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BY EMAIL and RESS

October 25, 2011
Our File No. 20110144

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2011-0144 – Toronto 2012 Rates – SEC Submissions on Motion

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #2 in this proceeding, this letter constitutes SEC's submissions with respect to the Applicant's motion to add a witness panel to give oral evidence at the hearing on November 1, 2011.

In our submission, set forth in more detail below, the Board has three logical choices:

1. Deny the request as inconsistent with the Board's established procedure in this particular matter, and inconsistent with the Board's normal approach to *viva voce* evidence. The Applicant has the onus to demonstrate that they meet the threshold test through their pre-filed evidence and full responses to interrogatories, and they have failed to do so. They should not be allowed to shore up their lack of evidence through this indirect means.

2. Allow the unusual step of supplementing written evidence, and filling holes in inadequate interrogatory responses, by oral direct evidence, but provide for a period of time subsequent to that oral hearing for a) undertaking responses, and b) intervenor argument.

3. Require the full completion of written discovery, including filing of witness statements by the proposed witness panel and full answers to the interrogatories already filed (and refused).

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After that, the witness panel can be added, but not to provide evidence in chief. As per the Board's normal practices, the witnesses would give a brief summary of their written evidence, and then their primary purpose would be to have their evidence tested by cross-examination. Argument would then follow in whatever schedule the Board considers reasonable in light of the oral evidence.

In our submission, the third of these options is the one most likely to produce a good evidentiary foundation for the Board's determination of the threshold issue.

The balance of these submissions provides our analytical basis for the above conclusions.

Goal

In our submission, the sole goal of the Board in responding to this Motion should be to ensure that the evidentiary foundation for the Board's decision on the threshold issue is as complete as possible. That evidence will include the pre-filed evidence, the interrogatories and responses, and any other written material made available to the Board by the parties. It will also include any oral evidence, and cross-examination on that evidence.

The Board's standard practice is that the evidence in chief of the Applicant is delivered in writing, and as much as possible it is tested through written questions. This allows the Applicant to be very clear on what it wants, and the basis for what it wants, and allows for the questions and answers on that initial evidence to be well-thought-out, thorough, and as helpful as possible to the Board. This written process, sometimes supplemented by second round interrogatories or a technical conference to discuss the answers to interrogatories, produces a body of evidence in which the issues are canvassed in detail, and the facts needed to decide those issues are fully fleshed out.

The additional step of an oral hearing is generally not to hear more direct evidence. While sometimes minor corrections to written evidence are done orally, the Board generally does not encourage – or even allow, really – direct evidence provided orally. The purpose of the provision of witnesses in an oral hearing is for them to face cross-examination under oath based on their written evidence. It is a testing exercise. Evidence needs to be tested, and cross-examination is a key method of doing so.

Because of this history, and the Board's standard practice with respect to *viva voce* evidence, it is submitted that on this Motion the Board should continue its primary reliance on written evidence, with proper and relevant written questions and answers on that evidence. Any oral evidence from the Applicant should, unless this case is shown to be exceptional, be limited to cross-examination on the written evidence.

In our view, this combination of thorough written evidence, questions and answers on that evidence, and cross-examination in an oral hearing, has been shown time and time again by the Board to be the most effective way to ensure that the record before the Board is thorough, and the foundation on which the Board makes its decision is solid.

Basis for the Motion

It appears to SEC that the Applicant's Motion, and the entire Application for cost of service treatment, are based on three misconceptions by the Applicant:

1. ***"Non-Suit" vs. "Leave".*** The Motion refers to the threshold question as a type of "non-suit", a legal proceeding in which a party with a claim defends against another party who seeks to have their claim thrown out without a trial on the merits. The Applicant says that the threshold question "is equivalent to passing summary judgment" on the Application. This theme shows throughout the pre-filed evidence, and the limited answers to interrogatories filed yesterday.

   This conception of the threshold question is fundamentally incorrect. It embeds in the Applicant's thinking an assumption that the onus is on those challenging the Application to prove that it is inappropriate. In effect, it is founded on the notion that the Applicant has a right to cost of service regulation, unless that right is somehow displaced.

   Critical to this misunderstanding of the nature of the issue are the ideas that:

   a. The threshold issue will have been resolved if and when the Applicant makes a *prima facie* case (which in their conception means "untested on the facts") that their Application should be considered [Ex. R1/5/7].

   b. The issue of whether in fact they need additional revenue requirement is not engaged until after the Board has determined that the threshold question is met [Ex. R1/0/1, p. 2].

   These operate from the premise that their allegations of fact must be accepted by the Board in consideration of the threshold issue. For this reason, they have refused to answer numerous questions related to their alleged need for additional funds, while at the same time continuing to allege as a fact their need for the funds.

   Our understanding of the Board's approach is quite different. Our analogy would be to an application for leave, not a non-suit. In many legal proceedings, a party doesn't have a right to make an application or claim. Rather, they have a right to ask for leave to make their application, and the adjudicator decides whether there is sufficient evidence of their basic case that they should be allowed to proceed and prove it in full.

   In an application for leave, the onus is on the Applicant to demonstrate that it should be given permission to proceed. If they make allegations of fact, those allegations must be supported, and can be questioned. Opposing evidence or questions demonstrating that their allegations are untrue are also allowed.

   In its letter of April, 2010, the Board made clear that this was the approach being taken. The letter sets out criteria that have to be met in fact for an Applicant to rebase early.

2. ***Conditions for Cost of Service.*** The Board has established criteria for early rebasing. The basic rule is set out in the Board's letter of April 20, 2010, as follows:

   > *"A distributor, including the four distributors referred to above, that seeks to have its rates rebased in advance of its next regularly scheduled cost of service proceeding must justify, in its cost of service application, why an early rebasing is required notwithstanding that the "off ramp" conditions have not been met. Specifically, the distributor must clearly demonstrate why and how it cannot adequately manage its resources and financial needs during the remainder of its IRM plan period."*

   The Board has expanded on this in some detail in the cases of Hydro Ottawa, Horizon, and Norfolk in 2011. It has also considered these issues again in the Toronto Hydro EB-2010-0142 decision. By now it should be crystal clear to anyone, including the Applicant, that in order to have cost of service ratemaking out of the normal schedule, a utility has to demonstrate that it has special circumstances.

   The Applicant has rejected that requirement entirely.

   First, the Applicant says that it does not have to consider whether it can manage its resources at all. Instead, the Applicant proposes that it should be able to have a wholly theoretical discussion about whether utilities like the Applicant should be on IRM [Ex. R1/0/1, p. 2].

   Second, the Applicant denies its obligation to demonstrate that it has a unique situation, saying "it is not necessary for THESL to demonstrate that it is unique in order to show that the application of IRM to THESL is not appropriate" [Ex. R1/1/2, p. 7].

   Third, the Applicant alleges that IRM is inappropriate for THESL not just this year, but in the foreseeable future [Ex. R1/2/3]. It seeks an open-ended exemption from IRM, something that is clearly inconsistent with the Board's criteria for cost of service applications.

   Instead of following the guidance laid down by the Board, the Applicant has sought to set its own parameters for the discussion of its Application. Rather than discuss the Applicant's "resources and financial needs", the Applicant believes that it has the right to require all parties, and the Board, to limit their discussion of the threshold issue to IRM theory only. The Applicant, in effect, seeks to initiate a new policy consultation on IRM.

3. ***Illegality of Incentive Ratemaking.*** The Applicant alleges that the IRM framework used by the Board is illegal, not just with respect to the Applicant, but likely with respect to all electricity distributors.

   With respect to the Applicant, the allegation is that IRM would be "confiscatory" and a "violation of the fair return standard" [Ex. R1/6/2, p.2].

   With respect to other distributors, the Applicant alleges that if capital expenditures in a rebasing year exceed depreciation in that year, then in any following IRM year the fair return standard is "violated automatically" [R1/7/8, p. 1].

Since virtually every rebasing application in the last three years has included capital expenditures in excess of depreciation, this means that, in the opinion of the Applicant, the Board's rebasing decisions have all (or almost all) been contrary to law.

What the Applicant appears not to understand is that the Board, in establishing the 3rd Generation IRM framework, did its homework to determine what levels of rate increases could reasonably be expected to afford a well-managed utility the opportunity to earn a fair return. The Board did not just pick numbers out of the air, without analysis or empirical research. The framework was consciously designed to meet the fair return standard. This is why many electricity distributors under IRM continue to spend 150% or more of depreciation on capital, yet continue to make reasonable returns.

The fact that Toronto Hydro has so far not been able to do that is not a flaw in 3rd Generation IRM. The Applicant should instead look to themselves in that regard.

These three misconceptions appear to us to form the real reason why the Applicant seeks to have a witness panel to present their case. The Applicant sees this, it seems, as an opportunity to "make its pitch" once more, in person to the Board, without having to worry about demonstrating the truth of the facts on which they rely, and without having to be constrained by the rebasing criteria established by the Board, all the while assuming - as they do – that 3rd Generation is fundamentally flawed.

In our submission, it is appropriate in its response to this motion for the Board to correct the Applicant's misconceptions. At present, the Applicant is not on the same page as the Board or the other parties. For the record to be completed, and a meaningful debate to take place on the threshold issue, in our view the Applicant may need further guidance on what is expected of them. Our proposed resolution of the motion, set forth later in this analysis, is based on that initial step.

Failure to Complete Written Discovery

The Board may be aware that the Applicant has, in responding to interrogatories, refused to answer any question that deals with the actual situation of Toronto Hydro. In so doing, the Applicant argues that their pre-filed evidence on the threshold question:

> *"…pertains to the theory of ratemaking and revenue requirement determination, and is general in nature, rather than being particular to THESL or THESL's specific capital and operation expenditure proposals underpinning the proposed revenue requirements and consequential rate changes for the test years."[Ex.R1/0/1, p. 2]*

Based on this precept, the Applicant refuses to answer dozens of obviously relevant factual questions relating to THESL's situation, while at the same time continuing to allege untested and unsupported facts, which it believes cannot be explored by other parties or the Board at this stage of the Application. It has thus prevented the Board and parties from carrying out a proper written discovery.

For example, the Applicant, presented with comparisons to its peers demonstrating that it is a high cost, low productivity utility [Ex. R1/7/1-5], consistently the worst performer of the ten largest Ontario LDCs, in every category, refuses to explain why that is the case. The fact that:

a. THESL has the highest distribution bills in all major classes [Ex.R1/7/1];

b. THESL's PP&E per customer is much higher than the average of the other utilities, and significantly higher than even the second-worst performer [Ex.R1/7/2];

c. THESL's 2010 capex per customer was more than two times that of the next highest utility, and it is proposing further massive increases for several more years [Ex. R1/7/3];

d. THESL's OM&A per customer is significantly higher than the next highest utility [Ex. R1/7/4]; and

e. THESL's revenue per customer is almost 50% higher than the average of the top ten utilities, and almost 25% higher than the second worst performer [Ex. R1/7/5],

are all said to be irrelevant to an Application that is based entirely on an alleged desperate need for increased spending. Further, the Applicant refuses to give any information on how, or even whether, its underlying cost structure is necessarily higher than its peers [Ex. R1/7/6].

On the other hand, it is apparently OK for the Applicant to do its own comparison with a single other utility [R1/1/2, p. 9], based on the same Yearbook data, as "proof" of a point the Applicant wishes to make.

SEC's initial response was to consider filing a motion for answers to refused interrogatories - posed by both SEC and others - that are all clearly relevant to the threshold question. However, in the end that seemed pointless, and an unnecessary delay in the process. The Applicant is on a different page than everyone else, and getting them on the same page can be just as easily accomplished in the context of this existing motion, rather than adding another one.

In our submission, the failure of the Applicant to understand the necessary scope of the written discovery is a serious problem. The three possible responses to the THESL motion set out below each adopt a different method of responding to this problem.

Denial of Motion

The simplest solution, and one that some parties will propose, we believe, is to deny the motion and proceed to hear submissions on the threshold question.

There is ample justification for this approach. The Applicant has known for months at least, probably longer, what evidence it needed to file to support an early rebasing application. If it has failed to do so by this time, there does not appear to be a good excuse for that failure.

As well, the Applicant was given a full opportunity to complete the written record through detailed interrogatories touching most aspects of the threshold question. Instead of engaging those interrogatories, the Applicant continued to avoid the issue, choosing instead to try to re-set the subject of the discussion to suit its own purposes.

So, the fact that they have such bad past performance relative to their peers is allowed to stand as simply an unexplained fact, from which the Board can draw the appropriate inferences. THESL had an opportunity to explain this poor performance, and they chose not to take it up. That opportunity is now past.

Finally, the onus is and has always been on the Applicant to demonstrate that they come within the Board's criteria for early rebasing. If they have failed to meet that onus at this point in the process, that is the whole point of having an onus in the first place.

On balance, SEC is of the view that this is not the best option for the Board to select. Part of that is the fact that, as discussed earlier, THESL has, for whatever reason, simply failed to understand their responsibility in this proceeding. Whether that is accidental/innocent, or intentional/strategic, the fact is that their pre-filed evidence and their interrogatory responses miss the mark by a fairly wide margin. It would seem fairer for the Board to make clear once more what is expected of them, and only if they then fail to meet that responsibility allow the logical consequences to unfold.

The other part of this is that, in general, SEC does not believe that important issues should be resolved based on procedural niceties. If the factual foundation for the threshold question is not complete, we believe it is better regulatory policy to seek to solidify that factual foundation, rather than simply let it be the Applicant's fault, and visit on them the consequences. That, then, implies that further written discovery, oral evidence, or both is appropriate.

Acceptance of Motion

At the other end of the scale, the Board could simply accept the Applicant's request to add oral evidence, notwithstanding that it is not consistent with Board practice. The justification for this would be to bend over backwards in allowing the Applicant to present their case.

This has certain obvious caveats that must be attached to it for the Board to be fair to other parties as well. Those would include at least the following:

1. Assuming that the witnesses would be providing new evidence (because, if not, why is a witness panel required?), they should be required to provide full witness statements or other pre-filed evidence well in advance of the oral hearing date, so that parties can prepare thoughtful cross-examination that is helpful to the Board. We suggest that at least three business days are required, but this could be more depending on the extent of the new evidence.

2. The evidence in chief should not be permitted to go beyond the witness statements and the other pre-filed evidence. Oral evidence is not an appropriate time to spring surprises.

3. The Board should rule in advance on which of the refused interrogatory responses are irrelevant, and which are not, with the expectation that the witness panel will be available to answer those interrogatories during cross-examination.

4. Sufficient time after the oral hearing should be allowed for undertakings, as would surely be required if the record is to be complete before argument. In the event that undertakings raise further questions, the Board should be open – as it has in the past – to bringing back the witnesses for further cross-examination.

5. In order to ensure that the change from proper written discovery to oral discovery does not provide a tactical advantage to the Applicant, sufficient time should be allowed after the oral hearing and the argument in chief (and all undertaking responses) for the intervenors and Board Staff to prepare and file (or deliver orally) final argument on the threshold question.

With these safeguards, it is our view that exceptional oral evidence can be used to help complete the record on the threshold question. However, in our submission this is not the preferred option. This approach would, in effect, "reinvent the wheel", and in our view is unnecessary. As noted below, the Board has a standard practice for building a record, and that practice is the most effective approach here as well.

Complete Written Discovery First

In SEC's submission, the best approach in this case is the one that follows the Board's normal practices.

In our view, the Board should grant the motion, but on the following conditions:

1. The Applicant must provide proper answers to interrogatories, so that the written discovery phase is complete. In the motion decision, we believe it is appropriate for the Board to give the Applicant further guidance on what it expects to be in scope for this discovery process, as well as guidance on the three misconceptions discussed earlier.

2. If the witnesses are going to lead any additional evidence, that must be provided in writing at the same time as the interrogatory responses. We assume in this suggestion that the new evidence is fairly limited, and the main purpose of the witnesses is to speak to the existing evidence on the record, and the interrogatory responses.

3. The direct evidence of the witnesses, if any, should be limited to a summary of their written evidence. The primary purpose of the witnesses – as with all witnesses before the Board – should be to be available for cross-examination on their written evidence.

4. Ample time should be allowed for cross-examination of the witnesses, without any "urgency" arising out of the Applicant's desire to move this process along as fast as possible.

5. The schedule for final argument should be established after the oral evidence, including all cross-examination, has been completed.

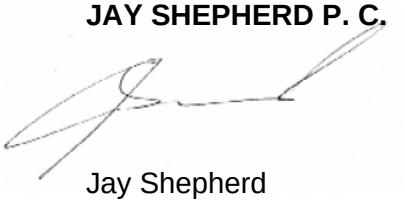
In our submission, this response not only builds the firmest evidentiary foundation for the Board's determination of the threshold issue, but it also probably takes the least amount of time and requires the fewest changes to the Board's standard procedures.

Conclusion

It is therefore submitted that the Board should grant the Applicant's motion, but on the conditions set forth above.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



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