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January 12, 2018

Delivered by Email, RESS & Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Kitchener-Wilmot Hydro Inc.
Application for Approval of 2018 Electricity Distribution Rates
Board File No.: EB-2017-0056
Reply Submissions – Group 1 DVA Balances

Pursuant to Procedural Order No. 1, please find enclosed the Reply Submissions of Kitchener-Wilmot Hydro Inc.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A.D. Vellone

John A.D. Vellone

cc: Liz Muir, Kitchener-Wilmot Hydro Inc.
Margaret Nanninga, Kitchener-Wilmot Hydro Inc.
Intervenors of record in EB-2017-0056

EB-2017-0056

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

AND IN THE MATTER OF an Application by Kitchener-Wilmot Hydro Inc. under Section 78 of the Act for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2018.

REPLY SUBMISSIONS
(GROUP 1 DVA BALANCES)

OF
KITCHENER-WILMOT HYDRO INC.

January 12, 2018

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REPLY SUBMISSIONS
(GROUP 1 DVA BALANCES)

January 12, 2018

A. INTRODUCTION

1. Kitchener-Wilmot Hydro Inc. ("**KWHI**") makes these written reply submissions in accordance with the Ontario Energy Board's (the "**OEB's**") Partial Decision and Rate Order dated December 20, 2017 (the "**Partial Decision**") in respect of an Application filed by KWHI on August 14, 2017, as amended, under Section 78 of the *Ontario Energy Board Act, 1998* ("**OEB Act**") seeking an order of the OEB approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2018 (the "**Application**"). The Board assigned file number EB-2017-0056 to the Application.

2. In accordance with the Partial Decision, these reply submissions address only the disposition of the group 1 deferral and variance account balances. These submissions are made in reply to the submissions of OEB staff ("**OEB Staff**"), the School Energy Coalition ("**SEC**") and the Vulnerable Energy Consumers Coalition ("**VECC**") each dated December 18, 2017. OEB Staff, SEC and VECC are referred to collectively as the "**Parties**", and each a "**Party**".

3. The Parties submissions in respect of the disposition of the group 1 deferral and variance account balances focused on two key topics: (i) Accounts 1588/1589; and (ii) Account 1595. KWHI will address each in-turn.

B. ACCOUNTS 1588/1589

"The fundamental and animating general principle of the law of restitution is the principle against unjust enrichment."[1]

4. The modern principle of unjust enrichment states that "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[2]

> *"The "restitution interest" involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two."*[3]

5. The underlying moral premise is a familiar one: one ought not reap what one has not sown. The doctrine of unjust enrichment is premised on the rationale that it is unjust to receive a windfall benefit at another's expense.

6. In the present Application, due to an unintentional and *bona fide* mistake, Regulated Price Plan ("**RPP**") customers received a benefit (electricity commodity) that they did not pay for, while non-RPP customers paid more than they should have for the benefit (electricity commodity) they actually received. In the words of Fuller and Perdue, the resulting discrepancy between RPP and non-RPP customers is not one unit, but two.

7. In this context, the OEB must set rates that are not only reasonable, but are also <u>just</u>. In this context, the principles of unjust enrichment are informative to an OEB panel that is tasked with establishing "just and reasonable" rates.

8. In the law of restitution, one defense to a claim of unjust enrichment is promissory estoppel (also referred to as the "reliance interest"). Under the doctrine of promissory estoppel, the courts will refuse to remedy a claim of unjust enrichment if the parties' dealings were on a

[1] Maddaugh and McCamus, The Law of Restitution, Thomson Reuters Canada Limited 2017, at Chapter 3, Section 3:100.
[2] *Ibid* at 3:200.
[3] Fuller and Perdue, The Reliance Interest in Contract Damages, (1936-37), 46 Yale L.J. 52 at pg. 56.

shared assumption of fact or law, a party conducted itself in reliance on such shared assumption in a detrimental way (i.e. the party seeking to establish estoppel must have changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his or her legal position, and should the other party subsequently be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change in his or her assumed position). Finally, it must be "unjust" and 'unfair" to permit a party to resile from the mutual assumption.[4]

9. Promissory estoppel is not a concept the OEB typically considers. However, the OEB's typical policy against retroactive ratemaking can be understood as a particular formulation of the doctrine of promissory estoppel that is applicable in the context of "just and reasonable" rate setting. The rule against retroactive ratemaking is, at its core, intended to protect the reliance interest.

10. This makes sense. All rate regulated utilities, including KWHI, are entitled to rely on the finality of Decisions and Orders issued by the OEB to be able to operate their business. Rate regulated utilities cannot obtain revenues except through Orders of the OEB. These utilities then expend monies on the operations and maintenance of the local distribution system, relying on the finality of these Decisions and Orders. Any departure from principle of "no retroactive ratemaking" would risk undermining this reliance interest and consequently the maintenance of a financially viable electricity industry.

11. In carrying out its responsibilities under the Act in relation to electricity, the OEB is guided by a number of other principles that relate to this dispute including:

- To facilitate the maintenance of a financially viable electricity industry.
- To promote the education of consumers.
- To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

[4] Ryan *v.* Moore, [2005] 2 S.C.R. 53, 2005 SCC 38.

12. KWHI submits that the OEB should depart from its policy of no retroactive ratemaking due to the unique circumstances in this Application to refund over collected amounts attributable to non-RPP customers **and** to collect under billed amounts attributable to RPP customers for six reasons:

    (a) First, failing to do so will result in the unjust enrichment of RPP customers at the expense of non-RPP customers arising from *bona fide* mistakes of fact that were voluntarily disclosed and proactively addressed by KWHI.

    (b) Second, failing to do so will not promote the education of consumers with regards to the true costs of electricity commodity, and will not promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario.

    (c) Third, by applying the principle of no retroactive ratemaking to Accounts 1588 and 1589 (the IESO does not apply a rule against making retroactive corrections) the OEB would perpetuate a potential systemic imbalance that could make utilities financially responsible for innocent and *bona fide* errors in respect of large "flow through costs" that are significantly greater in magnitude than a utility's internal financial capabilities, which in turn has the potential of bankrupting utilities and undermining the maintenance of a financially viable electricity industry as a whole.

    (d) Fourth, the unique facts of this case support making the correction. The errors are the result of inadvertent mistakes, administrative in nature, and not the result of any negligence or intentional misconduct. KWHI has not, does not, nor is it proposing to, benefit financially from the errors or the proposed corrections. The presence of the errors were first identified by KWHI as part of an internal review process. KWHI promptly and voluntarily disclosed the existence of the errors to the OEB. The OEB ordered an audit, and KWHI participated cooperatively and supported the audit. In response, KWHI has implemented additional training and

improved its internal processes and controls to ensure greater accuracy going forward. In addition, KWHI agreed with each of the observations made by OEB Staff in the April 7, 2017 Audit Report and KWHI has since acted on each of the management action plans outlined in that report.

(e) Fifth, when assessing the potential reliance interests of both RPP and non-RPP customers, the OEB should consider the magnitude of the bill impacts arising should the requested correction be made (see the clarification in paragraph 14 below). KWHI notes that the magnitude of the bill impacts resulting from the proposed correction are not large, and that this may factor into the OEB's consideration of the ratepayers' reliance interest.

(f) Sixth, less than a year had elapsed between the date of the OEB's order approving the disposal of 2013 balances and the error being identified and reported to the OEB.[5]

13. Finally, KWHI will also address the proposed "asymmetric disposition" proposed by the Parties, which shifts the financial harm arising from the unjust enrichment of RPP customers from non-RPP customers to KWHI. As more fully detailed below, this results in an unjust penalty of $2.2 million being imposed on KWHI that would: (i) perpetuate the unjust enrichment of RPP customers; (ii) amount to an unjust and disproportionate penalty being imposed on KWHI for making *bona fide* administrative errors (which KWHI voluntarily disclosed, and has actively attempted to remedy at every opportunity); (iii) would undermine KWHI's legitimate reliance interest in the finality of OEB Decisions and Orders, which in turn puts at risk the financial viability of the electricity industry as a whole; and (iv) would violate the fair return standard for KWHI.

[5] The difference in time between Decision and Rate Order dated December 4, 2014, as corrected December 19, 2014, in EB-2014-0089, and the November 23, 2015 letter KWHI sent reporting the error to the attention of the OEB and asking that the error be corrected.

14. **Clarified Bill Impacts:** The bill impacts calculated in the response to IR Staff-13 did not separate the RPP and non-RPP customer and so while the impact by class was correct, the impact by subclass was not shown. KWHI has prepared an updated Table 1-1 to demonstrate the true impact on RPP and non-RPP customers. In creating the table, KWHI has considered the impact of three different assumptions: a) if no action had been taken with respect to the $2.2 million and the Accounts 1588 and 1589 were assessed as correct on December 15, 2015 (i.e. the OEB applies the principle of no retroactive ratemaking strictly); b) If the $2.2 million were removed from Accounts 1588 and 1589 and the balances of these accounts were corrected to December 31, 2015 (i.e. the OEB accepts the Application as proposed by KWHI); and c) if the balances were corrected to December 31, 2015 and then the over-collection of the GA in Account 1589 was refunded, resulting in a one-sided entry (i.e. the OEB accepts the one-sided adjustment proposed by the Parties). Finally, it is worth noting that effective January 1st, KWHI no longer has a large use customer.

Table 1-1 Bill Impacts of RPP and non-RPP customers

					Nothing		Remove the Error from the corrected balances in 2015		One sided correction from the corrected balances in 2015	
	kWh	kW			$	%	$	%	$	%
RESIDENTIAL SERVICE CLASSIFICATION	750		kWh	RPP	$ (3.06)	-3.15%	$ (2.08)	-2.14%	$ (3.06)	-3.15%
GENERAL SERVICE LESS THAN 50 kW SERVICE CLASSIFICATION	2,000		kWh	RPP	$ (6.74)	-2.59%	$ (4.34)	-1.67%	$ (6.74)	-2.59%
GENERAL SERVICE 50 TO 4,999 KW SERVICE CLASSIFICATION	100,000	250	kW	Non-RPP (Other)	$ (203.55)	-1.38%	$ (374.75)	-2.54%	$ (473.55)	-3.21%
LARGE USE SERVICE CLASSIFICATION	2,650,000	5,250	kW	Non-RPP (Other)	$ (11,837.47)	-26.30%	$ (8,810.84)	-19.58%	$ (11,837.47)	-26.30%
UNMETERED SCATTERED LOAD SERVICE CLASSIFICATION	2,000		kWh	RPP	$ (6.68)	-2.76%	$ (4.08)	-1.69%	$ (6.81)	-2.90%
STREET LIGHTING SERVICE CLASSIFICATION	750	37	kW	Non-RPP (Other)	$ (35.11)	-9.77%	$ (20.58)	-5.73%	$ (37.14)	-10.36%
RESIDENTIAL SERVICE CLASSIFICATION	280		kWh	RPP	$ 0.80	1.70%	$ 1.17	2.47%	$ 0.80	1.70%
RESIDENTIAL SERVICE CLASSIFICATION	750		kWh	Non-RPP (Retailer)	$ (2.61)	-2.20%	$ (3.81)	-3.21%	$ (4.63)	-3.91%
GENERAL SERVICE LESS THAN 50 kW SERVICE CLASSIFICATION	2,000		kWh	Non-RPP (Retailer)	$ (5.54)	-1.74%	$ (8.94)	-2.81%	$ (10.94)	-3.44%
GENERAL SERVICE 50 TO 4,999 KW SERVICE CLASSIFICATION	100,000	250	kW	RPP	$ (263.54)	-2.22%	$ (144.74)	-1.22%	$ (263.54)	-2.22%
GENERAL SERVICE 50 TO 4,999 KW SERVICE CLASSIFICATION	100,000	250	kW	Non-RPP (Retailer)	$ (203.55)	-1.38%	$ (374.75)	-2.54%	$ (473.55)	-3.21%

B.1 THE FACTS

15. The OEB has recognized that the electricity commodity is a large cash item that distributors are expected to manage on a monthly basis. KWHI takes its responsibility in this regard very seriously.

16. On November 23, 2015, following a comprehensive internal review of its RSVA accounts KWHI promptly and **voluntarily** notified the OEB of an error it discovered due to a manual input error of $3,443,918 in a spreadsheet resulting in a misallocation between Accounts 1588 and 1589.[6]

17. Account 1588 ($RSVA_{Power}$) is used monthly to record the net difference between the energy amounts billed to customers, including accruals, and the energy charge to a distributor by, *inter alia*, the Independent Electricity System Operator (the "IESO"). Account 1589 ($RSVA_{GA}$) is used monthly to record the net difference between the global adjustment amount billed to non-Regulated Price Plan consumers, including accruals, and the global adjustment charge to KWHI for non-Regulated Price Plan consumers from, *inter alia*, the IESO.

18. Accounts 1588 and 1589 are both commonly referred to as "electricity commodity" accounts that relate to "pass through" costs. Amounts collected from ratepayers by KWHI in accordance with an OEB order are remitted to the IESO, and vice versa, using these accounts.

19. KWHI has not, does not, nor is it proposing to, benefit financially from either of these two pass through accounts.

20. On the basis of the same moral principles that underpin the law of restitution, KWHI requested in its November 23, 2015 letter that the OEB make an adjustment to the Group 1 Deferral and Variance Accounts to correct for this error.

[6] KWHI letter providing comments on the draft Decision and Rate Order in KWHI's 2016 IRM Application (EB-2015-0084).

21. In its Decision and Rate Order dated December 10, 2015, the OEB determined, by way of delegated authority, that:

> "I will not consider Kitchener-Wilmot Hydro's proposed adjustment to its 2013 DVA balances. The 2013 DVA balances were disposed through a final rate order in Kitchener-Wilmot Hydro's 2015 IR proceeding (EB-2014-0089) and adjusting them now raises questions of retroactive ratemaking that go beyond the scope of this proceeding.
>
> While I note that Kitchener-Wilmot Hydro has undertaken a comprehensive review of balances, errors of this nature put into question whether there are further amounts which have been incorrectly allocated. For these reasons, I will not approve disposition of any balances at this time until the OEB's Audit and Performance Assessment unit has conducted an audit of the balances in Kitchener-Wilmot Hydro's Accounts 1588 and 1589. The results of the audit would be expected to be available for consideration in the applicant's next rate application."[7]

22. KWHI cooperated fully with OEB Staff's audit of Accounts 1588 and 1589 and KWHI's RPP variance settlement processes. A copy of the audit findings are attached as Appendix A to the interrogatory responses filed in this EB-2017-0056. In her April 7, 2017 cover letter to the Audit Report, the OEB's Acting Manager, Audit & Performance Assessment stated expressly:

> "We thank the staff of KWHI for the assistance and support provided to us during the audits."

23. The facts as it relates to the errors are, therefore, not in dispute.

24. KWHI has admitted to making three errors: (i) a spreadsheet input error of $3.447 million in 2013; (ii) a misallocation of unbilled revenues between 1588 and 1589 as at December 31, 2013; and (iii) using the final settlement amount instead of the actual IESO bill to record GA variances. As a consequence of these errors, Account 1588 was understated by $2.195 million and Account 1589 was overstated by $2.195 million, resulting in cross-subsidization between KWHI's rate classes. Specifically, RPP customers received a benefit (electricity commodity) that they did not pay for, while non-RPP customers paid more than they should have for the benefit (electricity commodity) they actually received

[7] Decision and Rate Order dated December 10, 2015 in EB-2015-0084.

25. The facts related to these errors are more fully explained in the responses to Staff-14 and SEC-3 and in the OEB's April 7, 2017 Audit Report attached as Appendix A to the interrogatory responses. The facts are clear. The errors are the result of inadvertent mistakes, administrative in nature, and not the result of any negligence or intentional misconduct. KWHI did not, nor is it proposing to, financially benefit from any of the errors. In addition, the presence of the errors was first identified by KWHI as part of an internal review process. KWHI promptly and voluntarily disclosed the existence of the errors to the OEB. The OEB ordered an audit as a result, and KWHI participated cooperatively and supported the audit.

26. In response to these errors, KWHI has implemented additional training and improved its internal processes and controls to ensure greater accuracy going forward (SEC-4). In addition, KWHI agreed with each of observations made by OEB Staff in the April 7, 2017 Audit Report and KWHI has since acted on each of the management action plans outlined in that report.

27. Finally, it is worth noting that there is no financial incentive for KWHI to make errors of this nature. And there is no need to impose a financial penalty to deter KWHI from making errors in the future. KWHI, much like the OEB, has an inherent interest in ensuring that all of the work it does is correct and free of errors.

28. Like any institution that is composed of human staff, errors will occasionally occur, despite best efforts to prevent them. The common law of restitution has arisen in large part because of this universal truth.

29. In this context, KWHI has proposed that the OEB should approve an adjustment to the 2013 DVA balances as part of this Application to (i) dispose of Account 1588 to collect from RPP customers that were previously undercharged the amounts they were undercharged; and (ii) to use those funds to refund via Account 1589 to non-RPP customers amounts that they were overcharged as a result of the same errors. KWHI has not, does not, nor is it proposing to, benefit financially from either of these two corrections.

B.2 LAW AND POLICY

B.2.1. The rule against retroactive ratemaking is not a legal requirement

30. KWHI recognizes that the OEB has a practice of applying a policy of "no retroactive ratemaking" to DVA balances that are disposed of on a final basis, subject to some exceptions.

31. What the Parties fail to explain is that "no retroactive ratemaking" is not a legal requirement. This can be seen in *Bell Canada v. Canada (Canadian Radio Television and Communications).*[8] Bell Canada failed in its attempt to argue that the CRTC was prohibited by law from retroactively adjusting rates.[9]

32. With regards to the OEB, the Ontario Court of Appeal has ruled that "[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments in a proper case"[10] and "[t]he critical factor for determining whether a regulator is engaging in retroactive ratemaking is the parties' knowledge that the rates were subject to change."[11]

33. In the present Application, KWHI had no knowledge that the rates that were previously disposed of on a final basis would be the subject of change. KWHI's request for a specific exception to the general rule of "no retroactive ratemaking" should not be mistaken for something it is not. KWHI is only proposing an exception if KWHI will not be harmed financially (subject only to KWHI's offer to compensate the OEB for the costs of its audit, up-to a maximum of $50,000, as discussed below). KWHI is not in any way waiving its legitimate reliance interest in the finality of prior OEB Decisions and Orders.

34. In general, the OEB's policy on "no retroactive ratemaking" has been tempered over time by the introduction of the principle of unjust enrichment. In particular, in instances where the utility in question would profit as a result of errors, both the CRTC and the OEB have

[8] [1989] 1 S.C.R. 1722.
[9] This Application is clearly distinguished from the Bell Canada case in three material respects. First, unlike Bell Canada, KWHI did not in any way profit as a result of the errors. The CRTC's rationale for allowing retroactive ratemaking was to prevent Bell Canada from profiting as a result of the errors. The same rationale does not apply to KWHI. KWHI will not profit as a result of the errors. Second, the Bell Canada case dealt with the CRTC and not the OEB. Third, the Bell Canada case did not involve any deferral and variance accounts.
[10] The Ontario Court of Appeal Decision in *Union Gas Ltd. V. Ontario (Energy Board)*, 2015 OCA 453, citing favourably the Alberta Court of Appeal at para 91.
[11] Ibid.

been willing to correct those errors to ensure the utility does not profit unjustly from an error that the utility itself made.

35. As one example, the OEB permitted a retroactive adjustment to Enbridge's QRAM orders that were previously declared as final in EB-2012-0352. The principle that arose from this decision is that "[a]n out of period adjustment can be justified if it ensures that a utility does not profit on account of its own errors".[12]

36. This Application is clearly distinguishable from this line of cases, however. Unlike Bell Canada, Enbridge or Union Gas, KWHI has not, will not, and is not proposing to profit from its error. KWHI has not been unjustly enriched as a result of the error.

37. The OEB has also allowed for other exceptions to its policy of no retroactive ratemaking. KWHI will address those cases below, when responding to the Parties' proposed "asymmetric disposition" approach.

B.2.2 The fair return standard is a legal obligation

38. The OEB's discretion is framed by another relevant, and legally binding, requirement. In setting "just and reasonable rates" the OEB's discretion is limited by the fair return standard.

39. In the December 11, 2009 *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities* (the "**2009 Report**"), the OEB consulted a range of stakeholders and reviewed the case law (as it was at that time) relating to the Fair Return Standard ("**FRS**") to establish the Board's approach to cost of capital, and more particularly the deemed rate of return on equity ("**ROE**") that is permitted in rates to meet the FRS. In the 2009 Report, the OEB confirmed that:

> "The Board is of the view that the FRS frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of the tribunal. **Meeting the standard is not optional; it is a legal requirement.**"[13]

40. The requirement that approved rates must produce a fair return was described by the

[12] Decision and Order dated April 10, 2014 in EB-2014-0043 at pg. 2. See also *MCI Telecommunications v. Public Service Commission*, 840 P. 2d 765 (Utah 1992).
[13] 2009 Report at pg. 18.

Supreme Court of Canada as an **absolute obligation**.[14] The OEB summarizes the three legal requirements to ensure a fair return on capital in the 2009 Report by citing the National Energy Board's RH-2-2004 Phase II Decisions:

> "*A fair or reasonable return on capital should:*
>
> - *be comparable to the return available from the application of invested capital to other enterprises of like risk (the comparable investment standard);*
> - *enable the financial integrity of the regulated enterprise to be maintained (the financial integrity standard); and*
> - *permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (the capital attraction standard).*"[15]

41. How have inadvertent and *bona fide* errors, similar in form and substance to the errors that were voluntarily reported by KWHI, be treated for "other enterprises of like risk"?

42. The answer can be found in the law of restitution. It is well established law that one who has paid money under a mistake of fact may recover the money paid in a restitutionary claim provided:

    (a) the mistake is honest (it arises from a genuine *bona fide* belief that certain facts exist which really do not exist);

    (b) the mistake caused the payment;

    (c) the payor did not intend the payee to have the money at all events; and

    (d) there has been no change in position (i.e. no promissory estoppel).[16]

43. On the basis of the law of restitution, private Canadian companies, including major banks, will not generally suffer from a lower return on capital as a result of *bona fide* mistakes. Rather, these enterprises can obtain court orders allowing for the recovery of moneys paid

[14] *British Columbia Electric Railway Co. Ltd. v. Public Utilities Commission of British Columbia et al [1960] S.C.R. 837*, at p. 848.
[15] National Energy Board. RH-2-2004, Phase II Reasons for Decision, TransCanada PipeLines Limited Cost of Capital. April 2005. p. 17.
[16] Maddaugh and McCamus, The Law of Restitution, Thomson Reuters Canada Limited 2017, at Chapter 10 "Money paid under a mistake of fact".

or received arising from *bona fide* mistakes. For example:

(a) The Royal Bank of Canada ("RBC") was entitled to retain the $777,336.04 it had been reimbursed from the Bank of Nova Scotia. Royal Bank had mistakenly honoured a fraudulent cheque and deposited the funds into the Bank of Nova Scotia account (*BMP Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15).

(b) The Royal Bank of Scotland was reimbursed the sum of $99, 975 mistakenly wired to an account held at RBC (*Royal Bank of Scotland PLC v. Oblak*, 2013 ONSC 4376).

(c) RBC was entitled to retain $112,327.33 it had been repaid by Toronto Dominion ("TD") Bank. TD Bank had returned the proceeds that had been mistakenly paid to it by RBC as a result of a mortgage fraud (*Cutherbert v TD Canada Trust*, 2010 ONSC 830).

(d) TD Bank recovered $11,760 it had mistakenly paid out by honouring stopped cheques from the payee (*Toronto-Dominion Bank v Anker Electric Motor and Equipment Co Ltd.*, [1979] 1 ACWS 66).

B.3 KWHI's proposed approach is the only approach that will result in both just and reasonable rates.

44. KWHI submits that the only approach that will result in both "just" as well as "reasonable" rates is its proposal to refund over collected amounts attributable to non-RPP customers, and to collect under billed amounts attributable to RPP customers.

45. Failing to do so will result in the unjust enrichment of RPP customers at the expense of non-RPP customers arising from bona fide mistakes of fact that were voluntarily disclosed and proactively addressed by KWHI. This will not result in "just" rates.

46. Failing to do so will not promote the education of consumers with regards to the true costs of the electricity commodity, and will not promote electricity conservation and demand

management in a manner consistent with the policies of the Government of Ontario.

47. Rather, by applying the principle of no retroactive ratemaking to Accounts 1588 and 1589 (the IESO does not also apply a rule against making retroactive corrections) the OEB would perpetuate a potential systemic imbalance that could make utilities financially responsible for innocent and bona fide errors in respect of large "flow through costs" that are significantly greater in magnitude than a utility's internal financial capabilities, which in turn has the potential of bankrupting utilities and undermining the maintenance of a financially viable electricity industry as a whole. This is explored further below under the heading "Potential Systemic Imbalance".

48. The unique facts of this case support making the correction. The errors are the result of inadvertent mistakes, administrative in nature, and not the result of any negligence or intentional misconduct. KWHI has not, does not, nor is it proposing to, benefit financially from the errors or the proposed corrections. The presence of the errors were first identified by KWHI as part of an internal review process. KWHI promptly and voluntarily disclosed the existence of the errors to the OEB. The OEB ordered an audit, and KWHI participated cooperatively and supported the audit. In response, KWHI has implemented additional training and improved its internal processes and controls to ensure greater accuracy going forward (SEC-4). In addition, KWHI agreed with each of the observations made by OEB Staff in the April 7, 2017 Audit Report and KWHI has since acted on each of the management action plans outlined in that report.

49. Finally, when assessing the potential reliance interests of both RPP and non-RPP customers, the OEB can consider the low magnitude of the bill impacts resulting from the correction as a relevant factor in the OEB's consideration of the ratepayers' reliance interest.

C. THE PROPOSED "ASYMMETRIC DISPOSITION" APPROACH

C.1 The "asymmetric disposition" approach would undermine KWHI's legitimate reliance interest in the finality of prior OEB Decisions and Orders, would put at risk the financial viability of the electricity industry as a whole, and would violate the fair return standard as that applies to KWHI.

50. Each of the Parties have argued that the OEB should apply the principle of "no retroactive ratemaking" to Account 1588 to prevent a retroactive adjustment that would charge RPP customers $2,195,104 which they were previously under-billed, however the Parties at the same time argue that the OEB should ignore the principle of "no retroactive ratemaking" to permit the refunding of $2,195,104 to non-RPP customers that were previously over-billed.

51. What the Parties fail to acknowledge is that the OEB has never once approved such an "asymmetric disposition" of accounts previously disposed of on a final basis to account for errors to a utility's detriment **in the absence of express consent from the utility**.

52. This makes sense. KWHI has a legitimate reliance interest in the finality of prior OEB Decisions and Orders. To undermine this reliance interest would undermine the maintenance of a financially viable electricity industry as a whole.

53. In their submissions, OEB Staff and SEC make reference to certain case-law that they argue supports their proposed approach. KWHI respectfully disagrees.

54. In EB-2009-0113, the OEB strictly applied the "no retroactive ratemaking" principle. The OEB did not apply the "no retroactive ratemaking" in an asymmetric way – to some accounts and not to others. North Bay Hydro's reliance interest on the finality of prior OEB Decisions and Orders was not threatened by this Decision.

55. In EB-2014-0043, Enbridge **proposed** to refund $10.1 million and the OEB did permit a retroactive adjustment to Enbridge's QRAM orders that were previously declared as final in EB-2012-0352. The principle that arose from this decision is that "[a]n out of period adjustment can be justified if it ensures that a utility does not profit on account of its own

errors".[17] Enbridge's reliance interest on the finality of the OEB's prior Decision and Order was not threatened, because Enbridge consented to the refund (Enbridge proposed it).

56. In EB-2016-0090, the OEB also permitted a retroactive adjustment to Accounts 1588 and 1589 in respect of Lakeland's Parry Sound service area arising from an after-the-fact discovery of accounting errors. Specifically, the OEB allowed for a violation of the principle of "no retroactive ratemaking" allowing Lakeland to refund $65,112.46 to customers that overpaid "because the adjustment in is in favor of customers **and Lakeland Power consented**."[18] Lakeland's reliance interest in the finality of prior OEB Decisions and Orders was not threatened, because Lakeland consented to the adjustment.

57. In this context, the most analogous case is EB-2014-0072/EB-2014-0301. In this case, Essex Powerlines did not consent to an "asymmetric disposition" and based on this the OEB refused to retroactively adjust final approved amounts in 2011 and 2012, and instead applied the "no retroactive ratemaking" principle strictly to all accounts. Once again, Essex Powerlines' reliance interest in the finality of prior OEB Decisions and Orders was not threatened.

58. It is also important to distinguish between the present Application with the Board's Decision and order dated June 9, 2015 in EB-2014-0301/EB-2014-0072, where the OEB found that:

> "*Unfortunately this proceeding devolved, in large part, into a forensic accounting exercise in which the OEB found it necessary to ask two sets of supplemental questions through procedural orders, in order to understand the evidence and clarify the record. Moreover, considerable resources were required by the OEB and the parties to decipher the three sets of continuity schedules filed after the interrogatory phase of the proceeding.*
>
> *As a result of these concerns, the OEB orders that a complete audit of all DVA accounts, procedures and controls be undertaken. The only exceptions are the smart meter Accounts 1555 and 1556 which have undergone a final review in this proceeding. The audit will ensure all DVA entries and balances, not just those associated with Group 1 variance accounts, are accurate for 2013 and on a go forward basis.*

[17] Decision and Order dated April 10, 2014 in EB-2014-0043 at pg. 2. See also *MCI Telecommunications v. Public Service Commission*, 840 P. 2d 765 (Utah 1992).
[18] Decision and Order dated December 8, 2016 in EB-2016-0090 at pg. 10.

Essex Powerlines will pay for the OEB's costs to conduct the audit of all DVA accounts."

59. In the present Application, the error was self-identified by KWHI and self-reported to the OEB, there is no question about the facts and there is no further need to conduct another compliance audit. The OEB has the benefit of Staff's audit report on the evidentiary record together with confirmation from KWHI that all management action plans have been implemented.

60. KWHI does not consent to the "asymmetric disposition" of Accounts 1588 and 1589 as proposed by OEB Staff, VECC and SEC in their submissions.

61. The amount at issue in this proceeding of $2,195,104 is material to KWHI. An "asymmetric disposition" of this amount, as proposed by the Parties, would constitute a penalty that would threaten the ongoing financial viability of KWHI and would violate the fair return standard.

62. If the OEB approves the "asymmetric disposition" approach, KWHI's forecasted net income for 2018 would fall by $2,195,104 and ROE in 2018 would fall to 4.78%.[19] This is 4.58% less, more than 300 basis points less, than the OEB's deemed ROE - the amount previously determined by the OEB to meet the fair return standard. This is also less than the OEB's pre-established dead band to trigger an off-ramp under the OEB's *Renewed Regulatory Framework for Electricity Distributors*.

63. If the OEB were to accept the proposed "asymmetric disposition" methodology, it would be setting rates that would violate the fair return standard, and would undermine KWHI's legitimate reliance interest on the finality of the OEB's final Decision and Order.

C.2 The "asymmetric disposition" approach would amount to a penalty that is entirely disproportionate to the errors that occurred.

[19] KWHI was at no time informed of the Parties "asymmetric disposition" proposal until it received the Parties' submissions on December 18, 2017. The OEB cannot now make a determination on this issue unless it has clear evidence of the impact of the "asymmetric disposition" proposal on KWHI's financial viability and on the fair return standard. If the OEB does not accept this evidence, KWHI requests a new procedural order allowing it to file updated evidence on the financial impact.

64. A $2,195,104 penalty is also entirely disproportionate to the errors that occurred.

65. By way of comparison, the OEB does have the jurisdiction under Section 112.5 of the OEB Act to impose administrative penalties **for violations of enforceable provisions under the OEB Act**. These are not mere accounting errors. These are violations of statutory provisions that are so important, the legislative assembly of Ontario deemed them to be "enforceable provisions."

66. KWHI has reviewed the administrative penalties imposed by the OEB under Section 112.5 over the past five years (i.e. going back to January 2013).[20] From November 25, 2014 to today, the OEB has imposed administrative penalties ranging from a low of $1,500 to a high of $75,000 for breaches of enforceable provisions.

67. The penalty of $75,000 was imposed on SNC Lavlin for operating a generation facility without a generation license for a period ranging over 10 years in contravention of Section 57 of the OEB Act. KWHI has done nothing nearly as egregious as operate its distribution business without an OEB license over a ten year period. Yet the Parties propose a penalty which is 29.27 times higher than what the OEB fined SNC Lavalin.

68. A penalty of the magnitude proposed would constitute an administrative penalty thereby triggering a proceeding under Section 112.5. However, the Parties have not engaged the Act and the associated Regulation,[21] which include a number of criteria that the Board is to consider prior to imposing a penalty including the criterion that the determined amount "shall not, by its magnitude, be punitive in the circumstances."

69. The highest penalty ever imposed by the OEB over the five year period considered was $450,000 imposed on Just Energy on April 4, 2014 in an enforcement proceeding where: (i) **in 132 cases**, Just Energy breached section 22(2) of the *Energy Consumer Protection Act, 2010* by failing to apply the correct cancellation fee for consumers as prescribed under section 23(1) of Ontario Regulation 389/10; and (ii) **in 2,060 cases** Just Energy misled

[20] This includes EB-2017-0088, EB-2017-0005, EB-2016-0282, EB-2016-0200, EB-2016-0180, EB-2014-0259, EB-2013-0394, EB-2013-0392/EB-2014-0393, and EB-2012-0443. Full decisions for the enforcement proceedings can be found at https://www.oeb.ca/industry/rules-codes-and-requirements/enforcement-proceedings.
[21] O. Reg 51/16 Administrative Penalties.

consumers about their cancelation rights in breach of sections 10, 5(1)(i), (xi) and (14) of the *Energy Consumer Protection Act* and Part B, section 1.1 of the Code of Conduct for Marketers and/or the Electricity Retailer Code of Conduct.

70. Just Energy admitted to breaching enforceable provisions in a total of 2,192 different cases. And yet received a penalty which would need to be multiplied by 4.78 times to equal the penalty that the proposed "asymmetric disposition" would have the effect of imposing on KWHI for three errors which KWHI identified, voluntarily reported and is now simply attempting to fix.

71. For the absence of doubt - no Party has alleged, and KWHI has not, violated any enforceable provision of the OEB Act. Yet the Parties appear to believe the OEB may impose a penalty pursuant to its "just and reasonable" rate setting methodology which is neither just nor reasonable.

C.3 Other penalty related considerations and KWHI's offer to pay for the OEB's audit

72. In EB-2014-0072/EB-2014-0301, the OEB ordered that Essex would pay the OEB's costs for an audit of its DVAs. As described above, KWHI's view is that the facts in this case simply do not merit a similar conclusion. The error was self-identified by KWHI and self-reported by KWHI to the OEB, there is no question about the facts and there is no further need to conduct another compliance audit.

73. However, if the OEB elects to approve the Application as proposed by KWHI and to refund over collected amounts attributable to non-RPP customers, and to collect under billed amounts attributable to RPP customers, KWHI is willing to voluntarily compensate the OEB for the costs it has incurred in respect of its now completed audit of KWHI, up-to a maximum of $50,000. KWHI makes this offer in good faith because it believes that its proposal is the right thing to do, and if some Parties believe (mistakenly) that KWHI should suffer a monetary penalty for a genuine and *bona fide* error, then perhaps this will satisfy them.

D. POTENTIAL SYSTEMIC IMBALANCE

74. KWHI would also like to raise its concern of a potential systemic imbalance that the OEB should consider when addressing the application of the policy of "no retroactive ratemaking" to these two flow-through accounts.

75. It is worth noting at the outset that the facts in this case do not trigger this issue, and consequently the concern is more systemic in nature than specific to the Application. It would fall into the category of other potentially relevant considerations.

76. Pursuant to Section 11.3.1 of Chapter 1 of the IESO Market Rules, upon the discovery of "any information previously undisclosed or provided by it to any person pursuant to the market rules was, at the time at which it was disclosed or provided, or becomes untrue, incorrect, incomplete, misleading or deceptive" KWHI "shall immediately rectify the situation and disclose or provide the true, correct, complete, not misleading or not deceptive information to the person to whom the original or currently untrue, incorrect, incomplete, misleading or deceptive information had been disclosed or provided."

77. Simply put: If KWHI identifies an error in its commodity accounts it must immediately notify the IESO of the error. There is no time limitation on this requirement. The IESO's process is to then investigate and correct for any such errors in the next settlement invoice following its investigation.

78. The IESO generally does not apply a principle of "no retroactive ratemaking" when making these adjustments to the commodity accounts. Rather, the IESO will generally correct for all known errors in its next settlement invoice following the completion of an investigation.

79. This creates the potential for a situation where a material error is subsequently identified, the IESO corrects for that error and then the OEB refuses to correct for that error due to the principle of "no retroactive ratemaking". Depending on the nature and magnitude of the error, this could bankrupt a utility.

E. ACCOUNT 1595

80. In the Application, KWHI requested the disposition of a residual amount in Account 1595 (2014) of a debit of $801,123 which included interest to December 31, 2017.

81. In their submissions, OEB Staff accepted the explanation from KWHI from Staff-4 regarding the balance in the account and submitted that they did not take issue with the disposition of the residual amount remaining in Account 1595 (2014).[22] No other Parties have objected to the disposition of Account 1595. KWHI requests that the Panel approve the disposition of the residual amount in Account 1595.

82. In their submissions, OEB Staff suggested that KWHI comment on its billing system capability to separate the GA residual amount applicable to non-RPP customers remaining in the sub-account from the overall remaining balances. KWHI does not currently have the billing system capability to separate the GA residual amount applicable to non-RPP customers remaining in the 1595 sub-account from the overall remaining balances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12TH DAY OF JANUARY, 2018

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A.D. Vellone

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John A.D. Vellone

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[22] OEB Staff Submissions dated December 18, 2017 at p. 3.