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### BY EMAIL AND RESS

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Our File: EB20140163

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

Dear Ms. Walli:

### **Re: EB-2014-0163 – THESL s.29 Motion to Review – SEC Submissions**

We are counsel to the School Energy Coalition (“SEC”). Pursuant to Procedural Order No. 1, these are SEC’s submissions with respect to Toronto Hydro-Electric System Limited (“THESL”) motion to review of the Board’s *Decision on Confidentiality*, dated April 8, 2014 (“Confidentiality Decision”).

At the core of this motion are not errors contemplated by Rule 44 of the *Rules of Practice and Procedure*<sup>1</sup>, but THESL’s dissatisfaction with the results of the Board’s balancing of interests in the Confidentiality Decision. SEC submits that the motion should be dismissed. THESL has not met the threshold test set out in Rule 45.01, and even if it had, it has not met the onus of demonstrating that the interrogatory responses should on balance warrant confidentiality treatment in accordance with the *Practice Direction on Confidential Filings* (the “*Practice Direction*”).

### ***Threshold Test and the Balancing of Interests***

Pursuant to Rule 45.01 of the Board’s *Rules of Practice and Procedure*, the Board conducts threshold inquiry, i.e. “whether the matter should be reviewed before conducting any review on the merits”.<sup>2</sup> The “threshold test” was articulated by the Board in *Motion to Review Natural Gas*

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<sup>1</sup> THESL filed its Motion to Review on pursuant to Rules 42, 43 and 44 of *Rules of Practice and Procedure*. On April 24<sup>th</sup>, the Board revised the *Rules of Practice of Procedure* which re-numbers Rules 42-45. To be consistent with THESL motion material, SEC is using the numbering in place as of the filing of this Motion to Review.

<sup>2</sup> Ontario Energy Board, *Rules of Practice and Procedure*, Rule 45.01

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*Electricity Interface Review* (“NGEIR”) Decision.<sup>3</sup> The Board stated that the purpose of the threshold test is to determine whether the grounds relied upon by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised that a review based on those issues could result in the Board varying, cancelling or suspending that decision.<sup>4</sup>

While the grounds listed in Rule 44.01(a) are not exhaustive<sup>5</sup>, in order for the threshold test to be met there must be an “identifiable error” and the “review is not an opportunity for a party to reargue the case”<sup>6</sup>. THESL has proposed or alleged an identifiable error in the Board’s Confidentiality Decision. It has simply argued that as a whole the decision is incorrect based on essentially the same grounds which it argued at first instance. It is seeking to re-argue the case, which is not the purpose of a motion to review. The Divisional Court in *Grey Highlands v. Plateau* has confirmed the Board’s principle that re-argument of issues is not an appropriate ground for review.<sup>7</sup>

There is a reason why the Board applies the threshold test (described below) to ensure that there is an identifiable error that goes to the correctness of the decision. A Board panel that rendered the original decision has a much better appreciation of the context and evidence that inform its weighing of factors in the exercise of its discretion. Reviewing panels should thus accord the original panel deference in their decision.

THESL’s preferred approach to confidentiality in a section 29 application was argued in significant detail in its reply submissions and discussed at length in the Confidentiality Decision.<sup>8</sup> THESL now states that the Board erred by ruling 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.”<sup>9</sup>

SEC submits that this is an incorrect reading of the Confidentiality Decision. What the Board stated, and correctly so, is that the *Practice Direction* is applicable in all Board proceedings, but that the “nature and circumstances of the case are important factors to consider in a request for confidentiality”<sup>10</sup>. It explicitly agreed with THESL that commercial sensitivity is a relevant consideration, but that it is “not determinative; it must be balanced with the Board’s interested in conducting an open, transparent process, including an oral hearing and a fully public decision”.<sup>11</sup>

The Board understood THESL’s argument about the purpose of section 29, it accepted that if it granted the application, the Board would no longer regulate the rate for wireless attachments and THESL would therefore have a commercial interest in keeping those costs and revenue

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<sup>3</sup> *Decision with Reasons*, Motion to Review Natural Gas Electricity Interface Review Decision (EB-2006-0322/338/340, dated May 22 2007. Also see *Decision and Order on Motion to Review* (EB-2011-0053) dated April 21, 2011, *Decision and Order on Motion to Review* (EB-2013-0193), dated July 4 2013 at p.4, *Decision on Motion to Review Decision and Order* (EB-2013-0331), dated January 16 2014 at p. 3.

<sup>4</sup> *Ibid* at p.18

<sup>5</sup> *Ibid* at p.14

<sup>6</sup> *Ibid* at p.18

<sup>7</sup> *Grey Highlands (Municipality) v. Plateau Wind Inc.*, 2012 ONSC 1001 at para 7

<sup>8</sup> Reply Submissions of Toronto Hydro-Electric System Limited of the Confidentiality Treatment of Certain Interrogatory Responses, dated March 28 2014, at para 6-33 (THESL Motion Record, Tab 5, at p. 135-140)

<sup>9</sup> Amended Factum of Toronto Hydro-Electric System Limited [“THESL Factum”] at para 25

<sup>10</sup> *Decision on Confidentiality* (EB-2013-0234), dated April 8 2014 [“*Decision*”] at p.2

<sup>11</sup> *Ibid* at p.3

confidential. In exercising its discretion, the Board weighed those considerations against its concern for an open and transparent process, and came to a different conclusion than the one THESL sought.

The Board also understood THESL's position with respect to the public interest. The Board, when applying Appendix A of the *Practice Direction*, must first determine what constitutes the public interest in the context of a section 29 application is incorrect.<sup>12</sup> The Practice Direction requires the Board to strive to find a balance between the "general public interest in transparency and openness and the need to protect confidential information."<sup>13</sup> It does not require the Board to conduct a probing examination at such an early part of the proceeding into the specific public interest of the application. This is especially important in this application, given that Issue 11 of the Approved Issues List asks that very question: "[w]hat is the public interest for purposes of this application?" If the Board were required to determine this in the context of a confidentiality request as THESL proposes, then it would be predetermining the final issues before all the evidence had been provided, test, and argued.

In its arguments, THESL seeks to have the Board emulate the Competition Tribunal. THESL's reference to the Competition Tribunal's approach to confidentiality is misplaced.<sup>14</sup> While the Competition Tribunal is a forum for determination of competition disputes, the companies that come before it are not licensed and rate regulated entities like those who are regulated by the Board. There is a greater need for transparency in Board proceedings as a result of this. As the Board stated in the Confidentiality Decision, "the credibility and the legitimacy of the Board and its decisions rests on the open and transparent processes the Board uses."<sup>15</sup>

### ***Evidence Does Not Support Harm***

While THESL may not be happy with its conclusions, the Board did consider the potential harm alleged by THESL, but simply did not agree with THESL's position. In some cases this was because THESL had not sufficiently demonstrated how disclosing information would prejudice its competitive position, a burden it was required to extinguish (CCC IR No.3 and 5, VECC No.12). In another case, THESL "failed to demonstrate how customer specific information could be derived" (SEC No.7).<sup>16</sup> With respect to costing information, the Board found that THESL had no basis to expect it would be confidential given that the same methodology is used to set wireline rates, which would still be regulated (CCC No.16).<sup>17</sup> SEC submits the Board was correct in each of those instances. Insofar as THESL now argues that the costs of wireless and wireline attachments are different<sup>18</sup>, [REDACTED]

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<sup>12</sup> THESL Factum at para 48-49

<sup>13</sup> Ontario Energy Board, *Practice Direction on Confidential Filings*, Appendix A

<sup>14</sup> THESL Factum para 53-54, Also see McGrath Affidavit, THESL Motion Record, Tab 7, at p. 174

<sup>15</sup> *Decision on Confidentiality* (EB-2013-0234), dated April 8 2014 [*Confidentiality Decision*], THESL Motion Record, Tab 6, p. 136

<sup>16</sup> *Confidentiality Decision* at p.4-8

<sup>17</sup> *Confidentiality Decision* at p.7

<sup>18</sup> THESL Factum at para 31

As SEC wrote in its submissions on confidentiality, the actual cost THESL incurs for attaching wireless devices to its poles is an important issue in this proceeding. THESL has stated that it will seek to share with ratepayers a portion of the revenues in excess of costs. The proper determination of forecasted costs and methodology will need to be determined. A specific issue on the Approved Issues List is the impact on ratepayers.<sup>20</sup> THESL's own evidence is that forbearance will eliminate the current ratepayer subsidy. The public, not just its counsel, should be able to determine what those costs are and how they are determined.

While in *some* circumstances public disclosure of cost information may be detrimental, THESL's position that "[i]f competitors know THESL's costs, they will be able to offer prices below those costs or otherwise use the information to their commercial advantage" is not supported by the evidence.<sup>21</sup>

[REDACTED]

The disclosure of THESL's actual costs will not harm its competitive position if the Board forebears.

Most troubling is THESL's position that by not ordering confidentiality treatment to its agreements with wireless attachers, the Board will "substantially reduce if not eliminate, the value of relief under section 29", since "it is reasonable to assume that, before for [sic] making an application under section 29, utilities would negotiate, and perhaps conclude agreements for the provisions of services in the competitive market".<sup>24</sup> Until the Board forebears from regulating pursuant to a section 29 order, all rates, terms, and conditions are regulated. Until that order is made, a utility is bound by its Board license, codes and orders, and has no authority to enter into any agreements which would deviate from them.

***CANDAS Decision Applies Only To That Proceeding***

THESL's position that the Board contravened the doctrine of issue estoppel by denying its request for confidentiality of the THESL agreement with a wireless attacher (Board Staff IR 22) has no merit. The scope of the Board's confidentiality order in the CANDAS proceeding was

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[REDACTED]

<sup>20</sup> Issue 9: "If the Board were to forebear from regulating the terms, conditions and rates for the attachment of wireless equipment to THESL's distribution poles, what are the potential impacts on THESL's ratepayers in terms of rates and of service?"

<sup>21</sup> THESL Factum at para 43

[REDACTED]

<sup>24</sup> THESL Factum at para 45

limited to that proceeding. This is why THESL still had to apply for confidentiality treatment for the specific interrogatory response at issue. Board decisions on confidentiality do not apply to the same information in every other proceeding in perpetuity. They are interlocutory procedural decisions, not final substantive decisions.

While it is always open for Board's panels to follow the reasoning of other panels on confidential matters, they are not bound to do so. Different proceedings have their own contexts which may require different balancing of interests. The Board explicitly recognized the different circumstances between the two proceedings. Since the CANDAS decision on the preliminary issue effectively concluded the case and was decided at the same time as the confidentiality issue, "...concern about the need for a fully public process, which is of concern to the Board in the current proceeding, was not a relevant consideration in the CANDAS proceeding".<sup>25</sup>

It should be noted that THESL did not take the position before the hearing panel in this matter that the Board was *bound* by the CANDAS decision. In its initial request for confidentiality over the agreements, it did not even reference the CANDAS decision, and in its reply submissions, only stated that there was no reason why the Board should make an opposite ruling in this case.<sup>26</sup>

**Summary**

SEC submits THESL's motion should be dismissed. THESL has not met the threshold test, nor the burden of demonstrating that the interrogatory responses, on balance, warrant confidentiality treatment.

All of which is respectfully submitted.

Yours very truly,  
**Jay Shepherd P.C.**

*Original signed by*

Mark Rubenstein

cc: W. McNally, SEC (by email)  
Applicant (by email)

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<sup>25</sup> *Confidentiality Decision* at p.6

<sup>26</sup> Reply Submissions of Toronto Hydro-Electric System Limited of the Confidentiality Treatment of Certain Interrogatory Responses, dated March 28 2014, at para 45, THESL Motion Record, Tab 5, at p. 142