Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2010-0295

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.

BEFORE: Paul Sommerville
Presiding Member

Karen Taylor
Member

DECISION AND ORDER

February 22, 2011

The Proceeding

By Notice of Proceeding ("Notice") dated October 29, 2010, the Ontario Energy Board (the "Board") commenced a generic written hearing on its own motion to determine:

1. As a threshold question, whether Affected Electricity Distributors should be allowed to recover from ratepayers the costs and damages incurred in the Late Payment Penalty (LPP) Class Action; and

2. If the answer to the first issue is yes, what would be an appropriate methodology to:
   (a) apportion costs across customer rate classes, and
   (b) recover such allocated costs in rates.

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.

Following the issuance of the Notice a number of Affected Electricity Distributors sought approval to withdraw from the proceeding. Hydro One Networks Inc. (HONI), Hydro One Remote Communities Inc. (HORCI) and Orillia Power Distribution (OPD) informed the Board that they did not intend to recover from ratepayers the costs arising from the LPP class action, were these costs found to be recoverable. Canadian Niagara Power Inc. (CNPI), PUC Distribution Inc. (PUCDI), Fort Albany First Nation (FAFN) and Kashechewan Power Corporation (KPC) informed the Board that they were not a party to the settlement and as such do not have costs related to this matter that need to be recovered. The Board allowed these distributors to withdraw from the generic proceeding noting that these distributors will not be seeking recovery in a future proceeding.

On November 8, 2010, pursuant to the Notice, the Board received the collective evidence of the Affected Electricity Distributors. This evidence was prepared and filed by the Electricity Distributors Association ("EDA") on behalf of all Affected Electricity Distributors.

On November 12, 2010, Toronto Hydro Electric System Limited ("THESL") filed limited supplementary evidence that primarily dealt with the second issue on the issues list.

While THESL supported the method of recovery proposed by the EDA, it submitted that due to circumstances unique to it, it preferred a different approach. THESL also informed the Board that its share of the recovery amount should be reduced by $185,628, to reflect amounts that were previously recovered. THESL stressed that it continues to rely on the collective evidence of the Affected Electricity Distributors and does not challenge or rebut that evidence.

On December 8, 2010, Port Colborne Hydro Inc. (PCHI) informed the Board that due to an administrative error, the amount it was seeking to recover was not listed in Schedule G of the Minutes of Settlement. PCHI stated that it was seeking to recover from ratepayers approximately $28,000 arising from the settlement of the LPP Class Action. The Board issued a revised Notice of Proceeding to PCHI.

On December 17, 2010, the EDA updated Appendix A to its evidence to correct for the error in relation to PCHI.

The EDA, Canadian Manufacturers and Exporters ("CME"), School Energy Coalition ("SEC"), Donald D. Rennick, Joe Stevens and Flora L. Dooley (jointly) and Vulnerable Energy Consumer's Coalition ("VECC") requested intervenor status and were granted such status. The Board also determined that CME, VECC, SEC and Donald D. Rennick were eligible to apply for an award of costs under the Board's *Practice Direction on Cost Awards*. The EDA, Joe Stevens and Flora L. Dooley indicated that they did not intend to seek costs.

On December 17, 2010, the Board issued Procedural Order No. 1, which set out amongst other things, the issues list, list of intervenors in the proceeding and the schedule for interrogatories and arguments.

On January 13, 2011, the Board issued Procedural Order No. 2, which deferred the date for 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 responses provided by the EDA and THESL to certain interrogatories of SEC. On January 17, 2011, the Board issued Procedural Order No. 3, and sought written submissions on the motions. Following which, on January 25, 2011 the Board issued its Decision. A copy of that Decision is attached as Appendix B.

With respect to the main issues in this case, the Board received submissions from SEC, VECC, Donald Rennick, CME and Board staff. The EDA and THESL filed their final reply argument on February 7, 2011.

The Board has chosen to summarize the record to the extent necessary to provide context to its findings. The full record of the proceeding is available at the Board's offices.

Background to LPP Class Action

In 1975, the Board approved a 5% LPP as an incentive for customers to make timely payments.[1] Guidelines were then developed in 1978 by a task force of public utilities formed by the Ministry of Energy and adopted by many public utilities.[2] According to these guidelines, a utility could impose a LPP of 5% on the outstanding bill if a payment was not made within sixteen days from the date of the bill. This LPP mechanism was adopted by Ontario Hydro, which then set the rates of all municipally owned hydro-electric utility commissions ("MEUs") and the Ontario Energy Board, the then regulator of the natural gas sector.

By 1989, almost all MEUs whose rates were set by Ontario Hydro, charged LPPs according to the established mechanism. In 1999, the Board began approving electricity rates and by early 2002, almost all utilities had transitioned to a new LPP mechanism.

In 1981, the Federal Parliament amended section 347 of the *Criminal Code* to make it a criminal offence to receive an interest payment at an effective rate of interest exceeding an annual amount of 60%.

In 1994, class actions were commenced against Consumers' Gas Company Limited ("Consumers' Gas", now Enbridge Gas Distribution Inc. ("Enbridge")) (the "Garland Action"), and against Toronto Hydro Electric Commission (now Toronto Hydro Electric System Limited) (the "Pichette Action") alleging violation of the *Criminal Code* interest provision. Both actions alleged that the LPP was interest as defined in section 347 of the *Criminal Code*, and, depending on the amount of the bill and the payment date, the LPPs could result in an effective interest in excess of 60%. The plaintiff in each case

[1] EBRO 302-11.
[2] *Residential Guidelines for Credit Collection and Cut-Off Practices of Public Utilities Suppliers, 1978*

claimed restitution on behalf of the plaintiff class for unjust enrichment arising from the LPPs levied by the defendant utility.[3]

In 1998, a new class action was started against THESL for restitution of LPPs (the "Griffiths Action"). In this action, THESL was named as the proposed representative defendant on behalf of all MEUs in Ontario, which had charged LPPs on overdue bills. A similar action was commenced against Union Gas Limited ("Union Gas").

The Griffiths Action, like the Pichette Action before it, was held in abeyance, while the Garland Action was prosecuted.

In 1994, Consumers' Gas brought a successful motion for summary judgment to dismiss the Garland Action on grounds that LPPs were not interest. In 1995, the Ontario Superior Court of Justice ruled that the LPP was not interest and the Ontario Court of Appeal upheld the ruling in 1996. This preliminary question was appealed to the Supreme Court of Canada.

In 1998, the Supreme Court of Canada held that the LPP constituted interest for the provision of credit within the meaning of section 347 of the *Criminal Code* and returned the matter to the trial court in Ontario for disposition. The Supreme Court of Canada held that in some circumstances the LPP resulted in an effective rate of interest in excess of 60% and thus contravened section 347 of the *Criminal Code*.

In April 2000 the Ontario Superior Court dismissed the class action. In 2001 the Ontario Court of Appeal upheld the lower court ruling dismissing the class action. Mr. Garland sought and obtained leave to appeal to the SCC, and in April 2004 the SCC ruled in favour of Mr. Garland, holding that none of the defenses raised prevented restitution of LPPs collected by Consumers' Gas after the commencement of the actions against the company and ruling that the company was liable to refund the amounts in excess of the *Criminal Code* limit since 1994.

After the Supreme Court of Canada rulings only the issue of damages remained. Instead of going to trial, the parties were successful in reaching a settlement and the Ontario Superior Court of Justice approved the settlement. Following the Enbridge settlement, Union Gas also settled. These settlements concluded the class actions against the natural gas utilities.

[3] Pre-filed evidence, paragraph 15,p.3

Settlement of LPP Class Action

After the conclusion of the actions against the natural gas utilities, attention turned to the class actions against the MEUs. By this time, and following industry restructuring that started in 1998, the MEUs had converted to business corporations, now referred to as Local Distribution Companies ("LDCs").

The Honourable Mr. Justice Peter Cumming, who had mediated both the Enbridge and Union Gas settlements, was engaged as the mediator for the Pichette and Griffiths Actions. Similar to the natural gas utilities, the LDCs were successful in reaching a settlement, the principal terms of which were the following: [4]

- LDCs would collectively pay $17 million in damages, based on a recovery of approximately 9% of LPP revenues, inclusive of pre-judgment interest;
- Payment would not be due until June 30, 2011;
- Amounts paid, after deduction for counsel fees, costs and applicable interest, would be paid to the Winter Warmth Fund or similar charities; and
- LDCs would be at liberty to seek Ontario Energy Board permission to recover settlement costs through rates.

The total cost agreed to in the settlement was $18,382,125. This amount includes the estimated settlement payment of $17 million (actual settlement payment pursuant to the Implementation Order is $17,037,500), $700,000 estimated in legal costs, $632,125 in taxes and $50,000 in publication costs related to various court orders and notices.[5] This total cost was divided amongst the LDCs that had charged the offending LPPs and the amounts owing by each of the LDCs was provided in Schedule G to the Implementation Order.[6] Following the settlement, each LDC executed a Consent and Waiver of Opt Out Rights form which declared to the court that the LDC had agreed to pay its proportionate share of the settlement costs.

The Ontario Superior Court of Justice approved the settlement in the Minutes of Settlement dated April 21, 2010.

[4] Pre-filed evidence, paragraph 38, p. 7
[5] Board staff interrogatory no. 2
[6] Jonathan Griffiths and Toronto Hydro-Electric System Limited, Implementation Order, Court File No. 94-CQ-50878, July 22, 2010,

The amount sought for recovery from ratepayers in this proceeding is $17,690,907.53.[7] This is the total of each distributor's individual share and excludes amounts attributed to distributors that are not seeking recovery and amounts already recovered by THESL. [8] A list of Affected Electricity Distributors and their proportionate shares of the cost is attached as Appendix A to this Decision.

Letters of Comment

The Board received a number of Letters of Comment in response to the Board's Notice. In almost every letter it received, consumers expressed strong opposition to the relief sought by the Affected Electricity Distributors. The Board has reviewed each of these letters because they come from the very consumers whose interests the Board is charged with protecting. While the Board will not address the letters individually, the Board has considered the concerns expressed by consumers in its deliberations.

Positions of Parties

With respect to the threshold question, the Affected Electricity Distributors submitted that the costs and damages (collectively "costs") arising from the settlement of the LPP class actions should be recovered from ratepayers. The Affected Electricity Distributors argued for recovery in rates on the basis that LPPs were imposed pursuant to mandatory orders of the regulators, the distributors did not profit from the revenues and that that LPP revenues were used to offset the overall distribution revenue requirement, and thereby reduced distribution rates for all customers. The Affected Electricity Distributors also argued that the costs of the settlement on a per customer basis was reasonable and that the settlement was advantageous to the Affected Electricity Distributors and their customers as it avoided greater costs had the matter proceeded to trial. The Affected Electricity Distributors also noted that the Board had previously approved a similar request by Enbridge and Union Gas.

With respect to the second issue, the EDA on behalf of the Affected Electricity Distributors proposed to recover the costs through a monthly fixed charge rate rider over 12-months from all metered customers, as reported in the Board's most recent Yearbook of Electricity Distributors (the "Yearbook"). For each Affected Electricity

[7] EDA Argument-in-Chief, p. 6
[8] Board staff interrogatory no. 1, Appendix A

Distributor, the monthly fixed charge rate rider would be calculated by dividing the recovery amount by the number of metered customers reported in the Yearbook, i.e. an allocation based on number of metered customers. Under this proposal, a single monthly fixed charge rate rider would be applied to all metered customers for each Affected Electricity Distributor.

As noted earlier, THESL filed supplementary evidence in relation to the second issue. While both THESL and the EDA proposed to recover the subject costs from all metered customers, THESL's proposal differed from the EDA's in three areas.

First, THESL's approach to the allocation of the amount it was seeking to recover was different from the EDA's. THESL proposed to allocate the recovery amount to the metered rate classes based on a 3-year average (2007-2009) of LPPs collected from the respective rate classes. The monthly per customer charge would be calculated for each rate class by dividing the allocated recovery amount by the number of customers (or volumes in the case of a volumetric rate rider) in that rate class. This results in each metered rate class having a unique rate rider.

Second, while THESL was agreeable to a recovery by means of a fixed charge rate rider, it stated that it preferred a volumetric rate rider. THESL noted that a volumetric rider was easier to implement and that consumption levels correlated more closely with the total bill, which itself is the determinant of the LPP charge.

Third, THESL submitted that given the magnitude of the amount it was seeking to recover, a 24-month recovery period was more appropriate.

Both THESL and the other Affected Electricity Distributors requested a variance account to record any difference between each distributor's portion of the recovery amount and the amount actually recovered from customers. THESL proposed to use Account 1508 – Other Regulatory Assets – Late Payment Penalties, while the EDA did not specify an account. Any residual balance in the variance account would be subject to future disposition.

CME supported the relief requested by the Affected Electricity Distributors. CME argued that the circumstances pertaining to the imposition, recovery of and use of LPPs in this case are similar to the situation that prevailed in the natural gas cases, in which LPP class action costs (and damages) were recovered from ratepayers of the natural gas

utilities. Therefore, CME submitted there was no basis upon which the Board could deviate from its previous approach. With respect to the second issue, CME submitted that that recovery of the LPP class action costs should reflect the extent to which each rate class benefitted from the allocation of LPP revenues.

Donald Rennick submitted that the Board should deny the request for rate recovery. Donald Rennick argued that recovery of class action costs from ratepayers would nullify the Court's ruling, which had established that the LPPs were collected illegally and should be returned to ratepayers. Donald Rennick also submitted that the fact that regulators approved the charging of LPP's is not a reason for recovery from ratepayers. Donald Rennick further submitted that a decision in favour of the Affected Electricity Distributors would penalize those ratepayers who were diligent in the payment of their bills.

With respect to the threshold question, SEC questioned the fairness of recovering the subject costs from ratepayers and submitted that the Board must not only determine whether the costs are recoverable from ratepayers, but how much of that cost can be recovered from ratepayers. To that end, SEC submitted that the Board must reduce the amount sought for recovery based on (a) whether there are any other entities[9] from whom the Affected Electricity Distributors could recover the costs or a portion of the costs and (b) disallow a portion of the cost related to LPPs for services other than the distribution of electricity. With respect to its second criterion, SEC proposed a reduction to the recovery amount based on gross revenues that were applicable to services other than the distribution of electricity, during the exposure period. SEC acknowledged the considerable effort its proposal entailed and recommended a two-pronged approach. SEC proposed that only those distributors wanting to recover the entire amount should be required to provide to the Board: proof that relevant liabilities were effectively transferred to the LDC; a copy of the general liability insurance in place during the exposure period; and, evidence that none of the LPPs applied to services other than the distribution of electricity. Alternately, a distributor not wanting to provide the proposed documentation could recover a predetermined lesser percentage. This approach, SEC submitted, was consistent with the Board's approach in the Final Recovery of

[9] Such as: Predecessor MEUs who transferred assets to LDCs, that due to the terms of the acquisition retained certain liabilities; Predecessor LDCs and former shareholders of predecessor LDCs that retained certain liabilities due to the terms of acquisition or amalgamation; and/or Insurance Companies, that covered liability over the LPP class action due to the terms of liability insurance policies. SEC Argument, p. 2

Regulatory Assets. With respect to the second issue, SEC supported the recovery of LPP amounts by way of a fixed charge rate rider.

VECC's submissions primarily dealt with the second issue. VECC questioned the appropriateness of the EDA's and THESL's proposals in relation to the allocation of the recovery amount to the different rate classes and how the amounts were to be recovered, i.e. fixed charge rate rider versus volumetric rate rider. With respect to allocation of the recovery amount, VECC submitted that it was not appropriate to recover the subject costs only from metered customers. VECC argued that LPP revenues were used to reduce the overall distribution revenue requirement that was applicable to all customers and therefore all customers and not just metered customers had benefitted from the revenues. Accordingly, VECC submitted that the costs arising from the class action should be recovered from all customers. VECC proposed that the recovery amount should be allocated to all rate classes based on distribution revenues, as LPP revenues were used to offset the base distribution revenue requirement. VECC submitted this approach was consistent with the treatment of Account 1508 and with the principles related to recovery established in the Enbridge case (EB-2007-0731). With respect to how the amounts should be recovered, VECC did not support a recovery based on a fixed charge rate rider as proposed by the EDA and questioned the rationale provided by THESL for a volumetric rate rider. VECC submitted that THESL's proposal to recover the entire amount using a volumetric rate rider ignores the fact that LPP revenues were used to reduce both the fixed charge and the variable distribution charge. Therefore, VECC submitted that the most appropriate approach is to establish a fixed and a variable rate rider. However, noting the limitations in the cost allocation methodology, the lack of reliable data and for the purposes of simplicity, VECC submitted that it was reasonable to use only a volumetric rate rider. VECC further submitted that typically when costs are allocated using distribution revenues as it has proposed, the rate rider used is usually volumetric.

VECC supported the request for a variance account, however noted that interest only accrue after the amounts are paid out as per the Minutes of Settlement. VECC supported a 24-month period for recovery for THESL and a 12-month period for the remaining Affected Electricity Distributors.

Board staff noted that the offending LPPs were incurred pursuant to orders of the regulators, that the Affected Electricity Distributors did not profit from the LPP revenues and that the revenues were used to reduce the rates of all customers. Board staff also

noted that the principles established by the Board in the natural gas cases should also apply in this case. For these reasons and others, staff did not oppose the proposal. With respect to the method of recovery, notwithstanding the limitations of both approaches, staff submitted that the approaches were reasonable and that the Board might wish to consider adopting both – one for THESL and the other for the remaining Affected Electricity Distributors.

In its reply argument, the EDA responded to the arguments of SEC, VECC and Donald Rennick. THESL's reply argument focused almost entirely on the issues raised by SEC.

With respect to the arguments of SEC on the issue of fairness, the EDA submitted that it had repeatedly asked the plaintiffs and the court to dismiss the action because of the absurdity of reimbursing late payers for the costs they imposed on other ratepayers. The fact that the litigation was allowed to proceed is not the fault of the LDCs. With respect to reductions to the recovery amount due to LPP revenues from non-distribution businesses, both THESL and the EDA submitted that the Board should reject the argument. The EDA submitted that the litigation did not include LPP revenues from non-distribution businesses and even if they were, these were *de minimus*. Both the EDA and THESL argued that LPP revenues from other sources, such as water heaters were lawful distribution functions at the time and that regardless of the source of the LPP revenues, these were used to reduce distribution rates. On the issue of whether any other entity was liable for the subject costs, the EDA submitted that the Board had already ruled on this matter in its Decision on the SEC motions, issued on January 25, 2011. The EDA further submitted that if the Affected Electricity Distributors were not responsible for a portion of the liability that would have been a defense available in the settlement discussions. The EDA submitted that the settlement is net of any such arrangements (without acknowledging that any such defense existed). The EDA submitted that the additional documentation sought by SEC as proof that liabilities were transferred appropriately is cumbersome for the distributors and the Board alike. THESL submitted that SEC's approach was punitive, inappropriate and inefficient. Notwithstanding the concerns already noted, the EDA and THESL submitted that if the Board needed more proof, it could require the Affected Electricity Distributors to file an affidavit confirming the same.

With respect to VECC's argument that a volumetric rate rider is more appropriate than a fixed charge rate rider (per the EDA proposal), the EDA submitted that the amounts being sought for recovery are small and that a volumetric rate rider was more difficult to

implement. The EDA also noted that there is a greater risk of over/under recovery under a volumetric approach. With respect to the argument of Donald Rennick, that by allowing recovery of class action costs from ratepayers, the Board was in effect "nullifying" a Court order, the EDA submitted that paragraph 10 of the Minutes of settlement acknowledged that the Affected Electricity Distributors may seek to recover the costs in rates. Therefore, the EDA submitted that rate recovery could not nullify the settlement.

Board Findings

Should the Affected Electricity Distributors be allowed to recover from ratepayers costs and damages incurred in the late payment penalty class-action?

Notice of this proceeding was issued in every distribution franchise in the province where the respective Affected Electricity Distributors sought recovery of the subject costs. In response to that Notice the Board received a substantial number of Letters of Comment from ratepayers. In virtually every case, these Letters of Comment strongly opposed any recovery by the Affected Electricity Distributors of costs or damages associated with the class action. Typically the Letters of Comment objected on the grounds that it was improper for the utilities to recover such costs because they arose from behavior that was found by the Supreme Court of Canada to have been illegal. How can it be fair, they suggested, for the utilities to recover costs and damages incurred in defending their illegal actions?

As an economic regulator, it is the Board's mandate to establish electricity rates within the province which are just and reasonable. In part, the Board discharges that mandate by asking whether the costs proposed to be recovered by the utility in question were prudently incurred.

In light of the fact that the LPPs were imposed for a valid and broadly recognized regulatory purpose, that the utilities were obligated to impose the LPPs by the Board and that the amounts that are now sought to be recovered were the outcome of a settlement of litigation before the Ontario Superior Court of Justice, the Board finds that the costs proposed to be recovered by the Affected Electricity Distributors have been prudently incurred.

Included in the Board's mandate is a very specific statutory obligation to protect the interests of consumers. In discharging this mandate the Board employs principles which have deep roots in regulatory practice, and which have been endorsed in one manner or another by the courts. Two of the most fundamental principles employed by the Board are “cost causality” which attempts to settle costs on those responsible for causing them, and “to whose benefit”, which allocates costs to those who benefit from the expenditures giving rise to the costs.

While many ratepayers have objected to the recovery of the costs and damages arising from the class action, it is clear to the Board that permitting such recovery is the only course of action which is consistent with the principles governing our work and the only course of action that is consistent with a just and reasonable outcome.

This is so because the costs and damages imposed by the settlement in the LPP class action were incurred on behalf of and for the benefit of ratepayers.

First, the imposition of the LPP was itself an action undertaken by the utilities to protect the interests of the large majority of ratepayers who pay their accounts on time. Delinquent accounts are an important source of costs for utilities, and these costs can only be recovered from ratepayers. There is no other source of funds to support collection activities. By imposing an LPP, utilities hope to encourage timely payment of accounts so that these costs can be minimized. It is for the same reason that the government, first through its Ontario Hydro administration, and then the Board required utilities to impose the LPP which was the subject of the class action.

Second, all of the funds generated by the LPP were for the benefit of ratepayers as a whole. Monies collected via the LPP did not go to the utility as some kind of special fund or source of profit. Instead they were invariably included in utility revenues so as to offset the revenue requirement of the utilities. This means that because of the revenues generated by the LPP, electricity rates were lower than they otherwise would have been. It was ratepayers, and ratepayers alone, who benefited from the LPP revenues.

Finally, it is important to note that the imposition of the LPP which gave rise to the costs and damages associated with the LPP class action was specifically mandated for use by the relevant regulatory authorities. It is a simple fact that utilities would have been out of compliance with enforceable direction had they failed to impose the late payment penalty.

In light of the Supreme Court of Canada finding that the architecture of the LPP could potentially give rise to an illegal rate of interest, the Board intervened to require a change in the approach adopted by Ontario utilities. To be clear, LPP architecture is still in place in Ontario and is still mandated for use by Ontario utilities. The fundamental rationale for the imposition of LPPs has not changed and is as important as ever for the protection of the majority of ratepayers who pay their electricity bills on time.

For these reasons and the reasons outlined below, the Board has concluded that, as a matter of principle, it is appropriate for the Affected Electricity Distributors to be eligible to recover the costs and damages associated with the LPP class action. In the Board's view any other result would be inconsistent with long-standing and court-approved regulatory practice. To deny the utilities recovery would be to impose on their shareholders, typically the municipalities in which they operate, costs which they were compelled to incur, relating to revenues that did not benefit them.

In the Board's view, no fair-minded person, cognizant of the facts of this case could come to a different conclusion.

It is worth noting that the settlement approved by the Ontario Superior Court of Justice specifically acknowledged that the Affected Electricity Distributors would be making an application to this Board to recover the costs of the settlement through rates. In that settlement the plaintiffs in the case agreed that they would not oppose any such applications.

Regulatory and Litigation Background

As set out earlier in this Decision, this regulatory proceeding is the final step in a long and complex legal history. The class action which really forms the background for this case was begun in 1994, and was characterized by two distinct decisions of the Supreme Court of Canada, both of which overturned previous decisions of the Ontario Court of Appeal.

While the first lawsuit was brought against Consumers' Gas, it had immediate and direct implications for all of the regulated utilities in Ontario who had adopted the same LPP approach.

Put simply, the class action successfully alleged that the LPP adopted by the regulated utilities of Ontario was illegal in that it had the potential to exact a rate of interest in excess of the legal standard.

The fatal flaw in the now discredited LPP approach was that it had the potential, depending on when a delinquent account was actually paid, to exact an illegal rate of interest. If a delinquent account was paid within a certain period of time, the imposition of the flat rate penalty could have a usurious effect.

Today, in light of the Supreme Court's decision, LPPs are imposed, and required to be imposed, but they do not have any potential for a usurious effect.

Because Consumers' Gas was the initial target of the class action, it was the first company to come to the Board seeking recovery of the costs associated with the lawsuit. That case was decided in February of 2008, under Board file number EB–2007–0731. In that case, the Board unequivocally approved recovery of those costs, which included costs of settlement as well as legal costs associated with the litigation. Some parties to that case brought a petition to Cabinet challenging the Board's findings. That petition was denied.

This case is a direct descendent of the Consumers' Gas litigation, and as a result, the principles established by the Supreme Court of Canada with respect to the LPP have been extended to the electricity distribution sector. There is no material difference between the LPP approach adopted by Consumers' Gas and that adopted by the Affected Electricity Distributors over the same period.

In the case presently before the Board, the Ontario Supreme Court has similarly approved and adopted a comprehensive settlement. The settlement acknowledges that the LPP adopted by the Affected Electricity Distributors was contrary to Canadian law in precisely the same fashion as was determined in the Consumers' Gas case. The court has also enumerated the Affected Electricity Distributors and established, by way of settlement, the global amount owing. The global amount owing has been allocated to the named Affected Electricity Distributors according to their relative service revenue for the period of time over which each Affected Electricity Distributor had exposure to pay damages in the class action litigation.

The School Energy Coalition Submissions

The thrust of the submissions made by the SEC was not that the recovery sought by the Affected Electricity Distributors ought to be denied per se, but rather that there were outstanding evidentiary issues respecting the liability of predecessor corporations, and the Affected Electricity Distributors themselves which could affect the amount to be recovered.

SEC suggested that the Board ought to require each of the Affected Electricity Distributors to file documentation respecting its corporate history to ensure that predecessor corporations did not have a residual liability which would offset that of the Affected Electricity Distributor. SEC also suggested that each of the Affected Electricity Distributors should file insurance policies so that the Board could be assured that there were no offsetting insurance proceeds which could lower the amounts to be recovered.

The Board will not require the Affected Electricity Distributors to file any documentation regarding their corporate history. In the Board's view the time and place for the assessment of the respective obligations of the Affected Electricity Distributors was in the course of the Ontario Superior Court of Justice proceeding. As has been noted above, the settlement of the case resulted in the creation of two appendices to the settlement. The first such appendix, Appendix F, stipulated the names of the Affected Electricity Distributors. The second appendix, Appendix G, stipulated the respective amounts for which the named Affected Electricity Distributors were responsible. It is the Board's view that the settlement has resolved the question with respect to the obligations of the Affected Electricity Distributors, and that it is inappropriate for the Board to make any further inquiry into the subject.

With respect to the quantum of costs and damages, the Board’s response to SEC’s submissions is to require as part of this decision that any Affected Electricity Distributor who received insurance proceeds, or any other funds related to the late payment penalty litigation, shall deduct such amount from the amount to be recovered through rates and shall advise the Board of any such deductions made.

Finding on Method of Recovery

Having found that it is appropriate for the Affected Electricity Distributors to be eligible to recover the costs and damages associated with the LPP class action in rates, it remains to be decided how that recovery is to be accomplished.

The Board received various submissions respecting the appropriate method to allocate and collect the sums approved for recovery. It is the Board's view that the collection should be accomplished by way of a rate rider specific to this purpose, to be applied to all customers of the Affected Electricity Distributor, metered and unmetered customers alike. The Board has adopted this approach in light of its view that the collection of an LPP was a benefit to all of the customers of the Affected Electricity Distributor, and the recovery of the costs and damages associated with the class action should therefore be collected from all of the customers of the Affected Electricity Distributor.

Both the EDA and THESL suggested in their submissions that unmetered customers represented a small percentage of the revenues derived from the LPP. It is the Board's view that the source of the revenues from the LPP is not the relevant consideration. In the Board's view, the relevant consideration is that the LPP had two elements. First, it had the effect of reducing overall utility costs associated with account management and collection efforts. The Board required utilities, and still requires utilities, to impose a LPP to encourage timely payment, and discourage delinquency. This had, and has, the effect of reducing costs across the utility as a whole. Second, the LPP produced revenue which also served to reduce the revenue requirement and therefore utility rates for all customers.

Another issue that arose dealt with how the amounts sought for recovery were to be allocated to the respective rate classes. The EDA proposed to recover the amount from metered customers, through one consolidated rate rider for each distributor. THESL proposed to allocate the recovery amount to the metered rate classes based on a 3-year average (2007-2009) of LPPs collected from the respective rate classes. VECC argued that the appropriate method would be to allocate the recovery amount across all rate classes on the basis of distribution revenues. Board staff submitted that THESL's approach was better than that proposed by the EDA on behalf of the other Affected Electricity Distributors, however noted that the EDA had submitted that not all distributors were able to undertake a similar allocation.

In the Board's view, while THESL may have allocated these revenues to the specific rate classes from which they were derived, there is no evidence that this was a universal or even a common practice among the other Affected Electricity Distributors. Where no allocation was made, the revenue created by the LPP served to reduce the revenue requirement across the utility as a whole.

The Board therefore finds that the allocation of the costs and damages arising from the settlement of the class action should be across all customers.

Further, in the Board's view, the appropriate approach is to allocate the recovery amount on the basis of distribution revenues to all rate classes (metered and unmetered). The distribution revenues to be used for this purpose shall be the 2009 actual distribution revenues as used for Reporting and Record Keeping Requirements ("RRR").

Having determined that the costs shall be allocated to all rate classes and as such shall be recovered from all customers, the issue that remains is how the rate rider should be determined. The EDA proposed a fixed charge rate rider and THESL stated that it preferred a volumetric rate rider. VECC noted the limitations of both approaches, however suggested that a volumetric rate rider was most appropriate. Board staff submitted that both approaches were reasonable and recommended the Board adopt both – one for THESL and the other for the remaining Affected Electricity Distributors, as proposed by the EDA.

The Board is of the view that the rate rider to be used to recover the subject costs should be established on the basis of a fixed customer charge for all utilities. Under this approach, a distributor shall first allocate the amount it is seeking to recover to each rate class by distribution revenue and then calculate a specific rate rider for each rate class based on the number of customers in that rate class. With respect to the unmetered rate classes, the rate rider shall be based on the number of connections in those rate classes. For the purposes of this calculation, each Affected Electricity Distributor (including THESL) shall use the 2009 year-end actual customer/connection data reported as part of each distributor's RRR.

The Board notes that in its Decision in the Enbridge and Union Gas cases respecting the LPP, it adopted a monthly fixed charge methodology as opposed to a volumetric allocation. The Board sees no reason to depart from this methodology in this case.

Finally, with respect to the duration of the monthly fixed charge rate rider, the Board concludes that with respect to all eligible Affected Electricity Distributors with the exception of THESL, the rate rider shall be calculated so that the full amount to be recovered will be recovered over a 12 month period, starting May 1, 2011. In the case of THESL, in light of the fact that the amount to be recovered is substantially larger than that for any other eligible Affected Electricity Distributor, the Board will make provision for a 24 month period of recovery, from May 1, 2011 to April 30, 2013.

Both THESL and the other Affected Electricity Distributors requested a variance account to record any difference between each distributor's recovery amount and the amount actually recovered from customers. The Board does not expect any material difference to occur in this regard and therefore the request for a variance account is denied.

The Board Orders that:

1. The costs and damages arising from the LPP class action that are sought for recovery in this proceeding shall be recovered from all ratepayers of the Affected Electricity Distributors. A listing of each Affected Electricity Distributor and their share of the class action costs that is approved for recovery is provided in Appendix A to this Decision.

2. For the purposes of recovery, the costs and damages arising from the settlement of the LPP class action that are approved in this proceeding, shall be allocated to all customers of each Affected Electricity Distributor in Appendix A, on the basis of distribution revenues. The distribution revenues to be used for this purpose shall be the 2009 distribution revenues used in the RRR process.

3. THESL shall recover its share of the amount approved for recovery, as provided in Appendix A over a 24-month period starting May 1, 2011. All other Affected Electricity Distributors shall recover each of their shares of the amounts approved for recovery, as provided in Appendix A, over a 12-month period starting May 1, 2011.

4. The rate rider for the purposes of recovery shall be a fixed customer charge and for the purposes of this calculation, each Affected Electricity Distributor in

Appendix A shall use the 2009 year-end actual customer or connection data, as applicable, reported as part of each distributor's RRR.

5. The Board directs all Affected Electricity Distributors (in Appendix A) that currently have an IRM or cost of service application before the Board, to file with the Board within seven days of the date of this Decision and Order, detailed calculations including supporting documentation, outlining the derivation of the rate riders based on the methodology outlined in this Decision. The submitted rate riders shall be verified in the Affected Electricity Distributors' respective IRM or cost of service applications.

6. For those Affected Electricity Distributors (in Appendix A) that do not currently have an IRM or cost of service application before the Board, the Board directs these distributors to file with Board within seven days of the date of this Decision and Order, detailed calculations including supporting documentation outlining the derivation of the rate riders based on the methodology outlined in this Decision. These distributors shall also file a draft tariff of rates and charges that includes the proposed rate riders. Intervenors and Board staff wishing to make submissions on the information filed shall do so within six days of the filing. The Affected Electricity Distributor shall have nine days from the date of the filing to respond to any submissions.

Cost Awards

7. Intervenors eligible for cost awards shall file with the Board and forward to the EDA their respective cost claims within 20 days from the date of this Decision and Order.

8. The EDA on behalf of all Affected Electricity Distributors (per Appendix A), shall review the cost claims and file with the Board and forward to intervenors eligible for cost awards any objections to the claimed costs within 27 days from the date of this Decision and Order.

9. Intervenors, whose cost claims have been objected to, may file with the Board and forward to the EDA responses to any objections for cost claims within 33 days of the date of this Decision and Order.

10. The Affected Electricity Distributors (per Appendix A) shall pay the Board's costs of and incidental to, this proceeding upon receipt of the Board's invoice.

DATED at Toronto, February 22, 2011
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Appendix A
Affected Electricity Distributors and their share of the LPP class action costs that are approved for recovery

	Affected Electricity Distributors	Recovery Amount (Per Board staff IR #1)
1	Atikokan Hydro Inc.	$7,567.85
2	Bluewater Power Distribution Corporation	$149,121.96
3	Brant County Power Inc.	$41,665.21
4	Brantford Power Inc.	$126,681.66
5	Burlington Hydro Inc.	$229,874.32
6	Cambridge & North Dumfries Hydro Inc.	$194,554.99
7	Centre Wellington Hydro Ltd.	$25,370.61
8	Chapleau Public Utilities Corp.	$5,314.22
9	Chatham-Kent Hydro Inc.	$132,809.95
10	Clinton Power Corp.	$4,702.32
11	COLLUS Power Corp.	$42,893.20
	CLEARVIEW TWP. HEC	$2,288.32
	THE BLUE MOUNTAINS ENERGY SERVICES	$1,304.11
12	Cooperative Hydro Embrum Inc.	$4,271.79
13	E.L.K. Energy Inc.	$28,387.69
14	Enersource Hydro Mississauga Inc.	$1,006,252.86
15	Enwin Powerlines Inc. & Enwin Utilities	$434,442.75
16	Erie Thames Powerlines Corp.	$55,928.58
17	Espanola Regional Hydro Distribution Corp.	$9,905.46
18	Essex Power Lines Corp.	$75,617.88
19	Festival Hydro Inc.	$78,686.23
	BRUSSELS PUC	$544.88
	DASHWOOD HS	$193.38
	HENSALL PUC	$1,001.99
	SEAFORTH PUC	$1,386.44
	ST. MARYS PUC	$4,818.64
	ZURICH HS	$423.01
20	Fort Frances Power Corp.	$9,076.63
21	Greater Sudbury Hydro Inc.	$140,833.20
	WEST NIPISSING ENERGY SERVICES LTD.	$8,958.21
22	Grimsby Power Inc.	$23,236.06
23	Guelph Hydro Electric	$204,943.57
	WELLINGTON ELECTRIC DIST. CO. INC.	$2,382.85
24	Haldimand County Hydro Inc.	$52,104.38
25	Halton Hills Hydro Inc.	$62,839.79
26	Hearst Power Distribution Co. Ltd.	$14,889.32

	Affected Electricity Distributors	Recovery Amount
27	Horizon Utilities Corporation	$0.00
	HAMILTON HYDRO INC.	$897,923.30
	ST. CATHARINES HYDRO UTILITY SERVICES INC.	$204,411.93
28	Hydro 2000 Inc.	$3,858.70
29	Hydro Hawkesbury Inc.	$26,420.72
30	Hydro One Brampton Networks	$444,880.45
31	Hydro Ottawa Ltd.	$1,017,550.77
	CASSELMAN HYDRO INC.	$3,305.26
32	Innisfil Hydro Distribution Systems Ltd.	$33,430.63
33	Kenora Hydro Electric Corp. Ltd.	$16,296.32
34	Kingston Electricity Distribution Ltd.142446 Ontario Ltd.	$104,031.09
35	Kitchener-Wilmot Hydro Inc.	$271,910.14
36	Lakefront Utilities Inc.	$36,872.16
37	Lakeland Power Dist. Ltd.	$31,478.25
38	London Hydro Utilities Services Inc.	$457,241.98
39	Middlesex	$25,780.68
	DUTTON HYDRO INC.	$1,254.13
	NEWBURY POWER INC.	$556.81
40	Midland Power Utility Corp.	$31,756.33
41	Milton Hydro Dist. Inc.	$74,673.59
42	Newmarket- Tay Power Distribution Ltd.	$0.00
	TAY HYDRO ELECTRIC DISTRIBUTION CO. INC.	$7,162.40
	NEWMARKET HYDRO LTD.	$88,162.91
43	Niagara on the Lake Hydro Inc.	$24,800.65
44	Niagara Peninsula Energy Inc. (Niagara Falls, PenWest)	$116,068.52
	PENINSULA WEST UTILITIES LTD.	$51,312.53
45	Norfolk Power Distribution Co. Ltd.	$55,876.38
46	North Bay Hydro Distribution Ltd.	$87,552.60
47	Northern Ontario Wires Inc.	$18,433.02
	KAPUSKASING PUC	$2,968.30
48	Oakville Hydro Electricity Distribution Inc.	$257,572.31
49	Orangeville Hydro Ltd.(Grand Valley)	$32,833.10
	GRAND VALLEY ENERGY INC.	$1,590.02
50	Oshawa PUC Networks Inc.	$171,994.93
51	Ottawa River Power Corp	$25,966.85
	KILLALOE HEC	$394.20
	MISSISSIPPI MILLS PUC	$2,058.64

	Affected Electricity Distributors	Recovery Amount
52	Parry Sound Power Corp.	$12,414.74
53	Peterborough Distribution Inc.	$103,599.84
	LAKEFIELD DIST. INC.	$4,752.69
	ASPHODEL-NORWOOD DIST. INC.	$1,925.39
54	Port Colborne Hydro Inc.	$28,872.42
55	Powerstream Inc.	$0.00
	RICHMOND HILL HYDRO INC.	$144,833.23
	AURORA HYDRO CONNECTIONS LTD.	$54,628.33
	HYDRO VAUGHAN DISTRIBUTION INC.	$352,990.39
	MARKHAM HYDRO DISTRIBUTION INC.	$273,886.24
	BARRIE HYDRO DIST. INC.	$170,592.02
	BRADFORD-WEST GWILLIMBURY PUC	$6,224.56
	ESSA TWP. HEC	$240.31
	NEW TECUMSETH HEC	$11,365.94
	PENETANGUISHENE HEC	$4,560.60
56	Renfrew Hydro Inc.	$14,453.29
57	Rideau St. Lawrence Dist. Inc.	$18,391.97
58	Sioux Lookout Hydro Inc.	$12,422.98
59	St. Thomas Energy Inc.	$52,622.33
60	Thunder Bay Hydro Electricity Dist. Inc.	$160,239.21
61	Toronto Hydro-Electric System Limited	$7,525,588.82
62	Tillsonburg Hydro Inc.	$29,932.56
63	Veridian Connections Inc.	$280,780.55
	1382154 ONTARIO LTD. [Brock HEC]	$3,068.61
	BELLEVILLE ELECTRIC CORP.	$29,382.69
	PORT HOPE HEC	$11,119.02
	GRAVENHURST HYDRO ELECTRIC INC.	$14,065.49
	SCUGOG HYDRO ENERGY CORP.	$6,908.95
64	Wasaga Distribution Inc.	$14,942.12
65	Waterloo North Hydro Inc.	$173,479.23
66	Welland Hydro-Electric System Corp.	$74,531.55
67	Wellington North Power Inc.(Wellington)	$11,517.59
68	West Coast Huron Energy Inc.(Goderich Hydro)	$18,419.16
69	West Perth Power Inc.	$8,514.12
70	Westario Power Inc.	$58,336.87
	MINTO HYDRO INC.	$2,395.91
	WALKERTON PUC (including Elmwood HS)	$2,964.81

	Affected Electricity Distributors	Recovery Amount
71	Whitby Hydro Electric Corp.	$124,544.36
72	Woodstock Hydro Services Inc.	$57,743.72
	Total Recovery Amount	**$17,690,907.53**

Appendix B
Decision on Motions,
Dated January 25, 2011

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

_____
Paul Sommerville
Presiding Member

Original signed by

_____
Karen Taylor
Member