ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION (REDACTED)

Toronto Hydro-Electric System Limited

MOTION FOR REVIEW

Board File No. EB-2014-0163

April 29, 2014

I. Background

The Motion

1. Toronto Hydro Electric Systems Ltd. ("THESL") has filed a Motion to Review (the "Motion") against a decision of the Board dated April 8, 2014 (the "Decision"). The Decision related to a request by THESL that the information in certain interrogatory responses (the "Information") be treated in confidence pursuant to the Board's *Practice Direction on Confidential Filings* (the "Practice Direction").
2. The Decision accepted some of the requests for confidential treatment, but rejected others. THESL requests through the Motion that the portions of the Decision rejecting confidential treatment be overturned; i.e. that the Board treat all of the Information as confidential.
3. THESL's Notice of Motion identifies what THESL believes to be twelve separate errors in the Decision. In THESL's factum, these errors are grouped into five different headings.

The Practice Direction on Confidential Filings

4. The starting point for any consideration relating to confidential treatment of information is the Practice Direction: "[t]he Board's general policy is that all records should be open for inspection by any person. This reflects the Board's view that its proceedings should be open, transparent, and accessible. The Board therefore generally places materials it receives … on the public record so that all interested parties can have equal access to those materials. […] The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case."[1]
5. Despite the default position of transparency, the Practice Direction does recognize that there will be cases in which confidential treatment is warranted. In

[1] The Practice Direction, p. 2.

this light, the "Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential."[2]

Rule 42 Motions

6. The Motion is filed under Rule 42 of the Board's *Rules of Practice and Procedure*. Rule 44.01 requires that the moving party set out the grounds for a motion to review:

> Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
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> (i) error in fact;
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> (ii) change in circumstances;
>
> (iii) new facts that have arisen;
>
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

7. The use of the words "may include" suggests that this list is not exhaustive, and that the Board may consider other grounds if it finds it appropriate to do so.
8. However, Board staff submits that Rule 44.01 must at a minimum serve as the starting point for a motion to review. The fact that the Board chose to set out a list of grounds suggests that these grounds will in most cases be the focus of a motion to review.
9. A motion to review is not meant to serve as an automatic right to a hearing *de novo* whenever a party is dissatisfied with the result of a Board decision. In most cases the moving party should be able to point to one of the grounds enumerated

[2] Practice Direction, p. 2.

in Rule 44.01. As the Board stated in EB-2006-0322/0338/0340, a "review is not an opportunity for a party to reargue the case."[3]

10. A recent decision of the Ontario Divisional Court confirms that the Board has the discretion to limit the grounds available on a motion to review: "The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing."[4]
11. Board staff does accept that the reviewing Panel is not strictly limited to these grounds, and can grant a motion to review on other grounds where warranted.
12. Board staff observes that the five categories of errors identified by THESL do not appear to fit neatly into any of the grounds enumerated in Rule 44.01.

II. THESL's grounds for the motion

13. THESL's original request for confidential treatment related to eleven interrogatory responses. However, as several of these interrogatories were "duplicates" (i.e. essentially the same question asked by different parties), there are really only four actual responses to interrogatories that required confidential treatment in THESL's view.[5]
14. Although THESL identifies five categories of errors it believes were committed in the Decision, it for the most part does not specifically identify which categories apply to which interrogatories.
15. Board staff offers the following commentary on the arguments raised by THESL:

Issue 1: Did the Decision properly interpret section 29?

16. THESL argues that the Board "does not properly interpret Section 29 of the Act." Strictly speaking, the Decision does not require an interpretation of Section 29; it requires a consideration of the Practice Direction. The Practice Direction does

[3] EB-2006-0322/0338/0340, Decision with Reasons, p. 18.
[4] *Grey Highlands (Municipality) v. Plateau Wind Inc.*, [2012] O.J. 847, p. 2.
[5] Letter from THESL to the Board Secretary, February 28, 2013, THESL's Motion Record, Tab 3.

not establish any particular guidelines with respect to Section 29; in fact Section 29 is not referenced at all. THESL's position that there is a fundamental difference between how the Board should consider confidentiality issues in a Section 29 proceeding versus a non-Section 29 proceeding is not supported by the Practice Direction.

17. Regardless, Board staff agrees that the fact that this application is made under section 29 is a relevant consideration in the Board's analysis. Each case is considered on its own merits, and Section 29 may be an important contextual factor for the Board to consider.
18. This approach is also perfectly consistent with the Practice Direction. The ultimate issue for THESL in this motion is its concern about its potential future competitive position. Appendix B to the Practice Direction specifically states that one of the factors the Board should consider is: "the potential harm that could result for the disclosure of the information, including prejudice to any person's competitive position." In short, the Board's current framework for considering requests for confidentiality is already sufficient to address THESL's concerns, and no special treatment on account of Section 29 is required or warranted.
19. Indeed, in Board staff's view THESL's entire submission in this regard is based on a false premise. THESL suggests that the Board failed to consider the potential harm that could result to THESL's future competitive position if its Section 29 application is successful. The Board was fully aware of this potential risk, and explicitly stated: [i]n considering THESL's request for confidentiality, the Board will consider the potential adverse impact on THESL's competitive position…"[6]
20. The Board therefore was fully aware of THESL's arguments that its (potential) future competitive position could be damaged, and agreed with THESL that this was a relevant consideration. The Board simply found that THESL had not satisfied its onus to show that these adverse impacts had been demonstrated.

[6] The Decision, p. 4.

21. Stated differently, the Decision essentially adopted the framework proposed by THESL – it simply concluded that there was no convincing rationale to keep most of the Information confidential.

Issue #2 - Did the Board mis-categorize the Information?

22. THESL argues that the Decision did not properly categorize the confidential information. Although THESL's factum does not identify a particular interrogatory response, it appears to be referring to the information in CCC IR #16, which dealt with THESL's direct and indirect costs for pole attachments.
23. Contrary to THESL's suggestion[7], the Board did not state that the information in CCC IR #16 is already publicly available. Clearly it is not; otherwise an interrogatory would not have been necessary.
24. In its factum, THESL states that "…the costs for wireless attachments are not the same as those for wireline attachments."[8] Board staff is not aware of the different cost characteristics of wireless and wireline attachments. However, the response to CCC #16 purports to set out the direct and indirect costs for "tele-communications pole attachments". "Telecommunications attachments" can mean both wireline or wireless attachments.
25. At no point in the interrogatory response did THESL specify that these were costs only for wireless attachments, and there would be no reason for the Board to suspect that was the case. Given THESL's submissions in its factum, it is not even clear if the information provided in CCC #16 is for wireless communications specifically, or telecommunications attachments more broadly.
26. Regardless, the issue before the Board is whether the public release of the Information, including CCC #16, would materially prejudice THESL's potential future competitive position. The Board's alleged mis-categorization is not particularly relevant to this analysis.

[7] See paras. 31 and 35 of THESL's factum.
[8] THESL's factum, para. 31.

Issue #3: Did the Decision improperly reverse a previous Board decision?

27. THESL alleges that the Decision improperly reverses the Board's earlier decision on confidential treatment of an agreement. The agreement for pole attachments with a third party (the "Agreement") was accorded confidential treatment in a previous Board proceeding (EB-2011-0210, the CCTA decision).
28. THESL states that the Board's decision to reverse its earlier decision contravenes the doctrine of issue estoppel. In Board staff's submission, the doctrine of issue estoppel does not apply to this situation.
29. It is a well-known principle of administrative law that tribunals are not bound by their own precedents. As stated in Macauley & Sprague's *Hearings Before Administrative Tribunals*:

> The question as to the role of precedent for agencies most commonly arises in one of two situations: i. where an agency is empowered to consider an issue involving the same party on a regular or periodic basis (e.g. rate setting); ii. where an agency is required to adjudicate an issue similar to that in other cases. In either case, the prevailing rule is easy to state: an agency is not bound by its prior decisions. Stated otherwise, the notion of *stare decisis* is not applicable in the administrative sphere. Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obliged not to do so.[9]

30. Put simply, the Board panel that made the Decision is not bound by the decision of the CCTA panel. This is a new proceeding with a new panel. Although the document is the same, this is a fresh request for confidential treatment. The issue in question is certainly similar to the one addressed in the CCTA decision, but that does not amount to issue estoppel nor does it make the CCTA decision binding on the panel that made the Decision.
31. Board staff submits that Board panels should give careful consideration to precedents. Precedents certainly have persuasive value, and in many cases they are followed. The law is clear, however, that Board panels are not bound by precedent, and can stray from them as they deem appropriate.

[9] Macauley & Sprague, *Hearings Before Administrative Tribunals*. Third edition, 2007, pp. 6-6 to 6-9.

32. Board staff must also disagree with THESL's assertion that it "is reasonable to assume that, before [making] an application under section 29, utilities would negotiate, and perhaps conclude, agreements for the provision of services in the competitive market."[10] If a utility were to conclude (i.e. execute) an agreement for the provision of services at a rate something other than the rate authorized by the Board prior to a successful section 29 application, that would constitute a direct breach of a Board order. Board staff would not view that as a "reasonable" thing to do.

Issue #4: Did the Decision strike the appropriate balance between the public interest in disclosure and maintaining confidentiality?

33. THESL argues that the Decision does not properly balance the public interest in disclosure against the public interest in keeping the Information confidential. In other words, THESL argues that the harm that public release of the information will impose on THESL is greater than the benefits of public disclosure.
34. THESL's argument under this heading is essentially that the Decision arrived at the wrong conclusion. It does not point to new evidence or any of the other enumerated grounds under Rule 44.01, although Board staff accepts that this list is not exhaustive.
35. As discussed above, Board staff agrees with THESL's position that the Board should consider the potential harm the public release of the Information might cause if THESL's section 29 application is ultimately successful. (Indeed, the Decision also agreed with that premise.) The onus, however, rests with THESL to show that the risk of harm is both real and material.
36. Although the specific interrogatories related to this point are not identified in THESL's submission, Board staff understands that the chief concern lies with the public release of the information showing the price THESL currently charges a third party carrier for wireless attachments (and the terms of that contract more broadly), and THESL's actual direct and indirect costs for pole attachments.

[10] THESL's factum, para. 45.

37. It is not clear to Board staff how the public release of the price it charges the third party carrier for pole access would be detrimental to anyone's competitive interests. THESL has stated that it intends to offer access to its poles in a non-discriminatory manner. Although the evidence is not entirely clear on this point, it also appears that THESL does not intend to charge different rates in different parts of the city. THESL's competition expert Dr. Church states in his report:

> There are likely only a very limited number of locations where using small cells or DAS mounted on poles is the sole option for wireless service providers to implement outside data coverage and capacity. But, these localized circumstances are not likely to be known by THESL. Hence it is unlikely that THESL can exercise market power in those locations: if it cannot distinguish the locations where it has market power from those where it does not, then the relevant geographic area is no smaller than the footprint of its entire pole network. **THESL does not know the value of pole access at a given location to a wireless service provider and hence cannot discriminate if rates were forborne.**[11]

38. It appears to Board staff, therefore, that THESL intends to charge the same price to any carrier that wants access to its poles. If that is the case then presumably a carrier can simply ask THESL what the price is. Under such circumstances, it is unlikely that THESL's pricing information could be kept from its competitors. It is not clear how revealing this price harms THESL's competitive position.
39. If THESL does in fact intend to charge different rates for different carriers or different locations, then it is also unclear how revealing the price currently being charged to one carrier will negatively impact that process. Pricing in a competitive market will largely turn on supply and demand, and not necessarily the price charged to one carrier in one location.
40. In theory THESL's costs for pole attachments (i.e. the information in CCC #16) could be used by competitors to seek to undercut them in a competitive market. If a competitor were able to charge a rate lower than THESL's actual costs (and certainly its direct costs), then presumably THESL would not be able to compete in the market.

[11] Expert Report of Jeffrey R. Church, para. 25 (emphasis added).

41. However, the potential for material harm rests on a number of assumptions. First, as described above it is not clear that the information in CCC #16 actually provides THESL's costs specifically for wireless attachments, as opposed to telecommunications attachments generally (THESL has stated that wireless and wireline costs are different).
42. **[This paragraph contains confidential information and has been redacted.]**
43. **[This paragraph contains confidential information and has been redacted.]**

Issue #5: Does the Decision properly consider whether the Information will be referred to by parties in their argument?

44. Board staff does not understand THESL's arguments under this heading. THESL states: "[t]he Decision makes no attempt to determine whether the information is relevant to what it must decide under section 29." This is simply not accurate. Much of the Information will be highly relevant to the issue of whether or not THESL can exercise market power, which is the key issue in this proceeding. Board staff also notes that THESL did not refuse to answer the interrogatories on grounds of relevance.
45. THESL continues: "[t]he logic of the Decision, on that point, is that as long as a party asks for the information, it is ipso facto relevant and should, therefore be disclosed publicly." Nowhere does the Decision say this; indeed the Decision accepted a number of THESL's request for confidentiality despite the fact that a party had requested the information.
46. The Decision's approach to this issue is, in part, a practical one. There appears to be little question that some of the Information (in particular the details relating to THESL's costs and the price it is able to charge) will be highly relevant to the proceeding, and will be referred to frequently by parties. There has already been an *in camera* portion to the technical conference, and one of the expert's reports had to be redacted.
47. There is a real possibility that the Board's ultimate decision in the proceeding will directly reference the Information. Of course where information legitimately

meets the tests set out in the Practice Direction, then the redaction of information from the public is an unwelcome but necessary practice. However, there is nothing improper about the Board considering the practical impacts on the hearing process that are necessitated by the confidential treatment of information.

III. Conclusion

48. In the original hearing of this issue, the onus rested with THESL to demonstrate to the Board that there was a material risk that the public release of the Information could harm its potential future competitive position. In the Decision, the panel hearing the matter determined that THESL had not met that onus.
49. The grounds for the Motion do not focus on legal errors or errors of fact. THESL's main argument appears to essentially be that the Decision reaches the wrong conclusion.
50. To the extent the panel hearing this Motion chooses to consider matters beyond the grounds identified in Rule 44.01, Board staff submits that they key issue is THESL's issue #4: Did the Decision strike the appropriate balance between the public interest in disclosure and maintaining confidentiality? The onus remains with THESL to demonstrate that the potential harm occasioned by the public release of the Information outweighs the objectives of transparency and openness.

All of which is respectfully submitted.

April 29, 2014