Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2012-0248

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 an application by St. Thomas Energy 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 St. Thomas Energy 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-2011-0196.

BEFORE: Cynthia Chaplin
Vice Chair and Presiding Member

Karen Taylor
Member

DECISION AND ORDER
ON MOTION TO REVIEW AND VARY
July 26, 2012

On May 9, 2012, St. Thomas Energy Inc. ("STEI") filed with the Ontario Energy Board (the "Board") a Notice of Motion to Review and Vary (the "Motion") the Board's Decision and Order dated April 19, 2012 in respect of STEI's 2012 rate application (EB-2011-0196) (the "2012 IRM Decision"). The Board assigned the Motion file number EB-2012-0248.

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 2012 IRM Decision

In its 2012 IRM Decision issued on April 19, 2012, the Board made the following findings:

> The Board will not approve the disposition of Account 1562 as filed. The Board is of the view that, as per the Board's decision and order in EB-2002-0109, the effective date for rates was November 1, 2002 and consistent with that decision, St. Thomas' PILs entitlement, from a rates perspective, began on that date. There is no question that St. Thomas was required to pay PILs from an earlier date. However, it was St. Thomas' responsibility to manage its affairs to ensure that its costs were reflected in rates in a timely manner. The decision of the Board in EB-2002-0109 is clear that St. Thomas did not do so. For the Board to now decide in this proceeding that St. Thomas' PILs entitlement in rates began earlier than November 1, 2002, the Board would, in effect, undo the decision in EB-2002-0109 and engage in retroactive rate-making. As such, the Board-approved accounting guidance for distributors following the standard application timing in that proceeding does not apply.
>
> The Board acknowledges that actual, adjusted interest in this case is less than deemed interest and that the claw-back penalty does not apply.
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> The Board accepts the alternative calculation of the PILs proxy submitted by Board staff as an equitable and reasonable methodology and finds that the balance in account 1562 approved for disposition on a final basis is a credit balance of $278,574, representing principal and interest to April 30, 2012. The Board approves a one-year disposition period, from May 1, 2012 to April 30, 2013.[1]

The Motion

The Motion seeks to vary the Board's Decision so that STEI would be permitted to recover its PILs proxies recorded in its Account 1562 for the period prior to March 1, 2001 (i.e. from October 1, 2001 to February 28, 2002). STEI put forward the following as grounds for the Motion:

- The basis for the Board's 2012 Decision to deny all of STEI's PILs proxies recorded in Account 1562 prior to November 1, 2002 was the 2002 Decision. The

[1] EB-2011-0196, St. Thomas Energy Inc., Decision and Order, page 15

Board interpreted the 2002 Decision to deny all of STEI's PILs proxy amounts recorded prior to November 1, 2002, which interpretation in effect would preclude recovery of the actual legislated PILs payments incurred by STEI for the period prior to March 1, 2002 (i.e. October 1, 2001 to February 28, 2002).

- This interpretation is an error in fact, since the 2002 Decision did not deny all of STEI's PILs proxies recorded prior to November 1, 2002. Rather, the 2002 Decision denied the Lost Revenue Deferral Account that would have included PILs proxies recorded in Account 1562 from March 1, 2002 until the implementation date of rates.

- STEI's PILs proxies recorded prior to March 1, 2002 (i.e. from October 1, 2001 to February 28, 2002) were unaffected by the 2002 Decision. While the 2002 Decision did state that the effective date for rates was prospective from November 1, 2002, this statement was made in regard to denying the Lost Revenue Deferral Account. The disallowance of the proxy PILs from March 1, 2002 to October 31, 2002 was meant to correspond to the delay in the implementation of the applicable MARR. This is the reasonable interpretation of the 2002 Decision.

- Therefore, granting STEI's pre-March 1, 2002 PILs proxies would not "in effect undo the decision in EB-2002-0109 and engage in retroactive rate-making" as stated in the 2012 Decision.

- Further, since STEI's pre-March 1, 2002 PILs proxies were recorded in a deferral account (Account 1562), they can be recovered without violating the rule against retroactivity.[2]

STEI proposed that the Motion be heard orally.

[2] EB-2012-0248, Notice of Motion, May 9, 2012, pages 3 and 4

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 time.[3]

Under Rule 45.01, 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.[4]

Board Findings

The Board has considered previous decisions in which the principles underlying the threshold test were discussed, namely in the Board's Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Review Decision") and most recently in the Divisional Court's decision in the *Grey Highlands v. Plateau* case in which the court dismissed an appeal of the Board's decision in EB-2011-0053.[5]

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, 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."[6] The Board stated as follows:

[3] Ontario Energy Board's *Rules of Practice and Procedure*, revised January 9, 2012, Rule 44.01
[4] Ontario Energy Board's *Rules of Practice and Procedure*, revised January 9, 2012, Rule 45.01
[5] EB-2006-0322/0388/0340, May 22, 2007 ("NGEIR Decision") page 18 and EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012)
[6] EB-2006-0322/0388/0340, NGEIR Decision, pages 16 and 18

> 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.[7]

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.[8]

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

STEI had a 2001 PILs proxy and a 2002 PILs amount incorporated into the rates set effective November 1, 2002. The amounts were $203,311 for 2001 PILs and $771,965 for 2002 PILs. These amounts are set out explicitly in the Board's Decision and Order of October 25, 2002 (RP-2002-0100/ EB-2002-0109). These amounts were allocated to STEI'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 November 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

[7] Ibid., page 18.
[8] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court) (*"Grey Highlands v. Plateau"*) paragraph 7.

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 February 28, 2002.

In the 2012 IRM Decision the Board found that this would not be appropriate. STEI argues that this conclusion is incorrect. The Board does not agree. On June 28, 2012, the Board issued its decision on a motion by Thunder Bay Hydro Electricity Distribution Inc. regarding a request for a review and vary of the Board's findings on account 1562 in the decision of Thunder Bay's 2012 IRM application.[9] While certain facts are different between the St. Thomas and Thunder Bay cases, the issue of delayed implementation

[9] EB-2012-0212, Decision and Order on Motion to Review, Thunder Bay Hydro Electricity Distribution Inc., June 28, 2012

is the same. In the Thunder Bay motion decision, the Board found that there is no support for the type of true-up that Thunder Bay (and now St. Thomas) put forth in their respective motions.

By asserting that its entitlement to the 2001 PILs proxy should start on October 1, 2001 and that its entitlement to the 2002 PILs proxy should start on January 1, 2002, STEI is effectively arguing that it is appropriate to use Account 1562 to perform a limited form of true-up. STEI 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 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 STEI is November 1, 2002.

Consistent with the Board's findings in Thunder Bay, were the Board to accept STEI'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 October 25, 2002 Decision and Order for STEI 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 STEI has not identified any error in the 2012 IRM Decision which would warrant a review of the decision.

Conclusion

The Board has decided to dismiss the Motion without a hearing, pursuant, to Section 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.

THE BOARD ORDERS THAT:

1. The Motion be dismissed.

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

DATED at Toronto, July 26, 2012
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary