

**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 and other charges for electricity distribution to be effective May 1, 2012, May 1, 2013 and May 1, 2014.

**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 in writing.

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

1. Varying its October 4, 2011 Procedural Order No. 1 to allow THESL to present a witness panel to provide *viva voce* evidence relevant to the Preliminary Issue (defined below) during the hearing scheduled on November 1, 2011, and prior to hearing oral submissions related to the Preliminary Issue from Board staff, intervenors and the applicant.

**THE GROUNDS FOR THE MOTION ARE:**

2. In Procedural Order No. 1 the Board determined that it will, in advance of further procedural steps, consider the question of whether the application filed by THESL is acceptable or whether it should be dismissed (the “Preliminary Issue”).
3. Procedural Order No. 1 provides for a written interrogatory process on the Preliminary Issue, as well as oral submissions from the parties on the Preliminary Issue on November 1, 2011 (the “Oral Hearing”).

4. The values underlying the duty of procedural fairness relate to the principle that the persons affected by a decision should have the opportunity to present their case fully and fairly.<sup>1</sup>
5. This principle is commonly cited by the Latin phrase *audi alteram partem* – the right to be heard.
6. THESL submits that the right to be heard in this case includes being provided with the opportunity to give *viva voce* evidence relevant to the Preliminary Issue during the Oral Hearing.
7. THESL proposes to present one witness panel to provide oral testimony on matters relevant to the Preliminary Issue, including evidence describing the THESL's factual circumstances relevant to the Preliminary Issue and evidence that THESL would be unable to manage its resources and financial needs under an IRM framework because of the structural deficit in revenue requirement that would arise under an IRM framework in THESL's circumstances. At this time it is anticipated that THESL's witness panel will be comprised of Mr. Anthony Haines, Mr. JS Couillard and Mr. Colin McLorg.
8. This witness panel would be presented at the commencement of the Oral Hearing and be available for cross-examination by the parties and questioning by the Board in the ordinary course. THESL submits that no party would be prejudiced if the Board allows this witness panel to appear prior to counsel's oral submissions.
9. The issue of whether THESL is able to manage its resources and financial needs under an IRM framework is a question of fact that is best addressed through *viva voce* evidence.

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<sup>1</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 28.

10. An advantage of *viva voce* evidence over documentary evidence is that the witness panel is available for cross-examination (enabling the strength of the evidence to be tested) and can directly address any new circumstances or additional information that have arisen as a result of the interrogatory discovery process (that is currently underway).
11. The Board's decision on the Preliminary Issue is critical to THESL. The Board has characterized the Preliminary Issue as "whether the application filed by THESL is acceptable or whether it should be dismissed"; the Board's decision on the Preliminary Issue therefore appears to be the equivalent to passing summary judgement on THESL's cost of service application for just-and-reasonable rates. As such, THESL has a legitimate expectation that it be allowed to present *viva voce* evidence on the Preliminary Issue.
12. For these reasons, THESL seeks an order of the Board to amend Procedural Order No. 1 to allow THESL to present a witness panel to provide *viva voce* evidence relevant to the Preliminary Issue during the Oral Hearing and prior to hearing oral submissions.
13. THESL may provide such further and other grounds as counsel for THESL may submit and the Board allow.

**All of which is respectfully submitted this 21<sup>th</sup> day of October, 2011.**

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**AND TO: INTERVENORS OF RECORD IN EB-2011-0144**

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