



**Ontario Energy Board
Commission de l'énergie de l'Ontario**

**DECISION AND PROCEDURAL ORDER
NO. 3**

EB-2015-0073

GUELPH HYDRO ELECTRIC SYSTEMS INC.

Guelph Hydro

BEFORE: Ken Quesnelle
Presiding Member

November 6, 2015

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1. INTRODUCTION AND SUMMARY

Guelph Hydro Electric Systems Inc. (Guelph Hydro) is the electricity distributor that serves approximately 53,000 customers in the City of Guelph and the Village of Rockwood. Guelph Hydro filed an application with the Ontario Energy Board (OEB) to change the rates it charges to its customers for electricity distribution, to be effective January 1, 2016 (the application). Under the OEB Act, distributors must apply to the OEB to change the rates that they charge customers.

In order to determine the amount Guelph Hydro can charge its customers for electricity service, the OEB must first determine how much total revenue Guelph Hydro should be allowed to recover from its customers. This amount is known as the revenue requirement. Rates are then determined to recover that revenue requirement using forecasts of the number of customers and the energy usage of customers. The OEB considers among other factors, the distributor's expected operating and maintenance costs and the investments the distributor expects to make which are necessary to provide reliable, and cost-effective service. It is the OEB's responsibility to approve specific rates a utility is able to charge its customers.

The OEB's process for this application included an opportunity for parties participating in the proceeding to come to an agreement on a pre-defined set of issues. The parties were able to agree on all issues in the application.

In late September, Guelph Hydro filed a settlement proposal with the OEB reflecting the agreement it has reached with parties. In late October, Guelph Hydro filed a revised settlement proposal to update for the cost of capital parameters for rate applications effective January 1, 2016 issued on October 15, 2015. The OEB is prepared to accept the proposed settlement with one modification.

2. THE PROCESS

The OEB published a Notice of Application (the Notice) in the newspaper having the highest circulation in Guelph Hydro's service territory, and served to the appropriate individuals. The Notice indicated that anyone interested in participating in the proceeding should apply for intervenor status.

A procedural order was then issued accepting the parties who applied for intervenor status and further outlining the next steps in the proceeding.

In reaching its findings, the OEB was aided by the participation of three parties who each represent different groups of customers affected by the application: Energy Probe Research Foundation, the School Energy Coalition, and the Vulnerable Energy Consumers Coalition. OEB staff also participated in the proceeding.

The OEB provided parties and OEB staff the opportunity to ask Guelph Hydro questions about its evidence in writing through interrogatories, and in person at a technical conference. A settlement conference took place on August 31 and September 1, 2015. Guelph Hydro filed the resulting settlement proposal on September 24, 2015.

OEB staff filed its submission on the settlement proposal on October 1, 2015. OEB staff made a supplementary submission on October 27, 2015 with respect to the use of the term "privilege" instead of "confidentiality" in the settlement proposal. Subsequently on October 28, 2015, the OEB issued Procedural Order No. 2, which requested submissions from the parties on the settlement proposal's use of the word "privilege" instead of "confidentiality". The Procedural Order observed that the *Practice Direction on Settlement Conferences* refers to confidentiality, and sought submissions on the appropriateness of using "privilege" instead.

3. DECISION ON THE ISSUES

This Decision and Order determines Guelph Hydro's rates for 2016.

3.1. Settlement Proposal

The parties in the proceeding met on August 31 and September 1, 2015 to determine whether they could agree on the revenue requirement and the rates for Guelph Hydro for 2016. The parties to the settlement proposal were able to settle all issues.

OEB staff filed a submission indicating its overall support of the settlement proposal. OEB staff indicated that it reviewed the settlement proposal in the context of the objectives of the *Renewed Regulatory Framework for Electricity (RRFE)*, other applicable OEB policies, relevant OEB decisions, and the OEB's statutory obligations. The RRFE is a rate setting option developed for distributors in the *Report of the Board - Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*. OEB staff submitted that the outcomes arising from the OEB's approval of the settlement proposal would adequately reflect the public interest and would result in just and reasonable rates for customers. OEB staff supplemented its submission, observing that the *Practice Direction on Settlement Conferences* refers to confidentiality, and the settlement proposal refers to privilege. Procedural Order No. 2 sought submissions on this issue.

Findings

The OEB accepts the cost consequences of the settlement agreement and OEB staff's analysis in support of its submission that the settlement proposal reflects the public interest. The OEB has reviewed the submissions of the parties on the issue outlined in Procedural Order No. 2, and the balance of the settlement proposal itself. The OEB is prepared to accept the settlement proposal except for one issue.

The settlement proposal includes the following paragraph:

These settlement proceedings are subject to the rules relating to privilege contained in the Guidelines. The Parties understand this to mean that the documents and other information provided, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the settlement conference are strictly privileged and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception, the need to resolve a subsequent dispute over the interpretation of any provision of this Settlement Proposal.

The OEB has also reviewed the filed settlement proposal in the Kingston Hydro case (EB-2015-0083), where the same issue is addressed. Although the Kingston Hydro case involves many of the same intervenors, it appears that there has been an evolution in the proposed framing of this issue, as the proposal is worded differently:

The Parties acknowledge that this settlement proceeding is confidential in accordance with the Board's Practice Direction on Settlement Conferences (the "Practice Direction"). The Parties understand that confidentiality in that context does not have the same meaning as confidentiality in the Board's Practice Direction on Confidential Filings, and the rules of that latter document do not apply. Instead, in this settlement conference, and in this Agreement, the Parties have interpreted "confidential" to mean that the documents and other information provided during the course of the settlement proceeding, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the settlement conference are strictly privileged and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception, the need to resolve a subsequent dispute over the interpretation of any provision of this Settlement Proposal. Further, the Parties shall not disclose those documents or other information to persons who were not attendees at the settlement conference. However, the Parties agree that "attendees" is deemed to include, in this context, persons who were not physically in attendance at the settlement conference but were a) any persons or entities that the Parties engage to assist them with the settlement conference, b) any persons or entities from whom they seek instructions with respect to the negotiations, and c) any persons or entities to whom they are expected to report the results of the negotiations, and/or the reasons for the positions they have taken; in each case provided that any such persons or entities have agreed to be bound by the same confidentiality provisions.

The OEB is not satisfied with the wording proposed by the parties for the Guelph Hydro settlement proposal. The *Practice Direction on Settlement Conferences* (Practice Direction) and the *Rules of Practice and Procedure* refer to confidentiality, not privilege, and confidentiality has a broader meaning than privilege. The OEB is not prepared to accept a settlement that does not follow the Practice Direction without having a fuller understanding of all the potential ramifications of this significant change.

The OEB believes that the wording used in the Kingston Hydro settlement proposal is preferable, though still not ideal. The Kingston Hydro proposal is clear that the

settlement discussions are confidential, and cannot be disclosed except under three circumstances: a) any persons or entities that the Parties engage to assist them with the settlement conference, b) any persons or entities from whom they seek instructions with respect to the negotiations, and c) any persons or entities to whom they are expected to report the results of the negotiations, and/or the reasons for the positions they have taken; in each case provided that any such persons or entities have agreed to be bound by the same confidentiality provisions.

The OEB can accept the first two exceptions with the proposed blanket proviso that any such persons or entities have agreed to be bound by the same confidentiality provisions. However, the OEB is not satisfied that the third exception (c) – persons to whom parties are expected to report the results of the negotiations and the reasons for positions taken – is appropriate. The OEB finds this exception to be overly broad. Parties are free to discuss settlement discussions with their direct instructing client (this is covered by exemption (b)); however, the OEB does not see a strong reason to allow for a broader disclosure of settlement discussions. In order to be effective, it is important that parties to settlement discussions have confidence that their discussions will not be widely disclosed.

The OEB recognizes that the settlement proposal has been filed as a complete package. As the proposal states: “If the Board does not accept this Settlement Proposal in its entirety, then there is no settlement (unless the Parties agree in writing that any part(s) of this Settlement Proposal that the Board does accept may continue as a valid settlement without inclusion of any part(s) that the Board does not accept).” Since the OEB cannot accept the provisions of the agreement relating to privilege as written, it must reject the entire proposal. However, the OEB encourages the parties to consider whether they can agree to wording similar to that used in the Kingston Hydro proposal, subject to the OEB’s comments on the exemptions above. The OEB has no other concerns with the settlement proposal.

The OEB has reviewed the information provided in support of the draft Rate Order and proposed Tariff of Rates and Charges, and is satisfied that the Tariff of Rates and Charges filed by Guelph Hydro accurately reflect the settlement proposal. The OEB’s tentative acceptance of this proposal does not encompass any matters that were not explicitly considered in this process. Any matters raised in OEB staff’s submission that are subsequently dealt with by the OEB in separate processes are subject to the findings of the OEB at that time.

4. ORDER

THE BOARD ORDERS THAT:

1. If the parties are able to agree to changes to the settlement proposal outlined in the Decision, they shall re-file the proposal by November 13, 2015. If the parties are unable to reach an agreement, the OEB will take steps to schedule a written hearing in this matter.

All filings to the Board must quote the file number, EB-2015-0073, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Georgette Vlahos at georgette.vlahos@ontarioenergyboard.ca and Board Counsel, Ljuba Djurdjevic at ljuba.djurdjevic@ontarioenergyboard.ca.

DATED at Toronto November 6, 2015

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary