



EB-2010-0354

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF an application by Toronto Hydro-Electric System Limited for an order approving just and reasonable rates to be effective November 1, 2010.

AND IN THE MATTER OF a motion by Toronto Hydro-Electric System Limited requesting the varying of the Decision with Reasons issued October 29, 2010, which approved just and reasonable rates to be effective November 1, 2010.

BEFORE: **Paul Sommerville**
Presiding Member

Ken Quesnelle
Member

DECISION AND ORDER ON MOTION

INTRODUCTION

Toronto Hydro-Electric System Limited (“THESL” or “the Applicant”) filed an application with the Ontario Energy Board, (the “Board”), received on May 14, 2010, under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B), seeking approval for changes to the rates that THESL charges for electricity distribution, to be effective May 1, 2011. The effective date was subsequently revised to November 1, 2010.

The application, which was assigned file number EB-2010-0193, was for recovery of \$8.586 million plus carrying charges of approved contact voltage remediation costs arising out of the Board's Decision on THESL's EB-2009-0243 application of December 11, 2009 (the "Prudence Decision"). The Prudence Decision approved the recovery of up to \$9.44 million of these costs, but found that any relief provided in the Prudence Decision would be conditional on THESL's actual spending in controllable operating, maintenance and administration ("OM&A") expenditures for the 2009 year (ending December 31, 2009). THESL was authorized to record in a deferral account an amount of \$9.44 million for review once the 2009 audited financial results were known and upon application by THESL to clear the balance in the account.

The Vulnerable Energy Consumers' Coalition ("VECC"), the School Energy Coalition ("SEC"), the Energy Probe Research Foundation ("Energy Probe") and the Canadian Union of Public Employees, Local One ("CUPE One"), were intervenors in the EB-2009-0243 proceeding and were deemed by the Board to be intervenors in the EB-2010-0193 proceeding.

On October 29, 2010, the Board issued its Decision (the "Recovery Decision") which allowed THESL a total recovery amount of \$5.296 million plus carrying costs, representing a reduction of \$3.29 million from the \$8.586 million which THESL had sought for recovery.

On November 18, 2010, THESL filed a Notice of Motion (the "Motion") for an Order of the Board reviewing and varying the Recovery Decision. The Motion requested that the Board vary the Recovery Decision to instead find that actual residual contact voltage costs in their entirety are eligible for inclusion in controllable expenses pursuant to the implementation mechanism specified in the Prudence Decision and that therefore the contact voltage costs allowable for recovery in 2011 rates are \$8.586 million, as requested by THESL in the proceeding leading to the Recovery Decision, and that the initially disallowed amount of \$3.290 million, representing the difference between \$8.586 million and \$5.296 million, together with carrying costs be allowed for recovery in 2011 rates commencing May 1, 2011. THESL requested that the Motion be heard orally.

On December 10, 2010, the Board issued an acknowledgement letter which noted THESL's request that the Motion be heard orally. The Board invited comments from parties as to whether an oral or written hearing should be held. Parties wishing to comment on this matter were required to do so by December 17, 2010. No parties

expressed opposition to THESL's request that an oral hearing should be held on the Motion.

On January 14, 2011, the Board issued Notice of Hearing and Procedural Order No.1 which established that an oral hearing of the Motion would be held on March 10, 2011. The Board also established dates by which THESL could file additional materials related to the Motion if it wished to do so and Board staff and intervenors could make any submissions they wished on both the threshold issue and the substance of the Motion.

On January 20, 2011, THESL advised the Board that it had no further materials to file at that time.

On February 3, 2011, the Board received a submission from Board staff on this matter and on February 11, 2011, a submission from SEC. No other submissions were received.

THE MOTION

THESL submitted that there were two grounds for the Motion:

The first was that the Recovery Decision had made an error in fact when it had deducted \$3.29 million from the recovery amount when the reasons only provide for disallowance of \$2.5 million in non-scanning residual contact voltage costs, resulting in an unjustified deduction of \$0.79 million.

The second was that the Recovery Decision had made a mixed error of fact and law by misapplying the Prudence Decision and failing to include the \$2.5 million in non-scanning residual contact voltage costs in 2009 controllable expenses.

THESL cited four aspects of the Recovery Decision in support of its claim of the mixed error of fact and law:

1. The Recovery Decision had improperly expanded the question that was set in the Prudence Decision and was to be implemented in the recovery proceeding, thereby improperly re-trying the original contact voltage prudence application by THESL;

2. The Recovery Decision had improperly changed the accepted definition of controllable expenditures established by the Board to exclude \$2.5 million in non-scanning expenditures 'caused' by the contact voltage emergency;
3. The Recovery Decision had erred in its finding that certain 'residual' contact voltage expenditures (i.e. actual contact voltage-related expenditures in excess of the maximum conditionally allowed amount pursuant to the Prudence Decision) either were not controllable expenditures or were to be deducted from controllable expenditures in the application of the test prescribed by the Prudence Decision for determination of the recoverable amount of contact voltage expenditures; and
4. The Recovery Decision had erred in its finding that the purported 'normalization' of controllable expenses was necessary to carry out the intention of the Prudence Decision, which among other things was to ensure that no 'double benefit' be conferred to shareholders contrary to the fact that the disallowed residual contact voltage expenditures conferred no financial benefit to the corporation or its shareholders whatsoever.

During the oral hearing of the Motion, THESL suggested that the Board should be guided by four principles in its consideration of the Motion which were:

1. The Board should strive to give effect to the original intent of the Prudence Decision, taking into account the ordinary and well-understood meaning of the words in that decision.
2. The Board should strive to provide predictability and certainty for market participants when implementing the prior Prudence Decision.
3. The Board should avoid interfering with a utility management's legitimate discretion to reallocate its spending to respond to urgent new priorities that unexpectedly and can inevitably arise over the course of any given rate year.
4. The Board should avoid indirect retroactive rate making, such as indirectly reopening the prudence of actual 2009 spending, which THESL argued is effectively what happened in the Recovery Decision.

Threshold Issue

The Board received submissions from Board staff and SEC on the threshold issue. Both of these submissions were in agreement that the threshold test had been met, although both had some concerns with the threshold issues raised by the Motion.

SEC stated that it came to the conclusion that the threshold test had been met with considerable reluctance. SEC submitted that what was clear was that the proceeding leading to the Recovery Decision had allowed all parties full opportunity to put forward the facts and their positions and the Board had received the full assistance of all parties in reaching its decision. SEC expressed the concern that while based on the Board's various precedents, the Motion probably met the threshold test, Rule 42 should not devolve into a forum for rearguing decisions a party did not agree with.

Board staff submitted that the interpretation of a previous decision, as was the case with the Recovery Decision, generally involves a wide measure of panel discretion, and absent a clear error of interpretation, the panel's decision should not be overturned since a motion to review should not be seen as an opportunity to re-argue the same case and hope for a different answer. However, Board staff accepted that the notice of motion was sufficient to pass the threshold question and proceed to a hearing on the merits.

SEC submitted that in such situations the Board should consider applying the test of "reasonableness" that is used in the Divisional Court to consider appeals from Board decisions, which balances deference to the original decision maker with the need to ensure that obviously incorrect decisions can be reversed or varied. SEC argued that if the general approach to Rule 42 motions followed that line, the tendency of parties, particularly regulated entities, to seek to reargue their cases in motions for review would be reduced. SEC argued that the Board should comment on the extent to which the Motion is essentially an attempt to reargue the case, and therefore is inconsistent with the overall intent of Rule 42.

Board Findings

The Board finds that the threshold test has been met and has therefore considered the relief requested in the Motion on its merits. The Board notes that no parties argued that the threshold test had not been met. In making this finding, the Board is mindful of the

concerns of Board staff and SEC that motions not be used to in effect reargue decisions that one or more parties were in disagreement with. The Board shares these concerns.

Merits of the Motion

Board staff submitted that both of THESL's alleged grounds for the Motion, first that there was an error of fact made by the Board and second that there was an alleged mixed error of fact and law were without merit.

Staff noted that the Prudence Decision stated as follows with regards to the matter of implementation¹:

The Panel therefore finds that it would be reasonable in the circumstances for any relief provided in this Decision to be conditional on THESL's actual spending in controllable OM&A expenditures for the 2009 year (ending December 31, 2009). In the event that THESL's actual controllable OM&A expenditures are below the level reflected in THESL's 2009 approved base rates, the amount of the relief eligible for recovery found below shall be reduced by the amount of the underspending. To emphasize, this finding is not intended to reopen the testing of the 2009 revenue requirement nor the prudence of the actual 2009 OM&A spending.

Based on the information filed in the proceeding from THESL's 2010 rates application, the total OM&A level used to derive 2009 rates was \$350.0 million. Excluding amortizations expenses of \$154.4 million, the total controllable expenses used to derive 2009 rates was \$195.6 million. Any underspending in OM&A controllable expenses below \$195.6 million shall be deducted from the conditional relief found in this Decision. THESL's audited 2009 statements shall be the basis of determining the level of underspending, if any.

Staff submitted that the Prudence Decision provided no specific guidance supporting the recovery mechanism used by both THESL and the Board in the Recovery Decision, nor any guidance as to the appropriateness of the differing deductions of contact voltage costs.

Staff noted that all parties to the proceeding leading to the Recovery Decision, including THESL, had submitted that some account needed to be taken of the contact voltage costs in achieving a meaningful comparator level of 2009 OM&A controllable expenses.

Staff stated that the methodologies proposed by THESL and those used by the Board in reaching the Recovery Decision were identical with the only difference between the

¹ EB-2009-0243 Decision Toronto Hydro-Electric System Limited, p.9

THESL approach and that in the Recovery Decision being in the amount of contact voltage costs deducted in the second line of the table. The Board deducted \$12.73 million of these costs and THESL \$9.44 million. The difference of \$3.29 million was due to the additions made to the deductible contact voltage costs in the Recovery Decision which are the subject of the Motion.

Staff submitted that while THESL proposed one approach and the Recovery Decision adopted a modified version of it, neither approach was either predetermined or precluded by the Prudence Decision. As such, staff submitted that there was no mixed error of fact and law related to the Board inclusion of the additional \$2.5 million deduction.

Staff argued in addition that THESL's claim that an error of fact had taken place related to the amount of \$0.79 million was also unfounded as this amount was the difference between the updated level of total contact voltage costs of \$15.139 million on which the Recovery Decision was based and the original level of projected contact voltage costs at the time of the Prudence Decision of \$14.35 million. Staff noted that the explanation for this differential was acknowledged by THESL in its Motion.

Staff submitted that it was clearly demonstrated in the Recovery Decision that the Board was using this amount in determining the allowed level of recovery. Staff also argued that just as the overall level of controllable OM&A was updated for 2009 actuals at the time of the Recovery Decision, it was also appropriate that the amount of contact voltage costs be updated for actuals in order to ensure comparable numbers were used in determining an appropriate level of recovery.

SEC was in agreement with the views of staff that the Motion should be dismissed. SEC argued that both the \$2.5 million deduction from controllable 2009 OM&A made in the Recovery Decision and the additional \$0.79 million deduction were appropriate.

SEC argued that if the Board accepted THESL's submission on the \$2.5 million deduction, the effect would be to increase the recovery by that amount, thus allowing the Applicant to recover indirectly the \$2.5 million of costs the Board had already found to be caused by improper maintenance practices of the Applicant and its affiliate. SEC argued that where the additional \$0.79 million deduction was determined, as best as it could determine, it was not a "math error" at all, but a correct way to account for the fact

that the Applicant's actual contact voltage expenses were higher than originally approved.

SEC also expressed concern that it appeared THESL's spending on controllable expenses in December 2009 was \$8.0 million (47%) higher than the average of spending on controllable expenses in all other months. SEC observed that it was possible that December was a month in which spending was higher than in other months, but noted that THESL did not provide information through interrogatories that might have clarified this matter.

SEC further noted that it had argued in its submission related to the EB-2010-0193 application that the Board should either a) decline the Application for recovery entirely on the basis that the Applicant failed to provide requested and ordered information, or b) draw the only available inference, which was that the \$8.0 million increase in December 2009 was anomalous, in which case it was submitted that the actual controllable expenses for 2009 should be reduced by that amount.

SEC submitted that the contact voltage expenses should be reduced by \$8 million, reflecting apparently higher than expected spending after the Prudence Decision. SEC argued during the oral hearing that the Recovery Decision erred in law and fact by finding that this matter was outside the scope of its decision. SEC justified this submission on the basis that once the question of the appropriate recovery amount is opened up by the Applicant as was done through the filing of the Motion, the question also arose as to whether or not the Applicant's refusal to provide necessary evidence should lead to the conclusion SEC had proposed in its submission in the proceeding leading to the Recovery Decision.

THESL argued, during the oral hearing of the Motion that there was no basis for SEC's assumption, while also providing an explanation of the \$8 million amount, stating that over the course of 2009 it had been tracking various costs and there were some \$15 million in the deferral or variance account. During December 2009, the Board's Prudence Decision was issued which allowed THESL a maximum recovery amount of \$9.44 million. Accordingly, THESL had transferred about \$6 million from the deferral account into the organization which was the explanation for much of the increase.

Board Findings

The Motion is denied.

The Board agrees with staff that in a circumstance where there is a need for one panel to base its decision on the findings of a previous panel, there is considerable latitude for such a panel in interpreting the findings of the previous panel. The Prudence Decision did not provide a precise specification as to how the achieved 2009 level of controllable OM&A was to be assessed in order to ensure an appropriate level of recovery was achieved by THESL.

One interpretation available to the Board in the Recovery Decision was to be guided by a plain reading of the Prudence Decision, thereby taking the position that no detailed assessment of the 2009 level of OM&A was required. Had the Board in the Prudence Decision intended to normalize OM&A, it would have said so. This option assumes that the Board's intention in the Prudence Decision was to engage in a high level assessment of the 2009 controllable OM&A as identified in THESL's 2009 audited financial statements, as a "final check" against any significant under spending.

The Prudence Decision did however express the concern that if in fact there was underspending in the 2009 total controllable OM&A, it would confer a double benefit to the shareholder. The Board finds that the Recovery Decision was appropriately guided by this concern in implementing the Prudence Decision.

The Board upholds the finding in the Recovery Decision that the very act of normalizing the 2009 actual controllable expenses does not mean that a prudence review of the 2009 revenue requirement has been undertaken, nor that a further prudence review has been undertaken of the disallowed residual contact voltage costs, as alleged by THESL. The Board finds that what was instead undertaken in reaching the findings in the Recovery Decision was an appropriate normalization of 2009 controllable OM&A in order to ensure that no unwarranted recovery by THESL would take place, as was required by the Prudence Decision.

The Board therefore finds that the \$2.5 million deduction made in the Recovery Decision was proper as part of this normalization process, since this amount included overtime costs which arose as a result of the emergency and based on the findings in

the Prudence Decision, it was necessary that such costs be deducted in order to ensure an appropriate level of cost recovery by THESL.

The Board also finds that the \$0.79 million deduction made in the Recovery Decision was appropriate. This deduction represents the difference between the forecast amount of contact voltage costs of \$14.35 million originally applied for in the prudence application and the actual amount of \$15.139 million, as provided in the recovery application review process. The Board does not accept THESL's characterization of this adjustment as an error of fact. The Board finds that updating these costs to replace a forecast number with an actual number is appropriate as it would represent normal practice under such circumstances.

In making its findings, the Board has been mindful of the four principles which THESL suggested during the oral hearing should guide the Board in its consideration of this matter.

The Board has already dealt with the first principle of giving effect to the original intent of the Prudence Decision and has found that the Recovery Decision met this principle. The Board has also dealt with the fourth principle which was to avoid retroactive rate making by indirectly reopening the prudence of actual 2009 OM&A spending. The Board does not agree with THESL's contention that normalizing 2009 actual controllable expenses as was done in the Recovery Decision in any way reopens the prudence issue.

Where the second principle of striving to provide predictability and certainty for market participants is concerned, the Board notes that inherent in the establishment of a contact voltage deferral account by the Prudence Decision was an uncertainty as to the exact amount of recovery that THESL would be allowed. If the Prudence Decision had determined with certainty that THESL was to recover the maximum amount of \$9.44 million, there would have been no need for either a deferral account or a subsequent proceeding. The Board is of the view that market participants understand the creation of a deferral account by the Board implies an element of uncertainty regarding future recovery of amounts in that deferral account, pending appropriate justification by an applicant to the Board.

THESL's third principle was to avoid interfering with a utility management's legitimate discretion to reallocate its spending to urgent new priorities that unexpectedly and

inevitably arise over the course of any given rate year. The Board is of the view that there was no element of interference with such discretion contained in the Recovery Decision. Utilities under the Board's regulatory model are allowed to recover a specified level of revenue requirement annually through rates and are free to and indeed expected to make necessary reprioritizations of spending as unforeseen urgent priorities arise. The Recovery Decision, like all other rate-setting decisions issued by the Board, determined an appropriate level of rate recovery for the Applicant, but did not interfere with utility management's legitimate discretion to reallocate its spending to urgent new priorities that unexpectedly and inevitably arise over the course of any given rate year.

The Board is concerned about THESL's failure to provide clarifying information related to the \$8 million of adjustments that were made to controllable expenses in December 2009, prior to the oral hearing of the Motion. The Board notes that THESL had many opportunities to provide this information during the proceeding leading to the Recovery Decision.

THESL had first been asked for this information by both Board staff and SEC through interrogatories. In its responses to these interrogatories, THESL did not provide the requested information. On July 26, 2010, the Board issued Procedural Order No. 2 requiring THESL to provide additional information on this matter by August 3, 2010.

On July 28, 2010, THESL also received correspondence from SEC requesting an expanded response to one of its interrogatories related to this matter.

On August 3, 2010, THESL sent a letter to the Board stating that it would be unable to provide the requested information by the required date of August 3, 2010.

On August 23, 2010, THESL provided a partial response to the Board's request, but declined to provide further information related to SEC's request.

On September 3, 2010, THESL sent a letter to the Board noting that the composition of 2009 actual expenditures and the reconciliation of THESL's audited financial results with the regulatory accounting concept of 'controllable expenses' might not be transparent to the Board, Board staff and intervenors. THESL accordingly requested that it be given the opportunity to file further clarification supported by appropriate material. The Board granted THESL this opportunity, but THESL's Supplementary

Evidence filed September 13, 2010 did not contain any additional explanation relating to the increase in the December 2009 level of controllable expenses.

The Board also provided THESL with an opportunity to file additional materials related to the Motion in this proceeding, but it chose not to do so.

The Board considers that the provision of this information as part of the process leading to the Recovery Decision would have been helpful to parties in that proceeding, as would an earlier provision of the explanation provided at the oral hearing in this proceeding.

Given the nature of the information provided by THESL at the oral hearing of the Motion, the Board is unclear as to why this information could not have been provided sooner. The Board also is concerned that THESL's provision of this information at that time did not provide parties to the proceeding with any opportunity to undertake further discovery related to it. The Board echoes the concerns expressed in the Recovery Decision that THESL had been less than forthright in responding to these inquiries. The Board will expect THESL to be more forthcoming when information requests of this kind are made in future proceedings.

IMPLEMENTATION

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. The Board will determine eligibility for costs in accordance with its *Practice Direction on Cost Awards*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

All filings with the Board must quote the file number EB-2010-0354, and be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at

BoardSec@ontarioenergyboard.ca. All other filings not filed via the Board's web portal should be filed in accordance with the Board's *Practice Directions on Cost Awards*.

THE BOARD DIRECTS THAT:

1. Intervenor shall file with the Board and forward to THESL their respective cost claims within **7 days** from the date of this Decision.
2. THESL shall file with the Board and forward to intervenors any objections to the claimed costs within **21 days** from the date of this Decision.
3. Intervenor shall file with the Board and forward to THESL any responses to any objections for cost claims within **28 days** of the date of this Decision.
4. THESL shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, March 25, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary