

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.

THESL'S REPLY SUBMISSIONS ON THE THRESHOLD ISSUE

1. On November 27, 2009 Toronto Hydro-Electric System Limited ("THESL") filed a Notice of Motion (the "2009 Motion to Review") 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", an aspect of the Board's EB-2007-0680 Decision.
2. On December 17, 2009 the Board issued Procedural Order No. 1 in the 2009 Motion to Review, which invited submissions from intervenors, and reply from THESL, on the threshold question of whether the 2009 Motion to Review should be heard, prior to a review of the merits.
3. Two intervenors, SEC and VECC, ("the intervenors") filed submissions on the threshold question with the Board. THESL's reply submissions follow below.

The Narrow Threshold Issue

4. As set out both in the Notice of Motion and Procedural Order No. 1, the Board's Rules of Practice and Procedure set out at 44.01(a) certain grounds which may support a Motion for Review. Among others, these grounds include
 - a. A change in circumstances; and
 - b. New facts that have arisen.

5. The Notice of Motion set out the particulars of these grounds in detail: essentially, these were the history of THESL's challenges to sale proceeds order; the passage of time which rendered impossible the implementation of the sale proceeds order as originally crafted; and the overtaking of forecast events by actual events specifically with respect to the sale of properties.
6. There is no doubt whatsoever that circumstances have changed and that new facts have arisen in this case, relative to both the original sale proceeds decision and the motion decision of June 2008, and neither SEC nor VECC dispute this point. They do differ with THESL as to the meaning and consequences of these factors, but those issues relate to the merits.
7. The simple facts that pertain to this matter are as follows:
 - a. The Board's original proceeds of sale decision cannot now be implemented because the revenue requirement to which it applied is obsolete;
 - b. Insofar as the original proceeds of sale decision pertained to events that were forecast to have occurred by the close of 2009, the now obsolete forecast of those events is irrelevant and has been overtaken by an actual record; and
 - c. Despite the claims of VECC and SEC that the sale proceeds decision can now be properly implemented (VECC, para. 14) and that "there is no reason to disturb the Board's original decision" (SEC, para. 15), at this time there exists no direction or mechanism for the disposition of the gain on sale amounts, given that the effect of the EB-2007-0680 Decision has now expired. Nevertheless THESL believes that common ground exists between itself and the intervenors in that all parties wish to have resolution of this matter.
8. At para. 13 c, VECC implicitly acknowledges that an alternative to the original implementation is necessary by stating that its rendition of the amount in question "should be included as a revenue offset to THESL's 2010 rates". In this VECC and THESL agree on the principle that the appropriate amount be disposed of through 2010

rates. However, this matter is not at present included within the 2010 application, and furthermore that approach clearly does require either a variance of the Board's sale proceeds decision or a new order. The sale proceeds decision, along with the rest of the EB-2007-0680 Decision, governed 2008 rates, not 2010 rates.

9. Despite the opposition of the intervenors to THESL's contention that the threshold is clearly met, THESL submits that the substantive dispute between it and the intervenors concerns the merits rather than the threshold question, and that attempting to avoid the issues by denying that the threshold is met is unconstructive.

10. In summary on the narrow threshold issue, THESL submits that

- a. The threshold conditions are clearly met in that relevant new facts and changes to circumstances have undeniably occurred;
- b. A variance to the sale proceeds decision, or a new order, is clearly required if only to direct that the issue be joined to the EB-2009-0139 Application;
- c. It is unreasonable to attempt to secure an outcome on the merits by opposing a proper process for its determination.

11. THESL acknowledges the different views of the intervenors on the merits and simply seeks a proper determination of the issues by the Board. As stated above, THESL believes that the sale proceeds order cannot now simply be implemented as though nothing had happened in the interim, but if on this view a variance to that order is also precluded, THESL consents to this matter being treated as a new application to dispose of a variance account balance.

The Existing Sale Proceeds Order Cannot be Relied Upon

12. The substantial difference between THESL and the intervenors is that the intervenors wish to preserve the operation and the quantum of the original sale proceeds order. Specifically, this would involve reducing THESL's (2008) revenue requirement by \$10.3 million by way of a revenue offset, and disposing of any variances between the actual

after-tax gains on sale from the Named Properties and the reference amount of \$10.3 million through subsequent clearing of a variance account. The intervenors submit that this may be done through the 2010 revenue requirement with no further order, and seek to ensure this outcome by preventing a proper determination of the issues on their merits. VECC goes so far as to characterize the relief sought by THESL as moot (VECC para. 2).

13. Although THESL has disputed the correctness of the figure of \$10.3 million from the outset of the appeal process, there is no doubt and no party disagrees that that figure was a forecast. The sale proceeds decision was itself founded on that forecast, as is evident from the Board findings at page 27 of the EB-2007-0680 Decision:

“To defray these substantial costs to the ratepayer, the Board finds 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. As the sale of 60 Eglinton West is planned for 2010, it does not impact the rates being set in this proceeding.” (emphasis added)

14. The only issue which is moot in this case is the correctness of the forecast, because it has been overtaken by actual events and thus rendered irrelevant.
15. It is clear from the Board’s sale proceeds decision as set out above both that the forecast events underpinning the figure of \$10.3 million were deemed to occur within 2008 (or at most within the test period, 2008-2009) and that the impact of the forecast was upon “the rates being set in this proceeding”.
16. A forecast is used in a forward test year context as a proxy for information on actual quantities. A forecast is never superior to actual information, which fact underlies the Board’s policy of disposing of deferral and variance account balances only on an actual basis. A dated forecast of events which have actually unfolded in the interim may never be considered even a valid, much less a superior source of information for ratemaking purposes.

17. The intervenors therefore have no basis to submit that ratemaking, which in its origin pertained specifically to events, i.e., the sale of the Named Properties, should now be conducted using an obsolete and highly inaccurate forecast of those events rather than actual information.
18. THESL believes that common ground exists between it and the intervenors on the point that ultimately, 100% of the after-tax gains on sale from the Named Properties are to be cleared to ratepayers. At the current time, some of those gains have been realized while other properties remain to be sold at some point in the future. As to the after-tax gains on sale from the properties actually sold, THESL submits that the correct approach is to clear those actual gains through a proper order governing 2010 rates, and that it would be unreasonable to clear variances derived with reference to fictional forecast values.
19. With respect to the properties remaining to be sold, THESL submits here as it did in the Notice of Motion (para. 11) that the vagaries of the real estate market make it unreasonably difficult to forecast after-tax gain on sale amounts, and that an efficient, timely approach would be to simply clear the actual amounts as they become known through successive rate periods.
20. THESL cannot accept a ratemaking approach that would use obsolete forecasts, which are in excess of two years old and come from a completely different economic period, for the purpose of defining a reference amount for the after-tax gains on sale of the properties yet to be sold. Such an approach would be an untenable departure from the standards of information routinely demanded by the Board for ratemaking purposes. As a result therefore, if the forecasting approach is taken a new finding of facts pertaining to the forecast after-tax gains on sale is required of the Board and this clearly requires an examination of the merits.

Summary

21. THESL makes the following submissions in summary:

- a. The threshold conditions have undoubtedly been met and the relief sought by THESL is not moot. Circumstances have undeniably changed through the passage of time, specifically in that the subject rate year of the EB-2007-0680 Decision has expired, and new facts, specifically pertaining to the after-tax gains on sale from the Named Properties, have emerged.
- b. The sale proceeds order cannot be relied upon since intrinsically it went to the 2008 revenue requirement by way of the subject revenue offset. The 2008 revenue requirement and the associated rates have come and gone. The intervenors cannot support the proposition that the EB-2007-0680 Decision can now legally govern 2010 rates. Therefore a new order is required and that order must be based on the merits.
- c. The forecast of the after-tax gains on sale from the Named Properties which underpinned the EB-2007-0680 Decision is now irrelevant, and clearly does not meet the standards of information required by the Board for ratemaking purposes. The disposition of any realized after-tax gain on sale amounts must be on the basis of their actual values, and not any other values.
- d. It is open to the Board to approve THESL's proposed approach with respect to the after-tax gains on sale from the unsold properties, and THESL submits that that approach is efficient, fair, and timely. Should the Board elect to require forecasts of the after-tax gains on sale from the unsold properties, a current forecast and a new finding of facts are required.
- e. For all the reasons provided above, including THESL's submissions in-chief on this Motion, we submit that the relief sought by THESL should be granted by the Board.

All of which is respectfully submitted this 11th day of January, 2010.

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