

CITY OF VAUGHAN

EXTRACT FROM COUNCIL MEETING MINUTES OF JANUARY 29, 2013

Item 3, Report No. 2, of the Finance and Administration Committee, which was adopted without amendment by the Council of the City of Vaughan on January 29, 2013.

3 POWERSTREAM REQUEST TO POSTPONE SHAREHOLDER DEBT

The Finance and Administration Committee recommends approval of the recommendation contained in the following report of the Commissioner of Finance & City Treasurer, dated January 21, 2013:

Recommendation

The Commissioner of Finance & City Treasurer recommends:

1. That the Mayor and Clerk be authorized to execute the Postponement Agreement with the Bank of Montreal for backstop financing; and
2. That the Mayor and Clerk be authorized to execute a similar Postponement Agreement in relation to the new debenture issue.

Contribution to Sustainability

Not applicable.

Economic Impact

There is no economic impact associated with this report. Currently there is a postponement agreement in place for PowerStream's financing arrangement with the Toronto Dominion Bank, as well as a PowerStream debenture issued in 2012. Postponing the municipal promissory notes allows PowerStream to obtain lower borrowing rates, which benefits both PowerStream and the shareholders.

Staff has been advised by PowerStream staff that the extension or repayment of the City's Promissory note on the expiry date of May 31, 2024 will not be affected by either of the postponement agreements contemplated in this report.

Communications Plan

Not applicable.

Purpose

The purpose of this report is to obtain Council authority to execute the Postponement Agreement with the Bank of Montreal for PowerStream's backstop financing and a similar Postponement Agreement in relation to the new debenture issue.

Background Analysis and Options

In 2000, the assets and liabilities of Vaughan Hydro Commission were transferred to new Hydro Vaughan corporations incorporated under the *Business Corporations Act (Ontario)*, pursuant to section 142 of the *Electricity Act, 1998*. The majority of the assets were transferred to Hydro Vaughan Distribution Inc. (HVDI) which was allocated to equity and a promissory note from HVDI to the City of Vaughan for \$45,000,000.

On June 1, 2004 PowerStream was formed upon the amalgamation of Hydro Vaughan Distribution Inc., Markham Hydro Distribution Inc. and Richmond Hill Hydro Inc. (jointly owned by

CITY OF VAUGHAN

EXTRACT FROM COUNCIL MEETING MINUTES OF JANUARY 29, 2013

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Vaughan and Markham) As part of the amalgamation agreement, the City of Vaughan and the Town of Markham agreed to adjust the capital structure of their respective utilities insofar that PowerStream's debt to equity ratio would not exceed 65:35 as a percentage of total capital. Prior to closing, in order to ensure that both of the shareholders were treated equally, this adjustment was achieved with the approval of both shareholders through the exchange of common shares for amendments to the promissory notes. In the City of Vaughan's case, this resulted in the Amended and Restated Promissory Note, dated June 1, 2004 in the amount of \$78,236,285 in favour of the City of Vaughan. The note provides for an interest rate of 5.58% and payment is due to the City of Vaughan on May 31, 2024.

On January 8, 2013, PowerStream Inc. issued a notice to each of its shareholders advising of the upcoming Toronto Dominion Commercial debenture for \$50 million coming due in February 2013, which PowerStream intends to refinance. In the event that there is market volatility at the time the TD debenture comes due, PowerStream is putting a financial backstop with BMO Nesbitt Burns in place to ensure that PowerStream has access to capital to refinance the TD debenture.

Included in the January 8, 2013 notice from PowerStream is a request that each of the City of Vaughan, Town of Markham and City of Barrie sign a postponement agreement with BMO, effectively subordinating their promissory notes to the backstop financing. The postponement agreement is essentially the same as the postponement agreement approved by Council in June of 2012. As the promissory note is held by the City of Vaughan, not Vaughan Holdings Inc., the City must authorise the postponement. In addition, PowerStream notes in their letter that when the TD debenture is refinanced, the City will have to sign a similar postponement agreement in relation to the new debenture issue. The details regarding the postponement agreement for the new debenture issue are not known at this time.

Vaughan's promissory note was subordinate to the TD debenture, pursuant to section 4.1 of the Amended and Restated Promissory Note and Vaughan further agreed in section 4.2. to subordinate its debt to other debt issued by PowerStream from time to time. Although these clauses requiring subordination are included in the Amended and Restated Promissory Note issued by PowerStream, Vaughan, Markham and Barrie sought an outside legal opinion in this regard and based on legal advice, the postponement agreements require Council approval.

Relationship to Vaughan Vision 2020

Not applicable.

Regional Implications

No Implications.

Conclusion

Staff recommends that the Mayor and Clerk be authorized to execute the Bank of Montreal postponement agreement for backstop financing. It is also recommended the Mayor and Clerk be authorized to execute the postponement agreement for PowerStream's new debenture issue refinancing the TD debenture.

Attachments

Attachment 1 – Postponement Agreement

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EXTRACT FROM COUNCIL MEETING MINUTES OF JANUARY 29, 2013

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Report prepared by:

Barbara Cribbett, CMA
Commissioner of Finance & City Treasurer

(A copy of the attachments referred to in the foregoing have been forwarded to each Member of Council and a copy thereof is also on file in the office of the City Clerk.)

POWERSTREAM REQUEST TO POSTPONE SHAREHOLDER DEBT**Recommendation**

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Attachment 1 – Postponement Agreement

Report prepared by:

Barbara Cribbett, CMA
Commissioner of Finance & City Treasurer

Respectfully submitted,

Barbara Cribbett, CMA
Commissioner of Finance & City Treasurer

POSTPONEMENT AGREEMENT

THIS POSTPONEMENT AGREEMENT is entered into as of January ____, 2013 among The Corporation of the City of Barrie ("**Barrie**"), The Corporation of the City of Markham ("**Markham**") and the Corporation of the City of Vaughan ("**Vaughan**") and together with Barrie and Markham, the "**Cities**" and individually, a "**City**", PowerStream Inc. (the "**Borrower**") and Bank of Montreal (the "**Bank**").

WHEREAS:

A. The Borrower is now and may hereafter become further indebted or otherwise liable to the Bank pursuant to a credit agreement dated as of February ____, 2013 between the Borrower and the Bank (the "**BMO Credit Agreement**") or otherwise in connection with any present or future agreement of any nature or kind from time to time in effect between the Borrower and the Bank, including without limitation, any account, loan, credit, cash management, derivative or other financial services agreement or indemnities for letters of credit or bankers' acceptances (collectively, the "**Bank Documents**");

B. The Borrower is now indebted to Barrie pursuant to an amended and restated promissory note in the principal amount of \$20,000,000 dated December 31, 2008 issued by the Borrower in favour of Barrie (the "**Barrie Note**");

C. The Borrower is now indebted to Markham pursuant to an amended and restated promissory note in the principal amount of \$67,866,202 dated June 1, 2004 issued by the Borrower in favour of Markham (the "**Markham Note**");

D. The Borrower is now indebted to Vaughan pursuant to an amended and restated promissory note in the principal amount of \$78,236,285 dated June 1, 2004 issued by the Borrower in favour of Vaughan (the "**Vaughan Note**" and together with the Barrie Note and the Markham Note, the "**City Notes**");

E. The parties hereto wish to enter into this Agreement so as to set out the priorities between the Bank Debt and the present and future indebtedness, obligations and liabilities of the Borrower to each of the Cities arising under or in connection with the City Notes, whether on account of principal, interest, premium, fees, expenses, damage claims or otherwise (collectively, the "**City Notes Debt**");

NOW THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and adequacy of which are hereby irrevocably acknowledged by each party hereto, the parties agree as follows:

1. Defined Terms. In this agreement, unless the context otherwise requires, the following words and phrases shall have the meanings set forth below:

"**Bank Debt**" means all present and future indebtedness, obligations and liabilities of any nature or kind of the Borrower to the Bank arising under or in

connection with the Bank Documents (whether on account of principal, interest, premium, fees, expenses, damage claims or otherwise).

“**Debt**” means, collectively, the City Notes Debt and the Bank Debt.

“**Default**” means any default by the Borrower under any Bank Document.

“**Documents**” means the Bank Documents and each of the City Notes and
“**Document**” means any one of the Documents.

“**Insolvency Law**” means any of the *Bankruptcy and Insolvency Act* (Canada), the *Companies’ Creditors Arrangement Act* (Canada), the *Winding-Up and Restructuring Act* (Canada) and any similar Canadian or provincial corporation statutes, including without limitation, corporate statutory provisions dealing with arrangements, assignment and preference statutes and fraudulent conveyance legislation, each as now and hereafter in effect, including any successor legislation to such legislation and statutes, and any other applicable insolvency, preference or other similar laws of any jurisdiction.

“**Insolvency Proceeding**” means (a) any voluntary or involuntary case or proceeding under any Insolvency Law with respect to the Borrower; (b) any other voluntary or involuntary insolvency, compromise, arrangement, reorganization or bankruptcy case or proceeding, or any receivership, liquidation, reorganization or other similar case or proceeding with respect to the Borrower or with respect to a material portion of its assets or its creditors and others; (c) any liquidation, dissolution, reorganization, compromise, arrangement or winding-up of the Borrower whether voluntary or involuntary and whether or not involving insolvency or bankruptcy; (d) any assignment for the benefit of creditors or any other marshalling of assets and liabilities of the Borrower; or (e) the appointment of a trustee, receiver, receiver-manager, interim receiver, monitor, liquidator, custodian, sequestrator, conservator or any similar official for the Borrower or for or in respect of a substantial part of the property or assets of the Borrower.

“**Notice of Default**” means a written notice delivered by the Bank to each City of a Default.

“**Person**” includes any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership (whether general or limited), governmental authority or other legal entity.

2. Restriction on City Notes Payments.

(1) No Subordinated Debt Principal Payments. Unless previously consented to in writing by the Bank and as otherwise permitted in this Section 2, no payments (whether on account of principal, interest, premium, indemnification, fees, expenses or otherwise) in respect of any of the City Notes may directly or indirectly be paid by the Borrower to any of the Cities or received and retained by any of the Cities in cash or other property or by set-off or any other manner prior to the payment in full of all Bank Debt.

(2) Permitted Subordinated Debt Interest Payments. The Borrower may pay to each of the Cities, and each of the Cities may receive and retain (x) regularly scheduled quarterly cash interest payments in respect of the principal amount of each of the City Notes in accordance with the terms and conditions thereof (as currently written) in an amount not exceeding 5.58% per annum and (y) such other payments as are from time to time permitted pursuant to the terms of the BMO Credit Agreement; provided that upon the delivery of a Notice of Default by the Bank to each of the Cities, no amounts which would otherwise be permitted to be paid by the Borrower to, and accepted by, any of the Cities pursuant to this Section 2(2) shall be paid by the Borrower to or accepted by any of the Cities.

3. Payments Held In Trust. Should any payment be received by any of the Cities upon or with respect to any of the City Notes prior to the payment in full of the Bank Debt (other than a payment expressly permitted pursuant to Section 2), then the applicable City shall forthwith deliver the same to the Bank in the form received (except for endorsement or assignment by such City where reasonably required by the Bank) and until so delivered the same shall be held in trust by such City as the property of the Bank. Each of the Cities agrees that in the event that all or any part of any payment made on account of the Bank Debt is recovered from the Bank pursuant to any Insolvency Proceeding as a preference, fraudulent transfer or similar payment under any Insolvency Law, any payment or distribution received by any of the Cities from the Borrower on any of the City Notes (other than a payment expressly permitted pursuant to Section 2 within the one year period prior to any Insolvency Proceeding) shall be deemed to have been received by such City in trust for the Bank and shall promptly be paid over to the Bank for application to the Bank Debt until the Bank Debt is paid in full. The Borrower agrees to make all payments (or, as applicable, shall refrain from making payments) to the Bank and each of the Cities in compliance with this Agreement.

4. Payment of Bank Debt. Nothing herein contained shall prevent, limit or restrict the Bank in any manner from exercising all or any of its rights and remedies otherwise permitted by applicable law or under the terms of the Bank Documents. For the purposes of this Agreement, the Bank Debt shall be deemed not to be paid in full until the Bank has received cash in an aggregate amount equal to the Bank Debt at that time or other provision satisfactory to the Bank for payment of the Bank Debt in full has been made and all commitments and other obligations of the Bank to extend credit, make a payment or provide or continue other financial services to the Borrower under all Bank Documents have been permanently cancelled.

5. Postponement and Subordination.

(1) Postponement and Subordination. The City Notes Debt is hereby and shall hereafter be postponed and subordinated, on the terms set forth herein, to the prior payment in full of, and shall rank junior and subordinate in all respects to, the Bank Debt.

(2) Insolvency Proceedings. The parties hereto agree that if an Insolvency Proceeding is commenced by a Person other than any of the Cities or the Borrower, each of the Cities shall be entitled to participate in such Insolvency Proceeding and to vote its City Notes Debt and otherwise exercise its rights as a creditor during such Insolvency Proceeding; provided that (i) none of the Cities shall be entitled to apply to the court for relief from the stay provisions of such Insolvency Proceeding, (ii) nothing in this Section 5(2) shall entitle any of the Cities to,

and each of the Cities agrees not to, initiate an Insolvency Proceeding, and (iii) none of the Cities shall vote its City Notes Debt in favour of a plan or other proposal under an Insolvency Proceeding that would defeat (A) the priority of the Bank Debt provided for hereunder or (B) the rights of the Bank under this Agreement.

(3) Each of the Cities agrees that all dividends, distributions or other sums which may be or become payable in respect of the City Notes Debt pursuant to any Insolvency Proceeding shall be subject to Section 3.

6. No Challenge, Discharge, Release.

(1) **No Challenge.** None of the Cities will, in any manner, contest or bring into question the validity, priority, perfection or enforceability of the Bank Documents or the rights of the Bank thereunder or hereunder, and each of the Cities agrees that the postponement of the City Notes Debt pursuant to the terms hereof shall not be affected by the invalidity, unenforceability or imperfection of any Bank Document or any security contemplated thereby.

(2) **Further Assurances.** Each of the Cities agrees to execute and deliver, upon request by the Bank, such further instruments and agreements as may be reasonably required by the Bank to confirm and give effect to the provisions of this Agreement. Each of the Cities agrees to execute and deliver, upon request by the Bank, such further instruments and agreements as may be reasonably required by the Bank to confirm and give effect to the provisions of this Agreement.

7. Insolvency Proceedings. In the event of any Insolvency Proceeding, the Bank shall be entitled to receive and retain any payment, distribution or security proceeds upon or with respect to the Bank Debt prior to and in preference to any such payment, distribution or security or proceeds to any of the Cities upon or with respect to the City Notes Debt, and, in order to implement the foregoing, the City hereby agrees to account to the Bank in respect of all sums received on account of the City Notes Debt imposed with a trust pursuant to Section 3 hereof.

8. Continuing Agreement. This Agreement shall constitute a continuing agreement and shall continue until the Bank Debt has been paid in full.

9. Dealings with Borrower. At any time, and from time to time, the Bank may deal with the Borrower in any manner which it sees fit in accordance with the terms of the Bank Documents and applicable law. The Bank shall have no liability of any nature or kind (in contract, tort or otherwise) to any of the Cities should any such dealings (including those described below), knowingly or unknowingly, constitute or result in a breach under any of the City Notes.

10. Amendments to City Notes. Neither Borrower nor any of the Cities may amend, modify or otherwise vary the terms and conditions of any of the City Notes unless such amendment, modification or variation is not material.

11. Amendments to Senior Debt. The Borrower and the Bank may amend, modify or otherwise vary the terms and conditions of the Bank Documents and enter into new Bank

Documents. The City hereby consents to any such amendment, modification or variation to the Bank Documents and any new Bank Document.

12. Sharing of Information. The Borrower agrees that the Bank and any of the Cities may share between themselves any information regarding the financial position, property and/or operations of the Borrower and that any such sharing of information shall not breach any express or implied duty of confidentiality to which any party hereto might otherwise be subject.

13. No Waivers. No waiver shall be deemed to be made by any party hereto of any of the rights of such party hereunder unless the same shall be in writing and signed by such party and each such waiver, if any, shall be a waiver only with respect to the specific matter or matters to which the waiver relates and shall in no way impair the rights of such party except as expressly set forth therein.

14. Successors and Assigns. This Agreement shall be binding on the parties hereto and their respective successors and permitted assigns and shall enure to the benefit of the Bank and each of the Cities and their respective successors and permitted assigns; provided that neither the Bank nor any of the Cities may assign or transfer, in whole or in part, its rights under the Documents to which it is a party or granted in its favour or its rights in respect of the Debt owing to it unless the assignee or transferee contemporaneously therewith becomes bound by this Agreement in its place and stead.

15. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario, including the federal laws of Canada applicable therein, but excluding choice of law rules.

16. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and there are no representations, warranties or other agreements between the parties in connection with the subject matter hereof except as specifically set forth herein.

17. Communication. All communications provided for or permitted hereunder shall be in writing, personally delivered to an officer of the addressee or sent by facsimile, in each case, to the applicable address set forth on the signature page of this Agreement or to such other address as a party hereto may from time to time designate to the other parties in such manner. Any communication so personally delivered shall be deemed to have been validly and effectively given on the date of such delivery. Communications so sent by facsimile shall be deemed to have been validly and effectively given on the business day next following the day on which it is sent.

18. Borrower Bound. By executing this Agreement, the Borrower acknowledges the existence of this Agreement and agrees to be bound by its terms; provided, however, that nothing in this Agreement shall confer or be deemed to confer any right, benefit or advantage on the Borrower.

19. Several Obligations. The parties hereto agree that the rights and obligations of each of the Cities under this Agreement are several and not joint and several.

20. Counterparts. This Agreement may be executed in any number of counterparts, and in original, facsimile or electronic "PDF" format, each of which when executed and delivered, (including personal delivery or delivery by facsimile or in electronic "PDF" format) shall be deemed to be an original, but all of which, when taken together, constitute one and the same instrument.

21. Amendments. This Agreement may not be amended except pursuant to an agreement in writing entered into by the Borrower, the Bank and each of the Cities; provided, however, that no consent of the Borrower shall be necessary to any amendment of the terms hereof unless the obligations of the Borrower are adversely affected thereby; provided that the Borrower shall not be bound by any amendment to which it is not a party.

[Signatures to follow on next page]

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement as of the date first above written.

The Corporation of the City of Barrie

Address: _____

Attention: _____
Facsimile: _____

**THE CORPORATION OF THE CITY OF
BARRIE**

By: _____
Name:
Title:

By: _____
Name:
Title:

The Corporation of the City of Vaughan

Address: _____

Attention: _____

Facsimile: _____

**THE CORPORATION OF THE CITY OF
VAUGHAN**

By: _____

Name:

Title:

By: _____

Name:

Title:

The Corporation of the Town of Markham

Address: _____

Attention: _____
Facsimile: _____

**THE CORPORATION OF THE CITY OF
MARKHAM**

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

PowerStream Inc.

Address:
161 Cityview Boulevard
Vaughan, Ontario
L4H 0A9

Attention: John Glicksman
Facsimile: (905) 532-4505

POWERSTREAM INC.

By: _____
Name:
Title:

By: _____
Name:
Title:

Bank of Montreal

Address:
100 King Street West
4th Floor
Toronto, Ontario
M5X 1H3

Attention: Sean Gallaway

Facsimile: (416) 359-7796

TOR_LAW\ 8072608\3

BANK OF MONTREAL

By: _____
Name: Sean P. Gallaway
Title: Vice President