EB-2008-0381

IN THE MATTER of the *Ontario Energy Board Act 1998*, S.O. 1998, c.15, Sch. B;

AND IN THE MATTER OF a proceeding commenced by the Ontario Energy Board on its own motion to determine the accuracy of the final account balances with respect to account 1562 Deferred PILs (for the period October 1, 2001 to April 30, 2006) for certain 2008 and 2009 rate applications before the Board.

SUBMISSIONS OF THE

SCHOOL ENERGY COALITION

ON THE JURISDICTION ISSUE

1. On October 26, 2009, the Board, by Procedural Order #6 in this proceeding, asked the parties to make submissions on whether the limitations contained in Bill 210 on the Board's rate-setting powers during the period November 11, 2002 to January 1, 2005 limit today the Board's jurisdiction and/or power to review and, if necessary, adjust the balances in account 1562 for electricity distributors.

2. School Energy Coalition has had an opportunity to review the submissions of Board Staff, filed on November 13, 2009. Those Staff Submissions contain a detailed history, and an analysis including references to the key statutory and court precedents applicable to this situation.

3. In general, we are in agreement with the conclusions reached in the Staff Submissions, but we would reach those same conclusions by a slightly different analysis. Our submissions below walk through those logical steps, and reach the conclusion that the Board is not in any way restricted in its ability to a) determine the amounts that should be cleared from accounts 1562 by the electricity distributors, and b) order the clearance of those amounts.

Background

4. It appears to be common ground amongst all parties that the following background facts are true:

(a) The obligation placed on electricity distributors to pay PILs came into effect as of October 1, 2001. The Board decided as a matter of principle that this was an additional expense, established by the government, and under normal ratemaking

principles it should be recovered from ratepayers as part of the cost of service of the electricity distributors.

(b) Because the new expense did not come in at the beginning of a fiscal period, but nine months in, the Board determined that it would establish rates, effective March 1, 2002, that recovered both 2001 and 2002 PILs expenditures over twelve months. For most electricity distributors, their 2002 rates were set on that basis, with in essence an over-recovery of PILs on a single year basis (because a catchup amount was included as well as a full year).

(c) The Board also established account 1562, so that later PILs collected in rates could be trued up against PILs actually payable by the distributor relative to their regulated operations. The Board intended to have a proceeding to determine the appropriate calculation methods and procedures for this true-up, but that never came about. There was a computer model developed by Staff, the SIMPIL model, which was used the electricity distributors, but the assumptions and policy issues built into that model were not the subject of a review and decision by this Board in which all parties would have a right to be heard. This proceeding is the first to allow all parties to consider the appropriate amounts to be included in account 1562, and to compare them to the amounts calculated to have been collected from ratepayers for PILs.

(d) In November 2002 the government passed Bill 210, which froze all rates and dramatically limited the Board's ability to adjust rates going forward. All interim rate orders were made final, and all rates could not be changed without the permission of the Minister. Even applications before the Board at that time were deemed void. Essentially, nothing was grandfathered.

(e) However Bill 210 also recognized that there were existing deferral and variance accounts, and expressly allowed them to continue. Account 1562 was among those allowed to continue. The Board was, however, not free to order those accounts to be cleared.

(f) The Board's freedom to regulate the rates of electricity distributors was restored as of January 1, 2005. The Board's freedom to review and clear deferral and variance accounts was restored effective December 13, 2003. The Board ordered interim and then final clearance of many deferral and variance accounts in 2004 through 2007, but expressly excluded account 1562.

(g) A comprehensive review by Board Staff showed that there were material inconsistencies between electricity distributors in how they used the SIMPIL model, and how they calculated the amounts to be credited or debited to account 1562. There were also many adjustments along the way to the taxes paid or payable by the distributors.

Questions to be Addressed

5. Based on the above facts, in our view the legal question posed by the Board disaggregates into several discrete sub-questions, as follows:

(a) ***Basic Power to Clear Account 1562.*** Did Bill 210, or any other intervening government action, operate to prohibit the Board from clearing account 1562 balances altogether, whether they would have resulted in payments to the ratepayers, or amounts to be collected from the ratepayers?

(b) ***Binary Clearance Limitation.*** If the Board retained the power, after the end of the freeze, to clear account 1562 balances, did Bill 210 operate to render the balances in account 1562 fixed based on the "rules" in place on November 11, 2002, or any other date, such that the Board's power to order clearance today is limited to a "yes/no" question, or such that the Board is obligated to clear the accounts in their current amounts?

(c) ***Power to Adjust the Credit or Debit Balance Downwards.*** If the Board retained the power to determine "how much" may be cleared, and on what terms, is that power limited by Bill 210 to "dividing the existing pot up"? That is, is the Board only allowed to deal with the amounts currently recorded in account 1562 by each distributor, determining in each case how much of those amounts can be cleared to or from ratepayers? Put another way, is the Board limited to adjusting the existing credit or debit balance in the account downwards?

(d) ***Power to Increase the Debit or Credit Balance, or Change a Credit to a Debit.*** Conversely, does the Board have, in respect of these accounts, its normal power to adjust the amount in the account upward or downward depending on its view of the correct or appropriate amount to be paid to, or recovered from, the ratepayers?

(e) ***Power to Correct Incorrect Applications of the Board's Instructions/Model.*** Whether the Board is adjusting a balance upward or downward, is it limited by reason of Bill 210 to making corrections where a distributor did not properly implement the Board's instructions at the time?

(f) ***Power to Determine the Appropriate Principles Under Which the True-Up Should Occur.*** Conversely, does the Board have the power, as it does with all other deferral and variance accounts, to determine in a principled way the appropriate amount to be included in the account, in order to achieve a result of just and reasonable rates, or did Bill 210 limit that power?

6. It is our submission that Bill 210 did not limit the Board's power to deal with account 1562 today. Therefore, in our submission the Board is now in a position where it can, and should, determine the principles under which amounts should have been credited or debited to the account with respect to the relevant period, unencumbered by the instructions given to distributors in 2001 and beyond with respect to this account. The Board should thus determine what the balances should be for each distributor, and then should order appropriate clearance of those accounts, all in the same manner as it does with any other deferral or variance account.

Power to Clear Account 1562

7. Section 79.13 of the OEB Act deals with the status of deferral and variance accounts during the freeze:

> *"79.13. The following amounts shall be deemed to be regulatory assets until the Board addresses the disposition of the amounts in an order under Section 78:*
>
> …
>
> *4. An amount recorded in an account prescribed by the regulations."*

8. Ontario Regulation 339/02 prescribes, in Section 6, Account 1562 as one of the accounts to which this applies.

9. Section 78 is the Board's basic power to make orders fixing just and reasonable rates.

10. In our submission, it is clear that Bill 210 specifically contemplated the continuance of Account 1562, and its subsequent clearance by the Board. Further, it specifically contemplated that such clearance would be pursuant to the Board's power to set just and reasonable rates.

11. It is therefore submitted that, at the basic level, the statute specifically empowers the Board to clear Account 1562 in the future. Thus, the answer to the first question we posed – the right to clear the account – is right in the statute. The freeze did, of course, defer the clearance of account 1562, but the statute preserved the account so that the Board could, on a subsequent date, clear it.

12. Further, the statute specifically imports the standard of just and reasonable rates into that clearance when it does happen. We will comment on this below.

Binary Clearance Limitation

13. This question is included for completeness, although there does not appear to be a reasonable argument that account 1562 was somehow fixed in amount, so that the Board could only clear it or not, but not determine the appropriate amount to be cleared. In our submission, for the Legislature to do so would require clear language to that effect, since nothing in the other language in Bill 210 suggests that the regulatory assets exception was intended to be circumscribed in that way, or such a limitation was necessary to achieve the goals of the statute.

14. We also note that if there is a proposal that the balance was somehow fixed, then one would have to ask when that happened. Account 1562 was the subject of numerous entries by each distributor from 2001 to 2006. Many of those applied judgment by the distributors, without any clear rules to follow. During that period, and subsequently, many distributors had adjustments (from the Ministry of Finance and otherwise) to their actual taxes paid or payable, which also potentially changed the balances in these accounts. Bill 210 says nothing that would help the Board to determine at what point in time the balance became immutable and no longer subject to adjustment by the Board. It could not have been November 2001, unless the

legislation is assumed to have, not expressly, but by implication, prohibited entries to deferral and variance accounts during the period of the freeze. That was clearly not the case, and, if it was, then many utilities have overcollected market transition costs from ratepayers.

15. But if it was not at that time, when the freeze started, when was it? It stretches the limits of interpretation to suggest that the legislation fixed the amount in deferral accounts at some time, but failed to say when that time should be.

16. A further complication is that, if the Board does not have the freedom to adjust the amount, only to clear it or not, on what basis would the Board make that clearance decision? Suppose, for example, that a distributor has an amount of $5 million owing to ratepayers in account 1562. Can the Board decide that amount should not be repaid to the ratepayers? If so, what would be the basis for such a decision, particularly given that any clearance order arises under the rubric of section 78? The same is true if the balance is an amount to be collected from the ratepayers.

17. The result of this dilemma is that this position – the fixed amount argument – obligates the Board to clear account 1562, and to do so without any change to the number. The Board would have no legal basis to say no. If this unusual role for the Board was in fact the intent of the Legislature, in our submission the legislation would and could have said so simply and directly.

18. We believe the Board is therefore forced to the conclusion that the amount in account 1562 is not fixed, and as a result the Board is required, at this time, to determine the appropriate amount in the account as part of the process of ordering clearance.

Splitting the Pot vs. Getting the Number Right

19. In the normal course of events, an amount in an expense-related deferral or variance account is the amount that the utility wants to recover from ratepayers, so it is almost always the maximum amount that could be claimed. The distributor has a $1 million balance in an account, and the Board says "OK, we have to determine how much of that should be recovered from the ratepayers." Issues of proper calculation, categorization, and prudence are considered, but in most cases the amount ordered recovered is not greater than the original amount claimed.

20. That is, in fact, what happened with respect to market opening costs. Distributors made a claim, and the Board allowed them to recover some or all of that claim. To the best of our knowledge, the Board did not order recovery of an amount in excess of the amount claimed by any distributors. In all cases, the Board in effect "split the pot", determining how much of the balance would be recovered from ratepayers, and how much would be borne by the shareholder.

21. True up accounts like account 1562 are different, in that variations between the account balance, and the "right" amount, can be in either direction, and the balance itself can be positive or negative. In those situations, the Board's task is not to determine how much of the amount presented to them is paid to, or collected from, the ratepayers. Rather, it is to determine the

correct amount (and its sign, positive or negative), which could be an increase or decrease to the amount presented to them.

22. The question here raised is whether the Board, in exercising its section 78 jurisdiction with respect to accounts over the freeze period, is limited to taking the account balance presented to it by the utility, and determining how much of that balance is recoverable from, or payable to, as the case may be, the ratepayers. In effect, s the Board limited to adjusting the credit or debit balance downward?

23. In our submission, such an interpretation of the Act and Bill 210 would be capricious, and should be rejected. It cannot have been the intention of the Legislature that the Board would not be able to clear the fair amount from the account, because by happenstance an adjustment to get to that amount is a movement in the wrong mathematical direction.

24. This would also produce unusual results. Consider a utility that has a $500,000 credit balance in account 1562, but has made an $800,000 error that the Board needs to correct. The Board determines, after review, that after the $800,000 adjustment there should be a $300,000 debit balance. However, the proposed restriction would require the Board to order no clearance of the account, since it would be restricted to deciding how much of the $500,000 credit goes to each of the ratepayers and the shareholder. The other $300,000 would have to be ignored.

25. It is therefore submitted that the Board's power and obligation is to establish what, in its view, is the appropriate amount for clearance, regardless of whether the balance in the account is increased or decreased, or the sign ends up being the same or different.

Scope of, and Grounds For, Review

26. The last question is whether the Board, in looking at the amounts to be cleared, is limited to determining whether the claimant complied with the instructions and model the Board was using at the time, or whether the review should be to determine the fair, correct, or appropriate amount to be paid to or recovered from the ratepayers, based on principle. In our submission, the latter is the case.

27. It is well accepted that the Board's jurisdiction in matters of this sort arises from section 78 of the Act, which mandates the just and reasonable standard for rate-setting. Under section 79.13, it is clear that this expressly applies to the clearance of account 1562.

28. Has the Board at some time in the past made a legally binding determination as to the method for calculating account 1562 that results in just and reasonable rates? Clearly the answer is that it has not. The Board did not have a hearing, and did not make a formal and binding determination. The Board issued instructions and directions, including providing (and from time to time revising) the SIMPIL model, but none of those instructions or directions, nor the model itself, purported to be binding decisions in exercise of the Board's section 78 jurisdiction.

29. Thus, without more, in our submission this is much like the Board's determination in a policy process of, for example, a method for structuring gas IRM, or the rules surrounding 3rd

Generation IRM, or the cost of capital for regulated entities. Those guidelines and policies are often thorough and compelling, but the Board has always been clear that they are not determinative of how the rates for any given distributor will be set. The rates for a distributor must be established in a proper manner, with all parties having a full right to be heard.

30. By way of example, the Board determined a comprehensive 3rd Generation IRM framework, to be applicable to all distributors. Toronto Hydro applied for a multi-year cost of service, a model that the Board had expressly rejected in the course of the policy process. Nonetheless, it was Toronto Hydro's right to apply for it, and to make their case that it was the right result for them. In the end, they were given a two year cost of service result, still non-compliant with the 3rd Generation rules.

31. In the case of deferred PILs in the early part of the decade, and in particular during the freeze, the Board did not even have the opportunity to carry out a thorough consultation on the many issues surrounding the calculations and the true-up process. It intended to do so. Bill 210 intervened, in fact at a time when most distributors likely had, to the Board's knowledge, too much PILs expense built into rates on a going-forward basis.

32. Now the Board, eight years later, is in the position where the current account 1562 balances have at least two general categories of problems with them:

(a) The Board was prevented from having the kind of consultation and review of its approach to PILs calculation and true-up that it knew it needed, and planned to have. As a result, no principled set of rules, standards, or guidelines have ever been considered or established by the Board in this area. It remains, from the point of view of the Board, a blank slate. Board Staff has attempted over the years to fill the gap, but that is not a substitute for the Board grappling with the issues in the exercise of its statutory jurisdiction.

(b) The instructions and guidelines in use during the freeze were complex, and in some cases utilities, who in fairness were new to both being taxable and being regulated, simply were not able to understand and follow the instructions, and use the model, in a comprehensive and consistent way. Thus, even to the extent that the framework developed largely by Board Staff, and in use throughout this period, was consistent with just and reasonable rates, the implementation of that framework was in many cases not consistent with the Board's guiding principle for ratemaking.

33. It is therefore our submission that the Board is now obligated, in reviewing the claims by distributors to clear account 1562, to start from a principled foundation, determine in a rigorous way the appropriate methodology for calculating how much was actually collected in rates, and how much was actually paid in PILs, and then for each distributor applicant determine in an equally rigorous way whether the amounts in their account 1562 comply in all respects with that methodology.

34. It is only by solving both of the shortcomings with the current account 1562 balances that the Board can meet its statutory requirement that, in clearing these accounts, it does so consistent with the just and reasonable rates standard.

35. We note one final thing. Our conclusion is, in essence, that the Board should treat these account 1562 balances no differently than it treats requests for clearing any other deferral or variance account. At the time of clearance, the Board asks whether the amounts have been correctly calculated, whether they have been categorized correctly, and whether they were prudently incurred. The Legislature has not given any clear statement that it intended this normal process to be cut back in the case of these accounts. In fact, the opposite occurred. The Legislature advised the Board that clearance would be done through section 78 orders, i.e. following the normal rules and processes for account clearance.

36. Because PILs, and therefore the true-up system, was new, there was not at the time these accounts were in use the same shared expectations amongst the Board and all stakeholders with respect to these accounts as are usually the case for accounts that have a history and a track record. There was confusion and misunderstanding, and the Board's intention to clear those things up was frustrated by events. This is unfortunate, and it means that some parties – utilities and ratepayers – may have had expectations at the time that will turn out to be incorrect.

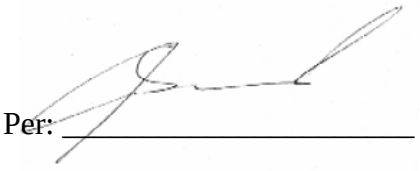
37. But this is an accident of the unusual history of electricity distribution in Ontario, and is not in any way a reason for the Board to jettison its principled and reasoned approach to rate-setting, nor to read into the legislation implied restrictions that, if the Legislature had intended them, would certainly have been expressed directly and clearly.

Conclusion

38. We hope our submissions are of assistance to the Board. It is our intention to attend at any oral hearing the Board establishes to consider further submissions on this issue.

Respectfully submitted on behalf of the School Energy Coalition this 20th day of November, 2009.

SHIBLEY RIGHTON LLP



Per: _____

Jay Shepherd