



**EB-2006-0095**

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

**AND IN THE MATTER OF** an application by Essex Powerlines Corporation for an Order or Orders approving and fixing just and reasonable distribution rates and other charges effective May 1, 2006;

**AND IN THE MATTER OF** a Notice of Motion by Essex Powerlines Corporation seeking an Order Varying the Decision and Order of the Board in RP-2005-0020 / EB-2005-0363.

**BEFORE:** Paul Vlahos  
Presiding Member

## **DECISION ON MOTION**

June 19, 2006

## **Background**

On April 28, 2006, Essex Powerlines Corporation (“Essex Powerlines”) filed a Notice of Motion (“Motion”) with the Ontario Energy Board (“Board”) in relation to the Board’s Decision and Order dated April 12, 2006 (the “Decision”) in the application by Essex Powerlines for 2006 electricity distribution rates (“Application”), under file number RP-2005-0020/EB-2005-0363.

In its Decision, the Board disallowed Essex Powerlines’ proposal for the Board to treat as common equity a promissory note to its parent, which note was described in Essex Powerlines’ audited financial statements as long term debt bearing an interest rate of zero percent. In its Decision, the Board found that the amount in question should be treated as debt attracting a cost rate of 6.25%, instead of equity attracting a rate of 9.00%, and made corresponding adjustments to the revenue requirement. The Motion seeks a review and an Order varying that element of the Board’s Decision.

Subsequent to the release of the Decision, Essex Powerlines and its parent effected a conversion of the promissory note to common equity. The Motion asks the Board to vary its Decision to recognize this new fact which has come into existence after the release of the Decision. The relief sought by Essex Powerlines consists of according equity treatment to the amount in question, and making corresponding upward adjustments to the revenue requirement and distribution rates.

## **Decision on the Motion**

The Motion does not challenge the factual basis upon which the Board’s Decision was made.

In considering the Motion brought by Essex Powerlines, under Rule 45.01 of the Board’s Rules of Practice and Procedure the Board may determine whether the Motion properly supports a request for review and variance of the Board’s Decision. Rule 45.01 allows the Board to dismiss a motion without holding a hearing if the Board determines that a motion does not meet this threshold.

The Board's Rules of Practice and Procedure, at Rule 44.01, provide that motions to review "shall 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."

The Board acknowledges that there has been a change in circumstances and that new facts have arisen. Therefore, the issue is whether the new facts and circumstances properly support a review of the Decision.

The Board finds that in the context of an historical test year application, a change of facts or circumstances, even if material, that occurs subsequent to the release of the Decision cannot properly support a review of the application when the application is based on the 2004 historical test year and the facts that existed in 2004 are unchanged. An event that first occurs in 2006 and has effect only going forward cannot alter the pertinent facts applying to 2004 or the Board's consideration of an application based on the 2004 historical test year data. The change brought into effect by Essex Powerlines was voluntary and forward looking; it does not reach into the past.

Therefore, the Board chooses to exercise its discretion under Rule 45.01 of the Board's Rules of Practice and Procedure and dismisses the motion brought by Essex Powerlines Corporation.

Should Essex Powerlines wish to pursue the adjustment to its revenue requirement, it will be necessary for it to make an application to the Board on a current or forward test year basis. The standard process for notice, discovery, and hearing would apply to such an application.

DATED at Toronto, June 19, 2006

**ONTARIO ENERGY BOARD**

*Original Signed By*

Paul Vlahos  
Presiding Member