

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”) ON THE  
UNSETTLED ISSUES  
FURTHER TO PROCEDURAL ORDER NO. 9**

1. The EDA appreciates this opportunity to comment on the appropriate resolution of the unsettled issues in this proceeding.
2. The EDA reminds the Board that, in its submission on the threshold question dated October 16, 2009, the EDA explained the principles which it submits ought to govern the Board in this proceeding when considering the current treatment of any given line item or issue in the SIMPIL model further to determining Account 1562 balances for disposition. The EDA submits that it is crucial that the Board follow a principled approach to resolving the issues in this proceeding.
3. By way of summary, the guidance given by the EDA at that time is reiterated here for convenience in the form of 4 governing principles.

### **Principled Framework for Resolution of all Issues**

4. For any given issue or line item from the SIMPIL model, the EDA proposes that the Board should do as follows:
  - (a) The Board should query if the amount was approved and included in rates prior to Bill 210 and therefore frozen by virtue of Bill 210. If so, the figure to be inserted by each LDC is the amount in place at the time Bill 210 was passed and cannot be changed because of the *principle against retroactive ratemaking* (hereinafter referred to as “**Principle 1**”).
  - (b) If the particular line item was not an amount approved and included in final rates, then:
    - (i) If guidance was given by the Board in the Accounting Procedures Handbook (“APH”) or otherwise by Board publication, the *principle against retroactive rule-making* prohibits the Board from changing that guidance. Accordingly, the Board may examine only whether the LDC was reasonably prudent in interpreting and applying that guidance and, if it was, the amount should not be disturbed (hereinafter referred to as “**Principle 2**”).
    - (ii) If no guidance or inconsistent guidance was given as to how a particular issue or line item should be addressed, the Board may examine whether the LDC was reasonably prudent in its interpretation of the requirements of the SIMPIL model. If the LDC was reasonably prudent, the amount should not be disturbed (hereinafter referred to as “**Principle 3**”).
  - (c) Account 1562 was closed on April 30, 2006 and the timing of such closing could not have been anticipated by a prudent LDC. This incomplete accounting cycle led to distortions in the Account.<sup>1</sup> Where balances could not self-adjust in the

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<sup>1</sup> This is the “Incomplete Cycle” problem discussed by Board staff in their Discussion Paper of August 20, 2008 at page IX of Appendix B.

next cycle, as prudently anticipated by the LDC, such distortions should be corrected (hereinafter referred to as “**Principle 4**”).

5. The EDA submits that purely arithmetic errors may be corrected to the extent that the correction does not negate any of these principles. Further, fairness dictates that a given LDC, if it finds itself in unique circumstances, ought to be permitted to demonstrate to the Board why a strict application of the principles ought not to apply to its situation.
6. The EDA will now address each of the unsettled issues in turn.

**Issue 3: Has the distributor correctly applied the true-up variance concepts established by the Board’s guidance?**

7. The EDA has no general submission on this issue but will instead only comment upon a statement made by Board staff in its Submission on the issue.
8. Board staff stated as follows: “If Bill 210 froze the methodology, then none of the changes to evidence would have been made voluntarily by the applicants.”
9. The EDA submits that, in the context of a proceeding where recalculations are performed for a variety of reasons and often without prejudice, it is not appropriate to impute to the applicants a legal position with respect to the purpose and effect of Bill 210.

**Issue 8: How should the materiality threshold be applied to determine which amounts should be trued up?**

10. Board staff proposes that each LDC rerun their SIMPIL worksheets with a zero materiality threshold, despite that this is a change in the rules: “Board staff recognizes that this would be a change from the methodology previously issued in the SIMPIL worksheets. The Board should consider whether the administrative simplicity of this option warrants the change”.

11. The EDA submits that this issue ought to be resolved by applying Principle 2. Simply put, the Board guidance was clear that materiality thresholds were applicable throughout the SIMPIL model. An LDC which inserted amounts based on a materiality threshold was prudent in following the rules applicable at the time, and the rule against retroactive rule-making should prevent the Board from globally resetting or eliminating the materiality threshold.
12. The EDA submits that where a given LDC can demonstrate that an acute mismatch inadvertently created by the model has a serious impact on it, the Board may reconsider the applicable materiality threshold on a case-by-case basis.

**Issue 9: What are the correct tax rates to use in the true-up variance calculations?**

13. With respect to the more than 30 distributors that are subject to tax rates that lie between the minimum and maximum rates, Board staff has suggested that the tax rate be derived by dividing the net income tax payable by the taxable income. Board staff also suggested that this method can apply to most distributors. The EDA submits that this formula, while attractive in its simplicity, results in offending Principle 2, because the application of the formula to determine the tax rate presupposes that all items in the calculation are subject to true-up, and this is not the case.
14. Indeed, the effective tax rate is a very poor proxy for the rate applicable to Regulatory Net Income. The use of the effective tax rate would true-up such items as loss carryforwards, non-distribution items, actual earnings and the tax treatment of regulatory assets and liabilities. The EDA submits that the true-up of such items would constitute a change in methodology that existed at the time.

**Issue 10: How should the continued collection of the 2001 PILs amount in rates be considered in the operation of the PILs deferral account?**

15. The EDA fully endorses and adopts the submissions made by the Coalition of Large Distributors with respect to this issue.

**Issue 11: Should the SIMPIL true-up to specified items from tax filings be recorded in the period after the 2002 rate year until the 2001 deferral account allowance was removed from rates?**

16. Board staff has stated as follows on page 8 of its submission:

There were no instructions issued that the distributors should continue to calculate additional true-up variances for 2001 deferred PILs as the tax rates declined in 2003 and 2004...Revised PILs/SIMPIL guidance was issued in 2003, but no instructions were issued for the continued tracking of true-up variances related to 2001 deferred PILs.

17. The EDA submits that Board staff has used unfortunate language when it reiterates that “no instructions” were given. From the inception of the use of the model, Board staff instructed the LDCs as to which items were to be trued up. In this case, Board staff did not advise the LDCs to continue to true up the items related to 2001 deferred PILs and, therefore, the instructions to the LDCs were clear: do not true up the items. To now say that staff omitted to tell the LDCs to true up items is akin to “no instructions” confuses the issue. The EDA submits that Principle 2 is squarely engaged here, in that Board staff set the rules as to what items were to be trued up and, by omission, which were not to be trued up. It is not appropriate to retroactively change those rules.
18. To be clear, the EDA submits that this is not an issue that engages Principle 3 summarized above. That is, this is not a circumstance where no guidance was given on an issue such that the prudence of each LDC in interpreting the SIMPIL model should be examined. Despite the language used by Board staff, the EDA submits that it is more

simply an issue resolved by Principle 2, the rules were clearly given and ought not to be changed now.

**“Settled” Issue 4: How should tax impacts of the regulatory asset movements from 2001 to 2005 tax years be dealt with in the PILs true up model reconciliation?**

19. The EDA understands that Issue 4 is not considered by the Board to be an “unsettled issue” and was, therefore, not discussed by Board staff in its Submission.
20. However, in its Decision and Procedural Order No. 9, the Board made a comment with respect to Issue 4 leads the EDA to be concerned that the Board may have overlooked an important element in the resolution of Issue 4. In particular, the Board stated at page 3 as follows:

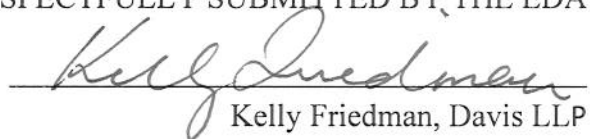
The Board has accepted issue number 4 pertaining to ENWIN’s regulatory asset issue and expects that the details of the considerations that led to the proposal will inform other distributors and stakeholders that may be *[sic.]* have experienced similar circumstances. However, the Board expects that there will likely be other considerations when dealing with the circumstances of other distributors and therefore the terms of this particular settled issue have limited precedential value.

21. In the EDA’s view, the Parties’ agreement to exclude regulatory assets is actually a recognition of the need to address the Incomplete Cycle problem caused by the closing of Account 1562. In the EDA’s submission, the Parties properly applied Principle 4. That is, the Parties’ agreement (that regulatory assets should be excluded from PILs calculations both when they are created, and when they are collected, regardless of the actual tax treatment accorded those amounts) was a reasonable way of resolving a distortion created by the fact that Account 1562 was closed on April 30, 2006, the timing of such closing could not have been anticipated by a prudent LDC, and the balances could not self-adjust in the next cycle. The EDA submits that the precedential value that ought to be taken from this negotiated resolution is that cycle distortions caused by the unanticipated closing of Account 1562 ought to be corrected.

**Conclusion**

22. In conclusion, the EDA cautions the Board that, given the complex regulatory accounting involved in this proceeding, an innocent and seemingly innocuous suggestion to correct a simple math error may in fact amount to changing methodology that was clearly set and followed in good faith. For this reason, the EDA urges the Board, when resolving individual issues, to go back to first principles, and to ensure that retroactive tinkering with rates and rules does not occur.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY THE EDA

  
Kelly Friedman, Davis LLP