EB-2010-0193

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

AND IN THE MATTER OF an Application by Toronto Hydro-Electric System Limited for an order or orders approving recovery of certain costs relating to contact voltage remediation.

FINAL ARGUMENT

OF THE

SCHOOL ENERGY COALITION

Introduction

1. On December 11, 2009, the Board rendered a decision (the "Decision") in EB-2009-0243, an application by Toronto Hydro Electric System Limited for recovery of costs associated with contact voltage problems on their system. In the Decision, the Board determined that THESL would be allowed to recover part of the costs they had claimed. The formula stipulated by the Board for that recovery was $9.44 million less the amount by which THESL underspent their 2009 controllable expenses (excluding contact voltage costs).

2. On May 14, 2010 THESL filed this Application, seeking (after adjustments during the proceeding) $8.586 million as the net recovery based on their interpretation of the Decision.

3. This is the final argument of the School Energy Coalition in this matter. We have been assisted by the early filing of the Staff submissions, which has allowed us to shorten and focus this final argument.

4. In our submission, this proceeding raises a two stage analysis. As a first step, does the evidence provide a basis for the Board to order any recovery to THESL? If the answer is yes, then the calculation of the correct amount becomes the remaining issue. We will deal with each of those two stages in turn.

Has THESL Justified Any Recovery?

5. ***Burden of Proof.*** Parties to proceedings at the Board often talk about the onus and burden on the Applicant. Simply put, it is the Applicant's case to make, and the Applicant at all times has and maintains the burden of putting forward sufficient evidence for the Board to reach the decision applied for.

6. But in reality, Board proceedings virtually never turn on onus and burden of proof. In practice the Board considers all of the evidence before it, and reaches its conclusions based not on a

legal rule, but on what the Board thinks the evidence that is before it shows. In most cases, the evidence is not perfect, but the Board is a specialized regulator with the ability to assess incomplete data and reach reliable conclusions.

7. The one appropriate exception to that standard practice, it is submitted, is when critical information is in the possession of the utility, the parties or the Board ask for that information, and the utility declines to provide it. When those facts exist, it is submitted that the refusal to provide that necessary evidence should be considered fatal to the application.

8. That, in our view, is the case here, and as a result we believe that recovery should be denied by the Board.

9. ***Information Requested and Ordered.*** There were two requests for information denied, both driving for the same type of information. The issue was whether any unusual spending or adjustments took place at the end of 2009 that affected the total of 2009 controllable expenses. Since some expenses for any company – actual or through accounting adjustments – are subject to judgment as to their timing, it is legitimate for the Board to explore whether, knowing that year end spending or adjustments could affect their payout, THESL made any such judgments that affected the amount to be recovered.

10. It is important, in our view, to recognize that, up to as much as $9.44 million, spending or adjustments at the year end in 2009 by THESL would not actually cost them any money. If controllable expenses would otherwise have been $5 million below Board-approved, thus denying any recovery for that amount, electing to increase year-end spending by $5 million would cost the Applicant nothing. The amount spent would be recovered in full through a higher claim for contact voltage. Accounting adjustments would be even better, because there is no cash outlay, just an increase in the recovery.

11. There are only two possible ways to get at these sort of judgments.

12. On a top down basis, the Board can compare the monthly pattern of controllable expense spending in 2009 against previous years. If the spending at the end of the year in 2009 is higher relative to the pattern in prior years, that raises questions that have to be addressed.

13. On a bottom up basis, the Board can look at the actual year-end adjustments made by THESL in 2009, and follow up on any unusual adjustments that had the effect of increasing controllable expenses.

14. ***Monthly Data and Comparative Information.*** Staff IR #3 [Ex. J/1/3] sought to pursue the top down question by asking for a month by month breakdown of controllable expenses. In their response, THESL declined to provide that information, using the unusual excuse that their monthly data was not audited.

15. On July 26, 2010, the Board in Procedural Order #2 ordered THESL to produce not only the information Staff had requested, but also similar information for 2007 and 2008, all by August 3, 2010.

16. THESL did not meet the August 3rd deadline, but on August 3rd wrote the Board advising that it would be late with the information. The letter did not advise that the information would be deficient.

17. On August 23, 2010, THESL filed an updated response to Staff #3, but did not comply with the Board's order. Only 2009 monthly data was provided. The Board's order to produce monthly data for 2007 and 2008 was refused, on the basis a) that it could not be produced with reasonable effort, and b) the order was not justified on the basis of the terms of the Decision.

18. Without commenting on the appropriateness of refusing to comply with a Board order, especially on the basis that – essentially – it was wrong (i.e. not consistent with the Decision), the Applicant was clearly given an opportunity to produce material evidence necessary to support the Application, and they declined.

19. How material is the missing 2007 and 2008 information? The answer lies in the 2009 data. What it shows [Ex. J/1/3/App.A, Updated] is that the average controllable expenses per month during 2009 were $17.0 million. December 2009, however, was $25.0 million. The difference, $8.0 million, is equal to substantially all of the claim by the Applicant in this proceeding.

20. Of course, it may be that higher spending in December is perfectly normal. However, the Board quite correctly asked for comparative information so that question could be answered, and THESL decided it would not comply with that requirement. Thus, the Board is left with evidence that shows only that December expenses were high. The evidence does not contain any explanation, and the obvious one is that discretionary spending was increased due to the Decision.

21. ***Year End Information.*** SEC pursued the question of bottom-up evidence in SEC IR #3 [Ex. J1/3/3], which said the following:

    "Please provide a list of all year-end adjustments to OM&A for 2009, including but not limited to accruals of expenses not yet paid or invoiced, and any items that by their type or amount are not normally seen in year-end accounting."

22. THESL declined to provide the information requested on the basis that the financial statements were audited and received a clean opinion.

23. On July 28, 2010 SEC, seeking to keep the costs down in the proceeding, contacted THESL by email seeking a further and better answer to SEC IR#3, but advising that a motion would have to be filed ordered a response if that answer was not forthcoming. A copy of that email is annexed to this Final Argument.

24. On August 3, 2010, THESL wrote the Board with respect to Staff #3, and also advised of the request from SEC. THESL's letter makes clear that further answers were planned for both Staff #3 and SEC #3.

25. Notwithstanding the August 3rd letter, on August 23rd the response to the SEC interrogatory was "THESL relies on its response as originally filed". We note that the rationale – that the statements are audited – is essentially the converse of the rationale provided to the Board for failing to respond to Staff #3, and is no more appropriate in the case of the SEC interrogatory as in the case of the Staff interrogatory. Further, having read the August 3rd letter and assuming that the more efficient and less expensive approach disclosure was being pursued, SEC did not file a motion to get the information. (Was this just a procedural trick on the part of THESL? Possibly, but the more likely explanation is that they simply changed their minds between August 3rd and 23rd about whether they should let the Board see the information requested.)

26. The refusal to answer SEC IR #3 is particularly telling because the information requested would, if 2009 were a normal year, be so innocuous. Companies have many routine adjustments to their accounts at year end, and the accountants and auditors regularly develop a set of adjustment working papers to deal with those transactions. With minimal work, the Applicant could have shown clearly that the year end transactions did not include any adjustments that the Board would find unusual. Unless, of course, there are some unusual transactions.

27. When an Applicant such as THESL refuses after repeated requests to provide material information that the Board can only see if they provide it, in our submission it is appropriate for the Board to assume that the information withheld would be detrimental to their position. In this case, it is appropriate for the Board to assume that the information contains unusual year end transactions which would cause the Board to question the appropriateness of the controllable expenses number.

28. Now, THESL's answer to this appears to be that the Decision relies on their audited financial statements to determine the figure for controllable expenses. In our submission, this does not mean that THESL was free to make whatever accounting decisions in 2009 that they wanted, even if the intent of those decisions was to increase the recoverable amount. Further, it does not mean that the Board has to close its eyes to any such accounting choices. Rather, the Board remains free to look behind the controllable expenses number in the audited financials to satisfy itself that the character of that number is what the Board anticipated when it created the formula in the Decision.

29. ***The September 10th Update.*** We acknowledge that the Applicant filed further evidence on September 10th at its own request, apparently because it also felt that the record is not complete. However, there are two problems with the September 10th evidence:

    a. It is essentially argument, written and organized not to provide any new information to the Board, but to press THESL's case for recovery.

    b. It does not respond in any way to the issues raises in Staff #3 or SEC #3.

30. In our submission, the September 10th "evidence" has little incremental value to the Board, and does not address the key issues in this proceeding. As discussed below, the only evidentiary area in which it is useful is in the calculation of the recovery amount (the second phase of the analysis), and for that issue the September 10th evidence demonstrates fairly clearly that the amount claimed has been overstated.

31. ***Recommended Action.*** It is very unusual to ask the Board to refuse an Applicant's request for relief on the basis of failure to file sufficient evidence, but in our submission there has to be some circumstance in which that would be the right answer. For example, if a utility filed an application seeking recovery of an extraordinary event, but filed nothing other than the balance in Account 1572, would the Board order recovery? The answer clearly is no.

32. So the question is not whether failure to meet the burden of proof can be determinative. The question, rather, is where to draw the line between what is merely a weak application, and circumstances that amount to failure to meet that fundamental burden.

33. In our submission, the test should be whether the application lacks information that a) is available to the utility and b) is essential to the determination of one or more issues material to the Board's decision. In this case, the situation is exacerbated by the Applicant's refusal to

comply with an order from the Board for comparative information, and refusal to provide year end information after suggesting to the Board that they planned to do so. Not only did they have the obligation to file all necessary information, but when ordered and requested to do so, they refused.

34. ***Best Evidence Alternative.*** In the alternative, in the event that the Board does not reach this conclusion, in our submission the Board should follow its more normal practice and act on the best evidence before it. That best evidence, weak as it may be, is that the controllable expenses in December 2009 were $8.0 million more than the normal level of controllable expenses. Absent any empirical evidence explaining that excess amount (there is none, and given that evidence to explain it was ordered and requested, and was refused, in our submission the amount to be recovered should be reduced by that $8.0 million.

Amount of Recovery

35. In the event that the Board does not accept our main argument, i.e. that insufficient evidence has been filed to support recovery of the amounts claimed, or our alternative that the best evidence rule should be applied, it is our submission that in any case the amount claimed is overstated, and that the appropriate amount for recovery is $2.887 million.

36. In the Decision, the Board was dealing with two main categories of concerns. First, some of the expenses were not incurred primarily in response to an "extraordinary event". Second, some or all of the expenses were not actually incremental to the Board-approved OM&A budget.

37. To deal with the first of these concerns, the Board denied recovery for $5.699 million of the expenses claimed. To deal with the second of these concerns, the Board created a formula to compare the controllable expenses with and without the recoverable contact voltage expenses. Only contact voltage expenses that were truly incremental to the Board-approved OM&A budget would be recoverable.

38. What the Decision does not do is consider the interaction of the disallowance of the $5.699 million and the incrementality formula. Where the formula amount is within a given range, that interaction is material.

39. In our submission, the Decision makes clear that the amount of recovery must be incremental to the controllable expenses without any contact voltage charges. The entire amount should be deducted from controllable expenses to determine how much of the Board-approved budget was available to defray the $9.44 million. This is simply the plain reading of the Decision.

40. We have also reviewed the submissions of Staff on this issue, and there is much to commend that analysis. In the event that the Board determines that the disallowed expenses must be looked at individually, we agree with Staff's analysis and result.

Conclusion

41. In our submission, the Board should deny recovery to the Applicant on the basis that the Application lacks sufficient evidence on key issues necessary to reach a decision in their favour. In the alternative, the best evidence is that controllable expenses in December 2009 were $8.0 million above average, and in the absence of any evidence as to the reason for that, in our

submission the amount recoverable should be reduced by that amount, i.e. to $0.586 million. In the further alternative, the amount recoverable should be recalculated to be consistent with the Decision, and thus reduced to $2.887 million by removing the impact of the disallowed contact voltage charges.

42. The School Energy Coalition hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this proceeding. It is submitted that the School Energy Coalition has participated responsibly in all aspects of the process, in a manner designed to assist the Board as efficiently as possible.

Respectfully submitted on behalf of the School Energy Coalition this 1st day of October, 2010

Per: _____
Jay Shepherd, Counsel for School Energy Coalition

Jay Shepherd

From: Jay Shepherd [jay.shepherd@canadianenergylawyers.com]
Sent: Tuesday, July 27, 2010 11:05 PM
To: 'regulatoryaffairs@torontohydro.com'; 'Rodger, J. Mark'
Subject: EB-2010-0193 THESL CV Recovery

I note that PO #2 requires a fuller answer to Staff IR #3. I am actually more concerned about SEC IR#3, relating to the year end adjustments in 2009. My obvious step is to file a motion to compel an answer, or seek a Technical Conference as the next step in the proceeding, but given the Board's attitude on Staff IR #3, I wonder whether the Company would be willing to provide a full answer voluntarily. I am conscious of the amount of money involved in this proceeding, and so I would like to keep the regulatory costs down if possible.

Would THESL be willing to file that answer on the same time frame as provided in PO#2?

Thanks.

Jay

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