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November 30, 2009

BY EMAIL & COURIER

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

Dear Ms. Walli:

**Board File No. EB-2009-0180/ EB-2009-0181/
EB-2009-0182/ EB-2009-0183
Re: Applications by Toronto Hydro Energy Services Inc.,
Toronto Hydro-Electric System Limited & 1798594 Ontario Inc.
Energy Probe Redacted Argument**

Pursuant to the Board's letter, dated November 26, 2009, attached please find two hard copies of the Redacted Argument of Energy Probe Research Foundation (Energy Probe) in the consolidated proceeding noted above. The Unredacted Argument will be filed when a list of those parties that filed a confidentiality Declaration and Undertaking is obtained from Board staff. An electronic version of this Intervention will be forwarded in PDF format.

Should you require additional information, please do not hesitate to contact me.

Yours truly,

David S. MacIntosh
Case Manager

cc: Mark Rodger, Borden Ladner Gervais LLP (By email)
Pankaj Sardana, Toronto Hydro-Electric System Limited (By email)
Chris Tyrrell, Toronto Hydro Energy Services (By email)
Lawrence Wilde, 1798594 Ontario Inc. (By email)
Peter Faye, Counsel to Energy Probe (By email)
Intervenors of Record (By email)

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Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application pursuant to section 60 of the *Ontario Energy Board Act, 1998* by 1798594 Ontario Inc. seeking an electricity distribution licence;

AND IN THE MATTER OF an application pursuant to section 86(1)(a) of the *Ontario Energy Board Act, 1998* by Toronto Hydro Energy Services Inc. seeking an order granting leave to sell streetlighting assets as an entirety or substantially as an entirety to 1798594 Ontario Inc.;

AND IN THE MATTER OF an application pursuant to section 86(1)(b) of the *Ontario Energy Board Act, 1998* by Toronto Hydro Energy Services Inc. seeking an order granting leave to sell streetlighting assets necessary in serving the public to 1798594 Ontario Inc.;

AND IN THE MATTER OF an application pursuant to section 86(1)(c) by Toronto Hydro-Electric System Limited and 1798594 Ontario Inc. seeking leave to amalgamate;

AND IN THE MATTER OF a request pursuant to section 77(5) of the *Ontario Energy Board Act, 1998* by 1798594 Ontario Inc. and Toronto Hydro-Electric System Limited seeking the cancellation of their distribution licences.

AND IN THE MATTER OF an application pursuant to section 60 of the *Ontario Energy Board Act, 1998* by Toronto Hydro-Electric System Limited for an electricity distribution licence.

**Final Argument On Behalf Of
Energy Probe Research Foundation
("ENERGY PROBE")**

November 30, 2009

TORONTO HYDRO-ELECTRIC SYSTEM LIMITED ET AL

EB-2009-0180/81/82/83

Final Argument On Behalf Of

Energy Probe Research Foundation

How these Matters came before the Board

1. On June 15, 2009, Toronto Hydro Corporation's ("Toronto Hydro") subsidiaries, 1798594 Ontario Inc. ("NewCo"), Toronto Hydro Energy Services Inc. ("THESI") and Toronto Hydro-Electric System Limited ("THESL") filed applications with the Ontario Energy Board (the "Board") under sections 60(1), 86(1)(a)(b)(c) and 77(5) of *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B) (the "Act"). The Board assigned the applications file numbers EB-2009-0180, EB-2009-0181, EB-2009-0182 and EB-2009-0183.
2. The Board issued a Notice of Applications and Hearing on July 21, 2009. The Notice was sent to all electrical distributors in Ontario among other parties. Energy Probe filed a Notice of Intervention on July 28, 2009, as a full time intervenor.
3. Energy Probe filed Interrogatories on September 10, 2009, and the Applicant filed Interrogatory Responses on September 25, 2009.
4. The Oral Hearing took place on November 17 and 19, 2009. On November 17, Energy Probe took an active part in cross examination of the Applicants' Witness Panel. On November 19, after cross examination was completed, Counsel for the Applicants, Mr. Rodger, gave an oral Argument-in-Chief.

Argument Overview

5. **Energy Probe has conducted itself as an all issues intervenor throughout this proceeding. The issues in this proceeding were narrow in scope.**

6. **In its Argument, Energy Probe will not seek to explore all aspects of the Issues before the Board, but will be examining those areas of concern to Energy Probe where we believe we can be of most assistance to the Board. Energy Probe has therefore focused its submissions on the areas of evidence in which it filed Interrogatories and pursued cross-examination.**

Final Argument

7. **This application for THESL to acquire the City of Toronto street lighting system from its affiliate THESI has, in Energy Probe's submission, been prompted primarily by the contact voltage problems experienced in winter of 2009.**

8. **Mr. LaPianta's affidavit in evidence at Section B, Tab 6, sets out the arguments for acquiring the street lighting system. Energy Probe understands those arguments to be primarily focused on resolving public safety concerns and secondarily on eliminating inefficiencies arising from having both THESL and THESI involved in the system.**

9. **Energy Probe agrees with the Applicants that clarity of demarcation points is essential to avoid public safety hazards caused by contact voltage. One agency should be both owner and operator of the supply conductors to all customer loads and it makes sense that the distributor should be that agency. Therefore, Energy Probe supports the transfer of street light conductors, connectors and handwells to THESL.**

10. The demarcation point of ownership could then be established as the connection to that supply conductor. This would result in THESL having control of both the handwells and the connections inside them. THESI would retain ownership of the service wire from the load side of the handwell connector to the luminaire along with any dedicated poles and hardware on which the luminaire is mounted. In cases where the luminaire and bracket are mounted on THESL distribution poles, THESI would continue to own the bracket, luminaire and wiring on the load side of the connection to the distributor's secondary system.

11. Energy Probe believes that this action will allow THESL to secure handwells and control who can make connections to the system. It will also allow THESL to maintain accurate records of the system to assist in troubleshooting and repair of faulty components. By giving THESL this control, it should be possible to prevent a recurrence of the public safety concerns that arose with contact voltage problems.

12. The rationale for transferring the remaining street lighting assets, namely poles, hardware and lighting fixtures, is, in Energy Probe's submission, less clear. These components were not the cause of the contact voltage problems so that transfer cannot be predicated on a public safety basis.

Applicant's Rationale for Assuming Poles, Hardware and Lighting Fixtures

13. The affidavit evidence of Mr. LaPianta provides alternate rationales for assuming those other streetlighting assets. One of these is described in sections 15-16 of his affidavit under the heading of *Service Levels and Efficiency Concerns*. The scenario described in those sections involves inefficiencies of THESI and THESL crews having to respond to trouble calls because the source of the trouble cannot be determined without a field visit.

14. If the proposal in (9) above to transfer street light supply conductors to THESL is implemented then every trouble call would be responded to by THESL as a no power call. If the trouble turns out to be in the luminaire or the service conductor leading from the handwell to the luminaire, THESL would notify THESI that the problem is not on the THESL system, just as it notifies any other customer when the trouble turns out to be on the customer's system. If THESL and THESI wish, they can enter into a servicing agreement whereby THESL's trouble crew can make repairs to THESI's system and charge costs back to THESI. Energy Probe submits that this would address the concern about inefficiency without requiring the transfer of street light poles, hardware, internal wiring and luminaires to THESL.

15. Sections 17-21 of Mr. LaPianta's affidavit describe the possible consequences of demarcation confusion. Transferring the street light supply conductors and handwells to THESL will, in Energy Probe's submission, eliminate demarcation confusion and resolve the situations described in these sections.

16. Sections 22-31 of the affidavit describe the complications resulting from *Affiliate Relationship Code* restrictions on information sharing between affiliates. The issues raised in these sections relate almost exclusively to demarcation confusion which, again, in Energy Probe's submission, would be resolved if THESL assumes ownership of the street light supply conductors, connectors and the handwells.

17. The Applicant also argues that because it makes use of street light poles, brackets and luminaries for temporary supply to other unmetered scattered loads, these assets should also be transferred to it. This argument is, in Energy Probe's submission, overstated for the following reasons.

18. First, the number of scenarios in which these temporary attachments to street lighting assets must be made are very limited. The Applicant's witness confirmed this when asked for other examples of THESL having to attach temporary overhead conductors to street light poles and hardware to feed a traffic signal when the underground supply was interrupted. (Transcript, Volume 1, Page 134, lines 7-10).

19. Second, these are temporary connections that are intended to be removed once the underground supply is restored. Temporary use, in Energy Probe's submission, is not a persuasive reason to transfer the assets.

20. Third, it is Energy Probe's understanding that joint use agreements are common in the distribution industry to permit use of poles owned by other parties. THESL and THESI may not have a formal joint use agreement but their practices suggest that an unwritten agreement exists to permit temporary use of street light assets by THESL when necessary. Energy Probe submits that, if needed, a formal agreement modeled after joint use agreements with telephone and cable television providers, could be entered into between the parties without a great deal of trouble.

Argument-in-Chief of the Applicants

21. The Applicants' counsel in his submissions raised additional arguments in support of transferring the entire streetlighting system from THESI to THESL.

22. The first of these concerns the possible reasons for Ontario Hydro mandating the transfer of street light systems to the municipality in 1985. The Applicant suggests that Ontario Hydro was attempting to limit municipal influence over the distributor on how new streetlighting systems were designed and constructed, the so called "Porsche vs. Prius" analogy that appears in the Transcript, Volume 2 at Page 77, lines 14-27. The argument seems to be that distributors were influenced by municipal officials to install higher cost decorative lighting systems in lieu of lower cost, less decorative systems and that this was a misuse of capital resources that could have been better deployed for system improvements.

23. It is Energy Probe's understanding that when upgraded street lighting poles and luminaires were requested in a development, the developer paid for the difference between the cost of the standard system and the upgraded system as a capital contribution. Therefore, distributor capital resources were not devoted to decorative lighting expenses and, Energy Probe submits, it is unlikely that the cost of decorative lighting was the issue that prompted Ontario Hydro's decision to have street lighting systems transferred to municipalities. It is more likely, in Energy Probe submission, that the decision was based on the fact that streetlighting is a utilization system not a distribution system and consequently not something that distributors should be involved in.

24. The second argument in the Applicant's submissions concerns the supposed dysfunctionality of the status quo starting in the Transcript, Volume 2, at line 21 on Page 78. Some of this argument has already been addressed in Energy Probe's submissions above so won't be repeated here.

25. One component of the Applicant's submissions that is not addressed above is the question of Electrical Safety Authority ("ESA") oversight referenced in the Transcript, Volume 2, starting at line 4 on Page 79. Here the argument is made that ambiguous demarcation points makes it difficult to determine what part of the system falls under O.Reg, 22/04, in which the distributor is self regulating and what part falls under the Electrical Safety Code which is regulated by the ESA.

26. Energy Probe submits that transferring the streetlighting handwells, conductors, and connectors to THESL would permit establishing clear demarcation points that would eliminate the confusion that appears to exist now. The demarcation point would become the connector where service wires feeding either the streetlights or other unmetered scattered load are connected to the distribution system. This, in Energy Probe's submission, will eliminate uncertainty around what regulatory regime applies to inspection of the system.

27. The safety concerns raised in the Applicant's submissions starting at line 6 on Page 80 of the Transcript, Volume 2 would also be eliminated by transferring conductors, connectors and handwells to THESL. Scenarios in which temporary overhead supplies to streetlights remain in service after the underground supply is restored would not occur because THESL would be responsible for providing the temporary supply during the time the underground supply is unavailable. It is unlikely, therefore, that THESL would overlook removing a temporary supply that it originally installed.

28. The third theme of the Applicant's submission starting at Page 81 of the Transcript, Volume 2, concerns the inefficiencies that result from THESI ownership of the streetlighting system. Most inefficiency concerns have been addressed earlier in these submissions and Energy Probe concludes that transfer of handwells, conductors and connectors to THESL would eliminate the problems referred to because they are all related to the electrical part of the system not the poles, hardware and luminaires.

29. The fourth theme in the Applicant's submissions starting on Page 84 concerns the definition of the term "distribute". Energy Probe does not dispute the definition "*to convey electricity at voltages of 50 kilovolts or less*" but points out that this definition could be read to include all electrical wiring in all utilization equipment. For example, residential appliances and lighting all operate from conductors running at 120/240 volts. No one seriously argues, though, that house wiring should be part of the distributor's system. The wiring from a connector in the distributor's handwell that Energy Probe proposes should be part of THESL's system is likewise running at a voltage that would nominally fall within the definition of "distribute" but only because the definition is so expansive as to capture every utilization conductor everywhere. Energy Probe submits that the definition of "*distribute*" was intended to differentiate distribution from higher voltage transmission systems and the word "*convey*" within that definition was not intended to include utilization wiring. If it were otherwise, the definition would be of no help in defining the extent of a distributor's system, a purpose that was clearly in mind when the OEB Act, 1998 was drafted.

30. The Applicant provides a definition of a distribution system at lines 11-14 of the Transcript, Volume 2, Page 85. This definition includes structures and equipment used to distribute electricity. Energy Probe does not argue with the definition but points out that it was intended to be read in the context of what “*distribute*” means. If, as Energy Probe contends, distribution was not intended to include utilization wiring, then street lighting poles that house that wiring were not intended to be included in the “*structures and equipment*” referred to in the definition of a distribution system. Therefore, the argument that these poles and hardware are used to distribute electricity is a misunderstanding of the intent of the legislation.

31. The Applicant’s submissions on the subject of the luminaire bulb are superfluous if Energy Probe’s proposal to transfer only the street light conductors, connectors and handwells to THESL is accepted. However, should the Board decide to permit transfer of the poles, hardware and luminaire to THESL, Energy Probe agrees with the Applicant that leaving the bulb with another agency is not sensible or necessary.

32. The fifth theme of the Applicant’s submission starting at line 9 of Page 93 of the Transcript Volume 2, is a discussion of the test the Board applies in the case of merger applications. This is the “no harm” test and Energy Probe agrees with the Applicant that it is the appropriate test in determining whether or not to permit a merger of distributors.

33. Energy Probe submits, however, that the Board does not have sufficient information before it in this application to determine whether or not the no harm test is satisfied. Much of this information is, in Energy Probe’s submission, related to valuation of the assets to be transferred.

Valuation of the Assets to be Transferred

34. [REDACTED]

35. Energy Probe submits that the Board's practice in distributor amalgamations has been to allow book value of the assets into rate base not market value. Therefore, the valuation of \$60 M should not be accepted as a reasonable substitute for book value.

36. [REDACTED]

37. Energy Probe is also concerned that no comprehensive physical inspection of the system was undertaken to establish the condition of the assets when THESI acquired them in 2005. The Applicant has suggested in the contact voltage cost recovery proceeding that the streetlighting supply system probably requires extensive rebuilding. (see EB-2009-0243 transcript line 14 page 110 to line 1 page 112). There is no estimate of how much that cost will be and, without that cost, Energy Probe submits that it is impossible to assess the value of the assets proposed to be transferred in this proceeding.

38. Energy Probe has submitted interrogatories on the expected cost of rebuilding the streetlighting system in the THESL cost of service application (EB-2009-0139) but THESL has not yet responded to interrogatories. Energy Probe submits that the Board might want to delay its decision in this application until the cost of service application is complete in order to gain a better understanding of the potential cost of rebuilding the street lighting system.

39. The third concern is that street lighting systems in new “greenfield” developments are usually financed by developers (see the City of Toronto Services Agreement with THESI filed at Section F, Tab 19, Schedule 4, Appendix E, Page 14, Section 2.7). It is Energy Probe’s understanding that, in the distribution business, developer funded assets fall into the category of contributed capital which distributors cannot include in rate base.

40. There is no evidence on the record about how much of the asset value proposed for transfer in this application was acquired by the City and THESI as contributed capital. Energy Probe submits that the Board might want to consider whether contributed capital should be excluded from the asset value should it decide to approve the transfer. The rationale for excluding contributed capital from the asset value would be based, in Energy Probe’s submission, on the principle that a distributor should not be able to do by indirect means what it is prohibited from doing directly, that is, including contributed capital in rate base.

Energy Probe Summation

41. In summary, Energy Probe believes that this application would not have come before the Board had public safety issues not arisen from the contact voltage incident. Therefore, Energy Probe submits that the Board should evaluate the application from the point of view of responding to the public safety issues inherent in THESL not having complete control of the supply system to street lights and other unmetered scattered load.

42. Energy Probe submits that transferring the secondary conductors, connectors and handwells presently owned by THESI to THESL will resolve the safety issues. Transfer of the streetlighting poles, hardware, internal wiring and luminaires is unnecessary to resolve safety concerns and sets a precedent of permitting distributors to own utilization equipment rather than just distribute power to customers. The eventual consequences of such a change in Board policy have not, in Energy Probe's submission, been properly studied and should not be undertaken in this application if it is not necessary to resolve the problems that prompted the application.

Costs

43. Energy Probe submits that it participated responsibly in this proceeding. Energy Probe requests the Board award 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 30, 2009

Peter Faye

Counsel to Energy Probe Research Foundation