Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2008-0138

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 just and reasonable rates and other charges for electricity distribution to be effective May 1, 2008, May 1, 2009, and May 1, 2010.

AND IN THE MATTER OF a motion by Toronto Hydro-Electric System Limited requesting the varying of a part of the Decision with Reasons issued May 15, 2008, which approved just and reasonable rates and other charges for electricity distribution to be effective May 1, 2008 and May 1, 2009

PROCEDURAL ORDER NO. 1

Toronto Hydro-Electric System Limited ("Toronto Hydro") filed an application with the Ontario Energy Board, received on August 3, 2007 under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, Schedule B, seeking approval for changes to the distribution rates that Toronto Hydro charged for electricity distribution, to be effective May 1, 2008 (the "application"). The Board assigned the application file number EB-2007-0680.

On May 15, 2008, the Board issued its Decision with Reasons in the application ("the Decision"). The Board made the following finding and order with regard to certain properties owned by Toronto Hydro: "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 (the "sale proceeds order")."

On June 4, 2008, Toronto Hydro filed a Notice of Motion with the Board requesting, among other things, a review and variance of the sale proceeds order ("2008 Motion to Review"). The Board assigned file number EB-2008-0138 to the 2008 Motion to Review. On June 9, 2008, Toronto Hydro filed an amended Notice of Motion with the Board advising it would appeal the sale proceeds order to the Divisional Court, which it did on June 16, 2008. On June 25, 2008, the Divisional Court granted Toronto Hydro's request for a stay of the sale proceeds order pending the hearing of the appeal.

On June 27, 2008, the Board issued a Decision declaring the portion of the 2008 Motion to Review related to the sale proceeds order moot given the stay granted by the Divisional Court. The Board ordered Toronto Hydro to record the forecasted sale proceeds of $10.3 million in Deferral Account 1508, Other Regulatory Assets, to ensure that it could be credited to ratepayers in the event that Toronto Hydro was unsuccessful with its appeal.

On April 29, 2009, the Divisional Court dismissed Toronto Hydro's appeal and on September 14, 2009, the Court of Appeal denied Toronto Hydro's motion for leave to appeal the decision of the Divisional Court.

On November 27, 2009 Toronto Hydro filed a Notice of Motion under Rule 42 of the Board's *Rules of Practice and Procedure* for an Order of the Board reviewing and varying the sale proceeds order (the "2009 Motion to Review"). Toronto Hydro stated the passage of time had rendered it impossible to implement as its 2008 rates had been superseded by its 2009 distribution rates, and no process had been established through which to dispose of the sale proceeds. Further, Toronto Hydro advised that it had not realized $10.3 million from the disposition of the properties referred to in the Decision.

Toronto Hydro requested: (i) that the net after-tax gains on the sale of properties which were actually sold be used rather than the forecast contained in the Decision, which as of the date of filing was $1.65 million; and (ii) that this amount be treated as a revenue offset to the 2010 revenue requirement.

Toronto Hydro noted that 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 and that 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.

Toronto Hydro submitted that the passage of time since the Decision and its failure to realize $10.3 million from the disposition of the properties constituted significant new facts and changes in circumstances which necessitated the development of an alternative ratemaking approach to dispose of the subject amounts.

Toronto Hydro further stated that 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 and that it has a responsibility to its debt holders 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. As such, Toronto Hydro now sought a determination of this matter by the Board. Toronto Hydro further stated that were it 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 fiscal year need to be produced.

Rule 45.01 of the Rules states:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The Board has determined that it wishes to receive submissions from parties on the threshold question of whether the 2009 Motion to Review should be reviewed before conducting any review on the merits.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. Written submissions by parties on the threshold question are to be received by **Wednesday January 6, 2010.**

2. Toronto Hydro may reply to any such submissions by **Monday January 11, 2010.**

All filings to the Board must quote file number EB-2008-0138, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

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ISSUED at Toronto, December 17, 2009
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary