EB-2008-0381

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

AND IN THE MATTER OF a proceeding initiated by the Board on its own motion to deal with common issues relating to Account 1562 - Deferred PILs.

SUBMISSIONS

OF THE

SCHOOL ENERGY COALITION

1. On November 28, 2008 the Board published a Notice that it intends to deal with certain common issues relating to PILs variance accounts for the period 2001 through 2005 through a combined proceeding. As a basis for the proceeding, the Board on August 20, 2008, in the predecessor to this proceeding (EB-2007-0820) published a Staff Discussion Paper entitled "Account 1562 – Deferred Payments in Lieu of Taxes" (the "Staff Paper"). The Staff Paper provides extensive background information, as well as identification of a number of issues of principle that Board Staff feel should be addressed by the Board in this proceeding.

2. Pursuant to Procedural Order No. 1, interested parties are invited to make preliminary written submissions with respect to the Staff Paper, the issues identified therein, and any other issues that may arise. The Board has announced a Technical Conference commencing January 20, 2009 to consider the issues and hear evidence from parties.

3. These are the preliminary submissions of the School Energy Coalition.

4. We note that the issues raised in this proceeding are unusually complex, and the amount of background material is extensive. It is also apparent that the several years of history have created a number of unique concerns that make this unlike most Board proceedings. The submissions now submitted by SEC should be considered to be preliminary comments, not formal positions. While we have reviewed much of the background information, there is still more to analyze, and we anticipate that a great deal of useful input will arise next week in the Technical Conference. In fact, we have already had an opportunity to see the submissions of Toronto Hydro ("THESL"), filed today, and those submissions have raised concepts and perspectives that we had not previously considered. Further, as noted below some of the information that should be reviewed is not currently available to us.

5. While the Board has not announced the next steps in this process after the Technical Conference, we hope and anticipate that there will be a further opportunity to provide submissions once the record is more complete.

6. The submissions below start with some procedural issues that we believe the Board should resolve. Following that, we have provided comments on the issues raised in the Staff Paper, using the ordering therein. We have also briefly raised in the last section issues that Board Staff consider settled, but do not appear to us to be so, or that Board Staff have not raised at all.

Procedural Matters

7. ***SIMPIL Models.*** Pursuant to PO #1, the three sample utilities – EnWin, Halton Hills, and Barrie – have filed a number of reference documents, including their SIMPIL filings for each of the five years being reviewed. The Board has, of course, live versions of those spreadsheets, but what has been filed in this proceeding, and thus available to the intervenors, is only .pdf versions. For the intervenors to fully understand the issues, it is necessary to be able to see the same evidence that the Board sees, particularly since the complexity of the issues means that the process of modelling impacts of various policy choices will be critical to that understanding.

8. We therefore request that the Board publish the live versions of those filings on the Webdrawer prior to the Technical Conference, to allow all parties to see and consider the same evidence.

9. ***Selection of Sample Utilities.*** The Staff Paper identifies a number of specific issues, and we must assume that the selection of EnWin, Halton Hills and Barrie for this proceeding was made with the intent of illustrating those issues. Assuming that is the case, we believe that it would be of assistance to all parties if Board Staff were to identify which of the issues in the Staff Paper are raised in each of the sample cases.

10. Conversely, if there are issues raised in the Staff Paper that are not illustrated by the three sample utilities, we believe it would be of value to add filings from other utilities so that we can see each of the issues arising in practice.

11. ***Changes to the SIMPIL Model.*** As a collateral issue, it is our understanding that a number of LDCs made changes to the SIMPIL model when they filed it during the period in question. If that is in fact the case, it would be useful for Board Staff to provide a detailed list of those LDCs, and the changes that they made.

12. ***Sample Utilities – Decisions and Orders.*** One of the things that would be useful for each of the sample utilities is copies of any Decisions or Orders of the Board dealing with their PILs situation. There have been a number of opportunities over the period 2001 through 2006 for LDCs to seek Board orders with respect to PILs, often by way of exception. Understanding the evidence filed by the sample utilities would be greatly assisted by knowing what the Board has said in the past about their PILs situation.

13. ***2006 EDR PILs Model.*** Board Staff lists this model [Staff Paper, Appendix C. page IV] as one of the relevant pieces of evidence in this proceeding, and we agree. However, Board Staff also refers to it as confidential and proprietary, and implies that parties in this proceeding are therefore not allowed to see it. All distributors have, of course, seen it, as has the Board, meaning that the only parties that would not be able to see it are the ratepayer groups that are footing the bill.

14. We assume that this is not the intent. The Board is, of course, sensitive to its legal obligation to ensure that evidence in rate-related proceedings is available to all parties, and we therefore ask that a copy of the 2006 model be provided to intervenors such as SEC on request. We hereby request a copy. If the Board has found it to be a confidential document in accordance with its procedure relating to confidential filings, then of course we would expect to have to sign the Board's undertaking to that effect. (We would assume, as well, that all distributors that have received a copy would be under the same obligation.)

Issues Identified in the Staff Paper

15. ***Date for the Initial Entries.*** On the basis of the information set forth in the Staff Report, it is difficult to reach a conclusion on whether the pro-rating concept is appropriate. If there are examples of specific utilities that can be used, that would assist in understanding this issue.

16. In our view, there are at least two collateral questions that have to be addressed to deal with this issue.

17. First, in some or all of the cases in which new rates were implemented later than March 1, 2002, this was a voluntary decision on the part of the utility and/or its municipal shareholder. If that is in fact true, is it reasonable to assume that this delay was conditional on retroactive recovery by the utility of some of the delayed increase? It is likely that is not the case, and that if prorating is implemented, the result will be that some of the public benefit initially intended will effectively be clawed back. It is a policy issue whether the Board should implement such a change.

18. Second, if there is a change in the implementation date of new rates, there should at the same time be a material change in the PILs obligation, since income will be lower than otherwise expected for the 2002 year. It would be useful for parties to have an analysis from Board Staff of the impact of this income differential on PILs for the period, and whether it affects the prorating idea proposed.

19. ***PILS Amount for the Fourth Quarter 2001.*** The collection of fifteen months of PILs each year in 2003 and 2004 is a clear example of a known overcollection from ratepayers. Prima facie, it should be refunded.

20. THESL, in their submissions, suggest that balancing this is the fact that in the same period the LDCs were under a rate freeze, so they needed every dollar they could get. This is,

fundamentally, a fairness argument. The rules were unfair to the LDCs, and any subsequent relief must therefore always be fair.

21. With respect, that argument is not valid. Whatever one thinks of the government's decision to freeze rates, that is what happened, and one of the implications of that was that many utilities were forced to tighten their belts. This was an inevitable result of the government decision, and the government must be taken to have known that. It is not within the Board's jurisdiction to undo the government policy by allowing the LDCs some "extra money" because they were being hard done by.

22. That having been said, this is a proceeding about PILs over a four year period, and the excess collections as a result of the Q4 2001 amount is only part of that question. In the subsequent years, the PILs collected were frozen at that amount. Just as it is known that the amount embedded in rates was calculated on a false premise (15 months vs. 12), so it is known that there was another false premise (revenues and income would not change). It is therefore a live issue as to whether, if the Q4 2001 "problem" is to be fixed, some form of true-up – positive or negative – for the years 2003 to 2005 should be implemented as well. This would affect LDCs in different ways, but it could be more fair than the essentially random alternative of overcollection from one source, but undercollection (or overcollection, in some cases) from another source.

23. ***Regulatory Assets and Liabilities – Incomplete Cycle.*** The Board has been very clear that regulatory assets should be treated as tax-neutral events for regulatory purposes. Whether regulatory assets were deducted for tax purposes as the expenses were incurred, or were treated as deferred expenses and deducted later, the same result should arise. The Board's approach assumed that they were deducted as spent, and the SIMPIL model calculated PILs accordingly. We believe that the resolution of this issue should be consistent with those past Board decisions.

24. It would appear to us that the comments of THESL on this point are correct. The optimum solution is to have everyone calculate their Account 1562 as if they had deducted regulatory asset expenses as incurred. There is no "incomplete cycle" if that is the case. There will be some utilities that did not do that, and so will have excess deductions available in the future, but those deductions should also not be counted for ratemaking purposes. Those utilities will lose the time value of their tax savings, but will otherwise be whole.

25. ***Over and Under Collection.*** The SIMPIL model was based on a particular view of the level at which true-up would occur. As we have noted below, the question of whether there should be true-up that shifts volume risk should, in our view, be a live issue considered by this Board.

26. Aside from that more fundamental question, it would appear that the submissions of THESL on this point are correct. Every distributor's Account 1562 should be calculated on the basis of the original intent, not various interpretations that are inconsistent with that intent. Once that baseline is established, and consistent for all LDCs, there is still an issue as we have submitted about whether the implicit shift in volume risk is appropriate. Aside from that, there

would appear to us to be little justification for allowing different interpretations of the regulatory model to co-exist.

27. ***Stub Period Amounts.*** We have considerable difficulty with the notion that the stub period should be treated as a variance from annual PILs calculations. This may be because we are operating under a different conceptual basis than Board Staff or other parties.

28. It has been our understanding that the revenue requirement for LDCs is set on a calendar year basis, and rates are established accordingly. Those rates are then collected over the twelve month period commencing May 1st, but they are essentially calendar year rates. There is an offset of the collection period only.

29. This would mean, to us, that PILs must also be calculated on a calendar year basis, but recovered from ratepayers on a rate year basis. PILs, in this context, are just another component of revenue requirement.

30. The implication of this is that there can never be a stub period. All calculations take place on a calendar year basis, and the timing of collection in rates is a completely separate issue.

31. The alternative, of course, is that the Board treats the rate year as a delay period, and accepts that for the first four months of every year, there is an undercollection – not just of PILs, but of OM&A, depreciation, ROE, and everything else – which at some point needs to be resolved. If that is in fact the paradigm, then the Board has a much bigger problem, because at some point that under collection must be caught up, and PILs is only a portion of it.

32. ***Impact of Ministry of Finance Audits.*** We would understand the relevance of MoF audits if the principle were that 2001–2005 PILs are trued-up to actuals. That is not the principle. The Board has determined that PILs are not trued-up to actual PILs paid, despite the fact that would benefit the ratepayers.

33. This, then, raises the question of how MoF audits could have an impact on the Account 1562 clearances. MoF adjustments would not appear to be, prima facie, relevant to the amounts that should be recoverable from ratepayers. It would be useful if Board Staff or LDCs would provide examples where there is an argument within the current paradigm that a change due to an MoF audit is relevant to ratepayer recovery. In this regard, the starting point might be a fuller understanding of how initial tax assessments are relevant to Account 1562. Once that information is available, that would inform all parties as to the various potential ways in which re-assessments could be relevant as well.

34. The Staff Paper also implicitly raises a collateral question, and that is whether assessments of the opening period and assessments of subsequent periods should be treated differently. We are not clear why that would be the case, but given the explicit reference in the Staff Paper to audits of the opening period, it would be useful if Board Staff provided their analysis of how, if at all, opening period vs. subsequent period audits should be treated differently. With that analysis we would then have a clearer picture of the question being asked on this point in the Staff Paper.

35. ***Interest True-up.*** As a matter of general principle, in our view interest on deferral and variance accounts should be calculated based on correct balances from time to time. If balances are incorrect, then they should be adjusted as if correct in the first place, and the interest should be calculated as if they were right all along.

36. This can be put more simply. If a utility puts an expense in a deferral account, and it is later determined that a lower amount is actually recoverable from ratepayers, then the interest that the ratepayers should pay is also calculated on the basis of the lower amount. The fact that the account had a higher amount in the past is irrelevant to the amount of interest recoverable. The same thing must therefore be true in the other direction. If the amounts in the deferral account are too low, and must be adjusted upwards, then the interest on those amounts must be calculated as if the adjusted higher amounts had accrued at the previous times. If an LDC said its ratepayers owed it $1 million on January 1, 2006, but the Board determines that the amount owing at that time was $2 million, then the interest from January 1, 2006 should be calculated on the basis of $2 million owing, not $1 million owing. Anything else would be unfair.

37. Board Staff has also asked a second question, i.e. whether interest recovery should be given some kind of special treatment. If the essence of the question is about mitigation, then of course the analysis must have dollar amounts in order to get a good read on the problem. If the question is one of principle, i.e. whether interest should be treated differently from other recoveries, then our initial reaction is that there does not appear to be any reason for that. We would want more analysis of that concept before considering it.

38. ***Impact of MAADs.*** Many aspects of ratemaking since 2000 are complicated by the many MAADs transactions that have taken place, and the Staff Paper correctly points out that PILs is another of those impacts. When utilities merge or are acquired, there are many tax impacts that could potentially arise, including at the very least:

    a. Incorrect tracking of PILs obligations when Accounts (including 1562) are merged;

    b. Reduction in actual PILs obligations on sale as a result of past PILs attributes including loss carryforwards, deferred tax assets and liabilities, and others;

    c. Sheltering of the tax cost of sale due to sale structuring;

    d. Anomalies – including both tax costs and benefits - resulting from the combination of CCA pools;

    e. Burying of ECE and/or FMV bump in combined tax attributes to allow indirect flow through of these amounts to ratepayers;

    f. Changes in whether particular expenses are excluded for regulatory tax calculation purposes based on affiliate relationships;

    g. Other potential impacts too numerous to mention.

39. The simple answer to this question is that it is not feasible to determine how in principle MAADs transactions impact on Account 1562 or PILs generally without looking at specific situations. MAADs transactions are actively structured to optimize tax impacts, and those structures are never 100% identical. It is only by looking at individual transactions that the Board can determine what is the appropriate Account 1562 resolution.

40. In light of that, it is our view that the Board in this proceeding should establish two clear principles relating to PILs carryover in MAADs situations:

    a. Each MAADs situation must be dealt with on its own merits, in light of its particular fact situation and tax circumstances.

    b. Account 1562 and other PILs carryover treatment should be consistent with the principle that the ratepayers should be no worse off under the MAADs transaction as they would have been without it.

Additional Issues

41. ***Volume Risk.*** The Staff Paper, at page II of Appendix A, makes the assumption that the difference between the amount of PILs in the revenue requirement, and the amount of PILs actually collected from customers, should be trued-up. This would imply that, at least with respect to PILs, the risk of variations in throughput has been shifted to the ratepayers. While it is not unreasonable to suggest this possibility (i.e. it is not a priori incorrect), it is a substantial change in the basic regulatory concept under which the Board operates, and therefore we would expect that it would be addressed head-on in this proceeding.

42. ***True-Up List.*** The Staff Paper, at pages III and IV of the same Appendix, makes the assumption that the list of items that should be trued-up, and of those which should be subject to a materiality threshold, is based on a consensus of stakeholders. We do not believe that this is the case. The process leading up to the original handling of PILs was not characterized by extensive ratepayer involvement, and it could be said that this is the first real opportunity that ratepayers have had to look at issues such as this for the period in question. While many of the amounts being trued-up are quite obvious, that is not true of all of them, nor is the split between the pure flow-through true-ups, and those that are more like a Z factor, i.e. tested by materiality. We are still reviewing the Board's formal decisions and other communications relating to these matters, but pending that analysis we believe that these matters remain open issues.

43. ***SREDs.*** While it may be in the past materials, it is not clear to us how claims for Scientific Research and Experimental Development tax credits are reflected in the Account 1562 amounts. From the filings of the sample utilities, it is clear that for at least some LDCs material credits have been enjoyed through the use of his mechanism. What is not clear to us is whether those credits are retained by the shareholders, or flow through to the ratepayers. It would be of assistance if Board Staff would provide a summary of how SRED tax credits flow through to rates and/or Account 1562 under the 2001-2005 PILs approach.

44. ***Effective Tax Rates.*** At page IV of Appendix A, the Staff Paper assumes that the use of "effective tax rates" is appropriate for true-ups. The term "effective tax rates" is tax jargon meaning the percentage that final tax is of income, whatever the published rates may be. If that is how the term is used here, this principle is not obvious to us. (If the term is being used to mean "blended actual rates", as in the January 2002 SIMPIL Notes, then this concern does not arise in the same way.) It is often – perhaps usually – true that if you change the amount or timing of deductions or revenues, you will change the effective tax rate. We believe that, once we have an opportunity to review the live SIMPIL models for the sample utilities, it will become clear whether applying the effective tax rate, or recalculating the tax payable with the true-up in place, is the more correct approach.

45. ***Stand-Alone Principle.*** The Staff Paper, at pages IV and V of Appendix A, assumes the appropriateness of the stand-alone principle, but also the appropriateness of certain exceptions to it. The Board will be aware that, in the 2006 EDR proceeding, SEC took the position that the stand-alone principle was not appropriate for PILs, because it provides collateral benefits to shareholders and affiliates at the expense of the ratepayers.

46. But, SEC lost on that issue. In our view, now if the stand-alone principle is to apply, as the Baord has determined, it should apply fully, which would imply that distributors should calculate taxes as if they have no affiliates at all. If that is the case, then business limits, deductions, and the like would not be shared within a corporate group. On the other side, if the distribution operations have to share certain tax benefits (like the business limit) with their affiliates, then they should also be entitled to share tax benefits that their affiliates get from the distribution operations as a result of that relationship.

47. ***Financial Distress Situations.*** On September 17, 2001, the Board by letter invited LDCs who felt that the new obligation to pay PILs would create financial distress to file immediate rate adjustment applications, and set out the rules for doing so. We are not aware of how many utilities took up this offer, and of course there is the obvious question of how a utility that is sufficiently profitable to pay a tax based on income could be in financial distress. However, at the very least it would be useful to us and perhaps to other parties if Board Staff could identify which utilities applied, and what the impact of this application and any subsequent decision would be on the Account 1562 balances for those LDCs.

48. ***Previous Collection of Account 1562.*** The RRR SIMPIL Model Guide for 2005, at page 9, suggests that some LDCs were given orders for recovery of Account 1562 amounts as part of the regulatory assets proceedings. While SEC were not aware of this, if that was the case the impacts of that will be a further issue that should be addressed in this proceeding.

49. ***Cost Allocation and Inter-Class/Intra-Class Subsidies.*** The Staff Paper does not identify as an issue the allocation of PILs recovery as between ratepayers. This is particularly important since the 2004 and 2005 amounts were apparently recovered solely in volumetric rates, which would be a disadvantage to customers at the high volume end of their respective rate class, such as some schools.

50. It would appear to us that, if a true-up of some sort is going to take place, it is important that the Board look at adjustment of the allocation of PILs in rates during the period 2001 through 2005 to reflect appropriate allocation of the final PILs amount being collected after recovering Account 1562. While it is not conclusive based on the current evidence that such a ratepayer-related true-up will in fact be required, we believe that this is the appropriate time for the Board to consider that issue.

Conclusion

51. We appreciate the opportunity to provide input on these important issues, and hope that our involvement is of assistance to the Board. Once the Board determines the further process required on this matter, we would be pleased to participate if it would assist the Board.

52. The School Energy Coalition requests that the Board order payment of our reasonably incurred costs of participating in this process.

Respectfully submitted on behalf of the School Energy Coalition this 12th day of January, 2009

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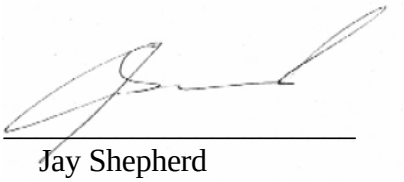

Per: _____
Jay Shepherd