



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.

### **DECISION AND PROCEDURAL ORDER No. 3**

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 the Motion.

On October 21, 2011, the Board issued Procedural Order No. 2 in which it determined that it would hear the Motion in writing. The Board stated that it would seek written submissions from Board staff and intervenors on the matters raised by the Motion by the end of the day Tuesday October 25, 2011 with THESL to file any reply submissions by the end of the day Wednesday October 26, 2011.

The Board received submissions from a number of intervenors on this matter.

The City of Toronto and the Building Owners and Managers Association of the Greater Toronto Area (“BOMA”) supported THESL’s position.

The School Energy Coalition (“SEC”) argued that the Board should grant the Motion, but on the basis that: (1) THESL must provide proper answers to interrogatories so that the written discovery phase is complete; (2) if THESL’s witnesses are going to lead any additional evidence, such evidence must be provided in writing at the same time as the interrogatory responses; (3) the direct evidence of the witnesses, if any, should be limited to a summary of their written evidence; (4) ample time should be allowed for cross-examination of the witnesses, and (5) the schedule for final argument should be established after the oral evidence, including all cross-examination, has been completed.

SEC submitted that if the Board were to choose this approach, it would not only build the firmest evidentiary foundation for the Board’s determination of the threshold issue, but also would probably take the least amount of time and require the fewest changes to the Board’s standard procedures.

The Consumers Council of Canada (“CCC”) and the Vulnerable Energy Consumers Coalition (“VECC”) both opposed the Motion.

CCC submitted that the Board should dismiss the Motion on the grounds that it did not believe that additional oral evidence would add to what THESL has already submitted on the issue. CCC argued that THESL was 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. CCC submitted that allowing THESL to do so is neither necessary nor appropriate.

VECC submitted that THESL had, in requesting permission to provide a witness panel to provide oral testimony, misconstrued the role of oral testimony before the Board. VECC argued that the clear expectation is that applicants provide their evidence in chief in writing through the application and interrogatory processes and that the ability to provide oral evidence in chief is not normally afforded to applicants, except to the extent that the applicant witnesses are simply restating their written evidence briefly, in advance of being cross examined.

VECC submitted that unless the Board believes it is necessary for the intervenors, Board staff and/or Board members to cross examine THESL on its evidence on the Preliminary Issue, there is no reason to allow for a witness panel in this case.

VECC argued that if the Board determines that THESL should be allowed a witness panel, it should be restricted to making available a panel for the purposes of cross examination, not to provide new evidence in chief. VECC expressed a particular concern in this context about THESL's assertion that there are "new circumstances" and "additional information" that the panel will address orally. VECC submitted that to the extent THESL wants to address such circumstances and additional information, it should do (or should have done) so as part of the interrogatory process, not orally.

On October 26, 2011, THESL made its reply submission. THESL argued that none of the parties had disputed that the Board has placed the burden of proof related to the Preliminary Issue on THESL and THESL submitted that it should be given the right to present a witness panel to discharge that onus.

THESL argued that several of the parties' submissions had mischaracterized the approach the Board has established regarding the Preliminary Issue. Where CCC's submission is concerned, THESL submitted that an attempt to portray its concerns as repetitive of prior proceedings was incorrect, as the new evidence was not before the Board before the present 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 the present proceeding.

Where VECC was concerned, THESL stated that the Preliminary Issue hearing is not a theoretical argument requiring submissions, but is an argument grounded in particular facts established in the application. THESL stated that contrary to VECC's expressed concern, it does not intend to address in direct testimony any matters not already raised in the pre-filed written evidence and furthermore committed to confining its testimony to the Preliminary Issue, which includes explaining THESL's current circumstances and requirements.

THESL rejected the arguments of SEC submitting that 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 the Motion of whether or not THESL should be permitted to present a witness panel on November 1, 2011. THESL argued that oral examination-in-chief is regularly permitted by the Board to allow an applicant an opportunity to distill complex evidence down to the key themes that are relevant to the Board's determination on the issues. THESL submitted that it was not typical in Board proceedings for an applicant's witnesses to provide witness statements in the manner suggested by SEC, nor would it be appropriate to further delay or complicate the Board's process for hearing the Preliminary Issue.

THESL noted the emphasis placed by SEC on its refusal to answer certain interrogatories and argued that its reason for refusing each of the interrogatories in question is clearly stated in its responses and is based on the limitations on the scope of the Preliminary Issue established by the Board in Procedural Order No. 1. THESL stated that its understanding was that the Board had done this as a practical approach to limit the scope of the evidence during the Preliminary Issue hearing. THESL stated that it would welcome clarification from the Board if it had intended otherwise.

THESL submitted that the scope of the Preliminary Issue hearing could be reasonably contained if further interrogatories pertaining to THESL's circumstances in respect of the Preliminary Issue are allowed and answered. THESL stated, however, that if interrogatories on its broader cost-of-service application, including the proposed plans to deal with its 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. THESL concluded that the Board's approach, as set out in Procedural Order No. 1 does raise other procedural fairness concerns which THESL would address in submissions of counsel during the oral hearing.

## Board Findings

The Board grants the Motion and will allow THESL to present a witness panel prior to the hearing by the Board of submissions on the Preliminary Issue. The Board considers that the presentation of such a panel would be of assistance to the Board and will not prejudice other parties, particularly since all parties and Board staff will be afforded the opportunity to cross-examine the witness panel.

The Board notes THESL's assurances that the panel will not present new evidence through examination-in-chief but rather will "distill complex evidence down to the key evidentiary issues that are relevant to the Board's determination of the Preliminary Issue". The Board will require THESL to provide a list of the witnesses it intends to put forward, their curriculum vitae, and witness statements which will provide all parties with sufficient notice with respect to the specific portions of the evidence to which each witness will speak.

Where the issues related to the interrogatory responses are concerned, the Board notes the arguments made by THESL as to the limitations on relevant interrogatories established by Procedural Order No. 1. While the Board did intend that the scope of interrogatories related to the Preliminary Issue would be narrower than the entire application under consideration, based upon its review of the interrogatory responses provided by THESL, the Board is of the view that there may be additional information relevant to the Preliminary Issue that was not provided by THESL.

The Board will accordingly invite Board staff and intervenors to file with the Board and deliver to THESL submissions with respect to the sufficiency of interrogatory responses by THESL. In particular, the Board would be assisted if those parties that did not receive complete responses from THESL to one or more interrogatories would consider whether such interrogatories are directly relevant to the Preliminary Issue and are required to make full and complete submissions on the Preliminary Issue and, if so, to provide a brief explanation as to how such interrogatories are relevant to the Preliminary Issue. The Board will further expect all parties and THESL to come prepared to speak to the issue of unanswered interrogatories on November 1, 2011, the date originally scheduled to hear submissions on the Preliminary Issue.

In light of this new procedural step, the Board will not require the attendance of THESL's witness panel on the original hearing date of November 1, 2011. The Board

will retain the date of November 4, 2011 for the hearing related to the Preliminary Issue until the outcome of the proceedings on November 1, 2011 is known. The Board will issue further procedural direction at the conclusion of this process.

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. Part 3 of the Board's Procedural Order No. 1 issued on October 4, 2011 is hereby rescinded.
2. Toronto Hydro-Electric System Limited shall file with the Board and deliver to Board staff and all intervenors a list of all witnesses that Toronto Hydro-Electric System Limited intends to call to speak to the evidence related to the Preliminary Issue and a curriculum vitae and witness statement for each witness specifically indicating those portions of the evidence to which the witness will speak by **Monday, October 31, 2011**.
3. Board staff and intervenors shall file with the Board and deliver to Toronto Hydro-Electric System Limited any written submissions with respect to interrogatory responses by Toronto Hydro-Electric System Limited which are alleged to be deficient by **9:00 a.m. on Monday, October 31, 2011**.
4. The Board will hear oral submissions from Board staff, intervenors and the applicant related to the issue of allegedly deficient interrogatory responses, including the relevance of the interrogatories to the Preliminary Issue and the question of whether the Board should compel further and better responses to such interrogatories on **Tuesday, November 1, 2011** in the Board's hearing room at 2300 Yonge Street, 25<sup>th</sup> Floor, Toronto, at 9:30 am.

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, unless otherwise ordered, 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 28, 2011**

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary