Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0219

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 Midland Power Utility Corporation 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 Midland Power Utility Corporation 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-2011-0182.

BEFORE: Cynthia Chaplin
Vice Chair and Presiding Member

Karen Taylor
Member

DECISION WITH REASONS AND ORDER
ON MOTION TO REVIEW AND VARY
July 12, 2012

On April 24, 2012, Midland Power Utility Corporation ("Midland") filed with the Ontario Energy 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 "2012 IRM Decision"). The Board assigned the Motion file number EB-2012-0219.

The Motion seeks to vary the portion of the 2012 IRM Decision related to the Review and Disposition of Account 1562 - Deferred Payments in Lieu of Taxes ("Account 1562"). The grounds for the Motion are the following:

- 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 account balances to two years from the one year determined in the 2012 IRM Decision; and
- A declaration that its current rates and charges (i.e. 2012 rates) be made interim pending the disposition of the Motion.

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

> 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. The Board has determined that this aspect of the Motion does not meet the threshold test as contemplated in the Board's *Rules of Practice and* Procedure.

The Board also stated:

> The Board will not grant Midland permission to file new evidence regarding tax rates as identified in paragraph 15 of the Motion. This is material which could have been filed during the proceeding. It is 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.

The Board decided to proceed as follows:

With respect to the balance of the Motion, given its narrow scope, the Board has determined that the most expeditious way of dealing with this Motion is to consider concurrently the threshold question of whether the matter should be reviewed (as contemplated in the Board's *Rules of Practice and Procedure)* and the merits of the Motion.

Background – the 2012 IRM Proceeding

In the 2012 IRM proceeding, Midland originally requested to recover a debit balance of $173,418 in Account 1562. In response to interrogatories, Midland revised this amount to a debit balance of $164,412.

In its 2012 IRM submission, Board staff argued that since Midland was not subject to the maximum income tax rates in 2001 through 2005, Midland should not use these maximum income tax rates to calculate the variances in the account. Board staff noted that Midland's regulatory rate base, a proxy for taxable paid-up capital, was below $10 million. Based on this tax profile, Board staff was of the view that Midland was eligible for the full small business deduction from 2001 through 2005 and therefore should use the minimum income tax rates.

Midland responded that Grimsby's 2012 rates were approved based on a settlement agreement that included the disposition of account 1562. Midland also stated its understanding that the Board typically would not approve a settled issue that was not consistent with Board policy. As a result, Midland submitted that it would not be consistent with Board policy to allow Grimsby to use the maximum blended tax rates for the purposes of true-up when they are subject to the small business deduction, but then suggest that Midland should not use the maximum blended tax rate since they are subject to the small business deduction.

Midland submitted that the maximum blended tax rate should be used to be consistent with all Board decisions issued to date. In the alternative, Midland submitted that the tax rates listed in the table below should be used.

2001	2002	2003	2004	2005
19.12%	19.12%	29.41%	31.58%	29.7%

Midland explained that for 2001 and 2002, the tax rates are the minimum tax rates. For 2003 to 2005, the tax rates are the effective income tax rates based on Midland's incurred taxable regulatory income.

In the 2012 IRM Decision, the Board found as follows:

> The Board notes that Midland was not subject to the maximum taxation rates over the 2001 to 2005 period and that it was also eligible for the full small business deduction. The Board is not persuaded that the alternative taxation rates proposed by Midland should be used, as the evidentiary basis to support the proposed tax rates in 2003, 2004 and 2005 was not provided and the tax rates were not subject to discovery, as Midland filed these alternative tax rates in its reply submission. Finally, the Board is not convinced that the facts in the Grimsby proceeding are relevant to the facts in this case, particularly as elements of that case were subject to a settlement proposal.
>
> The Board agrees with the submission of Board staff that Midland should use the income tax rates shown in the table entitled "Minimum Income Tax Rates in Percentages" provided in Board staff's submission based on in the Board's decision in the PILS Combined Proceeding on page 17.

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:
(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 time.

Positions of the Parties

Board Staff

Board staff submitted that the Motion does not raise a question as to the correctness of the 2012 IRM Decision, does not meet the threshold test for review, and accordingly, Board staff did not believe that the Board should hear the Motion.

Board staff noted that Midland "acknowledges that the use of the maximum [income tax] rates would not be appropriate in its circumstances"[1]. Midland's Motion alleged 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 #5 (c), and by adopting the minimum income tax rates to be used in calculating the revised amount to be disposed. Board staff noted that Midland had stated that the income tax rates on which its Motion is based are incorrect and that its auditors have calculated new evidence that it now wants the Board to consider. Board staff submitted 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.

Board staff also submitted that the Board would have considered the alternative tax rates submitted by Midland in response to Board staff interrogatory #5 (c) and in the 2012 IRM Decision the Board decided not to apply them. In Board staff's view, the Motion is an attempt by Midland to reiterate the argument made in its reply submission in the 2012 IRM proceeding which the Board did not accept.

Board staff was of the view that the critical components of evidence in determining the final balance to be disposed by rate riders are the five SIMPIL models and the continuity

[1] Motion/ para. 11

schedule which summarizes data from 2001 through 2012. Midland did not file this evidence to support its alternative proposal for different income tax rates.

Board staff noted that Midland filed applications for 2009, 2010, 2011 and 2012 rate adjustments and that in these applications Midland applied using the minimum income tax rates. Midland stated at paragraph 11 (b) of the Motion that the Board erred in its adoption of the minimum rates for Midland. Board staff submitted that Midland's own applications have demonstrated that the minimum income tax rates are the correct tax rates to be used.

VECC

VECC submitted that the Board proceeded in a prudent fashion given the information it had before it to set just and reasonable rates. VECC also stated that while knowledge gained in the passage of time and experience is useful for regulators on a prospective basis, it must play very little role in adjusting past decisions to meet discovered facts. VECC concluded that the Motion does not meet the threshold and therefore should be dismissed.

Midland

In its reply submission, Midland reiterated that the Board erred in its adoption of the minimum rates and that the evidence before the panel in the 2012 IRM application confirmed that minimum income tax rates were not appropriate for Midland.

Midland disagreed with Board staff's suggestion that Midland nullified the arguments in its Motion by stating that the income tax rates provided in answer to interrogatory 5 (c) were not accurate. Midland argued that the rates provided in its response to Board staff interrogatory #5 (c) are directionally closer to the appropriate rates for Midland, and are more appropriate than the minimum rates and that therefore it is open to the Board to adopt them. However, Midland reiterated its understanding that these rates are still not accurate. While it acknowledged that the Board does not wish to hear evidence on updated calculations of the tax rates at this time, Midland suggested that it is important to ensure that the rates used in the final calculation of the amount for disposition are as accurate as possible.

In response to Board staff's submission that Midland had not provided the Board with complete evidence up to the close of record and that the income tax rates chosen in response to interrogatory 5 (c) were higher than the maximum Ontario tax rates which

was counterintuitive, Midland reiterated that the fundamental issue was that the Board had erred in assigning the minimum income tax rates to Midland for the purpose of recalculating the PILs balance to be disposed.

With respect to Board staff's argument that Midland used the minimum tax rate for each of 2009 to 2012, Midland submitted that there was no basis for concluding that because the minimum income tax rates applied in years outside the period 2001-2005 that the minimum income tax rates should apply in the period under review.

Midland asserted that true-up income tax rates should be derived using the principles Midland believes were established in the Combined Proceeding whereby rates were determined based on regulatory taxable income, the ability to utilize small business tax reductions as determined by taxable capital levels, and the legislated federal and provincial income tax brackets and rates of the day.

In response to Board staff's argument that the introduction of new evidence from other distributor's cases does not assist in the review of Midland's evidence, Midland acknowledged that the decision of another panel cannot bind the panel in the current proceeding but submitted that by issuing conflicting decisions in similar fact situations, the Board created significant uncertainty in the proper understanding of the Board's Combined PILs Decision. Midland submitted that there was no reasonable basis for treating Midland differently from other distributors in similar circumstances or for diverging from the principles Midland believes were established in the Combined Proceeding.

In conclusion, Midland submitted that the threshold question should be answered in the affirmative.

Board Findings on the Threshold

The Board has considered previous decisions in which the principles underlying the "threshold question" were discussed, namely in the Board's Decision on a Motion to Review Natural Gas Electricity Interface Review Decision[2] (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.

[2] 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)

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 result in the Board varying, canceling or suspending the decision. The Board also 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."[3] 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.[4]

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.[5]

The Board finds that the Motion does not meet the threshold test. In the Board's view, the Motion does not indicate an error of fact or any of the other grounds for review enumerated in section 42.01 of the Rules. Neither does it raise a question as to the correctness of the 2012 IRM Decision nor does it point to an identifiable error in the 2012 IRM Decision. The Board therefore finds it appropriate to deny the Motion at the threshold stage.

The Board will address each of the grounds for the Motion.

[3] NGEIR Decision at pages 16 and 18.
[4] Ibid. at page 18..
[5] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court) (*"Grey Highlands v. Plateau"*) at para 7

1. The Board erred in fact in finding that there was no evidentiary basis for the alternative tax rates shown in Midland's reply submission.

In Midland's 2012 IRM application, the Panel's primary decision with respect to the disposition of account 1562 related to determining the applicable taxation rates to be used in the true-up variance calculation. The correct tax rate to use in the true-up variance calculation was considered in the Combined Proceeding as Issue #9. No settlement was reached on this issue in that proceeding and the Board determined that applicants are to use the applicable tax rate percentages from the applicable table on page 17 of the Combined Decision. The Board has subsequently approved the use of taxation rates that fall between the minimum and maximum taxation rates set out in the table, on a case by case basis.

Throughout the 2012 IRM proceeding, Midland argued that the blended maximum taxation rates from the Combined Proceeding should apply. In response to Board staff interrogatory 5(c), Midland also calculated certain taxation rates that fall between the minimum and maximum rates.

The Board observes that at no time in the 2012 IRM proceeding did Midland specifically endorse the methodology used to construct the rates set out in interrogatory 5(c), acknowledge that the Board in the Combined Decision directed the use of taxation rates other than the blended maximum rates, explain why the use of the taxation rates calculated in interrogatory 5(c) would be more appropriate than the blended maximum taxation rates or the minimum rates, as suggested by Board staff in its submission, or otherwise accept that the rates calculated in interrogatory 5(c) should be used in the true-up calculation.

The Board points out that it was only in its reply submission that Midland puts the rates calculated in 5(c) forward as a default if the 2012 IRM panel did not approve the use of the blended maximum taxation rates from the Combined Proceeding.

The record from the 2012 IRM application is also clear that Midland did not file the five SIMPIL models and the continuity schedule, summarizing data from 2001 to 2012, to support the use of the taxation rates set out in interrogatory 5(c). Nor did Midland provide this information in it reply submission when it was again requested to do so by Board staff in its submission. Midland, in its reply submission of February 24, 2012 in the 2012 IRM proceeding, specifically declined to file this supporting evidence, as

requested by staff, stating: "It is also Midland PUC's understanding that the record is closed and to provide the requested information within the Board staff's submission would be inconsistent with the current practices of the Board."[6] The Board notes that this response is at odds with the Board's long standing procedural practice of using the evidence and analysis filed by applicants in response to the submission of Board staff to complete the record of an IRM application given the abbreviated nature of an IRM proceeding.

The Board is of the view that Midland cannot decline to file the evidence requested in the 2012 IRM proceeding, through both interrogatories and submissions, that is necessary to facilitate the assessment of the taxation rates put forth by the company, and then argue that that an error has occurred when the Board finds that the evidentiary basis that would support the use of those taxation rates was not provided.

The Board finds that this alleged error has not been substantiated.

2. The Board erred in its adoption of the minimum rates for Midland.

It is clear from the record of the 2012 IRM application that Midland's 2002 rate base, which is used by the Board as a proxy for taxable capital for the purposes of truing up account 1562, was below $10 million over the 2001 to 2005 period, and as such, Midland was eligible for the small business reductions to tax rates over this period. Therefore, there is evidentiary support for the use of the minimum tax rates.

The Board does not agree with Midland's Motion submission that the level of taxable capital as per the actual Federal T2 tax returns should be used to determine if small business reductions to tax rates were appropriate for years 2003, 2004 and 2005 and is a key principle arising from the Combined Decision. The Board notes that from a ratemaking perspective, the Board is concerned with regulated balances, not balances that are constructed for taxation purposes. Tax accounting and regulatory accounting have different purposes and from a ratemaking perspective, the Board is concerned with the latter, not the former.

The Board finds that this alleged error has not been substantiated.

[6] Reply Submission of Midland Power Utility Corporation, EB-2011-0182, February 24, 2012 at page 11.

3. The Board's Decision is inconsistent with is decisions in respect of other distributors in similar circumstances.

Midland submits that the Board has created significant uncertainty in the proper understanding of the Board's Combined PILs Decision by issuing what Midland views as conflicting decisions. The Board has previously found that regulatory consistency is not sufficient grounds for a review.
As the Board set out in its Decision and Order on a Motion to Review Veridian's 2012 IRM decision[7]:

> The Board concludes that regulatory consistency is not sufficient grounds for a review. As indicated above, the Board is guided by the principles articulated in the NGEIR Review Decision regarding the presence of an "identifiable error" as grounds for a review. The Board concludes that a lack of regulatory consistency cannot be an error, because if it were, then a future panel's discretion would be bound by the prior decision. This is wholly inappropriate. While a panel should endeavour to consider other similar cases and the associated decisions, no prior decision of the Board can fetter the discretion of a later panel. Further, any enquiry into regulatory consistency would result in a potentially complex analysis. For example, the Board would need to consider and potentially determine which decision, from amongst a set of decisions, is the "correct" decision which in turn forms the standard against which others are measured for consistency. Does the earliest decision form the standard against which others are measured for regulatory consistency? If there are two or more decisions which appear to be the same, do they form the standard against which other decisions before or after are measured for consistency? The enquiry in any particular review motion would introduce an enquiry into other decisions which had not been the direct subject of the motion.
>
> Each Board decision must be reasoned and free of errors, but that does not mean that decisions will be – or should be – identical in every case where there are similar fact situations. In reaching a decision, the Board must take into account all aspects of the specific fact situation and the interplay amongst facts and issues within the application. Decisions are often complex and multi-faceted documents. As a result, the Board may well reach a different decision in two

[7] EB-2012-0201,June 14, 2012. at page 10

> cases which present similarities in their fact situations. (For the same reason, the Board may reach the same decision in two cases which present different fact situations.)

Although regulatory consistency is not grounds for review, the Board does not agree with Midland's position in any event.

Midland asserted that the findings in the Combined PILs Decision are based on three key factors:

- The level of taxable income was set equal to regulatory taxable income used in the PILs determination models which were used to calculate the amount of PILs that were included in rates;
- The level of taxable capital as per the actual Federal T2 tax returns was used to determine if small business reductions to tax rates were appropriate; and
- The actual level of legislated annual federal and provincial income tax rates was used for the specific years.

The Board notes that these key factors are not identified as such by the Board in the Combined PILs Decision, but more importantly, the issue of which income tax rates should apply to distributors that were not subject to the maximum income tax rates was not decided in the Combined Proceeding. As the Board stated in Procedural Order No. 8 of the Combined Proceeding:

> 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.[8]

The Board finds that this alleged error is not substantiated.

Conclusion

The Board has determined that the Motion does not meet the threshold test. In the Board's view, the Motion does not indicate an error of fact or any of the other grounds for review enumerated in section 42.01 of the Rules. Neither does it raise a question as

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

to the correctness of the 2012 IRM decision nor does it point to an identifiable error in the 2012 IRM decision. The Board therefore finds it appropriate to deny the Motion at the threshold stage.

As such, the Board does not need to consider the Motion to Review and Vary on its merits.

Cost Awards

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

1. VECC shall submit its cost claim no later than **7 days** from the date of issuance of the final Rate Order.

2. Midland shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of the final Rate Order.

3. VECC shall file with the Board and forward to Midland any response to any objections for the cost claim within **28 days** from the date of issuance of the final Rate Order.

4. Midland shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2012-0219**, 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

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DATED at Toronto, July 12, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary