VIA COURIER AND EMAIL

Robert B. Warren
T: 416-947-5075
rwarren@weirfoulds.com

April 22, 2014

File 15441

Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2701
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms Walli:

Re: EB-2013-0234/Motion for Review

We are counsel to Toronto Hydro-Electric System Limited in this matter. On behalf of our client we enclose herewith its Factum.

With the original of this letter we are delivering three copies of the Factum.

Yours truly,

WeirFoulds LLP

Robert B. Warren

RBW/dh
cc: Michael Miller
cc: Julie Girvan
cc: Peter Faye
cc: Patrick Hoey
cc: Mark Rubenstein
cc: Michael Janigan
cc: Alan Mark and Robert Malcolmson
cc: Rob Barrass
cc: Nikiforos Iatrou
6346446.1

EB-2013-0234

ONTARIO ENERGY BOARD

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 pursuant to section 29 of the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF Rules 42, 43 and 44 of the Ontario Energy Board's Rules of Practice and Procedure;

AND IN THE MATTER OF a motion by Toronto Hydro-Electric System Limited for a review and variance of the Decision on Confidentiality dated April 8, 2014.

FACTUM OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

April 22, 2014

Robert B. Warren
Nikiforos Iatrou
WeirFoulds LLP
Suite 4100 Toronto-Dominion Centre
66 Wellington Street West
Toronto, Ontario M5K 1B7
Tel: (416) 365-1110
Fax: (416) 365-1876
E-mail: rwarren@weirfoulds.com
niatrou@weirfoulds.com

Rob Barrass
Toronto Hydro-Electric System Limited
14 Carlton Street
Toronto, Ontario M5B 1K5
Tel: (416) 542-2546
Fax: (416) 542-3024
E-mail: rbarrass@torontohydro.com

Counsel to Toronto Hydro-Electric System Ltd.

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ONTARIO ENERGY BOARD

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FACTUM OF THE APPLICANT, TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

PART 1 -OVERVIEW OF THE MOTION

1. This is a motion by Toronto Hydro-Electric System Limited ("**THESL**"), pursuant to Rules 42, 43 and 44 of the Ontario Energy Board's ("**OEB**") Rules of Practice and Procedure ("**Rules**").

2. THESL seeks an order that the Decision on Confidentiality dated April 8, 2014 ("**the Decision**") be reviewed and varied so that certain confidential interrogatory responses be kept confidential. Those responses are referred to hereinafter as "the confidential information".

3. THESL has applied, pursuant to section 29 of the *Ontario Energy Board Act* ("**the Act**") for a determination that the OEB forbear from regulating the rates, terms and conditions

for access to THESL's poles for the attachment of wireless telecommunications attachments.

4. Unlike other sections of the Act, which contemplate ongoing regulation, section 29 contemplates that a service provided by a regulated utility will no longer be regulated. Accordingly, while the service is to be provided by an entity that is regulated, the service itself will not be regulated; rather it will be provided in the competitive market.

5. This difference is fundamental, and requires the OEB to take a different approach to the treatment of confidential information than would be the case in a typical application, where the entity and the service are to remain regulated. It also requires a fundamentally different approach to the nature of the public interest, and how it is to be protected.

6. Regulated operations, in respect of which the utility's costs are to be recovered from ratepayers, require as a default position the public disclosure of confidential information. The same does not hold true for competitive, unregulated, operations. Indeed, the disclosure of competitively sensitive information in the latter circumstance actually has the effect of undermining the competitive dynamics in the market Since the legislature has, in enacting section 29, encouraged the pursuit of competition and free markets where appropriate, THESL submits that the OEB's operating assumption should therefore be that the disclosure of confidential information should not be ordered, as doing so will damage the provision of services in a competitive market and will therefore damage the public interest.

7. The fundamental error in the Decision is that it does not distinguish between the nature of the OEB's function in making a determination under section 29, and of the OEB's function in making decisions under other sections of the Act. The Decision does not distinguish these functions, which has the inadvertent effect of undermining the apparent legislative purpose of section 29 and effectively negating the public benefit that is meant to flow from section 29 applications.

8. One consequence of the Decision's apparent interpretation of section 29 is the incorrect categorization of the confidential information. The Decision proceeds on the premise

that all of the information generated in the provision of an ostensibly regulated service must be publicly disclosed in the context of a section 29 application. This is new ground for the OEB and, in THESL's submission, the approach employed in the Decision is wrong.

9. A related consequence of both the Decision's interpretation of section 29 and the incorrect categorization of the confidential information is that it prevents the OEB from properly considering and then striking the appropriate balance between the public interest in disclosure and the importance of maintaining confidentiality.

10. The reversal of an earlier ruling to keep an agreement confidential both violates the doctrine of issue estoppel and is unfair to THESL, in addition to the fact that public disclosure of the agreement would be prejudicial to THESL's commercial interests and to its contractual obligations. Public disclosure of the agreement would also violate the legitimate commercial interests of a third party.

11. The Decision gives inappropriate weight to the fact that some parties may refer to the confidential information in their arguments.

12. The disclosure of the confidential information is not necessary to allow the OEB to make a determination under section 29. Nor is its disclosure necessary in order for the public to understand the OEB's determination. In analogous adjudicative proceedings under the *Access to Information Act* and the *Competition Act*, the preservation of confidential information is recognized and privileged, especially where the disclosure of the information will not result in any appreciable benefit to the public or the adjudicative process.

13. Since this is the first application by a utility under section 29, the OEB is provided with the first opportunity to consider what section 29 requires. It is essential that the OEB correctly interpret its functions under section 29 and that it give effect to the legislature's intention in enacting section 29, both of which require the OEB to be correct in its determination with respect to confidential information.

PART 2 - FACTS

14. THESL has applied for a determination, under section 29 of the Act, that there is competition for wireless attachments sufficient to protect the public interest and that, therefore, the OEB should forbear from regulating the rates, terms and conditions of wireless attachments to THESL's poles.

15. In support of its application THESL filed expert reports from Dr. Jeffrey Church and Dr. Charles Jackson.

16. Although the application, if successful, would allow THESL to charge potentially higher rates for wireless attachments to its poles, no telecom company or telecom attacher intervened in the application.

17. Four entities, all representing consumer interests, intervened. Only one of those interveners, the Vulnerable Energy Consumers Coalition, filed evidence. None of the interveners have disclosed what their positions are on the application.

18. OEB staff filed expert reports from Nordicity and from Dr. Markus Van Audenrode.

19. In response to written interrogatories, THESL filed certain responses which it asked be kept in confidence. Broadly speaking, the confidential information contained in those responses falls within the following categories:

    (i) THESL's costs for wireless attachments;

    (ii) The market rate which THESL has charged for certain attachments;

    (iii) An agreement between THESL and a telecom company ("**the Agreement**").

20. THESL's request that the interrogatory responses be kept confidential was based on the following arguments:

    (i) That disclosure of its costs would prejudice THESL's ability to compete in that it would allow competitors to price their services below THESL's costs;

(ii) That requiring public disclosure of information about a the identities of its clients, the attachments they seek, the terms of the attachments, the locations of the attachments, and the revenue earned from the attachments would prejudice the interests of THESL's existing and potential clients and would in the process prejudice THESL's competitive position.

21. Objections to THESL's request for confidentiality were delivered by three parties – OEB staff, the Consumers Council of Canada and the School Energy Coalition. Neither the Vulnerable Energy Consumers Coalition nor Energy Probe objected to THESL's request.

22. The three objecting parties all have access to the confidential information, and can make full use of that information in the proceedings. Keeping the information confidential does not therefore harm their ability to represent their clients or present their cases. Having said that, as neither the Consumers Council of Canada nor Energy Probe have filed evidence, it is impossible to know, at this point, what their positions are or how, if at all, they may seek to rely on the confidential information.

23. Despite this, the OEB rejected THESL's request for confidentiality. Its Decision is based on the following propositions:

(i) That the application of the OEB's policy on confidential information is the same regardless of whether the OEB is dealing with an application under section 29 or any other section of the Act;

(ii) That, because the information about THESL's costs is in respect to a regulated service, that information can be disclosed because that information is a matter of public knowledge in any event;

(iii) That, since the confidential information might form part of the arguments advanced by parties, and therefore might have to form part of the OEB's decision considerations of transparency and the public interest require disclosure;

(iv) That, although the OEB had, in an earlier proceeding, granted THESL's request that the Agreement be kept confidential, the circumstances of this application are different and that the Agreement should, therefore, be disclosed.

PART 3 - ISSUES AND ARGUMENT

24. The issues to be considered, and THESL's argument on those issues, can be grouped into five categories as follows:

(a) The Decision does not properly interpret section 29 of the Act;

(b) The Decision does not properly categorize the confidential information;

(c) The Decision improperly reverses the OEB's earlier decision on the confidential treatment of the Agreement;

(d) The Decision does not properly consider and then strike the appropriate balance between the public interest in disclosure and the public interest in maintaining confidentiality;

(e) The Decision does not properly consider whether the confidential information would be referred to by parties in their arguments.

A. The Decision does not Properly Interpret Section 29 of the Act

25. The fundamental error in the Decision, from which a number of other errors in the Decision flow, is the its failure to properly interpret section 29, and its function under that section. The Decision proceeds on the basis that its policy on confidential information has to be applied in the same way in every case, regardless of whether an application is made under section 29 or under another section of the Act. In THESL's submission, that is wrong.

26. Section 29 differs from the other sections of the Act in that it contemplates that a service provided by a utility will no longer be regulated. Rather, although it will be offered by a party that is regulated, the particular service will be offered in a competitive market, at terms and prices that will be determined by the market. This is in contrast to the OEB's role when determining the terms on which a regulated service will be provided, as in such circumstances, the OEB is examining the costs of those services and whether those costs should be recovered from ratepayers. In those circumstances, information about costs, and whether they should be recovered from ratepayers, should be and is typically disclosed publically. However, if, as here, the costs are not to be recovered from

ratepayers, then there is no public policy reason why they need to be disclosed to the public.

27. To give effect to the legislative intent in enacting section 29, the OEB must consider whether the nature of the competition, for the particular service, is sufficient to protect the public interest. The OEB cannot carry out that function, and give effect to the legislative intention, if its decision on confidentiality will prejudice the ability of the utility to compete or will damage or distort the competitive dynamic at play. If, by the disclosure of confidential information, the OEB prejudices the ability of the utility to compete, then the legislative intent in enacting section 29 is undermined.

28. The nature of the public interest considerations, in an application under section 29, are fundamentally different than the public interest considerations that apply under other sections of the Act. The legislature, in enacting section 29, has determined that public interest is protected by effective competition. The OEB's role is to encourage such competition, not undermine it by making the public information that should not be in the public domain.

29. In relying on the objective of protecting the public interest, the OEB failed to distinguish between the nature of the public interest under section 29 and under other sections of the Act. It also failed to consider the important public interest in maintaining the competitive dynamic in the market by keeping out of the public domain information that is competitively sensitive.

B. The Decision does not Properly Categorize the Confidential Information

30. The Decision proceeds in part on the basis that information arising from when the service was regulated must be disclosed publically. In THESL's submission, that is wrong.

31. To begin with, and simply as a matter of fact, the information about THESL's costs is not in the public domain. In addition, the costs for wireless attachments are not the same as those for wireline attachments.

32. The larger issue, however, is whether the nature of the information is such that, if disclosed, it would harm THESL's ability to compete. The fact that the information arose during a time when the service was regulated is irrelevant. The question of whether to disclose it publicly must turn not on when the information arose, or whether it related to a regulated service, but on considerations relevant to a section 29 application.

33. Information created while the service is regulated should not, without reason, be disclosed. The decision of whether to disclose it should be subject to the same balancing of considerations as any other confidential information, again in the context of a section 29 application.

34. The real issue is not whether the information arose when a service was regulated, but whether it should now be disclosed. It is striking, in this context, that the OEB, in the Decision, held that all of the information of THESL's affiliate, THESI, should be kept confidential because THESI is not regulated. In fact, much of the information for THESL and THESI is identical. The fact that the information of one should be treated, automatically, as confidential, while the information of the other should be disclosed highlights the artificiality in the distinction between information of regulated and unregulated services. The distinction is of no help in deciding whether the confidential information should remain confidential.

35. By relying on incorrect assumptions about what information is publicly available, and on the artificial distinction between information arising from regulated and unregulated services, the OEB avoided the obligation to consider the particular requirements of section 29 and the related obligation to strike the appropriate balance between protecting the public interest and protecting confidential information.

C. The Decision Improperly Reverses the OEB's Earlier Decision on the Confidential Treatment of the Agreement

36. THESL filed the Agreement in EB-2011-0120. THESL requested that the Agreement be held in confidence.

37. In its "Decision on Preliminary Issue and Order" dated September 13, 2012 in EB-2011-0120, the OEB made the following ruling:

> The Board has now determined that the evidence will be kept confidential and that it will only be disclosed to the external counsel and external consultants that have executed the Board's Declaration and Undertaking.
>
> (Decision on Preliminary Issue and Order, September 13, 2012, EB-2011-0120, page 18)

38. In making that ruling, the OEB did not say that the ruling was a function of the particular circumstances in which it was made. In addition, the ruling was made in circumstances when the OEB had before it an application by THESL under section 29 of the Act. The OEB could have, but did not, indicate in its ruling that a decision would have been different in the context of a section 29 application.

39. It is a reasonable interpretation of the ruling that it was the nature of the Agreement that warranted confidential treatment.

40. In its Decision, the OEB has reversed that ruling on the premise that the circumstances in which the original ruling was made have changed.

41. The OEB decision to reverse its earlier ruling contravenes the doctrine of issue estoppel. The principles governing the application of issue estoppel were described by the Supreme Court of Canada in the case of *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125. In the dissenting judgment in that case, Justices LeBel and Abella described the principles underlying the doctrine of issue estoppel as follows:

> The finality of litigation is a fundamental principle assuring that fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel advances this principle. It seeks to protect the reasonable expectation of litigants that they are able to rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether the decision was made in the context of a court or an administrative proceeding. The purposes of proceedings may vary like the governing procedures, but the principle of finality of litigation should be maintained.

(Decision of Justices LeBel and Abella in *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125, para. 73) ("*Penner*")

42. There are three conditions for the operation of issue estoppel. They are:

(1) Whether the same question has been decided;

(2) Whether the judicial decision which is said to create the estoppel is final;

(3) Whether the parties to the decision or their privies are the same in both proceedings.

(*Penner*, para. 92)

43. Those three preconditions exist in this case. More importantly, the principles underlying the application of the doctrine of issue estoppel should have precluded the OEB from reversing its earlier ruling that the Agreement should be kept confidential.

44. Even if the preconditions for the operation of issue estoppel were not present, considerations of fairness dictate that the earlier ruling should have been maintained. THESL was entitled to rely on the earlier decision and had a reasonable expectation that the Agreement would be kept confidential.

45. By reversing its earlier ruling and requiring that the Agreement be disclosed, the OEB has created a precedent that will substantially reduce, if not eliminate, the value of relief under section 29. It is reasonable to assume that, before for making an application under section 29, utilities would negotiate, and perhaps conclude, agreements for the provision of services in the competitive market. It is also to be expected that interveners will ask for information about those negotiations and for copies of any concluded agreements. Based on the Decision, utilities will be reluctant to negotiate such agreements let alone enter into them, which in turn will reduce the attractiveness of an application under section 29. Furthermore, by placing into the public domain commercially negotiated agreements, the Decision prejudices and distorts the future competitive dynamics that will apply in other commercial negotiations for these services.

46. In effect, the Decision so fundamentally undermines the operation of section 29 that it may prevent THESL or any other utility from seeking relief under it in the future.

D. The Decision does not Properly Consider and then Strike the Appropriate Balance Between the Public Interest in Disclosure and the Public Interest in Maintaining Confidentiality

47. In Appendix A to its "Practice Direction on Confidential Filings" the OEB listed the factors it may consider in addressing confidentiality filings. They include the following:

> (a) The potential harm that could result from the disclosure of the information, including:
>
> (i) Prejudice to any person's competitive position;
>
> (ii) Whether the information could impede or diminish the capacity for parties to fulfill existing contractual obligations;
>
> (iii) Whether the information could interfere significantly with negotiations being carried out by a party;
>
> (iv) Whether the disclosure would be likely to produce a significant loss or gain to any person;
>
> (b) Whether the information consists of a trade secret or financial, commercial, scientific or technical material that is consistently treated in a confidential manner by the person providing it to the Board.
>
> (Ontario Energy Board *Practice Direction on Confidential Filing*, page 17)

48. The application of those considerations requires, first, a correct understanding of what constitutes the public interest in applying considerations. Set out in paragraph 9 above, the Decision does not properly identify what the public interest is in the circumstances of a section 29 application. Beyond that, the Decision simply does not apply these considerations. THESL submits that the disclosure of the confidential information prejudices its competitive position; diminishes its capacity to fulfill its existing contractual obligations; would likely interfere with any negotiations being carried out by a potential attacher to its poles and would, therefore, likely produce a significant loss for

THESL. In addition, part of the information, namely the agreement, has been consistently treated as confidential information not just by THESL but by the OEB itself.

49. These considerations are analogous to the requirements of the federal *Access to Information Act,* R.S.C. 1985, c. A-1 ("**AIA**").

50. Section 20(1)(c) of the AIA precludes the disclosure of information "of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party".

51. Applying that test in this circumstance, the third party being THESL, the disclosure to the public of confidential information could reasonably be expected to prejudice the competitive position of THESL. It could also result in material financial loss to THESL.

52. If successful in its application, THESL will compete in the market for wireless attachments. If it must disclose its costs for those attachments, its ability to compete effectively is undermined. If competitors know THESL's costs, they will be able to offer prices below those costs or otherwise use the information to their commercial advantage. Just as important, the disclosure of THESL's costs, undermining its ability to compete effectively, will undermine the very purpose for which section 29 was enacted.

53. Similar considerations apply frequently in cases brought by the Competition Bureau before the Competition Tribunal. There, in recognition that the disclosure of competitively sensitive information will distort and undermine the competitive dynamics in the market, confidentiality orders are used as a matter of course in order to allow the Competition Tribunal to properly adjudicate matters while nonetheless ensuring that the adjudication of the competition issues does not itself result in the undermining of competition.

54. The approach of the Competition Tribunal, and of the courts in dealing with appeals from Competition Tribunal rulings, is reflected in the case of the *Commissioner of Competition v. CCS Corporation*, as described in the Affidavit of Scott McGrath, sworn April 21, 2014. There, the confidentiality of competitively-sensitive information was maintained throughout: from the process at first instance before the Competition Tribunal, to the

initial appeal before the Federal Court of Appeal, to the hearing before the Supreme Court of Canada. Although some of the confidential information was relied upon and was central to the decisions that were rendered in that case, it was understood and accepted that nothing positive would come from releasing the details of that information into the public domain. Accordingly, by a process of selective redaction, the competitively-sensitive information was kept confidential.

E. The Decision does not Properly Consider whether the Confidential Information would be Referred to by Parties in their Arguments

55. The Decision repeatedly refers to the fact that the objecting party may view information in their arguments and that, therefore, the OEB would have to consider it in its decision. The Decision makes no attempt to determine whether the information is relevant to what it must decide under section 29. The logic of the Decision, on that point, is that as long as a party asks for information, it is ipso facto relevant and should, therefore, be disclosed publically. The net result is that the Decision delegates parties' control over the question of what information should be disclosed publically.

56. Further, as is seen from the CCS case identified in Mr. McGrath's affidavit, even where the competitively sensitive information is to be used in the case, that does not automatically mean that the details pertaining to that information need to be made public. The public interest in maintaining competitive markets must be considered. In determining whether to make public competitively sensitive information, the OEB should engage in a balancing exercise. This should be undertaken at the time of the decision making/writing, not at a preliminary stage when it is unclear what use, if any, any of the parties will make of the confidential information.

PART 4 -RELIEF REQUESTED

57. That the decision be reviewed and the confidential information be kept in confidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Robert Warren

"Nikiforos Iatrou"

Nikiforos Iatrou

SCHEDULE A
CASE LAW

1. *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125

SCHEDULE B
RELEVANT STATUTES

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

29. (1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest. 1998, c. 15, Sched. B, s. 29 (1).

Scope

(2) Subsection (1) applies to the exercise of any power or the performance of any duty of the Board in relation to,

(a) any matter before the Board;

(b) any licensee;

(c) any person who is subject to this Act;

(d) any person selling, transmitting, distributing or storing gas; or

(e) any product or class of products supplied or service or class of services rendered within the province by a licensee or a person who is subject to this Act. 1998, c. 15, Sched. B, s. 29 (2).

Where determination made

(3) For greater certainty, where the Board makes a determination to refrain in whole or in part from the exercise of any power or the performance of any duty under this Act, and does so refrain, nothing in this Act limits the application of the *Competition Act* (Canada) to those matters with respect to which the Board refrains. 1998, c. 15, Sched. B, s. 29 (3).

Notice

(4) Where the Board makes a determination under this section, it shall promptly give notice of that fact to the Minister. 1998, c. 15, Sched. B, s. 29 (4).

ONTARIO ENERGY BOARD

FACTUM OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

WEIRFOULDS LLP
Barristers and Solicitors
66 Wellington Street West, Suite 4100
P.O. Box 35
TD Bank Tower
Toronto, Ontario M5K 1B7

Robert Warren (LSUC #17210M)
Nikiforos Iatrou (LSUC # 50776O)

Tel: 416-365-1110
Fax: 416-365-1876

Lawyers for Toronto Hydro-Electric System Limited