

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 the Board's Decision dated April 4, 2012 (File Number EB-2011-0197).

**SUBMISSION
THE THRESHOLD QUESTION**

1. In accordance with Procedural Order No. 1 in this proceeding (the "Procedural Order"), this is the submission of Thunder Bay Hydro Electricity Distribution Inc. ("TBHE") on the threshold question.
2. According to the Procedural Order, the Board is of the view that the grounds for the Motion expressed by TBHE appear to be arguments already heard by the Board in either EB-2011-0197 (the "IRM Proceeding") or in EB-2008-0381 (the "Combined PILs Proceeding"). Accordingly, the Board has invited submissions on the threshold question in order to make a determination as to whether or not it will proceed to hear TBHE's Motion.
3. These submissions have been organized to correspond with the grounds identified by TBHE.

Error in Fact #1

4. As set out in TBHE's Notice of Motion, the Board made an error in fact in its belief that the Board sanctioned methodology for recording PILs proxies in 2001 and 2002 distinguished between March 1, 2002 and other rate implementation dates.
5. In response to the Board's comment in the Procedural Order that the grounds for the Motion appear to be arguments already heard by the Board in either the IRM Proceeding or the Combined PILs Proceeding, TBHE submits that the Board did hear this argument in the Combined PILs Proceeding and decided in a manner that supports TBHE's motion.

6. To assist the Board, TBHE has attached at Exhibit "A" a submission from the Electricity Distributors Association (the "EDA") to the Board in the Combined PILs Proceeding, in which the EDA addressed this very issue. The relevant portion of the EDA's letter is:

*"The distribution rate decisions in the year 2002, for most LDCs, were effective March 1, 2002. But for some distributors the Board order was effective later in the year. In the case of those distributors whose rate decisions were effective much later in the year, the PILs recovered from customers in the year were much lower than the receivables recorded in Account 1562. This perhaps led to the Board staff's question "whether the distributors should prorate the PILs amount approved by the Board based on the effective date of the rate adjustment, **rather than posting the entire approved amount as per the accounting instructions**".*

The EDA is of the view that the Board approved PILs amount for 2002 should not be prorated based on the effective date of the rate adjustment because the LDCs paid PILs to the government for the entire year whether or not they collected PILs in full. Therefore, posting the entire Board approved PILs amount in Account 1562 as receivables is considered logical.

In view of the above, EDA recommends that the accounting instructions provided by Board staff in the past should be pursued without any amendment."¹ [emphasis added]

7. Although this argument was made, the Board's Decision in the Combined PILs Proceeding did not address it specifically (likely because it was not applicable to the three subject distributors). However, the Board in the Combined PILs Proceeding did state that *"the appropriate approach is a review of the account in terms of whether the distributors applied the methodology appropriately as the methodology existed at the time."*²
8. Therefore, the Board has ruled on this topic such that the Board sanctioned methodology in place at the relevant time should apply (i.e. the rules should not be changed to prorate PILs proxy amounts for post March 1, 2002 effective rates as suggested by Board Staff).
9. The Board's decision in the IRM Proceeding, mistakenly believed that the methodology in place at the relevant time treated March 1, 2002 and post-March 1, 2002 effective rate dates differently. This is not the case (otherwise why would Board Staff have asked in the Combined PILs Proceeding "whether the distributors should prorate the PILs amount approved by the Board based on the effective date of the rate adjustment, rather than posting the entire approved amount as per the accounting instructions"?). It is clear that the Board sanctioned methodology for recording PILs proxies in 2001 and 2002 did not distinguish between March 1, 2002 and non-March 1, 2002 effective rates.
10. Further, although the Board stated in its decision in the IRM Proceeding that Board Staff's proposed reduction of TBHE's PILs proxy amounts was "consistent with the decision in the

¹ At pages 2 and 3.

² EB-2008-0381, Decision with Reasons, December 18, 2009, pages 5-6.

Combined Proceeding", it provided no reasons or explanation for this alleged consistency. The relevant portion of the Board's decision has been reproduced and emphasized below:

"The Board finds that Thunder Bay's entitlement to PILs proxies in rates began with the effective date of the Board decision in EB-2002-0035, ie. May 1, 2002. The Board notes that the effective date for the 2002 rates including the 2001 and 2002 proxies was delayed to May 1, 2002 at the request of Thunder Bay. The Board acknowledges that Thunder Bay had a PILs liability for the period October 1, 2001 to April 31, 2002. However, the Board is of the view that the entitlement to PILs in rates commenced with the effective date for rates, not the date taxation commenced. The Board also notes that no deferral account was approved by the Board in EB-2002-0035. As such, the Board finds that the PILs proxy calculation provided by Board staff fairly reflects the Board's 2002 decision and is consistent with the decision in the Combined Proceeding." [emphasis added]

11. The reason why the Board did not provide an explanation of *how* the PILs proxy reduction calculated by Board Staff was consistent with the Combined PILs Proceeding was because the calculation conflicted with the Combined PILs proceeding. In other words, the Board was wrong in its assertion of consistency. This is an error of fact that, on its own, satisfies the threshold question and therefore justifies TBHE's motion to review.

Error in Fact #2

12. Another error in fact made by the Board was that 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. The relevant portion of the Board's decision in EB-2011-0197 is reproduced and emphasized below:

"The Board finds that Thunder Bay's entitlement to PILs proxies in rates began with the effective date of the Board decision in EB-2002-0035, ie. May 1, 2002. The Board notes that the effective date for the 2002 rates including the 2001 and 2002 proxies was delayed to May 1, 2002 at the request of Thunder Bay. The Board acknowledges that Thunder Bay had a PILs liability for the period October 1, 2001 to April 31, 2002. However, the Board is of the view that the entitlement to PILs in rates commenced with the effective date for rates, not the date taxation commenced. The Board also notes that no deferral account was approved by the Board in EB-2002-0035. As such, the Board finds that the PILs proxy calculation provided by Board staff fairly reflects the Board's 2002 decision and is consistent with the decision in the Combined Proceeding." [emphasis added]

13. The Board's belief that the entitlement to PILs proxies commenced with the effective rate date was based on respecting the rule against retroactive ratemaking.
14. As stated in TBHE's Notice of Motion, 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. TBHE's pre-May 1, 2002 proxy amounts have been recorded in a deferral account - Account 1562, in accordance with the methodologies in place at the time.

15. This issue was not raised or disputed in the IRM Proceeding, likely because it is such a well known principle of regulatory law. Board Staff recognized this principle in the Combined PILs Proceeding where it submitted:

*"Board Staff submits that, the present proceeding is analogous to that in the Bell Aliant case in that the LDCs were well aware, since the establishment of the PILS account in 2001, that a final review of the account would be conducted by the Board at a future date and that such a review could include adjustments to the amounts in the account and determinations as to the methodology used. As such, the PILS account, just like the deferral account in the Bell Aliant case, was 'encumbered' and that review **and adjustment of such accounts does not constitute retroactive or retrospective ratemaking.**"*³ [emphasis added]

16. The Board in the IRM Proceeding mistakenly believed that the rule against retroactive ratemaking required it to commence TBHE's PILs proxy entitlement no earlier than May 1, 2002, despite the fact that TBHE's PILs proxies were recorded in a deferral account. This is another error in fact (or law) that, on its own, satisfies the threshold question and therefore justifies TBHE's motion to review.

Error in Fact #3

17. Another error in fact made by the Board was that TBHE required a deferral account in order to be entitled to its pre-May 1, 2002 PILs proxies. The relevant portion of the Board's decision in EB-2011-0197 is reproduced and emphasized below:

*"The Board finds that Thunder Bay's entitlement to PILs proxies in rates began with the effective date of the Board decision in EB-2002-0035, ie. May 1, 2002. The Board notes that the effective date for the 2002 rates including the 2001 and 2002 proxies was delayed to May 1, 2002 at the request of Thunder Bay. The Board acknowledges that Thunder Bay had a PILs liability for the period October 1, 2001 to April 31, 2002. However, the Board is of the view that the entitlement to PILs in rates commenced with the effective date for rates, not the date taxation commenced. **The Board also notes that no deferral account was approved by the Board in EB-2002-0035.** As such, the Board finds that the PILs proxy calculation provided by Board staff fairly reflects the Board's 2002 decision and is consistent with the decision in the Combined Proceeding."* [emphasis added]

18. This issue was not raised in the IRM Proceeding. This statement demonstrates that the Board mistakenly believed that TBHE required another deferral account to record its PILs proxies in addition to Account 1562.

³ November 13, 2009 Submission of Board Staff in EB-2008-0381 at paragraph #33.

19. Perhaps the Board was contemplating the absence of a deferral account to record lost revenues resulting from delayed rate implementation from March 1, 2002 (the standard effective date for rates) to May 1, 2002 (the effective date of TBHE's rates). If this were the case, the Board's decision would also be erroneous since such a deferral account would have only covered lost revenues for two months (March and April of 2002), so the absence of such a deferral account would have resulted in TBHE losing two months of PILs proxies and not seven months which was the result of the Board's decision.
20. In either case, this is another error in fact that, on its own, satisfies the threshold question and therefore justifies TBHE's motion to review.

Error in Law

21. As stated in TBHE's Notice of Motion, TBHE's PILs proxies for Q4 2001 and the first four months of 2002 were built into its May 1, 2002 rates. The denial of TBHE's entitlement to PILS proxies prior to May 1, 2002 is effectively a retroactive rate adjustment. TBHE is effectively being required to return amounts collected through a final rate order. As such, TBHE submits that the Board has violated the rule against retroactive rate making.
22. TBHE submits that this statement speaks for itself and has nothing further to add to it.

Conclusion

23. TBHE is essentially a not-for-profit distributor. Although it is entitled to earn the Board established Return on Equity ("ROE"), TBHE's rates are based on a 3.75% ROE. As a not-for-profit distributor, TBHE's operations are extremely sensitive to the loss of budgeted amounts (especially budgeted amounts recorded in compliance with the Board's accounting rules). The PILs proxy amount denied by the Board in the IRM Proceeding was significant, amounting to \$897,127 including principal and carrying charges. This would represent approximately 5% of TBHE's audited 2011 distribution revenue.
24. Typically in any rate proceeding, a delay in filing an application would at most result in the applicant losing its revenue deficiency from the requested implementation date to the actual implementation date. However, although implementation of TBHE's 2002 rates was delayed by only two months, TBHE has been denied seven months of PILs proxies representing approximately 5% of its audited 2011 distribution revenue.
25. In light of the gravity of the Board's decision in TBHE's case, TBHE requests the Board to recognize the "identifiable errors" described above and allow TBHE to proceed with its Motion to Review.

All of which is respectfully submitted.

May 14, 2012

A handwritten signature in black ink, appearing to read "Andrew Taylor", written over a horizontal line.

Thunder Bay Hydro Electricity Distribution Inc.
By its Counsel: Andrew Taylor