



**EB-2008-0381**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O. 1998, c. 15, (Schedule B);

**AND IN THE MATTER OF** a proceeding commenced by the  
Ontario Energy Board on its own motion to determine the  
accuracy of the final account balances with respect to  
account 1562 Deferred PILs (for the period October 1, 2001  
to April 30, 2006) for certain 2008 and 2009 distribution rate  
applications before the Board.

**BEFORE:** Ken Quesnelle  
Presiding Member

Cynthia Chaplin  
Member

**DECISION WITH REASONS**

**December 18, 2009**

## Background

On November 28, 2008, pursuant to sections 78, 19 (4) and 21 (5) of the *Ontario Energy Board Act, 1998*, the Ontario Energy Board commenced a proceeding on its own motion to determine the accuracy of the final account balances with respect to account 1562 Deferred PILs (for the period October 1, 2001 to April 30, 2006) for certain electricity distributors that filed 2008 and 2009 distribution rate applications. The Board announced its intention to hold such a proceeding in a letter to all distributors issued on March 3, 2008 and assigned this proceeding file number EB-2007-0820, now updated to EB-2008-0381.

Board staff issued a discussion paper on August 20, 2008 summarizing the principles established by the Board to date with respect to the determination of the account 1562 balances. The staff discussion paper also identified matters that Board staff believes are outstanding and may require clarification.

Procedural Order No. 1 was issued on November 28, 2008, setting out the initial steps in the proceeding, and Procedural Order No. 2 was issued on December 16, 2008 approving new interventions. A technical conference was held on January 20, 2009. Procedural Order No. 3 was issued on February 3, 2009, making provision for interrogatories and ordering submissions from three of the named distributors: EnWin Utilities Ltd., Halton Hills Hydro Inc., and Barrie Hydro Distribution Inc. (collectively, the “applicants”).

Procedural Order No. 4 was issued on March 6, 2009 and set the dates for submission of interrogatory responses by the applicants. Dates were also set for submissions by all parties on further procedural steps.

On April 7, 2009, Halton Hills Hydro Inc. requested an extension to the deadline for submission of interrogatory responses. On April 27, 2009, the Board issued Procedural Order No. 5 that extended the due date for interrogatory responses and invited submissions on further procedural steps.

A non-transcribed meeting of the applicants, intervenors and Board staff was held on August 17 and 18, 2009. Opinions differed on the regulatory purpose of the 1562 deferral account and on the method to calculate the balances to be recovered from or paid to ratepayers.

On October 7, 2009, Board staff issued a letter which requested comments on a proposed procedural step whereby the Board would invite written submissions on a threshold question. The question posed in Board Staff's letter was as follows:

The Board's authority to adjust electricity rates was limited by Bill 210 from November 11, 2002 until January 1, 2005. Does the Bill 210 limitation on the Board's rate setting authority in the rate-freeze period in effect to December 31, 2004, impose any restrictions on the Board's ability to make adjustments to the account 1562 balances as they existed, and were audited, as of December 31, 2004?

The Board decided to address the threshold issue before continuing with the proceeding and invited written submissions from all parties with respect to the threshold question and subsequent procedural steps.

Procedural Order No. 6 was issued on October 26, 2009 and clarified which parties were applicants in the proceeding and which parties were intervenors only. The three applicants that submitted evidence, namely, EnWin Utilities Ltd. (EnWin), Halton Hills Hydro Inc., and Barrie Hydro Distribution Inc. became the only applicants for this phase of the proceeding. The following distributors that were named as applicants in the Notice and Procedural Order No. 1, but were not required to submit evidence, were made intervenors in this proceeding: Hydro Ottawa Limited, Sioux Lookout Hydro Inc., Oshawa PUC Networks Inc., Wellington North Power Inc., Rideau St. Lawrence Distribution Inc., Newmarket-Tay Power Distribution Ltd.

Submissions on the threshold issue were received from the following: Hydro One Brampton Networks Inc. (Brampton), Electricity Distributors Association (EDA), Coalition of Large Distributors (CLD), EnWin, School Energy Coalition (SEC), Consumers Council of Canada (CCC), and Board staff.

### **The Issue**

The *Ontario Energy Board Act, 1998 (Act)* was amended in 2002 by the *Energy Pricing, Conservation and Supply Act, 2002, S.O. 2002, c.23 (Bill 210)*. Pursuant to section 79, the Board was restrained from accepting applications, commencing a proceeding on its own motion, and issuing orders to change rates under section 78 without leave of the Minister of Energy.

The PILs account 1562 was created by the Board before Bill 210 was proclaimed and Bill 210 did not suspend the operation of this account. Ontario Regulation 339/02

provided that the following accounts were prescribed for the purpose of paragraph 4 of section 79.13 of the *Act*: Accounts 1508, 1525, 1562, 1572, 1574 and 2425 which were established in accordance with the Accounting Procedures Handbook issued by the Board, as it read on the day section 79.13 of the *Act* came into force. Account 1563, the contra-account to 1562, was opened in 2003 and was not identified by Bill 210.

During the period which ended on December 31, 2004, the Board issued instructions and guidance on many subjects. For example, the April 2003 FAQ was released providing additional guidance and explanations on the methodology for accounting for PILs. The RRR SIMPIL worksheets were substantially modified by the Board in 2003 for the 2002 tax year (before and after November 11, 2002) and new instructions were issued. In 2004, the RRR SIMPIL worksheets for the 2003 tax year were slightly modified by the Board to deal with issues that arose after the previous years' RRR filings. In 2005, revised RRR SIMPIL worksheets were provided for the 2004 tax year.

During the Bill 210 period the Board did modify prior RRR guidance in order to improve the information being recorded in account 1562. The Board also continued to exercise its authority and responsibilities with respect to RRR notwithstanding the restrictions of Bill 210 on ratemaking.

### **Board Findings**

The Board cannot adjust the PILs amount included in any final rates – during or after the rate freeze period. The Board is prohibited from changing rates retroactively or retrospectively. No parties disputed this limitation on the Board's jurisdiction.

However, the Board finds that it can review the balances in Account 1562 across the entire time period, including during the Bill 210 period, and dispose of those balances. Some parties have described this as a prudence review. It is not a prudence review in the sense of determining whether expenditures were prudently incurred; rather it is a prudence review in the sense of ensuring the accuracy of the accounts and whether the amounts placed in the accounts were calculated in a manner consistent with the Board's methodology as it was established at the time.

There was no significant disagreement in the submissions on this point either. It is clear from the legislation that the account was permitted to be continued, and reviewing the balance for accuracy and prudence is a necessary part of any disposition determination.

Where the parties disagree is the extent of the review of the account balances.

Board staff submits that a prudence review is necessary because

it appears that not all LDCs followed the instructions issued by the Board regarding the use of account 1562 and the SIMPIL model which has resulted in inconsistencies in the manner in which amounts have been recorded.<sup>1</sup>

CCC adopted Board staff's submissions.

SEC argues there is essentially no limitation on the Board's review and that the Board should also review the underlying methodology to determine whether it was appropriate. SEC's position is based, in part, on the assertion that the methodology was never formally tested or included in a formal order of the Board. In SEC's view,

The Board issued instructions and directions, including providing (and from time to time revising) the SIMPIL model, but none of those instructions or directions, nor the model itself, purported to be binding decisions in exercise of the Board's section 78 jurisdiction.<sup>2</sup>

CLD and EDA disagree with this scope of review. They maintain that the Board cannot change the methodology now, but must determine whether the amounts recorded in Account 1562 were done so in accordance with the methodology as it was known at the time. EDA points out that there were a variety of tools the Board used to establish the account methodology, including frequently asked questions (FAQs) and Board guidance, which were not formal orders but were clearly Board directions. In these parties' view, to now change those underlying methodologies would be to engage in retroactive or retrospective ratemaking. The one exception, in EDA's view, is that the Board must review modifications made to the SIMPIL model during the Bill 210 period to ensure that no changes were made which were contrary to Bill 210 and the rate freeze.

The Board agrees 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. The Board finds that it would be inappropriate to now change the methodology which was used in the past. This would only be appropriate if the Board had clearly signaled that the methodology itself would be subject to future revision on a retrospective basis. The Board made no such pronouncement. While the Board's methodology may not have been formally tested and adopted through a rates

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<sup>1</sup> Board staff submission, para.46.

proceeding, the tools clearly were sanctioned by the Board and formed the basis on which distributors were expected to operate. It was reasonable to expect that any methodological changes would be prospective in their application.

The degree to which the methodology could be altered was limited during Bill 210. The accounts continued by the regulation were to be maintained as they had been established in accordance with the Accounting Procedures Handbook issued by the Board, as it read on the day section 79.13 of the Act came into force. So while it would have been appropriate to revise the model and issue additional guidance to ensure the ongoing appropriate application of the underlying methodology, it would have been inappropriate to change the underlying methodology itself during this period. The Board therefore finds that it is appropriate to review any changes in the model or guidance during this period to ensure the changes were consistent with Bill 210 while also recognizing the intent of Account 1562 as expressed in the relevant Board documents published in advance of Bill 210. These documents are the APH of December 2001 and SIMPIL model issued in summer 2002. A review of changes to the SIMPIL model during this period may be warranted to ensure that the changes did not result in a departure from the APH.

Once the restrictions of Bill 210 were lifted, however, restrictions on changes to the methodology for determining balances for Account 1562 were also effectively lifted. Modifications were appropriately made through the various tools the Board uses to address these types of issues. Board direction in the form of letters from the Board Secretary, the Accounting Procedures Handbook and the associated FAQ, and the SIMPIL models all provided direction to distributors. The Board finds that it would be inappropriate to review those changes now, or the methodology itself, with a view to making retrospective changes. While those instruments were not the result of a rates proceeding, they were all sanctioned by the Board and formed the directions under which distributors were expected to operate.

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

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<sup>2</sup> Board staff submission, para. 28.

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.

The parties may well differ in their interpretations of the methodology but the Board will decide those questions on the basis of the facts and the underlying documents. The Board will not enter into an enquiry as to what the methodology should have been but rather, will determine, where necessary, what the methodology was and what the appropriate application of the methodology should have been.

In particular, the issue raised by Hydro One Brampton is a fact issue to be determined later and the issue raised by EDA with respect to the impact of distorted balances as at April 30, 2006 is an issue to be determined later.

### **Next Steps**

Procedural Order No. 7 is being issued concurrently with this decision. It sets out next steps in this proceeding.

**DATED** at Toronto, December 18, 2009

**ONTARIO ENERGY BOARD**

Original signed by

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Ken Quesnelle  
Presiding Member

Original signed by

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Cynthia Chaplin  
Member