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June 17, 2019

**Delivered by Email, RESS & Courier**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street,  
Suite 2701  
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: OEB File No. EB-2018-0219  
PUC Distribution Inc. ("PUC") Application for 2019 ICM/IRM Rates  
Reply Submissions on Confidential Filing**

1. School Energy Coalition ("**SEC**") and the OEB Staff filed submissions in respect of the PUC Distribution Inc.'s ("**Applicant**") request for confidential treatment of the following materials filed with the Responses to Interrogatories filed on May 31, 2019 pursuant to the Ontario Energy Board's ("**OEB**") *Practice Direction on Confidential Filings* ("**Practice Direction**"):
  - Appendix 9 – Letter of Intent between the Applicant and Energizing, LLC (now named Infrastructure Energy LLC ("**IE**")) ("**LOI**")
  - Appendix 11 – Amendment of Letter of Intent in No. 1 above ("**LOI Amendment**")
  - Appendix 13 – Current working draft version of the main Project Agreement ("**Draft Project Agreement**")
  - Appendix 12 – Schedule to Project Agreement in No. 3 above ("**Draft Project Agreement Schedule**")(collectively as the "**Documents**")
2. The Applicant filed the Documents in confidence in reliance on two prior OEB decisions which held that information of an identical nature were to be held in confidence in their entirety.
3. Specifically:
  - a. In EB-2013-0059 the Board upheld the confidentiality of a commercially sensitive term sheet, and an amending agreement to the term sheet between Tribute Resources, Union Gas and Market Hub Partners Canada LP. The Board agreed the documents were commercially sensitive and therefore should be held in confidence.

The Board noted that they had in the past granted confidentiality status to these types of documents.

- b. In EB-2011-0272, the Board determined that it would grant confidential treatment to a number of commercial contracts filed by Norfolk Power Distribution Inc. including:
  - i. a consulting contract with Util-Assist,
  - ii. a metering supply contract with Sensus,
  - iii. a purchase agreement with General Electric,
  - iv. a smart meter installation contract with Olameter,
  - v. a software agreement with Harris, and
  - vi. a smart meter audit security agreement with Bell Canada.

The OEB found that the counterparties engage in competitive businesses, and that the disclosure of the terms of these agreements could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive positions of, cause undue financial loss to, and be injurious to the financial interests of those businesses, since it would enable their competitors to ascertain the scope and pricing of services provided by these companies.

- 4. The Applicant has forwarded the submissions of SEC and OEB Staff to IE, the third party whose confidential information is the subject of dispute by both SEC and OEB Staff.
- 5. Attached to this letter are the submissions from counsel to IE with regards to their confidential information.
- 6. As explained in the attached letter, following a more detailed review of the Documents, IE is willing to disclose most of the information contained in the Documents and has limited and narrowed their request for confidential treatment to very specific redactions in the two remaining Documents.
- 7. The Applicant supports the submissions of IE with regards to the remaining confidential information.
- 8. In their submissions, OEB staff cited several decisions of the Information and Privacy Commissioner (“**IPC**”) that suggest that contracts, by their very nature, cannot be found to be confidential.

9. The Applicant does not agree. The IPC is a different administrative body and its decisions are not binding on the OEB.
10. Rather, in deciding what should be afforded confidential treatment, the previous decisions of the OEB in EB-2013-0059 and EB-2011-0272 are relevant and should be taken into consideration.
11. That is to say, the OEB has a practice of affording confidential treatment to certain agreements where there is sensitive commercial information that could, if disclosed, harm an entity engaged in a competitive business.
12. The Applicant submits that the Board should grant confidential treatment to the limited redactions included with IE's submissions.
13. The Applicant will file the non-confidential portion of the Documents on the public record. In addition, the Applicant is prepared to provide copies of the confidential material to individuals who have executed and delivered the OEB's Form of Declaration and Undertaking with respect to confidentiality, subject to the Applicant's right to object to the OEB's acceptance of a Declaration and Undertaking from any person.
14. In keeping with the requirements of the Practice Direction, the Applicant is filing two confidential unredacted versions of the LOI Amendment and Draft Project Agreement in hard copy only. The unredacted versions of the documents have been placed in a sealed envelope marked "Confidential". These documents are marked "Confidential", and the Applicant has identified the portions of the documents in respect of which confidentiality is claimed through the use of sidebars ("I") and printed on yellow paper. The Applicant requests that the unredacted documents be kept confidential.

Yours very truly,

**BORDEN LADNER GERVAIS LLP**

Per:

*Original signed by John A. D. Vellone*

John A. D. Vellone

/Encl.

cc: Intervenor of Records in EB-2018-0219  
George Vegh, McCarthy Tétrault LLP  
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June 17, 2019

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, Suite 2700  
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**Re: EB-2018-0219 – PUC Distribution Inc. 2019 IRM/ICM Rate Application – Infrastructure Energy Letter to Ontario Energy Board regarding confidentiality of draft project agreement and schedule to letter of intent submitted in response to Board Staff interrogatory 31(d)**

Dear Ms. Walli:

We are counsel to Infrastructure Energy (“**IE**”). We understand that pursuant to Procedural Order No. 4 in EB-2018-0219, the Ontario Energy Board (“**OEB**”) has requested submissions regarding the confidentiality of four documents submitted to the OEB in response to Board Staff interrogatory 31(d).

As detailed below, IE is amenable to two of the documents in question being disclosed in full on the public record and is requesting very limited, but important, redactions to two of the four documents.

In regards to Appendix 9 – Letter of Intent between PUC and Energizing, LLC (now IE) as well as Appendix 12 – Schedule to Project Agreement (Definitions), IE is amenable to these two documents being placed on the public record in full.<sup>1</sup>

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<sup>1</sup> IE notes that the versions proposed to be placed on the public record are non-blacklined versions of the documents. IE understands that blacklined (i.e., comparison document) versions were submitted (pursuant to the Board’s confidentiality guidelines) with PUC’s IR responses but that there was no particular reason for a blackline/comparison document version to be submitted. Submitting non-blacklined versions to be placed on the public record reduces the number of redactions needed as there is no need to redact notes and comments of third parties which appear in the blacklined versions.

In regards to Appendix 11 – Amendment to Letter of Intent No. 1 and Appendix 13 – Working draft version of Project Agreement<sup>2</sup>, IE has made limited redactions to these two documents in order for the redacted versions to be placed on the public record.

A description of the redactions and reasons for these redactions are set out below.

### ***Working Draft of Project Agreement***

In regards to the redactions applied to the draft Project Agreement, the following six short redactions have been applied: part of section 3.1 including a note to draft; section 3.4 (b); section 3.6 (which section is one sentence); a note to draft in section 8.3(b) (but not the provision itself); a small part of section 9.1(a); and a note to draft in section 14.2(d) (collectively, the “**Project Agreement Redactions**”).

The Project Agreement Redactions have been applied because while the entire project agreement is in draft form and in the process of being negotiated, the notes to draft and provisions in the Project Agreement Redactions could, if placed on the public record, interfere significantly with the negotiations being carried out by parties. More specifically, negotiation by parties of these provisions, which are commercially sensitive in the negotiations, would be impeded by the notes to draft and provisions in the Project Agreement Redactions being placed on the public record at this time.

The risk is that the parties’ negotiating positions on commercially sensitive points will be placed on the public record and result in parties having to negotiate their positions on the public record. This would be prejudicial to all parties. Moreover, for negotiations to be impeded in this manner would ultimately be detrimental to ratepayers.

As a result of the above, the Project Agreement Redactions meet the criteria set out in Appendix A of the Board’s *Practice Direction on Confidential Filings*. Specifically, there is significant potential harm that could result from the disclosure of the Proposed Redactions as parties would be impeded in their negotiations of commercially sensitive issues in the Project Agreement.

IE notes that as the Project Agreement Redactions consist of only six short redactions, they are consistent with Board Staff’s submission that the Project Agreement contains a few specific provisions that could be considered for confidential treatment.<sup>3</sup>

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<sup>2</sup> IE notes that the versions proposed to be placed on the public record are non-blacklined versions of the documents. IE understands that blacklined (i.e., comparison document) versions were submitted (pursuant to the Board’s confidentiality guidelines) with PUC’s IR responses but that there was no particular reason for a blackline/comparison document version to be submitted. Submitting non-blacklined versions to be placed on the public record reduces the number of redactions needed as there is no need to redact notes and comments of third parties which appear in the blacklined versions.

<sup>3</sup> Board Staff submissions on confidentiality page 7.

***Amendment to Letter of Intent No. 1***

In regards to the Amendment to Letter of Intent No. 1, redactions have been made to parts of Schedule D (the “**Amendment Letter Redactions**”). The information redacted in Schedule D is commercially sensitive as it sets out a unique approach to making certain calculations, developed by IE and a third party engineering firm. If placed on the public record, this information could be used by IE’s competitors which would prejudice IE’s competitive position in the business of developing and deploying community microgrid projects in North America.

IE notes that the Amendment Letter Redactions are consistent with Board Staff’s submission that Schedule D “sets out some information which could be used by IE’s competitors”.<sup>4</sup>

***Test under FIPPA section 17(1)***

Should the Board apply the three part test applicable to section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the “**FIPPA**”), the Project Agreement Redactions and Amendment Letter Redactions meet this test:

- One, the content to which the redactions have been applied reveal commercially sensitive information including information that is unique and developed with a third party in the case of the Amendment Letter Redactions;
- Two, the content to which the redactions have been applied was supplied to PUC Distribution with the understanding that it would be kept confidential; and
- Disclosure of the Project Agreement Redactions and Amendment Letter Redactions is likely to result in significant interference with negotiations currently being carried out by parties as well as prejudice to IE’s competitive position in the business of developing and deploying community microgrid projects in North America.

***In conclusion: Board criteria for preserving confidentiality is met***

In conclusion, the Board’s criteria set out in Appendix A of the Board’s *Practice Direction on Confidential Filings* are met by the Project Agreement Redactions and Amendment Letter Redactions and should the Board determine that the test under section 17(1) of the FIPPA should be applied or considered, this test is also met.

Please contact the undersigned with any questions in relation to the foregoing.

Yours Truly,



George Vegh

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<sup>4</sup> Board Staff submissions on confidentiality page 7.