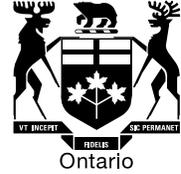


Ontario Energy
Board

Commission de l'énergie
de l'Ontario



EB-2012-0112

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 Canadian
Niagara Power Inc. for an order approving or fixing just and
reasonable rates and other charges for the distribution of
electricity to be effective January 1, 2013.

BEFORE: Paula Conboy
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER
November 22, 2012

Canadian Niagara Power Inc. (“CNPI”) filed a cost of service application (“application”) with the Ontario Energy Board (the “Board”) on May 11, 2012. The application was filed under section 78 of the *Ontario Energy Board Act, 1998* (the “Act”), seeking approval for changes to the rates that CNPI charges for electricity distribution to be effective January 1, 2013. The Board assigned the application file number EB-2012-0112.

A description of the procedural matters related to this application can be found in the Board’s partial decision issued November 8, 2012 accepting the Settlement Agreement reached by the parties in this proceeding, namely CNPI, Energy Probe Research Foundation, School Energy Coalition (“SEC”) and Vulnerable Energy Consumers Coalition. The full record of the proceeding is also available on the Board’s website.

This decision provides the Board’s determination on the following threshold question set out in Procedural Order No. 4:

“Should the Board’s findings and instructions from the Combined [Payments in Lieu of Taxes] PILs proceeding, and from other Board decisions pertaining to PILs, be applied to CNPI?”

Submissions on the threshold question were received from CNPI, SEC and Board staff.

In its original filing in this application, CNPI used the Board’s spreadsheet, which included the methodology developed as result of the Board’s Decision and Order in the Combined PILs Proceeding (EB-2008-0381). This resulted in a proposed refund of a credit balance in “Account 1562 – Deferred Payments in Lieu of Taxes” (“PILs”) in the amount of \$1,119,031, the sum of the balances for each of CNPI’s three service areas (Fort Erie, Eastern Ontario Power, and Port Colborne).

In a letter dated August 27, 2012 amending its application in regard to Account 1562, CNPI withdrew this proposal. CNPI stated that after filing its original application it had concluded that it was not required to use Account 1562 for its Fort Erie and Eastern Ontario Power service areas because the company is not subject to section 93 of the Electricity Act.

CNPI stated that as a privately owned company it pays taxes in accordance with the *Income Tax Act* and does not remit PILs. CNPI also pointed out that further

confirmation that Account 1562 did not apply to it was that the Board's Decision and Order in the Combined PILs Proceeding excluded CNPI as a beneficiary of the principles derived from that proceeding.

The Combined PILs Proceeding was a proceeding held by the Board to determine the accuracy of the final account balances in Account 1562 for the period October 1, 2001 to April 30, 2006 (EB-2008-0381).

“Account 1562 - Deferred Payments in Lieu of Taxes”, is described in the Uniform System of Accounts, which forms part of the Board’s Accounting Procedures Handbook (“APH”) as an:

“account [that] shall record the amount resulting from the Board-approved PILs methodology for determining 2001 Deferral Account Allowance and the PILs proxy amount determined for 2002 and subsequent years” .

The amounts to be recorded refer to the Board approved PILS methodology and the recording of variances between the Deferral Account Allowance and the actual results reflected in a utility’s tax filing (e.g. to the Ministry of Finance for payments in lieu of tax).

SEC argued that the APH did not explicitly state that the amount resulting from the Board approved PILs methodology was intended for only distributors who are now subject to section 93. In support of this SEC argued that the use of “e.g. to the Ministry of Finance for payments in lieu of taxes” in the APH is an indication that the intention was that the APH contemplated tax amounts remitted other than PILs to the Ministry of Finance (such as taxes paid by CNPI). CNPI argued that the difference between ‘e.g.’ and ‘i.e.’ is obscure and that these two terms are often used interchangeably. CNPI argued that it would be placing too much emphasis on the use of ‘e.g.’ to consider this an indication of the Board’s intention for Account 1562, especially since the Board entitled the account “Deferred Payments in Lieu of Taxes”. CNPI submitted, and the Board agrees, that if it had been the Board’s intention to expand the meaning of Account 1562 in the APH to this extent, the Board would have had more effective, clearer and easier ways to do so. The term ‘e.g.’ cannot be used as an indication of the Board’s intention for Account 1562

Account 1562 was created in 2002 at the time that the previously tax-exempt municipal electricity utilities (“MEUs”) were first required to make PILs as a result of Section 93 of the *Electricity Act*. This was a new expense that MEUs were required to incur beginning October 1, 2001. However, they needed a mechanism to recover these PILs amounts in rates. The Board developed such a mechanism in time for setting March 1, 2002 electricity distribution rates.

There were three types of owners of distribution companies at the time: MEUs (the vast majority), provincially owned (Hydro One Networks and its affiliates), and privately owned, such as CNPI. While the provincially owned utilities were not subject to the new requirements under section 93, they were required to remit PILs under section 89 of the *Electricity Act*, having also been previously exempt from taxes.

Privately owned utilities such as CNPI had, however, been paying taxes for many years prior to 2001, so there was no change in their status in 2001, and no new category of expense to be recovered in rates.

CNPI repeated that Account 1562 specifically refers only to PILs. CNPI pointed out that unlike MEUs, it had no deferred balances for the time period October 1, 2001 to December 31, 2001 to record in the account nor did it record any amounts after that time as it did not remit PILs.

CNPI reminded the Board that rates were initially set based on historical expenses; however MEUs had never recorded PILs expenses so the Board calculated a PILs proxy to be embedded into base rates and established a pass-through mechanism in the form of Account 1562 for those utilities to which PILs would now apply. It is CNPI’s position that the Board did not intend all taxes to be considered a pass through, only PILs.

CNPI argued that in its case estimating their tax expense wasn’t any different than estimating any other operating expenses as it had been paying taxes under the *Income Tax Act* for years, and therefore it did not require a variance account to capture this uncertainty. CNPI reiterated that the APH as it was back then, clearly showed that Account 1562 dealt with PILs, and not income taxes. CNPI argued that the APH could have articulated that the account was for income taxes as well as for deferred payments in lieu of taxes, but it did not.

CNPI further noted that as part of the Board's Reporting and Record-keeping Requirements, CNPI has historically showed a zero balance in Account 1562 for all three of its service areas demonstrating that it has not been using the account nor has it filed annual reconciliations between estimated and actual taxes, with the exception of the Port Colborne service area which showed a balance in Account 1562 relating to the October 2001 to April 2002 PILs it remitted before CNPI started to operate its assets. CNPI argued that it would be retroactive ratemaking for the Board to determine now that the account should have applied to CNPI and record today what should have been recorded in the past.

CNPI noted that the methodology for filing rate applications in 2002 was the use of a Rate Adjustment Model ("RAM"), which was a very mechanistic approach. The RAM provided the calculation of a PILs proxy to be included into base rates. CNPI stated that the only way it could recover its tax costs in its 2002 rate filing was to include the amount in the PILs proxy cell to the RAM spreadsheet, but repeated the fact that they had confidence in their calculated tax expense because they had been paying taxes for decades.

Board Staff and SEC's position is that Account 1562 is broader than just PILs. Staff and SEC argued that the intention was that taxes, whether PILs or income taxes were meant to be a pass through and therefore Account 1562 was to be used by utilities that estimated their taxes as well as those that estimated PILs.

In addition, SEC suggested that the Board consider whether it was fair to allow CNPI to gain from a significant windfall if not required to reconcile Account 1562.

The Board accepts CNPI's argument that its review should be a legal consideration about the application of Account 1562 and whether or not the account when it was created, encompassed CNPI, and not a consideration of whether it seems to be unfair to CNPI customers relative to other customers in the province. In reaching a decision the Board may look at consistency across decisions but must take into account all aspects of the specific fact situation and the interplay amongst facts and issues within the application. The Board may well reach a different decision in two cases which present similarities in their fact situations. For the same reason, the Board may reach the same decision in two cases which present different fact situations.

The Board finds that it should have regard first to the Board documents available to distributors at the time Account 1562 was established. Regrettably, not all of these were placed on the record for consideration during the argument phase of the hearing so the Board did not have the benefit of submissions on those. However, they are all readily available on the Board's website. As they form part of the public record, the Board will take notice of them and refer to them in this decision.

The guidance available to distributors at the time rates were set in 2002 included:

- the APH;
- the December 21, 2001 Filing Guidelines for March 1, 2002 Distribution Rate Adjustments and their related appendices; and,
- the Rate Adjustment Model, a spreadsheet to be completed by distributors.

As noted in the December 21, 2001 Filing Guidelines, the rate adjustments to take place on March 1, 2002 included recovery of the 2001 PILs deferral account allowance, and a pass through of the 2002 PILs proxy (estimate).

Those guidelines include the following:

With respect to the 2001 PILs Deferral Account Allowance, the guidelines state:

Ontario electricity distribution utilities have been subject to payments in Lieu of taxes (PILs) since October 1, 2001. These expenses for 2001 have not been included in distribution rates but have been recorded in a deferral account. The Board has issued a methodology for utilities to calculate the PILs deferral account allowance that may be recoverable. The methodology is shown in Appendix "B" to these guidelines.

With respect to the 2002 PILs Proxy (estimate) the guidelines state:

Rate adjustments to reflect the 2002 Payments in Lieu of taxes (PILs) will also be made on March 1, 2002. The Board has issued a methodology for utilities to calculate the recoverable 2002 PILs proxy which is attached as Appendix "B" to these guidelines.

Appendix B provides details of the methodology but states as its last paragraph that:

Please note that the model is designed to address PILs imposed under section 93 of the *Electricity Act*. Contact the above staff regarding how it should be applied in the case of utilities paying proxy taxes under different rules, or paying regular corporate taxes.

There is no evidence as to what advice staff gave any utilities that enquired or indeed whether any such enquiries were made.

The Board finds however that the wording is an indication that the Board at the time recognized that the PILs model might not be applicable in all respects to utilities paying regular taxes (such as CNPI).

In December 2001, the Board also posted some Frequency Asked Questions ("FAQs") on the APH. These were not produced at the hearing. One question (#15) dealt with PILs:

Will a deferral account be established for the fourth quarter 2001 and whole year 2002 PILs estimates? Will an interest return be allowed on the deferral account?

The answer says:

Account 1562, Deferred Payments in Lieu of taxes (PILs) should be used to record the amount resulting from the use of the Board-approved PILs methodology for determining the 2001 Deferral Account Allowance and the PILs proxy amount for 2002 and subsequent years.

During the oral hearing in this proceeding, Board Staff produced a copy of the FAQs issued in April 2003 (which amended those issued in 2001) to read as follows:

The following guidance with respect to accounting entries in the PILs account also apply to utilities which pay the non-section 93 income and capital taxes and which use the SIMPIL model to determine the amount of income and capital taxes that they can recover from customers. The acronym PILs used in the following guidance stands for 'payments in lieu of taxes', section 93 taxes, and for utilities which actually pay income and capital taxes, PILs may be read to be such income and capital taxes paid to tax authorities."

There was argument during the hearing as to the status of the FAQs as a source of policy guidance to the Board in rendering decisions. Board Staff argued that the Board

could rely on the 2003 FAQs as one of the expressions of Board policy and, in effect, an enhancement of the detail in the APH. SEC also agreed with Board staff that in the December 18, 2009 threshold decision in the Combined PILs Proceeding the Board Panel came to the conclusion that supporting documents, such as FAQs to the APH, regarding Account 1562 were representative of the Board's direction.

Board staff's position was that it is clear from the 2003 FAQs that the Board's policy is applicable to both distributors that pay PILs in accordance with section 93, as well as distributors that pay taxes to tax authorities. Board staff argued that these FAQs clearly indicate the Board's intention that the acronym PILs is applicable to any tax proxy calculation for the purpose of calculating distribution rates, regardless of whether the distributor is subject to section 93 of the *Electricity Act*. Board staff submitted that following the Board's guidance CNPI should have recorded balances in Account 1562.

CNPI argued that the FAQs may have weight to determine the methodology of calculating Account 1562 but have no weight as an instrument of the Board in determining the issue of to whom the account applies. In reply CNPI noted that the FAQs were not issued by an order nor were they amendments to the APH. In addition, CNPI argued that it would have been inappropriate to expand the scope of Account 1562 during the Bill 210 rate freeze, which lasted from November, 2002 until January, 2005. CNPI submitted that if the Board wanted to make a change after Bill 210 was lifted, it should have made the appropriate adjustment through an amendment to the APH or by way of an order. Such explicit adjustments were not forthcoming.

The Board agrees with Board Staff and SEC that FAQs can be referred to as a source of policy guidance, but that they have to be read in the context of the relevant provisions of the APH, and to the extent that they do not support the plain wording of the APH, the APH should be preferred. The Board finds that the decision on the applicability of the FAQs in the Combined PILs Proceeding was with respect to clarifying the methodology and not to whom the account applies. In addition, the Board did not turn its mind to this question in the Combined PILs Proceeding. In this case, the Board is also faced with the practical difficulty that there are two versions of the FAQs. The 2001 FAQs are part of the "package" of guiding documents available at the time rates were initially set and, in the Board's view, are preferred over the later, 2003 version, for the purposes of this decision.

While Board Staff argued that when the Board introduced the PILs tax proxy approach in 2001, there was no regulation, rule or policy statement that privately-held utilities would be exempt from the true-up exercise that the PILs approach entailed, the Board finds that it is not nor has it ever been a standard regulatory principle that costs are a pass through. Variance accounts are established on an exception basis and when the Board accepts that there is significant uncertainty.

As outlined previously, rates were set for electricity companies in 2002 on a historical year basis. MEUs had never paid income tax expenses, so there was no historical tax expense to use in the 2002 rates. The Board therefore developed a PILs proxy and established a variance account to capture both the deferred amount for 2001 and the difference between the PILs proxy and the actual amount paid. As a result, the 2002 filing included both the PILs proxy for 2002 and the deferred payment for October to December 2001, an allowance for 15 months of PILs, with the expectation the amounts would be trued up later.

CNPI, on the other hand, had been paying income taxes for years and therefore had an expense on which to base its 2002 rates. The Board also notes that the amount in rates for 2002 would not, as it did with MEUs, need to contain any amounts for the last 3 months of 2001 as those had already been recovered in CNPI's 2001 rates.

While the Board agrees with Board Staff that the approach of a PILs proxy was new in 2001-2002, the whole concept of taxes was new for the MEUs at the time. It was not for CNPI. The Board finds that if the intention was to fundamentally change the regulatory treatment of an existing expense as one estimated and borne by the utility in the normal course, to an expense to be passed through to ratepayers to be reconciled later, it should have been clearly and unambiguously communicated to all the affected utilities at the time. In the Board's view, there is a significant level of ambiguity in the Board documents relating to the scope of the application of Account 1562. This suggests to us that the Board never clearly turned its mind to this issue at the time.

The Board finds that the description of Account 1562 in the APH as applying to Deferred Payments in Lieu of Taxes is consistent with this new expense for MEUs, but nothing in its wording suggests clearly enough that it also applies to CNPI and others whose taxes were neither deferred, nor payments in lieu of taxes.

The Board finds that the 2001 filing guidelines and 2001 FAQs reinforce this view. It was not until 2003 that the FAQs reference utilities in CNPI's position. However, the Board notes that these were issued during the provincial rate freeze (which lasted from December 2002 to January 2005); as a practical matter, neither utilities nor the Board were likely to revisit their accounting procedures and filings once the 2002 filing had been made. The Board agrees with CNPI that the 2003 FAQs could not have been used to expand the scope of to whom the account applies.

Board Staff also argued other non-section 93 distributors, namely Hydro One Brampton Networks Inc. (Hydro One Brampton) disposed of a balance in Account 1562 in its 2012 IRM rate application as per the direction given in the Combined PILs Proceeding. Board staff referred to Hydro One Brampton's case as an example of the "acceptance in the industry" that distributors not subject to section 93 were also to use Account 1562.

CNPI agreed that while Hydro One Brampton is not subject to section 93, it is subject to section 89 which also provides for PILs, and therefore account 1562 would apply to it.

The Board agrees with CNPI's argument that the term 'industry acceptance' is an irrelevant term and that the Board's rules and policy should be the only considerations in determining Account 1562 applicability to CNPI. Further, the Board agrees that Hydro One Brampton is not indicative that account 1562 applies to all non-section 93 distributors as the company is required to pay PILs, albeit under section 89.

The question then remains, should the Board treat CNPI the same as most other electricity distribution companies that have pass through of PILs or should it treat CNPI the same as other tax paying entities that are required to estimate their tax expenses in rates.

The Board finds that CNPI is not required to apply the methodology from the Combined PILs proceeding with respect to its Fort Erie and Eastern Ontario Power service areas as it is not sufficiently clear to the Board that that the pass through of taxes was intended to apply to those businesses which were already paying taxes without true-up.

SEC argued that if the Board did not agree that Account 1562 applies to all three of CNPI's service areas that the account should at least apply to the Port Colborne service area because during the time in question (2002 to 2006) Port Colborne was a municipally owned distributor.

The Board notes that CNPI has been operating Port Colborne Hydro Inc.'s assets under a lease agreement since April 15, 2002. The Board notes that since that date CNPI has paid taxes on the revenues as part of CNPI consolidated taxes. However, during the period prior to April 2002 Port Colborne may have paid PILs to the Ministry of Finance. Notably, in the 2002 rate filing for the Port Colborne service area, there is an amount recorded to Account 1562. Having set up the account and used it in 2002, the Board finds that CNPI must apply the methodology from the Combined PILs proceeding and subsequent Board decisions for the Port Colborne Service Area.

The Board recognizes that it did not hear submissions on the quantum of Account 1562. The Board will require CNPI to dispose of the balance in Account 1562 of the principal amounts recorded to Account 1562 for the Port Colborne service area from October 1 2001 to April 15, 2002 as well as carrying charges to December 31, 2012. These amounts should be refunded to/recovered from customers in the Port Colborne service area. Detailed calculations in support of the amounts must be filed as part of CNPI's draft Rate Order.

Parties may file submissions on the quantum claimed by CNPI as part of any comments on the draft Rate Order.

THE BOARD THEREFORE ORDERS THAT:

1. CNPI shall file with the Board, and shall also forward to intervenors, a draft Rate Order attaching a proposed Tariff of Rates and Charges reflecting the Board's findings in this Decision within **7 days** of the date of the issuance of this Decision. The draft Rate Order shall also include customer rate impacts and detailed supporting information showing the calculation of the final rates including the Revenue Requirement Work Form in Microsoft Excel format.
2. Board staff and intervenors shall file any comments on the draft Rate Order with the Board and forward to CNPI within **7 days** of the date of filing of the draft Rate Order.
3. CNPI shall file with the Board and forward to intervenors responses to any comments on its draft Rate Order within **4 days** of the date of receipt of Board staff and intervenor comments.

4. Intervenors shall file with the Board and forward to CNPI their respective cost claims within **7 days** from the date of issuance of the final Rate Order.
5. CNPI shall file with the Board and forward to intervenors any objections to the claimed costs within **14 days** from the date of issuance of the final Rate Order.
6. Intervenors shall file with the Board and forward to CNPI any responses to any objections for cost claims within **21 days** of the date of issuance of the final Rate Order.
7. CNPI shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings with the Board must quote the file number EB-2012-0112, and be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, 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.ontarioenergyboard.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*.

DATED at Toronto, November 22, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary