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March 22, 2010

BY EMAIL AND BY COURIER

Ms. 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-2009-0308 – Compliance Order Proceeding against Toronto Hydro –
Costs of Smart Sub-metering Working Group**

We are counsel to members of the Smart Sub-metering Work Group (SSMWG). This letter is in response to a letter filed on March 19th by counsel to Toronto Hydro-Electric System Limited (THESL) objecting to the SSMWG's request for payment of its costs of this proceeding.

On March 10, 2010, the SSMWG sent its cost request to Toronto Hydro-Electric System Limited (THESL). That letter was not copied to the Board, or to the Board's cost assessment officer, or to other parties, because this did not appear appropriate in light of the Board's February 22nd Compliance Order in this matter.

The Board's Decisions in Phase I and Phase II (and the subsequent Compliance Order) made clear its very strong disapproval of THESL's conduct. At the time that the Board read its Phase II Decision, it appeared clear that the Board's intent was for THESL to reimburse the parties opposite for all the costs that they incurred to participate in the compliance proceeding against THESL. Specifically, in its oral Decision in Phase II of the compliance proceeding, the Board directed that the draft Compliance Order that had been filed include the following "further term" :

Toronto Hydro shall reimburse Metrogate and Avonshire, the Smart Sub-metering Working Group and the Board for all costs relating to their participation in this proceeding, which costs shall be borne by the shareholders, not the ratepayer. (at p. 55 – emphasis added)

That provision was embodied in paragraph 18 of the Compliance Order.

It is a fair reading of the Phase II Decision (and paragraph 18 of the Compliance Order) that the Board has concluded that parties and the Board are entitled to repayment of all amounts that they have expended to defend or prosecute their rights and the public interest against THESL. The SSMWG recognizes that this is an extraordinary remedy.

That is confirmed by the fact that it is THESL's shareholder (and not ratepayers) that is responsible to pay the costs.

There is no suggestion, either in the words of the Phase II Decision, or in the Compliance Order, that it is only costs in accordance with the OEB's tariff that are recoverable. There is also no suggestion that the costs reimbursable to the SSMWG, Avonshire and Metrogate will be treated or assessed differently or at a lower rate from those of the Board.

It is instructive to compare paragraph 18 of the Compliance Order to the typical cost award provisions in other Board Orders. An example of the typical approach used by the Board for cost awards in a contested proceeding can be seen in the recent THESL "streetlighting assets" case (EB-2009-0180), where the Board ordered:

COST AWARDS

The Board has determined that costs will be assessed against Toronto Hydro-Electric System Limited. The Board has also determined that it is appropriate to deal with the cost claims in two phases. Intervenor eligible to claim costs may make their claims now for costs incurred up until and including the date of this Decision and Order. Any costs relating to the continuation of this proceeding will be dealt with at a later time.

IT IS ORDERED THAT:

1. Intervenor eligible for cost awards shall file with the Board and forward to THESL their respective cost claims within 21 calendar days from the date of this Decision and Order.
2. THESL may file with the Board and forward to the applicable intervenor(s) any objections to the claimed costs within 35 calendar days from the date of this Decision and Order.
3. Intervenor whose cost claims have been objected to may file with the Board and forward to THESL a response to any objection for cost claims within 42 calendar days of the date of this Decision and Order.
4. THESL shall pay the Board's costs of, and incidental to, this proceeding immediately upon receipt of the Board's invoice.

The Compliance Order does not provide for costs to be "assessed". It contains none of the process that is typical in most Board cost orders, involving the participation of the assessment officer. Instead, paragraph 18 of the Compliance Order provides that:

18. THESL shall reimburse Avonshire and Metrogate, the SSMWG and the Board for all costs relating to their participation in proceeding EB-2009-0308, which costs will be borne by THESL's shareholder and not the ratepayer.

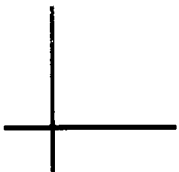
It is clear that the "Costs" provisions of the Compliance Order are intended to be different from the ordinary case. Had there been some doubt about this, then surely THESL would have insisted on different wording in the Compliance Order.

The Board's Practice Direction on Cost Awards relates to the common situation where a person has applied for and been granted eligibility for costs awards in a proceeding. That is not the case here. None of Compliance Counsel, the SSMWG or Avonshire or Metrogate applied for cost eligibility. The costs decision against THESL is therefore not subject to Rule 41 of the Board's Rules of Practice and Procedure. Similarly, the costs decision is not subject to the Practice Direction on Cost Awards. Instead, the costs decision appears to represent the Board's exercise of its jurisdiction under section 30 of the OEB Act to "order a person to pay all .. of a person's costs of participating in a proceeding before the Board". (emphasis added) Nowhere in the Board's Rules of Practice or the Board's Practice Direction on Cost Awards does it state that the Board's power to award costs on a full indemnity basis has been removed or fettered.

Similarly, the Board's Phase II Decision does not suggest that only certain types of costs are recoverable. Nowhere is it stated that the SSMWG is only entitled to payment for costs related to Phase II. The costs of the SSMWG for which it seeks reimbursement should be considered in light of the critical importance of the matters at issue in this proceeding to members of the SSMWG. While there were some restrictions on the SSMWG's level of participation in Phase I of the proceeding, that in no way diminished the importance of the SSMWG being fully engaged throughout the process. It was necessary for the SSMWG to actively follow, and participate as appropriate, in all aspects of the compliance proceeding against THESL. On several occasions, THESL brought motions that directly or indirectly sought disclosure from SSMWG members. In all aspects of the case, it was appropriate for the SSMWG (whose members are the parties most affected by THESL's improper activities) to monitor and attend proceedings. At all times, counsel for the SSMWG was present and available to assist the Board and Compliance Counsel with any questions or issues that arose. Ultimately, it was important to members of the SSMWG that they be fully represented in all aspects of this proceeding, and be apprised of all developments. It is the costs of that representation that are now being sought from THESL, in accordance with paragraph 18 of the Compliance Order. Of course, but for THESL's improper conduct, none of these costs would have been incurred.

For the reasons above, the SSMWG requests that the Board confirm its Order that THESL is required to pay all of the SSMWG's costs associated with the compliance proceeding. Those costs are set out in our March 10th letter that THESL attached to its March 19th letter.

As noted, the SSMWG believes that the intent of the costs provisions of the Compliance Order was to reimburse, or hold harmless, those parties who conducted or assisted the prosecution of the compliance proceeding against THESL. It should be noted, though, that the SSMWG had been pursuing the issues that were addressed in this compliance proceeding for many months before the Board's Notice of Intention was issued against THESL. It was the SSMWG's initial complaint to the Market Surveillance Panel, and the SSMWG's subsequent specific complaint about THESL's conduct in the Avonshire and Metrogate projects, that appear to have led to the Board's Notice of Intention against THESL. The members of the SSMWG incurred substantial costs associated with the development and preparation of those complaints. The SSMWG has not sought recovery of those costs from THESL. If, however, the Board is inclined to consider changes to what is set out in paragraph 18 of its Compliance Order (which, effectively, is what THESL

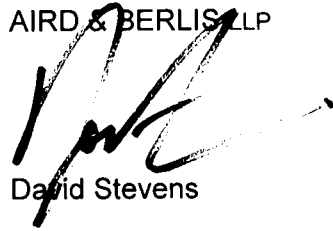


is now seeking), then the SSMWG asks that it be entitled to recovery of all of its costs related to its complaints against THESL.

Should you require further information, please advise.

Yours very truly,

AIRD & BERLIS LLP



David Stevens

cc. George Vegh, Counsel to THESL
Glenn Zacher/Patrick Duffy, Compliance Counsel

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