



ONTARIO ENERGY BOARD

STAFF SUBMISSION

NOTICE OF MOTION – REVIEW OF OEB DECISION EB-2010-0193

**Toronto Hydro-Electric System Limited
EB-2010-0354**

February 3, 2011

Background

On June 30, 2009 Toronto Hydro-Electric System Limited (“THESL” or the “Applicant”) filed an application (the “Prudence Application”) with the Ontario Energy Board (the “Board”) requesting the Board’s approval of rate riders to recover costs incurred by THESL for the remediation of contact voltage conditions on its system, effective May 1, 2010.

On December 11, 2009, the Board issued its EB-2009-0243 Decision (the “Prudence Decision”), which found that any relief provided in the Prudence Decision would be conditional on THESL’s actual spending in controllable 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.

On May 14, 2010, THESL filed an application (the “Recovery Application”) with the Board requesting the Board’s approval of rate riders to recover approved costs incurred by THESL for the emergency correction of contact voltage conditions on its system, effective May 1, 2011.

On October 29, 2010, the Board issued its EB-2010-0193 Decision (the “Recovery Decision”) which allowed THESL a total recovery amount of \$5.3 million plus carrying costs.

On November 18, 2010, THESL filed a Notice of Motion (the “Motion”) for an Order of the Board reviewing and varying the Recovery Decision as outlined in the Motion.

On January 14, 2011, the Board issued Notice of Hearing and Procedural Order No.1. The Board requested submissions on both the threshold issue under Rule 45.01 and the merits of the review.

Threshold Issue

Rule 45.01 of the Board’s *Rules of Practice and Procedure* states:

In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Rule 44.01(a) provides the grounds upon which a motion may be raised with the Board:

Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

- (i) error in fact;
- (ii) change in circumstances;
- (iii) new facts that have arisen;
- (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The Board's most thorough analysis of Rule 45.01 came from a decision on several motions filed in the Natural Gas Electricity Interface Review (the "NGEIR decision").¹ The NGEIR decision stated that the purpose of the threshold test was to determine whether the grounds for the motion raised a question as to the correctness of the order or decision under review. The Board held that: "in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently."

The Board continued:

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.²

¹ EB-2006-0322/0338/0340, Decision with Reasons dated May 22, 2007.

² *Ibid*, p. 18.

The current motion

THESL seeks a review of the motion on two grounds: error of fact, and mixed error of fact and law. Although “error of law” is not an enumerated ground for review under Rule 44.01, the Board was clear in the NGEIR review decision that an error of law can be an appropriate ground for a review³.

Alleged error in fact

With regard to the alleged error in fact, it is THESL’s position that the Board made an error by deducting \$3.29 million from the recovery amount when the reasons in the Recovery Decision only provided for a disallowance of \$2.5 million for non-scanning residual contact voltage costs (resulting in an unjustified deduction of \$0.79 million).

It is Board staff’s submission that an alleged error of fact will ordinarily pass the threshold question where: the alleged error of fact is not clearly spurious; and, if the allegation is ultimately shown to be correct (i.e. there was indeed an error of fact), it could result in a material change to the decision.

Board staff submits that the alleged error of fact passes the threshold question. Although Board staff ultimately disagrees that an error in fact has been made (see discussion below), the allegation is not clearly spurious. The amount of money in question (\$0.79 million) is by no means large for a utility the size of THESL, but it is above the *de minimus* range and could be considered material, at least in the context of the Recovery Decision.

Alleged mixed error of fact and law

With regard to the alleged mixed error of fact and law, it should be noted that the Board decision against which the motion to review is directed is somewhat unusual in that it is a decision which seeks to implement a previous Board decision. The Recovery Decision sought to give effect to the decisions previously made by the Board in the Prudence Decision, and therefore had to interpret that decision. THESL argues that the panel in the Recovery Decision erred by misapplying the Prudence Decision in a number of ways. However, with the exception of the alleged error in fact discussed

³ *Ibid.*, pp. 5-9.

above, THESL does not appear to allege that the Board made any true errors of fact regarding its interpretation of the Prudence Decision. Rather, the alleged errors are more akin to errors of analysis or interpretation, which THESL has equated to an error in law. For example, THESL states that the Board improperly changed the accepted definition of controllable expenditures established by the Board to exclude certain expenditures. However, the Board did not precisely define the “controllable expenses” in the Prudence Decision which were to be compared to the threshold amount, and the matter was therefore open to some interpretation. THESL is essentially stating that the Board’s interpretation was unreasonable. The Prudence Decision stated as follows with regards to the matter of implementation⁴:

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.

One of the appropriate grounds for review identified in the NGEIR decision was: “the panel made inconsistent findings.” In the current case, this might be modified slightly to: the panel made a decision inconsistent with the binding findings of a previous panel. Board staff is willing to accept that there are circumstances under which this would be an appropriate ground for review, and is therefore not prepared to submit that this question does not pass the threshold. It is staff’s submission, however, that the interpretation of a previous decision generally involves a wide measure of panel discretion, and absent a clear error of interpretation, the panel’s decision should not be overturned. As stated in the NGEIR decision, a motion to review should not be seen as an opportunity to re-argue the same case and hope for a different answer.

⁴ EB-2009-0243 Decision Toronto Hydro-Electric System Limited, p.9

Merits of the Review

Board staff submits that both of THESL's alleged grounds for the Motion, first that there was an error of fact made by the Board and second that there is an alleged mixed error of fact and law are without merit.

Alleged error in fact

Board staff would first note that the methodologies proposed by THESL and those used by the Board in reaching the Recovery Decision are identical. This is evident from an examination of the table incorporated into the Recovery Decision.⁵ The only difference between the THESL approach and that in the Recovery Decision is in the amount of contact voltage costs deducted in line 2 of the table. The Recovery Decision deducted an amount of \$12.73 million, while Toronto Hydro proposed a deduction of \$9.44 million. The \$12.73 million deduction in the Recovery Decision was derived as Total Contact Voltage Expenses of \$15.139 million less \$2.41 million of ongoing scanning costs to produce a net amount of \$12.73 million as explained in the Recovery Decision.⁶ The \$9.44 million deduction proposed by THESL was derived as Total Contact Voltage Expenses at the time of the Prudence Decision of \$14.35 million, less the \$4.91 million of disallowed contact voltage costs in the Prudence Decision to produce a net amount of \$9.44 million, or the total conditional relief found by the Board in the Prudence Decision, subject to adjustment depending on the achieved level of controllable OM&A.

Staff notes that THESL claims that an error of fact has taken place because there is what it sees as an unexplained disallowance of \$0.79 million in the Recovery Decision. This amount is in fact not unexplained but rather the difference between the updated level of total contact voltage costs of \$15.139 million on which the Recovery Decision was based and the original level of projected contact voltage costs at the time of the Prudence Decision of \$14.35 million. This is acknowledged by THESL in its Motion.⁷ Staff submits that no error of fact was made in the Recovery Decision as it was clearly demonstrated on page 10 of the Recovery Decision that the Board was using this

⁵ EB-2010-0193 Decision Toronto Hydro-Electric System Limited, p.10

⁶ EB-2010-0193 Decision Toronto Hydro-Electric System Limited, p.10, footnote 4

⁷ Toronto Hydro-Electric System Limited Notice of Motion – Review of OEB Decision EB-2010-0193, pp. 8-9

amount in determining the allowed level of recovery. Staff would also note that just as the overall level of controllable OM&A was updated for 2009 actuals at the time of the Recovery Decision, it is also appropriate that the amount of contact voltage costs be updated in order to ensure comparable numbers are used in determining an appropriate level of recovery.

Alleged mixed error of fact and law

Staff notes that the Prudence Decision provided no specific guidance supporting the recovery mechanism used by both THESL and the Board in the Recovery Decision, nor any guidance as to the appropriateness of the differing deductions of contact voltage costs. The key references in the Prudence Decision have been cited earlier in this submission. The Prudence Decision, when referencing the benchmark amount of \$195.6 million, states that this amount should be compared to “THESL’s actual controllable OM&A expenditures” and “Any underspending in OM&A controllable expenses”, but provides no further specifications as to how these amounts should be determined.

Staff would submit that a plain reading of the Prudence Decision might suggest that what it intended, based solely on the words it contained was that a simple comparison of THESL’s actual total 2009 controllable OM&A expenses with the benchmark should be undertaken.

However, all parties to the EB-2010-0193 proceeding leading to the Recovery Decision, including THESL, submitted that some account needed to be taken of the contact voltage costs in achieving a meaningful comparator. Staff would submit that while THESL proposed one approach and the Recovery Decision adopted a modified version of it, neither approach was either predetermined or precluded by the Prudence Decision. As such, staff submits that there was also no mixed error of fact and law.

- All of which is respectfully submitted –