



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.

DECISION ON MOTION

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 regarding 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.

On December 17, 2009, the Board issued an acknowledgement letter and Procedural Order No. 1 in which it stated that it wished 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 received submissions from the

Vulnerable Energy Consumers Coalition (“VECC”) and the School Energy Coalition (“SEC”), as well as a reply submission from Toronto Hydro.

VECC argued that the relief requested by Toronto Hydro was moot as the various issues raised by Toronto Hydro have already been dealt with by the Board’s May 15, 2008 Decision. VECC submitted that this Decision had contemplated that the timing and value of actual sales of the properties could be different from what was forecast and accounted for those factors in the Decision such that no new issue was being raised in the 2009 Motion to Review. Accordingly, VECC submitted, direction from the Board as to how to implement that Decision in view of the delay caused by Toronto Hydro’s unsuccessful review and appeal is all that is required.

SEC made similar arguments, submitting that the original facts on which the Board’s Decision was based remain the same as at the time of the Board’s original Decision with the only possible change being the difference between the actual gains and those that were forecast. SEC pointed out that had already been contemplated by the Board as reflected in its creation of the variance account. As such, in SEC’s view, the 2009 Motion to Review did not meet the threshold under section 45.01 of the Board’s *Rules of Practice and Procedure* and should not be heard.

Toronto Hydro’s reply submission reiterated its position that the threshold test has been met on the grounds that there have been changes in circumstances and new facts have arisen since the Decision was issued in 2008. These include the history of its challenges to the sale proceeds order, the passage of time which rendered impossible the implementation of the sales proceeds order as originally crafted, and the overtaking of forecast events by actual events specifically with respect to the sale of properties. In this context, Toronto Hydro argued that the passage of time had rendered the forecast of the after-tax gains in the 2008 Decision 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.”

Board Findings

The Board finds that Toronto Hydro has not met the threshold test as set out in Rules 44.01(a) and 45.01, and the 2009 Motion to Review is dismissed. As noted above, Rule 44.01(a) requires the grounds set out for the motion for review to raise questions concerning the correctness of the Order or Decision. The Board is not persuaded that the grounds raised by Toronto Hydro do so; its reasons for so concluding are set out below.

In its motion materials Toronto Hydro argued that the passage of time which elapsed as a result of the Applicant's unsuccessful appeals, and events which did or did not occur during that passage of time, constituted changes in circumstances or new facts as contemplated by Rule 44.01(a). The events included Toronto Hydro's failure to sell certain properties, resulting in the realization of sale proceeds significantly below those forecast; and the completion of the appeals, making the embedding of the sales proceeds in 2008 rates, directed by the Board, impossible.

The Board notes that a decision to appeal an order of the Board will always result in the passage of time during which the circumstances underlying the order may change. If Toronto Hydro's argument was adopted, a possible outcome is that any order under appeal could be the subject of a motion to review on the basis that changes in the circumstances or facts underlying the order have occurred.

Regardless of whether an appeal is initiated, if the Board accepted the principle underlying the argument proposed by Toronto Hydro, all of its orders and decisions would need constant and ongoing review to react to the changes occasioned by time passing. The end result would be that no order or decision would be final. Those affected by the orders or decisions of the Board could not plan and conduct their business with certainty as time would inevitably alter the circumstances and facts underlying each order and decision.

In refusing to accept the interpretation of Rule 44.01(a) proposed by Toronto Hydro, the Board reiterates that certainty and finality are a necessary and important outcome of any adjudication, and finds that the passage of time, and the events which occur or do not occur during its passage, do not constitute changes in circumstances or new facts as contemplated by Rule 44.01(a).

As Toronto Hydro has not put forward grounds which question the correctness of the order, it has failed to persuade the Board the matter should be reviewed as required by Rule 45.01. The motion is dismissed.

While the Board does not accept Toronto Hydro's argument, it does recognize that the implementation of the Decision requires further direction from the Board. The Board will hear submissions from parties during the oral hearing of Toronto Hydro's EB-2009-0139 rate application concerning the implementation of the Decision in view of the delay caused by the appeals process.

ISSUED at Toronto, January 22, 2010

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary