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via RESS e-filing – original to follow by courier

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

Dear Ms. Walli:

RE: EB-2010-0295
Recovery of Late Payment Penalty Settlement Amounts
THESL Argument-in-Chief

Pursuant to the Board's Procedural Order No. 3 and its Decision on Motions, THESL encloses its Argument-in-Chief in this Proceeding.

Yours truly,

[Original signed by]

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:CJM/acc

cc: Alan Mark, Jennifer Teskey, EDA Counsel, by email only
Rick Zebrowski, Maurice Tucci, EDA, by email only

EB-2010-0295: Recovery of Amounts Related to LPP Settlement

Argument-in-Chief of Toronto Hydro-Electric System Limited

Introduction

On its own motion, the Board has convened a proceeding under file number EB-2010-0295 (the “LPP Proceeding”) to determine whether certain Affected Electricity Distributors (Distributors) should be allowed to recover from their ratepayers the costs and damages incurred as a result of the Minutes of Settlement (Settlement) in the late payment penalty (LPP) class action (more particularly described in the associated Notice of Hearing), and if so, the form and timing of such recovery.

Pursuant to the direction given by the Board in the Notice of Hearing, Toronto Hydro-Electric System Limited (“THESL”) cooperated with the Electricity Distributors Association (“EDA”) to produce and file on November 8, 2010 the collective evidence required by the Board. Subsequent to the filing of that evidence, THESL advised the Board by letter dated November 10, 2010 of THESL’s view that further evidence particular to the circumstances of THESL would be necessary in order to produce a complete and transparent record in the LPP Proceeding.

That supplementary evidence pertained to the elimination of certain legal costs from the amount that would be recoverable by THESL in connection with this proceeding, and to both the method of allocation of the recoverable amount to rate classes and the manner of recovery of those amounts.

This Argument-in-Chief addresses

- the eligibility for recovery of the amounts arising from the Settlement, adjusted for factors described in the evidence and below;
- THESL’s distinct position in this matter;
- the options before the Board for the manner of allocation of such amounts to rate classes;
- the options before the Board for the manner of recovery of such amounts; and
- procedural options before the Board for the determination of rate riders.

Eligibility for Recovery of the Amounts Arising from Settlement

With respect to the eligibility for recovery of the amounts arising from settlement, THESL relies generally on the Argument in Chief of the EDA on behalf of all distributors. THESL submits that it together with the other Distributors acted responsibly and in good faith to implement regulator-approved rates and charges including the subject Late Payment Penalties during the period in question, and that the mechanisms of regulation during that period were such that no Distributor profited from the revenues derived from LPPs. Those revenues were instead used to reduce distribution rates from levels that would otherwise have prevailed.

With approval by the Supreme Court of Ontario of the Settlement, the central question now before the Board pertains to the recoverability of the Settlement costs by Distributors, and not the original behaviour of the Distributors. THESL continues to rely on the evidence of the EDA on this issue and submits that that evidence demonstrates the prudence of the Settlement amount and associated costs, as well as the deservedness by Distributors to recover those costs.

Specifically with respect to THESL's (Updated) Recovery Amount of \$7,525,589, as more particularly documented in THESL's evidence, THESL submits that this amount has been properly derived as a proportion of the overall Settlement and reflects all appropriate adjustments, including the deduction of amounts related to legal costs already notionally recovered in rates. THESL affirms that it does not and has not carried insurance that provides any coverage of THESL's Recovery Amount.

THESL's Distinct Position in this Proceeding

THESL's Liability Arising from the Settlement

THESL submits that the Supreme Court of Ontario has established that THESL, as it presently exists, is liable according to the terms of the Settlement and that the historical corporate evolution of THESL and the succession of that liability from predecessors of THESL to THESL is irrelevant to the issues in this proceeding.

THESL's Comparative Liability

As a result of THESL's different period of exposure, THESL's comparative liability is greater than that of other Distributors apart from utility size and revenue. Since THESL's behaviour was not different than that of other Distributors, THESL submits that its larger comparative liability is an accident of history.

In the context of this proceeding, and given its distinctive circumstances, THESL submits that it could be reasonable for the Board to grant THESL and its ratepayers distinctive treatment with

respect to the issues of cost allocation and recovery, if the Board were to determine that a simpler standard treatment would present difficulties in THESL's case. First, in view of THESL's comparatively more material Recovery Amount, it could be reasonable for the Board to find that a different approach to allocation among rate classes may be warranted in THESL's case. Second, for the same reason, it could be reasonable for the Board to find that a longer period of recovery is appropriate.

Elimination of Legal Costs Previously Paid and Recovered

As set out in THESL's Supplementary Evidence, THESL proposes that the amount of \$185,628 in relation to defendant legal costs, which has already been or is to be paid by THESL to the EDA, and which has been notionally recovered in THESL's rates, should be deducted from the Allocated Amount assigned to THESL for the purpose of determining the net amount now recoverable by THESL pursuant to this proceeding.

Options for Cost Allocation Among Rate Classes

The evidence in this proceeding has distinguished two alternatives for allocating Recovery Amounts to Distributor rate classes. These are:

- Allocation by Customer Numbers (the EDA proposal)
- Allocation by LPP Revenue Proportions (THESL's alternative proposal)

On the spectrum of options, allocation by customer numbers represents a simpler approach than the LPP Revenue Proportions option. It also appears that the Board has the required information on the record in this proceeding to adopt this approach for the purpose of allocating the Recovery Amounts, and possibly for the purpose of setting rate riders, either uniformly or by Distributor.

The body of THESL's Supplementary Evidence and interrogatory responses provides information on how an alternative approach could work conceptually, as well as in THESL's case specifically. Table 1 below consolidates and summarizes this information for THESL (only). Table 1 indicates that for THESL, the choice for allocator is principally between using customer numbers and using the LPP revenue offset allocation – the difference in outcomes between these is significant for THESL, whereas there is essentially no difference in THESL's case under the customer numbers option between using the metered customer count and the total customer count.

Table 1: Cost Allocation Options

	Residential	General Service <50 kW	General Service 50-999 kW	General Service 1000-4999 kW	Large User	Sub-Total Metered	Streetlights	USL	Total
ALLOCATOR									
Customer Numbers	623,406	65,792	13,067	514	47	702,826	1	1,130	703,957
LPP Revenue received (3 yr avg percent)	53.0%	21.4%	20.1%	4.6%	0.9%	100.0%	0.0%	0.0%	100.0%
PERCENTAGE ALLOCATION									
Customer Numbers (Metered)	88.7%	9.4%	1.9%	0.1%	0.0%	100.0%	NA	NA	NA
Customer Numbers (Total)	88.6%	9.3%	1.9%	0.1%	0.0%	99.8%	0.0%	0.2%	100.0%
LPP Revenue received	53.0%	21.4%	20.1%	4.6%	0.9%	100.0%	0.0%	0.0%	100.0%

Without implying that the Board should adopt this approach for all Distributors, THESL submits that in its circumstances it is reasonable to adopt the LPP revenue offset allocation option, on the basis that the information required is available and that this approach would better reflect the original incidence of LPP revenues, either as received or as returned through revenue offsets.

Manner of Recovery

Fixed Customer versus Variable Consumption Charges

Apart from the question of allocating Recovery Amounts across customer classes is the issue of the billing determinant basis of recovery, either by way of customer- or consumption-based charges. THESL's answer to Board Staff interrogatory #1 provides updated information on the rates that correspond to each alternative in THESL's case.

A reasonable approach in THESL's case may be to set recovery on a variable consumption basis, on the grounds that consumption levels correlate more closely with the total bill, which itself is the determinant of the LPP charge. However, THESL recognizes that current consumption is only a proxy for consumption during the exposure period, and that if allocation to classes is already on the basis of the three year average of LPP revenue received, the need to match the incidence of LPP revenue is reduced.

Period of Recovery

THESL submits that in view of its greater comparative Recovery Amount, it would be reasonable to establish a longer period of recovery for THESL than may be necessary for other Distributors, and that two years would be sufficient for this purpose.

Process for Setting of Rates

Apart from the threshold issue, Procedural Order No. 1 identifies the remaining issue as:

If the answer to the first issue is yes, what would be an appropriate methodology to:

- a) apportion costs across customer rate classes, and
- b) recover such allocated costs in rates.

As such THESL does not presume that the Board intended to set rates or rate riders *per se* in the context of this proceeding. Nevertheless, the Board may find on the record before it that it can do so and that it would be expedient to do so.

While THESL has no objection to the Board undertaking such an approach for Distributors generally, it respectfully requests that the Board exempt THESL from an otherwise potentially uniform rate rider and recovery period for the reasons set out above, which originate from the fact of THESL's comparatively higher Recovery Amount. THESL submits that there are good reasons to distinguish the allocation of costs to rate classes in THESL's case, and that even in the event that the Board determines a uniform allocation approach or a uniform rate rider, the period of recovery should be adjusted to recognize the larger amount to be collected by THESL.

In the event that the Board does not establish specific rate riders to be employed by THESL in the context of this proceeding, THESL requests that the rate rider determination process be re-joined to its 2011 rates application under docket number EB-2010-0142.

All of which is respectfully submitted this 26th day of January, 2011.