

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).

**REPLY SUBMISSION
THUNDER BAY HYDRO ELECTRICITY
DISTRIBUTION INC.**

1. In accordance with Procedural Order No. 1 in this proceeding, this is the reply submission of Thunder Bay Hydro Electricity Distribution Inc. ("TBHE") to Board Staff's May 23, 2012 submission.
2. This reply has been organized in two sections. The first section addresses the issues raised by Board Staff that are not relevant to this proceeding. The second section addresses Board Staff's submission on the issue of the threshold question.
3. We note that the additional ground of procedural unfairness has been requested and is discussed below.

SECTION #1: ISSUES NOT RELEVANT TO THIS PROCEEDING

4. While TBHE would like to focus only on the issues relevant to this proceeding, TBHE feels that it has no choice but to address certain issues raised by Board Staff that are not relevant to this proceeding, since Board Staff's submissions are on the record.

Alleged Inconsistencies with RRR Filings:

5. Board Staff's submission begins with a discussion under the heading of "Inconsistencies in RRR Filings" in which Board Staff identified inconsistencies between TBHE's RRR filings and its Account 1562 balance.

6. It is surprising that Board Staff identified these inconsistencies, despite recognizing that amounts recorded in the distributor's general ledger at each year end date are not relevant to this proceeding:

In this proceeding the Board is not approving a historical balance in Account 1562 that was recorded in the distributor's general ledger at each year end date. Each distributor has to recalculate a theoretical principal balance and related interest carrying charges in Account 1562 by following guidance and Board decisions.¹

7. Board Staff also wrote the following regarding alleged inconsistencies:

In another RRR balance filing made near the end of April 2012, TBHE reported a credit balance in Account 1562 of \$706,546. The balance reported for December 31, 2011 (as updated) does not match TBHE's original application, the Board's Decision or the balances stated in this Motion.²

8. TBHE submits that the balance was in fact meant to agree with the Board Decision; however, TBHE mistakenly assumed the \$706,546 as shown on Appendix H of EB-2011-0197 as prepared by Board staff was the December 31, 2011 balance (on closer review, this represents the principal and interest balance as December 31, 2006) and that the \$79,444 carrying charges to April 30, 2012 reflected the period January 1, 2012 to April 30, 2012. TBHE has amended the filing for Q4 2011 so that the balance on record reflects EB-2011-0197.
9. There was no conclusion to Board Staff's section on alleged inconsistencies, so TBHE does not know the point Board Staff was trying to make. In any event, any inconsistencies are not relevant to the issue of whether the Board made an identifiable error in TBHE's IRM proceeding.

Alleged Over-Collections by TBHE:

10. Board Staff also conducted an extensive analysis of past TBHE management intentions in order to support a conclusion that that one could argue that TBHE over-collected \$3,141,931 through its Account 1562. Specifically, Board Staff stated:

*The management at the time did not want to burden ratepayers beyond the rates necessary to maintain the 1999 not-for-profit ROE. Board staff submits that current management appears now to want to collect from current ratepayers the **costs that the prior management decided to avoid** when it asked for unbundled rates including PILs to be effective at market opening of May 1, 2002.³ [emphasis added]*

and

Having reviewed TBHE management's correspondence from the period 2001-2005, one could argue that the original requests of TBHE's management and the economic

¹ At page 19 of Board Staff's submission.

² At page 5 of Board Staff's submission.

³ At page 8 of Board Staff's submission.

intent of its application choices should be respected. By so doing, the Board would have to allow a refund to customers of the over-collection of \$3,141,931.⁴

11. Board Staff's over-collection theory is based on an assumption that TBHE's past management wished to recover its PILs costs on a flow-through basis, such that TBHE would only recover the PILs it paid. To support this interpretation, Board Staff relied on the following paragraph from TBHE's September 10, 2001 letter to the Board:⁵

In as much as the OEB has issued a directive that Payment-in-Lieu of taxes are to be treated as a flow through, and since our rates are revenue neutral, we hereby respectfully request that we implement our unbundled rates at the time that the electricity market opens. [emphasis added]

12. TBHE submits that this paragraph has been misinterpreted by Board Staff. The comment about PILs being treated as a flow through was simply TBHE's description of its understanding of the Board's directive regarding PILs. It was not a request by TBHE for its PILs to be treated as a flow through, thereby departing from the PILs rules regarding Account 1562.
13. Board Staff also referred to TBHE interrogatory responses from its 2001 proceeding to support its position that TBHE wanted to recover PILs on a flow through basis.⁶ The referenced interrogatory responses pertain to TBHE's rate of return, not to depart from the Account 1562 PILs rules:

Response:

It is the intention of the shareholder to have the utility set its rate to maintain its current status. Rate of return is not to be a motivating factor. The utility has received direction from the shareholder to maintain the rate of return it required in 1999. Please find attached a RUD model that reflects this direction.

14. TBHE's current management is fully aware of its past management's intentions with respect to distribution rates. The shareholder direction then and now is for TBHE to operate under a "Rate Minimization" model. This means that TBHE does not seek to recover its full return on equity ("ROE").
15. TBHE does not understand how Board Staff could interpret TBHE's September 10, 2001 letter and interrogatory responses to mean that "prior management decided to avoid" the recovery of its PILs proxies. There is nothing on the record to support this assertion.
16. The September 10, 2001 letter simply illustrates that TBHE wanted to delay implementation of its rates to avoid customer confusion. To find further meaning hidden in that letter as suggested by Board Staff is completely unreasonable.

⁴ At page 7 of Board Staff's submission.

⁵ At attachment 3 of Board Staff's submission.

⁶ At pages 7 and 8 of Board Staff's submission.

17. TBHE also notes that Board Staff's interpretation of TBHE's intentions is not supported by the Board's April 5, 2002 decision.⁷ There is no language in that decision to suggest: (i) that TBHE would forego any PILs proxies as a result of the May 1, 2002 effective date; or (ii) that TBHE would recover PILs on a flow through basis.
18. Furthermore, and most importantly, TBHE submits that the theoretical argument raised by Board Staff is not relevant to this proceeding. This proceeding is about whether the Board made an identifiable error regarding the disposition of TBHE's Account 1562 in TBHE's IRM proceeding. Board Staff's allegation of over-collection was not even raised in TBHE's IRM proceeding.
19. As such, Board Staff's over-collection argument is both incorrect and irrelevant and should therefore be disregarded by the Board.

SECTION #2: THE THRESHOLD QUESTION

Error in Fact #1

20. At page 10 of Board Staff's submission, Board Staff wrote:

*In its May 14 submission, TBHE makes the point that there is no distinction between the March 1, 2002 and May 1, 2002 dates, otherwise why would Board staff have raised this issue in the Combined Proceeding? **Board staff does not understand TBHE's logic** and can only say that Board staff raised this issue in the Combined Proceeding because it was an outstanding issue at the time, and as it turned out, remained outstanding until a Board Panel turned its mind to the matter in TBHE's 2012 IRM application.[emphasis added]*

21. TBHE will take this opportunity to explain its logic. TBHE made the argument that the PILs rules in place at the relevant time did not distinguish between March 1, 2002 and May 1, 2002 implementation dates. Regardless of the implementation date, you recorded all of your PILs proxies in Account 1562. Therefore, by recording its PILs proxies prior to May 1, 2002, TBHE followed the PILs rules that were in place at the time.
22. Had the PILs rules distinguished between implementation dates, those rules would have applied and there would have been no need for Board Staff to raise the issue of "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".
23. The only reason why Board Staff did raise this issue was because the PILs rules did not distinguish between March 1, 2001 non-March 1, 2001 implementation dates. The accounting instructions required distributors to post the entire approved PILs proxy amount, as indicated by

⁷ Attachment #6 to Board Staff's submission.

Board Staff's wording of its issue (i.e. "rather than posting the entire approved amount as per the accounting instructions").

24. Because the Board in the Combined Proceeding decided 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.*",⁸ and because the methodology that existed at the time required posting the entire PILs proxy amount, the PILs rules should not be changed now to prorate PILs proxy amounts for post March 1, 2002 effective rates.
25. To do so would depart from the fundamental premise from the Combined Proceeding that the PILs rules in place at the time should apply for the purpose of determining the balance of Account 1562.
26. Board Staff argued in its submission that only the issues listed in the Issues List of the Combined Proceeding were within the scope of the proceeding. Board Staff referred to Procedural Order No. 8 on the Final Issues List.⁹
27. If the impact of the rate implementation date on PILs proxy recovery was outside the scope of the Combined Proceeding as suggested by Board Staff, it would make no sense that the Board in TBHE's IRM proceeding stated that Board Staff's PILs proxy calculation was "consistent with the decision in the Combined Proceeding".¹⁰
28. Clearly, the Board's decision in the Combined PILs Proceeding that the PILs rules in place at the time should apply is relevant to TBHE's circumstance. TBHE refers the Board to the Decision and Order from the Combined Proceeding in which the Board wrote the following under the topic of "All Other Distributors":

*Each remaining distributor will be expected to apply for final disposition of account 1562 with its next general rates application (either IRM or cost of service). If the distributor files evidence in accordance **with all the various decisions made in the course of this proceeding**, including the use of the updated model referenced above and certifies to that effect, the distributor may expect that the determination of the final account balance will be handled expeditiously and in a largely administrative manner.[emphasis added]*

29. TBHE did file evidence in its IRM proceeding in accordance with all the various decisions made in the course of the Combined PILs Proceeding, including recording its PILs proxies back to October 1, 2001. However, the Board in the IRM proceeding erred in its belief that the Board sanctioned methodology for recording PILs proxies distinguished between March 1, 2002 and non-March 1, 2002 implementation dates.

⁸ EB-2008-0381, Decision with Reasons, December 18, 2009, pages 5-6.

⁹ At pages 12 and 13 of Board Staff's submission.

¹⁰ Decision and Order (EB-2011-0197) at page 11.

Error in Fact #2

30. According to Board Staff, the effective date of a deferral account signifies the date that costs start being recorded in that account. In other words, a distributor can only record amounts in a deferral account once that deferral account is effective.¹¹
31. TBHE agrees with that premise, however TBHE does not agree with Board Staff's application of that premise to TBHE's circumstances. Account 1562 was effective and available for use by distributors prior to October 1, 2001. The Uniform System of Accounts (Effective January 1, 2000) provided:

1562 Deferred Payments In Lieu of Taxes

A. This account shall record the amount resulting from the Board approved PILs methodology for determining the 2001 Deferral Account Allowance and the PILs proxy amount determined for 2002 and subsequent years. The amount determined using the Board approved PILs methodology will be recorded equally over the applicable PILs period (e.g. the 2001 PILs Deferral Account Allowance would be recorded in three equal instalments in October, November and December for utilities with a December 31, 2001 taxation year end).

32. Board Staff has suggested that TBHE was not permitted to record costs in Account 1562 until the effective date of its 2002 rates, since it did not have Board approval to do so:

*No exception to this general rule of the effective date being the date from which costs can be recorded was given by the Board with respect to Account 1562 in either TBHE's 2002 rates application or subsequent decisions.*¹²

33. TBHE submits that it did not require a specific order of the Board to use Account 1562. The deferral accounts set out in the Accounting Procedures Handbook (the "APH") are available for use by distributors without the approval of the Board unless otherwise stated in the APH. For example, the APH is specific about requiring Board approval to use Account 1574 - Deferred Rate Impact Amounts:

B. When authorized or directed by the Board, this account shall be used to record the difference between the rate of return reflected in the rates and the market based rate of return.[emphasis added]

34. The APH did not specify that Board approval was required to use Account 1562. Therefore, TBHE appropriately recorded its PILs proxy amounts in Account 1562 without a specific order of the Board just as every other distributor did.
35. The Board's belief that it could not allow TBHE to recover PILs proxies recorded in Account 1562 prior to the effective date of its 2002 rates is incorrect. Otherwise, how could distributors

¹¹ Last paragraph on page 14 of Board Staff's submission.

¹² At pages 14 and 15 of Board Staff's submission.

with March 1, 2002 effective rate dates have recovered their pre-March 1, 2002 PILs proxies recorded in Account 1562? They could because deferral accounts serve as the exception to the rule against retroactive rate making. The Supreme Court of Canada has recognized this concept:

*In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning.*¹³

Error in Fact #3

36. The third error in fact raised by TBHE was the Board's belief that TBHE required a separate deferral account in order to be entitled to its pre-May 1, 2002 PILs proxies.
37. TBHE did not understand Board Staff's submission on this issue. Board Staff again referred to its interpretation of TBHE's intentions in its 2001 and 2002 rate filings which, as explained above, do not reflect the intentions of TBHE's past management.
38. Board Staff also stated that the Board issued two decisions in 2001 and 2002 granting TBHE's request to receive PILs expenses on a flow through basis.¹⁴ TBHE could not find any language in past decisions to support this assertion by Board Staff. Therefore, Board Staff's comment that "Board decisions outrank Board guidelines in the hierarchy" is not applicable, since past Board decisions did not address how TBHE was to record amounts in Account 1562.
39. Board Staff seems to be confusing the issue by focusing on the PILs proxies built into TBHE's rates. The issue raised by TBHE is not about the PILs proxies built into rates, but whether TBHE required a deferral account separate from Account 1562 to record its pre-May 1, 2002 PILs proxies.
40. TBHE submits that Board Staff did not explain why the Board was correct in its belief that TBHE required another deferral account to record its pre-May 1, 2002 PILs proxies. TBHE maintains that it had deferral Account 1562 in which it could record its PILs proxies. Therefore, the following comment of the Board was an error, "*The Board also notes that no deferral account was approved by the Board in EB-2002-0035.*"

¹³ *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, paragraph 63.

¹⁴ At page 16, first paragraph.

Error in Law:

41. The only part of Board Staff's submission on this topic that TBHE would like to address is the following statement:

In the 2012 IRM application, Board staff was of the view that evidence from TBHE's 2001 rates proceeding, RP-2000-0055/EB-2000-0497/EB-2001-0163 and from its 2002 evidence filed in RP-2002-0026/EB-2002-0035 supports the facts that TBHE understood that delaying the effective date of its unbundled rates to May 1, 2002 would also delay all components of the unbundled rates including PILs from taking effect.¹⁵ [emphasis added]

42. As stated above, TBHE submits that Board Staff's view of past TBHE management's intention to forego the recovery of its pre-May 1, 2002 PILs proxies was incorrect, and unsupported by a Board decision.
43. Because Board Staff never raised its view in TBHE's IRM proceeding, and advised the Board in that proceeding, **TBHE requests that it be permitted to add the additional ground of procedural unfairness to its motion.**
44. Clearly, Board Staff's view of the previous TBHE management's intentions influenced its position on TBHE's entitlement to its pre-May 1, 2002 PILs proxies. We say this, because the topic was prevalent throughout Board Staff's submission in this motion proceeding. However, in TBHE's IRM proceeding, Board Staff's view was never raised and therefore TBHE never had the opportunity to respond to it.
45. TBHE only became aware of Board Staff's view on May 23, 2012 when it received Board Staff's submission. Although this view was formed based on evidence on the public record, the view itself was not introduced into evidence until after the IRM proceeding had concluded.
46. As such, Board Staff has introduced new evidence in this motion proceeding that was relevant to and influential in TBHE's IRM proceeding. Further, Board Staff advised the Board in the IRM proceeding, and could have influenced the panel's decision based on Board Staff's view. This is extremely troubling to TBHE since it did not know that an interpretation of its past management's intentions was at issue in the IRM proceeding.
47. As such, TBHE submits that the ground of procedural unfairness warrants its motion to be heard for the following reasons:
- i. Board Staff's view influenced its position that TBHE was not entitled to its pre-May 1, 2002 PILs proxies;
 - ii. Board Staff did not disclose its view in the IRM proceeding;
 - iii. TBHE never had a chance to respond to Board Staff's view;
 - iv. Board Staff's view is incorrect;

¹⁵ At pages 20 and 21.

- v. Board Staff advised the Board in TBHE's IRM proceeding; and
- vi. The Board may have been influenced by Board Staff's view.

48. The role of Board Staff in assisting the panel in a rate case is to ensure that the record in the case is clarified and that the Board has all information necessary to make a decision to implement just and reasonable rates.
49. TBHE makes reference to a paper released by the Board entitled *A Report with Respect to Decision-Making Processes at the OEB* dated September 2006 (the "Board Process Report"). In part, the Board Process Report looked at the role of Board Staff in decision making. In clarifying whether Board Staff's dual role of active participation in hearings and advising the Board in its decisions is consistent with the administrative law duty of fairness, the Board Process Report concluded the following:

The staff role being proposed here is the identification and evaluation of options for consideration by the panel. This involves demonstrating leadership in the hearing room, but not for the purpose of supporting or opposing a party's position. Staff's only driver is the public interest, and they remain neutral as between parties. Their analysis may lead them to see one argument or option as having greater public interest value than another. This is not the same as taking an adversarial position against a party. There are clearly limitations on how adversarial staff may be in pursuing its positions. The courts have noted that tribunal staff where leading evidence and making submissions, represents the public interest, and therefore have a different responsibility than a private party.

Conclusion Re Board Staff's Submission

50. For all of the reasons stated herein, THBE submits that Board Staff's submission did not successfully refute TBHE's assertion that the Board made identifiable errors in TBHE's IRM proceeding.
51. Further, Board Staff's submission identified that a procedural unfairness occurred in TBHE's IRM proceeding.

All of which is respectfully submitted.

May 30, 2012



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