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Delivered via RESS (*Signed original to follow by courier*)

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli,

Re: EB-2009-0243: Application to Recover Contact Voltage Remediation Costs

We are counsel to Toronto Hydro-Electric System Limited ("**Toronto Hydro**") in the above-captioned matter. You will find accompanying this letter Toronto Hydro's reply submission in respect of the above-captioned matter.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Original Signed by John Vellone

John A.D. Vellone

JADV/gr

Encls.

cc: JS Couillard, Toronto Hydro
Ben LaPianta, Toronto Hydro
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Intervenors in EB-2008-0243

/JADV

EB-2009-0243

Toronto Hydro-Electric System Limited (THESL)

Application for Recovery of Contact Voltage Remediation Costs

Reply Submissions of Toronto Hydro-Electric System Limited

INTRODUCTION AND SUMMARY

1. These Reply Submissions address the major positions put forward by Board Staff and intervenors in this proceeding, including the basis for the application (“Application”), the eligibility criteria for the amounts sought, and the proposed allocation and recovery of allowed costs. The discussion of eligibility criteria is further sub-divided into the topics of materiality, the incrementality of the costs sought for recovery both relative to the approved 2009 revenue requirement and with respect to the scope of costs that should be considered, the exogeneity of the expenditures incurred, and the prudence of those expenditures.
2. THESL submits that despite the assertions of intervenors, there is a sound basis for the Application regardless of the happenstance of whether THESL was subject to cost of service or incentive regulation; that the subject costs meet the relevant tests for consideration and approval; and that THESL’s proposals for allocation of the various cost components are reasonable and balanced.

THE BASIS FOR THE APPLICATION

3. Intervenors claim that the Application is not properly brought, because it is neither a Z-Factor nor a claim of financial distress. Intervenors claim that the method by which rates were set previous to the extraordinary event (in this case and presumably others) is somehow determinative of whether the Board should take account of and grant relief for extraordinary events that otherwise meet the eligibility criteria. Intervenors argue that if THESL characterized the subject costs and circumstances as a ‘Z-Factor’, then they must be automatically ineligible for recovery since THESL’s 2009 rates were not based on the Board’s Incentive Ratemaking Mechanism (IRM), and Z-Factor treatment is only possible if rates during the period of the extraordinary event were set under IRM.
4. The Board should dismiss these positions, which would have a matter of substance turn on essentially empty procedural distinctions and logically flawed arguments. Whether the name applied to the costs in question is ‘Z-factor’ or something else, the character of the costs and their eligibility for recovery remain the same.
5. This is recognized by Board Staff, which observes at page 3 of its Submission:
6. “Staff submits that THESL’s application would not meet the eligibility requirements for a Z-factor recovery under the 3rd Generation IRM criteria, as THESL is not presently under this regime. However, staff further submits that regardless of whether this application was filed

under the authority of the Board's 3GIRM report and the related Z-factor provisions, or whether THESL simply requested the disposition of an amount in deferral account 1572, the tests applied in the examination of the validity of these costs would be generally the same."

Does the Board's 3GIRM report express its policy regarding extraordinary event costs?

7. THESL submits that Board policy respecting the circumstances under which extraordinary costs can be sought is best and most recently articulated in the 3GIRM Report. There the Board clearly expresses the standards concerning causation, materiality, and prudence that will be applied. THESL reasonably relied on that express policy to determine the case that it would have to meet in an application for recovery of extraordinary costs. What the Board does not express is a stipulation limiting that policy to utilities which happen to be under IRM at the time of the extraordinary event.
8. Such a stipulation would be so important that it could scarcely be implicit. Furthermore, such a stipulation would require strong justification, since it would create severe discrepancies in treatment as between utilities (and their respective customers) in a given year, and for a given utility across years. By pre-emptively excluding utilities that happen at that time to be under CoS rate setting from the possibility of extraordinary event cost recovery, such a stipulation would be prejudicial and unduly discriminatory.
9. THESL submits that it is simply implausible to assert that this was the Board's intention, especially in the absence of express statements to that effect by the Board. The Board's enunciated policy governing extraordinary events in an IRM setting should apply with equal force and validity in a CoS ratemaking context.

Must an Extraordinary Amount be able to be forecast in a Cost of Service application?

10. Intervenors also attempt to argue that utilities that experience an extraordinary event during a year for which rates had been set on a cost of service (CoS) basis ought to be ineligible for Z-Factor type treatment, because unlike those subject to the IRM, they ought to have been able to forecast the extraordinary event, and that in any case Z-Factor type recoveries are meant only for utilities whose rates at the time were determined by that mechanism.
11. For example, VECC states at paragraph 20:
12. "VECC respectfully submits that Z factor treatment is accorded to utilities on Incentive Regulation Mechanisms to protect the utility (and shareholder) from diminished earnings and financial hardship related to unforeseen events outside of the control of management, largely in lieu of the fact that there is no opportunity for such utilities to forecast their expenses within the IRM year."

13. Clearly, such an argument misses the fundamental point that extraordinary events are by their nature unable to be forecasted. A utility under CoS has no more opportunity to forecast an extraordinary event than does a utility under IRM. There is, therefore, no relevant distinction on this ground between IRM and CoS in terms of eligibility for recovery of extraordinary costs, since the costs in question cannot, by definition, be included in the utility's revenue requirement or rates prospectively.

Is Extraordinary Event Cost Recovery Precluded for Utilities not under IRM?

14. Intervenors further attempt to show that Z-factors were meant for IRM, and if a utility is not on IRM, it is ineligible. At paragraph 19, VECC attempts to demonstrate THESL's consent to its proposition by truncating the quotation from THESL's witness. However, a fair reading of the transcript (TR. 75-76) shows that THESL objected consistently to the claim that the treatment of an extraordinary event should somehow hinge on the ratemaking mechanism that had been in place previous to the event.¹
15. Essentially, intervenors claim that
- a. If a utility is under IRM, then it is eligible for Z-Factors
 - b. THESL is not on IRM
 - c. Therefore, THESL is not eligible for Z-Factors.
16. Laid bare, the argument is clearly fallacious and involves the error known as 'denying the antecedent'. In an argument of the form If A then B, it is valid to conclude 'not A' if B is negated, but not the converse. Otherwise it would be valid to argue
- a. If it's a square, it's got four sides
 - b. It is not a square
 - c. Therefore, it doesn't have four sides

¹ MR. BUONAGURO: So back in 2007 when you applied for rates effective 2008 and 2009, and in that application, 2010, I believe, you had the opportunity to forecast your budgets based on your view of what's going to happen in those test years and accept the risk, up or down, on whether your forecasts were accurate?

MR. McLORG: I accept your statement with respect to business-as-usual items.

[The following paragraph was omitted by VECC.]

Our evidence, we think, clearly makes the case that the contact voltage Level III emergency was an extraordinary item that qualifies for Z factor treatment on all of the criteria that the Board has set out. So the relevance of our different position, vis-à-vis another utility that might be having its rates set on an IRM basis, is lost on me.

Does Cost of Service setting of rates bar recovery or refund of extraordinary amounts?

17. Despite intervenor theories, there is no substantive rule, explicit or implicit, that bars a utility under CoS rates from applying to the Board for recovery of extraordinary expenses, and in such circumstances, the Board may rightfully set criteria for eligibility. However, it would be clearly prejudicial both to utilities and ratepayers to categorically preclude a utility or its ratepayers, whose rates were set by way of CoS (most often at the direction of the Board) from eligibility for relief that could be available to a neighbouring utility that experienced the same extraordinary event.
18. Furthermore, as set out in testimony of a THESL witness², there is no expectation on the part of THESL that extraordinary cost *reductions*, occasioned for example by tax rate decreases, would somehow be exempt from being refunded to ratepayers if rates were set under a CoS regime. THESL's position is consistent and symmetrical; extraordinary costs, both positive and negative, that meet eligibility otherwise should not be pre-empted as a result of the ratemaking mechanism that happened to be used to set rates at the time.
19. While clearly disputing THESL's eligibility for it, SEC acknowledges the need for a generalized extraordinary event mechanism, stating at paragraph 2.4.1 "It would seem self-evident that if a utility faces a serious external event, like an ice storm or hurricane or the like, there must be some mechanism for the Board to step in and make a rate adjustment". THESL has addressed the procedural objections above and will reply to SEC's further objections below. However, SEC goes on to argue that such a mechanism for CoS utilities would require further consultation and more stringent standards.
20. The Board should dismiss the suggestions of SEC in this regard. The standards already in place and enunciated by the Board are appropriate to this case, and there is no credible reason to defer a decision on this application.

Must a claim for an extraordinary amount require financial distress?

21. Intervenors attempt to erect new standards for extraordinary event cost applications in CoS settings. For example, VECC states at paragraph 28:
22. "VECC submits that the only circumstance where a utility on COS rates may file an application to change rates (or seek approval of a rate rider) during a rate year without demonstrating a material revenue deficiency would be in the face of the unforeseen and major events resulting in extraordinary costs such as the 2003 Ice Storm and other Acts of

² Transcript page 134, line 3 and following

God such as storm damage or new regulatory requirements such as smart meters; THESL acknowledges that there is no such event.”

23. Again, VECC distorts the plain meaning of THESL’s response to Board Staff interrogatory 7, which the above response footnotes, attempting to imply that the Level III emergency was not an extraordinary event. That is to utterly ignore the tested evidence in this proceeding.
24. More fundamentally however, VECC attempts to assume the role of the regulator by simply declaring when “a utility on COS rates may file an application to change rates”. VECC offers no rationale, no precedent, and no other support for the standard set out in the paragraph above, and the most cursory examination reveals how flawed it is. On VECC’s theory it would presumably be required to demonstrate a material revenue sufficiency were the extraordinary item a credit to customers. VECC also fails to differentiate the Level III emergency from the other extraordinary events on its list, and fails to show why it was not an “unforeseen and major event resulting in extraordinary costs”. VECC’s list of events is arbitrary and ad hoc, and the fact that a particular unforeseeable event does not appear on its list should not be accepted as implying a requirement to demonstrate financial distress, which itself is excluded from the Board’s own criteria enunciated in the 3GIRM report. VECC improperly attempts to substitute its standard for the Board’s Materiality criterion, and the Board should reject VECC’s attempt to do so.

Is the Application properly brought?

25. For the reasons set out above THESL submits that the Board should reject the submissions of intervenors claiming that the application is not properly brought. THESL submits that it is clear that the Board perceived the nature of the issues, and that the issues were substantive, when it agreed to hold a hearing on this matter. Had THESL not been able to demonstrate a substantive case, or were it otherwise ineligible on prior grounds, the Board would have declined to hear the application at the outset. Therefore THESL submits that the Board should hear and decide the case on its merits and dismiss calls from intervenors to deny the application on empty procedural grounds.

ELIGIBILITY CRITERIA

Listing of Applicable Eligibility Criteria

26. For the purpose of clarity, THESL sets out below its submissions on the definitions and applicability of the various eligibility criteria. The underlined terms are defined in the 3GIRM report.
27. MATERIALITY. This criterion is described in the 3GIRM report as follows:
28. “The amounts must exceed the Board-defined materiality threshold and have a significant influence on the operation of the distributor; otherwise they should be expensed in the normal course and addressed through organizational productivity improvements.”
29. The 3GIRM report specifies a materiality threshold of \$1 million for a distributor in THESL’s category.
30. CAUSATION. This criterion is described in the 3GIRM report as follows:
31. “Amounts should be directly related to the Z-factor event. The amount must be clearly outside of the base upon which rates were derived.”
32. THESL submits that this criterion is really a compound of two distinct criteria. THESL will use the term ‘CAUSATION’ to denote the requirement above that ‘Amounts should be directly related to the Z-factor event.’ Stated differently, this criterion requires that no costs extraneous to the extraordinary event be included in the amount sought for refund or recovery.
33. THESL will use the term ‘INCREMENTALITY’ to denote the requirement above that “The amount must be clearly outside of the base upon which rates were derived.” Stated differently, the amount sought for recovery must be categorically outside the approved revenue requirement.
34. Again for clarity, THESL will use the term ‘SCOPE’ to refer to the manner in which the subject costs are identified by reference to both the Causation and Incrementality criteria. THESL submits that in order to meet the eligibility standards, the Scope of the subject costs must include all of the costs directly consequential to the extraordinary event that are themselves Incremental to the approved revenue requirement. Directly consequential costs may be both expenditures incurred and expenditures avoided, but they must be directly caused by the extraordinary event.

35. PRUDENCE. This criterion is described in the 3GIRM report as follows:

“The amount must have been prudently incurred. This means that the distributor’s decision to incur the amount must represent the most cost-effective option (not necessarily least initial cost) for ratepayers.”

36. THESL will continue to use the term ‘EXOGENEITY’ as it has in the Application, where it stated at page 6:

“Exogeneity of costs in this context refers to their character as having been externally imposed or required, as distinct from being discretionary and voluntarily undertaken.”

37. THESL stated in its response to Board Staff Interrogatory # 7

“The term ‘exogeneity’ is simply a synonym for the term ‘inability of management to control’, which term was defined in the original Rate Handbook at Chapter 5, page 5, as ‘the cost must be attributable to some event outside of management’s ability to control’.”

38. Exogeneity is addressed in the 3GIRM report at the beginning of section 2.6 where it states that “Z-factors are intended to provide for unforeseen events outside of management’s control.” The requirement is a logical consequence of the others and generally of Board policy in this area, and the Board itself stated in the 3GIRM report that:

“The Board expects that any application for a Z-factor will be accompanied by a clear demonstration that the management of the distributor could not have been able to plan and budget for the event and that the harm caused by extraordinary events is genuinely incremental to their experience or reasonable expectations.”

Is the Materiality Criterion met?

39. THESL’s evidence clearly shows that the incurred, subject costs meet the Materiality threshold and no intervenor disputed that fact. The Board should accept that the Materiality criterion has been met.

Is the Causation Criterion met?

40. THESL’s evidence is that all the incurred, subject costs were directly caused by the Level III emergency and the subsequent need for contact voltage monitoring, and that none of the subject costs are unrelated to those causes. This is clearly set out in the Application, where, for example, at page 6 THESL states:

“Examining the expensed costs category by category, those for Electrical Contractors, Scanning Contractors, Inventory and Materials, and Other (including External Services,

Rental Vehicles, and Communication) were directly caused by the Level III emergency situation and would not have been incurred but for that event.”

41. Intervenors and Staff have challenged the subject costs on other grounds such as incrementality and prudence, and THESL replies to these assertions below, but no intervenor appears to challenge THESL’s evidence regarding the *cause* of the costs or assert that any of the subject costs are not in fact directly related to the contact voltage event.
42. The Board should therefore conclude that the Causation criterion is met.

Is the Incrementality Criterion met?

43. THESL’s evidence is that the incurred, subject costs are entirely incremental to the approved 2009 revenue requirement. The Application states at page 6:

“THESL’s claim of incrementality of these costs rests fundamentally on the facts that the necessity of the expenditures was unforeseen, and that the expenditures were novel. No such work had apparently been necessary previously and the project overall was certainly unprecedented on the THESL system. As a result, neither THESL nor any other party had knowledge beforehand that such expenditures might be necessary, and THESL clearly did not include these as part of its requested Opex budget for 2009.”

44. Again, while certain intervenors appear to take the position that contact voltage suppression costs *should* have been in the 2009 revenue requirement, none appear to take the view that they were. The Board should therefore accept that the incurred, subject costs meet the criterion of incrementality.

Is the proper Scope of costs included?

45. The Board’s criterion of Causation states that the subject costs must be directly related to the extraordinary event, and together with the Incrementality standard it is fair to conclude that the analysis (and application) must include *all* of the costs directly attributable to the extraordinary event, whether those costs are incurred or avoided. There is no basis to conclude from the wording of either standard that any costs, incurred or avoided, can be selectively excluded. Neither can the concept of Incrementality be robust if the true net effect on costs of the extraordinary event is distorted by excluding certain costs, be they incurred or avoided.
46. THESL accepts that the proper Scope of costs for consideration is therefore the entire set of costs, both incurred and avoided, which are directly a result of the extraordinary event. In plain terms this means that the net incremental amount that can be eligible for recovery is the incremental amount incurred minus any avoided costs that were non-incremental, i.e.,

already included in the approved revenue requirement. This was confirmed during the hearing by the THESL witness in response to a question from the Chair, at TR. 127, 21-25.

47. In this connection then the disputed issue is really what costs, if any, were avoided by THESL as a result of its redeployment of resources to address the contact voltage emergency.
48. THESL's evidence is clear that as a result of a conscious decision on the part of management and deliberate effort on the part of THESL overall, it plans *not* to avoid any costs already provided for in rates but rather to complete its 2009 workplan entirely. It is not merely accidental that THESL's 2009 workplan would be completed and the associated revenue requirement exhausted; it is the result of a clear commitment on THESL's part to complete work that it considers necessary despite the unanticipated drain on resources presented by the contact voltage situation.
49. THESL's evidence is that it is faced with a system which demands intensive ongoing maintenance and renewal, and that it would therefore be highly undesirable to 're-allocate' or 're-prioritize' resources as SEC suggests with the result that the 2009 workplan is left incomplete.
50. Furthermore THESL has clearly indicated its willingness to absorb without compensation any additional costs which it may incur (for example with respect to additional contractors and increased overtime) in order to complete its 2009 work program. Although such costs might arguably be considered incremental and directly caused by the Level III emergency, THESL does not seek their recovery and has limited its application to the direct expenditures on contact voltage suppression.
51. The fact that THESL is committed to achieving its planned work program with no additional compensation clarifies and simplifies the assessment of its Application. THESL commits to completing its work plan with no alteration to its approved 2009 revenue requirement or rates, despite the fact that revenues are down very significantly due to weather and the economy (approximately \$20 million, TR. 129, 1) and takes the risk of any overrun in costs associated with that workplan. Since THESL foregoes any claim for additional costs *related to the accomplishment of its normal 2009 workplan*, there is no need to disentangle what costs related to that plan may be incremental or decremental, and there is certainly no need to re-open the 2009 case. The original revenue requirement produces the original workplan.

52. Apart from that, the assessment becomes one of determining whether the subject costs considered in isolation meet all of the criteria. The scope of costs included is proper in this case since avoided non-incremental costs are included in the analysis; the fact that they are accepted by THESL to be at a minimum zero and most probably negative (meaning positive additional costs with respect to the normal workplan) simplifies, rather than complicates, the situation.
53. In summary, THESL commits to completing its original workplan with its original approved revenue requirement. THESL believes that the costs of doing so will not be less than originally approved and most probably will be greater, but foregoes any claim to any additional costs. As a result, there will be no costs avoided or displaced by the Level III expenditures and activities. Therefore, the subject costs in the Application may be treated simply as stand-alone costs incurred to deal with an extraordinary event. The Board should conclude that the Scope of costs presented in the Application is proper.

Should the Board draw other cost and revenue fluctuations into consideration?

54. THESL's answer is unequivocally no.
55. Intervenors argue that in making its determination on the subject costs the Board should take into account the normal fluctuations of costs and revenues *that are unconnected to the extraordinary event*. This thinking is misguided, and were the situation reversed, intervenors would certainly insist that the Board categorically reject it. Such an approach actually would re-open the 2009 revenue requirement, which intervenors appear equally opposed to, and this fact demonstrates the fundamental flaw in that approach.
56. Intervenors including VECC and SEC essentially submit that in determining the recoverability of an extraordinary amount, the Board must also consider the financial results of the utility from all causes *other than the extraordinary event*. Not only would this amount to a further, unannounced criterion for eligibility that the Board has not adopted; it would conflict directly with the criterion of Causation which the Board has adopted, which states that amounts must be directly related to the extraordinary event.
57. This further criterion can essentially be stated as 'simultaneous financial hardship from other causes'. It may appear ironic for THESL to argue against this since the Board's acceptance of this criterion would be favourable to THESL in this case; revenues are very substantially down and expenses are likely to be at or over budget. Nevertheless THESL rejects this proposition, as the Board should, because at root it is utterly irrelevant to the considerations at hand.

58. Such an approach would have the untoward effect of randomly changing the recoverability of extraordinary event amounts depending on factors which are unrelated to them and for which the utility is already at risk. Thus two equivalent events might be either recoverable in a given year for one utility and not another, or recoverable for a given utility in one year and not in another. THESL submits that such an approach is capricious and ought to be rejected by the Board.
59. The fallacy of judging extraordinary event amounts with reference to business-as-usual results is demonstrated by considering the case where the extraordinary amount is a credit to customers. On the reasoning of intervenors, if a utility's financial results in the subject year were poor due to depressed revenues and higher-than-forecast expenses, it would be relieved of the obligation to refund the credit balance to customers. This would be clearly contrary to the Board's purpose in providing for Z-Factors to begin with.
60. Ultimately, and put simply, judging extraordinary event amounts by reference to other unrelated fluctuations defeats the purpose of having a separate category for extraordinary events. Utilities including THESL are and remain at risk for business-as-usual fluctuations in revenue and costs, and these are segregated from extraordinary events. The very purpose of the Board's eligibility criteria for extraordinary events is to keep such events segregated. If through the addition of another incompatible criterion utilities are now made to be at risk for extraordinary events (as would be the case under the intervenors' theory), then there is no point in the concept at all. THESL submits that this plainly contradicts the Board's policy in this area and should be rejected.
61. In contrast, THESL's position is internally consistent and coherent. Utilities should remain at risk (as THESL is in this case) for business-as-usual fluctuations, for which there are no re-openings of settled rates. Extraordinary events remain segregated, and the treatment of such events is consistent across time and across utilities. This is actually no more than the Board's current policy and framework, which the Board should retain.
62. In summary, it would be improper and would defeat existing Board policy to make the disposition of extraordinary event amounts conditional upon unrelated business-as-usual results of utility operations. The Board's eligibility criteria operate specifically to distinguish and separate extraordinary events and their cost consequences from normal utility operations.

Given the Contact Voltage emergency, were THESL's actions prudent?

63. As the proceeding developed the issue of Prudence bifurcated into two separate sub-issues, which THESL expresses as:

- a. Given the Contact Voltage emergency, were THESL's actions prudent? And
 - b. Was THESL imprudent in the period prior to the Contact Voltage emergency?
64. The latter question is addressed below.
65. With respect to the first question, THESL's understanding of the positions of Staff and intervenors is that none of these parties submit that THESL's actions in response to the Level III emergency (as distinct from follow-up scanning) were imprudent, *given the fact of the emergency and the circumstances at the time*.
66. THESL's evidence is essentially that it faced an unanticipated, acute public safety crisis which presented real possibilities of injury or death to the public and its employees, which crisis was markedly exacerbated under winter conditions and specifically the presence of electrically conductive salt-water solutions. The crisis therefore demanded immediate, concerted, and effective action to defuse.
67. Furthermore, it was THESL's evidence that time was of the essence and could not be squandered by taking an approach that narrowly isolated its own assets while disregarding other contact voltage hazards. Nor could an excessive amount of time be devoted to painstaking documentation of every one of tens of thousands of individual assets and asset locations.
68. On the record of evidence in this proceeding, THESL submits that the approach it adopted of remote scanning for *all* street-level contact voltage hazards, combined with an exhaustive, pre-emptive inspection and remediation of handwells, clearly was a prudent approach in the circumstances. The work that urgently had to be accomplished was accomplished, and there has been no suggestion that a more economical or effective approach was available.
69. Therefore, with respect to the Level III emergency, THESL submits that the Board should accept that THESL's actions were prudent and reasonable given the circumstances.

Are the ongoing scanning costs in 2009 prudent?

70. With respect to ongoing scanning costs in 2009, Energy Probe disputes their necessity while VECC objects to the procurement process by which they were acquired. SEC argues that non-emergency maintenance costs should be disallowed.
71. Energy Probe takes the view that the history of contact voltage instances in Toronto does not now justify ongoing monitoring expenditures, especially during periods of the year when salt-water solutions are not present.

72. THESL submits that Energy Probe's approach, if endorsed by the Board, would place THESL in the untenable position of being imprudent by way of making the monitoring expenditures, and negligent by way of not making them.
73. It is now (painfully) established that end-of-life conditions on THESL's underground secondary plant can give rise to contact voltage even under non-winter conditions, and furthermore that contact voltage is inherently a hidden failure, which does not interrupt service as an outright outage does, and which can be transient and recurring in the same location. The presence of contact voltage is therefore non-obvious and impractical to predict in individual instances.
74. As a non-rhetorical question, what answer would it be possible to give to an injured party as to why, after going through the Level III emergency, THESL subsequently abandoned monitoring its system for contact voltage conditions? While there must clearly be a balance between costs and benefits in the form of contact voltage suppression, THESL submits that halting the monitoring altogether does not represent a balance.
75. Especially given the recent and sudden emergence of contact voltage as a phenomenon, in THESL's submission it would be imprudent to err on the side of doing less. THESL's ongoing monitoring program operates at a significantly lower and less expensive intensity than the Level III emergency scanning program did. As experience is gained in this area, adjustments can be made to fine-tune the program and associated costs. However, at this stage it would border on recklessness to abandon monitoring altogether.
76. VECC complains that THESL did not acquire the ongoing scanning services by way of tender, and submits that the Board should not accept their costs. It is unclear whether VECC would accept the consequence of their position, which is that the scanning not be done.
77. Ironically, VECC cites the same passage in transcript as THESL would to support its position that in the circumstances and in view of the available alternatives, a sole source contract to PSC was the most reasonable course. THESL's evidence is that the PSC process and technology is proprietary. The one competing firm is embroiled in intellectual property litigation and has not been accepted as a provider by any other regulator. There is no physical alternative to remote scanning other than approach-and-test, and that is neither viable in terms of coverage nor cost effective considering the hundreds of thousands of electrically connected objects in the Toronto streetscape.

78. Neither VECC nor SEC nor Energy Probe offer a responsible alternative to the program of ongoing scanning embarked on by THESL. THESL submits that the responsible level of ongoing scanning it has undertaken is necessary, prudent, and effective, while Energy Probe would do without it altogether and VECC and SEC simply do not want the cost without accepting the absence of the program, which is a non-constructive position.
79. The Board should accept that ongoing scanning at the levels and costs undertaken by THESL is responsible and prudent.

Was THESL imprudent in the period prior to the Contact Voltage emergency?

80. Board Staff and intervenors challenged THESL's position that it followed good utility practice in the period leading up to the Level III emergency. Generally, there was a presumption that if THESL did not know about the potential for contact voltage, it should have. Staff argued that contact voltage suppression costs were higher under emergency conditions than they would have been otherwise and that there should be a partial disallowance on that basis. Intervenors argued that contact voltage suppression should have been a part of THESL's regular maintenance program and that THESL, having 'decided' not to do that, is not now entitled to seek relief.
81. This issue is bound up with the questions of whether the Level III emergency was exogenous and whether it was outside of THESL's control. THESL will address below the narrow question of Exogeneity, *given the circumstances at the time*. The broader question of whether THESL was prudent in its management of the system beforehand and whether the cause of the Level III was in THESL's control is addressed here.
82. First of all it is clear that THESL is responsible for the electricity distribution system; its construction, maintenance, safety, and operation. THESL squarely accepts that responsibility.
83. In order to discharge that responsibility, THESL and other competent utilities follow good utility practice, which is a defined term in the industry and which concept is relied upon by the Board for example in the Distribution System Code. There it is defined as follows:
- “ “good utility practice” means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry in North America during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgement in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good practices, reliability, safety and expedition. Good utility practice is not intended to be

limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in North America.”

84. Good utility practice is not itself precisely codified or static; it evolves through time as it must to recognize and adapt to new information and conditions. This fact is expressly recognized in the Board’s definition by its use of the qualifier ‘during the relevant period’.
85. The Board’s own definition of good utility practice also expressly refers to “the exercise of reasonable judgement in light of the facts known at the time the decision was made”. Consistent with the Board’s general approach to questions of prudence, this recognizes that the standard for prudence cannot rely on after-the-fact information or analysis, but rather must make reference to what was known at the time of the decisions or actions.
86. THESL submits that the question in this case is somewhat peculiar because it does not revolve around a decision consciously taken. It is not, for example, parallel to a hypothetical discussion of whether THESL was or was not prudent to install tree wire in heavily forested areas of the city, after having undertaken an analysis of that situation.
87. Rather, this was a case of THESL not acting on an issue it was not aware of. Contrary to the supposition of intervenors, there was no ‘decision’ to not undertake a contact voltage suppression program; instead there was the absence of a decision to do so. For clarity, THESL explained in testimony that it focussed its maintenance programs on the primary, rather than the secondary network, for cost-benefit reasons: *with respect to reliability parameters*, it was more cost effective to concentrate on the primary system. That decision, which may superficially appear to relate to contact voltage because it pertained to the secondary system, in fact did not: the decision related to maintenance for reliability, not contact voltage, which was not a known factor at the time.
88. THESL’s evidence is clear both that contact voltage is *not* a reliability issue but rather a safety issue, and that contact voltage is inherently a hidden fault.
89. THESL’s evidence was further that based on the actual experience of contact voltage occurrences in Toronto (and elsewhere in Ontario) prior to 2009, there was no reasonable indication or basis to conclude that contact voltage, *as a result of end-of-life conditions on underground secondary plant as distinct from isolated faults*, was an imminent threat.
90. Furthermore, THESL’s unchallenged evidence was that its knowledge of contact voltage occurrences elsewhere in North America indicated that it was an uncommon problem isolated to a few systems in the United States and was not endemic.

91. THESL submits that despite the presumptions of intervenors, in the period prior to the Level III emergency THESL did in fact follow good utility practice *as it was then known*, and that:
- a. It was reasonable on the available information for THESL not to conclude that contact voltage was an imminent risk on its system;
 - b. It was reasonable for THESL not to have more detailed information relating specifically to the threat of contact voltage since it had beforehand been confined to readily explainable, isolated instances, and was furthermore a hidden fault that was not visually apparent by external inspection and did not lead to service outages; and
 - c. Contact voltage suppression programs had not become one of the “acceptable practices, methods, or acts generally accepted in North America”.
92. THESL further submits that the specific mode of failure exhibited in instances of contact voltage due to end-of-life conditions made it particularly conducive to the development of crisis conditions rather than gradual revelation. THESL’s evidence was that the contact voltage problem emerged very quickly due to the fact that the underlying faulty condition was hidden and was then suddenly exacerbated by a triggering condition, in this case the flooding of handwells by an electrically conductive salt-water solution.
93. In this respect the contact voltage problem was very unlike the PCB problem, which was also inherent in the electricity system managed by utilities, had its roots what was good utility practice at the time, and was later discovered to be a severe problem with public health and environmental consequences. The difference was the absence of an acute triggering factor in the case of PCBs. That problem in contrast could be and was managed prospectively on a non-emergency basis.
94. The contact voltage problem was much more analogous to the emergence of a new disease for which the population has no immunity. The lack of immunity is the hidden fault, but does not become apparent and critical until a triggering factor i.e., the arrival of the new disease, acts in combination with the fault to create a crisis. During the crisis emergency steps are taken to protect the public; afterward, recognition of the problem enables its management on a prospective, non-emergency basis.
95. THESL acknowledges that the lack of recognition of the contact voltage problem was very regrettable but submits that it should be considered a non-culpable failure arising from the fact that good utility practice is not the product of perfect information and perfect foresight.

Is the Exogeneity Criterion Met?

96. To reiterate, THESL divides this into two questions:
- a. Were the conditions leading up to the Level III emergency under the control of management? And
 - b. Were the actions taken and costs incurred by THESL to resolve the contact voltage crisis discretionary or mandatory?
97. From the previous section, THESL submits that system conditions leading up to the Level III emergency were under the control of management but that management acted in good faith and in accordance with good utility practice, such that THESL's fault in this regard is non-culpable. THESL should not be expected to act to resolve a problem it was reasonably not aware of.
98. With respect to the second question, THESL's evidence was that in the opinion of management urgent action to resolve the contact voltage threat was mandatory. THESL stated at page 2 of the Application:
- “Considered together, the events outlined above indicated the possibility of systemic faults in underground equipment, which, if present, would pose an unacceptable risk to the public and to employees of THESL and THESI. The possible hazard to the public was heightened by the presence of road salt that when mixed with water, combined to form a highly conductive solution on sidewalks and thoroughfares throughout the city. Executive management of THESL therefore concluded that an emergency condition existed which demanded immediate and intensive efforts to correct. THESL declared a Level III emergency, the second highest level of system emergency, on January 30, 2009.”
99. *Given the circumstances*, THESL could not have responsibly declined to make every reasonable effort to ensure the safety of the public and its employees. THESL submits therefore that the Board should accept that the Exogeneity criterion has been met.
100. In summary THESL submits that the subject costs meet all the defined eligibility criteria and that THESL has provided “a clear demonstration that the management of the distributor could not have been able to plan and budget for the event and that the harm caused by extraordinary events is genuinely incremental to their experience or reasonable expectations.”

The appropriate threshold for the Exogeneity criterion

101. After the fact, all parties have the benefit of hindsight. With that benefit, intervenors and Staff argue that THESL fails to meet the exogeneity criterion on the basis that, in hindsight, THESL's system conditions leading up to the Level III emergency were under the control of management.
102. Intervenors and Board staff argue for an "absolute" exogeneity threshold. The essence of their argument is that if, in hindsight, an argument could be made that an event could have been, in-part, under management's control (regardless of how remote or unforeseeable the event in question is), then extraordinary event recovery should be denied.
103. The core of the argument appears to be that, if THESL had maintained its system in a different manner, the Level 3 emergency may have been avoided. THESL's evidence is that it could not have reasonably foreseen the Level III emergency. To the best of THESL's knowledge, and staff and no intervenor disputed this, no other utility in Ontario undertook the preventative maintenance program now suggested, with the benefit of hindsight, by staff and intervenors. Intervenors and staff point to the occurrence of a prior contact voltage problem in New York as evidence that THESL should have foreseen such an occurrence. In contrast, THESL's evidence is that: (i) the occurrence of a problem in New York does not mean the same issues would exist on the Toronto distribution system; (ii) until late 2008 and early 2009, there was no reasonable evidence that a similar systematic problem may have existed in the City of Toronto; (iii) THESL did not become aware of the New York situation until around the same time it became aware that a similar factual situation existed in Toronto; and (iv) THESL responded promptly and efficiently to the Level III Emergency in a manner that protected public safety, because it quickly recognized and responded to the evidence of a systematic condition in Toronto and drew on the experience of the utility in New York City to do so.
104. In contrast to an "absolute" exogeneity threshold, THESL submits that the Board's approach to the exogeneity criterion should be guided by a contextual analysis of the circumstances surrounding the event in question, particularly in view of the Board's role as an economic regulator charged with setting just and reasonable rates.
105. THESL submits that a contextual approach to the exogeneity criterion is supported by and consistent with the threshold set-out in the Board's 3GIRM report at page 34, which states that (emphasis added): "Z-factors are intended to provide for unforeseen events outside of management's control." The inclusion of the word "unforeseen" in this threshold suggests

that if an event is not reasonably foreseeable, then it should be considered outside of management's control.

106. This contextual approach gives the Board the discretion to make pragmatic decisions on what events could qualify for extraordinary event cost recovery on a case-by-case basis. It does not mean that the Board would have to cover any expense that was necessary and could not have been reasonably planned for, as suggested by Schools in 2.3.4. Nothing would prevent the Board from considering and accepting or rejecting those potential extraordinary event scenarios on a case-by-case basis in setting just and reasonable rates, and the Board's express eligibility criteria would serve to prevent spurious applications.
107. THESL submits that as an economic regulator, the Board should undertake a contextual approach to the Exogeneity criterion, allowing the Board to consider all the circumstances in assessing the reasonableness and the associated costs and benefits.

COST ALLOCATION AND RECOVERY

108. The focus of the dispute around cost allocation is the allocation of scanning costs.
109. In THESL's view, much of the disagreement stems from either a misunderstanding of the evidence or from a decision not to accept it. This is prominent in two areas particularly.
110. First, THESL's evidence, particularly in testimony (for example, TR. 63, 1-28; 65, 8-23) clearly indicated that in the case of contact voltage, there is a vital distinction between 'cause' and 'manifestation'. As was explained, the root cause of a contact voltage incident might easily be and frequently was substantially removed in location and in asset category from the place and asset where the contact voltage was manifest. A defective connection in a THESL vault could result in contact voltage appearing on a streetlight pole owned by THESI some distance away. It would be correct to say that the streetlight pole exhibited contact voltage, but it does not follow and often was not the case that the streetlight pole 'caused' the contact voltage. When the problem at the THESL vault is corrected, the contact voltage exhibited by the streetlight pole vanishes without the pole itself being touched.
111. THESL acknowledges that in this way contact voltage does not follow familiar cause and effect relationships that characterize much of the rest of electrical distribution plant, and that confusion may have resulted from this. THESL also acknowledges and apologizes to the Board for any confusion THESL created by following the wording in Energy Probe's Interrogatory 2, where the question was posed with the word 'cause' and should have been answered with the word 'exhibited'. Nevertheless, it is simply incorrect to suggest that if x%

of the contact voltage instances were exhibited by equipment in a particular category, that that equipment 'caused' x% of the contact voltage problem or that x% of the costs should flow to those customers taking service from that equipment.

112. Consequently, in the case of scanning costs (as distinct from remediation costs, which are directly traceable) it is not possible to trace cause from the information on manifestation, and it would be mistaken to allocate costs on the presumption that manifestation and cause were one and the same.
113. Furthermore, as explained at TR. 67 and forward, the fundamental purpose of scanning is different than that of remediation; as the THESL witness stated there, "The scanning was intended to limit or mitigate the risk of an electrical shock on the boulevard, regardless of the asset." Scanning is classified as a maintenance activity, but it is not directed to any specific asset or class of assets, or even exclusively to THESL assets. THESL witnesses were clear (for example, TR. 23, 15-24) that the scanning is agnostic as to the assets which it is scanning, and consequently the rate class that those assets would belong to. Again, this is a new activity on THESL's system and differs in significant ways from traditional maintenance that involves direct work on a specific asset.
114. Scanning is carried out on the secondary system (the primary system is partitioned from street level). In the Cost Allocation model, costs related to the secondary system (which serves all customer classes, not just SL and USL, as suggested by SEC at 1.2.10 c and 4.5.1) are allocated across all customer classes. THESL has therefore applied an allocation of secondary related cost which follows the cost allocation principles.
115. As stated by the THESL witness at TR. 59, 1-3, scanning is a 'system level' cost. It cannot be properly attributed to a particular customer class or classes. Therefore THESL sought to follow its understanding of the Board's cost allocation principles, which simply put in this case indicate that general maintenance should be generally allocated. THESL also sought to avoid a 'whiplash' in the allocation of these costs by proposing an approach that could be carried consistently into the future, in view of the fact that these costs together with the underlying need will persist.
116. THESL submits that the proposals from intervenors regarding the allocation of scanning costs to the SL and USL classes only involve a departure from Board principles since that approach necessarily involves allocating system level costs to a particular sub-set of customer classes. It is reasonable to ask in these circumstances why only those classes would be required to pay for benefits that flow to the system generally. The essential point is that the 'service' rendered by scanning is a service to the system as a whole and to the public at large.

THESL submits therefore that its allocation proposal for the scanning costs is reasonable and should be accepted by the Board.

117. The second major point of disagreement is around the concept of collecting contact voltage costs from non-THESL asset owners, which has two aspects.
118. The first aspect is the proposition that costs should be collected from asset owners in proportion to the assets that, in the view of intervenors, 'caused' the contact voltage. To this, THESL simply re-iterates that cause and manifestation of contact voltage are not one and the same. The asset exhibiting the contact voltage may have no intrinsic fault at all. Therefore such an approach is unsupportable.
119. The second aspect is that THESL should have created records enabling the direct tracing of fault repair costs to asset owners such that they could then be charged.
120. THESL's evidence on this point was clear, both in pre-filed evidence (pages 8-9) and in testimony (for example, TR. 54, 17-28). In essence, the circumstances of the emergency did not permit the creation of such records. That effort would have slowed the remediation of contact voltages very substantially and would itself have been very costly. Furthermore, in any event such records would have related to only a fraction of the work done and would not have entirely disposed of the costs.

SUMMARY

121. THESL's Application for recovery of contact voltage costs is properly brought. Styling of the Application as a Z-Factor application is no more than a convenience for reference, and no matter of substance turns on that. The substance of the matter is that THESL has incurred extraordinary costs to address an extraordinary event.
122. Nothing follows from the fact that THESL's rates were last set under a CoS framework to bar or invalidate THESL's Application.
123. THESL has thoroughly demonstrated, in detail, that the subject costs meet every threshold criterion established by the Board, under a stringent reading of those criteria.
124. THESL's proposals for the allocation and recovery of costs fair, balanced, and reasonable, and flow from correct characterizations of the nature of the costs incurred. Contrary proposals are flawed because they flow from an inaccurate characterization of the costs incurred.

125. Therefore, the Board should grant the relief sought in THESL's Application without prejudice to the disposition of any similar or follow-on costs that are sought in future applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 5TH DAY OF NOVEMBER, 2009

Original Signed by John Vellone

John A.D. Vellone

Counsel to Toronto Hydro-Electric System Limited