



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 by Thunder Bay Hydro Electricity Distribution Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review by the Board of its Decision and Order in proceeding EB-2011-0197 dated April 4, 2012.

BEFORE: Cynthia Chaplin
Presiding Member

Karen Taylor
Member

**DECISION AND ORDER
ON MOTION TO REVIEW**

June 28, 2012

INTRODUCTION

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

For the reasons set out below the Board will not hear the Motion as it does not meet the "threshold test" for review that has been established by the Board and upheld by the courts.

The Board issued its Notice of Motion to Vary and Procedural Order No. 1 (the “Notice”) on May 7, 2012. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition (“VECC”), which was the only intervenor in TBHE’s 2012 rate application.

In the Notice, the Board stated that it 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 or in the Account 1562 Deferred PILs Combined Proceeding (EB-2008-0381) (hereinafter referred to as the “Combined Proceeding”). The Board determined that it would hear submissions from parties on the threshold question in order to make a determination as to whether or not the Board will proceed to hear this Motion (as contemplated in the Board’s *Rules of Practice and Procedure*). The Board proceeded by way of a written hearing.

The Board established a timeline for all parties in the proceeding to file written submissions on the threshold question, and a reply submission by TBHE. TBHE filed a submission on the threshold question on May 14, 2012. Board staff filed its submission on May 23, 2012. VECC filed its submission on May 28, 2012. TBHE filed its reply submission on May 30, 2012.

BACKGROUND

On November 16, 2011 TBHE filed an IRM application for the 2012 rate year. The application sought approval for changes to the rates that TBHE charges for electricity distribution, to be effective May 1, 2012.

In its pre-filed evidence, TBHE requested disposition of a debit balance of \$500,023 in Account 1562 Deferred Payments in Lieu of Taxes (“PILs”) including carrying charges to be recovered from its ratepayers. In response to Board staff’s interrogatories TBHE revised the final PILs amount to a debit balance of \$328,040 consisting of a principal debit amount of \$125,162 and debit carrying charges of \$202,878.

In 2000, TBHE applied to the Board for its unbundled rates to be made effective when subsection 26(1) of the *Electricity Act, 1998* came into force as part of its rate mitigation strategies. Rate unbundling was done to separate the commodity-related components of the bill from the distributor’s costs in preparation for market opening which occurred on May 1, 2002. As part of its RP-2002-0026 application filed on January 30, 2002, TBHE requested that the implementation of unbundled rates, including the PILs proxy

expense, be delayed until market opening. The government announced on December 18, 2001 that the market would open in May 2002. PILs were incorporated into unbundled distribution rates for the first time for the former municipal electricity distributors in 2002 upon the effective date of the changed rates.

In its PILs 1562 continuity schedule filed in evidence in the 2012 IRM proceeding, TBHE recorded its first monthly principal entry starting on October 1, 2001 for the fourth quarter 2001 and starting on January 1, 2002 for the 2002 test year. The purpose of the continuity schedule is to recalculate the principal balance and related interest carrying charges in Account 1562 deferred PILs by following the various decisions which the Board has issued on the subject of PILs. In its interrogatories Board staff suggested that the 2001 and 2002 PILs proxies should be recorded in the continuity schedule starting on May 1, 2002 and pro-rated monthly for the period from May 1, 2002 (the effective date of 2002 rates) to March 31, 2004, or 23 months. April 1, 2004 was the date of the first industry-wide electricity rate adjustments after Bill 210 came into force in the fall of 2002.

In its response to Board staff interrogatories and in its reply submission dated February 23, 2012 TBHE indicated that it did not consider Board staff's PILs proxy calculation to fairly reflect the 2002 Board decision and that it is not consistent with the findings in the Combined Proceeding. TBHE submitted that its entitlement to the 2001 PILs proxy should start on October 1, 2001 and its entitlement to the 2002 PILS proxy should start on January 1, 2002.

On April 4, 2012, the Board issued its Decision and Order in TBHE's 2012 IRM Proceeding. The Board did not approve TBHE's requested disposition of a debit balance of \$328,040. Instead, the Board approved the disposition of a credit balance in Account 1562 of \$785,990, on a final basis, over a one year period. This credit balance was calculated by a) entering in the continuity schedule the first monthly PILs proxy amount on May 1, 2002 consistent with the effective date of the unbundled distribution rates that included PILs for the first time; and, b) increasing the amount of excess interest to be trued up in accordance with the Board's decision on IESO prudential fees. The Board decision stated the following with regards to the PILs proxy calculation:

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.¹

THE MOTION

The Motion seeks to vary the Board's 2012 IRM Decision so that TBHE be permitted to recover its PILs proxies from October 1, 2001 to April 30, 2002. The 2012 IRM Decision found that TBHE's entitlement to PILs proxies began with the effective date of the Board decision in EB-2002-0035, ie. May 1, 2002. TBHE submitted, as grounds for the Motion, that the Board made three errors in fact and one error in law in the 2012 IRM Decision 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.
 3. TBHE required a deferral account in order to be entitled to its pre-May 1, 2002 PILs proxies. TBHE 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 TBHE's entitlement to PILs proxies prior to May 1, 2002 is effectively a retroactive rate adjustment.

¹ EB-2011-0197, Decision and Order dated April 4, 2012, p.11

POSITIONS OF PARTIES

TBHE

Regarding the first error in fact, TBHE submitted that although the Board did not address the issue of post March 1, 2002 effective dates in the Combined Proceeding, the Board ruled on this topic such that the Board sanctioned methodology in place at the relevant time should apply. TBHE also submitted that the PILs proxy reduction calculated by Board staff conflicted with the Combined Proceeding.

According to TBHE, the second 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. TBHE submitted that an exception to the rule that costs can only be recorded in an account after the effective date 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.

TBHE stated that the third 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. In TBHE's view, the Board mistakenly believed that TBHE required another deferral account to record its PILs proxies in addition to Account 1562. TBHE submitted that perhaps the Board was referring to the absence of a deferral account to record lost revenues resulting from delayed implementation. TBHE argued that 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 the loss of two months of PILs proxies and not seven months which was the result of the Board's decision.

TBHE also argued that the Board made an error in law in its 2012 IRM Decision, by violating the rule against retroactive rate making. TBHE submitted that its 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 since TBHE is effectively being required to return amounts collected through a final rate order.

Board Staff

Board staff submitted that the Board has not erred in fact or law, that there is no 'identifiable error' and therefore, the Motion should be dismissed without a hearing of the merits of the Motion.

Board staff submitted that the issue of delayed implementation of unbundled rates was not addressed in the Combined Proceeding. Therefore, the Board had not made a determination on the methodology for recording PILs proxies for distributors with post-March 1, 2002 rates. Board staff noted that in the Combined Proceeding the Board stated that it was not considering issues that were not relevant to the applicants in the Combined Proceeding. All three applicants in the Combined Proceeding had March 1, 2002 implementation dates and had received 2001 orders for Board-approved unbundled rates (excluding PILs) to be implemented in 2001.

With respect to the second error in fact asserted in the Motion, Board staff submitted that delaying the effective date of TBHE's unbundled rates to May 1, 2002 also delayed all components of the unbundled rates including PILs. In Board staff's view, the general rule is that the effective date is the date from which costs can be recorded and the Board had not made an exception to this general rule with respect to Account 1562 in either TBHE's 2002 rates application or subsequent decisions. Board staff noted that TBHE's new unbundled rates that became effective on May 1, 2002 contained the full amounts of the fourth quarter 2001 and the 2002 test year PILs proxies and were recovered in TBHE's rate year of May 1, 2002 to April 30, 2003. Board staff provided the balances that TBHE filed with the Board under *Reporting and Record Keeping Requirements* ("RRR") which showed that TBHE reported a zero balance in Account 1562 as at December 31, 2002. Board staff submitted that TBHE therefore had nothing to recover at that time in the PILs deferral account.

Board staff submitted that the Board did not make the third error in fact asserted in the Motion in its decision in the 2012 IRM Decision. Board staff argued that Board decisions outrank Board guidelines and distributor-specific facts and evidence outweigh generic considerations. Board staff submitted that the 2012 IRM Decision is consistent with the 2001 and 2002 decisions in TBHE's applications, and with the decision in the Combined Proceeding.

Board staff submitted that the Board made no error in law. Board staff noted that the Board has not changed the 2002 rates, other than by a rate order issued in 2004. The

Board has not changed the amount that TBHE has calculated as its recoveries from customers. Board staff submitted that what the Board did do is determine whether or not the SIMPIL methodology for trueing up Account 1562 required a further finding regarding the treatment of delayed implementation. The Board decided that was the case and it did so by establishing the principle of consistency between the manner in which the reconciliation of the SIMPIL true up should be calculated and the manner in which the rates were actually charged.

Board staff also submitted that the 2012 IRM Decision upholds the prior decisions of the Board and TBHE management's request to relieve the burden on ratepayers for the 2001-2002 time period. Board staff submitted that TBHE understood at the time of the 2001 and 2002 decisions 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.

VECC

VECC filed its submission with the Board on May 28, 2012. VECC generally agreed with Board staff with respect to the threshold issue, and concurred with the analysis rebutting the errors of fact and law alleged by TBHE in its threshold argument. VECC requested that the Board decline to find that the Motion meets the threshold requirement to continue to the argument stage.

VECC submitted that the heart of TBHE's complaint is that the Board's individual attention to the particular factual circumstances of the recording and collection of PILs while following fundamental principles of ratemaking, did not produce as satisfactory a financial result for the applicant than the application of the methodology applicable to those distributors charging unbundled rates on March 2, 2002 rather than the May 1, 2002 date chosen by TBHE.

VECC further submitted that it would be destructive to the setting of meaningful regulatory frameworks if the making of Board decisions that accord with the regulatory regime requested by the regulated entities are trumped by principles applied elsewhere in very different fact situations.

TBHE's Reply Submission

TBHE reiterated that the methodology for recording PILs proxies established by the Board through its *Accounting Procedures Handbook* (the "APH") and the decision in the Combined Proceeding did not distinguish between March 1 and non-March 1, 2002 implementation rates. TBHE submitted that it recorded the PILs proxies by following the PILs rules at the time and that these rules did not distinguish between implementation dates. Further, TBHE submitted that the fundamental premise of the Combined Proceeding was that the PILs rules in place at the time should apply for the purpose of determining the balance of Account 1562. TBHE submitted that it filed evidence in its 2012 IRM Proceeding in accordance with the decisions made in the Combined Proceeding.

Regarding the second error in fact, TBHE submitted that it agrees with Board staff's premise that the effective date of a deferral account signifies the date that costs start being recorded in that account, however it does not agree with Board staff's application of that premise to TBHE's circumstances. TBHE stated that Board Staff 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. TBHE submitted that the APH did not specify that Board approval was required to use Account 1562. Therefore, in TBHE's view, it appropriately recorded its PILs proxy amounts in Account 1562 without a specific order of the Board.

TBHE submitted that it did not understand Board staff's submission on the issue of the third error in fact. TBHE submitted 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 reiterated that it had deferral Account 1562 in which it could record its PILs proxies.

Regarding the error in law, TBHE submitted 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. TBHE argued that since Board staff never raised this in TBHE's 2012 IRM Proceeding that it be permitted to add the additional ground of procedural unfairness to its Motion. TBHE submitted that it never had the opportunity to respond to Board staff's view on this matter in the 2012 IRM Proceeding. As such, in TBHE's view Board staff introduced new evidence in this Motion that was relevant to and influential in TBHE's 2012 IRM Proceeding. TBHE submitted that the ground of procedural unfairness warrants its motion to be heard.

THE “THRESHOLD TEST”

Rule 44.01 of the Board’s *Rules of Practice and Procedure* (the “Rules”) provides that:

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:
 - i. error in fact;
 - ii. change in circumstances;
 - iii. new facts that have arisen;
 - iv. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time²

Under Rule 45.01 of the Rules, 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 45.01 of 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 merits³.

BOARD FINDINGS

The Board has considered previous decisions in which the principles underlying the ‘threshold question’ (“Threshold Test”) were discussed, namely in the Board’s Decision on a Motion to Review Natural Gas Electricity Interface Review Decision⁴ (the “NGEIR Review Decision”) and most recently in the Divisional Court’s decision *Grey Highlands v. Plateau*, in which the court dismissed an appeal of the Board’s decision in EB-2011-0053.

In the NGEIR Review Decision, the Board 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

² Ontario Energy Board’s *Rules of Practice and Procedure*, revised July 14, 2008, Rule 44.01

³ Ontario Energy Board’s *Rules of Practice and Procedure*, revised July 14, 2008, Rule 45.01

⁴ EB-2006-0322/0388/0340, May 22, 2007 (“NGEIR Decision”) at page 18 and EB-2011-0053, April 21, 2011 (“Grey Highlands Decision”), appeal dismissed by Divisional Court (February 23, 2012)

result in the Board varying, cancelling or suspending the decision. The Board also indicated that in order to meet the Threshold Test 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”⁵. The Board stated as follows:

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.⁶

In the *Grey Highlands v. Plateau* decision the Divisional Court dismissed an appeal of a Board decision where the Board determined that the motion to review did not meet the Threshold Test and the Board did not proceed to review the earlier decision. In upholding the Board's decision, the Divisional Court stated:

The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.⁷

The Divisional Court also noted that the plain language of Rule 44.01 which enumerates the various grounds which the Board “may” consider in determining whether to hear a motion to review does not require the Board to consider other grounds, such as errors or law, and decided not to interfere with the Board's discretion in that regard. The court stated:

We do not agree that the word "may" in Rule 44.01 requires the Board to consider errors of law. This is not consistent with the plain meaning of the rule or the nature of a review or reconsideration process. We see no reason to interfere with the Board's exercise of discretion.⁸

⁵ EB-2006-0322/0388/0340, NGEIR Decision, at pages 16 and 18

⁶ *Ibid.*, at p. 18

⁷ *Grey Highlands (Municipality) v. Plateau Wind Inc.* [2012] O.J. No. 847 (Div. Court) (“*Grey Highlands v. Plateau*”) at para 7

⁸ *Grey Highlands v. Plateau* at para 8

The Board finds that TBHE has not demonstrated any identifiable error in its 2012 IRM Decision and therefore the Board finds it appropriate to deny the Motion at the threshold stage.

TBHE had a 2001 PILs proxy and a 2002 PILs amount incorporated into the rates set effective May 1, 2002. The amounts were \$576,475 for 2001 PILs and \$1,389,805 for 2002 PILs. These amounts are set out explicitly in the Board's Decision and Order of April 5, 2002 (RP-2002-0026, EB-2002-0035). These amounts were allocated to TBHE's various rate classes using distribution revenue shares by class. This allocated cost was recovered through a monthly fixed charge and by a variable charge, expressed as a \$/kWh or \$/kW, depending on class billing determinants, and rates were made effective May 1, 2002. As a result of the subsequent rate freeze, these amounts remained in rates through March 31, 2004.

As articulated in the Combined Proceeding Decision, the operation of Account 1562 was not to be used to remove the 2001 PILs proxy amount from recovery in subsequent years. This was addressed in the context of Issue #10 in the Combined Proceeding. Account 1562 was to be used to track the difference between the amount of the 2001 PILs proxy and the actual amount recovered from customers, and similarly, the difference between the absolute dollar amount of 2002 PILs included in rates and the actual amounts recovered from customers. In the Combined Proceeding Decision, the Board found as follows:

In its instructions, the Board required the 2001 PILs proxy included in rates, and amounts collected from (or billed to) customers for the 2001 PILs proxy rate components, to be recorded in the PILs 1562 deferral account. The function of the account was to determine the difference between a dollar amount (the PILS proxy), that formed part of the approved rate, and a dollar amount that was actually collected for that purpose. No departure from this guidance was implied or expressed in subsequent Board directions. The 2001 PILs proxy remained a portion of the amount to be collected for as long as it remained in rates. The variances derived by following the various forms of guidance and instructions were also to be posted to the PILs 1562 deferral account.

The SEC contention that the Board methodology required the 2001 PILs proxy to be included in the true-up calculations thus reducing the amounts now recoverable from the ratepayers is simply not supported by the instructions and

guidance provided. The Applicants were required to account for both the 2001 PILs proxy components included in rates and the PILs actually collected from customers until the rates were changed in 2004. There was no methodology in place that would have had the effect of backing out a portion of the approved rate as part of the true-up calculation.

What is at issue in the current Motion is whether Account 1562 may be used to record additional amounts related to the 2001 and 2002 PILs amounts to include the period October 1, 2001 through April 30, 2002.

In the 2012 IRM Decision the Board found that this would not be appropriate. TBHE argues that this conclusion is incorrect. The Board does not agree.

By asserting that its entitlement to the 2001 PILs proxy should start on October 1, 2001 and that its entitlement to 2002 PILs proxy should start on January 1, 2002, TBHE is effectively arguing that it is appropriate to use Account 1562 to perform a limited form of true-up. TBHE does not propose a true up between the amount of PILs actually paid or payable and what was collected, but rather a true-up between a 2001 PILs proxy and 2002 PILs amount which takes account of certain timing differences and what was collected. There is no support for this interpretation of the Account 1562 methodology; in fact, there is strong support for the conclusion that such an approach would be inappropriate.

Account 1562 had only very limited true-up purposes with respect to the 2001 and 2002 amounts embedded in rates. This was addressed in the Combined Proceeding Decision, as described and quoted above. The Board has already found that Account 1562 cannot operate to remove the 2001 PILs proxy from rates after the 2002 rate year. It is entirely consistent to conclude, as the 2012 IRM panel did, that Account 1562 likewise cannot be used to capture amounts which pre-date the 2002 rate order, which in the case of TBHE is May 1, 2002.

Were the Board to accept TBHE's position, Account 1562 would true up the amount collected against a 2001 PILs proxy and 2002 PILs amount adjusted only in respect of timing differences. There is no basis for this form of true-up in the Account 1562 methodology. In the Combined Proceeding Decision the Board stated:

The Applicants were required to account for both the 2001 PILs proxy components included in rates and the PILs actually collected from customers until the rates were changed in 2004. There was no methodology in place that would have had the effect of backing out a portion of the approved rate as part of the true-up calculation.

Just as there was no methodology in place which would have the effect of backing out a portion of the approved rate as part of the true-up calculation, there was also no methodology in place that would have had the effect of increasing (for timing differences) a portion of the approved rate as part of the true-up calculation.

The April 5, 2002 Decision and Order crystallized the amounts for 2001 and 2002 PILs and the effective date that these amounts would be reflected in rates. There is nothing in the Account 1562 methodology which would support the alteration of the effective date for rates now. This is consistent with the December 18, 2009 Combined Proceeding Decision in which the Board stated:

There may be differences now as to the interpretation of the methodology at various points in time. The EDA and CLD portray the main purpose of the account as being to record the difference between what was included in rates and what was collected from ratepayers through rates. There is some acknowledgement by those parties that the account was also intended for some level of true-up between amounts included in rates and amounts actually payable. ***To the extent there is some true up component to the account, the resulting balances are not an attempt to change the rates underlying the final rate orders; the balances appropriately reflect the purpose and objective of the account as it was established at the time.*** [emphasis added]

The Board finds that TBHE has not identified any error in the 2012 IRM Decision which would warrant a review of the decision.

The Board will review briefly the specific alleged errors put forward by TBHE.

Error in Fact #1

TBHE alleges that the Board retroactively changed the methodology for recording PILs proxies to distinguish between March 1, 2002 and other rate implementation dates, contrary to the Combined Proceeding Decision and the Uniform System of Accounts.

The Board does not agree. In Procedural Order No. 8 of the Combined Proceeding, the Board stated:

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.

The Board notes that the three applicants in the Combined Proceeding did not ask to delay 2001 or 2002 implementation of unbundled rates until market opening. It is in the context of TBHE's 2012 IRM case that the Board considered the issue of an effective date for rates that was not March 1, 2002. Similarly, the Board notes the submission of Board staff which indicates that only minimum guidance for the use of Account 1562 was provided on December 20, 2001 and that the April 2003 FAQ did not deal with the complexities associated with periods of less than twelve months.

As indicated above, Account 1562 was to be used to record the difference between the amount included in rates and the amount recovered from customers. This would be applicable regardless of the specific rate implementation date.

The Board finds that this alleged error is not substantiated.

Error in Fact #2

TBHE alleges that the Board erred in finding that the pre-May 1, 2002 PILs proxies could not be recovered because they were incurred prior to the rate implementation date. In TBHE's view the pre-May 1, 2002 amounts have been recorded in the deferral account, in accordance with the methodologies in place at the time and therefore are recoverable.

The Board does not agree. As indicated above, the amount of PILs which TBHE was authorized to recover for 2001 and 2002 was crystallized in the April 5, 2002 Decision and Order, in the amounts of \$576,475 and \$1,389,805, respectively. These are the amounts which TBHE was authorized to recover in rates and these are the amounts which form the basis for the account and the tracking of the difference between those amounts and the amounts actually collected, from the date rates were made effective forward. The methodology did not contemplate or address the recovery of additional amounts which pre-dated the order which first incorporated those amounts into rates.

The Board finds that this alleged error is not substantiated.

Error in Fact #3

TBHE alleges that the Board erred in stating that the company did not have an appropriate deferral account to capture the pre-May 1, 2002 PILs amounts. TBHE maintains that Account 1562 was to be used for this purpose.

The Board finds that this alleged error is not substantiated.

The Board has already established that Account 1562 was not to be used for this form of limited true-up for timing differences. Therefore, in the absence of specific authority in the 2002 Rate Decision to capture the difference between the PILs amounts embedded in rates and the additional amounts associated with the months prior to May 1, 2002, there is no reasonable basis upon which to conclude that the amounts to be recovered are anything other than the specific amounts identified in the 2002 Rate Decision, commencing on the effective date for rates.

Error in Law

TBHE alleges that the denial of recovery for PILs proxies prior to May 1, 2002 is effectively a retroactive rate adjustment.

The Board disagrees. The 2001 and 2002 PILs amounts were explicitly set by the Board in the 2002 Rate Decision. These amounts were authorized for recovery, and were recovered through rates in the period May 1, 2002 through March 31, 2004 when the Board removed the amount related to the 2001 proxy. The 2002 PILs amount continued to be recovered until April 1, 2005 when a new PILs proxy was included in distribution rates as part of an increased revenue requirement.

Accordingly, the Board finds that there is no retroactive rate adjustment and the alleged error in law in the 2012 IRM Decision is not substantiated.

CONCLUSION

The Board has decided to dismiss the Motion without a hearing, pursuant to Rule 45.01 of the Board's *Rules of Practice and Procedure*. In the Board's view, for the reasons outlined above, the Motion does not meet the requirements of Rule 44.01 of the *Rules of Practice and Procedure* or the Threshold Test required for further consideration of the motion to review.

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit their cost claims no later than **7 days** from the date of issuance of this Decision
2. TBHE shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of this Decision.
3. VECC shall file with the Board and forward to TBHE any responses to any objections for cost claims within **28 days** from the date of issuance of this Decision.
4. TBHE shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, June 28, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary