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BY EMAIL and RESS

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Our File: EB20140072

Ontario Energy Board
2300 Yonge Street
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2014-0072– Essex Powerlines IRM – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). The Board, in Procedural Order No. 2, deemed SEC an intervenor in this proceeding and sought submissions from parties on the following questions:

> *Should the Board consider an adjustment to the 2011 and 2012 DVA balances which were disposed on a final basis as part of EPL Corporation's 2014 IRM proceeding (EB-2013-0128)? Would any such adjustments violate the legal requirements concerning retroactive ratemaking?*

These are SEC's submissions in response to the Board's questions.

Overview

Essex Powerlines Corporation ("EPL") claims that due to an accounting error, recently discovered during this proceeding, it incorrectly allocated in 2011 and 2012 costs between accounts 1588 (RPP) and 1589 (Non-RPP). The effect of this is that they are now seeking to recover this year an extra $5,178,750[1] from non-RPP customers, which includes schools, and to refund the same amount to RPP customers, to adjust for the error. These amounts are very significant. For example, for a GS>50 Non-RPP customer, the 2015 total bill impact is 79.35%.[2]

In SEC's submission, the Board must first determine if the proposed adjustments to 2011 and 2012 DVA balances constitute retroactive ratemaking. If they are, then the Board is legally prohibited from making such an adjustment. If they are not, then the Board must determine if it should exercise its discretion to order the adjustment.

[1] Essex_GA Analysis Error Correction 2011-2013_021115_20150211
[2] Essex Powerlines, Response to Board Staff Submissions, dated December 14 2014, at p.2

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Further, SEC submits it is important that the Board determine these two questions separately for parties from whom additional amounts will be collected, and parties to whom a credit will be given.

SEC submits that, because of the rule against retroactive ratemaking, the Board is prohibited from collecting through future rates additional amounts that should have been included in past rates.

On the other hand, the question of the application of retroactive ratemaking is much less clear with respect to applying a credit through future rates for amounts that should not have been included in past approved rates.

This asymmetry means that, even if the Board does have the authority to make the adjustment proposed by EPL, the evidence in this proceeding to date indicates that it may be appropriate to allow RPP customers to be credited for their overpayment, but not to allow Non-RPP customers to be charged additional amounts. EPL itself would be held accountable for the net cost.

Retroactive Ratemaking

The well-established rule against retroactive ratemaking is that the Board can only act prospectively in setting rates, and may not establish rates that recover expenses or costs incurred in the past, and not recovered through the rates established for those past periods.[3]

The principle behind the rule is that rates are presumed to be final, and are just and reasonable until altered. As the Board has previously stated, "the principles of certainty and finality are a necessary component of effective rate regulation."[4] Consumers make consumption decisions based on the price of electricity at any given time, and a utility similarly makes business decisions based on the revenue they expect to receive through those same rates. Further, intergenerational equity concerns exist for consumers, as yesterday's customers may not be today's customers. For customers like schools, while they may not have changed, their students change, and the addition of out of period costs, when not expected, can have a significant effect on operations, as the additional amounts have not been budgeted. Something has to be cut to find the money.

EPL argues that a prospective correction of past errors is not "retroactivity in the strict legal sense".[5] SEC disagrees. It is proposing to do exactly that: charge customers prospectively in respect of past transactions. This makes the rates retroactive in the legal sense, and thus prohibited.[6]

There are exceptions to the rule of retroactive ratemaking: if rates are interim, or if a deferral or variance account "encumbers" past amounts with the expectation of all parties that they will adjusted in the future.[7] Neither of these exceptions is available for the amounts in 2011 and 2012. Both those amounts were cleared for those years on a final basis. They are no longer interim or "encumbered". In essence, "the books are closed" for those years. As the Board properly recognized in the formulation of its question to parties, this differs from the 2013 balances, which were disposed of on an interim basis.

The key recent case on correction of utility accounting errors in a deferral account, after final disposition, decided against allowing the adjustment, but with the judges split on whether to use retroactive ratemaking to reach that conclusion. In *Calgary (City) v. Alberta (Energy and Utilities Board)*[8], the Alberta Court of Appeal majority found that retroactively truing-up a gas commodity deferral account after it had

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[3] *EB-2005-0013/0031, Decision and Order*, dated February 24, 2006 at p.17, citing *Northwest Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* [2006] 1 S.C.R. 140, at para 71

[4] *EB-2013-0119, Decision and Rate Order*, dated March 13 2014, at p.8. *EB-2013-0022, Decision and Orde*r, dated April 25, 2013, at p.10

[5] [5] Essex Powerlines Corporation, Submission of New Evidence

[6] *Northwest Utilities Ltd. v. City of Edmonton,* [1979], 1 S.C.R. 681, at p.691. *City of Edmonton et al. v. Northwestern Utilities Ltd*., [1961] SCR 392, at p.402.

[7] *Bell Canada v. Canada (Canadian Radio Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722. *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764

[8] Calgary *(City) v. Alberta (Energy and Utilities Board),* 2010 ABCA 132 ("*Calgary*")

been already been cleared, to correct for accounting errors, did not constitute retroactive ratemaking. This is because based on the history of the use of the account, and past Alberta Energy and Utilities Board practice, the parties knew that there could be a continued true-up of the gas commodity accounts. The actual label of final or interim was not determinative on those particular facts.[9] The majority determined that the adjustment should not be made because it was unreasonable, not because it was retroactive.

In contrast, here there is no history of further adjustments to final RSVA DVA accounts. The process for disposition of these accounts is clear, and all parties assume it to be final. The Board has previously rejected proposals by distributors for adjustments to other DVA accounts after final disposition.[10] Thus, the argument that the adjustment would be retroactive ratemaking is clearer.

In a set of comprehensive concurring reasons in the *Calgary* case, Mr. Justice Côté took a different view from the majority. He found that the adjustment for the accounting errors would be retroactive ratemaking, and thus prohibited on that basis.[11]

It should be noted that in that case there was also a credit to other customers. However, the decision by the regulator to allow that credit was not appealed.[12] The end result in the case was that the credit to some customers was allowed, but the charge to other customers was not allowed.

The issue of retroactive credits is a somewhat different one. Board has in the past concluded that it has authority to order *credits* going forward for a one-time adjustment to a past overpayment of costs that the regulator finds unjust, and that does not constitute retroactive ratemaking.[13] This should not come as much of surprise, since utilities have a significant asymmetry of information over ratepayers and the Board. They should not be allowed to benefit from their mistakes, which only they have the ability to reveal.

Further, the issue of potential retroactive ratemaking, as applied to credit, has to be viewed in the context of the Board's statutory objectives for electricity. The protection of consumers with respect to price[14] is a key part of the Board's role. SEC submits, a broad interpretation of the retroactivity rule should be applied when determining whether ratepayers can be charged for previous amounts, while a more narrow interpretation is appropriate if the issue is providing ratepayers with a credit.

EPL has argued that this situation is analogous to that in the Brant County Power/Brantford Hydro dispute (EB-2009-0063), in which the Board determined that Brant County Power should have to pay RTS rates for previous periods for which it had originally not been billed. A billing error is not the same thing as a rate error. In the Brant County Power/Brantford Hydro case, the issue was about Board-approved rates that should have been charged, but were not. It was not about whether the rate itself was correct. A correction of a billing error is fundamentally different. It is not retroactive ratemaking, since the result is not basing future rates on past costs. A billing adjustment is about ensuring a customer was charged properly the approved rate. In contrast, EPL is seeking to recover amounts it believes should have been included in previous rates, but were not.

Conclusion

SEC submits that, with respect to the amounts EPL proposes to charge to certain customers as a result of past dispositions being too low, the Board should reject that proposal as retroactive ratemaking. In this respect, it is submitted that the concurring judgment in the *Calgary* case is applicable, as there are no issues of past practice that allow for late true-ups of these accounts. EPL wants to charge customers,

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[9] *Calgary*, at paras 58-60
[10] *EB-2013-0119, Decision and Rate Order*, dated March 13 2014, at p.8
[11] *Calgary*, at para 183
[12] *Calgary*, at paras 235
[13] *EB-2014-0043, Decision and Order*, April 10 2014. *EB-2005-0013/0031. Decision and Order*, February 24 2006, at p.17
[14] *Ontario Energy Board Act, 1998*, s.1(1)

including schools, more than $5 million for errors in final approved rates in 2011 and 2012 caused by incorrect evidence provided by EPL to this Board. This is the classic case in which the retroactivity rule prohibits a further charge.

With respect to the credits to other customers, including residential customers, the issue is less clear. The Board's practice is to allow those credits, although retroactive, on the basis that they are the result of the utility's failure to provide the Board with full and correct information, and it would be unjust for those customers to have to overpay because of a utility error. However, this would appear to be an exercise of the Board's discretion, and this is balanced against the impact on the utility.

SEC recognizes the nature of the error, and that it does not create any windfall for EPL. The proposed adjustments would put EPL in the same financial position as they are now. The issue as framed by EPL is the allocation of amounts not between ratepayers and the utility, but between different classes of ratepayers.

Yet, EPL is not simply an innocent party. It was the one that caused the coding error. Its supplementary evidence makes clear that its procedures were wholly inadequate. It appears that now, for the first time, there may be proper oversight through a review done by a supervisor.[15] Millions of dollars move through the RSVA DVA accounts every year. It is not prudent management for utilities to lack proper mechanisms to verify entries in these accounts. Upon clearance, the Board expects the correct entries have been made, and does not require utilities to provide detailed underlying documentation. Utilities are expected to be able to do the bookkeeping properly.

Further, the Board's mechanistic approach to these Group 1 DVA accounts during IRM relies in part on ensuring that there are no underlying coding or accounting errors that are invisible to the Board. If this process cannot be trusted, the Board and intervenors will, in each IRM proceeding, have to seek detailed accounting records to ensure that the amounts proposed to be cleared are correct. The limited evidence in this proceeding to date points to, at the very least, a lack of oversight by EPL.

Therefore, SEC concludes that the Board has sufficient basis on which to exercise its discretion to order repayment of overcharged amounts to the RPP customers, even though the effect would be to create a loss that would be borne by the utility and its shareholder. SEC expresses no view on whether the Board should exercise its discretion on that basis, but does say that if the Board chooses to do so, it would have sufficient basis on the facts and in law.

All of which is respectfully submitted.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Intervenors (by email)

[15] Essex Powerlines Corporation, Submission of New Evidence, at part 3.