



**EB-2011-0144**

**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.

## **PROCEDURAL ORDER NO. 2**

Toronto Hydro-Electric System Limited ("THESL") filed an application with the Ontario Energy Board (the "Board") on August 26, 2011 under section 78 of the *Ontario Energy Board Act*, 1998, (the "Act") seeking approval for changes to the rates that THESL charges for electricity distribution, to be effective May 1, 2012, May 1, 2013 and May 1, 2014. The Board has assigned the application File Number EB-2011-0144.

On October 4, 2011, the Board issued Procedural Order No. 1 which determined that, in advance of further procedural steps, the Board would consider the question of whether the application filed by THESL is acceptable or whether it should be dismissed (the "Preliminary Issue"). The Board stated that it would allow an initial round of interrogatories by intervenors and Board staff to seek additional information specifically related to the Preliminary Issue and THESL's evidence on the Preliminary Issue at Exhibit A1/Tab 1/Schedule 2. Following THESL filing its responses to these interrogatories, the Board stated that it would hear oral submissions on November 1, 2011 from Board staff, intervenors and the applicant on whether THESL's application is justified.

On October 21, 2011, THESL filed a Notice of Motion (the "Motion") with the Board requesting that the Board vary 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 submissions phase scheduled for November 1, 2011 and prior to oral submissions related to the Preliminary Issue from Board staff, intervenors and THESL.

THESL requested that the Motion be heard in writing and provided a number of grounds for it:

First, THESL stated that the values underlying the duty of procedural fairness relate to the principle *audi alteram partem*, the right to be heard, which is that the persons affected by a decision should have the opportunity to present their case fully and fairly.

THESL submitted 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.

THESL stated that in this context, it proposed to present one witness panel to provide oral testimony on matters relevant to the Preliminary Issue, including evidence describing 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.

THESL further stated that the 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 submitted that no party would be prejudiced if the Board allowed such a witness panel to appear prior to the oral submissions.

THESL argued that the issue as to whether or not it would be 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. THESL submitted that 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 currently underway.

THESL submitted that the Board's decision on the Preliminary Issue is critical to it, noting that the Board has characterized the Preliminary Issue as "whether the

application filed by THESL is acceptable or whether it should be dismissed.” THESL argued that the Board’s decision on the Preliminary Issue therefore appears to be equivalent to passing summary judgment on THESL’s cost of service application for just-and-reasonable rates. As such, THESL stated that it has a legitimate expectation that it be allowed to present *viva voce* evidence on the Preliminary Issue. THESL further stated that it may provide such further and other grounds as counsel for THESL may submit and the Board may allow.

The Board has determined that it will hear the Motion in writing. The Board will seek written submissions from Board staff and intervenors on the matters raised by the Motion by the end of the day Tuesday October 25<sup>th</sup>, 2011. THESL may file any reply submissions by the end of the day Wednesday October 26<sup>th</sup>, 2011.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

**THE BOARD ORDERS THAT:**

1. Board staff and intervenors shall file with the Board and deliver to Toronto Hydro-Electric System Limited any submissions with respect to the Motion on or before **Tuesday October 25, 2011.**
2. Toronto Hydro-Electric System Limited shall file with the Board and deliver to all intervenors any reply submissions with respect to the Motion on or before **Wednesday October 26, 2011.**
3. All dates established in Procedural Order No. 1 remain in effect.

All filings to the Board must quote the file number, EB-2011-0144, be made through the Board’s web portal at <https://www.errr.ontarioenergyboard.ca>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender’s name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two

paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Martin Davies at [martin.davies@ontarioenergyboard.ca](mailto:martin.davies@ontarioenergyboard.ca) and Board Counsel, Kristi Sebalj at [kristi.sebalj@ontarioenergyboard.ca](mailto:kristi.sebalj@ontarioenergyboard.ca).

### **ADDRESS**

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**DATED** at Toronto, **October 21, 2011**

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary