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January 21, 2011

**Delivered by Courier**

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

Dear Ms. Walli

**Re: Toronto-Hydro Electric System Limited ("THESL") - EDR 2011  
OEB File No. EB-2010-0142  
Confidential Filings**

We are writing in response to the submissions of the School Energy Coalition ("SEC") dated January 20, 2011 with respect to THESL's claim for confidential treatment of certain documents.

THESL again adopts and wishes to emphasize its submissions made on December 23, 2010 and January 6, 2011 in respect of the THC Business Plan 2011-2015 (the "Business Plan") and the Term Contract for Civil and Electrical Design Build Services (the "Agreement").

In addition, THESL makes the following submissions in response to SEC's submissions:

**1. Consistency in the Treatment of Information**

The Board has recognized in Appendix C of its *Practice Direction on Confidential Filings* (the "Practice Direction") that "consistency in the treatment of information is desirable", although the Board notes that the issue of confidentiality of any type of information must be addressed on a case-by-case basis. The appendix goes on to provide an illustrative list of the types of information previously assessed or maintained by the Board as confidential. In THESL's previous rate case (EB-2007-0680), the Board determined that information presented by senior management to the Toronto Hydro Board of Directors, which is substantially similar to the Business Plan at issue in this proceeding, met, in its entirety, the Board's criteria for confidential treatment. THESL submits that the Board's past practice in respect of this type of information should guide and inform the Board's treatment of Business Plan in this proceeding.

**2. Sensitive Financial and Commercial Material**

THESL submits that the Business Plan consists of financial and commercial material that is consistently treated in a confidential manner by THESL. THESL notes that each and every page of the Business Plan is explicitly marked as "confidential". In addition, Toronto Hydro submits that the information contained in the Business Plan falls within the scope of several exemptions provided under Section 17 of FIPPA, including:

- The Business Plan contains financial and commercial information that belongs to an institution and has monetary value or potential monetary value;
- The Business Plan contains information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- The Business Plan consists of plans relating to the management of personnel and the administration of an institution that have not yet been put into operation or made public; and
- The Business Plan contains 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.

THESL submits that SEC's submissions mischaracterize the nature of the information in the Business Plan by failing to appreciate the strategic importance of the order and contents of the information as it relates to THESL's proposed plans for operations over the next five years.

The Ontario Information and Privacy Commissioner ("IPC") has previously determined that similar records should be kept confidential. Specifically, in IPC Order PO-2019, the IPC found that "a document that contained confidential financial information from Ontario Power Generation including valuations", "a document that contained detailed financial analysis, including commercially sensitive business plan information", and a "slide presentation [...] that contains financial and commercial information" qualified as commercial and financial information and was found to be exempt from the general rule of public access.

The Business Plan also contains commercial and financial information of third party affiliates of THESL which was supplied in confidence and which if disclosed could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of these affiliates and could result in undue loss to these affiliates.

Finally, it is worth noting that the Business Plan contains pro-forma financial information that THESL is not required to disclose nor does it typically disclose as part of its securities disclosure obligations. This pro-forma financial information is, by its very nature, a snapshot of expected outcomes which is at best speculative.

### **3. Securities Law Obligations**

As regards the securities' law implications of disclosure of the Business Plan, the SEC has mischaracterized THESL's reasons for objecting to such disclosure on this ground. It is not simply that, because the forward-looking statements have not been disclosed, they cannot be disclosed under Ontario securities' law, as suggested on page 2 of their submission. Rather, the point is that Ontario securities laws contain strict requirements around disclosure of forward-looking information, including what additional information must be provided, the time period covered and the issuer's policy on updating. The underlying premise is that the information is being provided to investors for purposes of making investment decisions and future information

is, by its very nature, less reliable than ordinary factual information and, therefore, additional safeguards are needed in connection with its release.

The Business Plan is not prepared as a document for investors, but as a planning tool and a basis for decision-making by the Board of THC and THESL. It does not contain the additional disclosure mandated by securities laws and is therefore not appropriate for public disclosure.

It is important to remember that, as a result of relatively recent amendments to the *Securities Act* (Ontario), public issuers (and their officers and directors) may be sued by investors for misleading statements which are released. As a result, public issuers are very careful about what they release to the public. In the present case, the Business Plan was not prepared for a public audience, with the requisite attendant disclosure referred to above, and we submit that it is not appropriate to now mandate its release given the potential consequences to THESL.

With this background, we would briefly address the SEC's three enumerated points as follows:

1. As stated above, the point is that the Business Plan does not present the forward-looking information in the form mandated by securities' laws and, accordingly, it should not be made public.
2. We acknowledge that the disclaimer is not really necessary in a private document. It was inserted out of an abundance of caution. In any case, its inclusion is not sufficient in and of itself to make the Business Plan compliant with securities laws.
3. While securities law does require that there be equal access among investors to forward-looking information that is released, it does not require that it be released in the first place. The obligation to disclose is confined to material facts and material changes which have occurred. Forward-looking information is in an entirely different category: it is not generally required to be disclosed (except in certain specific situations and in relation to management's discussion and analysis of financial reports). Because it is recognized that issuers may wish to disclose forward-looking information, strict requirements are put around such disclosure, as referred to above.

To summarize, we submit that securities laws do not require disclosure of the Business Plan and its disclosure would not be in compliance with such laws.

Yours very truly,

**BORDEN LADNER GERVAIS LLP**

*Original Signed for J. Mark Rodger by John A.D. Vellone*

J. Mark Rodger

CC: Glen Winn, THESL  
Kristi Sebalj, OEB Counsel  
Intervenors of Record in EB-2010-0142