

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 Thunder Bay Hydro Electricity Distribution Inc. for an order or orders approving or fixing just and reasonable distribution rates and other charges, to be effective May 1, 2012.;

AND IN THE MATTER OF the Board's Decision dated April 4, 2012 (File Number EB-2011-0197).

NOTICE OF MOTION

Thunder Bay Hydro Electricity Distribution Inc. ("TBHE") will make a motion to the Ontario Energy Board (the "Board") on a date and at a time to be determined by the Board.

PROPOSED METHOD OF HEARING: TBHE proposes that the Motion be heard in writing.

THE MOTION IS FOR an Order or Orders of the Board:

1. Reviewing and varying its April 4, 2012 Decision and Order in the EB-2011-0197 proceeding (the "Decision") as follows:
 - a. that TBHE be permitted to recover its PILs proxies from October 1, 2001 to April 30, 2002.

BACKGROUND:

A. The Combined PILs Proceeding:

2. On November 28, 2008, pursuant to sections 78, 19 (4) and 21 (5) of the *Ontario Energy Board Act, 1998*, the Board commenced a Combined Proceeding (EB-2008-0381) on its own motion to determine the accuracy of the final account balances with respect to Account 1562 Deferred

Payments in Lieu of Taxes (“Deferred PILs”) (for the period October 1, 2001 to April 30, 2006) for certain electricity distributors that filed 2008 and 2009 distribution rate applications.

3. In the Combined Proceeding, the Board explained that it would be inappropriate to retroactively change the Board sanctioned methodologies used to record PILs in the past. In other words, the Board said that the methodologies in place at the time of recording deferred PILs should stand, and the question to be asked is whether the distributor applied those methodologies correctly:

The Board agrees that the appropriate approach is a review of the account in terms of whether the distributors applied the methodology appropriately as the methodology existed at the time. The Board finds that it would be inappropriate to now change the methodology which was used in the past. This would only be appropriate if the Board had clearly signalled that the methodology itself would be subject to future revision on a retrospective basis. The Board made no such pronouncement. While the Board’s methodology may not have been formally tested and adopted through a rates proceeding, the tools clearly were sanctioned by the Board and formed the basis on which distributors were expected to operate. It was reasonable to expect that any methodological changes would be prospective in their application.¹

4. The Notice in the Combined Proceeding included a statement of the Board’s expectation that the decision resulting from the Combined Proceeding would be used to determine the final account balances with respect to Account 1562 Deferred PILs for the remaining distributors. Therefore, the Board’s assertion in the Combined Proceeding that, “*it would be inappropriate to now change the methodology which was used in the past*” applies to all Account 1562 dispersal requests.

B. TBHE’s Account 1562 Balance:

5. On February 21, 2002, TBHE filed an application for a rate adjustment in which it requested that the standard March 1, 2002 effective date for rates be deferred to May 1, 2002.
6. TBHE has recorded its PILs proxy for 2001 and 2002 in accordance with the then Board sanctioned methodologies, which did not distinguish between rates implemented on May 1, 2002 as opposed to March 1, 2002. The Uniform System of Accounts (Effective January 1, 2000) provided:

1562 Deferred Payments In Lieu of Taxes

A. This account shall record the amount resulting from the Board approved PILs methodology for determining the 2001 Deferral Account Allowance and the PILs proxy amount determined for 2002 and subsequent years. The amount determined using the Board approved PILs methodology will be recorded equally over the applicable PILs period (e.g. the 2001 PILs Deferral Account Allowance would be recorded in three equal instalments in October, November and December for utilities with a December 31, 2001 taxation year end).

¹ EB-2008-0381, Decision with Reasons, December 18, 2009, pages 5-6.

7. The Board found that TBHE was not entitled to PILs proxies prior to May 1, 2002 and provided the following rationale:

The Board finds that Thunder Bay's entitlement to PILs proxies in rates began with the effective date of the Board decision in EB-2002-0035, ie. May 1, 2002. The Board notes that the effective date for the 2002 rates including the 2001 and 2002 proxies was delayed to May 1, 2002 at the request of Thunder Bay. The Board acknowledges that Thunder Bay had a PILs liability for the period October 1, 2001 to April 31, 2002. However, the Board is of the view that the entitlement to PILs in rates commenced with the effective date for rates, not the date taxation commenced. The Board also notes that no deferral account was approved by the Board in EB-2002-0035. As such, the Board finds that the PILs proxy calculation provided by Board staff fairly reflects the Board's 2002 decision and is consistent with the decision in the Combined Proceeding.²

GROUNDINGS FOR THE MOTION:

The grounds for the motion, including such further grounds as counsel for TBHE may submit and the Board may allow, are:

A. Error in Fact #1

8. TBHE respectfully submits that an error in fact made by the Board was the belief that the Board sanctioned methodology for recording PILs proxies in 2001 and 2002 distinguished between March 1, 2002 and other rate implementation dates. In fact, the Board sanctioned methodology for recording PILs proxies was unaffected by implementation dates for rates.
9. Therefore, by denying TBHE the recovery of its PILs proxy amounts for the period prior to May 1, 2002, the Board retroactively changed the methodology for recording PILs proxies, contrary to the decision in the Combined Proceeding and the section of the Uniform System of Accounts set out above.

B. Error in Fact #2

10. Another error in fact made by the Board was that pre-May 1, 2002 PILs proxies could not be recovered because they represented costs incurred prior to the "effective date" of the 2002 rate order. While it is generally true that an effective date signifies the date that costs can start being recorded for recovery, an exception to that rule is the recovery of costs recorded in a deferral account. TBHE's pre-May 1, 2002 proxy amounts have been recorded in a deferral account - Account 1562, in accordance with the methodologies in place at the time.
11. Further, as set out above, the Uniform System of Accounts specifically provided for PILs proxies to be recorded in Account 1562 in Q4 2001 and 2002. There would be no purpose for recording those amounts if future recovery were not permitted.

² At page 11 of the Decision.

12. If the Board is correct that entitlement to PILs proxies begins at the effective date of rates, than all distributors with effective rate dates of March 1, 2002 would not be entitled to PILs proxies from October 1 to December 31 of 2001, and from January 1 to February 29 of 2002. Clearly, that is not the case since other distributors with March 1, 2002 effective rate dates have recovered their pre-March 1, 2002 PILs proxies.

C. Error in Fact #3

13. Another error in fact made by the Board was that TBHE required a deferral account in order to be entitled to its pre-May 1, 2002 PILs proxies. Specifically, the Board stated, "*The Board also notes that no deferral account was approved by the Board in EB-2002-0035.*"
14. As stated above, TBHE had a deferral account - Account 1562 in which its pre-May 1, 2002 PILs proxies have been recorded correctly. A second deferral account was neither required nor necessary.
15. For the Board to say that TBHE did not have a deferral account is an error. While the Board merely "noted" this deferral account observation, this "note" was clearly given weight, as evidenced by the same panel's discussion in the North Bay Decision and Order (EB-2011-0187) in which the same observation was stated and not noted.

D. Error in Law

16. TBHE's PILs proxies for Q4 2001 and the first four months of 2002 were built into its May 1, 2002 rates. The denial of TBHE's entitlement to PILS proxies prior to May 1, 2002 is effectively a retroactive rate adjustment. TBHE is effectively being required to return amounts collected through a final rate order.
17. As such, TBHE submits that the Board has violated the rule against retroactive rate making.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- i. the record of the Combined Proceeding (EB-2008-0381);
- ii. the record in this proceeding (EB-2011-0197); and
- iii. such further evidence as counsel for TBHE may submit and the Board may allow.

All of which is respectfully submitted.

April 20, 2012



Thunder Bay Hydro Electricity Distribution Inc.
By its Counsel: Andrew Taylor