence in relation to a proceeding before the Board as follows:

- (a) to provide opinion evidence that is fair, objective and non-partisan;
- (b) to provide opinion evidence that is related only to matters that are within his or her area of expertise; and
- (c) to provide such additional assistance as the Board may reasonably require, to determine a matter in issue.

Form “A” further requires the expert witness to acknowledge that the duty referred to above prevails over any obligation which he or she may owe to any party by whom or on whose behalf he or she is engaged.

Appendix 'B'

Mercer Letter

PRIVATE & CONFIDENTIAL

February 14, 2019

Delivered by Email, RESS & Courier

Ms. Shirley Powell
Toronto Hydro
11th Floor, East Tower, City Hall
100 Queen Street West
Toronto, ON M5H 2N2**Subject:** OEB File No. EB-2018-0028
Toronto Hydro-Electric Systems Limited
Application for 2020-2014 Rates
Response to Confidentiality Submissions

Dear Ms. Powell:

This letter responds to submissions by Ontario Energy Board ("**Board**") Staff, the School Energy Coalition ("**SEC**") and the Building Owners and Managers Association, Greater Toronto ("**BOMA**", and altogether the "**Parties**") on the confidentiality request made by Toronto Hydro with respect to the confidential filing of the following document in the above-noted proceeding:

- 1B-SEC-3, Appendix D: Mercer (Canada) Limited, Toronto Hydro Corporation Senior Executive Compensation Policies & Practices dated October 31, 2017 (the "**Mercer Report**").

We reviewed Toronto Hydro's reply submissions to which this letter is appended and support Toronto Hydro's submissions in respect of the Mercer Report.

Toronto Hydro has endeavoured to be as selective in its redactions of the Mercer Report and provide as much detail as possible, balancing open disclosure with the need to maintain confidentiality of third-party and commercially sensitive information in the Mercer Report. The redactions have been limited to specific instances of confidential and sensitive information and Mercer requests confidential treatment of the redacted information.

We note Board Staff's submission of February 11, 2019, that neither Toronto Hydro nor its consultants are authorized by the relevant third parties to disclose information of, or pertaining to, third parties that is subject to existing contractual confidentiality obligations publicly and that Board Staff therefore has no

objection to the OEB affording confidential treatment to the information contained in the Mercer Report that relates to proprietary information of third parties for the reasons provided by Toronto Hydro.

In response to Parties' submissions in connection with commercially sensitive and proprietary information of consultants and Board Staff's citation of the Hydro One Transmission Rates (EB-2016-0160) and OPG payments amounts (EB-2016-0152) proceedings as an example where compensation benchmarking was placed on the public record, Mercer submits that the Hugessen Consulting report ("**Hugessen Report**") and Willis Towers Watson report ("**Willis Report**") fundamentally differ from the Mercer Report.

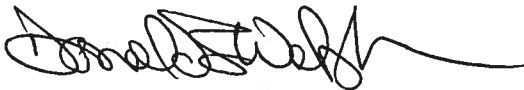
The Hugessen Report differs from the Mercer Report in that, being compiled based on publically available information, its unredacted disclosure would not disclose information not already on the public record. The Mercer Report, by contrast, necessarily required the participation and cooperation of each comparator company and could not be replicated based on information already available in the public domain.

The Willis Report reports information by salary band, which does not readily identify any survey participant, whereas the Mercer Report provides benchmarking by specific incumbents and positions which provides heightened specificity of information. Moreover, the Mercer Report contains details about entities which were provided to Mercer on a strictly confidential basis and were not intended to be made public at the time Mercer prepared the Mercer Report nor at any subsequent time. Disclosure of details pertaining to certain entities mentioned in the Mercer Report is not only contrary to public policy objectives, but has the potential to be offside Mercer's agreements with these counterparties: Public disclosure of such third party information 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 Mercer and third parties. Disclosure will also impair the ability of Mercer and other consultants to provide similar services to Toronto Hydro and other utilities in the future, since the likelihood of comparator entities providing their information will be greatly reduced.

Mercer requests that the redacted information contained in the Mercer Report be treated as confidential.

Mercer is amenable to provision of unredacted copies of the Mercer Report to Parties' counsel and experts or consultants provided that they have executed the Board's form of Declaration and Undertaking with respect to confidentiality and that they comply with the Practice Direction, subject to Toronto Hydro's right to object to the Board's acceptance of a Declaration and Undertaking from any person.

Yours very truly,

A handwritten signature in black ink, appearing to read "Donald S. Webster", with a long horizontal flourish extending to the right.

Donald S. Webster
Chief Counsel & Corporate Secretary