

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 Newmarket-Tay Power Distribution Ltd. for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2012.

Argument-in-Chief

Newmarket-Tay Power Distribution Ltd.

November 22, 2012

1. In accordance with Procedural Order No. 1 in the above matter, Newmarket-Tay Power Distribution Ltd. ("Newmarket-Tay") submits the following Argument-in-Chief.

A. Background Information:

2. As set out in Newmarket-Tay's response to Board staff's interrogatory 16(b), it became apparent to Newmarket-Tay in this proceeding that an error was made in regard to Newmarket Hydro Ltd.'s ("Newmarket") 2002 Decision and Order (RP-2002-0080/EB-2002-0089) (the "2002 Decision").
3. In the 2002 Decision, the Board reduced Newmarket's proposed \$512,987 2001 PILs Proxy by \$6,456 to \$506,531 and the proposed \$1,763,900 2002 PILs Proxy by \$347,920 to \$1,415,980. The Board ordered that the rates set out in the rate schedule attached at Appendix "A" to the 2002 Decision (the "2002 Rates Schedule") were approved effective March 1, 2002. However, those rates erroneously did not factor in the \$6,456 and \$347,920 reductions to the 2001 and 2002 PILs proxies as decided by the Board.
4. As a result of the Board's error, Newmarket over-collected PILs from March 1, 2002 until the error was resolved by Newmarket's rate order that was effective April 1, 2005.
5. As set out in Newmarket-Tay's supplementary evidence dated October 26, 2012, and as addressed in the November 15, 2012 oral hearing, Newmarket-Tay proposes to return the over-collected PILs, subject to two adjustments that will hold Newmarket-Tay harmless (i.e. as though the Board's error in the 2002 Rates Schedule had not been made).

Adjustment #1 - The Interest Adjustment: \$166,374.90

6. The first adjustment proposed was an interest adjustment in the amount of \$166,347.90. Based on the Board's PILs methodology, Newmarket-Tay would be deemed to have recorded \$411,981.65 in interest from 2002 to 2012 in its Account 1562. However, the actual interest it earned on the over-collection would have been \$245,606.75 based on interest rates offered by Newmarket-Tay's banking institution. A continuity table for Newmarket-Tay's Account 1562 with the proposed carrying charges is at Appendix III to the Supplementary Evidence filed by Newmarket-Tay. The rate of interest is the monthly rate received from Newmarket-Tay's banking institution.
7. Newmarket-Tay submits that it should not be prejudiced by the deemed vs. actual interest rates, since had it been aware of the error made by the Board in the 2002 Decision, it would have remedied the error to avoid recording higher deemed interest amounts than actual interest earned. As such, Newmarket-Tay has proposed to reduce its interest payable by \$166,374.90, being the difference between the Board's deemed interest and actual interest earned on the principal balance.
8. Without the Board's erroneous 2002 Schedule of Rates and Charges, Newmarket-Tay would have only over-recovered \$12,989.87 of PILs including carrying charges.¹ The interest adjustment proposed by Newmarket-Tay does not apply to this amount. Interest on the \$12,989.87 was calculated using the methodology and deemed carrying charges as approved in the combined PILs proceeding.

Adjustment #2 - The Tax Rate Adjustment: \$113,038.38

9. Newmarket-Tay is also prejudiced by the difference between the corporate tax rates at the time the error existed and the present rates which have declined. Newmarket paid corporate taxes on the principal amounts at the time they were taxed, but Newmarket-Tay will only receive tax relief at the current lower tax rates.
10. To hold Newmarket-Tay harmless, it proposed a tax rate adjustment of \$113,038.38, the basis for which was provided at page 5 of the Supplementary Evidence.
11. An explanation of this proposed adjustment was provided at the oral hearing:²

MS. CONBOY: Okay. I am not sure I understand completely the corporate tax proposal. I certainly

¹Please see footnote 1 of page 6 of the Supplementary Evidence.

²Transcript, Page 19, Lines 15-28 and Page 20, Lines 1-4.

understand that you have -- you were collecting PILs proxy in rates at a certain corporate tax rate, and now you are being required to pay that back at a lower corporate tax rate.

So can you walk me through that rationale, Mr. Clinton?

MR. CLINTON: If I may, yes. We paid 38 percent, so when the money came into our, shall we say, financial statement, we over-collected it in revenue. You would pay tax on it at 38 percent.

When we assume we have a judgment by the end of this year and we record the liability, we'll have an expense in the variance accounts of X dollars.

That will go against your taxable income. Therefore the tax you pay will be at this year's current rate, which is a lot less than it was 10 years ago.

B. Question Raised by the Board:

12. During the oral hearing, the Board asked why the Board should depart from the Board's prescribed interest rates for Newmarket-Tay based on the nature of the over-collection. The relevant section of the transcript has been reproduced below:

MS. CONBOY: I understand how your proposal -- I mean, the purpose underlying the setting of an interest rate for a deferral or variance account is to ensure that distributors neither gain or lose inordinately in carrying the balances in these accounts, and I've -- you can tell I am reading off something, and I am

reading off of the 2006 Electricity Distribution Rate Handbook.

The Board had determined that those -- in setting that prescribed amount in -- prior to May 1st, 2006 it was at the long-term debt rate, and then going forward it would be at the quarterly rate that was accounted -- that was posted, rather.

I am just trying to get a sense, in terms of how that is fair.

You know, we determined prior to 2006 that it was fair that customers get back this principal amount, plus an interest rate. Why wouldn't that apply now, in terms of -- I mean, the combined proceeding talked about the fact that it may be a different interest rate now, but the amounts that were over-collected or under-collected between 2001 or that were set in 2002 and 2006, I believe, would be repaid at the interest rate that was determined at the time.

So why is it that we are deviating today? Why are we being asked to deviate from that -- if it was appropriate at the time, it was an over-collection, why is it that we need to start parsing out why the over-collection occurred?

MR. TAYLOR: Madam Chair, maybe I could help with this one.

The proposals that we have made in the context of this proceeding were really made for the purpose of keeping

the applicant whole in light of the unique circumstances.

We didn't go back and look at the combined proceeding because we didn't feel that the circumstances here were ever contemplated in that proceeding, that there was a mistake in the 2002 decision and rate order.

So while the principles that came out of the combined proceeding were applicable in the normal course of over-collections, it is our belief that these over-collections are not in the normal course, and deserve some sort of alternate treatment.

MS. CONBOY: So if we're saying that that interest rate was appropriate for over-collections prior to May 1st, 2006, and indeed the amounts that we set on the quarterly basis post-May 1st, 2006, if we're saying that it is appropriate, that the interest rate that we prescribe is an appropriate amount for an over-collection, why does it matter what kind of over-collection there is?

13. The unique circumstances referred to at the oral hearing relate to the Board's error in the 2002 Rates Schedule. This is why it matters that the Board's deemed interest amount should not apply to the over-collection resulting from that error. Specifically:
 - i. The reason why Newmarket-Tay over-collected PILs (notwithstanding the \$12,989.87) was because the Board calculated and issued the erroneous 2002 Rates Schedule. The 2002 Rates Schedule was prepared by the Board itself in that proceeding, unlike other proceedings where generally rates schedules are prepared by the applicant and reviewed by the Board. Had the 2002 Rates Schedule been prepared correctly by the Board consistent with its 2002 Decision, the over-collection would not have occurred.
 - ii. Had Newmarket known of the erroneous 2002 Rates Schedule, it would

have applied to the Board to correct the error and avoided recording interest on the over-collection, as stated by Mr. Ferguson at the oral hearing;³

- iii. Newmarket-Tay's actual interest earned was lower than the Board's deemed interest, as set out in the continuity schedules in the Supplementary Evidence; and
 - iv. Newmarket-Tay is unaware of any other distributor in the province who over-collected PILs as a result of a Board error.
14. To summarize, the use of the Board's deemed interest rates would result in Newmarket-Tay being financially worse-off than had the Board issued a correct 2002 Schedule of Rates and Charges in the first place. Newmarket-Tay does not believe it would be fair for it to bear the financial burden of the Board's error.
15. In other words, if the Board does not make the adjustments proposed herein in the total amount of \$279,413.28, Newmarket-Tay will be penalized \$279,413.28 due to an error made by the Board.

All of which is respectfully submitted.

November 22, 2012



Andrew Taylor

³ Transcript at Page 23, Lines 14-22.