



EB-2012-0212

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

AND IN THE MATTER OF an application by Thunder Bay Hydro Electricity Distribution Inc. for an order or orders approving or fixing just and reasonable distribution rates and other charges, to be effective May 1, 2012.

AND IN THE MATTER OF a Motion to Review and Vary by Thunder Bay Hydro Electricity Distribution Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2011-0197.

**NOTICE OF MOTION TO VARY
AND PROCEDURAL ORDER No. 1**

May 7, 2012

On April 20, 2012, Thunder Bay Hydro Electricity Distribution Inc. ("Thunder Bay Hydro") filed with the Ontario Energy Board (the "Board") a Notice of Motion to Review and Vary (the "Motion") the Board's Decision and Order dated April 4, 2012 in respect of Thunder Bay Hydro's 2012 rate application (EB-2011-0197). The Board has assigned the Motion file number EB-2012-0212.

The Motion seeks to vary the Board's Decision and Order for EB-2011-0197 (the "Decision") so that Thunder Bay Hydro be permitted to recover its PILs proxies from October 1, 2001 to April 30, 2002. The Board's decision found that Thunder Bay Hydro's entitlement to PILs proxies began with the effective date of the Board decision in EB-2002-0035, ie. May 1, 2002. Thunder Bay Hydro submitted that the grounds for the motion are that the Board made three errors in fact and one error in law as outlined below.

- Errors in Fact:
 1. The belief that the Board sanctioned methodology for recording PILs proxies in 2001 and 2002 distinguished between March 1, 2002 and other rate implementation dates.
 2. Pre-May 1, 2002 PILs proxies could not be recovered because they represented costs incurred prior to the "effective date" of the 2002 rate order. Thunder Bay Hydro states that while it is generally true that an effective date signifies the date that costs can start being recorded for recovery, an exception to that rule is the recovery of costs recorded in a deferral account.
 3. Thunder Bay Hydro required a deferral account in order to be entitled to its pre-May 1, 2002 PILs proxies. Thunder Bay Hydro submitted it had a deferral account - Account 1562 in which its pre-May 1, 2002 PILs proxies have been recorded correctly.
- Error in Law:
 1. The denial of Thunder Bay Hydro's entitlement to PILs proxies prior to May 1, 2002 is effectively a retroactive rate adjustment.

Thunder Bay proposed that the Motion be heard by way of a written hearing.

In a January 13, 2012 letter granting intervention status to the Vulnerable Energy Consumers Coalition ("VECC") with regards to the IRM application, the Board stated that it would not consider cost awards with respect to the disposition of Account 1562 Deferred PILs in EB-2011-0197 because the application appeared to have no inconsistencies with the Board's findings in the Account 1562 Deferred PILs Combined Proceeding. This Motion relates to the disposition of Account 1562, but the Board has determined that given the nature of the Motion it is appropriate to grant VECC cost eligibility at this time for purposes of participating in the Motion.

Rule 44.01 of the *Rules of Practice and Procedure* states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The Threshold Issue

Under Rule 45.01 of the Board's *Rules of Practice and Procedure*, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. Section 45.01 of the Board's Rules of Practice and Procedure provides that:

In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The threshold question was articulated in the Board's *Decision on a Motion to Review Natural Gas Electricity Interface Review Decision*¹ (the "NGEIR Decision"). The Board, in the NGEIR Decision, stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there was enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision.

Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an "identifiable error" in the decision for which review is sought and that "the review is not an opportunity for a party to reargue the case"². A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and there is no purpose in proceeding with the motion to review.

The Board is of the view that the grounds for the Motion expressed by Thunder Bay Hydro appear to be arguments already heard by the Board in either EB-2011-0197 or in the Account 1562 Deferred PILs Combined Proceeding (EB-2008-0381). Therefore, the Board will invite submissions from parties on the threshold question in order to make a determination as to whether or not it will proceed to hear this Motion.

¹ May 22, 2007, EB-2006-0322/0388/0340, page 18.

² NGEIR Decision, at pages 16 and 18.

THE BOARD THEREFORE ORDERS THAT:

1. Thunder Bay Hydro shall file with the Board and deliver to VECC its initial written submission on the threshold question by **May 14, 2012**.
2. VECC and Board staff may file written submissions with the Board and deliver it to Thunder Bay Hydro no later than **May 23, 2012**.
3. Thunder Bay Hydro may file a written reply submission with the Board and deliver it to VECC no later than **May 30, 2012**.

All filings to the Board must quote file number **EB-2012-0212**, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
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DATED at Toronto, May 7, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary