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October 7, 2013

Kirsten Walli
Board Secretary
Ontario Energy Board
PO Box 2319
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Toronto Hydro-Electric System Limited Application; EB-2012-0064

On September 30, 2013, Toronto Hydro-Electric System Limited (Toronto Hydro) filed with the Board its submissions with regard to the Draft Phase 2 Issues List (Draft Issues List) that was attached as Appendix A to Procedural Order No. 6 in EB-2012-0064. Toronto Hydro also received submissions with regard to the Draft Issues List from Board staff, Energy Probe Research Foundation (Energy Probe), the School Energy Coalition (SEC) and the Vulnerable Energy Consumers Coalition (VECC), all of which were dated September 30, 2013.

Procedural Order No. 6 states that Toronto Hydro may respond to the submissions of intervenors on the Draft Issues List, and intervenors may respond to the submissions of Toronto Hydro or other intervenors, by October 7, 2013. These are the submissions of Toronto Hydro in response to the submissions with regard to the Draft Issues List that were filed by others.

Preliminary Comments: Issue 2 and Issue 6

Board staff's only comment on the Draft Issues List was that it understands Issue 2 to encompass consideration of Toronto Hydro's evidence at Tab 9, Schedule 2-5 relating to Group 1 Deferral/Variance Accounts, or alternatively, that an issue should be added to address the proposal to defer disposition of the Group 1 Accounts. Toronto Hydro accepts that Issue 2 encompasses the issue of concern to Board staff and accordingly submits that it is not necessary to add this as a specific issue in the Draft Issues List

VECC's only comment on the Draft Issues List is that Issue 6 appears to combine this proceeding with parts of the Toronto Hydro smart meter deferral account proceeding, EB-2013-0287. VECC points out that the Board has issued Procedural Order No. 1 in EB-2013-0287 setting out a process for that case that

includes final written argument by the parties. This is consistent with Toronto Hydro's submission, in its September 30th filing, that the EB-2013-0287 proceeding is already at an advanced stage and that there would be no efficiency benefit in joining the two cases.

VECC indicates that it would be helpful for the Board to clarify the process interrelationship, if any, between the two proceedings. Toronto Hydro submits that the minor revision to Issue 6 proposed in its September 30th filing would provide such clarity. Toronto Hydro's proposal for the wording of Issue 6, again, is as follows:

> Are THESL's proposals relating to rate implementation, including the disposition of the smart meter accounts, currently before the Board as a stand-alone application, appropriately coordinated for the year 2014?
>
> [Underlining added to indicate proposed revision.]

As revised, Issue 6 would allow the Board to establish a coordinated process for both applications. For example, if the Board decided it would be efficient to do so, it may wish to combine the final determination and implementation of rates from both proceedings as part of a unified rate order process in this application.

Issue 3: Application of the ICM Criteria

In their submissions, SEC and Energy Probe seek to reopen issues from Phase 1 of this proceeding that have already been decided by the Board and have not been included in the Draft Issues List.

In particular, Energy Probe's submission is that Issue 2.2 from Phase 1 should be added to the Phase 2 Issues List. Issue 2.2 in Phase 1 related to the justification for Toronto Hydro's proposed capital projects, including consultant reports, business cases and consideration of alternatives.

Similarly, SEC suggests that Issue 2.2 from Phase 1, although not carried forward to Phase 2 in the Draft Issues List, can be understood to fall within Issue 3 in the Draft Issues List (regarding Toronto Hydro's application of the ICM criteria). In addition, SEC seeks to reopen another issue from Phase 1 of the proceeding: it asserts that Issue 4 in the Draft Issues List should be expanded to allow for the potential of different monitoring and tracking requirements than those that were ordered in Phase 1.

Toronto Hydro respectfully submits that the Phase 2 Issues List should not be framed in a manner so as to reopen the issues referred to by Energy Probe and SEC as these issues were determined in Phase 1 of this case.

As the Board is aware, Toronto Hydro put forward its Incremental Capital Module (ICM) proposal for 2012 to 2014 in this case on the basis of work segments that remain constant throughout all three years of the application. The nature and type of work among the three years is identical – the only differences are the specific jobs that comprise any given work segment in a given year. The evidence that Toronto Hydro relies on to establish the eligibility for ICM treatment of each work segment from year to year (and phase to phase) does not change. The only differences between one year and another are the specific jobs that Toronto Hydro intends to undertake within each segment in the particular year.

Toronto Hydro accepts that intervenors may test, and the Board will consider whether the work segments in Phase 2 are of the same nature and type as those in Phase 1 and that the evidence relied on by Toronto Hydro to justify the segments in Phase 2 is the same as the evidence that Toronto Hydro relied on to justify those segments in Phase 1. Toronto Hydro agrees that an examination of these questions is appropriate and, as it submitted in its September 30th filing, believes that its proposed reformulation of Issue 3 enables this examination.

However, it is Toronto Hydro's respectful submission that, to the extent that the application of the ICM criteria and the evidence and justifications for the work segments are the same in Phase 1 and Phase 2, then the Board has already decided the very matters that Energy Probe and SEC seek to include in the Phase 2 Issues List.

The suggestion that, after the Board has made explicit determinations in a particular case, those determinations can be opened up for re-litigation and reconsideration within the same case is contrary to principles of law, fairness and efficiency.

In addition, and perhaps most central to the question currently before the Board, the proposed expansion of Issue 3 undermines the principle of decision-making consistency. The approach proposed by Energy Probe and SEC would introduce the potential for contradictory decisions on the same issue, on the same evidence, within the same proceeding. Toronto Hydro respectfully submits that such an outcome would threaten the integrity of the Board's decision-making processes, would not be in the interests of any party, the Board or ratepayers, and would be contrary to the public interest at large.

Further, in Phase 1 of this case, Toronto Hydro's evidence regarding the eligibility of the work segments for ICM treatment was extensively reviewed and tested. The wide-ranging and comprehensive nature of the review conducted in Phase 1 can be seen from the following elements of the Phase 1 process (which do not include the separate process initiated for the Copeland station):

(i) 3,439 pages of pre-filed evidence;
(ii) 778 interrogatories received,[1] resulting in 2,034 additional pages of evidence;
(iii) an update to the pre-filed evidence that touched on every aspect of the application;
(iv) a two-day technical conference that gave rise to the filing of numerous undertaking responses; and
(v) a five-day oral hearing, during which Toronto Hydro put forward 14 witnesses for examination.

After this extensive review and testing of the evidence filed by Toronto Hydro, the Board issued a 79-page Partial Decision and Order on April 2, 2013 that addressed the eligibility of the proposed work for ICM treatment, on a segment-by-segment basis. It is important to note that, in the Partial Decision and Order, the Board's consideration of, and findings on, Issue 2.2 (the issue that Energy Probe and SEC seek to repeat from Phase 1 of this case) extended from pages 19 to 67.

The Board made a specific and explicit finding in the Partial Decision and Order that Toronto Hydro had "provided sufficient evidence with respect to each segment for a determination to be made with respect to eligibility for an ICM".[2] The Board's decision then proceeded for approximately 40 pages with a segment-by-segment analysis of ICM eligibility.[3] As well, the Partial Decision and Order included a number of general findings about the ICM criteria that served as the foundation for the Board's analysis of whether each proposed work segment qualified for ICM treatment.[4]

No party has sought to challenge, by way of a review motion or an appeal, the determinations in the Partial Decision and Order regarding the work segments. Toronto Hydro submits that any party that wished to reopen those determinations should have done so directly through an appropriate avenue, namely, a review motion or an appeal. Phase 2 of this proceeding cannot and should not be used to seek relief, indirectly, that ought to have been pursued directly through the appropriate avenue.

There is an inter-related group of legal doctrines that has been developed by the courts of Canada to prevent re-litigation of previously determined matters. These doctrines include issue estoppel, cause of action estoppel (known as *res judicata*), the doctrine of abuse of process by re-litigation and the collateral attack doctrine.[5]

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[1] Including sub-questions.
[2] EB-2012-0064 Partial Decision and Order, April 2, 2013, page 21.
[3] EB-2012-0064 Partial Decision and Order, pages 22 to 61.
[4] EB-2012-0064 Partial Decision and Order, pages 11 to 21.
[5] See D. J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd Edition (Markham, Ontario: 2010), at pages 11-12.

The collateral attack doctrine, for example, applies when a party seeks to challenge an order indirectly, or collaterally, rather than through the avenues established for a direct attack on the order, such as an appeal or an application to vary.[6]

A number of important public policy considerations underlie the doctrines preventing re-litigation of previously determined matters and thus *res judicata* has been referred to as a "cornerstone of the justice system in Canada" and a "fundamental doctrine of the justice system".[7] The many public policy considerations include finality, fairness, protecting the validity or integrity of judgments, avoidance of conflicting decisions and making efficient use of decision-making resources.[8]

These "essential" doctrines tend to be applied by courts when an issue decided in one case is raised in another case.[9] Because, in Board proceedings, the decision of one panel does not bind another panel, re-litigation of previously decided matters in a different case does not have the same implications as it does in matters before the courts. The proposal in this case, though, is that issues explicitly and directly determined by the Board be reopened within the *same proceeding* in which those determinations have been made, and in respect of the same evidence. Toronto Hydro submits that this proposal brings into play the important public policy considerations that underlie the re-litigation doctrines. If parties can reopen issues in the very proceeding in which those issues have already been decided, procedural efficiency, procedural fairness, the ability of the Board to reach finality and the integrity of the Board's decisions and processes are all put into jeopardy.

For these reasons, Toronto Hydro submits that the Board should reject the submissions of Energy Probe and SEC regarding Issue 2.2 from Phase 1 of this proceeding and should frame Issue 3 in the manner proposed in Toronto Hydro's September 30th filing, as follows:

> <u>If THESL has applied the ICM criteria differently in Phase 2 than in Phase 1</u>, is THESL's application of <u>those</u> criteria appropriate?
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> [Underlining added to indicate proposed revisions.]

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[6] *The Doctrine of Res Judicata in Canada*, at pages 463-464.
[7] *The Doctrine of Res Judicata in Canada*, at pages 4-9.
[8] *Ibid.*
[9] *The Doctrine of Res Judicata in Canada*, at pages 11-12.

Issue 4: Monitoring and Tracking Requirements

The same principles and submissions that Toronto Hydro has set out in the context of Issue 3 apply in respect of SEC's position that Issue 4 in the Draft Issues List should be expanded to allow for different monitoring and tracking requirements than those that were ordered in Phase 1. The issue of monitoring and tracking requirements was closely examined by the parties and carefully considered by the Board in Phase 1 of this case: such requirements were addressed both in the Partial Decision and Order issued on April 2, 2013[10] and in the Decision and Rate Order issued on May 9, 2013[11] (collectively, the "Phase 1 Decisions").

While some aspects of the Phase 1 Decisions may be particular to Phase 1, the Board's decision on monitoring and tracking explicitly encompassed capital work that may be approved in Phase 2. For example, in Phase 1 the Board ruled as follows:

> In the event that THESL files the Phase 2 2014 application as is anticipated, project spending may also be moved between the approved years within the same project classification without creating a variance.[12]

Toronto Hydro submits that the principle of decision-making consistency should be given particular weight in this context. In addition, as a practical matter, significant confusion would likely be created if the Board were to approve different monitoring and tracking requirements in two phases of the same proceeding that would apply to jobs which all fall within the same work segments.

All of which is respectfully submitted.

Yours truly,

AIRD & BERLIS LLP

Fred D. Cass

c.c. R. Barrass/A. Klein, Toronto Hydro-Electric System Limited
All EB-2012-0064 Intervenors

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[10] See, for example, EB-2012-0064 Partial Decision and Order, April 2, 2013, pages 75-76.
[11] EB-2012-0064 Decision and Rate Order, May 9, 2013, pages 5 to 7.
[12] EB-2012-0064 Partial Decision and Order, April 2, 2013, page 75.