

May 30, 2013

BY COURIER (2 COPIES) AND EMAIL

Ms. Kirsten Walli

Board Secretary

Ontario Energy Board

P.O. Box 2319

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Email: boardsec@ontarioenergyboard.ca

Dear Ms. Walli:

**Re: Environmental Defence's Reply to Toronto Hydro's Cost Claim Submissions
EB-2012-0064 – Toronto Hydro-Electric System Ltd ("Toronto Hydro")
2012-2014 Rates**

I am writing to reply to Toronto Hydro's objections to Environmental Defence's cost claim in this matter. We submit that Environmental Defence should be awarded its full costs as it acted responsibly, avoided duplication, and contributed to the Board's understanding of the issues while incurring the lowest costs of all intervenors whose claims are available on the Board website.

Environmental Defence contributed to the Board's understanding of the issues by raising a new and important issue. Ultimately, all but one of the ratepayer intervenors supported Environmental Defence's position on this issue and the Board devoted over 10 pages to it in its decision. Although the Board did not accept or rely on the evidence of the one expert retained by Environmental Defence, this was only one aspect of Environmental Defence's overall case. Furthermore, this expert's evidence was supported and relied on by other intervenors. Overall, through its cross-examinations, argument, and otherwise, we submit that Environmental Defence played a significant and useful role by raising an important issue and in testing Toronto Hydro's justification for the Bremner Station.

We respectfully request that the Board firmly reject Toronto Hydro's request that costs be awarded *against* Environmental Defence. Toronto Hydro's request is based on completely unfounded allegations such as that "the purpose of the intervention was not to be of assistance to the Board but rather to create a platform for public advocacy by Mr. Gibbons" and that Environmental Defence decided to "flout the Board's usual procedures" when it "utterly refused" to provide a certain document.¹ As discussed in detail below, these and other serious allegations of impropriety made by Toronto Hydro are simply untrue. We submit that its aggressive and

¹ Toronto Hydro Cost Submissions, pp. 9 & 10.

unfounded request for costs *against* Environmental Defence should be firmly rejected by the Board to avoid a chilling effect on public interest intervenors.

Procedural Background to Bifurcated Process

As a preliminary matter, we submit that Toronto Hydro's letter does not accurately or completely reflect the procedural background to this case. For example, Toronto Hydro states that this proceeding was bifurcated as a "direct result of the involvement of Environmental Defence in this case."² On the contrary, as discussed below, the proceedings were bifurcated to meet the time constraints caused by Toronto Hydro's delay in filing its application and update.

The Board referred to these time constraints in *Procedural Order 3*, and stated as follows:

On October 22, 2012, THESL sent a further letter to the Board which advised that it intended to file its evidentiary update by October 31, 2012.

THESL stated that in order to provide ratepayers with clarity as to 2012 rates and to address critically needed capital work on its distribution system, it believed that the present application must be heard as expeditiously as possible and in 2012.

....the Board will adopt a schedule for the remainder of this proceeding similar to that which has been proposed by THESL with one modification: **In order to expedite matters, the Board has determined that the Bremner Station project will be considered as part of a separate process...**(emphasis added)³

The proceeding was bifurcated not because Environmental Defence was requesting special indulgences, but because Toronto Hydro had filed its application at such a late date that the proceeding had to be *expedited* to "address critically needed capital work." The timeline Toronto Hydro was seeking was extremely tight and could not accommodate intervenor evidence. We submit that Toronto Hydro was acting irresponsibly by filing its application and update at such a late date as to require an expedited process and to preclude normal procedural steps, such as intervenor evidence.

Toronto Hydro's drive to expedite this process showed disrespect for the role of the Board as regulator and the role of intervenors. If Toronto Hydro's concerns about "critically needed capital work" were well founded, it left the Board with no other option but to approve the application. The Board could not, for example, decide that Toronto Hydro must revise its plans in any way that might take a significant amount of time because doing so would put in jeopardy the "critically needed capital work" and thus threaten blackouts. Toronto Hydro was in essence telling the Board that it *must* approve the application in an *expedited* fashion or put customers at risk. This urgency was the result of Toronto Hydro's actions.

² Toronto Hydro Cost Submissions, p. 2.

³ *Procedural Order #3*, pp. 2-3.

Toronto Hydro asserts that Environmental Defence delayed the hearing due to the schedules of Mr. Elson and Mr. Bach. However, there is nothing to suggest that the hearing was in fact delayed because of these scheduling constraints. Counsel for Environmental Defence spoke with board staff in January to confirm that it was unlikely that the Board would have been able to accommodate such an early hearing as requested by Toronto Hydro and therefore Mr. Bach's scheduling constraint would likely have little or no impact. The hearing was scheduled within a normal timeframe.

Environmental Defence did not seek special indulgences as Toronto Hydro alleges. Instead, to the contrary, Toronto Hydro sought an indulgence by way of an *expedited* hearing, and it was this need that led to the bifurcated process in this proceeding and to the urgent and abridged timelines requested by Toronto Hydro.

Costs should be Awarded for Mr. Bach's Evidence

We submit that it was reasonable for Environmental Defence to believe that Mr. Bach's evidence would be of assistance to the Board. The evidence was relevant, dealt with significant and legitimate issues, was intended to play a role in Environmental Defence's overall case, and was produced in good faith. Although an error was made in the terms of reference provided to Mr. Bach, referring to 18 MW instead of 58 MW, in our submission this did not undermine the thrust of Mr. Bach's evidence that there was significant conservation and demand management ("CDM") potential not accounted for by Toronto Hydro. Although the Board ultimately did not accept Environmental Defence's evidence, the fact that all but one of the ratepayer intervenors supported Environmental Defence's position, and other intervenors expressly relied on Mr. Bach's evidence, suggests that it was reasonable for Environmental Defence to submit this evidence and that it had sufficient merit to warrant a cost award.

Error in Terms of Reference did not Undermine Mr. Bach's Evidence

Mr. Bach's evidence had merit and played a role in Environmental Defence's overall case, despite the error in the terms of reference. The main thrust of Mr. Bach's evidence was that there is significant CDM potential in the downtown Toronto area that Toronto Hydro had not accounted for. Mr. Bach listed 19 activities that would lead to declining demand, and summarized the impact of those activities as follows:

The nineteen activities described in this document each on their own have only a limited impact, but the total effect on electricity consumption and summer peak demand is large and growing significantly. Historical measures of peak demand growth are not truly representative of what is currently occurring in downtown Toronto. Toronto Hydro has a tremendous opportunity to build on these initiatives to avoid or delay investments in the distribution system. Like Con Ed, it can enhance these initiatives in specific areas such as downtown Toronto to maintain reliability at a lower cost.

On cross-examination, Toronto Hydro was asked whether these activities were accounted for in Toronto Hydro's load forecast, to which Mr. Simpson responded as follows: "No. As mentioned

earlier, only the projections up to 2014 from presently-funded programs are incorporated. And so some of these aspects, in Mr. Bach's report, are not in the forecast."⁴ Therefore, Mr. Bach's evidence contributed to Environmental Defence's case, among other ways, by outlining a number of important demand reduction initiatives that Toronto Hydro had not included in its analysis.

It was never intended that Mr. Bach's evidence would, on its own, establish the entirety of Environmental Defence's case. Instead, his evidence was intended to show that there was significant CDM potential that could be part of an alternative to the project. The cross-examination of Toronto Hydro's witnesses was intended to show that this CDM potential was never adequately assessed as an alternative. This part of Environmental Defence's case was at least partially successfully presented to the Board, as the above cross-examination excerpt shows. The overall purpose was to establish that Toronto Hydro had not undertaken the assessment necessary to justify its case. In our submission, Mr. Bach's evidence had merit and contributed to Environmental Defence's overall case despite the error in the terms of reference.

Environmental Defence's Evidence was Supported by Other Intervenors

Environmental Defence's position was supported by all but one of the ratepayer intervenors in this proceeding and some intervenors expressly relied on Mr. Bach's evidence, suggesting that his evidence had significant merit.

Environmental Defence was the first intervenor to raise the issue of whether the Bremner Station should be approved. After reviewing the evidence of Toronto Hydro and Environmental Defence, all of the ratepayer intervenors ultimately agreed that the application should not be approved, with the single exception of AMPCO, which nonetheless acknowledged that "some contribution of CDM and distributed generation might defer the need for a new station."⁵ The ratepayer intervenors that expressly supported Environmental Defence's position were the SEC,⁶ BOMA,⁷ VECC,⁸ and the CCC.⁹ Schedule A to these submissions contains relevant excerpts of their submissions in this regard.

Support for Environmental Defence's position came from intervenors representing many of the customers in downtown Toronto who would be impacted by the Bremner Project. They would not have taken this position had they not been convinced that there was significant potential for CDM and that Toronto Hydro had not adequately considered this as an alternative.

Some intervenors specifically relied on Mr. Bach's evidence. For example, the SEC noted Mr. Bach's evidence on the limit on the amount land in Toronto, how that would impact growth in the downtown core, and why future growth therefore cannot keep pace with past growth.¹⁰

⁴ Transcript, Vol. 6, February 19, 2013, p. 173, lns. 11-15.

⁵ Transcript, Vol. 9, March 1, 2013, p. 75 ln. 23 to p. 76 ln. 6.

⁶ Transcript, Vol. 9, March 1, 2013, p. 8 lns. 7 to 25.

⁷ Transcript, Vol. 9, March 1, 2013, p. 49 ln. 19 to p. 50 ln. 11.

⁸ Transcript, Vol. 9, March 1, 2013, p. 75 lns. 4 to 12.

⁹ CCC's Written Submissions, p. 2.

¹⁰ Transcript, Vol. 9, March 1, 2013, p. 9 ln. 23 to p. 11 ln. 2.

BOMA, which represents many of Toronto Hydro's downtown customers, also extensively relied on Mr. Bach's evidence, including in the following passage:

What BOMA would like to see in downtown Toronto for reliability and cost reasons Toronto is analogous to the program cited in **Mr. Bach's evidence** delivered in New York State

...

BOMA urges the Board to pay close attention to Mr. Bach's evidence. Mr. Cass was careful not to attack the quality of Mr. Bach's evidence directly. **Mr. Bach is one of the most knowledgeable analysts of, and practical advisors to, businesses and governments on energy efficiency in buildings in Canada.** He is careful, not given to exaggeration.

BOMA suggests that THESL should use its own experience in the last decade of involvement in CDM, as well as information from organizations like BOMA and REALpac in their load forecasts. The regression analysis approach described above does not recognize the progress made with respect to existing buildings.

Mr. Bach noted in his evidence that it was very likely, given the programs for the reduction of energy and demand, that energy efficiency in existing buildings would offset new load required by new construction.¹¹

We submit that the positions of these intervenors, and the reliance placed on Mr. Bach's evidence, suggests that his evidence was not without merit and that it was reasonable for Environmental Defence to believe that it would be of some assistance to the Board.

Overall, Environmental Defence Contributed to a Better Understanding of the Issues

One factor that the Board *may* consider in awarding costs is whether "the party ... contributed to a better understanding by the Board of one or more of the issues in the process."¹² We submit that costs should be awarded for Mr. Bach's modest fees despite the fact that the Board ultimately did not rely on this specific piece of evidence.

First, this factor (whether a party contributed to the Board's understanding) refers to the overall participation of a party, not each and every aspect of its intervention. We submit, as detailed below, that Environmental Defence's overall participation did contribute to the Board's understanding of the issues.

Second, this is just one factor among a non-exhaustive list of factors the Board *may* consider. Countervailing factors include that the evidence was submitted in good faith, that the cost of Mr. Bach's evidence is very modest, that other intervenors supported the evidence, that the evidence played a role in Environmental Defence's overall case, and that not awarding costs in these circumstances would have a chilling effect on public interest intervenors.

¹¹ BOMA's Factum for Argument, p. 8-9; See also Transcript, Vol. 9, March 1, 2013, p. 62 ln. 7 to p. 63 ln. 2.

¹² *Practice Direction on Cost Awards*, s. 5.01 (f).

Third, the cost rules should be interpreted to allow intervenors to be reimbursed for reasonable and modest costs, even in cases where the Board has not accepted the party's evidence, as long as the party acted reasonably in submitting the evidence. The fact that other intervenors supported this evidence suggests that it was reasonable for Environmental Defence to believe it would be of assistance to the board.

Conclusion re Mr. Bach's Evidence

Environmental Defence retained Mr. Bach, in good faith, to show that there was significant conservation potential in downtown Toronto. It intended that this evidence would play a role in its overall case regarding Toronto Hydro's assessment of alternatives to the Bremner Station. Environmental Defence's position and evidence received significant support from intervenors. Despite the outcome, we submit that it was reasonable to believe that the evidence would assist the Board. We therefore request that costs be awarded for Mr. Bach's very modest fees.

Purpose of Intervention was not to Create a Public Platform

Toronto Hydro challenges Environmental Defence's entire cost claim in part based on the assertion that "the purpose of the intervention was not to be of assistance to the Board but rather to create a platform for public advocacy by Mr. Gibbons."¹³ This is completely false. There is nothing to indicate that Environmental Defence had any intentions or ulterior motives other than to convince the Board that the Bremner Station should not be approved because of Toronto Hydro's failure to consider conservation and local generation as alternatives. To suggest otherwise is to suggest that Environmental Defence intentionally misled the Board, which is simply untrue.

Environmental Defence acknowledges that Mr. Gibbons spoke to the media about this case. However, of course, none of this time is included in this cost claim. Environmental Defence only seeks costs for fees and expenses directly incurred through this intervention.

Toronto Hydro implies that the evidence prepared for the Board was in fact prepared for some other extraneous purpose, such as public advocacy. Again, this is a bald allegation with no support.

Toronto Hydro's only support for its claims is that Mr. Gibbons spoke publicly about this proceeding. Toronto Hydro paid for a radio interview given by Mr. Gibbons to be transcribed as if this somehow established that Environmental Defence was acting irresponsibly. However, the mere fact that Mr. Gibbons spoke to the media does not mean that the purpose of this intervention was to create a platform for public advocacy. There is nothing irresponsible or untoward about an intervenor or its consultant speaking publicly about important energy policy matters such as this. This is simply an exercise in important democratic values.

¹³ Toronto Hydro Cost Submissions, p. 9.

Furthermore, Toronto Hydro itself often speaks publicly about proceedings before the board. The following are excerpts from a Toronto Star article based on a Toronto Hydro press release and statements from its vice-president:

The Ontario Energy Board has delivered a sharp rebuke to Toronto Hydro's plea for a massive renewal program to prevent more frequent blackouts. ...

But the utility says customers will suffer as a result. "This will likely result in deteriorating service, an increase in power outages, an increased risk to public safety, slower call-centre response times, as well as the likelihood of major workforce downsizing," it warned in a release. ...

And that spells trouble, according to Blair Peberdy, vice-president of Toronto Hydro

"We expect not only power outages, but it will have an impact on over-all service and public safety," he said. "Approximately half the grid is past its useful life, and the remainder will be coming up to that stage over the next decade."

If Toronto Hydro waits until big chunks of the system break down to start rebuilding, he said, it will be too late. **The cuts, he said, could impact programs like the utility's campaign against "contact voltage" - the stray electrical charges that have shocked and even killed dogs on city streets.**

Toronto Hydro officials will be meeting to assess the impacts, Peberdy said. But **he pointed to a 28-hour outage in a Scarborough neighbourhood just before Christmas**, where the wires and transformers are about 50 years old. As crews fixed one problem, wires or equipment a little farther along the line would fail.

A condominium near Yonge St. and Eglinton Ave. was without power for 36 hours early this week, he said: "It was a situation of old equipment that needs to be replaced."

The energy board didn't buy the utility's contention that its system is fraying.

There's no current proof that Toronto Hydro's system is performing unacceptably, it said, noting: "The company's reliability statistics show no marked deterioration."

Meanwhile, it found that Toronto Hydro "has not made significant productivity improvements in comparison to other Ontario distributors." (Distributors are local hydro utilities.)

At the same time, **the board said Toronto Hydro customers' bills "are higher than for any other urban distributor in Ontario with more than 30,000 customers."** (emphasis added)¹⁴

As detailed above, Toronto Hydro not only discussed Board proceedings, but openly criticized the Board's decision, asserting that it would threaten *public safety*. It even raised the prospect of dogs being electrocuted as a result of the Board's decision, presumably to garner public support.

¹⁴ See Schedule B – *Hydro blasted over cash call*, Toronto Star, January 6, 2012

This was one day after the Board expressly rejected these very arguments in its decision. Also, unlike Mr. Gibbons' responsible public comments, Toronto Hydro's were presumably funded with ratepayer and/or taxpayer dollars.

Attached as Schedule A are a number of similar articles in which Toronto Hydro appears to be seeking public or political support on Board-regulated matters. For example, one article details a new "blackout map" on Toronto Hydro's website that Blair Peberdy, vice president of Toronto Hydro, said is meant to "help our customers understand why Toronto Hydro's before the energy board [*sic*]" (i.e. seeking a review of the Board's earlier decision to deny its application).¹⁵ In the following passage from another article, former Toronto Hydro chairman Clare Copeland (who the Bremner Station has now been named after) seemingly blames the Board for Toronto Hydro failing to meet reliability standards: "The energy board [*sic*] is blocking that spending, Copeland argued, and executives can't be faulted for the resulting loss in reliability."¹⁶ Another article specifically relates to EB-2012-0064.¹⁷ These are just some of many articles of this sort.

Toronto Hydro cannot on the one hand conduct a considerable media campaign on Board-regulated issues and on the other hand accuse a public interest intervenor of being irresponsible or acting improperly simply because its consultant participates in media interviews. Contrary to Toronto Hydro's assertions, Mr. Gibbons' media interviews are no reason to deny a cost award.

Environmental Defence Acted Responsibly in this Proceeding

Contrary to Toronto Hydro's assertions, Environmental Defence acted responsibly in this proceeding.

First, Toronto Hydro alleges that "Environmental Defence never filed the evidence that it said it intended to file ('whether the Bremner Station is justified in light of the alternatives of CDM and distributed generation')."¹⁸ Presumably the implication is that Environmental Defence somehow misled the Board in its intervention letter. This is untrue.

Environmental Defence's intervention request letter stated that it "intends to provide expert evidence on whether the Bremner Station is justified in light of the alternatives of CDM and distributed generation." Environmental Defence was merely advising the Board of the subject or topic to be addressed by the evidence. The intervention letter does *not* say that the expert evidence would, on its own, conclusively establish that the Bremner Station was not justified. Environmental Defence intended to make its case also by way of cross-examinations and by testing the applicant's evidence, as stated in its intervention letter and discussed above.

Second, Toronto Hydro has overemphasized a minor error in a statement released by Environmental Defence.¹⁹ The release stated that "Environmental Defence will provide expert evidence that energy efficiency and local energy generation are a cheaper option for consumers"

¹⁵ See Schedule B – *Toronto Hydro issues blackout map*, Toronto Star, January 31, 2012.

¹⁶ See Schedule B – *Hydro execs get fat bonuses as utility misses benchmarks*, Toronto Star, January 27, 2012.

¹⁷ See Schedule B – *Building boom straining Toronto Hydro system*, Toronto Star, April 3, 2012.

¹⁸ Toronto Hydro Cost Submissions, p. 7.

¹⁹ Toronto Hydro Cost Submissions, p. 3.

when in fact Mr. Bach's evidence was limited to addressing the conservation potential in Toronto. This mistake is regrettable, but it was not intentional and is not relevant to the proceeding at hand.

Third, Toronto Hydro asserts that counsel for Environmental Defence refused to comply with an undertaking J7.4.²⁰ This is simply untrue. Environmental Defence provided the requested terms of reference document in its response to the undertaking. Toronto Hydro asserts that Environmental Defence provided "a re-print of the short section of Mr. Bach's evidence that gave rise to the questions about his terms of reference," which, again, is simply untrue.²¹ As expressly indicated in the undertaking response, counsel for Environmental Defence provided "a complete copy of the document containing the terms of reference provided to Mr. Bach."²² The document provided is not a "re-print" of the section in Mr. Bach's evidence. This is clear from the face of the documents as the terms of reference section in Mr. Bach's evidence contains a number of minor subsequent changes from the version provided to him.

Toronto Hydro has made a very serious, unfounded allegation that would constitute a breach of the *Rules of Professional Conduct* (i.e. professional misconduct) on the part of Environmental Defence's counsel for (1) failing to fulfill an undertaking and (2) for misleading a tribunal by submitting a response falsely describing the document in question. Yet, these cost submissions are the first instance that Toronto Hydro has indicated that it was dissatisfied with the response to undertaking J7.4. It did not email counsel for Environmental Defence to ask about the response or to request further information. It did not file a motion with regard to the response. With respect, we submit that it is irresponsible to make such a serious allegation as Toronto Hydro has done here, which again, is completely unfounded.

Fourth, although it is not expressly stated, Toronto Hydro implies that Environmental Defence intentionally delayed the hearing because "the delay allowed Mr. Gibbons an extended opportunity for his public advocacy activities."²³ This is yet another bald (and false) allegation without any foundation. It does not merit a further response.

Finally, Toronto Hydro asserts that Environmental Defence has put "at risk the reliability of service to customers." Again, as discussed above with respect to the procedural background to this complaint, it is Toronto Hydro that acted irresponsibly by filing this application with no time to allow for typical procedures such as the filing of intervenor evidence. The timing of Toronto Hydro's application and update is what caused the need for an expedited hearing and a bifurcated process. If consumers were in fact put at risk, this falls squarely at the feet of the applicant – not Environmental Defence.

In sum, Environmental Defence acted responsibly and should be awarded its full costs.

²⁰ Toronto Hydro Cost Submissions, pp. 4, 9 & 10.

²¹ Toronto Hydro Cost Submissions, p. 4; In footnote 12, Toronto Hydro states that the document is a re-print because "the response begins with the words 'Environmental Defence asked me', which most certainly cannot be the wording of the terms of reference given to Mr. Bach by Environmental Defence." The terms of reference were worded in that way as it was assumed that Mr. Bach would insert the terms of reference in his report.

²² Environmental Defence Response to Undertaking J7.4.

²³ Toronto Hydro Cost Submissions, p. 10.

Environmental Defence Avoided Duplication, Kept its Costs Low, and Contributed to a Better Understanding of the Issues

Other factors in the Board's *Practice Direction on Cost Awards* support an award of costs for Environmental Defence.

Environmental Defence's evidence and intervention was not "unduly repetitive" of the work of other parties.²⁴ Environmental Defence focused its entire intervention on an issue that was not being raised by any other party. It did not participate in other aspects of this hearing that were adequately addressed by others.

Environmental Defence submits that, overall, its intervention "contributed to a better understanding by the Board of one or more of the issues in the process."²⁵ Although the Board did not find Environmental Defence's specific evidence from its one expert to be of assistance, this factor, as set out in the *Practice Direction on Cost Awards*, refers broadly to whether "the party" in question contributed to a better understanding. We submit that, overall, this is clearly the case seeing as the Board devoted over 10 pages in its decision to the issue first raised by Environmental Defence, and all but one of the ratepayer intervenors supported Environmental Defence's position that the Bremner Station should be rejected.

Environmental Defence was also circumspect in its intervention and careful to keep its costs reasonable. In fact, although Environmental Defence was the only intervenor to submit expert evidence, its costs were lower than the costs of any other party whose claims are available on the Board's website.²⁶ Although Environmental Defence limited its intervention to the Bremner portion of the hearing, and therefore a complete comparison of costs is difficult to complete, this focusing of its efforts was intentionally done to avoid duplication and keep costs reasonable.

These factors support an award of costs.

Toronto Hydro's Cost Objections will have a Chilling Effect if not Firmly Rejected

Toronto Hydro seeks costs *against* Environmental Defence, asserting that "Environmental Defence should bear responsibility for the costs of other parties, and of the Board, associated with the process that was established when Environmental Defence said that it intended to file evidence to address whether the Bremner Project is justified." We respectfully submit that this bold request should be firmly rejected by the Board so that these types of threats do not have a chilling effect on public interest interventions such as this. Specifically, Environmental Defence requests that Toronto Hydro be ordered to pay Environmental Defence's costs in responding to its overly aggressive and unreasonable cost objections and that these costs not be recoverable by Toronto Hydro.

²⁴ *Practice Direction on Cost Awards*, s. 5.01(c)

²⁵ *Practice Direction on Cost Awards*, s. 5.01(f)

²⁶ The costs of other parties that are available on the Board website are as follows: AMPCO \$138,995.98; VECC \$94,000.33; Energy Probe \$91,745.52; CCC \$54,816.30. Although it appears that the SEC submitted a claim, it is not available online.

Toronto Hydro makes many unfounded but very serious allegations against Environmental Defence, its consultant, and its counsel in its cost objection. Those allegations are discussed above and summarized as follows:

- That the purpose of the intervention was not to be of assistance to the Board, but rather to create a platform for public advocacy;
- That Environmental Defence decided to “flout the Board’s usual procedures” when it “utterly refused” to answer an undertaking;
- That counsel for Environmental Defence breached his professional duties by (1) failing to fulfill an undertaking and (2) for misleading a tribunal by submitting a response falsely describing a document;
- An implication that Environmental Defence intentionally delayed the hearing to allow an extended opportunity for public advocacy; and
- That its intervention put customers at risk.

Environmental Defence has been forced to expend considerable resources to address these serious and unfounded allegations. We submit that Toronto Hydro acted irresponsibly by making such serious allegations without any foundation, and should therefore pay the costs of responding to them.

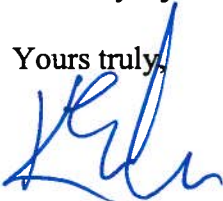
More importantly, we submit that the Board should express its disapproval of Toronto Hydro’s overly aggressive request for costs *against* Environmental Defence by ordering that it pay Environmental Defence’s costs in preparing these submissions (as discussed above) or by making a statement that costs against public interest intervenors will only be made in the rarest of cases. We believe this is necessary to avoid a chilling effect for public interest intervenors who may be intimidated by such tactics and who might thus shy away from challenging applicants such as Toronto Hydro.

Conclusion

Environmental Defence raised a new and important issue in this proceeding. Its position – that the Bremner Station should not be approved – was supported by all but one of the ratepayer intervenors. It made its case while incurring the lowest costs of all intervenors whose claims are available on the Board website. Its costs were reasonable and, we submit, should be awarded in full.

Toronto Hydro has responded with an extremely aggressive set of false and unfounded allegations. We also respectfully request that its request for costs *against* Environmental Defence be firmly rejected by the Board.

Yours truly,



Kent Elson

cc: Applicant and Parties

Schedule A
Excerpts of the Submissions of Ratepayer Intervenors
Indicating Support for Environmental Defence's Position

The following are excerpts from the arguments of all ratepayer intervenors on the Bremner portion of this proceeding. Each proposes that the Bremner station not be approved, with the exception of AMPCO, which nonetheless acknowledges that CDM and DG might defer the need for the station. Emphasis is added throughout.

Schools Energy Coalition²⁷

Our conclusion is this. **There are three needs** proposed: load growth, switchgear replacement at Windsor TS, and feeder connections, lack of feeder connections at Windsor TS.

We have concluded that none of those are urgent, that all of them have issues associated with either whether they're going to arise at all or, if they are going to arise, how they're best solved.

And therefore we're going to **propose that Bremner not be approved** in this proceeding, and that when the needs, these three needs that have been identified, start to crystallize, Toronto Hydro should come back to the Board, A, with the regional supply plan that we have heard about finished so the Board can review this in context; secondly, with a more sophisticated load forecast that does not pretend that the future is going to be the same as the past; and, third, with a proper review of all the options, not just the "build the infrastructure" options that they have looked at so far.

Building Owners and Managers Association²⁸

BOMA has four points to make: First, that **THESL has not demonstrated the urgency** of proceeding with the Bremner station at this time; second, along with the first two speakers, BOMA views **THESL's load forecast** and that of the OPA for the central and downtown Toronto regions and its five transformer stations as compromised by its uneven treatment of supply and demand side CDM resources and **should be disregarded** by the Board as a basis for any decision with respect to Bremner; third, that THESL and OPA's projection of the contribution of DG to the central and downtown Toronto plan **underestimates and marginalizes the contribution of distributed generation**, and that THESL has been slow to engage customers, other than microFIT customers, who are candidates for DG. This failure has undermined the integrity of the load forecast, also.

Fourth, and finally, the **Navigant study prepared for this case did not provide any independent analysis of the potential contribution of CDM and DG** in assessing the urgency of and the need for the Bremner station.

²⁷ Transcript, Vol. 9, March 1, 2013, p. 8 ln. 7 to 25.

²⁸ Transcript, Vol. 9, March 1, 2013, p. 49 ln. 19 to p. 50 ln. 11.

*Vulnerable Energy Conservation Coalition*²⁹

In effect, **the Board should not embark upon the approval of this project as a non-discretionary and urgent project, particularly in the face of the evidence that shows that alternatives exist, that the alternatives explored by the company were inadequately explored, and that the opportunity may possibly exist both to minimize the amount of public investment and to increase the amount of conservation that is practiced in the franchise of the applicant.**

*Consumer Council of Canada*³⁰

The Council submits that **THESL has not provided sufficient evidence to justify approval of the Bremner project** at this time. This is essentially a \$270 million project that needs to be carefully scrutinized by the Board in order to ensure that all feasible options have been thoroughly considered, and that undertaking this project, at this time, for recovery in 2014 rates is in the best interests of THESL's ratepayers. The Council does not accept, however, that there has been a sufficient case made by others that the Bremner Project can be deferred indefinitely in favour of other options like DG and CDM.

*Association of Major Power Consumers*³¹

AMPCO believes that THESL has made its case for the need to increase station capacity in downtown Toronto.

While some contribution of CDM and distributed generation might defer the need for a new station, the fact of insufficient conventional local generation and/or transmission pathways into Toronto suggests to us that Bremner is the most prudent solution available to strengthen the local supply.

²⁹ Transcript, Vol. 9, March 1, 2013, p. 75 lns. 4 to 12.

³⁰ Consumer Council of Canada's Written Submissions, p. 2.

³¹ Transcript, Vol. 9, March 1, 2013, p. 75 ln. 23 to p. 76 ln. 6.

Schedule B
Examples of Public Advocacy by Toronto Hydro Regarding
Ontario Energy Board Matters

Hydro blasted over cash call

Author: Spears, John

Publication info: Toronto Star [Toronto, Ont] 06 Jan 2012: A.1.

[ProQuest document link](#)

Full text:

The Ontario Energy Board has delivered a sharp rebuke to Toronto Hydro's plea for a massive renewal program to prevent more frequent blackouts,

Instead of spending more and asking customers to pay more, the board said in a ruling released Thursday, Toronto Hydro should improve productivity and become more efficient.

But the utility says customers will suffer as a result.

"This will likely result in deteriorating service, an increase in power outages, an increased risk to public safety, slower call-centre response times, as well as the likelihood of major workforce downsizing," it warned in a release.

Toronto Hydro had asked for permission to spend \$1.5 billion over the next three years on new wires, equipment and training. That would have cost a typical household about \$5 a month extra on its hydro bill.

But the energy board shrugged off the arguments of the utility, which is owned by the City of Toronto.

"The company did not provide cogent and compelling evidence showing significant prospective or operational financial distress," the energy board said.

The board didn't rule directly on Toronto Hydro's proposed spending program.

But it means that the company won't be given a full-blown hearing to make the case that it needs to spend so heavily.

Instead, it will have to rely on a formula-based method of determining its budget.

Toronto Hydro officials say they need to spend an average of about \$500 million a year for each of the next three years to keep the lights on reliably.

The energy board's formula, they estimate, will pare that back to about \$140 million a year.

And that spells trouble, according to Blair Peberdy, vice-president of Toronto Hydro

"We expect not only power outages, but it will have an impact on over-all service and public safety," he said. "Approximately half the grid is past its useful life, and the remainder will be coming up to that stage over the next decade."

If Toronto Hydro waits until big chunks of the system break down to start rebuilding, he said, it will be too late. The cuts, he said, could impact programs like the utility's campaign against "contact voltage" - the stray electrical charges that have shocked and even killed dogs on city streets.

Toronto Hydro officials will be meeting to assess the impacts, Peberdy said. But he pointed to a 28-hour outage in a Scarborough neighbourhood just before Christmas, where the wires and transformers are about 50 years old. As crews fixed one problem, wires or equipment a little farther along the line would fail.

A condominium near Yonge St. and Eglinton Ave. was without power for 36 hours early this week, he said: "It was a situation of old equipment that needs to be replaced."

The energy board didn't buy the utility's contention that its system is fraying.

There's no current proof that Toronto Hydro's system is performing unacceptably, it said, noting: "The company's reliability statistics show no marked deterioration."

Meanwhile, it found that Toronto Hydro "has not made significant productivity improvements in comparison to other Ontario distributors." (Distributors are local hydro utilities.)

At the same time, the board said Toronto Hydro customers' bills "are higher than for any other urban distributor in Ontario with more than 30,000 customers."

The board said its formula-based approach is not intended to allow utilities to rest with the status quo.

"The expectation is for changes in the way a distributor conducts business - not to do less - but to find efficiencies and drive productivity improvements."

All other utilities in the province operate under the formula-based approach that the energy board is pushing Toronto Hydro to adopt.

But Rod Sheppard, who heads the Society of Energy Professionals at Toronto Hydro, said the energy board's approach will result in a race to the bottom, with utilities cutting costs instead of assuring service.

Toronto Hydro faces unique challenges because of the size of the city and the age of its equipment, he said.

"I guess they believe misery loves company," Sheppard said.

MPP Victor Fedeli (Nipissing), the Conservative energy critic, said Toronto Hydro's woes are a result of misguided provincial policies.

There would be money to spend on infrastructure renewal if the province were not spending so much on misguided renewable energy projects and smart metres, he said.

Credit: John Spears Toronto Star

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Toronto Hydro's shocking audacity

Author: Martin Regg Cohn

Publication info: Toronto Star [Toronto, Ont] 17 Jan 2012: A.7.

[ProQuest document link](#)

Full text:

The last time Toronto Hydro made big news, a couple of dogs were electrocuted on the streets of Toronto.

Sparing no expense, our heroic local utility swung into action to prevent any more freak accidents: It redeployed crews across Toronto to inspect equipment for stray voltage that zaps canines.

Now, Toronto Hydro is back on the front pages - except this time all of us are on the firing line, human fodder for the electricity company in a high-stakes war to raise rates: The utility has issued a dire public warning that blackouts are coming and safety is at risk unless it gets more money,

This high drama over high voltage has the flavour of a "Man bites dog" headline: Toronto will soon be safe for dogs but unsafe for humans if we don't pay up.

This is extortion. It is brinkmanship. It is bullying (which I thought had gone out of fashion in this province).

And it is so reckless that it makes me question the judgment of my local electricity company, which is a truly scary thing.

When a utility resorts to the overheated rhetoric of a political campaign by raising the spectre of blackouts and threats to public safety, I get uncomfortable. When the big bosses fire off a press release announcing that they can no longer do their jobs properly it's time for the over-caffeinated management cowboys to quit their jobs and hand electrical power over to someone who can.

And if they don't quit, we should fire them. Yes, we can - because we are the shareholders of city-owned Toronto Hydro.

Here's why the utility's senior management has lost the right to serve us as shareholders, ratepayers, residents and voters:

Toronto Hydro submitted an extraordinary request for a major rate increase to the Ontario Energy Board, the independent regulator that weighs the interests of consumers and utilities (which, lest we forget, exercise monopoly power).

Toronto Hydro had a fair opportunity to make its case and the OEB found it utterly unpersuasive. The utility's productivity is lamentably poor, its internal costs are high and its credibility low.

When it sought a cumulative increase of about 49 per cent (\$500 million hikes for three years in succession) to forestall a supposed equipment crisis, the regulator concluded: "This scenario is not credible."

And countered that there is a better way to do business: "The expectation is for changes in the way a distributor conducts business - not to do less - but to find efficiencies and drive productivity improvements."

The OEB didn't blink. And Toronto Hydro blew a fuse.

It fired off an inflammatory news release proclaiming that the sky was falling, we would soon risk electrocution, and the OEB would roast in hell as a result.

"This will likely result in deteriorating service, an increase in power outages, an increased risk to public

safety, slower call centre response times, as well as the likelihood of major workforce downsizing."

The swaggering utility was as good as its word, summarily firing hundreds of private contractors (at what cost in penalties?), preparing to dump its own workers, and perhaps getting ready to make an example of the rest of us - its customers.

Imagine if OPG, the province's biggest electricity supplier, reacted in similar fashion whenever the regulator denied a rate increase. Would we turn the other cheek while the province's nuclear reactors and hydroelectric turbines were suddenly deemed at risk by a petulant power company?

OPG's political masters at Queen's Park would never tolerate such a threat, nor would Tom Mitchell, the engineer who runs it, issue such a reckless statement.

So why is Toronto Hydro behaving like a junior mining company in the Philippines rather than a big city utility? Why does our electricity monopoly believe it can drop-kick the regulator that oversees it?

Time to clean house at the electricity company. And if the politicians at city hall can't figure that out - because they were counting on revenues from their annual dividend rising by 50 per cent this year, which is so much easier than raising property taxes - then it's time to fire them, too.

Martin Regg Cohn's provincial affairs column appears Tuesday, Thursday and Sunday.
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Credit: Martin Regg Cohn Toronto Star

Illustration

Caption: Toronto Hydro warned that blackouts were coming unless it got more money. The Ontario Energy Board found the utility's case unpersuasive. CARLOS OSORIO/TORONTO STAR

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Hydro execs get fat bonuses as utility misses benchmarks

Author: Spears, John

Publication info: Toronto Star [Toronto, Ont] 27 Jan 2012: A.1.

[ProQuest document link](#)

Full text:

Toronto Hydro executives have earned incentive bonuses totalling \$2.9 million in the past five years despite the company's failure to meet reliability standards set by the Ontario Energy Board.

It was Toronto Hydro chairman Clare Copeland himself who noted Toronto Hydro's failing reliability record in a letter to Ontario Energy Board chair Rosemarie Leclair.

"Approximately 40 per cent of power outages in Toronto last year were caused by equipment failures and we have not met the OEB's minimum reliability standards for local distribution companies for the past five years," he wrote.

But poor reliability has not crimped incentive payments.

For example, chief executive Anthony Haines received \$340,018 in incentive bonuses in 2010, out of a total compensation of \$757,730. Haines' total pay is about double that of the other top four executives at Toronto Hydro.

The aggregate total of incentive payments to the top five active executives in the five years ending 2010 was \$2.9 million.

The reliability issues are the fault of fraying equipment rather than management performance, says Copeland. And the hydro executives' compensation - including an array of high-end cars - are in the lower half of the pay scale for comparable companies, he said.

The company has been feuding with the energy board, which regulates its spending and rates, since the board made a ruling that Toronto Hydro says will force it to slash spending to renew its system by two-thirds.

Curbing renewal spending will lead to longer and more frequent blackouts, the company says. It has stopped work on many renewal projects, throwing hundreds of contract employees out of work, and has threatened to lay off hundreds of staff.

The board insists it has not restricted the company's spending nearly as much as the company claims. The company is asking the board to reconsider its decision.

Copeland said Toronto Hydro deliberately weights much of its executive pay on bonuses that must be earned. Reliability standards are only one of a dozen or more measures that go into determining bonuses, he said. Others include financial performance, safety and productivity.

For example, he said, executives have been rewarded because they've reduced the workforce by 35 per cent in the past dozen years.

To improve reliability, Hydro wants to spend heavily on renewing both its equipment and its workforce, to the tune of \$500 million or more in each of the next three years.

The energy board is blocking that spending, Copeland argued, and executives can't be faulted for the resulting loss in reliability. "Until we spend the money and fix it, we'll hit our own standards, but we can't hit the ones they've set," he said.

Copeland said the high-end cars driven by Hydro executives - including Mercedes-Benz and BMW

models - are fully taxable and part of their overall compensation package. If they choose a fancy car, they'll have another part of the package trimmed: "You can have the car but you don't get it in salary, or you don't get it in pension or you don't get it in some other way."

In terms of pay scale, Copeland says Toronto Hydro can't be compared with any other municipal utility in Ontario. Instead, he said comparable companies include Ontario Power Generation (where CEO Tom Mitchell earned \$1.8 million in 2010) and Hydro One (where CEO Laura Formosa earned \$953,844).

Toronto Hydro uses the human resources consultant Mercer to help set compensation formulas. Michael Thompson of Mercer said Hydro "probably uses one of the most disciplined and rigorous performance management processes I've seen in any organization, anywhere - public or private sector."

Of the many performance measurements, each is weighted, and standards are set for achievement, ranging from minimal to outstanding. Executives are rated on individual performance and the achievements of their divisions as well as that of the company as a whole.

Credit: John Spears Toronto Star

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Toronto Hydro issues online blackout map

Author: Spears, John

Publication info: Toronto Star [Toronto, Ont] 31 Jan 2012: B.2.

[ProQuest document link](#)

Full text:

Reading this story by candlelight? Then odds are you live north of Eglinton Ave.

Toronto Hydro has mapped out the areas of the city most prone to blackouts.

They are concentrated in North York, northern Scarborough and the former City of York, where some neighbourhoods suffer a dozen blackouts a year or more, on average.

Toronto Hydro has launched a new section on its website detailing the woes of its aging system. It includes a map of the areas where blackouts occur most frequently.

The company has been embroiled in a dispute with the Ontario Energy Board about how much Toronto Hydro needs to spend to renew its aging system.

The company says it needs an average of \$580 million a year for each of the next three years to replace equipment that's half a century old or more. The energy board has questioned the need for the spending and said the company's claims are not credible.

It released a decision earlier this month that would limit the amount the company can spend, although the two sides sharply disagree on what the limit would be. Toronto Hydro says the board's decision would limit it to annual spending of \$140 million; the board says the limit would be \$480 million.

Toronto Hydro - which has asked the board to review its decision - is now taking its case into a more public forum by posting material on its website.

"It's there to give some context to what all the discussion's about," said Blair Peberdy, vice-president of Toronto Hydro. "It's to help our customers understand why Toronto Hydro's before the energy board, and why we feel the grid needs to be renewed."

The site notes the suburban areas have the worst reliability problems.

"In Scarborough, North York and Etobicoke, roughly 250,000 residents experience at least one power outage, on average, every six weeks lasting longer than 50 minutes," it says.

About 40 per cent of blackouts are caused by aging equipment.

Credit: John Spears Toronto Star

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Building boom straining Toronto Hydro system

Author: Spears, John

Publication info: Toronto Star [Toronto, Ont] 03 Apr 2012: B.4.

[ProQuest document link](#)

Full text:

Toronto's downtown building boom is straining the city's aging power system, says Toronto Hydro.

The utility's warning comes as it pleads its case before the Ontario Energy Board for permission to boost spending on renewing its system.

Toronto Hydro says it's scrambling to find ways to connect big, new developments to the power grid: Toronto has 200 new buildings or projects under way, twice the number currently under way in New York.

Many of them need dedicated cables to connect to the hydro grid.

But the closest downtown transformer stations are often running at full capacity, which forces the utility to install long cables from more distant stations, some of them kilometres away. At \$110 a metre for cable - not including installation - costs add up. New cables in many cases have to pass through underground ducts made of clay tile - some of which date back to the 1930s, and are collapsing.

Tanya Bruckmueller of Toronto Hydro said in an interview that no developments have been delayed for lack of power connection so far, but finding ways to feed power into the core becomes very complex.

Toronto Hydro has proposed building a new transformer station on Bremner Blvd., costing \$128 million over three years, to feed power to developments in the downtown core, including planned waterfront projects.

The city-owned utility's latest release comes as it prepares a new application for the energy board, seeking permission to proceed with the Bremner station and other projects.

In January, the board had rejected an earlier application, forcing the city-owned utility to re-apply under different rules. The board said Toronto Hydro's case for investing \$1.5 billion in system renewal over the next three years was not "cogent and compelling."

The spending would increase a typical residential hydro bill by about \$5 a month in each of the next three years.

The company responded by warning the city risks longer and more frequent blackouts if it's not allowed to renew old equipment.

It has already laid off dozens of its own staff and terminated contracts, forcing contractors to lay off hundreds more.

Credit: John Spears Toronto Star

Illustration

Caption: Toronto Hydro warns the city's building boom is straining the system, risking longer, more frequent blackouts. TORONTO HYDRO CORPORATION

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