

October 25, 2011

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File 10606.00011

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
Suite 2701  
2300 Yonge Street  
Toronto ON M4P 1E4

Dear Ms Walli:

**Re: EB-2011-0144**

## **I Introduction and Overview**

Toronto Hydro-Electric System Limited ("THESL") has filed a Notice of Motion ("Motion"), seeking an order varying Ontario Energy Board ("Board") Procedural Order No. 1, to allow THESL to present a witness panel to provide *viva voce* evidence relevant to the Preliminary Issue. Procedural Order No. 2 requires intervenors to file any submissions with respect to the Motion on or before Tuesday, October 25, 2011.

These are the submissions of the Consumers Council of Canada ("CCC") with respect to the Motion.

For the reasons set out below, the CCC submits that the Board should dismiss the Motion.

## **II Background**

In Procedural Order No. 1, the Board ordered that it would consider, as the "Preliminary Issue", the question of whether the application filed by THESL was acceptable or whether it should be dismissed. In so doing, the Board cited that portion of the Decision in EB-2010-0142 in which the Board considered the question of whether, and if so when, THESL should be required to operate under an IRM plan.

Issue 1.5, in EB-2010-0142, was "When would it be appropriate for Toronto Hydro to commence filing rate applications under incentive regulation? Is this application and appropriate base case for a future IRM application? If not, why not?"

THESL presented oral evidence in that case, on the issue, made written submissions on the issue in its Argument-In-Chief, and responded to the submissions of intervenors, and Board Staff, on the issue, in its Reply Submission.

As noted above, the Board addressed the issue in its Decision in EB-2010-0142, in the process giving THESL's arguments a full expression. The Board expressed its expectation that THESL would, in filing an application for 2012 rates, address the question of whether it should be on an IRM plan.

In response to that Decision, THESL, in this application, filed evidence addressing the issue of whether it should be required to operate under an IRM plan. (Exhibit A1, Tab 1, Schedule 2) That evidence, in substantial measure, repeats the evidence on the issue which THESL had presented in EB-2010-0142, and the arguments that were contained in its Argument-In-Chief and Reply Submission in that case.

THESL now seeks to supplement that very substantial record with oral evidence. THESL does not state what that evidence would be, or how it would differ from, or supplement, the evidence already filed.

### **III Issues**

In support of its Motion, THESL makes two arguments. The first is that the common law on the duty of procedural fairness requires the Board to allow THESL to lead oral evidence. The second is that the importance of the disposition of the issue is such that THESL should be allowed to lead oral evidence. We will deal with these two arguments separately.

#### **A. Fairness**

In support of its argument that the common law duty of procedural fairness requires the Board to permit the introduction of oral evidence, THESL relies on the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (the "Baker Decision")

The Baker Decision does not require that in all cases a party be allowed to lead oral evidence. In that Decision, the Supreme Court of Canada expressed the principle that "the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial, and open process appropriate to the statutory, institutional, and social context of the decision." (Emphasis

added). The CCC submits that the Board has in this case established a procedure that meets all of these requirements.

The Supreme Court of Canada observed that “the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute on the rights affected”. The Baker Decision does not stand for the proposition that, in all instances, parties have a right to lead oral evidence.

The common law duty of fairness consists of the following components. The first is the right to know the case that the party affected by the decision has to meet. The second is the right to lead evidence, whether in writing or orally. The third is the right to make submissions. This last component might be supplemented by the right to respond to the submissions made by those adverse in interest.

In this case, THESL has known, from the time the issue was first raised in its last rates case, the case that it had to meet, namely whether it should be required to operate under an IRM plan. It has had the opportunity to present, and has indeed presented, evidence on that issue in both its last rates case, and in the present case. It made submissions on the issue in its Argument-In-Chief and Reply Submission in its last rates case. It will have an opportunity to make oral submissions on the issue again, in this case.

The CCC submits, therefore, the requirements of the common law duty of procedural fairness have been fully satisfied without the need to allow THESL to lead oral evidence.

We note that the City of Toronto, in its submission, argues that the provisions of the *Statutory Powers Procedure Act* create a statutory right to lead oral evidence. With respect, that position is simply wrong.

***B. The Importance of the Issue to THESL***

As noted above, THESL does not indicate the nature of the oral evidence it proposes to produce. THESL nowhere argues that there are gaps in the evidence it has filed on the issue, or that oral evidence is required in order to ensure that all of the facts are before the Board. In these circumstances, the CCC submits that the Board should conclude that any oral evidence would merely be a repetition of the evidence already filed, supplemented by arguments from the witness panel, about the conclusions the Board should draw from that evidence.

It would, in any event, be very difficult for THESL to make the argument that there is new evidence on the issue, given that it has made the same argument on the basis of the same facts

on four separate occasions. The first was in the oral evidence in its last rates case, EB-2010-0142, the second was in its Argument-In-Chief in EB-2010-0142, the third was in its Reply Submission in EB-2010-0142, and the fourth was in its pre-filed evidence in this case.

Attached hereto as Appendix A and Appendix B are, respectively, THESL's arguments on the issue in its Argument-In-Chief and in its Reply Submission in EB-2010-0142. The CCC notes that the arguments are essentially identical to the content of Exhibit A1, Tab 1, Schedule 2 in this case.

THESL will have the opportunity to make this argument on a fifth occasion, when it makes oral submissions on November 1, 2011.

The CCC finds it difficult to conceive of what oral evidence would add to what THESL has already submitted on the issue. The CCC submits that THESL is seeking an opportunity to have a witness panel make the same arguments that have already been made, several times, and which will be repeated in oral submissions. The CCC submits that allowing THESL to do so is neither necessary nor appropriate.

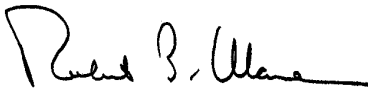
CCC acknowledges the importance of the issue to THESL. Indeed, CCC acknowledges that the importance of the issue is evident by the number of times THESL has made the same arguments, based on the same facts, on the issue. CCC submits that enough is enough, and that THESL neither needs nor has a right to gild this particular lily one more time.

#### **IV Conclusion**

The CCC submits that the Board should dismiss THESL's Motion.

Yours very truly,

**WeirFoulds LLP**



Robert B. Warren

RBW/dh

cc: Toronto Hydro-Electric Limited  
J. Mark Rodger  
All Parties

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