



EB-2012-0217

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 Algoma Power Inc. for approval to dispose of the balance in Account 1562, Deferred Payments in Lieu of Taxes.

Before: Cynthia Chaplin
Presiding Member and Vice Chair

DECISION WITH REASONS
February 7, 2013

Algoma Power Inc. ("API") applied to the Ontario Energy Board (the "Board") for approval to dispose of the balance in Account 1562, Deferred Payments in Lieu of Taxes ("Account 1562"). The application was filed on June 6, 2012 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B). The Board assigned the application File Number EB-2012-0217.

The Board issued a Notice of Application and Hearing for an Electricity Distribution Rate Change ("Notice") on August 16, 2012. The intervention period closed on September 10, 2012 and no party requested intervenor status.

On September 10, 2012 API requested that the Board hold API's Application in abeyance pending the Board's determination of a threshold issue in Canadian Niagara Power Inc.'s ("CNPI") 2013 cost of service proceeding, EB-2012-0112, (the "CNPI Proceeding") as to whether Account 1562 applies to distributors who are not subject to Section 93 of the *Electricity Act, 1998*. The Board accepted API's request but noted

that its findings in this proceeding would not necessarily be limited to an application of the Board's determinations on the threshold question in the CNPI Proceeding.

The Board issued its Decision and Order on the threshold question in the CNPI Proceeding on November 22, 2012 (the "CNPI Decision").

On December 10, 2012 API notified the Board that on the basis of the merits of the CNPI Decision API was withdrawing its Application.

On December 21, 2012 the Board notified API that submissions on API's request to withdraw its Application would assist the Board in its determination of the matter. The Board referred to Section 20.05 of the Board's Rules of Practice and Procedure which states that:

If the Board has reason to believe that a withdrawal or discontinuance may adversely affect the interests of any party or may be contrary to the public interest, the Board may hold or continue the hearing, or may issue a decision or order based upon proceedings to date.

Board staff filed its submission on January 17, 2013 and the Board received API's reply submission on January 24, 2013.

Board Findings

API based its request to withdraw its Application on the merits of the CNPI Decision. In the CNPI Decision, the Board determined that CNPI was not required to use account 1562 for operations not covered by section 93 of the *Electricity Act, 1998*.¹ API took the position that its situation is analogous to the CNPI situation.

¹ Section 93 of the *Electricity Act, 1998* states:

Payments in lieu of federal corporate tax

93. (1) If a municipal electricity utility is exempt under subsection 149 (1) of the *Income Tax Act* (Canada) from the payment of tax under that Act, it shall pay to the Financial Corporation in respect of each taxation year an amount equal to the amount of the tax that it would be liable to pay under that Act if it were not exempt. 1998, c. 15, Sched. A, s. 93 (1).

Same: payments in lieu of provincial corporate tax

(2) If a municipal electricity utility is exempt under subsection 57 (1) of the *Corporations Tax Act* from the payment of tax under that Act in respect of a taxation year ending before January 1, 2009, it shall pay to the Financial Corporation in respect of each taxation year ending before that day an amount equal to the total amount of tax that it would be liable to pay under Parts II, II.1 and III of that Act for the year if it were a corporation to which that subsection did not apply. 2007, c. 7, Sched. 12, s. 3 (4).

Board staff submitted that the Board should not allow the Application to be withdrawn. In Board staff's view, the impact of reductions in the Large Corporation Tax in 2004 and 2005 should be recorded and returned to customers.

Board staff identified two factors that distinguish API's circumstances from the CNPI Proceeding. Firstly, staff noted that the 2007 cost of service application of API's predecessor company, Great Lakes Power Limited, included a proposed Account 1562 refund of \$103,000. In Board staff's view, this demonstrates that the company, unlike CNPI, used Account 1562 and expected to be subject to the Board's findings in the Combined PILs proceeding. API responded that this was irrelevant to determining API's actual regulatory obligations.

The Board finds that the position taken in the 2007 proceeding is not determinative of API's regulatory obligations. The issue was not decided in that proceeding, and the Board has subsequently considered the issue in detail in the CNPI Decision.

Secondly, Board staff distinguished the two situations on the basis of timing and stated in its submissions:

Board staff acknowledges that the Board was not persuaded by the 2003 FAQ in its determination for CNPI. However, for API, Board staff notes that the taxes in question in this proceeding pertain to periods after the 2003 FAQ was published. Unlike the CNPI Decision, which involved a period prior to the release of this FAQ, this Application is concerned with tax amounts for 2004 and going forward.²

API responded that, "the FAQ has no impact on whether Account 1562 applies to API, just as it did not in CNPI's case."³ In API's view, Board staff's argument requires that the April 2003 FAQ extend the scope of Account 1562 to include utilities which are not subject to section 93 of the *Electricity Act, 1998*. API submitted that this issue was decided in the CNPI Decision and therefore, because the April 2003 FAQ does not extend the scope of Account 1562, the timing issue is irrelevant.

² Board Staff Submission, at page 5.

³ API Reply Submission, at page 3.

The April 2003 FAQ includes the following language pertaining to the recording of variances in Account 1562:

The following guidance also apply [sic] 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.⁴

The Board considered this matter extensively in the CNPI Decision, and concluded that the April 2003 FAQ could not extend the scope of the Board's policy regarding Account 1562. The Board also found that the wording of the Accounting Procedures Handbook ("APH") regarding Account 1562 clearly includes section 93 utilities – but not utilities which are not subject to section 93. The Board arrived at this conclusion by considering a number of factors, and importantly the regulatory treatment of taxes.

The Board stated in the CNPI Decision:

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

⁴ Ontario Energy Board Accounting Procedures Handbook Frequently Asked Questions (PILs Account 1562), April 2003 ("April 2003 FAQ")

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.⁵

The Board's CNPI Decision is clear that the wording of the Accounting Procedures Handbook and 2001 FAQ support the conclusion that Account 1562 was only applicable to section 93 utilities and that the 2003 FAQ cannot operate to extend the scope of Account 1562 to include utilities which are not subject to section 93. There is nothing in the current proceeding which would cause the Board to reach a different conclusion. API was not required to use Account 1562, and therefore, the fact that the tax change took place after the 2003 FAQ was issued is irrelevant.

Board staff also argued that the Application should be heard because of issues related to Account 1592 and the changes in tax recovery methodology introduced in 2006. In Board staff's view, API should have recorded changes in the Large Corporation Tax in Account 1592. API responded that its Application concerned Account 1562, not Account 1592:

API expects that it will address Account 1592 in the normal course, likely in its next IRM proceeding. At that time, the issue of whether Account 1592 applies to API, as well [as] the appropriate balance in that account will be scrutinized by the Board.⁶

⁵ Decision and Order, EB-2012-0112, November 22, 2012 ("CNPI Decision"), at pages 9-10.

⁶ API Reply Submission, at page 7.

The Board agrees that the current Application does not concern Account 1592. That account will be reviewed in due course and at that time the Board will determine whether API has implemented it appropriately.

The Board accepts API's request to withdraw its Application. This file is hereby closed.

DATED at Toronto, February 7, 2013

ONTARIO ENERGY BOARD

Original signed by

Cynthia Chaplin
Presiding Member and Vice Chair