

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 approving or fixing just and reasonable rates and other charges for the distribution of electricity to be effective May 1, 2008, May 1, 2009, and May 1, 2010.

NOTICE OF MOTION

Toronto Hydro-Electric System Limited (“THESL”) will make a motion to the Ontario Energy Board (the “Board”) on a date and at a time to be determined by the Board.

PROPOSED METHOD OF HEARING: THESL proposes that the Motion be heard orally.

THE MOTION IS FOR an Order of the Board:

1. Reviewing and varying its May 15, 2008 Decision in the above-captioned proceeding (the “Decision”), as follows:

Regulatory Treatment of Smart Meters

- (a) With respect to section 3.3 of the Decision (Meters), and more particularly with respect to regulatory treatment of smart meters, rescinding its finding at pages 23-24 that the 2007 balances recorded in smart meter operating expenses account 1556 shall be expensed in the 2008 rate year; and instead directing that such balances be disposed through clearance of the 2007 smart meter deferral account in the manner previously approved by the Board with respect to the 2006 smart meter deferral account;

Proceeds from Sale of Assets

- (b) With respect to Section 3.4 of the Decision (Proceeds from Sale of Assets), rescinding its finding at page 27 that “100% of the net after-tax gains from the sale of 228 Wilson Avenue, 175 Goddard Street, and 28 Underwriters Road, the

properties that are planned to be sold in 2008, should go to the ratepayer. The Company's revenue requirement for the 2008 test year shall be adjusted downward by \$10.3 Million to reflect this finding", and instead finding that:

- (i) the named properties are surplus to THESL's needs;
- (ii) the Board accepts the THESL rate mitigation proposal to reduce the service revenue requirement by an amount equal to 50% of the net after-tax gain on sale of the properties; and
- (iii) the amount of \$4.476 million, representing 50% of the net after-tax gain, be substituted for the figure of \$10.3 million, which is before-tax, for the purpose of finding a base distribution revenue requirement and associated rates for implementation.

In the alternative, if the Board does not determine the percentage of the net after-tax gain to be deducted from the service revenue requirement by June 11, 2008, then as an interim measure for purposes of producing a timely rate order, an order rescinding the finding at page 27 and instead directing that;

- (iv) the amount of \$8.951 million, representing 100% of the net after-tax gains, be substituted for the figure of \$10.3 million for the purpose of finding a base distribution revenue requirement and associated rates for implementation as soon as possible; and
- (v) the reference figure for purposes of the associated variance account be subject to amendment upon final determination of the percentage of the net after-tax gain to be credited against the service revenue requirement

Revenue to Cost Ratios

- (c) With respect to Section 6.1 of the Decision (Revenue-to-Cost Ratios), clarifying its direction, at page 64 of the Decision, that the higher revenue to be realized from THESL's Unmetered Scattered Load ("USL") and Streetlighting rate classes as a result of the cost allocation-related adjustments ordered by the OEB be allocated proportionally to the Intermediate and Large Use rate classes, and directing by way of clarification that the higher revenue be allocated proportionally to the GS 50-1,000 kW and Intermediate rate classes, in accordance with the Board's underlying reasoning;

Draft Rate Order

- (d) With respect to section 8.2 of the Decision (Draft Rate Order):
- (i) to clarify an apparent contradiction between the OEB's direction at page 71 to prepare a draft rate order "incorporating an effective date of May 1, 2008 for the new rates", and its acknowledgement that the new rates will have a different implementation date, so as to provide that the approved revenue requirement is to be collected in full on a forecast basis through the combination of rates in effect throughout 2008;
 - (ii) to confirm that the 2008 rates should be calculated to recover the approved 2008 revenue requirement less an estimate of the revenue received under 2007 rates during the period commencing May 1, 2008 and ending the day before the 2008 rates become effective;
 - (iii) to confirm that the estimate of revenues received by THESL for the period May 1, 2008 to the effective date of the new Rate Order shall exclude revenue from rate riders that were to have expired April 30, 2008 but which were extended; and
 - (iv) to provide that the actual amount of revenue recovered after April 30, 2008 through the 2007 CDM rate rider and the 2007 Smart Meter Deferral Account rate rider, both effective in 2007 but arising from 2006 activities, as well as the Recovery of Approved Regulatory Assets rate rider, be disposed of separately in a manner and at a time to be determined by the Board.

THE GROUNDS FOR THE MOTION ARE:

2. THESL respectfully submits that the OEB's findings set out above raise questions as to the correctness of the Decision and require the OEB's review, for the following grounds:

Regulatory Treatment of Smart Meters

- (a) With respect to the regulatory treatment of smart meters:

- (i) the OEB made the following findings at pages 23-24 of the Decision:

"With respect to the 2007 expenditures, the Board notes that the Company had filed forecasts as part of its original application. It updated that forecast on November 30, 2007, and subsequently provided the actual 2007 values.

The 2007 values were broken down in the categories of minimum and beyond minimum functionality. The Board agrees with the Company that parties had opportunities to test the prudence of these expenditures. The Board has no basis to reject the 2007 expenditures on the strength of any argument by the parties. The Board finds that the Company's evidence in this regard is sufficient for the Board to accept the expenditures for 2007 as reasonable and include them in rate base.

Having said that, it is important to note that as the "beyond minimum functionality" expenditures for 2007 have not been subjected to a detailed review in this proceeding, our acceptance of them should not be considered to have any particular precedential value in the consideration of such expenditures by other utilities, or this utility, in a future rates proceeding. The Board further finds that the balances recorded in smart meter capital expenditures account 1555 be included in rate base; however, the balances recorded in smart meter operating expenses account 1556 shall be expensed in the 2008 rate year."

- (ii) THESL submits that having accepted THESL's 2007 smart meter expenditures, the OEB's direction concerning the treatment of the actual 2007 smart meter operating expenses of \$2.0 million contradicts the Board's existing, approved methodology for the annual clearance of the smart meter deferral account(s). That methodology was approved at page 18 in the Board's Decision in EB-2007-0063, the Combined Smart Meter Proceeding, and in the corresponding Rate Order issued to THESL by the Board on October 23, 2007. Under that methodology, a revenue

requirement corresponding to the actual 2007 smart meter activity was to be calculated, after the fact, consisting of operating expenses together with the capital-related costs of depreciation, return on the annual average 2007 smart meter incremental ratebase, and PILs on that return. That revenue requirement was then to be offset by the total revenue obtained through the 2007 Smart Meter Rate Rider, effective from May 1, 2007 to April 30, 2008. The net balance, debit or credit, was then to be cleared to ratepayers through the implementation of a limited-period rate rider.

- (iii) Under the approach set out in the Decision, the OEB is dealing with only a portion of the 2007 smart meter-related revenue requirement while leaving the remainder unresolved. This approach leaves outstanding the need to dispose of the 2007 capital-related smart meter costs and the rate rider revenues.
- (iv) It is necessary to clear the 2007 Smart Meter Deferral Account through a separate proceeding because the 2007 rate year smart meter rate rider revenues could not be known until after April 30 2008, and because of the need to clear the 2006 residual balances arising from the Board's decision in the Combined Smart Meter Proceeding (EB-2007-0063).
- (v) Separating the 2007 smart meter operating expenses from the determination of the 2007 smart meter deferral account balance would distort that balance needlessly and without justification.
- (vi) THESL therefore requests that the Board vary its Decision to permit disposition of the 2007 Smart Meter Operating Expense through clearance of the 2007 Smart Meter Deferral Account, in the context of a separate proceeding.

Proceeds from Sale of Assets

- (b) With respect to the reference amount of \$10.3 million pertaining to gains on sale of property:
- (i) THESL asserts that the Board erred in fact by characterizing an amount of \$10.3 million as the net after-tax gain on sale of specified properties whereas that figure represents a before-tax amount, contrary to the evidence in this area.
 - (ii) The Board found that “100% of the net after-tax gains from the sale of 228 Wilson Avenue, 175 Goddard Street, and 28 Underwriters Road, the properties that are planned to be sold in 2008, should go to the ratepayer” (collectively referred to herein as the ‘Surplus Properties’).
 - (iii) Considered separately from the issue of the percentage of the net after-tax gain on sale which should be deducted from the service revenue requirement, the figure of \$10.3 million is a before-tax figure, which in THESL’s submission is not in accordance with the Board’s description of the figure that should be deducted from the Service Revenue Requirement and is inconsistent with the evidence before the Board.
 - (iv) The after-tax amount corresponding to the figure of \$10.3 million (actually \$10.218 million) is \$8.951 million, which is derived by applying the corporate capital gains tax rate to the gain recognized for tax purposes after valuation changes arising from Fair Market Valuation. The figure of \$10.2 million itself is documented at Exhibit R1, Tab 6, Schedule 12.
- (c) With respect to the percentage of the net after-tax gain on sale that may be deducted from the service revenue requirement, the Decision reflects an error in fact on the issue of whether the Surplus Properties are surplus, used and useful or not:

- (i) THESL asserts that the Board erred in fact by holding that the Surplus Properties were used and useful and not surplus to needs of THESL, contrary to the evidence in this area.
- (ii) The Board found at page 27 that “The Company’s reply argument confirms that the 228 Wilson Ave. and 175 Goddard St. work centres were not sold in 2007. The Board agrees with intervenors that these two properties, as well as 28 Underwriters Road and 60 Eglinton West, have been rendered redundant and have been or will be sold as part of the Company’s Facilities Consolidation and Renewal Plan (the “Plan”). If it were not for the Plan, the properties would continue to be used and useful. The properties’ functions are useful and will be transferred to or replaced by other facilities, at a substantial cost to the ratepayer.” (emphasis added).
- (iii) THESL asserts that the Board has erred in fact in concluding that “If it were not for the Plan, the properties would continue to be used and useful”, and that, on the record, the evidence shows that the Plan in fact is a response to facility obsolescence rather than the cause of that obsolescence.
- (iv) The evidence on the record clearly shows that the Surplus Properties have become obsolete and unsuited to providing economical and efficient service due to factors quite outside of the Plan. These factors include physical location relative to the areas of geographical focus for operations and to inadequate road infrastructure; lack of ability of the facilities to support efficiency improvements such as indoor loading and provisioning; size of the facilities relative to the workforce that must be stationed at those locations; and the need, absent the Plan, for extensive repairs and modifications together with the attendant impacts on the efficiency of operations continuing out of the facility. No contradictory evidence was brought by any party.

- (v) In fact, the Plan is a response to both the physical aging of the facilities and the changing demands that THESL's maintenance and capital operations place on those facilities. The Plan has not and does not cause facilities to become obsolete; the obsolescence of facilities has caused the Plan. It is not correct to suggest that the facilities would continue to be used and useful in the absence of the Plan. The Surplus Properties have been sitting vacant for months or years.
- (vi) On the evidence it is also incorrect to conclude that "The properties' functions are useful and will be transferred to or replaced by other facilities, at a substantial cost to the ratepayer", with the implication that the transfer of functionality is not necessary. THESL acknowledges that the Plan involves the transfer of activities and functions from obsolete facilities to functional facilities, and it is clear that those activities and functions have to continue in order to provide service to customers. However, the fact that the functions will be transferred does not imply that the existing obsolete facilities could continue to function effectively; the implication is the opposite. It is common for a facility or piece of equipment to deteriorate and lose functionality. The function to which the equipment is put continues, but the equipment eventually does not. It is therefore fallacious to conclude that because the function of a facility continues to be needed, the functionality of that facility continues.
- (vii) For this reason the Board has erred in fact when it compares on page 27 the conclusion it reached in the Cushion Gas case with the matter presently before it: "In a Decision which dealt with the sale of cushion gas by Union Gas Limited (the "Cushion Gas case"), the Board allocated 100% of the capital gain to the utility. The Board made that allocation after finding the evidence established the asset to be truly surplus in that the utility did not intend to replace it. In contrast, in Toronto Hydro's case, the evidence is clear

that the properties' functions are not surplus and will be transferred to another location or replaced."

- (viii) There was never any suggestion by THESL that the "properties' functions" are surplus. Indeed, the fact that the functions are vital underpins the need for the Plan. Instead, the facts are that the subject facilities are obsolete and are not capable of proper and efficient functioning; they can no longer meet the need and are therefore no longer needed. Therefore they are surplus properties. The stated contrast to the Cushion Gas case is not supported in fact.
- (ix) In the result, the Decision in this matter confiscates shareholder property and improperly distributes that property to ratepayers, which actions are founded on factual error and are therefore unjustified and improper. THESL therefore requests that the Board's finding in this matter be rescinded and that instead the Board approve THESL's original proposal that, on a voluntary basis, THESL would credit 50% of the net after-tax gain on sale on the identified properties to the service revenue requirement.

Revenue to Cost Ratios

- (d) With respect to Revenue-to-Cost Ratios and the allocation of higher revenue from the USL and Streetlighting classes:
 - (i) THESL asserts that the Board erred in fact by incorrectly identifying one of the two rate classes exhibiting the highest revenue to cost ratios, contrary to the evidence in this area.
 - (ii) The OEB made the following findings at page 64 of the Decision: "The Board finds it reasonable, and it so directs, that the higher revenue from the USL and Streetlighting rate classes be allocated proportionally to the

Intermediate and Large Use rate classes, as these two classes exhibit the greatest distance from 100%.”

- (iii) In Table 12 of the Decision, at page 63, the OEB listed the revenue to cost ratios for THESL’s customer classes from Run 2 of THESL’s 2006 Cost Allocation Informational Filing; the ratios proposed by THESL in the Application; and the OEB-sanctioned ranges of revenue to cost ratios. For the GS 50-1,000 kW, Intermediate 1,000-5,000 kW and Large Use classes, that information was as follows:

	Run 2 Ratio	Ratio Proposed by THESL	OEB-sanctioned range
GS 50-1000 kW	140.5	130.5	80 – 180
Intermediate 1000-5000 kW	148.0	136.8	80 – 180
Large Use	114.8	110.3	85 – 115

- (iv) In accordance with the Board’s stated reasoning, THESL understands the Board to direct that the higher revenue be allocated proportionally to the GS 50 – 1,000 kW and Intermediate classes. Therefore, THESL requests that the OEB vary its Decision to provide that the higher USL and Streetlighting revenue be allocated, in proportion to their respective 2008 class revenue requirements, to the GS 50 – 1,000 kW rate class instead of the Large Use class, and to the Intermediate class.

Draft Rate Order

- (e) With respect to its directions pertaining to the draft rate order and rate implementation:

- (i) The Board states at Section 8.2 of the rates to be set out in the Draft Rate Order that “These are to be properly reflected in a Draft Rate Order incorporating an effective date of May 1, 2008 for the new rates.” However, it is clear from the text following that new rates i.e., the 2008 rates will not be implemented until a later time, and that THESL is

effectively directed not to re-bill customers retroactively for consumption after May 1, which in any event would be unwelcome for customers and a costly and time-consuming process for THESL to implement.

- (ii) THESL therefore seeks clarification that the intent of the Board's direction in this regard is to indicate that THESL is not to be subject to foregone revenue arising from delayed implementation of '12-month' rates computed to recover its annual approved revenue requirement, and further that the new 2008 rates are to be applied on a going-forward basis only i.e., to consumption only on and after the effective date of the rates.
- (iii) Secondly, THESL requests the OEB's confirmation of THESL's proposed approach to calculating the rates that will enable it to recover its full revenue requirement for the May 1, 2008 – April 30, 2009 rate year over that period through a combination of the extended 2007 rates and the new 2008 rates. There are three factors that must be determined in this regard.
 - (1) Inclusion of revenues under 2007 rates. The revenues collected through 2007 rates applied in the period between May 1, 2008 and the date of implementation of the approved 2008 rates must be deducted from the approved 2008 revenue requirement in order to derive 2008 rates. For clarity, THESL requests that the Board confirm that this was its intention in stating "Depending on the date of implementation of the new rates, the new rates shall be set so as to recover the annualized revenue requirement over the remaining period of the 2008 rate year."
 - (2) Determination of revenues under 2007 rates. The actual revenues collected under 2007 rates for the period prior to 2008 rate implementation cannot be determined in advance, and an estimate must be used. THESL proposes that 2007 rates, exclusive of rate

riders, be applied to the 2008 monthly billing unit forecast to derive estimated revenues.

- (3) Exclusion of Revenue from Extended Rate Riders. To provide for rate stability, THESL sought and obtained the Board's permission to keep rate riders that had been in effect for the 2007 rate year in effect beyond their intended expiry on April 30, 2008. These rate riders were the 2006 Smart Meter Deferral Account Clearance rider and the 2006 CDM rate rider (the '6 month riders'), both of which commenced on November 1, 2007, and the Recovery of Approved Regulatory Assets (RARA) rider.

The RARA revenues continue to be tracked and recorded in the associated deferral account and are subject to true-up in accordance with the Board's Decision in the RP-2004-0100 proceeding, where at Section 9.0.19 the Board stated "At the end of the three year period, at April 30, 2008, as there will be a residual (positive or negative) balance in the Regulatory Asset Recovery Account (1590), this balance shall be disposed of to rate classes in proportion to the recovery share as established when rate riders were implemented."

The 6-month riders were approved to prospectively recover fixed dollar amounts with variances to the account of the shareholder. However, it was not foreseen that the 6-month riders would continue in effect past April 30, 2008.

In all these cases, the revenue collected through these riders is separate and apart from the base distribution revenue requirement. For clarity, THESL therefore proposes that it bring separate application(s) to clear these amounts, in accordance with the Board's direction where applicable to the RARA amounts, after the

actual revenue collected through the extended effectiveness of these riders is known.

3. THESL requests that the Board vary its Decision as requested herein pursuant to its authority under Sections 21 and 78 of the *Ontario Energy Board Act, 1998*, as amended, and pursuant to Rule 42 of the Board's *Rules of Practice and Procedure*.
4. THESL may provide such further and other grounds as counsel for THESL may submit and the Board allow.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Affidavit of Jean-Sebastien Couillard, Chief Financial Officer, Toronto Hydro Corporation;
- (b) The Affidavit of Colin McLorg, Manager of Regulatory Affairs for THESL;
- (c) Such further documentary evidence as counsel for THESL may submit and the Board allow.

All of which is respectfully submitted this 4th day of June, 2008.

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3Y4

J. Mark Rodger

Tel.: 416-367-6190
Fax: 416-361-7088
E-mail: mrodger@blgcanada.com

Counsel to Toronto Hydro-Electric System Limited

TO: ONTARIO ENERGY BOARD

P. O. Box 2319
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Kirsten Walli
Board Secretary

Tel.: 416-481-1967
Fax: 416-440-7656