Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2010-0295

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether the costs and damages incurred by electricity distributors as a result of the April 21, 2010 Minutes of Settlement in the late payment penalty class action, as further described herein, are recoverable from electricity distribution ratepayers, and if so, the form and timing of such recovery.

AND IN THE MATTER OF Rules 8 and 29.3 of the *Rules of Practice and Procedures* of the Ontario Energy Board

BEFORE: Paul Sommerville
Presiding Member

Karen Taylor
Member

DECISION ON MOTIONS

January 25, 2011

Introduction

On October 29, 2010 the Ontario Energy Board (the "Board") issued a Notice of Proceeding on its own motion to determine (i) whether Affected Electricity Distributors should be allowed to recover from their ratepayers the costs and damages incurred in the Late Payment Penalty Class Action ("LPP Class action"), and if so, (ii) the form and timing of such recovery. This proceeding was commenced pursuant to sections 19 and 78(2) of the *Ontario Energy Board Act, 1998* and the Board has assigned File no. EB-2010-0295 to this proceeding.

For purposes of this proceeding, "Affected Electricity Distributors" means licensed Ontario electricity distributors that were named as defendant class members in Schedule F of the Minutes of Settlement, dated April 21, 2010.

On December 17, 2010, the Board issued Procedural Order No. 1, which set out, amongst other things, the case timetable. Pursuant to this Order Board staff, the Vulnerable Energy Consumers Coalition ("VECC"), School Energy Coalition ("SEC") and Donald Rennick filed interrogatories on the evidence filed by the Electricity Distributors Association ("EDA") and the supplementary evidence of Toronto Hydro Electric System Limited ("THESL"). The EDA and THESL provided their responses to the interrogatories on January 10, 2011.

On January 13, 2011 the Board issued Procedural Order No. 2 in which it deferred the date for filing argument-in-chief from January 17, 2011 to January 20, 2011.

On January 14, 2011, SEC filed two separate Notices of Motion, in relation to interrogatory responses provided by the EDA and THESL to certain interrogatories of SEC. Specifically, the motions sought an order of the Board directing the EDA to provide the material requested in SEC interrogatories #2, #3, #4, #5 and #6, and an order directing THESL to provide material requested in SEC interrogatory #2 and #3. SEC proposed that the motions be dealt with either orally or by written submissions.

On January 17, 2011, the Board issued Procedural Order No. 3 and invited written submissions from all parties on the motions. By way of letter dated January 18, 2011, SEC withdrew its request in relation to SEC interrogatory #2 to the EDA. On January

19, 2011 the Board received separate submissions from the EDA and THESL. On January 21, 2011 the Board received the joint reply submissions of SEC.

The Board has dealt with both motions jointly in this decision.

SEC Interrogatories to EDA:

SEC #3

SEC interrogatory #3 to the EDA and the EDA's response is below:

> *SEC #3 to EDA*
> Please provide, for each LDC that was incorporated after the date the first impugned late payment penalties were charged to customers, a copy of the agreement by which the incorporated LDC became liable for the existing obligations, including legal claims, of the predecessor entity that carried on the electricity distribution business. To the extent, if any, that there were disclosures of existing claims at the time of the transfer of the electricity distribution business, please provide a copy of those disclosures.
>
> *EDAs Response to SEC #3*
> The information requested cannot be obtained within the time lines prescribed by the Board for responding to interrogatories. Furthermore, the requested information is not relevant to either of the Board approved issues.

The EDA submitted that the response provided to the interrogatory was sufficient. On the issue of liability, the EDA submitted that no entity other than the Affected Electricity Distributors is responsible for the payment of the settlement. With respect to the transfer of liabilities at incorporation, the EDA submitted that for all Affected Electricity Distributors (other than THESL), the period of liability exposure reflected in the Settlement is 1998-2001.This period largely postdates incorporation. Further, the EDA submitted that it was "generally known" that upon incorporation, Local Distribution Companies ("LDC") assumed the associated liabilities, including liability for Late Payment Penalties ("LPP") incurred by predecessor municipal electric utilities ("MEU"). The EDA also noted that the requested information is contained in the transfer by-laws and are available at the relevant municipality. The EDA submitted that these are not LDC documents and that SEC should obtain these directly.

In reply, SEC submitted that the onus was on the Affected Electricity Distributors to prove that they properly assumed the LPP liabilities that rose prior to incorporation. SEC argued that if liability resided with a predecessor MEU, and was not properly assumed by the successor LDC, even a small amount of that exposure could affect the quantum of recovery sought.

SEC #4

SEC's interrogatory #4 to the EDA and the EDA's response is below:

> *SEC #4 to EDA*
> Please provide, for each LDC that was acquired by, or amalgamated with, another LDC or entity after 1998, a copy of the agreement by which the successor LDC became liable for the existing obligations, including legal claims, of the predecessor entity that carried on the electricity distribution business. To the extent, if any, that there were disclosures of existing claims at the time of the acquisition or amalgamation, as the case may be, please provide a copy of those disclosures.
>
> *EDAs Response to SEC #4*
> The information requested cannot be obtained within the time lines prescribed by the Board for responding to interrogatories. Furthermore, the requested information is not relevant to either of the Board approved issues.

The EDA submitted that its response provided to the interrogatory was sufficient given that "as a matter of law, upon a merger, the merged entity is liable for the obligations of the merging entities. No contractual assumption of liability is required".

SEC argued that the EDA's reasoning was insufficient and incorrect. SEC submitted that while it agrees with the EDA on the transfer of liabilities at the time of merger, it still depends on the specific terms of the merger. SEC also submitted that the EDA's argument is incomplete, as it does not apply to acquisitions. SEC argued that depending on the method and terms of the acquisition, liabilities may or may not be assumed by the acquiror.

SEC #5

SEC's interrogatory #5 to the EDA and the EDA's response is below:

> *SEC #5 to EDA*
> Please provide, for each LDC claiming recovery, details of any insurance in place at the time of incorporation or thereafter covering any form of third party claim against the distribution business.
>
> *EDAs Response to SEC #5*
> The information requested cannot be obtained within the timelines prescribed by the Board for responding to interrogatories. However, The MEARIE Group has advised that its general liability insurance policy, which applies to the vast majority of LDCs, does not provide coverage for the Revised Allocated Amounts owing by LDCs. Furthermore, the EDA is not aware that any LDC carried insurance covering its liability under the settlement of the LPP Class Actions, but agrees that any proceeds from any such insurance that may have existed in the case of a particular LDC should be deducted from its Updated Recovery Amount.

The EDA submitted that no Affected Electricity Distributor had insurance that covered the subject liability. To address this issue, the EDA recommended that the Board direct

distributors to record the proceeds from any insurance that may exist in the requested variance account. The EDA also noted that the MEARIE Group, which provides liability insurance to a large number of LDCs, had confirmed that their general liability insurance policy did not cover LPP class action costs.

SEC argued that the information requested is relevant in determining the issues in this proceeding. On the issue of insufficient time raised in the interrogatory response, SEC argued that that if the EDA needed more time to answer the interrogatory, then it should have requested it. As an alternative, SEC submitted that a small number of LDCs should be designated to provide the requested information.

SEC #6

SEC interrogatory #6 to the EDA and the EDA's response is below:

> *SEC #6 to EDA*
> Please provide, for each LDC claiming recovery that, during the period of the impugned late payment penalties, billed charges for goods or services other than electricity and its distribution on the same bill, a breakdown of the billed charges, by year, between electricity and its distribution, and all other charges. Please provide details of any late payment penalty policies that differed between the components of the bill, e.g. different interest rates, grace or notice periods, order of disconnection rules, etc.
>
> *EDAs Response to SEC # 6*
> The information requested cannot be obtained within the time lines prescribed by the Board for responding to interrogatories. Furthermore, the requested information is not relevant to either of the Board approved issues.

The EDA submitted that the information requested was not available and, even if it were, it would be burdensome and irrelevant. The EDA argued that only a small portion of LPP revenues could have related to charges for goods or services other than electricity and its distribution. The EDA submitted that it was irrelevant because, LPP revenues were applied to reduce distribution rates regardless of whether a portion of the LPP charges related to non-distribution revenue.

SEC submitted that the onus was on the Affected Electricity Distributors to provide evidence to the Board detailing how much of the historic bills were for the purpose of electricity and its distribution and how much for other goods and services. SEC submitted that regardless of how small the amount was on any individual bill, in its aggregate it could be a significant amount.
SEC argued that the Board must see some evidence of these amounts in order to determine how much, if any, should be recoverable from ratepayers. SEC further

submitted that if a non-recoverable amount is known to exist, the Affected Electricity Distributors are obliged to provide evidence as to that non-recoverable portion.

Board Findings

The Motion is dismissed. The Board will not order the EDA to provide the information sought in SEC #3, #4, #5 and #6. The Board's reasons for so finding are set out below.

In SEC #3, #4 and #5, SEC raised concerns in relation to liability of class action costs and the possibility of insurance coverage that may cover that liability. Specifically, SEC sought to determine whether there were any entities from which the Affected Electricity Distributors could claim recovery from, such as: Vendor MEUs who transferred assets to LDCs (typically municipalities); Predecessor and former shareholders of other LDCs that retained certain liabilities due to the terms of acquisition or amalgamation; and Insurance Companies, that covered liability over the LPP class action due to the terms of liability insurance policies.

In the Board's view, there is little doubt that liability for the costs and damages arising from the class action rests with the Affected Electricity Distributors. This was established by the Settlement and resulting court judgments. Also, the affected distributors are listed as defendant class members as per Schedule F of the Minutes of Settlement and Schedule G of that settlement provides each Affected Electricity Distributors' share of the settlement amount that they are legally bound to pay. It is the Board's view that the implementation of the Settlement in this process involves the application of the Court's Order arising from it, and not an independent assessment by the Board of its content. The issues raised by SEC in its requests for additional information and various confirmations relate to issues that were inherently part of the Court process and the resulting Settlement. This finding applies to both Motions brought by SEC.

With respect to the issue of transfer of liabilities at incorporation and amalgamation raised in SEC #3 and SEC #4 respectively, the Board agrees with the EDA that upon incorporation, LDC's likely assumed the associated liabilities, including liability for LPPs incurred by predecessor MEUs. In the case of amalgamations, the parties agree that as a matter of law, upon merger, the merged entity becomes liable for the obligations of the merging entities.

In SEC#5, SEC sought to determine if Affected Electricity Distributors had any insurance that provided coverage for the subject liability. The EDA submitted that no Affected Electricity Distributor had such insurance. The Board is satisfied with the response provided by the EDA. The Board also notes that the advice from the MEARIE Group confirms that the general liability insurance policy of LDCs does not provide coverage for LPP class action costs.

In the Board's view SECs concern that any recovery ordered be net of all proceeds from insurance, is appropriate, but it does not require the filing of individual insurance policies. If it is found by the Board that the costs arising from the LPP class action are recoverable from ratepayers, the Board will order that any recovery be adjusted for proceeds from insurance and other offsets.

The Board is also concerned that the information requested in the interrogatories is extensive and may take a significant amount of time to procure and submit. This is especially true with respect to SEC #6. Further, the production of the documents may only help to confirm what the EDA has already stated. The Board notes that the SEC acknowledged this concern in its reply.

SEC also submitted that, if the Board does not order the production of the requested information, the Board could create a mechanism under which if recovery from ratepayers is ordered, each Affected Electricity Distributor seeking recovery must:

(i) provide proof to the Board that they properly assumed pre-incorporation liabilities and,
(ii) provide copies of the general liability insurance policies in place at the time of exposure, before any amount of the recovery is remitted to them.

With respect to the requirement for providing proof of properly assumed pre-incorporation liabilities, for the reasons stated in this decision the Board does not believe that it is necessary.

With respect to the requirement to provide copies of general liability insurance, as stated earlier, the Board is of the view that SECs concerns can be addressed in the decision in this proceeding, by ensuring that any recovery, if approved, is net of all proceeds from insurance and other offsets – such as amounts previously recovered.

SEC Interrogatories to THESL:

SEC posed the following interrogatories to THESL.

> SEC #2 to THESL
> Please provide a copy of the agreement by which THESL became liable for the existing obligations, including legal claims, of any predecessor entity that carried on the electricity distribution business. To the extent, if any, that there were disclosures of existing claims at the time of the transfer of the electricity distribution business, please provide a copy of those disclosures.
>
> SEC # 3 to THESL
> Please provide, for any LDC that was acquired by, or amalgamated with THESL after 1998, a copy of the agreement by which THESL became liable for the existing obligations, including legal claims, of the predecessor entity that carried on the electricity distribution business. To the extent, if any, that there were disclosures of existing claims at the time of the acquisition or amalgamation, as the case may be, please provide a copy of those disclosures.

In each case, THESL responded by stating:

> THESL declines this interrogatory on the basis that this matter has already been determined by the Supreme Court and does not relate to any approved issue in this hearing.

As the grounds for the Motion, SEC submitted that contrary to the response provided by THESL, the Supreme Court of Canada had not decided the issue of whether THESL or any other Affected Electricity Distributors should be allowed to recover from ratepayers the costs arising from the class action. On the issue of relevance, SEC submitted that the materials requested in the interrogatories are relevant to answering the Board's threshold question. SEC submitted that the information will provide the Board with an understanding of how legal liabilities were transferred to THESL from predecessor entities, and if ratepayers or some other legal entity, should be responsible for the costs incurred by THESL in the LPP class action.

THESL submitted that the Board should dismiss the Motion. THESL argued that SEC #3 does not apply because THESL has not acquired any utilities or amalgamated with any utilities after 1998. With respect to the issue of liability, THESL argued that liability was established by the Settlement and resulting court judgment and is not an issue in this proceeding. THESL also submitted that the process by which THESL became incorporated does not affect THESL's liability in this matter. THESL also argued that the Board's Notice of Proceeding acknowledges that liability rests with the Affected Electricity Distributors.

SEC maintained that there has never been Supreme Court of Canada decision on the issue of recovery from ratepayers of the LPP class action or on the issue of liabilities between predecessor MEUs and the Affected Electricity Distributors. SEC further submitted that THESL's arguments are not supported by evidence and that the onus is on THESL to provide evidence that they assumed these LPP liabilities upon transfer of assets from predecessor MEUs.

Board Findings

The information sought in SEC #2 and #3 to THESL is similar to the information sought in SEC #3 and #4 to the EDA. For the reasons noted earlier in this decision, the Board will not order THESL to provide the information sought in SEC #2 and #3. The Motion is therefore dismissed. The Board notes that if it were to grant SEC's Motion, the only practical outcome from SEC's point of view would be a revision of the amounts payable by one or some LDCs under the Settlement. In the Board's view this would represent a variance of the Court's Order adopting the Settlement, an action the Board has no authority to effect. If SEC wishes to pursue these issues, the appropriate venue is before the issuing Court.

Procedural Matters

The Board reminds the EDA and THESL that argument-in-chief is due by January 26, 2011 as ordered in Procedural Order No. 3, dated January 17, 2011.

DATED at Toronto, January 25, 2011
ONTARIO ENERGY BOARD

Original signed by

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Paul Sommerville
Presiding Member

Original signed by

_____
Karen Taylor
Member