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BY EMAIL

May 25, 2012

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

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Midland Power Utility Corporation
Motion to Review and Vary
Board Staff Submission
Board File No. EB-2012-0219**

In accordance with the Notice of Motion to Vary and Procedural Order No.1, please find attached the Board Staff Submission in the above proceeding. Please forward the following to Midland Power Utility Corporation and to all other registered parties to this proceeding.

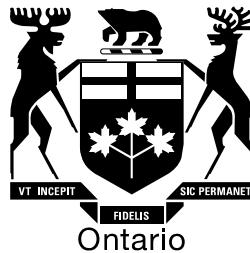
In addition please remind Midland Power Utility Corporation that its Reply Submission is due by May 29, 2012.

Yours truly,

Original Signed By

Suresh Advani

Encl.



ONTARIO ENERGY BOARD

STAFF SUBMISSION

Motion to Review and Vary
Midland Power Utility Corporation

EB-2012-0219

May 25, 2012

Board Staff Submission
Midland Power Utility Corporation
Motion to Review and Vary EB-2012-0219

On April 24, 2012, Midland Power Utility Corporation ("Midland") 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 Midland's 2012 rate application (EB-2011-0182). The Board has assigned the Motion file number EB-2012-0219.

The Motion seeks to vary the portion of the Board's EB-2011-0182 Decision and Order (the "Decision") in relation to the Review and Disposition of Account 1562 - Deferred Payments in Lieu of Taxes ("Account 1562"). Midland submitted that the grounds for the Motion are that:

- The Board erred in its adoption of the minimum rates for Midland;
- The Board erred in fact in finding that there was no evidentiary basis for the alternative tax rates shown in Midland's reply submission; and
- The Board's Decision is inconsistent with its decisions in respect of other distributors in similar circumstances.

Midland also requested:

- An order extending the time for recovery of the Deferral and Variance Accounts to two years from the one year provided for in the Decision; and
- A declaration that its current rates and charges (i.e. 2012 rates) be made interim pending the disposition of this Motion.

The Board issued a Notice of Motion to Vary and Procedural Order No. 1 on May 8, 2012. In the notice, the Board stated the following:

- The Board will not hear that part of the Motion seeking a change to the disposition period for Midland's Deferral and Variance Account balances; and
- The Board will not grant Midland permission to file new evidence regarding tax rates as identified in paragraph 15 of the Motion as this was material which could have been filed during the proceeding. The Board was of the view that it was not

appropriate to file a motion to review in order to re-argue an issue and place new evidence before the Board when that evidence could have been placed on the record of the original proceeding.

Introduction

In pre-filed evidence, Midland applied to collect from customers a debit balance of \$173,418. In response to interrogatories, Midland amended its evidence to support a recovery of \$164,412.¹ In the evidence to support the draft rate order Midland filed a continuity schedule which contains a credit balance of \$483,400² to be refunded to customers which is based on the minimum income tax rates as determined by the Board in its Decision. In its Motion, Midland states that using the income tax rates from the alternative identified in its reply submission would result in a re-calculated credit amount of \$245,872.³ Further on in the Motion, Midland identifies a revised credit balance of \$205,686 based on revised income tax rates calculated by Midland's auditors which were not filed on the record of the original proceeding.

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* (the "Rules") 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.

Rule 44.01(a) provides the grounds upon which a motion may be raised with the Board:

Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

¹ Midland_IRR_PILS_2001-06_ACCT_20120127.XLS, Tab Continuity Sch. 2001 to 2012.

² Motion, para. 10, page 7.

³ Motion, para. 10, page 7.

- i. error in fact;
- ii. change in circumstances;
- iii. new facts that have arisen; and
- iv. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The threshold test was articulated in the Board's decision on several motions filed in the *Natural Gas Electricity Interface Review Decision* ("NGEIR Review Decision")⁴.

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 raised 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.

The following is Board staff's submission on the threshold issue.

Submissions on the Threshold Issue

Board staff does not agree with Midland's arguments in support of its position that the Board has erred in fact or law in its Decision.

Board staff submits that the Motion does not raise a question as to the correctness of the Decision, does not meet the threshold test for review and accordingly, Board staff does not believe that the Board should hear the Motion for the reasons set out below.

1. Midland "acknowledges that the use of the maximum [income tax] rates would not be appropriate in its circumstances".⁵ However, Midland's Motion then states that the Board erred in fact by not giving more weight to the income tax rates provided by Midland in response to Board staff interrogatory #5c and by adopting the minimum income tax rates to be used in calculating the revised amount to be disposed.⁶ Midland further states that the income tax rates on which its Motion is based are incorrect and that its auditors have calculated new evidence that it

⁴ Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006-0332/0338/0340, May 22, 2007 (« NGEIR Review Decision ») at paras. 43-49 and recently applied in EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012).

⁵ Motion/ para. 11

⁶ Motion/ para. 11(a) and (b).

now wants the Board to consider.⁷ That is, the evidence on which Midland believes the Board erred to consider more fully is now acknowledged by Midland to be incorrect. Board staff submits that by impugning its own evidence in the Motion, and by stating that the Board erred in fact because it did not consider this incorrect evidence, Midland has essentially nullified the arguments made in this Motion, and therefore, it should be dismissed.

In addition, Board staff submits that the revised evidence (in the form of the auditors' report appended to the Motion) is not sufficient grounds for the Board to review its Decision. The Board would have considered the alternative tax rates submitted by Midland in response to Board staff interrogatory #5c and in its Decision the Board opted not to apply them. The present Motion requests that the Board vary its Decision by applying slightly revised tax rates but still similar to those provided in interrogatory #5c. In Board staff's view, the Motion is an attempt by Midland to reiterate the argument made in its reply submission in the original Application (which the Board did not adopt). As the Board has indicated in the NGEIR case as well as other decisions, a motion to review is not an opportunity for a party to reargue its case⁸ and Board staff submits that this aspect of the Motion fails to meet the threshold test.

2. Midland submitted that the Board erred in fact in finding that there was no evidentiary basis for the alternative tax rates shown in Midland's reply submission⁹. Board staff notes that Midland proffered in its reply submission the minimum tax rates for 2001 and 2002 of 19.12%, and revised rates that it calculated in response to Board staff interrogatory #5c of 29.41% for 2003, 31.58% for 2004, and 29.70% for 2005. Board staff further notes that Midland selected the minimum tax rates for 2001 and 2002 and that the Motion focuses on 2003 to 2005. Board staff submits that Midland did not provide the Board with complete evidence in the EB-2011-0182 proceeding to support the use of these revised income tax rates.

Board staff is of the view that critical components of evidence in determining the final balance to be disposed by rate riders are the five SIMPIL models and the continuity schedule which summarizes data from 2001 through 2012. Midland

⁷ Motion/ para. 15.

⁸ NGEIR Review Decision at para. 56

⁹ Response to Board Staff Interrogatory #5c, pages 16-19.

did not file this evidence to support its alternative proposal for different income tax rates, which it offered only as an alternative in its reply submission in the event the Board did not approve Midland's original request for the use of the maximum tax rates.

Board staff further notes that the maximum Ontario income tax rate for 2003 was 12.5%, and 14% for 2004 and 2005. In Midland's calculations of the blended income tax rates, it used the following Ontario income tax rates in part: 17.17% for 2003; and 18.67% for 2004 and 2005. Board staff observes that Midland's Ontario income tax rates are in excess of the maximum income tax rates, which is counterintuitive.

3. Midland filed applications for 2009, 2010, 2011 and 2012 rate adjustments. In these applications Midland applied using the minimum income tax rates.¹⁰ Midland states at paragraph 11 b) of the Motion that the Board erred in its adoption of the minimum rates for Midland. Board staff submits that Midland's own applications demonstrate that the minimum income tax rates are the correct tax rates to be used in calculating the balance in Midland's Account 1562 deferred PILs.
4. The current proceeding is a prudence review of evidence which is specific to Midland. The Board is not conducting a generic proceeding using the evidence from more than 80 distributors to create a policy applicable to future proceedings. The Board's purpose with respect to the PILs component of Midland's application was to determine a re-calculated balance on a final basis for Account 1562 deferred PILs as of April 30, 2012, and for the Board to approve rate riders on a final basis. The introduction of new evidence from other distributors' cases does not assist in the prudence review of Midland's evidence. Each distributor's prudence review is based on its unique tax evidence and prior Board decisions pertaining to that distributor. For these reasons, Board staff submits that this additional evidence should be dismissed.

Board staff submits that Midland's Motion has failed to establish grounds for reviewing the Board's Decision and accordingly fails to meet the threshold test and that the Board should dismiss the Motion without considering the merits thereof.

¹⁰ EB-2008-0236; EB-2009-0236; EB-2010-0099; EB-2011-0182.

Submissions on the Merits

In the event that the Board wishes to consider the merits of the Motion, Board staff offers the submission set out below.

Inconsistencies in RRR Filings

The Motion is dated April 24, 2012. Board staff submits that the balance in Account 1562 reported by Midland in its most recent 2011 RRR filings in April 2012 appears to be inconsistent with the position Midland has stated in this Motion.

Midland RRR Account 1562 Balances			
2002	0	2007	-432,177
2003	0	2008	-446,590
2004	-234,130	2009	-450,709
2005	-432,616	2010	-453,597
2006	-393,679	2011	-458,920

No Harm Principle

Board staff notes that Midland collected \$1,244,935 from its customers during the period covered by the Account 1562 methodology while Midland was assessed \$100,501 for the same period as shown in the table below. The difference is \$1,144,434. While Midland paid corporate minimum tax, Board staff is of the view that this is similar to a deposit for future income tax payments as Midland was able to offset this tax paid against income taxes when it started to pay in 2006. Corporate minimum taxes have been excluded from the Board's PILs 1562 methodology since December 2001.¹¹

Board staff understands that the Board's PILs methodology is not the same as flow through taxes. Board staff also understands that a total true up of the amounts collected from ratepayers and the amounts actually paid in taxes to the government was not the intent of the PILs Account 1562 methodology and Board staff would not argue

¹¹ <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/198685/view/>

for such an outcome. However, the analysis does demonstrate that Midland has not been harmed by the Board selecting the minimum tax rates to re-calculate the balance in Account 1562. The refund amount to customers calculated by Midland using the minimum income tax rates is \$483,400.¹² Midland collected considerably more from its ratepayers during the period 2002-2006.

Midland	2001	2002	2003	2004	2005	2006	Total
Notices of Assessment							
Corporate minimum tax				27,324	26,562		53,886
Ontario capital tax	3,740	3,894	14,529	16,738	7,714		46,615
Taxes Assessed (1)	3,740	3,894	14,529	44,062	34,276		100,501
Billed to Customers (2)		218,337	325,846	309,722	275,572	115,458	1,244,935
Difference							1,144,434
Source							
1. Notices of assessment filed in evidence							
2. Midland_PILS_2001 to 2006_Variance_Acct_20120404_20120413.XLS							

Relevance of the Combined Proceeding (EB-2008-0381)

In 2001, the Board approved a regulatory PILs tax proxy approach for rate applications coupled with a true-up mechanism filed under the RRR to account for changes in tax legislation and rules, and to true-up between certain proxy amounts used to set rates and the actual amounts. The variances resulting from the true-up were tracked in Account 1562 for the period 2001 through April 30, 2006.

In Procedural Order No. 8 of the combined proceeding,¹³ the Board included language at the top of the approved final issues list the Board released following Issues Day:

In the Board's Decision in this proceeding, which was issued December 18, 2009, the Board established certain parameters for this proceeding. Among those parameters, the Board stated: "The Board will not enter into an enquiry as to what the methodology should have been but rather, will determine, where necessary,

¹² Motion, para. 10, page 7.

¹³ EB-2008-0381, Procedural Order No. 8, Final Issues List, February 17, 2010.

what the methodology was and what the appropriate application of the methodology should have been.” Accordingly, the individual issues below are to be interpreted in a manner that exclusively furthers the Board's determination as set out in the Decision.

Further, the issues below only address the issues relevant to the three named applicants; Account 1562 Deferred PILs issues that are relevant to the disposition of the account for other LDCs, but which are **not relevant to the three named applicants, are not within the scope of this proceeding.** *[Emphasis added.]*

In the transcript of Issues Day before the Board, Presiding Member Ken Quesnelle made the following statements:

What we don't want to do now, in fairness to the applicants that are before the Board, is slow down these proceedings in testing hypothetical scenarios, in tweaking the existing evidence to a point where it might suit someone else who is outside of this proceeding and to test hypotheticals.¹⁴

We have come this far and we want to concentrate on the applicants that are before us and the evidence that is here.¹⁵

But we will be resisting the stretching of the current applicants' evidence to consider all permutations of scenarios that could occur.¹⁶

The generic issue of which income tax rates would apply to distributors that were not subject to the maximum income tax rates was not decided in the Combined Proceeding. In conducting the prudence review of the re-calculation of the balance in Account 1562, the Board has to consider many inputs that a distributor used throughout its evidence. The income tax rates are one of many important inputs in the calculations.

The Board has used rate base as a proxy for taxable paid-up capital in the PILs calculations since the 2002 application.¹⁷ A taxpayer is eligible for the full amount of the federal small business deduction when taxable capital is below \$10 million. The small business rate is available to the taxpayer and the minimum income tax rate applies.

¹⁴ Decision on Issues List, Transcript, Issues Day, February 9, 2010, Page 32, lines 21-26

¹⁵ Decision on Issues List, Transcript, Issues Day, February 9, 2010, Page 33, lines 10-12.

¹⁶ Decision on Issues List, Transcript, Issues Day, February 9, 2010, Page 34, lines 10-12.

¹⁷ See PILs application instructions and footnotes issued in December 2001 and updated January 18, 2002.

Midland applied using the maximum income tax rates which based on its evidence is inconsistent with Midland's particular circumstances. In its Motion, Midland acknowledged that it was not appropriate for it to have used the maximum income tax rates.¹⁸

Midland had losses of \$1,406,482¹⁹ which offset the payment of income taxes during the period October 1, 2001 to December 31, 2005.²⁰ While Midland was subject to small amounts of corporate minimum tax, this minimum tax was recoverable when Midland began paying income taxes sometime after the 2005 tax year. Based on the Board's instructions issued in the 2002 application guidelines, corporate minimum tax was not used in the determination of the PILs proxy.²¹

A major difficulty for the Board in its prudence review of a re-calculated balance of Midland's Account 1562 deferred PILs is how to interpret the effects of the tax losses on the PILs methodology and how to select the most reasonable income tax rates to be used in the calculations. Since this proceeding is not generic, and relies on Midland's specific tax facts and evidence, the Board must select from the evidence the applicant places before it. In the decision in the Combined Proceeding, tables of maximum and minimum income tax rates appear on page 17.

The Board reviewed Midland's specific circumstances for the first time in its 2012 IRM application and selected tax rates from a range of options. In a sense, Midland is arguing with the Board's interpretation of the evidence Midland submitted in support of an issue on which the Board had not previously opined. Board staff submits that this is not sufficient grounds for a motion.

Board staff submits that the Board selected a well-reasoned regulatory solution to the complex tax rate issue for Midland due to a lack of clarity on the record with respect to the most correct tax rates applicable to Midland's circumstances. Board staff submits that the Board did not err in fact in directing Midland to use the minimum tax rates to re-calculate the balance in Account 1562.

All of which is respectfully submitted.

¹⁸ Motion, para. 11, page 7.

¹⁹ Application, pdf page 529

²⁰ Application, pdf pages 529, 607, 692, 772.

²¹ EB-2008-0381, Exhibit: 2002_Application_PILs_proxy_notes_180102, May 14, 2010, page 1.