EB-2009-0180/EB-2009-0181
EB-2009-0182/EB-2009-0183

IN THE MATTER OF applications pursuant to Sections 60(1), 86(1)(a), 86(1)(b), 86(1)(c) and 18(2) of the *Ontario Energy Board Act, 1998* by Toronto Hydro-Electric System Limited ("THESL"), Toronto Hydro Energy Services Inc. ("THESI"), and 1798594 Ontario Inc. ("NewCo") (collectively, the "Applicants") seeking a declaration by the Board that street and expressway lighting assets in the City of Toronto are deemed to be a distribution system and orders to facilitate the transfer of the street and expressway lighting assets to a newly amalgamated distribution company consisting of THESL and NewCo;

AND IN THE MATTER OF additional evidence filed by the Applicants pursuant to a Decision and Order of the Ontario Energy Board (the "Board") dated February 11, 2010.

SUBMISSIONS IN REPLY OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED, TORONTO HYDRO ENERGY SERICES INC., AND 1798594 ONTARIO INC.

July 4, 2011

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

J. Mark Rodger
Tel: (416) 367-6190
Fax: (416) 361-7088
mrodger@blg.com

John A.D. Vellone
Tel: (416) 367-6730
Fax: (416) 361-2758
jvellone@blg.com

Counsel to the Applicants

EB-2009-0180/EB-2009-0181/EB-2009-0182/EB-2009-0183

IN THE MATTER OF applications pursuant to Sections 60(1), 86(1)(a), 86(1)(b), 86(1)(c) and 18(2) of the *Ontario Energy Board Act, 1998* by Toronto Hydro-Electric System Limited ("THESL"), Toronto Hydro Energy Services Inc. ("THESI"), and 1798594 Ontario Inc. ("NewCo") (collectively, the "Applicants") seeking a declaration by the Board that street and expressway lighting assets in the City of Toronto are deemed to be a distribution system and orders to facilitate the transfer of the street and expressway lighting assets to a newly amalgamated distribution company consisting of THESL and NewCo;

AND IN THE MATTER OF additional evidence filed by the Applicants pursuant to a Decision and Order of the Ontario Energy Board (the "Board") dated February 11, 2010.

SUBMISSIONS IN REPLY OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED, TORONTO HYDRO ENERGY SERVICES INC., AND 1798594 ONTARIO INC. (THE "APPLICANTS")

DELIVERED JULY 4, 2011

A. INTRODUCTION

1. These Submissions in Reply are filed with the Board in accordance with Procedural Order No. 8. The summary of the procedural record in this case (the "Valuation Proceeding") is set out in the Argument in Chief of the Applicants. The Applicants continue to rely on the detailed evidentiary record in this proceeding and the submissions made in their Argument in Chief. Capitalized terms used in these Submissions in Reply but not otherwise defined herein have the meaning given to those terms in the Argument in Chief.

2. The Applicants originally received submissions on June 14, 2011 from only one party to this proceeding, namely the Electrical Contractors Association of Ontario and the Greater Toronto Electrical Contractors Association ("ECAO-GTECA"). After the period for filing responding submissions had elapsed, the School Energy Coalition ("SEC") sought and obtained Board approval to make late submissions in this matter. The Applicants did

not object to SEC's request for additional time to make submissions. The Applicants received SEC's submissions on June 24, 2011.

3. The Applicants understand (as they must) that the other parties to the proceeding, including Board Staff, accept the evidence and submissions of the Applicants as having entirely met the requirements set out by the Board in its February 11, 2010 Decision ("February Decision") in this proceeding. In particular, the Applicants must conclude that these other parties do not in any way dispute the methodology employed by the Applicants in the conduct of the inventory and valuation studies, or the results, including the classification of assets and the asset valuations, which emerged from those studies. Had these parties had any concerns or objections with regard to the record or these matters, it was their duty to make them known by way of submissions to which the Applicants could have responded. As it stands, the Applicants submit that the silence of these parties, including Board Staff, must be understood as an expression of no opposition on their parts to the relief sought by the Applicants in this proceeding.

B. THE ROAD CLASSIFICAITON SYSTEM AND THE INTENDED USE TEST

4. Both ECAO-GTECA and SEC object to the Applicants' use of the City of Toronto's Road Classification System ("RCS") as a tool to assess whether or not assets in certain locations meet, or do not meet, the Board's intended use test.

5. To address these objections, it is worth briefly revisiting the Board's intended use test, which is the basis of the distinction made between "residential" and "mixed use urban" areas, and to further elaborate how the Applicants strove to implement the intended test through the use of information available in the Inventory Study and the RCS.

6. The Board established the intended use test in its February Decision as follows:

> The Board agrees with the Applicants that a criterion that depended on use at any particular point in time would result in a cumbersome and likely inoperable scheme by which to separate distribution system assets and non-distribution

> system assets. However, a criterion based on the functionality or the *intended use*, addresses this concern because the classification would remain constant irrespective of the use at any particular time. For example, a distribution circuit that has been legitimately put in place to service multiple customers remains a distribution facility even if only one customer is attached at a particular time.
>
> **Pages 6-7 of the February Decision.**

7. Using this test, the Board drew a distinction between "mixed use urban" and "residential" areas of the City based, primarily, on its assessment of the intended use of the assets in these areas. The objective of the Board was to ensure that only appropriate assets are identified as distribution and are transferred based on their intended use.

8. Specifically, the Board found with respect to conductors that:

> Similarly, if the distribution circuits are underground in a mixed use urban setting, then the underground conductor and the above ground conductor (and associated equipment), excluding the conductor along the streetlight bracket, can appropriately be considered distribution system assets. *The urban landscape, with its signage, traffic lights, phone booths, etc., is such that the functionality or intended use of the conductors is for multiple connections to multiple users.*
>
> If, however, the distribution circuits are underground in a residential setting, then the Board concludes that the underground conductors are appropriately considered distribution assets but the conductor on the poles and brackets can not be considered distribution assets. *In this situation, the conductors are used almost exclusively for streetlighting as the existence of other users is extremely limited. In this situation it cannot be said that the functionality or intended use of the conductors on the poles includes other customers.*
>
> **February Decision at Page 8.**

9. Similarly, the Board found with respect to poles that:

> Similarly, if the distribution circuits are underground in a mixed use urban setting, then the poles can appropriately be considered distribution system assets. *The urban landscape, with its signage, traffic lights, phone booths, etc., is such that the functionality or intended use of the poles is part of a distribution system serving multiple connections to multiple users.*

> If, however, the distribution circuits are underground in a residential setting, poles in the Board's view are not distribution assets. *In this situation, the poles are used almost exclusively for streetlighting as the existence of other users is extremely limited. Accordingly, it cannot be said that the functionality or intended use of the poles includes other customers.*
>
> **February Decision at Page 8.**

10. The Board did not include an explicit definition of "residential" and "mixed use urban" areas in its February Decision. Instead, the Board relies upon its assessment of the intended use of the assets in each of these areas. As a result, the Applicants submit that the intended use of the assets represents the principal consideration in determining whether an area should be classified as "residential" or "mixed use urban" for the purposes of the February Decision.

11. The Applicants submit that the purpose of the Board's intended use test is to ensure that the assets that are identified as distribution assets are: (1) intended for use by multiple recipients; and (2) not dependant upon the use of the assets at any particular point in time, which in the Board's view "would result in a cumbersome and likely inoperable scheme". The Applicants argued, and the Board agreed, that a demarcation based on a static assessment of existing users was not appropriate because it was overly rigid and would require continuous updating as customers come and go on any particular circuit. As a result, the Board articulated its intended use test.

12. It was in this context that the Applicants undertook to classify the assets identified in the Inventory Study in two separate steps, which is fully explained in the Additional Evidence and is summarized below.

13. First, the Applicants used the information gained from the Inventory Study to classify all of the assets that could be classified as either distribution or streetlighting on the basis of asset definitions (pole, conductor, bracket, luminaire, etc.) and type of supply (overhead or underground supply). The outcome of this process was the classification of certain assets as categorically streetlighting (such as the bracket and luminaire) and other assets

as categorically distribution (such as poles and conductors in overhead supply areas). In addition, based on the information available from the Inventory Study, certain assets could also be classified as "residential" or "mixed use" based upon the characteristics of the assets identified in the Inventory Study.

Additional Evidence at Pages 11-12.

14. Second, in the limited circumstances where the intended use of certain assets was not readily apparent by simple observation of the primary determinants identified in the Inventory Study, the Applicants used the RCS to implement the Board's intended use test. The RCS intended use analysis in no case overrode the asset definition or supply type criteria established by the Board. It was used only to resolve ambiguity in cases where those criteria could not be used to definitively determine the intended use of the assets. In addition, the RCS provided a useful objective guide with which to implement the Board's intended use test where the Inventory Study proved that counter-examples to a simplistic application of the criteria existed (for example, the presence of multiple users, such as illuminated pedestrian crossings, on underground supplied collector roads traversing residential neighbourhoods).

Additional Evidence at Pages 12-13.

15. In exercising their professional judgement and expertise, including a detailed understanding of the assets based on the Inventory Study, the Applicants concluded that the RCS classification of "Arterial", "Collector", and "Local" roads provides a very useful schema with which to implement the Board's intended use test. As will be discussed below, the RCS provides an independent, accurate and reliable base of information about the characteristics of the road system which hosts current and future customers served by the underground-supplied streetlighting assets in the City of Toronto, which information is highly pertinent to the intended use analysis. The Applicants submit that their use of the RCS to inform and implement the Board's

intended use test for the purposes of classifying assets as streetlighting and distribution in accordance with the February Decision is entirely reasonable and appropriate.

16. Both ECAO-GTECA and SEC suggest implicitly or explicitly in their submissions that the Applicants have misused the RCS in an attempt to classify more assets as distribution than would otherwise be appropriate. The Applicants submit that this is definitely not the case. The Applicants, collectively and individually, have nothing to gain from misclassifying certain streetlighting assets as distribution assets or vice-versa. In preparing the Additional Evidence, the Applicants sought to ensure that all of the assets that were intended to serve multiple customers were properly classified as distribution, so they can be consistently operated and maintained along with other distribution assets, while those assets that are intended to serve only a streetlighting function would continue to be owned and operated as such.

17. In arguing that the Board should reject the Applicants' use of the Inventory Study and the RCA to implement the Board's intended use test and categorize the assets, neither ECAO-GTECA nor SEC suggest a specific alternative approach. As a result, the Board is now left to choose either to accept the Applicants' concrete and reasonable proposal to implement the intended use test using the Inventory Study and the RCS, or to further delay this process based on various vague and misleading criticisms. The Applicants submit that in this circumstance, the Board should accept the Applicants' proposal and additional evidence as a reasonable implementation of the intended use test.

C. ECAO-GTECA'S OBJECTIONS

18. ECAO-GTECA alleges (paragraph 5) that the Applicants' use of the RCS as the basis of classification incorrectly includes in the 'mixed use' category assets on arterial and collector roads which are, at least in part, residential in character. Furthermore ECAO-GTECA contends (paragraphs 8, 9) that since the RCS was not initially designed for the purpose to which it was put by the Applicants, it therefore is incapable of meeting that purpose and cannot be so used.

19. The Applicants submit that the arguments of ECAO are flawed and should be rejected by the Board for two reasons: (1) ECAO has misconstrued the Board's February Decision; and (2) ECAO wrongly asserts that the RCS cannot be used in these circumstances.

C.1 ECAO Has Misconstrued the February Decision

20. In the first instance, ECAO-GTECA either misunderstands the classification criteria articulated by the Board in the February Decision or deliberately mischaracterizes them. ECAO-GTECA attempts to construe the Board's test as one dictating that if roads have a residential character, they are necessarily not in the 'mixed use' category, and ECAO-GTECA argues on this basis that streetlight assets in 'residential' areas are ineligible for categorization as distribution assets.

21. ECAO-GTECA states at paragraphs 5 and 6 as follows:

> "Rather, it [the Applicant's proposed classification] is based on an incorrect premise that no roads other than Local roads can or do have a residential character, in whole or in part. *As a result*, the applicants' use of the Road Classification System Report to determine which assets are of "mixed use" is inappropriate and results in the categorization of more assets as distribution assets than is properly justified." (emphasis added)

22. This is clearly not what was either stated or intended by the Board when it distinguished between "residential" and "mixed use urban" areas in the February Decision. At no time did the Board ever state that the 'mixed use' category could not include residential areas, and to assert that this was the Board's intent is plainly false. There are innumerable examples of streets in Toronto (e.g., Eglinton, Lawrence, Islington avenues) that are in some areas zoned residential and are lined for considerable distances with houses and other residential buildings; yet these are also clearly sites of bus routes, bus shelters, cross-walks, phone booths, traffic signals, and other multiple or 'mixed use' forms of equipment.

23. The critical distinction made by the Board in the February Decision did not turn on whether a local area was 'residential', but rather on whether the streetlighting assets in the area were fed through underground assets (as distinct from overhead assets), and supported or were intended to support no other forms of equipment loads. The term 'residential' in this context is simply denotes the most prevalent instance of land use in areas that are served by local roads and underground-supplied, single purpose streetlighting. Therefore while it is illustrative of areas contemplated by the Board as being of non-mixed use character, the characteristic of being 'residential' is not an essential part of the Board's intended use test.

24. The ECAO-GTECA premise, plainly stated, is that 'residential' neighbourhoods cannot be or include 'mixed use' areas. On its face, this clearly contradicts the February Decision and the facts upon which it was based. The streetlighting system in some residential neighbourhoods with an underground supply in fact supply other "mixed use" equipment such as pedestrian crossings, traffic lights, and bus shelters. In assessing whether or not to use the RCA, the Applicants found that this occurred principally along Collector and Arterial roads (which reinforced the Applicants decision to rely on the RCA). ECAO-GTECA's argument is only valid if *all* residential neighbourhoods do not include mixed use assets. From a false premise springs a false conclusion.

C.2 ECAO Wrongly Asserts that the RCS Cannot Be Used

25. In the second instance, ECAO-GTECA asserts that since the RCS was not initially designed to categorize Toronto's geography into mixed use and non-mixed use areas, it therefore cannot be used for that purpose. Its premise is that no tool can be used for a purpose for which it is not specifically designed. This is an absurd and untenable premise and should be rejected by the Board.

26. At paragraphs 8 and 9, ECAO-GTECA states:

> More specifically, the definitions of "Collector" and "Arterial" roads described in the Road Classification System Report were developed for a wholly different purpose than that for which they have been adopted by the applicants in the current proceedings.
>
> Therefore, contrary to the submissions of the applicants, the Road Classification System Report does not provide a comprehensive and correct implementation of the functionality or intended use of assets aspect of the Decision, and the use of that report to determine which assets are of "mixed use" is problematic. (emphasis added)

27. In fact, and as explained in the Additional Evidence at pages 12 and 13, the RCS is very well suited to the analytic purpose to which it was put by the Applicants. The RCS itself states, at page 9, paragraph 6,

> "A road classification system not only provides a fundamental management tool for transportation staff, but road users as well as communities derive benefits from its existence and consistent application. Formalized road classifications help residents, residents' groups, business people, planning professionals and other stakeholders to have a clear understanding of the function and characteristics of particular roads." (emphasis added)

28. The RCS contains explicit and implicit references too numerous to mention of the facts that collector and arterial roads host traffic signals, pedestrian cross-overs, transit routes (with associated shelters) and other forms of street furniture, all of which require connection to the electricity distribution system. Conversely, it clearly identifies local roads as being primarily for the purpose of low-traffic-volume local property access, and therefore as being without the need for signalized intersections and the other kinds of loads associated with collector and arterial roads.

29. Therefore, contrary to the assertions of ECAO-GTECA, the RCS is not limited to use only by the City, or only for the purposes to which it is put by the City. The information provided by the RCS is highly pertinent to the intended use test articulated by the Board in its February Decision, regardless of the fact that the City in preparing the RCS could not have anticipated the formulation of this test when the RCS was initially designed.

30. The ECAO-GTECA position is inconsistent with the widespread practice of urban planners, academics, social policy makers and others of using general databases for specific purposes. For example, Census data is routinely used to answer specific questions about population characteristics for the purposes of specific analyses which were not necessarily anticipated by the designers of the general Census database. It is absurd to suggest that although such data is accurate, reliable, and pertinent to the questions to be decided, the use of such data is invalid because it was not originally gathered for those purposes.

31. The Applicants have appropriately used the information contained in the RCS to identify and distinguish local roads from collector and arterial roads, and in the cases of collector and arterial roads to substantiate the current or future 'mixed-use' character of those roads. The Applicants submit that this approach, in conjunction with the pole-by-pole inventory study, correctly implements the Board's February Decision in a robust and enduring way. There is no conflict or mismatch between the categories set out in the February Decision, and the RCS classification of streets in the City of Toronto, despite the erroneous assertions of ECAO-GTECA.

C.3 Handwells and Pole Foundations

32. At paragraph 14, ECAO-GTECA states:

> It is unclear why the applicants have attributed 100% of the handwells and pole foundations to distribution. ECAO/GTECA submit that where power distribution is underground, the street lighting pole is solely dedicated to streetlighting. Therefore, for those poles that are not categorized as distribution assets, the related handwells and pole foundations should be excluded from distribution assets.

33. With respect to handwells, the Board stated in the February Decision at pages 7 and 8 that all streetlight conductors in Overhead, Mixed-Use, and Underground Residential Setting areas can be considered as distribution. The only streetlight conductors that cannot be considered distribution are those running up the streetlight pole, and along the

bracket. Since all the conductors that feed into and out of handwells are classifiable as distribution, handwells now serve only a distribution function. Therefore, the Applicants submit that it is appropriate to classify all handwells as distribution.

34. With respect to pole foundations, these are used where necessary as an alternative to the more prevalent approach (for both existing distribution power poles and streetlight poles) of direct burial, and are used for steel or aluminum poles (Additional Evidence, page 73). Streetlight poles in non-mixed use residential areas are predominantly concrete and direct-buried, and do not use pole foundations, although they may have decorative bases. Substantially all streetlight pole foundations (i.e., 90% by count and over 90% by value) are found in commercial-industrial areas (especially the downtown core) where the area type is either Overhead or Mixed Use, and where direct burial is too costly or is infeasible due to the presence of other buried infrastructure. Since the Board has determined in the February Decision that all streetlight poles in Overhead and Mixed Use areas can be classified as distribution, and since the foundation is an integral part of the streetlight pole, pole foundations can appropriately be classified as distribution for the same reason as the associated pole is.

35. Nevertheless, the Applicants wish to ensure an outcome of this process which is as clear, regular, and distinct as possible. As a result, the Applicants agree with ECAO-GTECA that in the small minority of cases in which poles with foundations occur in local road, non-mixed use areas, it would be undesirable from operational and regulatory perspectives for the pole foundations to be classified as distribution while the pole itself is classified as streetlighting. To address this concern, the Applicants propose to reduce the transfer of pole foundations to THESL by 10% (by number) such that in all cases ownership of the pole and any associated foundation resides with one or the other company but not both. This will result in a corresponding reduction in the value (NBV) of the assets transferred to distribution of $479.9 thousand.

D. SEC'S OBJECTIONS

36. In its late submissions, SEC addresses four main themes. In logical order, these are:

- The use of the RCS is inappropriate
- The Valuation Proceeding does not present an adequate record to support a decision
- The DRC methodology is inappropriate
- The assets in question should be transferred for $1

D.1 The Applicants' use of the RCS

37. With respect to the use of the RCS, SEC provides its submissions at paragraphs 20 to 26. Generally, these submissions mischaracterize the evidence on the record, attempt to draw conclusions from partial and misleading information, and most fundamentally, miss the point of the Board's February Decision by confounding the condition of 'existing use' (not in the February Decision) with the concept of 'intended use' (in the February Decision).

38. First, SEC states at paragraph 20 that "The Applicant proposes to allocate assets based on whether they are on arterial, collector, or local roads, using the City of Toronto's Road Classification system", and at paragraph 24 that "The primary basis for this allocation is the assumption that all streetlighting assets on arterial and collector roads should be considered distribution assets, and those on other roads should not."

39. This is inaccurate and misleading. As is clearly stated in the Additional Evidence at pages 12 and 13, and as more fully detailed above, the primary determinants of classification were the asset definitions (pole, luminaire, conductor etc) and street area types (i.e., overhead or underground supply; to avoid any possible confusion, this will be referred to as 'supply type' henceforward). The intended use analysis aided by the RCS was only used where (as stated at page 12) the intended use of the assets may not have been completely apparent by simple observation of the primary determinants.

40. Again as stated at those pages, the RCS intended use analysis in no case overrode the asset definition or supply type criteria established by the Board. It was used simply to

resolve ambiguity in cases where those criteria could not definitively determine the intended use of the assets, or more pointedly, where counter-examples existed (for example, illuminated pedestrian crossings on underground supplied residential roads).

41. The Board specifically envisioned circumstances in which the combination of asset definition and supply type would not fully determine the intended use of the assets, and stated at page 8 of the February Decision "Similarly, if the distribution circuits are underground in a mixed use urban setting, then the poles can appropriately be considered distribution system assets. The urban landscape, with its signage, traffic lights, phone booths, etc., is such that the functionality or intended use of the poles is part of a distribution system serving multiple connections to multiple users."

42. SEC also commits the same error in logic previously addressed in reply to ECAO-GTECA, namely, by assuming that 'mixed-use' and 'residential' are mutually exclusive categories.

43. At paragraph 23, SEC attempts to use superficial analysis to challenge the intended use analysis, by claiming that certain of the named streets are residential in character and yet are classified in the RCS as being collector roads. First of all, this claim rests on the logical error explained above. In any case however, the attempt fails, since SEC neglects to mention that the named streets in the vicinity of Yonge and Eglinton are already classified as distribution on the basis of supply type (i.e., overhead supply). This is illustrative of the off-the-cuff and misleading analyses put forward by SEC, and stands in contrast to the approach taken by the Applicants under which the RCS was used only to resolve cases of ambiguity.

44. The most important error committed by SEC, however, is the confusion between 'existing use' and 'intended use'. The February Decision did not suggest that mixed use was to be determined only on the basis of *existing* use, as is clearly indicated by the excerpt of the February Decision given at paragraph 6 above. Indeed, there the Board recognized that the February Decision could not be operationalized on the basis of

existing use since the existing use of the streetlighting poles is constantly changing. While not every pole changes use frequently, *some* poles in any given area may, and even an individual pole may have attachments installed and uninstalled several times. It would clearly be infeasible from all perspectives to constantly be changing individual pole designations. The only practical way to operationalize the classification rules established by the Board is to abstract from the particular conditions that *exist* at a given moment and instead to characterize street segments according to intended or potential use. This does not mean that the entire length of any street would be designated one way or the other, but rather that all assets on a particular segment of a given street would be classified according to the pertinent characteristics until those characteristics changed further along the street. It would be impossible, practically, for maintenance and repair crews to operate on any other basis.

45. The Applicants submit therefore that the objections of SEC (and ECAO-GTECA) in this regard are misguided and follow from a fundamental misunderstanding of the Board's February Decision. Had the Board meant to specify that *every* pole in a mixed use area had to host an attachment in addition to streetlighting in order to be considered distribution, it clearly would have done so. Instead, it spoke of 'mixed use urban settings' and the 'urban landscape'. It is not necessary to know for all arterial and collector roads what percentage of their length is covered by bus routes; it is only necessary to ascertain that for certain segments of their lengths, these roads are classified by a impartial authority as being of the type to support bus shelters, traffic lights, pedestrian crossings, phone booths and similar scattered loads. The existence at this time of any of those types of loads particularly is not determinative of their *intended* use.

46. The Board should therefore dismiss objections based on this misapprehension of the Board's intentions in the February Decision.

D.2 The Adequacy of the Evidentiary Record

47. With respect to the adequacy of the record, SEC asserts at paragraph 4 that "The Applicant took almost a year to prepare that evidence, but still failed to file a complete record", and argues that the Applicants did not file proper interrogatory responses. These are among several gross mischaracterizations of the facts of this matter and the Applicants submit that the Board should dismiss these complaints as inaccurate and unfounded.

48. In its Decision in the first phase of this proceeding, the Board established a novel basis of categorization for existing assets involved with streetlighting. All parties accepted that Decision but it fell to the Applicants to implement and operationalize it. As it stood, the basis of categorization did not correspond to any existing records kept by the Applicants (or, to their knowledge, by any other distributor or streetlight owner). Therefore an intensive, 'grass roots' effort was necessary, and was undertaken diligently by the Applicants. In the result the Applicants filed comprehensive evidence detailing the inventory of SEL assets and the subsequent classification and valuation of those assets. The Applicants further relied upon the RCS as a publically accessible, independent, reliable and accurate database of information to implement the Board's intended use test. The Applicants submit that the record is clear and complete for any party that wishes to examine it (which SEC evidently neglected to do in its haste), and presents a fair and accurate decomposition of the SEL assets into the two relevant categories.

49. SEC's complaint that its and other interrogatories were not properly responded to is unfounded and not borne out by an examination of those interrogatories and the associated responses. The Applicants observe that no party, including SEC, moved for the Board to direct more or better responses. The simple fact is that SEC either did not like the responses it received, or did not take the time to understand them. Instead, it baldly asserts that they are inadequate. The answers (and questions) speak for themselves and the Applicants submit that a fair reading of them supports their completeness.

50. For example, with respect to SEC IR#2, SEC faults the Applicants for the fact that length information is not presently available for collector or arterial roads. Had the Applicants

possessed this information, it would have been provided, but it has never been the responsibility of the Applicants to create or maintain such information. With respect to IR#3, SEC asserts that the response of the Applicants did not confirm or deny the (false) premise of the question and did not provide an 'explanation'. In fact, without making note of the false premise of the question (i.e., that there was an 'assumption' regarding the NBV of the assets), the response clearly sets out and explains the derivation of the result in question. Far from being unresponsive, these answers are simply ones that SEC does not like or has not made the effort to understand. However, that does not detract from their validity or helpfulness to the record.

51. The bias and fallacy of the SEC submissions is illustrated at paragraph 5, where it states: "The most obvious example of this is the Applicant's refusal to provide the information ordered in PO #5. As the Board pointed out in PO#5, the Applicant did not file information on the actual depreciated cost of the assets in question, or information on the depreciated cost of comparable assets so that an estimate could be made, but instead proposed to rely on a valuation approach that is essentially identical to the approach the Board rejected in the February Decision."

52. The Applicants did not 'refuse to provide the information ordered in PO#5'. What the Applicants did do, after undertaking a diligent search for alternative means to provide the information sought, was to state that that information was not available and that a very costly and time consuming process would be required to produce it. The Applicants regret that no party had the foresight at the time the Inventory Study was launched to anticipate that such information might be required, but that does not change the facts now. The Board itself accepted the Applicants' evidence in this regard and withdrew its Order set out in PO No. 5.

53. Similarly, the Applicants did not 'file information on the actual depreciated cost of the assets in question', if 'actual' is understood to mean 'historical', because as SEC knows, that information does not exist. That fact was the genesis of the valuation exercise that

the Board directed the Applicants to undertake. It is impertinent for SEC now to imply that that circumstance discredits the evidentiary record in this case.

D.3 The DRC methodology

54. Finally, SEC demonstrates its misunderstanding of the record by asserting that the Applicants 'rely on a valuation approach that is essentially identical to the approach the Board rejected in the February Decision'. This is simply false and contradicts the evidence on the record.

55. The Board itself characterized the SEC position in the initial application as follows (page 16 of the February Decision): "SEC argued that the Deloitte valuation, while appropriate for a business valuation, was not appropriate for regulatory purposes because it is derived from a revenue-based fair market value not the physical value of the assets."

56. SEC has either not read or has chosen to ignore the evidence set out in the Valuation Application. There, at pages 15-17, the Applicants explain their deliberate avoidance of a revenue-based, discounted cash flow approach in favour of the physical valuation approach embodied in the DRC approach. The DRC approach is expressly not 'identical to the approach the Board rejected in the February Decision'. In fact, of the three accepted methods of commercial valuation, the DRC approach is the only one remaining and available for this purpose since the Market approach is clearly inapplicable to the SEL assets, for which no observable, liquid market exists, and the Income (i.e., DCF) approach was rejected by the Board in the February Decision.

57. SEC fails to understand or acknowledge that while the DRC physical valuation approach most closely approximates the historical cost approach, the current NBV of the SEL assets (and the transferable subset of those assets) imposes a ceiling value on the amount that can be recognized in ratebase (the "write-up constraint"). As explained at page 19 of the Additional Evidence and at paragraphs 22-24 of the Applicants' Argument in Chief, the transferred amount cannot exceed the current NBV of the transferrable assets. Given

that the physical DRC valuation produced a value higher than the current NBV, this constraint became binding and resulted in the proposed transfer value being adjusted down substantially to (the proportional level of the) current NBV.

58. This does not mean in any way that the Applicants 'reverted' to the methodology previously rejected by the Board. Neither is it an attempt on the part of the Applicants to substitute the DCF methodology for a physical valuation. On the contrary, the Applicants met the requirements set out in the February Decision at page 19, where the Board stated: "With respect to the asset valuation, the Board notes that the Deloitte methodology is not one that is typically employed for regulatory purposes. As SEC noted, the Deloitte valuation is a revenue-based fair market valuation; it is not a physical valuation of the assets. The Board will require an asset valuation to be prepared for the physical assets and will determine at that point, and on the basis of the revised transaction, the appropriate amount for inclusion in rate base."

59. With respect to the validity of the DRC approach, SEC states at paragraph 11 "At the root of our concern is the fact that the Applicant has made no attempt to determine – directly or by proxy – the historic cost and resulting book value of the assets in question. While the Applicant says [AIC p. 6] that the DRC methodology used is "cost-based", that is in fact a bit of an equivocation. A "cost-based" valuation would be based on the cost of those actual assets, not the fictional cost of some other assets that would hypothetically be used to replace those assets. There does not appear to be any credible argument offered or available that the replacement cost of old assets, no matter how adjusted, can be used as a proxy for the historic cost of those assets."

60. With respect, the equivocation is on the part of SEC, not the Applicants. In the first place, the Board's requirement was for a 'physical valuation', which the evidence clearly shows the DRC was. That valuation was carried out by a reputable, accredited, independent organization using a transparent, established methodology, and in the submission of the Applicants it meets the Board's requirements in this matter. The Applicants later observed that the methodology was cost based and it clearly was. It is

SEC which equivocates by assigning a restrictive meaning to the phrase 'cost based' (i.e., based on historical cost) and then attempting to attribute that claim to the Applicants. The Board should encourage SEC to refrain from attributing inaccurate statements to Applicants generally, a practice which is very unhelpful to the record.

61. Furthermore, there is no substance to the SEC claim that "[there] does not appear to be any credible argument offered or available that the replacement cost of old assets, no matter how adjusted, can be used as a proxy for the historic cost of those assets." As noted above, the Board itself already recognized in the February Decision that the circumstances of the streetlighting assets were unusual in that (unfortunately) there was no unbroken chain of historic book values (or even a continuous approach to the recording of depreciation as between the different entities owning the streetlights through time). As a result the Board directed that a physical valuation be undertaken, and did not lapse into mere wishful thinking as SEC has done with respect to historical information that does not exist. It is in fact preposterous for SEC to suggest as it does at paragraph 12 that the 'real historical cost' of the assets in question is 'one of those things where the common sense response is "someone must know this" '. This is indicative of the immunity to evidence and reason displayed by SEC. Without regard to the record, SEC simply asserts without supporting facts or explanation that 'no credible argument' is available to support the use of the DRC approach.

62. In fact, in the absence of the historical information, the DRC approach represents the most credible and plausible 'physical' valuation of the assets in question. It involves not only a physical count of the assets but a rigorous determination of replacement cost, from which is subtracted accumulated depreciation based on the expired portion of asset life *valued at current replacement cost*. Therefore the DRC approach substantially overstates accumulated depreciation relative to the historic cost method and is not simply a replacement cost model.

63. SEC is wrong when it asserts at paragraph 9 that the Applicants "failed to make any attempt to deal with the underlying premise of the question, i.e. that depreciated

replacement cost generally is higher than historical acquisition cost". Had SEC reviewed the Additional Evidence at page 17, or the Argument in Chief at paragraph 21, it would have seen the explanation set out above, i.e., that the DRC approach offsets the higher replacement cost (which is only a reference value, not the final result) with a substantially higher figure for accumulated depreciation, which under that approach is itself a function of replacement cost.

64. As it stands the Board has made no finding that the current carrying value of the assets on the Applicants' books is an inappropriate value for regulatory purposes, or that that value is likely to be higher or lower than what would have prevailed under the historic cost NBV approach. In addition, the premise mentioned by SEC as noted above remains just that; a premise. However, the Board did order, and the Applicants did deliver, a reputable physical valuation of the assets. The Board did not pre-specify the exact methodology nor did it provide any qualifications to or limits on the results. It is not now open to SEC to effectively argue 'yes, but the Board meant a valuation that produces a lower result than current carrying value'.

65. The Applicants also submit that due to the operation of the "write up constraint" it is already the case that the DRC valuation has been de facto reduced in the proposed transfer value by more than one-third (i.e., the proposed value is 64% of the DRC value). The Applicants specifically do not submit that that relationship holds necessarily or characteristically as between DRC and historic NBV approaches, but nevertheless that degree of reduction should certainly reassure the Board that a very conservative transfer value has been proposed, in fact, by the Applicants, regardless of the means by which it was reached.

D.4 The $1 Transfer Value

66. The most stark example of SEC's inept analysis in this proceeding is its proposal, advanced as an alternative to the DRC and one "which can be implemented based largely on the existing evidence" (paragraph 3b), that the assets classified as distribution be

transferred for the amount of $1. SEC follows (at paragraph 18) by purporting to opine on 'the primary value to the Toronto Hydro companies of making the assets regulated assets', which, according to SEC, 'is to include the operating costs associated with these assets in rates, and to include new qualifying assets in rate base'.

67. These assertions are preposterous. First, there is absolutely no basis in evidence to support a transfer value of $1. In fact, that is nothing more than a request that the Board approve an expropriation of the assets in question. Second, the justification advanced by SEC amounts to nothing more than 'it won't matter and they won't care'. Of course, nothing could be more unfounded or further from the truth. It is outrageous for SEC to purport to represent the Applicants' views or position in this matter, and it is equally outrageous for SEC to imply that the ensuing write off of $29.418 million is a matter of indifference to the Applicants.

68. Apparently, SEC has also devised its own test of materiality, and finds (at paragraph 19) that "The actual value of depreciating, and earning a return, on what is likely not more than $5 - $10 million of assets is not very material for a utility the size of the Applicant." That proposition certainly does not accord with the Board's definition of materiality for THESL, and even apart from the foregone return considerations, the Applicants strongly reject the concept that the loss of depreciation on any number of millions of dollars is not 'very material'. SEC apparently fails to realize that depreciation represents the return of capital, and that any disallowance of the current asset carrying value would cause a direct, current period expense of equal magnitude.

69. Furthermore, SEC treats as a revelation the fact that THESL, upon approval of the asset transfer, would include the corresponding operating costs in revenue requirement and new qualifying assets in ratebase. To this obvious proposition the Applicants can only ask in reply if SEC was expecting something different.

70. The Applicants submit that SEC's proposals in this regard are irresponsible and absolutely without rationale, and so should be flatly rejected by the Board.

E. CONCLUSIONS

71. For all of the foregoing reasons, the Applicants submit that the Board should reject the submissions of ECAO-GTECA and SEC which, for the reasons explained above, are logically flawed, factually inaccurate, and unsupportable on their face.

72. The Applicants also urge the Board to carefully consider the SEC claim that "it has acted responsibly and efficiently in its participation in this proceeding, with a view to assisting the Board as much as possible" (SEC, paragraph 33). While the Applicants will reserve further submissions on this topic to the process determined by the Board for dealing with cost claims in this proceeding, they now submit that SEC's participation (as is illustrated by their late and misleading submissions) has not been efficient, responsible, or helpful to the record or the Board. The ready-fire-aim approach taken by SEC should not be encouraged or rewarded by the Board.

All of which is respectfully submitted this 4th day of July, 2011.

Original signed by John A.D. Vellone for J. Mark Rodger
J. Mark Rodger

Original signed by John A.D. Vellone
John A.D. Vellone

Counsel to the Applicants.

TOR01: 4673324: v3