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ONTARIO ENERGY B

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File No.: 97294

January 16, 2013

Delivered 16/1/13

Ms. Kirsten Walli
Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street (27TH Floor)
P.O. Box 2319
Toronto, ON
M4P 1E4

Dear Ms. Walli,

Re: EB-2012-0064

Enclosed please find the following:

1. Two copies of letter to Kirsten Walli dated January 15, 2013, with e-filing receipt no. 19323.

Yours truly,

Gardiner Roberts LLP

Ian A. Blue per Ian

Ian A. Blue

TORONTO: 360633\1 (97294)

OEB BOARD SECRETARY	
File: EB-2012-0064	Sub File: 16
Panel	K.Q./C.S./M.H.
Licensing	
Other	Martin D.
	Michael M.
00/04	

ONTARIO ENERGY BOARD

EB-2012-0064

Toronto Hydro-Electric System Limited

Written Submissions on Behalf of the City of Toronto

January 15, 2013

INTRODUCTION AND SUMMARY

These are the Submissions on behalf of the City of Toronto (City) in support of the City's request for an interim order, under s. 21(7) of the Act, making Toronto Hydro-Electric System Limited's (THESL) existing rates for Street Lighting service approved in EB-2010-0142, and any subsequent IRM adjustments thereto, interim from May 10, 2012 until the Board establishes new rates for Street Lighting service as a result of the consultation process recommended in File No. EB-2010-0219 and initiated in File No. EB-2012-0383.

In these Submissions the City will demonstrate that the Board should make the requested order because:

- Fairness, justness and reasonableness require it;
- The City has been clear and consistent in expressing its concern about THESL's rates for Street Lighting Service to the Board;
- The Board has all the legal authority it requires in order to make the requested order;
- The requested order would not be unfair to other THESL customers;
- The requested order would have minimal effect on other THESL customers;
- The requested order would cause no practical problem for THESL; and,
- The requested order would avoid unduly penalizing customers of the Street Lighting Class of which the City is the largest.

PROCESS RESPECTING THE CITY'S REQUEST FOR AN INTERIM ORDER

On May 10, 2012 the City filed an Application for interim rates for Street-Lighting service and the Board designated it File No. EB-2012-0250 (**Ex.-K4.5**). On July 9, 2012, at the Board's suggestion, the City requested that the Board combine its EB-2012-0250 Application with THESL's Application in File No. EB-2012-0064 for hearing and decision. In its issues List Decision of August 16, 2012, the Board so directed. It said that while it would not add an issue to the issues list respecting interim rates, that to the extent parties wished to file argument concerning interim rate orders at the end of the case they might do so under the Implementation Issue. The Board stressed that cost-allocation and rate design would not be issues in this proceeding.

SUBMISSIONS

The City requests that the Board make THESL's rates for the Street Lighting class interim as requested above, for the following reasons:

Fair, Just and Reasonable

First, the Board, Board Staff, THESL, the City and other utilities all accept that the cost-allocation for the Street Lighting class requires adjustment and has done so since 2010. That being so, the City submits that rates for Street Lighting service would not be just or reasonable if the City should have to continue paying rates for Street Lighting service whose underlying cost-allocation is acknowledged to require adjustment, with no ability to be compensated at some future time. This would be comparable to regulatory expropriation without compensation which is impermissible absent clear statutory language authorizing it.

There is ample evidence supporting the widely held view that the current cost-allocation is inappropriate. The Board's Report of March 2011, in File No. EB-2010-0219, discussed the subject of consultation about rates for Street Lighting Service. On p. i, the focus of this consultation was said to be to determine the need for and nature of any update and refinement to the elements of the Board's electricity distribution cost-allocation policy on:

> ... unmetered loads (i.e., unmetered scattered loads, *street lighting* and sentinel lighting) (**emphasis added**)

At page iii, the March 2011 Report said:

> There is a need to clarify some aspect of the terminology surrounding the USL and Street Lighting classes (e.g., definition of a customer, an account, a device) and the associated modelling methodology. This matter will be addressed as part of a separate consultation process that will be initiated by the Board.

At page 24, under the heading: Weighting factors for USL and Street Lighting classes, the Board said:

> The Board also agrees that clarification of the issues raised by various stakeholders related to the terminology and methodology used to allocate costs to the Street Lighting class is necessary. The Board believes that these issues are best addressed in the context of a separate consultation process focussed on the terminology and modelling methodology for the Street Lighting and USL classes.
>
> Once that consultation process is completed, the underlying methodology and principles for allocating costs to the Street Lighting and USL classes will be identified and embedded in a separate worksheet in the CA Model. This worksheet will provide examples for how to derive weighting factors and will contain illustrative weighting factors.

On October 1, 2012 the Board initiated File No. EB-2012-0383 which it described as a review of cost-allocation policy for unmetered loads which encompass Street Lighting, Unmetered Scattered Loads, and Sentinel Lighting classes. It said that this initiative followed directly from the Report of the Board in File No. EB-2010-0219, Review of Electricity Distribution Cost-allocation Policy, issued March 31, 2011.

Also, on November 11, 2011 in File No. EB-2011-0144, Mr. McLorg of THESL agreed that THESL had much earlier agreed that the current cost-allocation methodology for street lighting rates is not the best one (**Tr. pp.68-69**) On November 23, 2012 in this proceeding, Mr. Seal confirmed that THESL still has concerns about the appropriateness of the cost-allocation for the Street Lighting Class (**Tr. p.139, l.29-p.139, l.8 and p. 140, ll1-8**).

There is, simply, no contrary evidence in this hearing.

City Clear and Consistent in Expressing Its Concern

Second, the City submits that it has been consistent and clear in bringing its concern that rates for the Street Lighting class require adjustment before the Board. By letter dated December 1, 2010 in EB-2010-0142, the City requested that the Board proceed with the consultation process and adjustment to the cost-allocation applicable to rates for Street Lighting service referred to in EB-2010-.0219. In that letter, the City also expressed its concern about the five-fold increase in its street lighting costs it had experienced between 2003 and 2007 (**Ex. K2.4 in EB-2011-0144**). On September 26, 2011, in EB-2011-0144, the City intervened and stated that it was concerned about the rates for THESL's Street Lighting Service. On October 14, 2011, also in EB-2011-0144, the City, through counsel, delivered interrogatories directed mainly at the issue of THESL's rates for Street Lighting service and the City's street lighting costs. On October 25, 2011, again in EB-2011-0144, the City, through counsel, stated that its goal in participating in the hearing was to have a regulatory platform sufficiently flexible to allow the City a full and fair exploration of the street lighting rate issue. On October 31, in EB-2011-0144, the City, through counsel, stated that it was the City's position that THESL's rates for street lighting *are excessively high*. This was demonstrated in **Ex. K2.6,** the City's comparison of its rates for street lighting with those of other LDCs. In addition, the City took the steps described above under the heading Process Respecting the City's Request for an Interim Order.

The Board Has the Legal Authority

Third, the City next submits that the Board has full legal authority to declare THESL's rates for Street Lighting service interim back to the date of the filing of the application for an order for interim rates at the request of an intervenor like the City. Section 21(7) of the Ontario Energy Board Act, 1998 allows the Board to make interim orders pending the final disposition of a matter before it. THESL's 2010 rates for Street Lighting service set in EB-2010-0042 to be adjusted annually by the Board's IRM methodology until THESL's next rate re-basing hearing in 2015 are a matter before the Board. On December 13, 2012, Mr. Seal of THESL agreed that the cost-allocation for the Street Lighting class used in 2011 (which are 2010 rates) would be perpetuated in 2012, 2013 and 2014 (**Tr. p.95, l.4-p.96, l.1**; **see also**: **Ex. K4.4**).The City submits that the EB-2012-0389 proceeding is also a matter before the Board within section 21(7).

The Board has also recognized that it has the authority to make such interim order effective from the date of the application for it. In the Board's Decision on Motion to Review in File No. EB-2008-0016, it held that the adjustment of interim rates could be made retroactive to the date of the application.

> Board staff submits that the Board cannot designate rates to be interim prior to the date of the decision making the rates interim. Specifically, as the Board's decision making the applicant's rates interim was issued on December 20, 2007, the earliest possible date that the Board could have chosen was December 21, 2007. The applicant argues that the Board is not so constrained. The applicant contends that the Board can make rates interim at any point after the date upon which the application is made. Specifically, as the application was filed on August 31, 2007, the Board can decide to make rates interim at any time after that date, regardless of when that decision is made.
>
> The review panel agrees with the applicant, with one proviso. The request for interim rates must be made at the time of application. In this case, the application itself, which was filed on August 31, 2007, contained the applicant's request that rates be made interim from September 1, 2007. In the reviewing panel's view, this provides notice of the applicant's request, and the reviewing panel can decide to make rates interim from that date forward, and the reviewing panel does so.

The City submits that the Board's decision in EB-2008- 0016 is undoubtedly correct because it is consistent with the Supreme Court of Canada's decision in *Bell Canada v. Canada (CRTC), [1989] 1 S.C.R. 1722* where the Court said:

> ...The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

> ...Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion.

Requested Order Would Not Be Unfair

Fourth, if the Board declares THESL's rates for Street Lighting service interim from May 10, 2012 and it subsequently proved that the City had been overpaying, recovery of the overpayment from other customers would not be unfair in any way. Statements made at the Technical Conference form part of the Board's record **(Tr. December 13, 2012 p. 91, l. 3-p.92, l. 21)**. At the Technical conference Mr McLorg said there was nothing unfair about an interim rate order as long as the increase in rates resulting would be collected prospectively **(Tr. p. 137, ll.9-24)**. He explained that while repayment of the overpayment would affect other customers, they would have enjoyed the benefit of underpaying to that point. He also agreed that the effect of a repayment would not be very noticeable to other customers. **(Tr. p. 142, l. 24- p.145, l.12)**

Requested Order Would Have Minimal Effect

Fifth, the effect of recovery of any City's overpayment for Street Lighting services from other customers would be minimal. Mr. Seal testified that revenue from the Street Lighting class for THESL's 2011 year was $11.8 million which was approximately 2.2% of THESL's distribution revenue of $528 million **(Tr. p. 140, ll. 9-15)** and Mr. McLorg also agreed that the effect of a repayment would not be very noticeable to other customers. **(Tr. p. 142, l. 24- p.145, l.12)**

Requested Order Would Cause No Practical Problem

Sixth, the need for THESL to repay an overpayment to the Street Lighting class and recover it from other customers would not cause THESL any material practical problem. Mr McLorg said that the only practical problem the City's requested interim order would cause would be that THESL would have to review its customer billing records of its street lighting customers to establish the overpayment or underpayment but that THESL's Staff could do so **(Tr. p. 142, l. 24- p.145, l.12)**. The City submits that the Board may take administrative notice that the number of customers in THESL's Street Lighting class is only one, the City. Mr Seal agreed that if the Board were to direct THESL to retrospectively adjust rates to the Street Lighting class, THESL

could recover that overpayment prospectively and smooth any spikes that might be caused **(Tr. p.101, l. 27-p.102, l. 21)**.

Requested Order Would Avoid Unduly Penalizing Customers

Seventh, the City submits again that until the Board completes the process which the Board itself recommended in File No. EB-2010-0219 and has initiated in File No. EB-2012-0383, it is only just and reasonable that THESL's rates for street lighting service, viz., the EB-200-0042 rates and subsequent IRM adjustments thereto be declared interim from May 10, 2012 until the cost-allocation model for street lighting is corrected and the Board approves new THESL rates for Street Lighting service. Interim rates would ensure that the City would not be penalized if it proves that it has been overpaying and cross subsidizing other customers. While small in terms of THESL's total distribution revenues, $11.8 million in 2011 (**tr. p. 140, ll. 9-15)** escalated in each subsequent year by IRM adjustments until 2015 will represent over $60 million. If the City is overpaying by even 20%, that represents an overpayment-penalty of at least $12 million. The City submits that if the Board declines to make the order, City taxpayers will be so overcharged to the benefit of other customer groups. This would be contrary to everything the Board has always stood for.

THE CITY'S REQUEST

For the above reasons, the City once more respectfully requests that THESL's existing rates for Street Lighting service approved in EB-2010-0142 and any subsequent IRM adjustments thereto prior thereto be made interim until completion of that consultation process recommended in File No. EB-2010-0219 and initiated in File No. EB-2012-0383 and until the Board approves new THESL's rates for Street Lighting service based upon the resulting new cost-allocation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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