PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC
1204-ONE Nicholas Street, Ottawa, ON K1N 7B7

Tel: (613) 562-4002 EXT. 26 Fax: (613) 562-0007 e-mail: mjanigan@piac.ca

September 30, 2013 **VIA Mail and E-Mail**

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge St.
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: EB-2013-0234 Toronto Hydro-Electric System Limited ("THESL")
sec. 29 forbearance application

We are counsel to the Vulnerable Energy Consumers Coalition ("VECC") in the within matter. We are in receipt of correspondence from counsel for the applicant, THESL, of September 27, 2013, which appears to set out his argument with respect to the expected treatment of issues before the Board engaged by THESL's forbearance application. While the perspective is unique, it is unlikely to pass muster, particularly at the stage of granting of intervenor status.

In this proceeding, THESL has the onus of showing that there is competition in the provision of attachment for wireless communications services that is sufficient to protect the public interest. Leaving aside for the moment considerations associated with the strength of the competition for provision of wireless attachments, there is an additional criterion that THESL must meet for forbearance, and that is whether such competition is sufficient to protect the public interest. Counsel for THESL essentially advances the proposition that the effect upon the rates and revenue requirement of THESL of the granting of forbearance to the regulation of wireless attachments to THESL's poles is not a matter of public interest. According to THESL, rates can simply be determined later notwithstanding forbearance.

In VECC's submission, the effects on rates and the revenue requirement are integral to the determination of whether the public interest will be protected. This includes the issue of whether regulated rates for wireless attachments could provide for the elimination of any alleged subsidy to wireless attachers, together with fair recompense to ratepayers for the rate base assets that are proposed to be used for such attachments.

The meaning of the term the "public interest" associated with the test set out in sec. 29 of the *Ontario Energy Board Act 1998 ("the Act")* was discussed the in the Board 's Decision in *EB 2005-0551 Natural Gas Electrical Interface Review* ("*NGEIR Storage Decision*")

> **"The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly."[1]**

The Board concluded that financial impacts upon ratepayers were a relevant, but not the only consideration, upon which the public interest test was based.

> **"The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. The scope of appropriate considerations is broader and includes factors related to market signals, incentives and efficiency."[2]**

The final result of the Board NGEIR Storage Decision was a treatment of the financial impacts that attempted to balance statute supported ratepayer interests with those statutory objectives associated with the development of the gas storage market in accordance with *the Act:*

> **"2. 1.to facilitate competition in the sale of gas to users; and**
>
> **2.1.4 to facilitate rational development and safe operation of gas storage"**

It is clear, whatever the result of the *NGEIR Storage Decision*, the financial impacts of the forbearance upon ratepayers are essential considerations before any forbearance decision can be made. Here, we have a proceeding to consider whether a revenue opportunity for the utility, outside of its electricity service delivery, should be forborne from regulation, and attendant Board scrutiny of revenues. This request is being made despite the fact that the wireless attachment revenues will be collected from the commercial use of assets developed in rate base. The wireless attachment service in issue is not provided to ratepayers, so competition will not be able to protect their key interests which include enhancing contribution to revenue requirement and reducing rates. In fact, VECC would submit that,

[1] *NGEIR Storage Decision*, p.42
[2] Ibid at p. 43

unlike the circumstances of *NGEIR Storage Decision* ,there are no countervailing objectives in *the Act* that support forbearance, that might have to be balanced against that set out in sec. 1 (1) 1.:

> **"To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service."**

We do not wish to appear to instruct THESL counsel as to how to present this case. However, the proposition that the current proceedings are divorced from considerations of financial impacts on ratepayers and revenue requirement in general strays far from the responsibilities of the Board under the *Act* and the relevant section. In addition, THESL bears the onus of proof that the objective of the *Act* set out above can be at least as well protected with forbearance rather than regulation. We commend THESL counsel's submissions in another capacity in Final Argument in the NGEIR Storage Decision upon a similar point:

> **"It is also the case that the question of forbearance does not arise in a vacuum. The Board has created the existing structure for the regulation of storage-based on its understanding of the relevant facts and on its presumption of how the public interest is to be protected. The Council's position is that those who propose a change to the status quo bear the onus of showing why it does not protect the public interest, and why an alternative arrangement, in this case forbearing in whole or in part from regulation, would better protect the public interest. The burden of demonstrating that the existing arrangement should change falls on the utilities which are the proponents of change and the sole beneficiaries of it."**

In VECC's respectful submission, THESL has not outlined useful criteria for determining appropriate intervention in this proceeding, but provided a truncated and radical view of the operation of the operative section of *the Act.* We would submit that THESL's submissions may better presage deficiencies in its application rather than problems with interventions.

Yours truly,

Michael Janigan
Counsel for VECC

Cc: THESL – Amanda Klein – regulatoryaffairs@torontohydro.com
THESL – Counsel – Rob Barrass - rbarrass@torontohydro.com
THESL – Counsel – Robert Warren – rwarrren@weirfoulds.com
All Parties