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BY EMAIL and RESS

September 16, 2013
Our File No. EB201302234

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

Dear Ms. Walli:

Re: EB-2013-0234 – THESL Section 29 Application – SEC Intervention Reply

We are counsel to the School Energy Coalition (“SEC”). We have received a copy of a letter from counsel to Toronto Hydro-Electric System Limited (“THESL”) objecting to SEC’s request for intervention status and cost eligibility in the above-noted proceeding. This reply has been organized similarly to that of the THESL’s letter, i.e. by the issues of concern set out in SEC’s Notice of Intervention.

1. “Application of section 29 of the *Ontario Energy Board Act, 1998*”

THESL objects that it is not clear to them what this statement means. SEC thinks it is quite clear. It would seem self-evident that the application of the specific provision of the *Ontario Energy Board Act 1998* (“*OEB Act*”) relied upon by THESL is the central issue in this proceeding.

When the Board exercises its mandate pursuant to section 78 of the *OEB Act*, among other things, it ensures that consumers are protected with respect to price. Section 29 of the *OEB Act* is an extraordinary power, providing that in certain circumstances the Board has the authority to forbear from regulating any licensee, person, service or class of service, that it would otherwise have the power to regulate. To do so, it must determine as a fact that its mandate to protect consumers with respect to price is met despite the forbearance.

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This section has only been used by the Board once (with respect to the storage of natural gas)¹, and never with respect to electricity. This case will therefore likely set a precedent as to how the Board should assess the public interest in the context of this special power to, in effect, decline jurisdiction. Ratepayers have a clear and direct interest in ensuring that section 29 is applied by the Board appropriately. This decision may have significant implications for the Ontario electricity sector beyond the current area of wireless attachments. While the Board is required to make a factual determination, it will necessarily require the Board to interpret the precise requirements of section 29.

As Ontario ratepayers, schools have a significant interest in the outcome of this proceeding, not just as it affects THESL, but the broader implications of the Board's decision on the application of section 29 of the *OEB Act* in the future.

2. "The impact on ratepayers of forbearance of wireless attachments"

THESL complains that SEC does not have an interest in the proceeding because ratepayers will not be harmed by the proposal, and according to THESL's expert evidence it meets the requirements section 29.²

SEC at this point cannot reach the same conclusion as THESL and its expert Mr. Church. The evidence requires testing as would any other application before the Board. THESL's evidence regarding ratepayer impact is no more than assertion with no evidentiary support.³ The Board itself raised similar concerns in its correspondence dated July 12th and July 25th in which it sought further evidence from THESL regarding ratepayer impact. As the Board's Notice states, "Toronto Hydro says that the application will have no effect on its distribution services" [emphasis added]. This is not yet a fact. It is THESL's position. Ultimately, the Board will determine if it is a fact, not THESL.

If after a through testing of the evidence, SEC reaches a similar conclusion to THESL – that ratepayers will not be harmed and ultimately benefit from the relief requested – then it will be in a position to support the application. What is clear at this stage in the proceeding is that the impact on ratepayers from forbearance of wireless attachment is a central issue to THESL's application.

THESL in its letter repeatedly asks if SEC is challenging the evidence as filed and its conclusions.⁴ SEC will, of course, challenge and test the evidence as filed. That is what intervenors are supposed to do, and the value we provide to the Board's processes. However, that does not mean we will reach a different conclusion from THESL. We will reach our conclusions based on the evidence as tested.

¹ *Decision with Reasons*, Natural Gas Electricity Interface Review (EB-2005-0551), dated November 7, 2006

² THESL Notice of Application, para 4

³ Pre-filled Evidence of Toronto Hydro-Electric System Limited, at para 15, 17

⁴ "Is it, for example, the position of SEC that section 29 doesn't apply in the circumstances described in THESL's pre-filed evidence?" "Is there something in Dr. Church report, as it related to section 29, that the SEC intends to challenge?" "Does SEC propose to challenge the evidence, and if so, on what basis." "Does SEC intent to lead evidence to challenge the proposition, or, indeed to take a position that the current subsidy should continue."

Before we have tested the evidence, SEC is in no position to detail its position on the application. We consider that inappropriate and premature. To the best of our knowledge, the Board has never required a potential intervenor to do so at the outset of the proceeding

3. “Impact and allocation of the revenues revenue revived by THESL for wireless attachments as a result of forbearance”

THESL’s says SEC’s intervention is not required since THESL has proposed that the rate implications be dealt with in a future rate application and because of that proposal, it has undertaken to track the revenues and costs derived from wireless attachment.

SEC believes that separating the section 29 application from the allocation of the revenue may not be appropriate due the interrelated nature of the issues. The impact and allocation of revenue may inform the Board not just the conditions of any forbearance but if “in whole or in part” competition protects the public interest. Based on the application currently before the Board, it is not possible to assess whether allocation will be a material issue, but we would expect that through interrogatories that can be determined fairly easily.

Either way, since THESL proposes to share the revenues in excess of costs with ratepayers, the determination in this proceeding of what costs it will track is at issue. In its application THESL did not seek the establishment of any deferral or variance account. The undertaking itself to share and track these costs only arose after repeated requests for ratepayer information from the Board.⁵ The specific wording of any deferral or variance account will be an important issue in this proceeding.

What makes the issue potentially complicated is that THESL is seeking forbearance of the rate, terms, and conditions it charges those who wish to attach wireless attachments on assets (poles) that are being paid for by ratepayers. In a forbearance situation, THESL’s decisions with respect to rates, terms, and conditions could significantly impact – up or down – the recovery of ratepayer-paid costs from third parties.

4. “Generally to represent the interest of school board and their students in the process.”

Finally, THESL takes issue with SEC stating that it will represent the interest of clients in this proceeding. SEC finds this position of THESL very disappointing. SEC has been active and responsible intervenor in regulatory proceedings before the Board for over a decade. Ontario’s 5000 schools (almost 900 of which are in Toronto), who as a group are among Ontario’s largest single-purpose ratepayer groups, clearly have an interest in a proceeding that will a) affect the interpretation of the forbearance power going forward, and b) may materially increase or decrease the “other revenues” of THESL.

This is not just true only if THESL’s application is found to be based on an incorrect assessment. If ratepayers ultimately do benefit from forbearance, which as THESL states would eliminate the current ratepayer subsidy, then it is clear SEC has a “substantial interest in the matter”. The substantial interest requirement of the Board’s Rules does not mean that the relief requested in the application must adversely affect the intervenor. It is equally met if the intervenor is adversely affected by the status quo, as is asserted by THESL.

⁵ THESL Letter to the Board, dated August 14, 2013

SEC submits that this proceeding is of significant importance to ratepayers, including SEC, and the Board should grant SEC intervenor status and cost eligibility as requested in its Notice of Intervention.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and interested parties (by email)