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via RESS e-filing – signed original to follow by courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
PO Box 2319
2300 Yonge Street, 27th floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Toronto Hydro-Electric System Limited (“THESL”)
Further Comments, OEB File No. EB-2013-0301**

THESL writes to the Ontario Energy Board (“OEB”) to make further comments in respect of the above-noted matter, as provided for by the OEB in its letter of August 22, 2013 (the “August 22 Letter”). These comments build upon THESL’s prior comments, as set out in its letter of September 27, 2013 (“Initial Comments”) and made during the stakeholder conference hosted by the OEB on October 8, 2013 (the “Stakeholder Conference”).

THESL would like to reiterate its appreciation for the opportunity to engage in this important discussion with the OEB and with other stakeholders. Through their written comments and thorough presentations at the Stakeholder Conference, participants have tabled a number of perspectives on the state of interventions at the OEB, as well as a variety of potential revisions to that process. THESL also appreciates the opportunity to hear the perspective of intervenors, and respects the value that they bring to the hearing of an application. As the Association of Major Power Consumers in Ontario noted during the Stakeholder Conference, engaged public interest intervenors are part of the regulatory compact; their participation helps affirm the transparency of the regulatory process.¹

1. Phase 2 of this Consultation

As the first phase of this consultation closes, THESL believes that the perspectives of the various participants have been well-canvassed. In THESL’s respectful submission, the second phase of this consultation would benefit if the parties’ positions can be situated within further direction from the OEB. Participants have proposed a number of wide-ranging potential revisions to the treatment of intervenor status and the determination of cost eligibility in proceedings before the OEB. As several parties noted during the Stakeholder Conference, determining which of those proposals will be helpful to the OEB will depend, in part, upon the issue(s) that the OEB is most interested in addressing. THESL submits that a focussed round-table discussion of selected, specific proposals would be a sensible and productive next step.

¹ Tr.1, page 108, lines 10-13.

2. Potential Outcomes of this Consultation

As a comment on potential productive outcomes of this consultation, THESL submits that a central question should be what procedural mechanisms would allow the OEB to achieve its statutory objectives most effectively. In THESL's submission, a key opportunity arising from this consultation is the chance to review the tools at the OEB's disposal to effectively and efficiently address the matters before it (e.g. robust enforcement of the OEB's *Rules of Practice and Procedure*). THESL makes specific suggestions in this regard below in section 4.

3. Intervenor Status and Substantial Interest

As THESL noted in its Initial Comments, the OEB's existing *Rules of Practice and Procedure* require an intervenor to identify itself, its substantial interest in the specific matter before the OEB, and the nature and scope of its intended participation. In THESL's submission, robust enforcement of the existing rules on this point would assist the OEB in distinguishing the material interests of intervenors. A proceeding would only benefit if parties' interests in specific facts, arguments, or issues were clearly identified at the onset of an application. If there is substantial overlap between the interests of intervenors, it could be identified and addressed at this early stage.

As an example of how these suggestions might operate in practice, THESL proposes a process that addresses the following questions:

- (a) Who are the persons or organizations that comprise the party seeking status?
- (b) What is the party's substantial interest in the particular proceeding? Does it have a mandate? What specific facts, arguments or positions that are at issue in the current proceeding are of interest to the party seeking status in the proceeding?

THESL recognizes that item (b) above is, to some degree, an evolving answer for intervenors as the application process unfolds. Intervenors often have limited resources and participate in applications where the pre-filed evidence may span thousands of pages. Accordingly, at the time of their initial intervention requests, potential intervenors may not have fully canvassed or digested the application before the OEB. THESL respects that, as a result, intervenors may not have a fully-developed sense of their interests in the application when submitting their request for intervention. However, in order to have identified the application as a matter of substantial interest to their constituency (in accordance with the *Rules*), intervenors would necessarily be in a position to provide at least some detail on this point. While the level of detail may vary between intervenors and proceedings, THESL submits that greater specificity by intervenors would give the OEB better (and earlier) insight into major areas of interest and the likely roles of specific intervenors. In THESL's submission, this would tend to facilitate efficient and cost-effective hearing processes.

THESL reiterates that it is not suggesting a change to the OEB's *Rules* in this regard, but rather encouraging robust compliance with the existing *Rules*.

4. Case Management

In THESL's submission, the OEB may consider incorporating a number of the procedural proposals raised during the first phase of this consultation² into an enhanced case management system for rate-setting proceedings and other major applications. In an actively case-managed proceeding, intervenors and utilities would benefit from greater predictability and certainty regarding the steps and timelines within a proceeding. In turn, parties would be better able to plan and coordinate their efforts throughout a proceeding, and make increasingly efficient use of the OEB's limited time and resources. THESL recognizes that the OEB has recently made efforts towards enhanced case management, and offers the below in an effort to constructively contribute possible ideas to the OEB's efforts in this regard.

In THESL's respectful submission, the OEB may also consider electing a sitting Board member of the presiding panel, or third party facilitator, to work with the parties to the application to set a notional proceeding schedule at the beginning of the process (e.g. at the same time the issues list is established). This could involve establishing timeline "placeholders" for interrogatories, technical conference, settlement conference and hearing dates.³ In setting this schedule, factors such as the following could be taken into account:

- (a) the relative size and complexity of the application, including an estimate by the applicant of the number of potential witness panels;⁴
- (b) the number of intervenors participating in the process; and
- (c) a general description of intervenors' areas of interest in the application, as well as positions they intend to take, and whether they intend to file evidence.

While on THESL's suggestion above, there would of course be some fluidity in the schedule to account for contingencies (such as unanticipated motions), THESL submits that having milestone dates set in advance would both assist parties and the OEB in their planning processes (regarding the present application and coordination of resources for other proceedings/activities), as well as provide all parties dates to work towards (encouraging efficient use of time and resources and reducing delays due to scheduling conflicts). In THESL's submission, among other things, the role of the Board member or facilitator in this process could be to encourage the parties to work together to generate a hearing schedule that is both efficient and expeditious, and one that facilitates a sufficiently robust testing of the evidence and argument.

² For example, the Electricity Distributors Association ("EDA") proposed that parties may be able to identify major issues in advance of interrogatories (Tr.1, page 45, lines 6-10), and several parties proposed additional or alternative roles for OEB Staff in proceedings (EDA re: interrogatory process, Tr.1, page 44, lines 12-26; Enbridge Gas Distribution re: determining intervenor status at Tr.1, page 74, lines 19-23; Consumers Council of Canada and Canadian Manufacturers & Exporters re: active participation by OEB Staff, Tr.1, page 147, lines 7-17 and page 152, lines 16-26, respectively).

³ This schedule may also incorporate Information Sessions or Issues Conferences which THESL observes that the OEB is exploring in current applications processes such as Enbridge's rate application (OEB Case No. EB-2012-0459).

⁴ THESL observes that while precise identification of witnesses and panels often cannot usually occur until well into the application process, that as with intervenor's identifying their positions early on, applicants may be able to provide an estimate (subject to change) of at least the number of potential witness panels.

THESL observes that this type of case management is not uncommon in the legal system in other forums,⁵ and that the OEB may look to those other models (and assessments of what has worked and has not worked) to determine what particular aspects are likely to be most effective in this specialized tribunal setting.

5. Cost Eligibility/Awards

THESL recognizes that in recent years, the OEB has made efforts to further rationalize the cost eligibility/awards process at the OEB. THESL believes that this is an important element of the discussion regarding interventions, and looks forward to exploring this further in Phase 2 of this consultation.

THESL thanks the OEB for the opportunity to participate in this process and looks forward to Phase 2. Please do not hesitate to contact me if you have any questions.

Yours truly,

[original signed by]

Amanda Klein

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:AK/RB

cc: Intervenors of Record for EB-2013-0301 by electronic mail only

⁵ Examples of such forums include civil litigation and matters before the Competition Tribunal and the Human Rights Tribunal of Ontario. The rules of procedure at the Ontario Municipal Board also allow for pre-hearing conferences.