

May 29, 2024

Nancy Marconi, Registrar  
Ontario Energy Board  
2300 Yonge St., 27<sup>th</sup> Floor  
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: THESL EB-2023-0195 – Reply Expert Evidence**

We are writing in response to your letter on May 27, 2024 regarding THESL’s reply expert evidence. We address below its delivery of brief reply reports from experts ScottMadden Management Consultants and Clearspring Energy Advisors on May 24 and 27 respectively.

**The Reply Reports**

The main reports from ScottMadden (reports in respect of THESL’s proposed rate framework and a related jurisdictional scan) and Clearspring (an econometric cost and reliability benchmarking report in support of the proposed stretch factor in the rate framework) were filed as part of THESL’s initial application evidence in November 2023.

Recently, OEB Staff’s expert, Pacific Economics Group, delivered two lengthy responding reports: (i) a 97 page report entitled “*CIR 2.0 for Toronto Hydro-Electric System Limited*” on May 2, 2024, in response to the ScottMadden reports; and (ii) an 83 page report entitled “*Statistical Cost Research for THESL’s New CIR Plan*” on May 6, 2024, in response to the Clearspring report. PEG then provided accompanying interrogatory responses on its two reports on May 17 and 23 respectively.

In its reports and interrogatory responses, PEG has raised new issues and provided new analyses and studies which ScottMadden and Clearspring did not previously have an opportunity to address. Accordingly, ScottMadden has now provided a 3 ½ page reply report, to provide “reply comments in response to PEG’s new issues and concerns”, and Clearspring has provided a 10 page reply report to “respond to PEG’s new analyses/studies and the issues it has raised.”<sup>1</sup> These reply reports were prepared and provided to the parties as quickly as possible (within days after the delivery of PEG’s interrogatory responses) so the parties and OEB would have them far in advance of any hearing on this application, and also in connection with the settlement conference that is occurring this week.

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<sup>1</sup> ScottMadden *Reply to PEG Framework Report* dated May 24, 2024, p. 1; Clearspring *Responses to PEG’s New Analyses and Studies (in reply to PEG’s May 6, 2024 report)* dated May 27, 2024.

### **Rule 13 of the OEB's Rules**

The May 27 letter refers to the OEB's recently amended rule 13, including rule 13.02. THESL respectfully submits that this rule does not require (and should not be interpreted as requiring) an applicant to obtain leave to file expert evidence in support of its application, including any proper reply evidence from its experts.

Rule 13.02, which was created and adopted as part of the OEB's *Action Plan on the Framework for Review of Intervenor Processes*<sup>2</sup>, states that: "A party shall not file written evidence without leave of the OEB. This requirement does not apply to: (i) evidence filed in an application" or "(iii) amendments or corrections to evidence already on the record" (emphasis added). As such, applicants are exempted from the requirement to seek leave to file their expert or other written evidence in support of their rate applications.

THESL was therefore not required to obtain leave to file the expert reports it relies on as part of its application (along with its other written evidence), including the above initial reports of ScottMadden and Clearspring. The brief reply reports of ScottMadden and Clearspring are also part of their evidence, and are being delivered in support of and as part of THESL's application evidence. In the circumstances, rule 13.02 should not be interpreted to now require leave to be obtained to deliver this application evidence. The PEG reports comment on THESL's application evidence and raise issues and points in respect of it, and these reply reports are in direct response to these issues and points raised by PEG.

Further and importantly, the rules of procedural fairness give THESL (and other applicants) the right to deliver proper reply evidence in response to evidence filed by OEB Staff or other parties. And even if leave were needed, the requirements for obtaining it under rule 13.03 are met here in any event. We briefly address these points below.

### **The Rules of Procedural Fairness and OEB Rules Entitle the Filing of this Evidence**

As applicant, THESL's right to deliver proper reply evidence (including expert reply) is a fundamental element of the duty of procedural fairness. And it will put the parties' respective experts on a fair and equal footing, and facilitate the just and effective adjudication of the application on its merits, consistent with the OEB's *Rules*.

At the heart of the rules of procedural fairness is the right of an applicant – THESL, whose interests are directly at issue and impacted by the application – to know an opposing party's case and evidence against it and be given a fair opportunity to respond to it. This includes the right to deliver any necessary and proper reply evidence.<sup>3</sup>

OEB Staff has delivered two responding expert reports of PEG. In preparing its reports, PEG had an opportunity to fully consider the reports of ScottMadden and Clearspring delivered many months ago and respond to them. In doing so, PEG raised in its reports some new issues and presented for the first time new analyses and studies which ScottMadden and Clearspring

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<sup>2</sup> OEB's March 6, 2024 notice to the industry re: "Adoption of Amendments to Rules 13 and 13A of the Rules of Practice and Procedure".

<sup>3</sup> See for example, Robert W. Macaulay, James L.H. Sprague and Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto Carswell, 2004, loose-leaf updated 2021, release 9), WP: 303, Natural Justice; and the case law cited there.

(and THESL) did not previously have a chance to consider or address. This evidence from PEG is part of OEB's staff's case/evidence which THESL must meet. THESL is thus entitled, as a matter of basic fairness, to now respond. That is what these reply reports from ScottMadden and Clearspring do. They provide these experts' responses to the new issues/analyses/studies PEG presented in its reports. It would be fundamentally unfair to THESL to prevent the filing of their brief reply reports.

Further, these reply reports will help facilitate a just and efficient determination of this application on its merits, and will help enable the OEB to effectively and completely adjudicate the application, consistent with rules 2.01 and 2.02. These reports give OEB Staff, the intervenors (and also PEG) advance disclosure of ScottMadden's and Clearspring's responses to the new points raised by PEG. This will assist parties in preparing for cross-examination at the hearing, and provide the OEB with written evidence that will assist in adjudicating the issues to which these expert reports are directed. Also, experts are required to disclose intended testimony by way of written reports, a requirement these reply reports fulfil.

The filing of these reports will not impact the timelines of this application, since they have already been provided to the parties well in advance of any hearing. The parties will have ample time to prepare any cross-examination on them, and if the OEB is inclined to permit interrogatories to be asked on these reply reports (in the event any parties wish to do so), THESL would have no objection to this (provided the interrogatories are limited to proper questions on the reply reports).

For the reasons already noted above, the requirements of rule 13.03 would be met in the event leave to file these reports were required under that rule. The evidence is relevant and material, as it directly responds to PEG's reports and is in support of the rate framework parameters put forward by THESL in the application. Fairness and efficiency considerations – to which the rule refers – support the filing of the reports, and the application timelines will not be negatively affected.

Finally, we note that similar reply expert reports from Clearspring and its principal's prior firm have been filed by applicants in response to PEG reports in a number of other rate applications in recent years, including THESL's last major rate application (EB-2018-0165) and in EB-2019-0082 and EB-2021-0110.

THESL, therefore, should be permitted to proceed with the filing of these reply reports, which have already been served on the parties and were submitted on RESS. If any additional information or submissions are required from THESL on this, we ask that you please advise.

Yours truly,



Arlen K. Sternberg

AKS/tp

c: C. Keizer; D. Coban; All Parties