EB-2008-0381

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15 (Schedule 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 distribution rate applications before the Board.

SUBMISSION OF THE ELECTRICITY DISTRIBUTORS ASSOCIATION ("EDA") IN RESPECT TO THE THRESHOLD QUESTION

1. The Board issued Procedural Order No. 6 on October 26, 2009 setting out the following question ("Staff's Threshold Question") to be considered as a threshold issue in the context of this proceeding:

> The Board's authority to adjust electricity rates was limited by Bill 210 from November 11, 2002 until January 1, 2005. Does the Bill 210 limitation on the Board's rate setting authority in the rate-freeze period in effect to December 31, 2004 impose any restrictions on the Board's ability to make adjustments to the account 1562 balances as they existed, and were audited, as of December 31, 2004?

2. The Coalition of Large Distributors (the "CLD") has submitted a different question, as follows:

> Distribution rates approved by the Board under section 78 of the OEB Act effective March 1, 2002 reflected a revenue requirement including a PILs Proxy for the period October 1, 2001 to December 31, 2001. In December, 2002, the OEB Act was amended by S.O. 2002, c.23, which provided that, "if an order under section 78 was in effect on November 11, 2002, that order applies to electricity used on or after December 1,

> 2002." It further provided that applications for rates could only be made if approved by the Minister of Energy. The Minister of Energy permitted distribution rates to be adjusted to remove this 2001 PILs Proxy as of March, 2004. Does the OEB now have authority to change the PILs Proxy included in rate orders in effect during the period March, 2002 - March 2004 for the purposes of computing balances in the 1562 deferred PILs accounts?

The EDA submits that this latter question is an appropriately phrased question to deal with the PILs proxy amount for the period October 1, 2001 to December 31, 2001, commonly referred to and referred to herein as the "stub period", which was collected until March 2004. However, it does not deal with the other issues engaged in this proceeding.

3. The question phrased by Board Staff queries whether the Board may make adjustments to the balances in a deferral account (Account 1562) which was set up to track and record variances resulting from, amongst other things, differences between the Board-approved PILs amount and actual billings that relate to the recovery of PILs. In the EDA's respectful submission, Staff's Threshold Question is an entirely separate and more complicated question than the question of what can be done about the stub period amount. The EDA submits that both questions are pertinent to this proceeding and will accordingly answer both of these questions in this Submission.

Overview of the EDA's Position

4. The Stub Period With respect to the stub period, the EDA submits that the Board does not have authority to change the PILs proxy included in rate orders in effect during the period March 2002 to March 2004. Simply put, the stub PILs proxy amount was incorporated into rates which were subject to a final rate order (even prior to the passage

of Bill 210). Bill 210 legally prevented the Board from removing the stub PILs proxy amount from rates as early as it may have wished, and the Board cannot now cure what in hindsight became a deficiency in its final rate order because of the effect of Bill 210 and the very clear rule against retroactively disturbing final rates.

5. Staff's Threshold Question With respect to the Board's authority to otherwise adjust LDCs' Account 1562 balances, the EDA submits that the Board may only make limited adjustments to certain inputs into the SIMPIL model being used at that time to calculate the annual Account entry. The Board is constrained by well-established principles against retroactive ratemaking and retroactive rule-making and by Bill 210. Therefore, before making any adjustments, the Board must examine each line item in the SIMPIL model which was in use at the time the Account entry was calculated and make determinations as follows:

(a) The Board must determine if the line item ought to have been carried over from 2002 because of Bill 210's prohibition against changing rates. If so, the figure to be inserted by each LDC is the amount in place at the time Bill 210 was passed.[1] Such amounts cannot be changed retroactively because of the principle against ***retroactive ratemaking***.

(b) With respect to the other line items, the Board must determine if guidance was given in the *Accounting Procedures Handbook* ("APH") or otherwise by Board publication with respect to the calculation of the amount to be inserted in the line item.

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[1] The EDA has not, to this point, undertaken a line-by-line review to determine if any particular line items were to be carried over from 2002 because of Bill 210. The EDA understands that, as the SIMPIL model was revised from time to time during the rate freeze, Board Staff directed LDCs to make or not to make specific entries because of Bill 210. **The EDA simply wishes to underscore that if any input into the SIMPIL model was actually an amount approved and included in the distribution rates which were frozen by Bill 210, that input must remain frozen as well to ensure that the ultimate disposal of Account 1562 accords with Bill 210.**

(i) If so, the principle against ***retroactive rule-making*** prohibits the Board from changing that guidance with respect to past years. Accordingly, the Board may examine only whether the LDC was ***reasonably prudent*** in interpreting and applying the guidance and, if it was, the amount should not be disturbed.

(ii) If no guidance was given as to how a particular line item should be calculated, the Board may examine whether the LDC was ***reasonably prudent*** in its interpretation of the requirements of the SIMPIL model in regard to that item. If the LDC was reasonably prudent, the amount should not be disturbed.

6. The EDA submits that there is one exception to the rule that an entry ought not to be disturbed if it was prudently made in light of contemporaneous guidance. This exception relates to balances distorted by cycle issues caused by the closing of Account 1562 as of April 30, 2006. This exception is necessary because an amount may have to be disturbed because it was prudent to reflect that amount in the SIMPIL filing on the reasonable expectation that the entry would be reversed in a later cycle by the mechanics of Account 1562. However, Account 1562 did not remain open after April 30, 2006 so as to permit the account to self-adjust with time, leaving a distorted balance in the Account as at April 30, 2006. The EDA understands, despite prudent behaviour by some LDCs, this type of distortion may have occurred with respect to annual changes in regulatory asset balances on LDC tax returns, and submits that LDCs ought not to be prejudiced by distortions caused by the unanticipated closing of Account 1562.[2]

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[2] The EDA has attempted to assist the Board by suggesting a principled approach to its review of Account 1562 balances. However, the EDA asks the Board to be mindful that a given LDC may have unique circumstances which may affect the calculation of their Account 1562 balances and that flexibility in applying this framework may be required when examining the calculations of individual LDCs.

THE STUB PERIOD: FINAL RATE ORDERS MAY NOT BE DISTURBED

7. The fourth quarter 2001 PILs proxy amount, or the "stub", was approved for collection by LDCs in final rate orders which took effect on March 1, 2002 for most LDCs.

8. As a result of Bill 210, rates could not be adjusted unless permitted by the Minister. The stub amount was not removed from most LDCs' rates by Ministerial direction until March 2004. The stub amounts collected by LDCs from 2002-2004 through final rates cannot be modified now on the grounds that to do so is simply an adjustment to the SIMPIL model. To make changes to rates which included the stub would amount to retroactive ratemaking.[3] Nor is there any justification for selecting only one of the many components of rates during the freeze period for an adjustment after the fact.

9. Bill 210 prohibited the Board from making rate orders. It is accepted that before the passage of Bill 210, the Board and LDCs expected the stub PILs proxy to be removed in 2003. As a result of Bill 210, however, the stub remained in rates until March 2004, when the Board was once again empowered to make rates on a going-forward basis.

10. Viewed in isolation, it is clear that the carry-over of the stub period amount beyond 2002 rates was an unintended deficiency in the applicable rate orders in 2003 and 2004. Bill 210 had the effect of precluding adjustments to rates which might otherwise have been made during the freeze period, some of which would have been favourable to ratepayers,

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[3] "It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates": *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & LDCs Board)*, [2006] SCC 4 at para. 71, cited in Decision and Order of the Board in EB-2005-0031, page 8 ["2005 GLPL Decision"]. See also *Northwestern LDCs Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 at 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta.C.A.), leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731 at 734-35.

and some of which would not have been, but which all can be characterized as deficiencies in 2003 and 2004. The inclusion of the stub PILs proxy amount in the rate order after 2002 was a deficiency, among many others, that the Board was prohibited by Bill 210 from correcting. It is abundantly clear that the Board cannot now adjust this aspect of the rate order, as "trying to remedy a deficiency in a rate order through later measures is retroactive ratemaking".[4]

11. The Board's own jurisprudence affirms that the Board lacks any authority to make rates retroactively:

> The *Ontario Energy Board Act, 1998* does not contain any provisions that deal specifically with retroactive ratemaking, and the Board is therefore not empowered to alter a final rate order retroactively.[5]

12. Any attempt to alter the inclusion of the stub in rates beyond 2002 on the grounds that such inclusion amounts to an "over-collection of PILs"[6] is not appropriate. The Board cannot use policy rationale such as rate-payer protection to justify taking back the stub amounts even if they are perceived by some to result in an "over-collection" by LDCs. The stub was part of a final rate order, and LDCs subject to final rate orders are entitled to some certainty and predictability. The Board has recognized that hindsight does not justify retroactive interference with rates:

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4 *Bell Canada v. Bell Aliant Regional Communications*, [2009] SCC 40 at para. 63 ["*Bell Aliant*"].

5 2005 GLPL Decision, page 8.

6 Board Staff Discussion Paper, *Account 1562-Deferred Payments in Lieu of Taxes*, EB-2007-0820, August 20, 2008, p. 9.

> The general principle is that when a Board establishes a Final Order with respect to rates, that rate is in effect until replaced, i.e. the final rate either is replaced by an Interim Rate or is replaced by a new Final Rate Order in a subsequent proceeding. The reason is that the regulatory compact assumes that between rate hearings, there will always be over earnings or under earnings but the utility must accept the consequences. It is not entitled to be reimbursed if it does not make its full allowed rate of return. On the other hand, the utility does not have to give money back to the ratepayers if it earns in excess of that amount. Rates are to be corrected at the time of the next hearing on a going forward basis. They are not made retroactive. This allows the utility to finance its operations on a predictable basis and provides finality to proceedings.[7]

13. The stub was part of LDCs' revenue requirement which formed the basis for final rate orders. Any change to the rates finalized and then frozen by Bill 210, including a claw-back of the stub, would amount to retroactive ratemaking. The Board does not have authority under the Act or at common law to interfere with final rate orders in this way. Furthermore, to permit a claw-back of this component of rates, without permitting offsetting adjustments in respect of under-collected amounts, would be blatantly unfair.

14. Furthermore, the intent of Bill 210 was clear – a freeze on rates for the period it was in force unless the Minister directed otherwise. Bill 210 would be rendered practically nugatory if the Board could now go back and retroactively implement the rates it feels should have been in place during the freeze.

15. Board Staff, in its Submission, raises the point that deferral accounts are the exception to the rule against retroactive rate-making. While that may be so, this exception to the rule against retroactive ratemaking does not apply to the stub period amount.

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[7] 2005 GLPL Decision, page 17 (Member Kaiser in dissent) (emphasis added).

16. The stub was not part of the variances that Account 1562 was designed to track. Accordingly, the stub cannot be changed on the basis that it was a deferred amount subject to retrospective adjustment. The stub was a part of LDCs' base distribution rates and was collected pursuant to a final rate order.

ACCOUNT 1562

17. Board Staff proposes to examine the accounting items in the SIMPIL models which make up each utility's Account 1562 balance to inquire into whether the SIMPIL model was adhered to and whether the guidance offered in the SIMPIL model applicable at the time now accords with the Board's intentions for how best to structure the SIMPIL model.

18. The EDA submits that the Board must first decide which, if any, line items in each year's SIMPIL model were frozen by Bill 210.

19. Next, the Board may consider the other line items in each LDC's use of the SIMPIL model, on a case-by-case basis, to determine:

    (a) each utility's reasonable compliance with the guidance in the SIMPIL model; and

    (b) the reasonableness and prudence of each utility's treatment of the SIMPIL model where there was no or inconsistent guidance given or different interpretations were possible.[8]

    Where an LDC was reasonably prudent in following the Board's guidance at the time and in recording the line item, fairness and the principle against retroactive rule-making

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[8] The EDA understands that the model in a given year may have contained purely arithmetic errors, such as that the wrong formula was incorporated into the spreadsheet published on the Board's website. In the EDA's submission, it is acceptable for the Board to now correct such purely mathematical errors, as such corrections would not offend the principle against retroactive rule-making.

dictate that the Board is precluded from directing LDCs to follow new rules to recalculate and rerecord the line item.

20. The EDA submits that insofar as the Board proposes to use disposition proceedings such as the current proceeding to change the original guidance issued with respect to the SIMPIL model in the APH, Frequently Asked Questions and various other publications, it is precluded from doing so by the rule against retroactive rule-making and by principles of fairness and equity. The Board may only modify its original guidance if such modification is necessary to comply with Bill 210.

The SIMPIL model cannot be changed retroactively

21. The SIMPIL model as it was originally issued is a final instruction of the Board which cannot be changed retroactively. The SIMPIL model was incorporated by reference into the Board-issued APH, and formed a Board directive, irrespective of the process by which it was issued. It is irrelevant that the SIMPIL model was not subject to a formal Board proceeding; LDCs relied on the SIMPIL model as the Board's only direction regarding Account 1562.

22. To make changes to the SIMPIL model now with the intention of modifying Account 1562 balances which accrued during the period of 2002-2009 amounts to retroactive rule-making. The Board is not empowered to change the rules retrospectively or retroactively.

23. Retroactive powers must be explicitly granted. As stated by the Supreme Court of Canada: "The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by

the language of the Act."[9] The Act does not contain any language which would impute to the Board the power to adjust rules retrospectively.

24. Regulated LDCs are entitled to certainty and reliability in the rules governing their operation. Accordingly, courts have recognized that it is even more critical for retrospective powers to be clearly contemplated by a regulator's empowering statute: "A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language... This principle is based on notions of fairness and the reliability of expectations."[10]

25. To the extent that the SIMPIL model was used and relied upon by LDCs in recording amounts in Account 1562, it forms the basis for the Account 1562 balances. The SIMPIL model cannot now be retroactively altered by the Board in an attempt to review and modify the amounts in Account 1562. An overhaul to the SIMPIL model cannot be a permissible activity simply because of its link to a deferral account. The rules governing LDCs' use of Account 1562 must not be disturbed retroactively, as this would result in an unfairness to LDCs.

26. Board Staff have discussed the need for current direction from the Board on the methodology used in the SIMPIL model. Insofar as any such direction will affect the current balances in LDCs' Account 1562, the Board may only make such revisions as are necessary to bring the SIMPIL model methodology into compliance with Bill 210. No

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9 *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271 at 279.

10 *Beau Canada Exploration Ltd. v. Alberta (Energy and LDCs Board)*, [2000] A.J. No. 507 (C.A.) (QL) at para. 28.

other new or corrective directives to policy or principles may be issued by the Board as these would be retrospective. The Board may not retrospectively issue guidance in order to alter the balances in Account 1562 according to the Board's current policy goals.

***Bell Aliant* is inapplicable**

27. Board Staff have cited *Bell Aliant*, which is a fundamentally distinct case from the present proceeding, as support for its position that by its very nature as a deferral account, Account 1562 is open to subsequent modification.

28. In *Bell Aliant*, the CRTC was found to have the power to create a deferral account for broadband expansion and consumer credits. At the time of its establishment, the CRTC clearly indicated that the unallocated balance in the account at a future date would be disposed of in accordance with direction from the CRTC to be issued at that time. The Supreme Court found that the CRTC was empowered to rule on the disposition of this account, and further found that the LDCs in question knew from the outset that they would be obliged to use the balance of the deferral account in accordance with subsequent directions from the CRTC.[11]

29. *Bell Aliant* does not provide support for the retroactive modification of the SIMPIL model. The Supreme Court's decision does not empower the CRTC or any other regulatory authority to retroactively adjust the formulae or rules for determining the amounts to be recorded in a deferral account, but rather deals with the forward-looking disposition of those amounts. Indeed, the Supreme Court approved the consumer credits

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[11] *Bell Aliant* at para. 61.

created by the CRTC precisely because they "do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures..."[12].

30. The Board's current proposal to adjust the SIMPIL model and thus the balances in Account 1562 cannot be grounded in its authority to create or dispose of a deferral account. Rather, these adjustments amount to the Board's attempt to restrospectively remedy deficiencies in the rules provided to the LDCs for calculating Account 1562 balances, which the Board has no power to do.

Great Lakes Power case is inapplicable

31. Account 1562 is a regulatory asset account prescribed for recording variances as follows:

(a) Variances resulting from the difference between the Board approved PILs amount and the amount of actual billings that relate to the recovery of PILs;

(b) Variances between the PILs tax estimate and the actual tax liability cased by changes to tax legislation;

(c) The difference between certain items reported by the utility in the SIMPIL model and amounts reported for tax purposes (called "True-Up Items"); and

(d) An allowance for deemed interest.[13]

32. Unlike with other deferral accounts, the amounts to be recorded in Account 1562 were prescribed variances between fixed numbers, as opposed to amounts relating to unforeseen expenditures by LDCs.

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[12] *Ibid.* at para. 63 (emphasis added).

[13] Board Staff Discussion Paper, pp. 5-6.

33. Great Lakes Power's ("GLP") ongoing appeal of the Board's decision regarding its Account 1574 balances is not related to the methodology used by GLP in recording figures in a deferral account, as is the issue in this proceeding. Rather, the Board contends in that case that the deferral account was never authorized by the Board. That case has nothing to do with the issues in this proceeding. Accordingly, the Divisional Court decision relied upon by Board Staff does not apply broadly to any deferral account which was in place during the rate freeze, but is specific to GLP's circumstances.[14]

Limited review only

34. The only permissible review the Board may conduct of Account 1562 is of the LDCs' reasonably prudent adherence to the SIMPIL model's methodology in light of the contemporaneous guidance provided and Bill 210 prohibitions.

35. Once the SIMPIL model has been examined by the Board as described above, the EDA submits that, before the disposition of each LDC's Account 1562, the Board may conduct an examination of the treatment accorded to the SIMPIL model by each utility as a form of prudence review. That is, taking into account the SIMPIL model as it existed at the time and the guidance given with respect to the SIMPIL model's use, the Board will then examine whether each LDC was reasonably prudent with respect to its implementation of the SIMPIL model for each year. Reasonably prudent calculations, measured against the guidance given by the Board at the time, ought not to be disturbed simply because the

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[14] In any event, the Divisional Court decision in the GLP case is under appeal (the Court of Appeal has granted leave to appeal). Accordingly, Board Staff's reliance on the decision as settled law with respect to Bill 210 and its impact on the Board's authority to examine deferral accounts or otherwise is inappropriate, in addition to the case being inapplicable on the facts.

benefit of hindsight suggests that alternate or additional guidance would have been preferable in the Board's present view.

36. The EDA submits that this is the only fair way to proceed, especially given the passage of time. As of January 1, 2005, the Board was required by section 78(6.2) of the Act to review Account 1562 annually, but it did not do so. The Board has commented that the requirement to review deferral accounts annually is based on fairness to LDCs:

> Furthermore, the Act requires that balances in deferral accounts should be reviewed by the Board at least annually. We infer from this that there is a policy against adverse impacts and inter-generational inequity that might be caused by out-of-period rate adjustments.[15]

37. Account 1562 has not been reviewed since LDCs began using it in 2002. Board Staff's proposal that the Board can now completely revisit and adjust the SIMPIL model almost eight years later amounts to a prohibited out-of-period rate adjustment. If the Board was permitted to completely overhaul the methodology used to calculate the Account 1562 balances when the time finally came for the disposition of those balances, an unfairness would result to prudent LDCs which relied on the methodology given by the Board for several years. [16]

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[15] 2005 GLPL Decision, page 8.

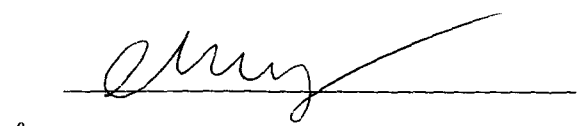
[16] The EDA submits that, although the Board may have had other pressing matters to address, the Board has had opportunities to address Account 1562 prior to the current proceeding, and therefore the LDCs ought not to be prejudiced by the passage of time:

(a) The Board could have analyzed the methodology for recording amounts in Account 1562 without issuing new rates during the Bill 210 rate freeze.

(b) With the proclamation of Bill 4 on December 18, 2003, the Board was permitted to address the recovery of Regulatory Assets, including Account 1562. However, Account 1562 was not included in phase 2 of the Regulatory Asset proceeding because none of the test subjects chosen by the Board claimed Account 1562 balances.

38. Adjustment of the SIMPIL model on policy-based grounds is precluded by the Act, contrary to judicial authority, and would perpetrate an unfairness to LDCs. The Board cannot undertake such a review on any basis. The Board is entitled, however, to first review whether Bill 210 affects any items in the model and freeze the applicable items in the SIMPIL model to ensure compliance with Bill 210, and then review each LDC's compliance with the SIMPIL model and correct for imprudent variations from the model judged against contemporaneous guidance provided with respect to the model.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



for Kelly Friedman
Counsel for the Electricity Distributors Association

(c) The lack of applicable test subjects in phase 2 of the Regulatory Asset proceeding and the corresponding absence of stakeholder input meant that the Board did not address Account 1562 in the 2006 EDR process.

(d) In the 2008 EDR process, seven applicants applied to the Board for disbursal of their Account 1562 balances, but the issue was not addressed in that process.