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Delivered by Email

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street,
Ste. 2701
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Toronto Hydro-Electric System Limited (“THESL”) 2012 EDR
EB-2011-0144 - Motion Reply**

We have reviewed and hereby reply to the submissions of CCC, VECC, SEC, BOMA and the City of Toronto in respect of THESL’s Oct. 21, 2011 motion to vary Procedural Order No. 1.

A. The onus of proof is on THESL.

None of the parties dispute that the Board has placed the burden of proof in the Preliminary Issue on THESL. The Board established this onus in its March 1, 2011 rebasing letter as follows:

“[A] distributor that seeks to have its rates rebased earlier than scheduled must justify, in its cost of service application, why early rebasing is required and why and how the distributor cannot adequately manage its resources and financial needs during the remainder of the 3rd generation IR plan term.”

The Board’s letter instructs a utility to provide its justification in its entire cost of service application. THESL has filed extensive evidence in its cost of service application which clearly satisfies this burden of proof to demonstrate why and how THESL cannot adequately manage its resources and financial needs in 2012, 2013 and 2014 under IRM.

B. THESL should be given the right to present a witness panel to discharge that onus.

It is in this context that THESL has proposed to present one witness panel to provide oral testimony on matters relevant to the Preliminary Issue. As is typical in Board proceedings, this panel would speak to relevant portions of the evidence that is already on the record – to distil complex evidence down to the key evidentiary issues that are relevant to the Board’s determination of the Preliminary Issue.

The purpose of presenting the witness panel would be to ensure that the Board has a full and complete record when determining the Preliminary Issue. Put simply, THESL believes that it is valuable to give the Board an opportunity to hear directly from senior management as to why and how the utility cannot adequately manage under IRM. It is equally valuable to the record to allow this witness panel to be questioned by the Board and to be cross-examined by other parties. THESL submits that the provision of oral evidence and cross-examination of that evidence is integral to the fact-finding and decision-making process that the Board will engage in during the Preliminary Issue phase of this proceeding.

As a general rule, natural justice and procedural fairness require that a party has an opportunity to present its case to an administrative tribunal. As is explained by Macaulay and Sprague in the looseleaf *Procedure Before Administrative Tribunals* (at page 17): "A refusal to admit relevant and material evidence, which cannot be justified, will likely amount to a breach of a party's right to present his or her case."¹

In this context THESL notes that:

1. The nature of the Board's decision on the Preliminary Issue (SEC equates the Board's decision on the Preliminary Issue to a court's determination on an application for leave) and the Board's decision-making process bear strong similarities to the processes of courts, which taken together supports the need for a significant level of procedural fairness;
2. The importance of the decision on the Preliminary Issue to THESL (the Board has framed its decision as "whether the application filed by THESL is acceptable or whether it should be dismissed") also supports the need for strong procedural protections; and
3. The legitimate expectations of THESL that it would be able to present *viva voce* evidence on the Preliminary Issue should factor directly into the Board's determination (the Board has historically allowed THESL to present *viva voce* evidence on its Applications and this Preliminary Issue hearing should be treated no differently).

C. THESL's responses to other intervenor submissions.

Several of the parties' submissions have mischaracterized the approach the Board has established on the Preliminary Issue in Procedural Order No. 1. We respond to each of these submissions below:

1. **CCC.** The Application is based on new evidence before the Board which details the structural deficit that would result if THESL's rates were established by IRM in the years of 2012, 2013 and 2014. An attempt to portray THESL's concerns as repetitive of prior proceedings, as done by CCC, is simply wrong. This new evidence was not before the Board before this Application was filed and, in any event, that somewhat-similar arguments were made in entirely different contexts does not lessen the procedural protections that THESL should be afforded in this proceeding. Submissions from prior proceedings cannot be used as a surrogate for the new evidence before the Board in this new Application. Oral testimony is required, as is typical in Board proceedings, to distil complex evidence down to the key issues that are relevant to the Board's determination on the Preliminary Issue.
2. **VECC.** The Preliminary Issue hearing is not a theoretical argument requiring submissions, as is suggested by VECC, but is an argument grounded in particular facts established in the Application. Oral evidence also affords all parties an opportunity to ask direct questions about the evidence, but that is not the only reason to allow it. It is usual in complex Board proceedings for the Applicant to have an opportunity to explain its pre-filed evidence in direct examination to crystallize the points that are relevant to the issue in question. Contrary to VECC's expressed concern, THESL does not intend to address in direct testimony any matters not already raised in the prefiled written evidence. THESL furthermore commits to confining its testimony to the Preliminary Issue which includes explaining THESL's current circumstances and requirements.

¹ See, for instance, *Djakovic*, 2010 BCSC 1279, where the court found that by denying a petitioner the right to cross-examine certain witnesses (effectively excluding that relevant evidence) the tribunal was found to have breached its duty to act fairly. In denying this opportunity the court found that the tribunal took the "unacceptable risk that not all information that could have affected its decision was placed before it."

3. **SEC.** SEC puts considerable effort into misconstruing THESL's approach and position in respect of this Application. Many of the issues raised by SEC go to the substance and merits of the Application as a whole, rather than the Preliminary Issue or the even narrower question raised by this motion of whether or not to permit a witness panel on Nov. 1, 2011. Limiting this reply to only those issues of relevance to the motion, SEC makes the same mistake as VECC by suggesting that the only reason to allow oral evidence is to permit cross-examination. This is simply not the case. Oral examination-in-chief is regularly permitted by the Board to allow an Applicant an opportunity to distil complex evidence down to the key themes that are relevant to the Board's determination on the issues.
- (a) It is not typical in Board proceedings for an Applicant's witnesses to provide witness statements in the manner suggested by SEC, nor is it appropriate to further delay or complicate the Board's process for hearing the Preliminary Issue as is suggested by SEC. As noted above, THESL's witness panel will speak only to the relevant portions of the evidence that is already on the record.

Finally, SEC puts considerable emphasis on THESL's refusal to answer certain IRs. THESL's reason for refusing each of these IRs is clearly stated in its IR responses, and is based on the fact that the Board itself strictly limited the scope of the Preliminary Issue hearing and this initial IR process in Procedural Order No. 1 to "information specifically related to the Preliminary Issue and THESL's evidence on the Preliminary Issue at Exhibit A1/Tab 1/Schedule 2." THESL's understanding, which is based on a plain reading of Procedural Order No. 1, is that the Board has done this as a practical approach to limit the scope of the evidence during the Preliminary Issue hearing. THESL would welcome clarification from the Board if it intended otherwise. THESL believes that the scope of the Preliminary Issue hearing can be reasonably contained if further interrogatories pertaining to THESL's circumstances in respect of the Preliminary Issue are allowed and answered. However, if interrogatories on THESL's broader cost-of-service application including the proposed plans to deal with it circumstances are allowed, the Board would have to substantially alter the timetable for the proceeding to accommodate a much larger set of interrogatories on the entire application.

It is worth noting that the Board's approach set-out in Procedural Order No. 1 does raise other procedural fairness concerns which THESL will address in submissions of counsel during the oral hearing.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Original Signed by J. Mark Rodger

J. Mark Rodger
Counsel to THESL

Encl.

Copy To: Pankaj Sardana, Colin McLorg and Amanda Klein, THESL
Intervenors in EB-2011-0144

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