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November 18, 2010

**Delivered by Courier**

Ms. Kirsten Walli, Board Secretary  
Ontario Energy Board  
2300 Yonge Street,  
Ste. 2701  
Toronto ON M4P 1E4

Dear Ms. Walli

**Re: Toronto Hydro-Electric System Limited  
Notice of Motion – Review of OEB Decision EB-2010-0193**

We are counsel to Toronto Hydro-Electric System Limited. On behalf of our client we enclose three copies of a Notice of Motion along with supporting materials in connection with OEB Decision EB-2010-0193 issued by the Board on October 29, 2010. Please find attached:

1. Notice of Motion dated November 18, 2010.
2. Affidavit of Jean-Sebastien Couillard dated November 18, 2010 and Exhibits.
3. The OEB's "Prudence Decision" dated December 11, 2009.
4. The OEB's "Recovery Decision" dated October 29, 2010.

Thank you for your assistance in this matter.

Yours very truly,

**BORDEN LADNER GERVAIS LLP**

*Original signed by J. Mark Rodger*

J. Mark Rodger

Encl.

copy to:

JS Couillard, Toronto Hydro-Electric System Limited  
Pankaj Sardana, Toronto Hydro-Electric System Limited  
EB-2010-0193 Parties of Record

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**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 to be effective November 1, 2010;

**AND IN THE MATTER OF** the Board's Decision dated October 29, 2010 (File Number EB-2010-0193).

**NOTICE OF MOTION**

Toronto Hydro-Electric System Limited (“THESL”) will make a Motion to the Ontario Energy Board (the “Board”) on a date and at a time to be determined by the Board.

**PROPOSED METHOD OF HEARING:** THESL proposes that the Motion be heard orally.

**THE MOTION IS FOR** an Order of the Board:

1. Reviewing and varying its October 29, 2010 Decision in the EB-2010-0193 proceeding (the “Recovery Decision”), as follows:

Disallowed Residual Contact Voltage Costs

- (a) With respect to the Board’s determination of contact voltage costs allowed for recovery in 2011 rates, rescinding its findings at pages 8 – 10 of the Recovery Decision that certain residual contact voltage costs were ‘caused’ by the contact voltage situation; that those costs were therefore ineligible for inclusion in 2009 actual controllable expenses; and that consequently the contact voltage costs allowable for recovery in rates were to be reduced to \$5.296 million from \$8.586 million; and

- (b) Instead finding that actual residual contact voltage costs in their entirety are eligible for inclusion in controllable expenses pursuant to the implementation mechanism specified in the EB-2009-0243 Decision (the “Prudence Decision”); that the contact voltage costs allowable for recovery in 2011 rates are therefore \$8.586 million; and that the initially disallowed amount of \$3.290 million, being the difference between \$8.586 million and \$5.296 million, together with carrying costs be allowed for recovery in 2011 rates commencing May 1, 2011.

**THE GROUNDS FOR THE MOTION ARE:**

2. THESL respectfully submits that the findings in the Recovery Decision that are the subject of this motion raise a question as to the correctness of the Recovery Decision on the following two grounds:

- (a) **Error in Fact:** The Recovery Decision makes an error in fact when it deducts \$3.29 million from the recovery amount when the reasons only provide for disallowance of \$2.5 million in non-scanning residual contact voltage costs, resulting in an unjustified deduction of \$0.79 million. Specifically, the Recovery Decision errs by:
- (i) Deducting the disallowed contact voltage expenditures from the actual, rather than forecast, contact voltage expenditures, the latter of which were the basis of the Prudence Decision, with the result that while an amount of \$2.5 million is discussed and expressly disallowed in the Recovery Decision, a further amount of \$0.79 million is effectively disallowed with no reason, creating a total disallowance of \$3.29 million.
- (b) **Mixed Error of Fact and Law:** The Recovery Decision makes a mixed error of fact and law by misapplying the Prudence Decision and failing to include the \$2.5 million in non-scanning residual contact voltage costs in 2009 controllable expenses. Specifically, the Recovery Decision errs by:
- (i) Expanding the question that was set in the Prudence Decision and was to be implemented in the Recovery

Proceeding, thereby effectively overriding the Prudence Decision and improperly re-trying the original contact voltage prudence application by THESL;

- (ii) Improperly changing the accepted definition of controllable expenditures established by the Board, to exclude \$2.5 million in non-scanning expenditures 'caused' by the contact voltage emergency;
- (iii) Finding that certain 'residual' contact voltage expenditures (i.e., actual contact voltage-related expenditures in excess of the maximum conditionally allowed amount pursuant to the Prudence Decision) either were not controllable expenditures or were to be deducted from controllable expenditures in the application of the test prescribed by the Prudence Decision for determination of the recoverable amount of contact voltage expenditures; and
- (iv) Finding that the purported 'normalization' of controllable expenses was necessary to carry out the intention of the Prudence Decision, which among other things was to ensure that no 'double benefit' be conferred to shareholders, contrary to the fact that the disallowed residual contact voltage expenditures conferred no financial benefit to the corporation or its shareholders whatsoever.

The detailed grounds for this motion follow below.

- 3. THESL requests that the Board review and vary the Recovery Decision as requested herein pursuant to its authority under Sections 21.2 and 25.1 of the *Statutory Powers Procedure Act*, as amended, and pursuant to Rules 42-44 of the Board's *Rules of Practice and Procedure*.
- 4. THESL may provide such further and other grounds as counsel for THESL may submit and the Board allow.

#### **BACKGROUND:**

- 5. On June 30, 2009, THESL filed an application to the Board requesting that the Board approve rate riders that would enable THESL to recover the costs incurred by THESL for the emergency correction of contact voltage

conditions on its system, experienced mainly during the months of February through March, 2009.

6. Following a round of interrogatories, the Board conducted a one-day oral hearing on October 8, 2009. The Prudence Decision arising out of that proceeding was issued on December 11, 2009. At page 9 of the Prudence Decision, the Board made the following finding:

“The Panel therefore finds that it would be reasonable in the circumstances for any relief provided in this Decision to be conditional on THESL’s actual spending in controllable OM&A expenditures for the 2009 year (ending December 31, 2009). In the event that THESL’s actual controllable OM&A expenditures are below the level reflected in THESL’s 2009 approved base rates, the amount of the relief eligible for recovery found below shall be reduced by the amount of the underspending. To emphasize, this finding is not intended to reopen the testing of the 2009 revenue requirement nor the prudence of the actual 2009 OM&A spending.

Based on the information filed in the proceeding from THESL’s 2010 rates application, the total OM&A level used to derive 2009 rates was \$350.0 million. Excluding amortizations expenses of \$154.4 million, the total controllable expenses used to derive 2009 rates was \$195.6 million. Any underspending in OM&A controllable expenses below \$195.6 million shall be deducted from the conditional relief found in this Decision. THESL’s audited 2009 statements shall be the basis of determining the level of underspending, if any.”

7. The Board reduced the \$14.35 million initially claimed by THESL by \$4.91 million, reflecting its determination that overtime maintenance costs (\$2.5 million) and ongoing scanning costs (\$2.1 million) were not recoverable as part of the Z-factor relief requested, for reasons discussed in the Prudence Decision. Following these reductions to the amount initially requested by THESL, the Board determined that THESL would be eligible for recovery of \$9.44 million. This was considered by the Board to be a “conditional” amount, as it would be subject to reduction depending on the determination of THESL’s actual spending on 2009 controllable expenses. The amount was to be recorded in a deferral

account for review once the 2009 audited financial results were known and upon application by THESL to clear the balance in that account. At page 12 of the Prudence Decision the Board provides (emphasis added):

“Rather, the Board authorizes the Applicant to record in a sub-account of account 1572 (Extraordinary Events Costs) an amount of \$9.44 million for review at a later time once the 2009 audited financial results are known and upon application of THESL to clear the balance in the sub-account. In its application to recovery relief through rate riders, THESL had not incorporated interest. In any event, until the **disposition matter** is brought forward by THESL there will be no interest on the \$9.44 million amount.”

8. It is important to emphasise that the reason the Board gave for excluding the \$4.91 million in the Prudence Decision is because these amounts would have otherwise been undertaken as part of THESL’s regular maintenance program. In other words, the Board expressly denied extraordinary recovery of the \$4.91 million in large part because the amounts would have been included as part of THESL’s 2009 approved revenue requirement. Page 11 of the Prudence Decision provides (emphasis added):

“[...] [A]s Energy Probe noted, some of the remediation work undertaken during the emergency **would have otherwise arisen as forced outages of secondary circuits as THESL would have responded to those events as normal trouble calls and the costs would have been reflected in its 2009 revenue requirement for OM&A.** For these reasons, the Panel reduces the requested relief by a deemed amount of \$2.5 million.

The Panel further reduces the requested relief by \$2.41 million in ongoing scanning costs as suggested by Energy Probe and SEC for the reason that once the emergency event was dealt with, the costs for ongoing scanning of the system cannot be characterized as emergency related. **Once the emergency was resolved and THESL made a decision to change its operating parameters of the secondary system to an inspect and maintain model, these costs were part of normal budgetary pressures that are subject to budgetary re-alignments.** [...]”

9. On May 14, 2010, THESL filed evidence with the Board as part of its application for recovery of \$8.586 million (subject to interest adjustments), and the Board issued the Recovery Decision on October 29, 2010. In the Recovery Decision, the Board determined that when comparing actual 2009 controllable expenses to the Board-approved \$195.6 million (this was subsequently corrected to \$195.2 million),

“the appropriate recovery amount will be determined by deducting from the 2009 actual controllable operating expenses all contact voltage costs that the Board determined in the Decision would not have arisen in the absence of the contact voltage emergency, whether permitted for recovery in the Decision or not. In making this finding, the Board is in agreement with the staff submission that the key criterion to be used in determining which contact voltage costs should be included in controllable expenses should be whether or not the disallowed costs were caused by the contact voltage emergency, rather than whether or not they were found eligible for Z-factor recovery.”

10. The Recovery Decision then considered the two expenditures disallowed for Z-factor recovery in the Prudence Decision, and determined (at page 9 of the Recovery Decision) that the scanning-related costs (\$2.41 million) should not be deducted from the 2009 actual controllable expenses, as those costs “represented an acceptable re-prioritization of costs by THESL and should not be included in the deduction.” The Board went on to determine that “the remaining \$2.5 million in costs were related to the contact voltage emergency, as they included overtime costs which arose as a result of the emergency, and should be deducted.” Having made these determinations, the Board found that it would allow a total recovery of \$5.296 million plus carrying costs, a reduction of \$3.29 million from the \$8.586 million plus carrying costs requested by THESL.
11. In the Prudence Decision, the Board identified and directed that the subsequent “disposition matter” proceeding should take place for the purpose of determining the actual allowable recovery of contact voltage



costs<sup>1</sup>, as a function of THESL's 2009 actual controllable expenses<sup>2</sup>. The Prudence Decision was the instrument by which the Board decided the eligibility, *for extraordinary cost recovery*, of proposed amounts related to correction and suppression of contact voltage. In the Prudence Decision, the Board established a test to determine the exact amount of the actually allowable contact voltage cost recovery.

12. The Prudence Decision found a conditionally allowable amount of \$9.44 million eligible for extraordinary cost recovery, as compared to the then-forecast total expenditure on contact voltage of \$14.35 million. The Prudence Decision thus excluded \$4.91 million from potential extraordinary cost recovery.
13. The single further condition or test that was to be imposed to determine the final extraordinary cost recovery was that THESL's actual controllable expense for 2009 was to be equal to, or exceed, the corresponding amount approved in the earlier EB-2009-0069 proceeding which authorized 2009 revenue requirement and rates. This amount (after correction) was \$195.2 million (the "approved threshold amount"), and was accepted in the Recovery Decision as a reference point in the Recovery proceeding<sup>3</sup>. The Prudence Decision stipulated that any shortfall in controllable expenses relative to the approved threshold amount would be deducted from the conditionally approved recovery amount of \$9.44 million.<sup>4</sup>
14. The Prudence panel's reasoning for imposing the test was:

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<sup>1</sup> "Since this relief is subject to further reduction as explained elsewhere, the Panel will not approve at this time recovery of the \$9.44 million starting May 1, 2010, a date requested by the Applicant. Rather, the Board authorizes the Applicant to record in a sub-account of account 1572 (Extraordinary Events Costs) an amount of \$9.44 million for review at a later time once the 2009 audited financial results are known and upon application by THESL to clear the balance in the sub-account." (Prudence Decision, Page 12)

<sup>2</sup> "Any underspending in OM&A controllable expenses below \$195.6 [corrected to \$195.2] million shall be deducted from the conditional relief found in this Decision. THESL's audited 2009 statements shall be the basis of determining the level of underspending, if any." (Prudence Decision, Page 9)

<sup>3</sup> "In a letter to the Board dated December 17, 2009, THESL stated that the amount of \$195.6 referenced in the Decision included \$0.4 million of expenditures on donations and special events, which was not included as a part of 2009 rates and should therefore be excluded, meaning that an appropriate reference level of approved controllable 2009 OM&A would be \$195.2 million.<sup>3</sup> No party questioned the validity of this adjustment and the Board accepts it." (Recovery Decision, page 3)

<sup>4</sup> See footnote 2

- (a) that if there had been a shortfall in actual controllable expense relative to the approved threshold amount funded in rates, that shortfall could be used to offset the extraordinary contact voltage expenses; and
  - (b) that the conditionally approved amount should be reduced by that shortfall, if any, to avoid creating a “double benefit”<sup>5</sup> for shareholders.
15. The “double benefit” would occur if shareholders obtained both the benefit of having rates support a level of controllable expenditures not fully realized, and the benefit of having (allowed) extraordinary costs matched dollar for dollar with allowable extraordinary cost recovery.

#### **THE ERROR IN FACT:**

- **AMOUNTS DISALLOWED WITHOUT REASON**

16. At page 10 of the Recovery Decision a table sets out the derivation of the allowable recovery amount. There it is stated in footnote 4 that an amount of \$12.73 million, that was deducted from 2009 controllable expenditures, was derived as \$15.139 million in *actual* 2009 contact voltage costs less \$2.41 million in ongoing scanning costs which was allowed as part of controllable expenditures.
17. The table further shows that the difference between the allowed recovery amount and the requested recovery amount is \$5.296 million minus \$8.586 million, or (\$3.29) million, whereas the amount given with reasons for disallowance is (\$2.5) million, being the non-scanning residual contact voltage costs referred to in the Prudence Decision by the Recovery Decision. The discrepancy between these amounts is (\$0.79) million.
18. The discrepancy arises because it is the difference between the *forecast* amount of \$14.35 million originally applied for in the Prudence

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<sup>5</sup> “On the other hand, the Panel is concerned that if in fact there is underspending in the 2009 total controllable OM&A, it would confer a double benefit to the shareholder.” (Prudence Decision, page 9)

application, and the *actual* amount of \$15.139 million in evidence in the Recovery application.

19. THESL submits that as the intent of the Recovery Decision was to implement a disallowance of \$2.5 million as is stated expressly in the reasons, the Recovery Decision errs in fact by deducting that \$2.5 million from the actual, rather than the forecast amount of contact voltage expenditures, since its starting point was the ‘disallowance’ in the Prudence Decision which in turn was based on forecast amounts.
20. The same \$2.5 million further disallowance would also result from simply adding \$2.5 million to the conditionally allowed \$9.44 million to obtain \$11.94 million as the total contact voltage expenses to be deducted from controllable expenses, instead of the current figure of \$12.73 million.
21. While expressly disputing the validity of any further disallowance of the \$2.5 million beyond what follows from the Prudence Decision, THESL submits that this calculation error should be corrected.
22. If instead the intent of the Recovery Decision was to order a disallowance of \$3.29 million, the Decision fails to justify or even mention the additional disallowed amount of \$0.79 million and that finding should be rescinded.

#### **THE MIXED ERROR OF FACT AND LAW:**

- **The Established Definition of Controllable Expenses**

23. The term “controllable expenses” has been used for many years for OEB ratemaking purposes, and was defined precisely by the Board itself in the 2006 Electricity Distribution Rate Handbook:

“Controllable expenses are defined as the sum of operations and maintenance, billing and collection, and administration expenses.”

24. This is further supported by the affidavit of J.S. Couillard which is attached to and forms part of this Motion.
25. The Prudence Decision used this term explicitly and it was central to the test that was established in the Prudence Decision. The observation by Board Staff and the Recovery Decision that the Prudence Decision made no comment on the definition of ‘controllable expenses’ is of no consequence, since there was no uncertainty regarding the meaning of that term, and the lack of comment in the Prudence Decision does not reasonably lead to the conclusion that an arbitrary re-definition or use of the term by the Recovery Decision was warranted or appropriate. Indeed, the Recovery Decision expressly observes that the Prudence Decision is silent on this point.<sup>6</sup> At pages 10 – 11 of the Recovery Decision, the Board finds that:

“... the [Prudence] Decision allowed an extraordinary event recovery of up to \$9.44 million of contact voltage costs, but did not make any further specification as to what level of such costs, if any, should be deducted from 2009 actual controllable OM&A expenses.”

26. This observation in the Recovery Decision itself defeats any presumption that a re-definition of controllable expenditures is expressly mandated by or contained in the Prudence Decision. Furthermore it conflicts with the Recovery Decision’s stated view, with respect to submissions of an intervenor, that tests for the validity of 2009 controllable expenses must have a basis in the Prudence Decision.<sup>7</sup>

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<sup>6</sup> “The Board finds that what is under consideration in both alternatives (ii) and (iii) is an appropriate level of contact voltage recovery by THESL, given the Decision allowed an extraordinary event recovery of up to \$9.44 million of contact voltage costs, but did not make any further specification as to what level of such costs, if any, should be deducted from 2009 actual controllable OM&A expenses. Both alternatives (ii) and (iii) involve the deduction of some level of contact voltage costs from 2009 actual controllable OM&A costs for the purpose of determining an appropriate level of extraordinary cost recovery only.” (Recovery Decision pages 10-11)

<sup>7</sup> “The Board does not accept the arguments of SEC that there is insufficient evidence on the record for the Board to make a decision in this matter, or that it should use what SEC characterized as the best evidence on the record to reduce the recovery

27. For the Recovery Decision to change the definition of controllable expenses in the Recovery Decision is an improper, retroactive change of a defined regulatory term critical to the meaning of the Prudence Decision, and thus is clearly outside the proper scope of the Recovery Proceeding. The change constitutes an error of law that raises a question as to the correctness of the Recovery Decision, and THESL submits that this change should be rescinded.

- **No Obligation to Remove the Expenses by Necessary Implication**

28. THESL submits that there are two avenues by which it could be demonstrated that removal of certain residual contact voltage expenses must follow by necessary implication. These are:

- (a) That residual contact voltage expenses must be excluded on categorical grounds according to the intrinsic logic of the Prudence Decision; or
- (b) That such an exclusion is necessary to carry out the intention of the Prudence Decision that a ‘double benefit’ not be conferred to the shareholder.

29. First with respect to the categorical grounds, the Prudence Decision used the term ‘controllable expenses’ explicitly and it was central to the test that was established in the Prudence Decision, as noted above. Furthermore the Prudence panel must have been keenly aware that there were residual contact voltage costs already incurred by THESL at the time of the Prudence Decision, since that panel created that category of costs and had before it evidence of significant costs in that category.

30. The Prudence panel’s unqualified use of the defined term ‘controllable expenses’, and its certain knowledge of the existence of residual contact voltage costs, makes it extremely difficult to support the view that the

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amount by \$8 million. *The Board is in agreement with the views expressed by THESL that the adoption of such approaches would represent a test of the validity of the 2009 controllable expenses for which there is no basis in the Decision.*” (emphasis added, Recovery Decision page 5)

Prudence Decision can be read to mean that residual contact voltage costs were to be excluded from controllable expenses. THESL submits that had it intended to do so, the Prudence panel would have stipulated that exclusion in the Prudence Decision.

31. The Prudence Decision clearly established two discrete, well-defined, and non-overlapping cost categories for the purposes of contact voltage cost recovery determination. These were:
  - (a) conditionally recoverable contact voltage costs; and
  - (b) controllable expenditures apart from conditionally recoverable contact voltage costs.
32. The establishment of a discrete, non-overlapping category for conditionally recoverable contact voltage costs does follow by necessary implication from the Prudence Decision since otherwise it would be possible for the same cost to count both toward recoverable contact voltage costs and controllable expenses, therefore raising the spectre of “double recovery”. The conflict with the intent of the Prudence Decision that this arrangement would create was explained by THESL in the Recovery Proceeding and was acknowledged and accepted by the Board at page 10 of the Recovery Decision.<sup>8</sup>
33. In contrast, there is nothing in the Prudence Decision that establishes or even suggests that controllable expenses are to be adjusted in any way or that residual contact voltage costs are to be deducted or excluded from controllable expenditures. The Prudence Decision expressly did not create a third category of costs which might have been termed ‘Unconditionally Disallowed Costs’. Furthermore, for residual contact voltage costs to be included in controllable expenditures creates no logical overlap of costs or

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<sup>8</sup> “The fact that the Decision does not provide such guidance might lead to the conclusion that alternative (i) would be the most appropriate option for the Board to adopt, except that the Board finds persuasive the arguments made by THESL in its reply submission as to why the intrinsic logic of the Decision would rule this alternative out.” (Recovery Decision, page 10)

risk of “double recovery” as would be the case for the inclusion of Conditionally Allowed Contact Voltage costs.

34. Therefore a necessary implication that residual contact voltage costs be excluded from controllable expenditures does not exist on categorical grounds or proceed from the intrinsic logic of the Prudence Decision.
35. Furthermore, the existence of residual contact voltage costs and their inclusion in controllable expenses does not confer a ‘double benefit’ to the utility. As a matter of fact, residual contact voltage expenses *were incurred by THESL* and therefore clearly do not meet the condition necessary for the ‘double benefit’ to be created, as outlined in paragraph 14 above. The incurring of the residual contact voltage costs conferred no financial benefit to the direct and beneficial shareholders of THESL.
36. The “double benefit”, or “double recovery” would have arisen had THESL actually spent less than the approved amount of \$195.2 million in controllable expenditures in 2009, while recovering the full \$9.44 million on account of conditionally approved contact voltage expenditures. That is because the approved \$195.2 million would have been recovered through rates but not fully spent, so that the difference would have accrued to the corporation. The test established in the Prudence Decision was expressly designed to prevent any ‘double benefit’ arising that way from being conferred on shareholders and the evidence in the Recovery Proceeding is that the mechanism performed exactly as intended, such that the shortfall of actual 2009 controllable expenditures relative to the approved threshold amount was deducted from the conditionally recoverable amount in calculating the requested approved recovery amount. At the end of the process, there were to be no leftover funds available to the corporation or its shareholders. THESL was authorized to recover in rates the approved amounts of controllable expenditures, and to

recover the approved extraordinary amount of its contact voltage expenditures.

37. The Recovery Decision adverted to the concept of the ‘double benefit’ but gave no explanation or reasons for its use of the concept to justify the exclusion of residual contact voltage costs from controllable expenditures. At page 11, the Recovery Decision states (emphasis added):

“In the [Prudence] Decision, the Board provided several comments that were intended to guide the implementation phase of the Decision. Of these comments, the one that this Panel views as identifying the overarching guiding principle is the one which led the Board to establish conditional relief in the first place. That being, that any approved recovery should not confer a double benefit to the shareholder. **On that basis, the Board is of the view that the exercise of normalizing the 2009 actual controllable expenses is crucial in determining a level of recovery that will not confer a double benefit upon the shareholder.** The Board is of the view that the very act of normalizing the 2009 actual controllable expenses does not mean that a prudence review of the 2009 revenue requirement has been undertaken, nor that a further prudence review has been undertaken of the disallowed residual contact voltage costs. Rather, the adjustments to the conditional relief approved in the original Decision were determined by the Board in this proceeding by reviewing the reasons for the disallowance of the residual contact voltage costs as determined by the Board in the original Decision, with no new findings made on the facts of the original case.”

38. Here the Recovery Decision introduces but does not explain or justify, or even illustrate the operation of the “exercise of *normalizing* the 2009 actual controllable expenses”. THESL submits that if the term ‘normalizing’ is to be understood to refer to the elimination of residual contact voltage costs ‘caused’ by the contact voltage condition, the Recovery Decision has not demonstrated how that procedure acts to prevent the ‘double benefit’ and that this finding cannot be supported by the facts of the matter.
39. Since no ‘double benefit’ is eliminated by this procedure, the elimination of residual contact voltage costs from controllable expenditures cannot be



supported as necessary by implication to carry out the intention of the Prudence Decision.

- **No Other Justifications for Exclusion**

40. THESL submits that the exclusion of certain residual contact voltage costs from controllable expenditures was not made under, and cannot be supported by, a finding that those costs were imprudently incurred.
41. Further, the Recovery panel did not find that any of the disallowed residual contact voltage expenditures were categorically ineligible for inclusion in revenue requirement under the existing definition of controllable expenditures, and could not have done so on the evidence in either proceeding.
42. Similarly, there was no finding in either the Prudence Decision or the Recovery Decision that the residual contact voltage expenses were not operating and maintenance expenses in accordance with the existing definition of controllable expenses. None of the residual contact voltage expenses were different in character or category from other expenditures made by THESL to operate and maintain its system. All of them were directed to THESL's own system and were necessary to provide safe and reliable distribution service.
43. THESL submits that these alternative grounds for the finding that residual contact voltage expenses 'caused' by the contact voltage emergency are to be deducted from controllable expenditures cannot support such a finding.
44. This demonstrates the Recovery Decision altered the Prudence Decision on improper grounds by adding substantive terms to it – that is finding that additional amounts, specifically those residual contact voltage expenditures found to be 'caused' by the contact voltage condition, are to

be deducted from controllable expenses, contrary to the findings of the Prudence Decision.

45. THESL respectfully submits that this is the only supportable interpretation that may be given to this finding, since as discussed above no reasonable alternative grounds exist for the disallowance found in the Recovery Decision. Therefore the *addition of a substantive term* to the test specified in the Prudence Decision constructively, significantly, retroactively and improperly changes the Prudence Decision.

46. As noted above, the Recovery Decision states (at page 12):

“...the adjustments to the conditional relief approved in the original [Prudence] Decision were determined by the Board in this proceeding by reviewing the reasons for the disallowance of the residual contact voltage costs as determined by the Board in the original Decision, with no new findings made on the facts of the original case.”

47. THESL submits that this passage clearly indicates that:

- (a) The Recovery Decision did not properly apply the test specified in the Prudence Decision but instead substituted its own new findings, contrary to the Prudence Decision, which improperly created a ‘double disallowance’ for THESL with respect to properly and prudently incurred costs, whereby those costs have been denied both in the context of the extraordinary expenditure and in the context of the controllable expenses; and
- (b) The Recovery Decision misused the original findings of the Prudence Proceeding, which were directed to the question of determining extraordinary cost recovery related to contact voltage expenditures and expressly not to the question of inclusion in controllable expenditures, in order to create a new category of costs and effect an absolute, retroactive disallowance of properly and prudently incurred costs.

48. In the Prudence Decision there is no mention of, nor a mandate for, ‘reviewing the reasons for the disallowance of the residual contact voltage costs as determined by the Board in the original Decision’. The express

mandate for the Recovery Proceeding was given in the Prudence Decision at pages 9 and 12, as follows:

“Any underspending in OM&A controllable expenses below \$195.6 million shall be deducted from the conditional relief found in this Decision. THESL’s audited 2009 statements shall be the basis of determining the level of underspending, if any.”

and

“Since this relief is subject to further reduction as explained elsewhere, the Panel will not approve at this time recovery of the \$9.44 million starting May 1, 2010, a date requested by the Applicant. Rather, the Board authorizes the Applicant to record in a sub-account of account 1572 (Extraordinary Events Costs) an amount of \$9.44 million for review at a later time once the 2009 audited financial results are known and upon application by THESL to clear the balance in the sub-account.”

49. THESL respectfully submits that the Recovery Decision did not properly carry out that mandate.
50. It was not open to the Recovery Decision to interfere with the reasons in the Prudence Decision, which were directed to a completely different determination, for the purpose of supporting additional and retroactive findings on the ‘cause’ of residual contact voltage costs.
51. A ‘double disallowance’ is created for THESL by the Recovery Decision since under its terms residual contact voltage costs ‘caused’ by the contact voltage condition are not only excluded from extraordinary cost recovery but also act directly to reduce the potential recovery available to THESL under the original terms of the Prudence Decision, by being excluded from controllable expenditures. This result is contrary to the Prudence Decision ruling which stipulated only that “Any underspending in OM&A controllable expenses below \$195.6 [corrected to \$195.2] million shall be deducted from the conditional relief found in this Decision.”

52. In addition to being improper, unfair, and unwarranted, that finding undermines the finality of the Prudence Decision and all Board decisions, and calls into question the certainty created through the regulatory compact. It is furthermore unfair to applicants generally, since it makes it impossible for applicants to rely on the accepted meanings of critical terms and to know the case they must meet.
53. The scope of the Recovery Decision exceeded the proper scope of the Recovery Proceeding for the reasons set out above, and therefore THESL respectfully submits that the Board should rescind that finding and reverse the disallowance of the subject residual contact voltage costs.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

54. The Affidavit of Jean-Sebastien Couillard, Chief Financial Officer, Toronto Hydro Corporation;
55. Such further evidence as counsel for THESL may submit and the Board allow.

**All of which is respectfully submitted this 18<sup>th</sup> day of November, 2010.**

**BORDEN LADNER GERVAIS LLP**

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**TO: ONTARIO ENERGY BOARD**

P. O. Box 2319  
2300 Yonge Street  
Toronto, Ontario  
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Kirsten Walli  
Board Secretary

Tel.: 416-481-1967  
Fax: 416-440-7656

**AND TO: INTERVENORS OF RECORD IN EB-2010-0193**

::ODMA\PCDOCS\TOR01\4502339\2

**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 to be effective November 1, 2010;

**AND IN THE MATTER OF** the Board's Decision dated  
October 29, 2010 (File Number EB-2010-0193).

**AFFIDAVIT OF JEAN-SEBASTIEN COUILLARD**

**I, JEAN-SEBASTIEN COUILLARD**, of the City of Toronto, in the Province of Ontario,  
**HEREBY MAKE OATH AND SAY AS FOLLOWS:**

1. I am the Chief Financial Officer ("CFO") of the Toronto Hydro Corporation. I was appointed to this position on May 30, 2005. Prior to this appointment, I was Acting CFO (since November 2004) and Vice-President of Finance (since April 2004). I am also the CFO for all of Toronto Hydro's wholly-owned subsidiaries, including Toronto Hydro-Electric Systems Limited ("THESL"), Toronto Hydro Energy Services Inc. ("THESI"), 1455948 Ontario Inc., and 1798594 Ontario Inc. As a member of the executive management team, I am responsible for leading all aspects of financial planning, financial reporting, taxation, treasury, regulatory affairs and internal controls for Toronto Hydro and all its subsidiaries. I am a Chartered Accountant with experience in high growth business environments. Prior to joining Toronto Hydro, I was Director of Business Operations of a new generation telecom service provider in Ontario. My past business experience includes eight years of public accounting practice with Ernst & Young in Montreal and the United States.
2. On page 9 of its December 11, 2009 Decision (EB-2009-0243) (the "Prudence Decision") the Board ruled that:

“The Panel therefore finds that it would be reasonable in the circumstances for any relief provided in this Decision to be conditional on THESL’s actual spending in controllable OM&A expenditures for the 2009 year (ending December 31, 2009.)”

3. Elsewhere in the Decision the Board makes reference to “OM&A controllable expenses” (page 9, EB-2009-0243). The concept of controllable expenses has been used by the Board for rate making purposes for many years and, in my opinion, is very well understood and accepted by me as CFO of Toronto Hydro and by the Ontario electricity industry generally.
4. For example, in the *Supplement to the Ontario Energy Board Staff proposed Electric Distribution Rate Handbook* June 30, 1999 “controllable expenses” is described as “the sum of Operations and Maintenance, Billing and Collection and Administration”. Attached as Exhibit A to this my Affidavit is an excerpt from the Supplement to the Ontario Energy Board Staff Proposed Electric Distribution Rate Handbook dated June 30, 1999.
5. Likewise the Board’s 2006 Electricity Rate Handbook defines “controllable expenses” as “the sum of operations and maintenance, billing and collection, and administrative expenses”. Attached as Exhibit B to this my Affidavit is an excerpt from the Board’s 2006 Electricity Distribution Rate Handbook dated May 11, 2005.
6. In THESL’s cost of service decision (Panel: Sommerville/Vlahos/Balsillie), EB-2007-0680, on page 34 the Board stated:


“For the expense areas of Operation, Maintenance, Billing and Collection, Community Relations and Administrative and General Expenses which are reflected in the first subtotal in the above table and are described hereafter as controllable expenses ...”
7. In its Prudence Decision the Board ruled that the relief provided in that decision (up to \$9.44M) “be conditional on THESL’s actual spending in controllable OM&A expenditures for the 2009 year (ending December 31, 2009)”. (emphasis added) (page 9, EB-2009-0243)

8. Toronto Hydro relied on the OEB's accepted definition of controllable expenses when preparing its evidence and properly adjusted 2009 audited operating costs to remove costs ineligible for inclusion in revenue requirement to arrive at the figure for 2009 actual controllable expenses.
9. These 2009 audited financial statements included \$4.91M as part of THESL's actual controllable expenses incurred but which were excluded in EB-2009-0243 from extraordinary cost recovery. THESL's approach was explained to the Board in its Reconciliation of Contact Voltage Costs supplementary filing dated September 10, 2011. Attached as Exhibit C to this my Affidavit is a copy of THESL's supplementary evidence filed with the Board on September 10, 2010.
10. The residual contact voltage costs (those extraordinary costs excluded in the December 11, 2009 Decision) were all clearly incurred as operating and maintenance expenses and were in no way different in character or category from other expenses made by THESL to operate and maintain the system. All residual contact voltage costs were directed to THESL's own system. There was no finding by the Board that the residual contact voltage expenses were not operating and maintenance expenses in accordance with the Board's existing definition of controllable expenses.
11. Certain expenditures such as political donations are recognized for financial reporting purposes as operating expenditures but are categorically excluded from the definition of revenue requirement due to their character. Similarly, other expenditures are excluded from the definition of regulated revenue requirement, such as expenditures on CDM programs conducted under the auspices of the Ontario Power Authority. However, none of the residual contact voltage expenditures fell into categories definitionally excluded from revenue requirement or in categories analogous but which had not yet been pronounced upon by the Board.
12. The Board has been clear and consistent in its definition of controllable expenditures and has pronounced in advance in cases where expenditures in certain categories have become ineligible, as for example in the instance of the CDM programs described above.





This Exhibit "A" referred to in the Affidavit of Jean-Sebastien Couillard, sworn before me this 18<sup>th</sup> Day of November, 2010.

  
\_\_\_\_\_  
JOHN A.D. VELLONE  
A Commissioner, etc.



## **SUPPLEMENT TO THE ONTARIO ENERGY BOARD STAFF PROPOSED ELECTRIC DISTRIBUTION RATE HANDBOOK, JUNE 30, 1999**

**August 12, 1999**

This supplement to the Ontario Energy Board ("Board") Staff Proposed Electric Distribution Rate Handbook (June 30, 1999) provides clarification and further details on the following:

- Calculation of the market-based rate of return (Section S-1)
- The use of Table 4-2 of the draft Rate Handbook, ROE Impacts of Varying Productivity Performance (Earnings Caps). This includes a proposal for the treatment of overearnings, in the event that a utility exceeds its selected ROE Ceiling in any given year (Section S-2)
- An effective date is proposed for the change in treatment of contributed capital (Section S-3)
- The use of actual line losses, where a utility has such information, in the unbundling of rates is clarified (Section S-4)

As with the proposals in the draft Rate Handbook, the proposals contained in this supplement are Board Staff proposals and, as such, are subject to comment by interested parties and change by the Board.

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### **S-1 MARKET BASED RATE OF RETURN**

Several clarifications are necessary in regards to the market-based rate of return adjustment. These include:

- The actual formula used to calculate the market based rate of return adjustment
- Calculation of the rate base employed in the formula
- The treatment of tax effects on contributed capital
- Calculation of the target return on equity

### S-1.1 Formula for Calculating the Market Based Rate of Return

Section 3.3.3 of the draft Rate Handbook provides a formula for the calculation of market-based rate of return. This supplement provides two clarifications on the formula. First, the formula has been adjusted to convert the historic return on capital used for the contributed capital portion of the equation to a before tax basis. Second, the formula now provides the revenue requirement associated with a market based rate of return. Since utilities are currently earning a return (be it negative or positive), a second formula is used to calculate the incremental amount to be included in rates associated with the start of a market based rate of return.

The reorganized formula is as follows:

$$\begin{aligned} \text{MBRR} = & (\text{Rate Base} - \text{Contributed Capital}) \times \\ & \left( \frac{\text{Common Equity Ratio} \times \text{Target Return on Equity}}{1 - \text{Effective Tax Rate}} + (1 - \text{Common Equity Ratio}) \times \text{Debt Rate} \right) \\ & + (\text{Contributed Capital} \times \frac{\text{Return on Capital}_{1994-1999}}{1 - \text{Effective Tax Rate}}) \quad 1 - 1 \end{aligned}$$

This equation provides the total revenue requirement associated with the return on capital, debt expense, and income-based taxes. The first line calculates the net rate base to which the market-based rate of return is applied. The second line calculates the effective return on equity (grossed up for taxes) and the allowance for long-term interest payments. The third line calculates the increment to revenue requirements associated with providing the historical average (1994-1999) return on capital as well as making a provision for taxes associated with such a return.

In order to determine the additional revenue that a utility must collect in its initial PBR rates, in order to avail itself of the maximum adjustment for market-based rates, the return on capital that the utility earned during 1999 is subtracted from the MBRR value determined above as follows: Additional Revenue Required to Move to MBRR = MBRR – (1999 Rate Base X ROK99) (1-2)

### S-1.2 Definition of Rate Base

The rate base is the net fixed assets (average of year-start and year-end) plus a working capital allowance.

Net fixed assets is the total fixed assets (accounts 1600 through 2075 of the Board's Uniform System of Accounts) minus the total accumulated amortization (accounts 2100 through 2180). The proposed working capital allowance to be included in the rate base for first generation PBR is 15% of the sum of the cost of power and controllable expenses. This accounts for approximately 2-months of cost of power and 1½ months of controllable expenses<sup>(1)</sup> and results in approximately similar levels to that allowed under the regulation by Ontario Hydro in the past. The working capital allowance component for the cost of power may need to be adjusted

reducing existent extraordinary costs, then the overearnings should be returned to ratepayers as a one-time rebate at the end of the year. The amount rebated to each customer would be proportional to each customer's annual distribution charges (excluding charges for Standard Supply Service).

Using overearnings to reduce rates is not considered optimal. The overearnings may be a one time event; incorporation of it into rates could result in a permanent rate reduction for subsequent price cap adjustments unless a true-up is done the following year (i.e. while the overearnings reduce rates in the next year, the base rates for the following year are readjusted to remove the overearnings component prior to calculating that year's price cap adjustments). This latter approach would seem overly burdensome.

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### **S-3 EFFECTIVE DATE FOR CHANGE IN TREATMENT OF CONTRIBUTED CAPITAL**

The proposed effective date for changing the treatment of Contributed Capital would be January 1, 2000. Contributed Capital collected after that date would no longer be allowed to earn a rate of return. See also Section 3.3.2 of the draft Rate Handbook.

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### **S-4 LARGE USE LINE LOSSES**

In the unbundling of rates, where a distribution utility has its own data on large-use line losses, this data should be used to derive unbundled rates. The 1% line loss presented in Appendix A of the draft Rate Handbook is a default value that should be used in the absence of actual line loss data.

[Return to previous page](#)

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<sup>(1)</sup>Controllable expenses are the sum of Operations and Maintenance, Billing and Collection, and Administration.

[Return](#)

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<sup>(2)</sup>Cannon, William T., "A Discussion Paper on the Determination of Return on Equity and Return on Rate Base for Electricity Distribution Utilities", prepared for The Ontario Energy Board, December 1998.

[Return](#)

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This Exhibit "B" referred to in the Affidavit of Jean-Sebastien Couillard, sworn before me this 18<sup>th</sup> Day of November, 2010.

  
\_\_\_\_\_  
JOHN A.D. VELLONE  
A Commissioner, etc.

OEB 2006  
Electricity Distribution  
Rate Handbook

**Chapter 4**

**4 Rate Base**

**4.0 Definition of Rate Base**

An applicant must file rate base information for the years 2002, 2003 and 2004.

The applicant is required to file information on its 2004 total assets, broken down into distribution and non-distribution segments. The level of detail in this filing will be as outlined in Appendix A and in the 2006 EDR Model.

Distribution assets are those associated with activities that enable the conveyance of electricity for distribution purposes. Such activities include operation and maintenance of the distribution system, meter reading services, billing and collection services, and others.

Non-distribution assets are those associated with activities not falling within the above definition of distribution activities, including street lighting services, renting and selling of hot water heaters, electricity transmission, and others.


Appendix A provides more detailed information on distribution and non-distribution assets, and how non-distribution assets should be identified and removed from the rate base. The nature of any such removals should be specified. The 2006 EDR Model provides the details of these filing requirements.

A distributor wishing to have any assets included in the distribution rate base that would not be included in the definition of the distribution rate base, as specified in Appendix A (e.g. Account 1815 Transformer Station Equipment – normally primary above 50 kV), should request in the summary of the application that the Board, in its decision on the application, deem such assets to be distribution assets.

The rate base used to determine the revenue requirement is defined as net fixed assets calculated as an average of the balances at the beginning and the end of 2004, plus a working capital allowance, which is 15% of the sum of the cost of power and controllable expenses. Controllable expenses are defined as the sum of operations and maintenance, billing and collection, and administration expenses. (See Appendix A for additional details.)

2004 net fixed assets, with the adjustments outlined in Chapter 3, will include the following items:

This Exhibit "C" referred to in the Affidavit of Jean-Sebastien Couillard, sworn before me this 18<sup>th</sup> Day of November, 2010.

  
\_\_\_\_\_  
JOHN A.D. VELLONE  
A Commissioner, etc.



Colin McLorg  
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2010 September 10

***via RESS e-filing – original to follow by courier***

Ms. Kirsten Walli, Board Secretary  
Ontario Energy Board  
2300 Yonge St, 27<sup>th</sup> Floor  
P.O. Box 2319  
Toronto, ON M4P 1E4

Dear Ms. Walli:

**RE: Toronto Hydro-Electric System Limited's  
Application for Approval of Contact Voltage Remediation Costs  
OEB File EB-2010-0193  
Filing of Supplementary Evidence**

THESL has received the Board's Procedural Order #4 in which the Board granted THESL's request to file supplementary evidence in this proceeding. In accordance with that Order, THESL encloses its supplementary evidence.

Yours truly,

*[Original signed by]*

Colin McLorg

Manager, Regulatory Policy and Relations  
[regulatoryaffairs@torontohydro.com](mailto:regulatoryaffairs@torontohydro.com)

cc: Intervenor of Record for EB-2010-0193, by email only

## Reconciliation of Contact Voltage Costs

### Introduction

THESL requested and obtained the Board's permission to submit this supplementary evidence because THESL is concerned that the existing record may not have provided a transparent explanation of the derivation of THESL's actual 2009 controllable expenses, or the differences of presentation between THESL's audited 2009 financial statements and what the Board requires for the determination of the allowed contact voltage cost recovery.

In addition THESL corrects, by way of this supplementary evidence, an error in the identification of charitable donation and special event costs which are non-eligible for inclusion in controllable expenses. As a result controllable expenses are reduced by \$0.46 million and the amount requested for contact voltage cost recovery is correspondingly reduced from \$9.05 million to \$8.586 million. THESL regrets this error and any misunderstanding it may have caused.

The allowance/disallowance mechanism established by the Board in the EB-2009-0243 Decision is novel in that it makes the allowable recovery of contact voltage costs a function of the level of THESL's controllable expenses, of which certain 'residual' contact voltage costs are a part. ('Residual' contact voltage costs are those actual contact voltage costs in excess of the \$9.44 million amount conditionally approved for recovery.) Nevertheless the tables forming Appendix A to this supplementary evidence and this accompanying narrative demonstrate that actual 2009 controllable expenses can be accurately and independently derived from THESL's audited 2009 financial results, and that while the allowable contact voltage recovery amount depends on the level of controllable expenses, there is no circularity in the calculation. No circularity exists because the level of actual controllable expenses is strictly independent of the allowable contact voltage recovery amount.

An appearance of circularity may have been created due to the fact, explained below, that when controllable expenses are within a certain range, the sum of controllable expenses and any amount disallowed for recovery under the mechanism established by the Board will be identically equal to the threshold amount of controllable expenses set by the Board i.e., 2009 allowed controllable expenses. This result is a direct outcome of the Board's allowance/disallowance mechanism.

Some confusion may also have been created due to differing recognition and presentation requirements as between THESL's financial reporting and what could be termed 'regulatory accounting' as it applies to the allowance/disallowance mechanism in this case. Specifically, accounting standards required THESL to recognize, as a regulatory asset, its estimate of the amount that would ultimately be recoverable as extraordinary contact voltage cost. THESL did this and the

recognition is explicit in THESL's 2009 audited statements. As a corollary, any remaining non-capital expenditures, including any disallowed amount, must be categorized as part of operating expenditures i.e., a current period expense in 2009. However, this does not in any way defeat the operation of the Board's allowance/disallowance mechanism or introduce circularity since any disallowed amount is already included in total expenditures for 2009. The recognition of a portion of those expenditures as a regulatory asset is simply an accounting procedure and does not in any way affect the actual 2009 controllable expenses or the operation of the Board's allowance/disallowance mechanism.

## Description and Explanation of Table 1.

Table 1 sets out the derivation of THESL's actual controllable expenses for 2009, the breakdowns of contact voltage costs, and the composition of 2009 actual operating expenses.

### DERIVATION OF 2009 ACTUAL CONTROLLABLE EXPENSES

Line 1: Actual operating expenses inclusive of residual contact voltages costs, but excluding that portion of total contact voltage costs that was estimated by management at the time of financial statement preparation to be recoverable through the Contact Voltage proceeding. That estimated amount was deferred and recorded on the balance sheet in a regulatory asset account. Source: Audited 2009 financial statements.

Line 2: The estimated recoverable amount of contact voltage expenses deferred and recorded as a regulatory asset as at December 31, 2009. The deferral *per se* of this amount has no impact either on the level of total actual expenses or the amount ultimately to be determined by the Board to be recoverable, but was required for financial statement purposes to provide the best estimate of THESL's financial position at that time. Source: Audited 2009 financial statements.

Line 3: Total audited operating expenditures, re-categorized for the purpose of this proceeding.

Line 4: Actual operating expenses falling in categories that are ineligible for inclusion in revenue requirement and controllable expenses. These expenses consisted of non-Winter Warmth charitable donations and special event costs.

The figure of \$724,000 represents a correction to the evidence originally filed by THESL and is the actual expense in this group of accounts, rather than \$0.3 million as originally filed. THESL mistakenly used a budget rather than an actual figure. THESL regrets this error and any consequential misunderstanding it caused.

Line 5: Total actual contact voltage expenditures in 2009, a portion of which were conditionally approved for recovery, and the balance of which represent actual operating expenses in expense categories which are eligible for inclusion in controllable expenses.

Line 6: Actual operating expenses net of categorically ineligible amounts and total contact voltage expenses.

Line 7: Residual contact voltage expenses defined as total actual non-capital contact voltage expenses minus the full conditionally approved (i.e., maximum potential) recoverable amount.

Residual contact voltage expenses were actual expenses incurred in account categories eligible for inclusion in controllable expenses and revenue requirement, but excluded by the Board from recoverable contact voltage expenses. For example, these costs included follow-on scanning costs. However, their exclusion from recoverable contact voltage costs does not preclude these costs from inclusion in controllable expenses.

Line 8: 2009 Actual controllable expenses categorically comparable to the threshold spending amount set by the Board in the EB-2009-0243 Decision.

In computing the amount of actual controllable expenses, THESL took the position that no part of the conditionally approved amount of \$9,440,000 could be included in 2009 controllable expenditures for purposes of comparison to the threshold controllable expense level of \$195,200,000. Stated differently, THESL interpreted the EB-2009-0243 Decision to require comparison to actual controllable expenses exclusive of the amounts which might eventually be recovered. Therefore, although expenses of \$9,440,000 were actually incurred and may not be totally recovered, that amount was excluded from the calculation of 2009 actual controllable expenses.

#### DERIVATION OF DISALLOWED CONTACT VOLTAGE EXPENSE

Line 9: 2009 Actual controllable expenses

Line 10: The Threshold Controllable Expenses amount, established in the EB-2009-0243 Decision, equal to the 2009 allowed amount in the same category. That Decision stated that any shortfall of actual Controllable Expenses relative to the 2009 allowed amount would be deducted from the conditionally approved contact voltage recoverable amount. Please also refer to pages 2-3 of THESL's original recovery application dated May 14 2010.

Line 11: The disallowed amount, calculated as described above (Actual Controllable Expenses minus Threshold Controllable Expenses)

#### CONTACT VOLTAGE COST BREAKDOWN

Line 12: Conditionally recoverable contact voltage costs.

Line 13: Disallowable portion of contact voltage costs.

Line 14: Actual recoverable contact voltage expenses, equal to the amount conditionally approved less the disallowable amount.

Lines 15 through 18 and 19 through 23: Total contact voltage expenses decomposed into various categories, illustrating the differences between conditionally allowed and actually allowable and disallowable amounts.

Lines 24 through 31: A reconstruction of total 2009 operating expenses, proceeding from 2009 actual controllable expenses excluding contact voltage and adding expense items in a stepwise manner to ultimately reconcile to total 2009 audited operating expenses.

Line 28 demonstrates that as long as any disallowed amount is in the range of \$0 to \$9,440,000, the sum of controllable expenses plus disallowed expenses will be identically equal to \$195,200,000. This result follows from the definition of the conditionally allowed amount in the EB-2009-0243 Decision, which, in the form of an equation, states that

$$D = CE_t - CE_a \text{ (for } 0 \leq D \leq \$9.44 \text{ million)}$$

where D stands for the disallowed amount,  $CE_t$  stands for the threshold level of controllable expenses, and  $CE_a$  stands for actual controllable expenses. (D can neither be less than zero nor greater than \$9.44 million). As a result

$$CE_a + D = CE_t$$

or

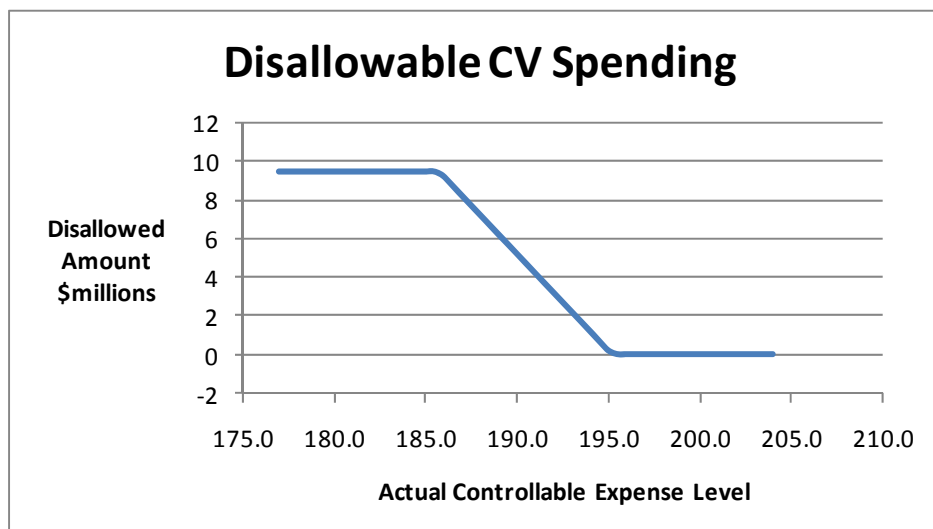
$$CE_a + D = \$195,200,000$$

If actual 2009 controllable expenses exceeded the threshold amount the disallowed amount would be zero (that is, the entire \$9,440,000 would be eligible for recovery), and the sum of controllable plus disallowed expenses would simply be equal to controllable expenses. If actual 2009 controllable expenses were less than  $(\$195,200,000 - \$9,440,000 =)$  \$185,760,000 then the disallowed amount would be \$9,440,000, and the sum of controllable plus disallowed expenses would be less than \$195,200,000. Within the stated range, however, the actual allowable and actual disallowable amounts are complements that add identically to \$9,440,000, and it follows that the sum of controllable expenses plus disallowable expenses will be identically equal to \$195,200,000. This result is further illustrated in Table 2 in which various hypothetical levels of spending, along with their consequences for the allowable and disallowable amounts, are depicted.

## Description and Explanation of Table 2.

Table 2 essentially replicates Table 1 with the addition of 3 columns depicting different hypothetical levels of operating expense, so as to illustrate the operation of the allowance/disallowance mechanism. Column 1 shows the 2009 actuals, with Columns 2, 3, and 4 respectively showing lower than actual spending, spending with a shortfall greater than \$9.44 million, and spending higher than the threshold.

Readers will observe at Line 11 that the disallowable amount grows in Columns 2 and 3 and is maximized in Column 3 as the spending shortfall increases and surpasses the \$9.44 million level. Conversely Column 4 with a higher spending level (exceeding the threshold) shows a disallowable amount of \$0. The allowable amount, which is the complement of the disallowed amount, is shown at line 20. However, the disallowable amount is not a continuous mathematical function since at any controllable expense level less than \$185,760,000, it is \$9,440,000; it then decreases linearly until it reaches zero, when controllable expenses are at or above the threshold level. This is depicted in the Chart below.



Lines 24 through 29 show how the various quantities of interest move as spending varies. In particular, Line 28 shows that within the described range of spending, any two arbitrarily different levels of spending produce the same sum of controllable and disallowed expenses.

## Conclusion

As a ratemaking mechanism the allowance/disallowance algorithm is unusual and THESL is not aware of any precedent which might have aided all parties in readily understanding its detailed implications. THESL is concerned that a misunderstanding could naturally have arisen from the existing record were parties to have concluded that THESL's calculations were such as to automatically reach a spending level of \$195,200,000 and thereby defeat the purpose of the mechanism.

THESL has not attempted to defeat the purpose of the mechanism but acknowledges that clarity may have been lacking in this area. THESL offers this supplementary explanation for the purpose of dispelling any obscurity which may exist around this issue.

## RECONCILIATION OF CONTACT VOLTAGE EXPENSES

**TABLE 1**

### **Derivation of 2009 Actual Controllable Expenditures**

Line	Item	Col. 1
1.	Operating Expenses	195,460
2.	Contact Voltage Regulatory Asset	9,050
3.	Total Operating Expenses	204,510
4.	Less Categorically Ineligible Expenses	-724
5.	Less Total Contact Voltage Expenses	-15,139
6.	Controllable Expenses Excluding Contact Voltage	188,647
7.	Add Residual Contact Voltage Expenses	5,699
8.	<b>2009 Actual Controllable Expenses</b>	194,346

### **Derivation of Disallowed Contact Voltage Expense**

9.	Actual Controllable Expenses	194,346
10.	Less Controllable Expenses Threshold	-195,200
11.	<b>Disallowed Portion of Conditionally Recoverable Expenses</b>	-854

### **Contact Voltage Cost Breakdown**

12.	Conditionally Recoverable Contact Voltage Costs	9,440
13.	Less Disallowed Portion	-854
14.	<b>Actual Recoverable Contact Voltage Costs</b>	8,586
15.	Total Contact Voltage Expenses	15,139
16.	Conditionally Recoverable Expenses	9,440
17.	Residual Contact Voltage Expenses	5,699
18.	<b>Total</b>	15,139
19.	Total Contact Voltage Expenses	15,139
20.	Actual Recoverable Contact Voltage Costs	8,586
21.	Disallowed Portion	854
22.	Residual Contact Voltage Expense	5,699
23.	<b>Total</b>	15,139

### **Composition of 2009 Actual Operating Expenses**

24.	Controllable Expenses Excluding Contact Voltage	188,647
25.	Residual Contact Voltage Expense	5,699
26.	2009 Actual Controllable Expenses	194,346
27.	Disallowed Contact Voltage Expenditures	854
28.	2009 Actual Controllable Expenses + Disallowed	195,200
29.	Actual Recoverable Contact Voltage Costs	8,586
30.	Categorically Ineligible Expenses	724
31.	Total Operating Expenses	204,510



**COMPARISON OF SPENDING SCENARIOS**

**TABLE 2**

Line	Item	Col. 1	Col. 2	Col. 3	Col. 4
		ACTUAL	LOWER SPENDING	LOWEST SPENDING	HIGHER SPENDING
1.	Operating Expenses	195,460	190,000	185,000	200,000
2.	Contact Voltage Regulatory Asset	9,050	9,050	9,050	9,050
3.	Total Operating Expenses	204,510	199,050	194,050	209,050
4.	Less Categorically Ineligible Expenses	-724	-724	-724	-724
5.	Less Total Contact Voltage Expenses	-15,139	-15,139	-15,139	-15,139
6.	Controllable Expenses Excluding Contact Voltage	188,647	183,187	178,187	193,187
7.	Add Residual Contact Voltage Expenses	5,699	5,699	5,699	5,699
8.	<b>2009 Actual Controllable Expenses</b>	194,346	188,886	183,886	198,886

**Derivation of Disallowed Contact Voltage Expense**

9.	Actual Controllable Expenses	194,346	188,886	183,886	198,886
10.	Less Controllable Expenses Threshold	-195,200	-195,200	-195,200	-195,200
11.	<b>Disallowed Portion of Conditionally Recoverable Expenses</b>	-854	-6,314	-9,440	0

**Contact Voltage Cost Breakdown**

12.	Conditionally Recoverable Contact Voltage Costs	9,440	9,440	9,440	9,440
13.	Less Disallowed Portion	-854	-6,314	-9,440	0
14.	<b>Actual Recoverable Contact Voltage Costs</b>	8,586	3,126	-	9,440
15.	Total Contact Voltage Expenses	15,139	15,139	15,139	15,139
16.	Conditionally Recoverable Expenses	9,440	9,440	9,440	9,440
17.	Residual Contact Voltage Expenses	5,699	5,699	5,699	5,699
18.	<b>Total</b>	15,139	15,139	15,139	15,139
19.	Total Contact Voltage Expenses	15,139	15,139	15,139	15,139
20.	Actual Recoverable Contact Voltage Costs	8,586	3,126	0	9,440
21.	Disallowed Portion	854	6,314	9,440	0
22.	Residual Contact Voltage Expense	5,699	5,699	5,699	5,699
23.	<b>Total</b>	15,139	15,139	15,139	15,139

**Composition of 2009 Actual Operating Expenses**

24.	Controllable Expenses Excluding Contact Voltage	188,647	183,187	178,187	193,187
25.	Residual Contact Voltage Expense	5,699	5,699	5,699	5,699
26.	2009 Actual Controllable Expenses	194,346	188,886	183,886	198,886
27.	Disallowed Contact Voltage Expenditures	854	6314	9440	0
28.	<b>2009 Actual Controllable Expenses + Disallowed</b>	195,200	195,200	193,326	198,886
29.	Actual Recoverable Contact Voltage Costs	8,586	3,126	0	9,440
30.	Categorically Ineligible Expenses	724	724	724	724
31.	<b>Total Operating Expenses</b>	204,510	199,050	194,050	209,050



**EB-2009-0243**

**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 to be effective May 1, 2010.

**BEFORE:**    **Paul Vlahos**  
                 Presiding Member

**DECISION  
(Corrected)**

**December 11, 2009**

## **INTRODUCTION**

Toronto Hydro-Electric System Limited ("THESL" or the "Applicant") filed an application with the Ontario Energy Board (the "Board") on June 30, 2009, under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B), seeking approval for changes to the rates that THESL charges for electricity distribution, to be effective May 1, 2010. The Board assigned the application File No. EB-2009-0243 (the "Application").

In the Application, it is requested that the Board approve rate riders to recover costs incurred by THESL for the emergency correction of contact voltage conditions on its system, mainly incurred from February through March of 2009.

The Board issued a Notice of Application and Hearing dated July 17, 2009. The Vulnerable Energy Consumers Coalition ("VECC"), the School Energy Coalition ("SEC"), Energy Probe Research Foundation ("Energy Probe") and the Canadian Union of Public Employees, Local One ("CUPE One") were approved as intervenors and, with the exception of CUPE One, were found eligible for an award of costs.

Procedural Order No. 1 was issued on August 19, 2009. The Board made provision for written interrogatories and for submissions. The Board stated that it intended to proceed by way of written hearing in this matter, but might include an oral component if in the Board's view it was warranted, with this determination to be made at a later stage.

Procedural Order No. 2 was issued on September 28, 2009. The Board stated that it had reviewed the responses to the interrogatories provided by THESL and determined that it would proceed by way of an oral hearing to allow for further clarification of the responses by THESL to the interrogatories. A one-day oral hearing was held on October 8, 2009.

Final submissions were received from all intervenors and Board Staff on October 22, 2009. THESL filed its reply submission on November 5, 2009.

In this Decision, the Panel summarizes the evidence and submissions only to the extent necessary to provide context to its findings. The full record is available at the Board's offices.

## **THE APPLICATION**

THESL applied to recover through rates certain costs incurred by THESL arising from the emergency correction of contact voltage occurrences on its electricity distribution system (the “Level III Emergency,” or the “contact voltage emergency” or the “emergency”). The costs were incurred from February through March of 2009, although one category would be continued to year end 2009. According to THESL, the costs incurred were unforeseen and incremental to its existing Board-approved revenue requirement. THESL further stated that the application was brought to demonstrate that the costs in question met the eligibility requirements of the Board (Incrementality, Exogeneity, Materiality and Prudence) pertaining to “Z-factor” type costs and that the recovery of these costs through rates would be proper.

The contact voltage correction costs for which THESL sought recovery are summarized in the table below.

<b>Cost Description</b>	<b>Expenditure (millions)</b>
<b>Scanning Costs</b>	
Level III Emergency Scanning Costs	\$ 4.15
Continued Scanning Expenditures	2.41
<b>Total Scanning Costs</b>	<b>\$ 6.56</b>
<b>Level III Emergency Remediation Costs</b>	
Labour – Regular time	\$ 3.37
Labour – Overtime	2.15
Electrical Contractor Cost	0.67
Inventory and Materials	1.01
Other	0.59
<b>Total Level III Emergency Remediation Costs</b>	<b>\$ 7.79</b>
<b>Total Contact Voltage Expenditures</b>	<b>\$ 14.35</b>

The \$14.35 million of incremental costs for which THESL sought recovery was segregated into two categories: scanning costs and remediation costs.

Scanning costs represented \$6.56 million of the \$14.35 million total. THESL proposed that, as the scanning costs were undertaken to ensure the safety of the entire distribution system and as an operational matter could not and should not have been confined to a particular class or classes of customers, these costs be allocated to all customers based on the methodology embodied in the Board's cost allocation model using customer numbers. THESL noted that this resulted in the large majority of these costs (86%) being allocated to Residential and small General Service customers, with substantially all of the remainder being allocated to the Streetlighting and USL classes.

The remaining balance of \$7.79 million related to the remediation of contact voltages and inspection and remediation of handwells. THESL proposed that these costs be recovered from the Streetlighting and USL rate classes only in proportion to the number of connections in those rate classes. THESL submitted that a strictly accurate determination of the allocation of remediation costs was not possible in the situation, but its proposal produced a reasonable outcome.

The results of THESL's proposals would allocate the \$14.35 million requested relief as follows: \$5.071 million for the Residential class, \$0.549 million for the General Service less than 50 kW class, \$7.126 million for the Streetlighting class, \$1.576 million for the USL class and lesser amounts for the remaining classes.

THESL proposed that the recovery of amounts allocated to classes other than Streetlighting and USL be recovered over 12 months commencing May 1, 2010 by way of rate riders calculated as fixed monthly amounts per customer as applicable. For the USL and Streetlighting classes, THESL proposed that in view of the significant bill impacts involved, the costs should be recovered over three years.

## **BOARD FINDINGS**

On the contents of the Application and the submissions of the parties, the Panel has determined that the issues it needs to address are as follows:

1. Is the relief requested of a Z factor type?
2. Are the expenditures material?
3. Was the emergency caused by exogenous factors?

4. Are the expenditures incremental?
5. What cost amounts are eligible for recovery?
6. How should the costs be allocated and recovered?

In setting out its findings, the Panel has also referenced parties' submissions but only to the degree necessary to provide context to its findings.

**Is the relief requested of a Z factor type?**

As THESL's 2009 rates were set under a cost of service review, the first issue requiring Panel consideration is the application for relief as a Z factor. This was seen by some as a threshold issue.

SEC and VECC argued that THESL is neither entitled to apply for Z factor relief in accordance with the July 2008 *Report of the Board on 3<sup>rd</sup> Generation Incentive Regulation for Ontario's Electricity Distributors* (the "3GIRM Report") nor has it met the threshold burden of proof required under cost of service regulation.

VECC noted that THESL could apply to the Board for relief under exceptional circumstances, such as financial distress, but these have not been demonstrated in this case. If the Board is persuaded that THESL may be entitled to consideration of its application, such consideration should be deferred, and in the interim THESL should be directed to track the costs in a deferral account.

SEC noted that while a utility can ask for a rate adjustment at any time and for any reason, in practice the Board establishes rules and guidelines to make the regulatory process manageable and predictable and the Board follows those rules and guidelines unless in an individual application there are special circumstances that warrant a departure. THESL's application, viewed either as a Z factor or in the context of account 1572 (Extraordinary Event Costs), was seen by SEC as ill-founded and should not be accepted.

Staff noted that regardless of whether this application was filed under the authority of the Board's 3GIRM Report and the related Z factor provisions, or whether THESL

simply requested the disposition of an amount in deferral account 1572, the tests applied in the examination of the validity of these costs would be generally the same.

The Panel agrees generally with THESL that the procedural distinctions made by SEC and VECC are too technical in nature, and not of substance. A distributor has the legal right to bring an application to the Board for what it may consider to be extraordinary circumstances. A cost of service regime cannot bar a distributor from bringing applications for relief for what it considers to be a genuinely extraordinary event. The fact that the Board has not specifically enunciated the circumstances and criteria that would apply for distributors under a cost of service regime as it has done for an IRM regime, does not mean that the application brought by THESL should fail outright. Rather, the issue for the Panel is what should be the standards or criteria for assessing THESL's requested relief.

This is a unique application in two respects. First, it seeks relief for a very unusual, surprising event in the history of the Applicant's distribution system and in the history of electricity distributors in the Province. Second, the Application is grounded on stipulated Z factor criteria reserved for an IRM regime, yet the Applicant is under cost of service. THESL fashioned and supported its application as a Z factor using the Board-stipulated criteria of materiality, exogeneity, incrementality, and prudence that apply to Z factor applications under the IRM regime. In that regard, it argued that its application for relief should be "ring-fenced" from the revenue requirement aspects pertaining to the 2009 rate year already ruled on by the Board in a cost of service proceeding.

In the Panel's view, assessment of the relief sought on the basis of the Z factor criteria enunciated in the 3GIRM Report can be applicable to the relief sought in this case as the Applicant has done. However, the Panel does not accept THESL's position that all aspects of the 2009 revenue requirement previously approved by the Board should be "ring-fenced". To the extent that actual expenditures in 2009 are below the level underpinning 2009 rates, this should also be a consideration for determining any eligible relief for the emergency expenditures made; otherwise, there is a possibility that the shareholder would be unfairly enriched by any relief provided.

### **Are the expenditures material?**

The Board's most recent materiality thresholds for different sized distributors appear in the Board's 3GIRM Report. The threshold is set at \$1 million for distributors with a

distribution revenue requirement of more than \$200 million, which is the group under which THESL falls. The cost claim of \$14.35 million related to the Level III emergency meets the Board's materiality criterion, as enunciated in the 3GIRM Report. There is no basis to suggest that the materiality threshold should differ whether under an IRM or a cost of service regime. Indeed, no party has taken issue with THESL having met the materiality criterion.

**Was the emergency caused by exogenous factors?**

THESL stated that the exogeneity of costs refers to their character as having been externally imposed or required, as distinct from being discretionary and voluntarily undertaken. THESL maintains that the Level III costs it incurred met the exogeneity criterion because it was imperative for reasons of public and worker safety to correct any instances of faulty electrification as soon as possible using all reasonable measures.

In the view of VECC, SEC and Staff, the Applicant has not demonstrated that the costs were incurred as a result of events outside of THESL's control; rather, the costs incurred were caused primarily by THESL's failure to maintain or plan for the maintenance of end of life assets. However, in Staff's view, the unique nature of the emergency in which the contact voltage remediation costs were incurred may allow for a broader application of the exogeneity test.

In the Panel's view, whether as a Z factor or as relief for an extraordinary event, a request for relief must be accompanied by a demonstration that the management of the distributor could not have been able to plan and budget for the event.

The causes of the contact voltage problems are described or conceded by THESL as a) missing plastic caps, degraded or faulty insulation, and improper repacking of the conductors, b) more generally wear and failure of assets nearing the end of their life cycle, and c) bifurcated ownership and control of the secondary distribution system. THESL also conceded that it ran the secondary system on a "run to failure" basis. These causes demonstrate that the contact voltage emergency was not caused by a single event.

Exogenous events are normally thought of as externally imposed events such as major storms or unexpected tax changes - occurrences that are clearly beyond management



control. It is true that given the nature of the emergency, the expenditures in this case may not have been discretionary or voluntarily undertaken. No doubt, it was imperative for reasons of public and worker safety to correct any instances of faulty electrification as soon as possible using all reasonable measures. However, the non-discretionary and non-voluntary nature does not make the contact voltage emergency synonymous with exogeneity, as THESL maintains. An ice storm is exogenous. Hazardous situations arising from an insufficiently maintained handwell system, justified or not, cannot be characterized as exogenous.

However, it is the Panel's view that failing the exogeneity test should not be fatal to the application in this unique case unless it is also found that THESL was imprudent in the period prior to the emergency.

Certain parties argued that THESL did not follow good utility practice in the period leading up to the emergency in that if it did not know about the potential for contact voltage, it should have.

The Panel accepts THESL's argument that based on contact voltage occurrences in Toronto and elsewhere in Ontario prior to 2009 there was no reasonable indication or basis to conclude that contact voltage was an imminent threat and that occurrences elsewhere in North America indicated that it was an uncommon, isolated problem in a few systems and was not endemic. The Panel does not find that the Applicant has acted imprudently in the circumstances that prevailed on the contact voltage issue prior to 2009 and on the information the Applicant had in its possession. The contact voltage matter was not considered as a significant enough problem by electricity distributors to have been raised before the Board prior to this time.

Therefore the failure of meeting the exogeneity test is not fatal to the application as the Panel does not find that the Applicant has not generally followed good utility practice on the issue other than its "run to failure" practice which has resulted in certain additional costs that would have been avoided if they were not incurred in an emergency setting. The Panel deals with these costs below.

### **Are the expenditures incremental?**

THESL's evidence was that the costs incurred in connection with the emergency were truly incremental to the requested and allowed operating expenditure amounts

underpinning 2009 rates. THESL stated that if its expenses were examined category by category, those for Electrical Contractors, Scanning Contractors, Inventory and Materials, and Other (including External Services, Rental Vehicles and Communication) were directly caused by the Level III emergency situation and would not have been incurred but for that event. With respect to regular labour and other miscellaneous internal costs charged to the Level III emergency project, THESL maintained that these were properly considered incremental to the approved revenue requirement because THESL is committed to achieving its planned and approved levels of operations and maintenance and capital work in 2009 and will therefore at least exhaust its approved revenue requirement in this category.

No party took issue with THESL's evidence that there were no amounts included in the 2009 test year by way of allowance for such an emergency event. However parties argued that there is little basis for THESL to claim that all of the costs were truly incremental.

In the view of VECC, SEC and Staff, the Applicant failed to demonstrate that the costs claimed are truly incremental to its 2009 revenue requirement. This resulted from THESL's failure to file evidence relating to 2009 spending, and more specifically its failure to bring this application within the context of a general rate filing. Parties referred to THESL's commitment to achieving its planned and approved levels of operations, maintenance and capital work in 2009 but noted that THESL's 2009 Bridge Year forecast contained in its 2010 Electricity Rate Application (EB-2009-0139) showed that the "Operations" and "Maintenance" expense categories (within total OM&A) are expected to be \$12 million below the 2009 Board-approved level. While it was also noted that the "Administrative and General" component was expected to be \$13 million higher than Board-approved, it was noted that these numbers would suggest that the present underspending of \$12 million in the "Operations" and "Maintenance" categories would be sufficient to cover most of the costs of the Level III emergency.

Staff however acknowledged that in its normal practice the Board does not implement rate adjustments in order to reconcile approved forecasts to actual revenue requirements. However, Z factor applications are filed in a year in which a utility is under IRM. THESL's case appears to be unique in that it has sought a Z factor type adjustment in a year in which it has also filed for a cost of service review, on the heels of a Board having approved rates for two years under cost of service. In Staff's view,

the status of 2009 actual spending is relevant to this particular case and should be the basis for testing the incrementality of the costs incurred.

The Panel notes THESL's repeated statements that it plans to complete its 2009 work plan with no alteration. This was THESL's own decision to make and presumed to have been made in light of an assessment of the priorities and the risks. THESL's statements however were not and could not be backed by evidence given the framing of its application. The Panel does not accept the proposition that it should deny the application on the basis that the forecast underspending in the "Operations" and "Maintenance" expense categories would cover the requested relief without giving any consideration to variations in the other controllable expense categories, such as the "Administrative and General" category. To do so would be too selective in this case. On the other hand, the Panel is concerned that if in fact there is underspending in the 2009 total controllable OM&A, it would confer a double benefit to the shareholder.

The Panel therefore finds that it would be reasonable in the circumstances for any relief provided in this Decision to be conditional on THESL's actual spending in controllable OM&A expenditures for the 2009 year (ending December 31, 2009). In the event that THESL's actual controllable OM&A expenditures are below the level reflected in THESL's 2009 approved base rates, the amount of the relief eligible for recovery found below shall be reduced by the amount of the underspending. To emphasize, this finding is not intended to reopen the testing of the 2009 revenue requirement nor the prudence of the actual 2009 OM&A spending.

Based on the information filed in the proceeding from THESL's 2010 rates application, the total OM&A level used to derive 2009 rates was \$350.0 million. Excluding amortizations expenses of \$154.4 million, the total controllable expenses used to derive 2009 rates was \$195.6 million. Any underspending in OM&A controllable expenses below \$195.6 million shall be deducted from the conditional relief found in this Decision. THESL's audited 2009 statements shall be the basis of determining the level of underspending, if any.

### **What cost amounts are eligible for recovery?**

In THESL's view, the prudence test for the Level III emergency costs is whether the costs were reasonable and effective in producing the required results in the circumstances and with the information available to management at the time of the

event. THESL argued that the assessment of prudence should be undertaken with due regard to THESL's responsibility to respond immediately and effectively to a demonstrated and serious threat to public safety. Consideration of approaches that might be taken in non-emergency circumstances is irrelevant in THESL's view to a determination of prudence in this case. In addition, THESL noted that the reasonableness of the measures and costs undertaken should be assessed by considering whether alternative approaches might have instead been used with greater effectiveness or lower cost, given the information at that time and the resources available.

Staff argued for the disallowance of the \$2.15 million in overtime labour costs as this cost would not have arisen in a non-emergency situation. Also, Staff noted THESL's acknowledgment that the costs would have been lower if they had been incurred under non-emergency conditions, but as THESL was not able to quantify this amount, Staff argued for a further 15% disallowance.

Energy Probe argued that some of the costs incurred for addressing the contact voltage problems offset some OM&A costs reflected in existing rates. For example, costs for trouble crews used in the emergency during their usual shifts were already embedded in rates and should not be recovered as part of the Z factor costs. Energy Probe also noted that some of the remediation work undertaken during the emergency would have otherwise arisen as forced outages of secondary circuits. THESL would have responded to those events as normal trouble calls and the costs would have been reflected in its 2009 revenue requirement for OM&A. Energy Probe also argued that because the faulty components were repaired during the emergency, THESL has avoided the costs of repairing them under normal operating conditions. Therefore some part of the claimed remediation costs of \$11.9 million should be disallowed. Energy Probe suggested the \$1 million materiality threshold should serve as a "deductible."

Energy Probe further suggested that THESI, as the owner of the street lighting assets, should bear some of the costs of the emergency on the basis that a lack of maintenance on its street lighting assets was a major contributing cause of the contact voltage emergency. Energy Probe recommended that this amount should be set at 25% of the remaining \$10.94 million total cost, or a further reduction of \$2.74 million.

Energy Probe and SEC argued that once the emergency event was dealt with, ongoing scanning of the system was no longer required. Therefore, the claimed \$2.41 million for

this cost should not be approved for recovery as a Z factor. Energy Probe further noted that scanning for contact voltage during seasons in which it is unlikely to occur is not a prudent expenditure.

Some intervenors raised the issue of whether ratepayers are getting the best value from the sole-source contract with Power Survey Corporation for scanning services. In their view there is inadequate support to satisfy the value for money requirement, given the multi-year multi-million dollars involved.

The Panel is of the view that THESL would not have incurred overtime maintenance costs had the necessary secondary system maintenance been undertaken as part of its ongoing maintenance program. The lack of maintenance by THESL on its street lighting assets was a major contributing cause of the contact voltage emergency and as such it is a contributing factor to these overtime costs. Also, as Energy Probe noted, some of the remediation work undertaken during the emergency would have otherwise arisen as forced outages of secondary circuits as THESL would have responded to those events as normal trouble calls and the costs would have been reflected in its 2009 revenue requirement for OM&A. For these reasons, the Panel reduces the requested relief by a deemed amount of \$2.5 million.

The Panel further reduces the requested relief by \$2.41 million in ongoing scanning costs as suggested by Energy Probe and SEC for the reason that once the emergency event was dealt with, the costs for ongoing scanning of the system cannot be characterized as emergency related. Once the emergency was resolved and THESL made a decision to change its operating parameters of the secondary system to an inspect and maintain model, these costs were part of normal budgetary pressures that are subject to budgetary re-alignments. While the Panel accepts that sole-sourcing the scanning service for purposes of the emergency was not imprudent in the circumstances of the emergency, in light of the finding that the ongoing scanning costs are not recoverable as part of the relief requested, this Panel does not need to deal here with the multi-year sole sourcing aspects of the issue raised by some parties. This is an issue for a future proceeding.

The total reduction to the requested relief is \$4.91 million. The total conditional relief therefore found by the Panel is \$9.44 million.

Since this relief is subject to further reduction as explained elsewhere, the Panel will not approve at this time recovery of the \$9.44 million starting May 1, 2010, a date requested by the Applicant. Rather, the Board authorizes the Applicant to record in a sub-account of account 1572 (Extraordinary Events Costs) an amount of \$9.44 million for review at a later time once the 2009 audited financial results are known and upon application by THESL to clear the balance in the sub-account. In its application to recover the requested relief through rate riders, THESL had not incorporated interest. In any event, until the disposition matter is brought forward by THESL there will be no interest on the \$9.44 million amount.

### **How should the costs be allocated and recovered?**

In a letter dated March 4, 2009 entitled “Wiring faults – servicing unmetered load connections,” sent by the Board to all electricity distributors, the Board stated that distributors are expected to recover from the customer the cost of repairs or isolation of customer owned equipment or connections through the use of a one-time billing charge or direct invoice.

THESL stated that the Level III emergency situation was distinctly and significantly different from business as usual. This was because, in contrast to the situation where a discrete piece of work is done on equipment for which the ownership is clear, the Level III emergency involved work on underground assets which in many cases were only nominally demarcated, making it difficult to distinguish whether the secondary equipment was a THESL, THESI or other third party asset. THESL reiterated that the situation did not permit the time and effort to disentangle, analyze and record whose was the faulty asset, and the circumstances did not support the usual recognition of and billing for work done on customer-owned equipment. THESL also reiterated that its recovery proposal would mean that costs would be recovered in a manner that would result in an outcome substantially similar to that which likely would have prevailed had it been possible to discretely record and cost each individual piece of remediation work.

A major focus of argument by intervenors and Staff was on the allocation of scanning costs to the Streetlighting and USL classes. It was generally suggested that all or most of the scanning costs be allocated to the Streetlighting and USL rate classes as it was perceived that it was the assets owned by or serving these classes that caused the contact voltage problem in the first place.

THESL responded that the disagreement stems from either a misunderstanding of the evidence or parties are not willing to accept the evidence. It explained that contact voltage does not follow familiar cause and effect relationships that characterize the rest of the electrical plant. THESL noted that it is incorrect to suggest that if x% of the contact voltage instances were exhibited by equipment in a particular category, that that equipment caused x% of the contact voltage problem or that x% of the costs should be allocated to customers taking service from that equipment. A defective connection in a THESL vault could result in contact voltage appearing on a streetlight pole owned by THESI some distance away. The streetlight pole would have exhibited contact voltage but it does not follow and often it was not the case that the streetlight pole caused the contact voltage. When the problem at the THESL vault is corrected, THESL stated that the contact voltage exhibited by the streetlight pole would vanish without the pole being touched. THESL stated that scanning is not directed to any specific class or class of assets, or even exclusively to THESL assets. The secondary system serves all customer classes, not just the Streetlighting and USL classes. THESL therefore applied an allocation of secondary related cost which follows the Board's cost allocation principles.

The Panel accepts THESL's explanation and clarification on the cause and manifestation of contact voltages. The Panel finds THESL's proposed cost allocation reasonable.

Another point of contention raised by some intervenors was that THESL did not create records enabling the direct tracing of fault repair costs to asset owners so that they could then be charged.

THESL responded that in its written evidence and oral testimony it has made its reasons clear. The circumstances of the emergency did not permit the creation of such records as doing so would have slowed the remediation of contact voltages "very substantially" and would itself have been "very costly". Further, it would have related to only a fraction of the work done. The Panel accepts THESL's reasons for not attempting to create such records.

THESL proposed that the recovery of amounts allocated to rate classes other than Streetlighting and USL be recovered over 12 months commencing May 1, 2010 by way of rate riders calculated as fixed monthly amounts per customer as applicable. For the USL and Streetlighting classes, THESL proposed that in view of the significant bill

impacts involved, the costs should be recovered over three years. No party opposed THESL's proposals.

Based on the Panel's findings, the maximum recovery amount is reduced for all rate classes, but mainly for the Residential and small General Service classes as these classes were burdened with the bulk of the scanning costs, which have been reduced substantially by the Panel. While the amounts to be recovered from the USL and Streetlighting classes will not be reduced proportionally, they will be reduced somewhat. The ultimate recovery amount may be reduced further for all rate classes at the time the Applicant's audited financial statements are available. Therefore, the Panel will not make a finding as to the appropriate recovery period or method of recovery. These matters will be dealt with when the Applicant brings forward an application for disposing of any balances in the noted 1572 sub-account.

### **Cost Awards**

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's Practice Direction on Cost Awards. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

The Board will issue a decision on costs awards after the completion of the following steps:

1. Intervenors shall file with the Board and forward to THESL their respective cost claims within 14 days from the date of this Decision.
2. THESL shall file with the Board and forward to intervenors any objections to the claimed costs within 28 calendar days from the date of this Decision.
3. Intervenors shall file with the Board and forward to THESL any responses to any objections for cost claims within 44 calendar days from the date of this Decision.

THESL shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.



**DATED** at Toronto, December 11, 2009

**ONTARIO ENERGY BOARD**

*Original Signed By*

Paul Vlahos  
Presiding Member



**EB-2010-0193**

**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 to be effective November 1, 2010.

**BEFORE:**           **Ken Quesnelle**  
                            Presiding Member

**Marika Hare**  
Member

## **DECISION**

**October 29, 2010**

## **INTRODUCTION**

Toronto Hydro-Electric System Limited (“THESL” or “the Applicant”) has filed an application with the Ontario Energy Board, (the “Board”), received on May 14, 2010, under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B), seeking approval for changes to the rates that THESL charges for electricity distribution, to be effective May 1, 2011. The effective date was subsequently revised to November 1, 2010.

The application is for recovery of approved contact voltage remediation costs arising out of the Board’s Decision on THESL’s EB-2009-0243 application. The costs had been approved in the Board’s EB-2009-0243 Decision (the “Decision”), which found that any relief provided in the Decision would be conditional on THESL’s actual spending in controllable operating, maintenance and administration (“OM&A”) expenditures for the 2009 year (ending December 31, 2009). THESL was authorized to record in a deferral account an amount of \$9.44 million for review once the 2009 audited financial results were known and upon application by THESL to clear the balance in the sub-account.

The Vulnerable Energy Consumers’ Coalition (“VECC”), the School Energy Coalition (“SEC”), the Energy Probe Research Foundation (“Energy Probe”) and the Canadian Union of Public Employees, Local One (“CUPE One”), were intervenors in the EB-2009-0243 proceeding and were deemed by the Board to be intervenors in the present proceeding.

The Board issued a Notice of Application and Hearing and Procedural Order No. 1 dated June 4, 2010, which, among other matters, set dates for the filing of interrogatories by intervenors and Board staff and responses by THESL. No other parties requested intervention status.

On July 26, 2010, the Board issued Procedural Order No. 2, which directed THESL to provide additional information in order to complete the record of this proceeding. On August 23, 2010 THESL provided its responses and on August 31, 2010, the Board issued Procedural Order No. 3 establishing dates for final written submissions. On September 8, 2010, the Board issued Procedural Order No. 4 which allowed for the filing of additional clarifying information by THESL and establishing revised dates for submissions in response to a request from THESL that it be allowed to file such material.

Final submissions were received from Board staff, Energy Probe and SEC. THESL filed its reply submission on October 7, 2010.

## **THE APPLICATION**

THESL has applied to recover an amount of \$8.586 million, to be adjusted for interest as found appropriate by the Board, for approved contact voltage remediation costs effective November 1, 2010.

The Board found in the Decision that THESL's recovery of up to \$9.44 million of contact voltage remediation costs would be conditional on THESL's actual controllable OM&A expenditures for the 2009 year. The \$9.44 million had arisen from the Board's determination that the total of \$14.35 million of contact voltage related recovery requested by THESL should be reduced by \$4.91 million, resulting in the conditionally approved amount of \$9.44 million.

In making this finding, the Board expressed the concern that if in fact there was underspending in the 2009 total controllable OM&A, it would confer a double benefit to the shareholder.<sup>1</sup>

The Board therefore found that in the event THESL's actual controllable OM&A expenditures were below the level reflected in THESL's 2009 approved base rates, the amount of the relief eligible for recovery would be reduced by the underspending. The Board emphasized that this finding was not intended to reopen the testing of the 2009 revenue requirement nor the prudence of the actual 2009 OM&A spending.

The Decision provided details as to how the appropriate amount of relief should be determined. Based on the information filed in the proceeding from THESL's 2010 rates application, the Board determined that any underspending in OM&A controllable expenses below \$195.6 million would be deducted from the conditional relief found in its Decision. THESL's audited 2009 statements were to be the basis of determining the level of underspending, if any.<sup>2</sup>

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<sup>1</sup> EB-2009-0243 Decision, Toronto Hydro-Electric System Limited, December 11, 2009, p. 9

<sup>2</sup> Ibid

In a letter to the Board dated December 17, 2009, THESL stated that the amount of \$195.6 referenced in the Decision included \$0.4 million of expenditures on donations and special events, which was not included as a part of 2009 rates and should therefore be excluded, meaning that an appropriate reference level of approved controllable 2009 OM&A would be \$195.2 million.<sup>3</sup> No party questioned the validity of this adjustment and the Board accepts it.

There are five areas where it is necessary that the Board make a decision on this application. These are: (1) the proposed recovery methodology and amount, (2) the allocation of the spending shortfall to the customer classes, (3) the time period of the recovery of costs from the customer classes, (4) the approach to interest carrying charges, and (5) the appropriate implementation date.

### **APPROPRIATE RECOVERY METHODOLOGY AND AMOUNT**

The submissions received from Board staff, Energy Probe and SEC as well as the reply submission from THESL all discussed the appropriate recovery amount and the various approaches by which it could be determined.

The SEC submission raised questions as to whether the evidentiary record was sufficient for the Board to make a decision in this proceeding, and if not, the nature of the decision that should be made.

Staff submitted that a key issue in the Panel's consideration of an appropriate recovery methodology and amount is that the Decision does not state whether or not the 2009 actual controllable OM&A expenses to be compared to the approved amount used to determine 2009 rates would be inclusive or exclusive of contact voltage remediation costs, and if exclusive, whether the costs to be excluded would be only those approved for recovery in the Decision, or all costs that are related to the contact voltage emergency, whether they were approved for recovery by the Board or not.

The Board will deal with the issues raised by SEC first followed by the issue of an appropriate recovery mechanism and amount.

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<sup>3</sup> Exhibit J, Tab 1, Schedule 1

*(i) SEC submissions as to sufficiency of evidentiary record*

**Background**

SEC argued that a two stage analysis was needed. The first step was to determine whether or not the evidence provided a basis for the Board to order any recovery to THESL. If the answer to this question was yes, the calculation of the correct amount became the remaining issue.

SEC argued that THESL had not met the first test and, as a result, recovery should be denied by the Board. This was because the burden of proof was on the applicant and the applicant at all times maintained the burden of putting forward sufficient evidence for the Board to reach the decision applied for. In SEC's view, THESL had not met this test because critical information in its possession, which had been requested by both parties to the proceeding and the Board had not been provided. The information related to whether or not any unusual spending or adjustments took place at the end of 2009 that affected total 2009 controllable expenses.

SEC further stated that the monthly 2009 information provided by THESL showed that average controllable expenses per month in 2009 were \$17.0 million, but that December expenses were \$25 million, with the difference of \$8 million being equal to substantially all of the claim made by THESL in this proceeding. SEC argued that THESL's failure to provide the equivalent information for 2007 and 2008, as requested by the Board, does not allow for a comparative assessment to determine whether or not the increase in December spending was normal.

SEC submitted that when an applicant refuses after repeated requests to provide material information, it would be appropriate for the Board to assume that the information withheld would be detrimental to the applicant's position. SEC concluded that when such facts exist, the refusal to provide that necessary information should be considered fatal to the application.

In the event the Board did not reach this conclusion, SEC submitted that the Board should follow its more normal practice and act on the best evidence before it. In this context, SEC argued that the best evidence was that controllable expenses in December 2009 were \$8.0 million more than the normal level of controllable expenses

and in the absence of any empirical evidence explaining that excess amount, the recovery amount should be reduced by \$8 million.

THESL responded that the Board should reject both of SEC's arguments on the grounds that SEC was suggesting there should be a further test of the validity of the 2009 actual controllable expenses. SEC argued that the actual expenses should not exceed the 'normal' level of controllable expenses. THESL submitted that this argument should be disregarded, first because there was no basis in the Decision for such a test and second, since there was no conceptual basis for it, much less an actual definition for a 'normal' level of controllable expenses, either annually or at any sub-annual interval.

## **BOARD FINDINGS**

The Board does not accept the arguments of SEC that there is insufficient evidence on the record for the Board to make a decision in this matter, or that it should use what SEC characterized as the best evidence on the record to reduce the recovery amount by \$8 million. The Board is in agreement with the views expressed by THESL that the adoption of such approaches would represent a test of the validity of the 2009 controllable expenses for which there is no basis in the Decision. The Board therefore finds that the evidence on the record in this proceeding is sufficient for it to make a Decision on this application.

However the Board considers THESL's response to repeated requests for this information to be less than forthright. The information in question, while not essential for the rendering of its Decision, could have been provided with whatever caveats THESL deemed appropriate and it may have provided useful context to parties in better understanding the nature of THESL's 2009 spending. The Board expects THESL to be more open in its responses in the future.

### *(ii) Appropriate recovery methodology and amount*

#### ***Background***

Staff took the position that there were three potential approaches open to the Board to determine an appropriate level of recovery of contact voltage remediation costs by

THESL based on the Decision. These were defining actual 2009 controllable OM&A to be compared to the approved \$195.2 million level in one of three ways:

- (i) including all contact voltage costs
- (ii) excluding only contact voltage costs approved for recovery in the Decision and,
- (iii) excluding all contact voltage costs.

The Board notes that no parties disputed that these were the three alternatives available to the Board in the event that it was determined that some level of recovery was appropriate. The relative merits of these three approaches were discussed in the submissions of all parties.

Board staff did not take a position as to which of the three approaches to recovery should be adopted. THESL and Energy Probe supported the second approach, while SEC supported the third approach.

No party supported alternative (i) which would have included all contact voltage costs. THESL argued that the intrinsic logic of the Decision would rule this alternative out, since its adoption would permit a situation in which the sum of 'non-contact voltage' operating expenditures and contact voltage expenditures could equal \$195.2 million and in which THESL would apparently be eligible to recover not only the (normal, at risk) amount of \$195.2 million already reflected in rates, but also a further amount of \$9.44 million representing contact voltage expenditures. THESL submitted that the logic of the Decision was clearly that it would be required to make controllable expenditures of \$195.2 million or more apart from costs that would be recoverable as extraordinary contact voltage costs in order to be able to recover the full conditionally approved amount; and that any shortfall in those expenditures relative to the reference amount would be deducted from the allowable contact voltage recovery amount.

THESL argued that the adoption of alternative (ii) would be fair and proper since it conforms to the express condition and intrinsic logic of the Decision, precludes any improper cost recovery on the part of THESL, and recognizes that categorically eligible actual expenditures outside the contact voltage recovery envelope were incurred by THESL and properly constitute controllable expenses for purposes of comparison to the reference amount.



Energy Probe also supported this alternative as the fairest, noting that it disallows inclusion of the \$9.44 million of contact voltage costs eligible for recovery in the Board's decision in 2009 actual OM&A but does allow the inclusion of the \$4.91 million that was refused in the contact voltage decision.

SEC argued in favour of alternative (iii) in the event the Board did not accept its other arguments. SEC submitted that the appropriate amount for recovery would be \$2.887 million. SEC stated that the basis for this conclusion is that the Decision makes clear the amount of recovery must be incremental to the controllable expenses without any contact voltage charges. As such, in SEC's view, 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.

THESL argued that the Decision ruled out alternative (iii) since it neither explicitly stated nor implicitly required that contact voltage expenditures not eligible for recovery as extraordinary contact voltage costs are anything other than controllable expenses in the usual sense. In THESL's view, had the Board intended such an exclusion to take place it would have said so in the Decision.

Staff submitted that the Decision had also provided no specific direction as to whether approved contact voltage costs, which have been deducted by THESL, should be excluded or included in calculating the appropriate level of controllable expenses.

THESL argued that the question posed in the Board staff submission as to whether the key criterion to be used in determining which contact voltage costs are included in controllable expenses should be whether or not the disallowed costs were caused by the contact voltage emergency was not within the scope of this proceeding because the answer to it is not a determinant of whether any part of THESL's actual 2009 operating expenses constituted controllable expenses.

THESL submitted that the observation in the staff submission that "the 2009 approved controllable OM&A levels were set on the basis that no specific contact voltage costs would be incurred" was also not within the scope of the proceeding because of the statement in the Decision that its finding was not intended to reopen the testing of the 2009 revenue requirement nor the prudence of the actual 2009 OM&A spending.

As such, THESL argued that there was no basis in the Decision or otherwise that would support the proposition that actual residual contact voltage expenses are not to be included in actual controllable expenses. THESL argued that the fact that it had re-prioritized certain operating expenditures, apart from those potentially recoverable through the contact voltage mechanism to deal with the contact voltage issues on its system does not disqualify those expenditures from inclusion in the calculation of 2009 controllable expenses.

THESL submitted that on the basis of the evidence in the present proceeding, it had met all the requirements of the Decision and the Board should now find that the amount of \$8.586 million documented in THESL's supplementary evidence, plus carrying costs, is properly recoverable by THESL in accordance with the Decision.

## **BOARD FINDINGS**

The Board finds that the appropriate recovery amount will be determined by deducting from the 2009 actual controllable operating expenses all contact voltage costs that the Board determined in the Decision would not have arisen in the absence of the contact voltage emergency, whether permitted for recovery in the Decision or not. In making this finding, the Board is in agreement with the staff submission that the key criterion to be used in determining which contact voltage costs should be included in controllable expenses should be whether or not the disallowed costs were caused by the contact voltage emergency, rather than whether or not they were found eligible for Z-factor recovery.

The Board does not agree with THESL's submission that this question is not within the scope of this proceeding. The Board finds that the scope of this proceeding is to determine an appropriate recovery amount of contact voltage costs in the context of the Decision and the criterion raised by staff is relevant to this determination.

The Board is in agreement with THESL that its re-prioritization of certain operating expenditures, apart from those potentially recoverable through the contact voltage mechanism to deal with the contact voltage issues on its system does not disqualify those expenditures from inclusion in the calculation of 2009 controllable expenses.

The Board has reviewed in this context the two disallowances in the Decision totaling \$4.91 million and consisting of \$2.41 million for ongoing scanning costs and \$2.5 million

related to overtime maintenance costs and remediation work. The Board finds that the \$2.41 million of ongoing scanning costs represented an acceptable re-prioritization of costs by THESL and should not be included in the deduction. The Board does not agree with staff's assessment that the scanning costs would not have occurred in the absence of the contact voltage emergency. While it is true that the scanning was prompted by the awareness gained through the emergency, had THESL gained awareness of the situation through other means such as evolving industry knowledge it could very well have commenced a scanning program as a reprioritization of its work programs. The Board notes that it is unlikely that a program prompted by this type of intelligence would have risen to the same scale as quickly as what occurred in THESL's actual experience. For reasons explained below the Board will not adjust the reduction to reflect this finding.

The Board finds that the remaining \$2.5 million of costs were related to the contact voltage emergency, as they included overtime costs which arose as a result of the emergency, and should be deducted. The record indicates that a notional portion of these costs are attributable to normal remediation work that may have occurred in the absence of the contact voltage emergency. It would not be possible to discern an accurate percentage of this category of costs that is made up by this activity. The Board deems that the notional cost associated with the remedial work that would cause a reduction in the \$2.5 million quantum is offset by the allowance of the exaggerated scanning costs explained above.

The Board will therefore allow a total recovery by THESL of \$5.3 million plus carrying costs. This is a reduction from the \$8.6 million plus carrying costs requested by THESL and is based on the principles of methodology (iii) as outlined earlier with the adjustments noted above. The calculation of both THESL's claimed recovery amount and the approved amount determined by the Board are shown in the table below, which is derived from the Board staff submission:

\$ millions	THESL Approach	Board Approved Approach
(1) 2009 Controllable Expenses	204.51	204.51
(2) Contact Voltage Costs Deducted	9.44	12.73 <sup>4</sup>
(3) Categorically Ineligible Expenses	0.724	0.724
(4) Net Expenses (1) - (2) - (3)	194.346	191.056
(5) Approved 2009 Expenditure Level	195.2	195.2
(6) Under Expenditure (4) - (5)	-0.854	-4.144
(7) Maximum Recoverable Expenditures	9.44	9.44
<b>(8) Allowable Recovery before carrying charges (6) + (7)</b>	<b>8.586</b>	<b>5.296</b>

In making this finding, the Board is mindful of THESL's arguments that there was no basis in the Decision or otherwise supporting the proposition that actual residual contact voltage expenses are not to be included in actual controllable expenses.

The Board however agrees with staff that the Decision does not make any reference to specific deductions that should be made from 2009 controllable OM&A, whether of the approved contact voltage expenditures as proposed by THESL and supported by Energy Probe, or additional deductions of non-approved costs as discussed in staff's alternative (iii) and supported by SEC.

The fact that the Decision does not provide such guidance might lead to the conclusion that alternative (i) would be the most appropriate option for the Board to adopt, except that the Board finds persuasive the arguments made by THESL in its reply submission as to why the intrinsic logic of the Decision would rule this alternative out. This leaves alternative (ii) and (iii) for consideration. The Board does not believe that the Decision provides any guidance that would support a conclusion that either one of these alternatives is more or less appropriate than the other, or that either one would effectively reopen the 2009 revenue requirement.

The Board finds that what is under consideration in both alternatives (ii) and (iii) is an appropriate level of contact voltage recovery by THESL, given the Decision allowed an extraordinary event recovery of up to \$9.44 million of contact voltage costs, but did not

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<sup>4</sup> Derived as "Total Contact Voltage Expenses" of \$15.139 million, as shown in *EB-2010-0193 Toronto Hydro-Electric System Limited Recovery of Amounts Related to Contact Voltage Supplementary Evidence Appendix A Filed 2010 September 10*, less the \$2.41 million of ongoing scanning costs.

make any further specification as to what level of such costs, if any, should be deducted from 2009 actual controllable OM&A expenses. Both alternatives (ii) and (iii) involve the deduction of some level of contact voltage costs from 2009 actual controllable OM&A costs for the purpose of determining an appropriate level of extraordinary cost recovery only. The adoption of either of these alternatives has no impact on the 2009 revenue requirement which remains unchanged.

In the Decision, the Board provided several comments that were intended to guide the implementation phase of the Decision. Of these comments, the one that this Panel views as identifying the overarching guiding principle is the one which led the Board to establish conditional relief in the first place. That being, that any approved recovery should not confer a double benefit to the shareholder. On that basis, the Board is of the view that the exercise of normalizing the 2009 actual controllable expenses is crucial in determining a level of recovery that will not confer a double benefit upon the shareholder. The Board is of the view that the very act of normalizing the 2009 actual controllable expenses does not mean that a prudence review of the 2009 revenue requirement has been undertaken, nor that a further prudence review has been undertaken of the disallowed residual contact voltage costs. Rather, the adjustments to the conditional relief approved in the original Decision were determined by the Board in this proceeding by reviewing the reasons for the disallowance of the residual contact voltage costs as determined by the Board in the original Decision, with no new findings made on the facts of the original case.

## **SPENDING SHORTFALL ALLOCATION**

### ***Background***

The Decision did not comment on the issue of the allocation of any spending shortfall between cost categories. THESL proposed to allocate the spending shortfall proportionally between the two categories of costs for which recovery was approved in the original application, which were scanning and remediation costs.

Board staff and intervenors had no concerns with THESL's proposal.

## **BOARD FINDINGS**

The Board approves THESL's proposal.

## **APPROPRIATENESS OF COST RECOVERY FROM CUSTOMER CLASSES**

### ***Background***

The Decision stated that the Board would not make a finding for the balance of contact voltage costs regarding the appropriate recovery period, or method of recovery in that Decision, and that these matters would be dealt with when THESL brought forward an application for disposition of any of these balances.

THESL requested recovery through fixed-term monthly rate riders with costs allocated to Streetlighting and USL classes recovered over a period of 3 years and costs for all other classes recovered over a single rate year. Recovery was requested to commence May 1, 2011. This date was subsequently revised by THESL in its reply submission to November 1, 2010.

THESL's evidence demonstrated that the impacts of its proposed recovery were highest for the Streetlighting and USL classes, ranging between 1.2% and 6.5%, which is why THESL proposed the three year recovery periods for these classes. THESL stated that impacts for all other classes were between zero and 1.4%.

No parties expressed concerns with THESL's proposed approach. However, staff noted that if the recovery amount claimed by THESL was to be reduced by the Board, the impacts for the most affected customer classes would also be reduced. Depending on the outcome of the Board's Decision, staff suggested the Board might wish to allow THESL the option of maintaining a mitigation plan for the affected classes or align the recovery period with the remaining classes as part of THESL's draft Rate Order.

### **BOARD FINDINGS**

The Board has reduced the amount of THESL's allowed recovery. Accordingly, the Board finds that the recovery period can also be reduced and in order to avoid unnecessary complexity, the recovery period will be 18 months for all customer classes.

## **INTEREST CARRYING CHARGES**

### ***Background***

The Decision had determined that until the disposition matter had been brought forward by THESL, there would be no interest on the \$9.44 million amount. It did not elaborate further on this matter.

In the present application, THESL requested carrying charges to be calculated, using the Board's prescribed interest rates and methodology, from a date to be determined by the Board until the date of requested rate implementation on May 1, 2011.

Board staff stated that it had no concerns with THESL's proposal and submitted that the Board might wish to consider whether or not an appropriate date from which carrying charges should be assessed would be from December 11, 2009, which was the date of the Decision.

## **BOARD FINDINGS**

The Board notes that no parties opposed staff's proposal that carrying charges be assessed from December 11, 2009. The Board accepts this proposal.

## **RATE IMPLEMENTATION DATE**

### ***Background***

THESL's original application proposed an implementation date of May 1, 2011 for any additional revenues awarded to it by the Board arising from the contact voltage emergency. THESL stated that the reason it had chosen this date was to minimize the number of rate changes for its customers by coinciding with the anticipated implementation of rates for 2011. THESL also noted that the suggested implementation date in this application is consistent with that proposed in THESL's 2007 CDM application (EB-2008-0401), in which the Board's September 22, 2009 Decision approved rate implementation to begin the following year on May 1, 2010.

THESL further suggested that if the proposed May 1, 2011 implementation date is not acceptable to the Board, the alternative of November 1, 2010, the date of the next RPP

change, would be more reasonable than an isolated rate change coming at an unexpected time for consumers.

No parties expressed concerns with THESL's approach.

In its reply submission, THESL submitted that with respect to the issue of the timing of rate implementation, there would be a benefit to consumers to discharge this matter at an earlier time rather than a later time in order to minimize carrying costs. THESL also argued that there was generally a benefit to all parties for there to be a timely conclusion to proceedings before the Board and implementation of the outcomes of those proceedings. As such, THESL requested that the Board render its Decision in this matter in a time frame that would permit rate implementation for November 1, 2010, if possible. If this date was not seen as possible, THESL requested that implementation be at the time of the next general distribution rate change which THESL foresaw as being May 1, 2011.

## **BOARD FINDINGS**

The Board accepts THESL's arguments and approves a November 1, 2010 effective and implementation date.

## **DRAFT RATE ORDER**

The Board has made findings in this Decision which change the distribution rates from those proposed by THESL. In filing its draft Rate Order, the Board expects THESL to file detailed supporting material showing the determination of its proposed final rates.

## **IMPLEMENTATION**

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. The Board will determine eligibility for costs in accordance with its *Practice Direction on Cost Awards*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.



All filings with the Board must quote the file number EB-2010-0193, and be made through the Board's web portal at [www.errr.oeb.gov.on.ca](http://www.errr.oeb.gov.on.ca), and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca). If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at [BoardSec@oeb.gov.on.ca](mailto:BoardSec@oeb.gov.on.ca). All other filings not filed via the Board's web portal should be filed in accordance with the Board's *Practice Directions on Cost Awards*.

**THE BOARD DIRECTS THAT:**

1. THESL shall file with the Board, and shall also forward to intervenors, a draft Rate Order attaching a proposed Tariff of Rates and Charges reflecting the Board's findings in this Decision, within 5 days of the date of this Decision. The draft Rate Order shall also include customer rate impacts and necessary supporting information.
2. Intervenors shall file any comments on the draft Rate Order with the Board and forward to THESL within 4 days of the date of filing of the draft Rate Order.
3. THESL shall file with the Board and forward to intervenors responses to any comments on its draft Rate Order within 4 days of the date of receipt of intervenor submissions.
4. Intervenors shall file with the Board and forward to THESL their respective cost claims within 21 days from the date of this Decision.
5. THESL shall file with the Board and forward to intervenors any objections to the claimed costs within 28 days from the date of this Decision.
6. Intervenors shall file with the Board and forward to THESL any responses to any objections for cost claims within 35 days of the date of this Decision.
7. THESL shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

**DATED** at Toronto, October 29, 2010

**ONTARIO ENERGY BOARD**

*Original Signed By*

Ken Quesnelle  
Presiding Member

*Original Signed By*

Marika Hare  
Member