

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

**AND IN THE MATTER OF** an application by Toronto Hydro-Electric System Limited for an order approving or fixing just and reasonable rates and other charges for the distribution of electricity to be effective May 1, 2008, May 1, 2009, and May 1, 2010.

### **NOTICE OF MOTION**

Toronto Hydro-Electric System Limited (“THESL”) will make a motion to the Ontario Energy Board (the “Board”) on a date and at a time to be determined by the Board.

**PROPOSED METHOD OF HEARING:** THESL proposes that the Motion be heard by way of a written hearing.

**THE MOTION IS FOR** an Order of the Board:

1. Reviewing and varying its May 15, 2008 EB-2007-0680 Decision in the above-captioned proceeding (the “Decision”), as follows:

Proceeds from Sale of Assets

- (a) With respect to Section 3.4 of the Decision (Proceeds from Sale of Assets), rescinding its finding at page 27 that “100% of the net after-tax gains from the sale of 228 Wilson Avenue, 175 Goddard Street, and 28 Underwriters Road, the properties that are planned to be sold in 2008, should go to the ratepayer. The Company’s revenue requirement for the 2008 test year shall be adjusted downward by \$10.3 Million to reflect this finding”, and instead:
  - (i) Directing THESL to record in a variance account the actual net after-tax gains on sale of the properties named above (228 Wilson Avenue, 175 Goddard Street, and 28 Underwriters Road) and those referred to at page 28 of the Decision (i.e., 124 Birmingham Avenue, 3706 Bathurst Street,

522 Rustic Road, and 211 Sterling Road; collectively, the seven “Named Properties”), together with simple interest on the principal account balance calculated monthly, for disposition by way of revenue offsets in THESL’s 2010 Rates Case and future main rate cases as necessary, in recognition of the passage of time and the disposition of a related appeal by THESL to the Divisional Court of Ontario; and

- (b) Granting such further and other relief that THESL may request and the Board consider appropriate.

**THE GROUNDS FOR THE MOTION ARE:**

Introduction

2. On June 16, 2008, THESL commenced an appeal from the Decision to the Divisional Court of Ontario. The appeal addressed the question of the Board’s authority to make the finding set out in paragraph 1(a), above.
3. The Board’s findings set out above in paragraph 1(a) were stayed by Order of the Divisional Court dated June 25, 2008;
4. THESL’s appeal of the Decision to the Divisional Court was decided in favour of the Board by the Divisional Court dated April 27, 2009, and by order of the Court of Appeal of Ontario dated September 14, 2009 THESL was denied leave to appeal the decision of the Divisional Court, so the issue under appeal has been only recently determined; and
5. The passage of time has rendered it impossible to implement the Board’s subject finding in respect of THESL’s 2008 distribution rates, as those rates have been superseded by THESL’s 2009 distribution rates, but no process has been established through which to dispose of the subject net after-tax gains on sale.
6. Moreover, as discussed below, THESL has not realized after-tax gains on sale of \$10.3 million from the disposition of the properties referred to in the Decision.

7. Part VII of the Board's Rules of Practice and Procedure deals with motions for review. Rule 44.01(a) requires a party to set out the grounds for the motion for review that raises a question as to the correctness of the Order or Decision. Such grounds may include:
  - (a) error in fact;
  - (b) change in circumstances;
  - (c) new facts that have arisen; and
  - (d) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.
8. Together, the factors set out above in paragraphs 2 through 6 constitute significant new facts and changes in circumstances which necessitate the development of an alternative ratemaking approach to dispose of the subject amounts.
9. While the gain on sale amounts in question have not all been finally determined, their regulatory treatment is significant for users of Toronto Hydro financial statements. Toronto Hydro has a responsibility to its debt- and shareholders, as well as to the Ontario Securities Commission and the general public, to present in its financial statements the best information available concerning its financial performance and circumstances. Therefore THESL now seeks a determination of this matter by the Board. Were THESL to reserve this request for its current main rates case, there would be no prospect of a determination of the issue prior to the time that financial statements for the 2009 fiscal year need to be produced.

THESL's Proposal for Disposition of the Gains on Sale from the Named Properties

10. THESL proposes to dispose of the actual net after-tax gains from the sale of the Named Properties by way of a revenue offset applying to the next Service Revenue Requirement to be found by the Board, which will be that for 2010. If not all of the Named Properties are sold by the time of rate finalization for the 2010 test year, any remaining gain on sale amounts would continue to be recorded and disposed of in the same manner in the succeeding case.

11. Disposition of the actual (rather than forecast) amounts is expedient and avoids the difficulties inherent in forecasting net gains on sale in a turbulent real estate market. It is also simpler to implement and more transparent. Evidence of the exact actual net amounts would be available and provided in support of the proposed revenue offsets, and could be updated until virtually the time of rate finalization (i.e., submission of the Draft Rate Order for review and approval by the Board).

#### Current Status of Property Disposals

12. As of November 27, 2009, four of the Named Properties, 3706 Bathurst Street, 124 Birmingham Avenue, 522 Rustic Road and 228 Wilson Avenue, have been sold, with net after-tax gains on sale of \$354.1 thousand, \$323.6 thousand, \$185.8 thousand, and \$786.3 thousand respectively, totalling \$1.65 million.
13. At the current time, THESL expects that one further property, 175 Goddard St, may be sold prior to 2010 rate finalization.
14. At the current time, THESL expects that 28 Underwriters Road will not be sold within the 2010 fiscal year.
15. At the current time, THESL expects that 211 Sterling Road will be sold by September 2010.

#### The Bearing of the EB-2008-0138 Decision (the “Motion Decision”)

16. On June 9, 2008, THESL filed a Notice of Motion for an Order reviewing or varying the EB-2007-0680 Decision with respect (among other items) to disposition of the gains from the sale of properties as directed at Section 3.4 of the Decision. That Motion was given file number EB-2008-0138.
17. Specifically, that Motion sought:
  - (a) a finding that the figure found by the Board of \$10.3 million represented the then-current forecast of before-tax, rather than after-tax, gains on sale;

- (b) a stay on that portion of Section 3.4 of the Decision directing a downward adjustment of THESL's 2008 base distribution revenue requirement; and
- (c) an order directing that gains on sale of the above-specified properties be recorded in a variance account for possible later disposition depending upon the outcome of the THESL appeal to the Divisional Court.

18. In the Motion Decision, the Board found as follows:

“The Board Orders that the Applicant employ Deferral Account 1508, Other Regulatory Assets, Sub-account Proceeds from Sale of Assets to record the disputed \$10.3 million to ensure that it can be credited to ratepayers in the event that Toronto Hydro is ultimately unsuccessful with its appeal. Carrying charges will apply to the principle balance in the account based on the Board's prescribed interest rates.”

and

“The Applicant shall record the \$10.3 million proceeds from the sale of assets in Deferral Account 1508.”

19. THESL has interpreted the phrases “the disputed \$10.3 million” and “the \$10.3 million proceeds from the sale of assets” to refer to the actual net after-tax gains on sale then to be realized in future through the disposal of the Named Properties. At the time of the Motion Decision, there was no existing, discrete amount of \$10.3 million, either from the sale of properties, or from distribution rates, to which the Board could have been referring.
20. Furthermore, as noted above, the net after-tax gains on sale of four of the Named Properties to date have totalled only \$1.65 million.
21. THESL submits that it has followed the Board's Order in the Motion Decision by recording the net after-tax gains on sale of the Named Properties as these sales have been executed, and by recording carrying charges in the prescribed manner. Therefore it remains only to dispose of these amounts in an orderly manner by way of revenue offsets to the revenue requirements determined by the Board in THESL's next, and if necessary, subsequent cost of service rate applications.
22. THESL may provide such further and other grounds as counsel for THESL may submit and the Board allow.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) The Affidavit of Asheef Jamal, THESL Controller;
- (b) The Affidavit of Pankaj Sardana, THESL Vice-President, Treasurer and Regulatory Affairs;
- (c) Such further documentary evidence as counsel for THESL may submit and the Board allow.

**All of which is respectfully submitted this 27th day of November, 2009.**

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