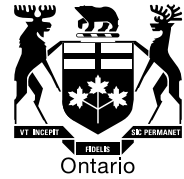


**Ontario Energy  
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**BY EMAIL**

February 23, 2015

Ontario Energy Board  
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[Kirsten.Walli@ontarioenergyboard.ca](mailto:Kirsten.Walli@ontarioenergyboard.ca)

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Essex Powerlines Corporation  
2015 IRM Distribution Rate Application & Smart Meter Recovery  
Board Staff Submission  
Board File Numbers: EB-2014-0072 and EB-2014-0301**

In accordance with Procedural Order No.2, please find attached the Board Staff Submission in the above combined proceeding. This document is being forwarded to Essex Powerlines Corporation and to all other registered parties to this proceeding.

Essex Powerlines is reminded that its Reply Submission is due by February 27, 2015.

Yours truly,

*Original Signed By*

Georgette Vlahos  
Analyst, Electricity Rates & Accounting

Encl.



# **ONTARIO ENERGY BOARD**

## **STAFF SUBMISSION**

### **2015 ELECTRICITY DISTRIBUTION RATES**

**Essex Powerlines Corporation**

**EB-2014-0072**

**EB-2014-0301**

**February 23, 2015**

**Board Staff Submission  
Essex Powerlines Corporation  
2015 IRM Rate Application & Smart Meter Recovery  
EB-2014-0072 and EB-2014-0301**

## **Introduction**

On September 23, 2014, Essex Powerlines Corporation ("Essex Powerlines") filed an application seeking approval for its final smart meter installation costs (EB-2014-0301). On September 26, 2014, Essex Powerlines applied for a Price Cap IR adjustment (EB-2014-0072). The Board consolidated its hearing of the applications.

Essex Powerlines filed its reply submission on January 20, 2015. Therein, Essex Powerlines included new information relating to an error, which it claims to not have known about before the applications were filed or the interrogatory responses were provided. The error relates to the disposition of Essex Powerlines' Group 1 Deferral and Variance Accounts (each, a "DVA") over the 2011, 2012 and 2013 rate years (of which years 2011 and 2012 have already been disposed of, pursuant to a Board order, on a final basis).

The Board issued Procedural Order #2 on February 6, 2015. Stating that it "generally does not accept new information provided in reply submission", the Board ordered that the record of the proceeding be reopened. The Board granted intervenor status and cost awards eligibility to all intervenors of record in Essex Powerlines' last cost of service proceeding, EB-2009-0143 (the "Parties")<sup>1</sup>. The Board invited the Parties to make submissions on the issue of rate retroactivity as it specifically relates to Essex Powerlines' new evidence. The issue was framed by the Board as follows:

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

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<sup>1</sup> Town of Amherstburg, Town of LaSalle, Municipality of Leamington, and Town of Tecumseh ("Representatives of the Streetlight Class"); Energy Probe Research Foundation ("Energy Probe"); the School Energy Coalition ("SEC"); and the Vulnerable Energy Consumers Coalition ("VECC")

The Board also stated that, following the Board's determination of whether or not the 2011 and 2012 DVA balances are within the scope of this proceeding, an opportunity will be afforded to the Parties to examine the new evidence filed by Essex Powerlines.

The purpose of this document is to provide the Board with the submissions of Board staff.

### **Board staff Position**

For the reasons set out below, Board staff submits that the Board should not consider Essex Powerlines' proposed adjustment to the 2011 and 2012 DVA balances. Deferral and variance accounts are treated as "interim" orders – and therefore subject to adjustment – until they are cleared through a final rate order. The 2011 and 2012 DVA balances were disposed of through a final rate order in Essex Powerlines' 2014 IRM proceeding and adjusting them now would compromise the principles of, and violate the rules against, retroactive ratemaking.

### **Background**

On September 26, 2014, Essex Powerlines applied for a Price Cap IR adjustment, for rates effective May 1, 2015 (EB-2014-0072). As part of the application (as originally filed), Essex Powerlines sought approval to dispose of the balances incurred in its Group 1 DVAs, as of December 31, 2013 including projected interest to April 30, 2015. In its prior IRM proceeding (EB-2013-0128), the Board granted Essex Powerlines approval to dispose its Group 1 DVA balances as of December 31, 2012, on a final basis. These balances included the variances accumulated in Essex Powerlines' Group 1 DVAs for the 2011 and 2012 rate years.

Through its reply submission, Essex Powerlines effectively seeks to amend its EB-2014-0072 application as originally filed, in order to correct an error relating to the misallocation of the IESO's global adjustment and Hydro One Network Inc.'s power billings for the 2011, 2012 and 2013 rate years. Essex Powerlines submits that, over this time, it has under-collected approximately \$11.6 million from its non-RPP customers and over-collected that same amount from its RPP customers. Essex Powerlines' breakdown, per year, is as follows:

	<b>Under-collected from Non-RPP (\$)</b>	<b>Over-collected from RPP (\$)</b>
2011	1,561,164	1,561,164
2012	3,617,586	3,617,586
2013	6,419,261	6,419,261
<b>Total</b>	<b>11,589,011</b>	<b>11,589,011</b>

In order to correct the error, Essex Powerlines proposes an adjustment and re-allocation between its RPP and non-RPP customers. The proposed accounting adjustments would be a credit to Account 1588 – RSVA<sub>Power</sub> over a two-year period and a debit to Account 1589 – RSVA<sub>GA</sub> over a four-year period. Thus, the result of the proposed adjustments, if approved by the Board, would be that RPP customers would receive a credit refund for a two-year period, and non-RPP customers would be left with a debit balance owing, payable over four years.

Accounts 1588 and 1589 are ongoing variance accounts. Account 1588 is used monthly to record the net difference between the energy amount billed to customers, including accruals, and the energy charge to a distributor using the monthly settlement invoice received from the IESO, host distributor or embedded generator, including accruals<sup>2</sup>. Account 1589 is used monthly to record the net difference between the global adjustment amount billed to non-RPP consumers, including accruals and, the global adjustment charge (i.e., under charge types as applicable) to a distributor for non-RPP consumers using the monthly settlement invoice received from the IESO, host distributor or embedded generator, including accruals (the global adjustment charge for RPP consumers is not included in this account since the distributor settles this part of the global adjustment charge on its monthly settlement filings with the IESO)<sup>3</sup>.

In its response to questions posed by the Board in Procedural Order #2, Essex Powerlines submits that correcting the error from 2011 and 2012 would not result in a violation of the regulatory principles of retroactive ratemaking. Essex Powerlines asserts that this situation is more akin to the billing error dispute that was at issue in Board proceeding EB-2009-0063<sup>4</sup>. Essex Powerlines also states that if the Board were to not correct the mistake in regards to years 2011 and 2012, ratepayers who overpaid

<sup>2</sup> Accounting Procedures Handbook for Electricity Distributors, Issued December 2011, Page 37

<sup>3</sup> *Ibid*

<sup>4</sup> Decision and Order, EB-2009-0063, August 10, 2010 (re: Brantford Power Inc./Brant County Power Inc.)

would benefit to the detriment of ratepayers that had underpaid and that, in essence, the ratepayers are innocent third parties that should not be advantaged or disadvantaged as a result of a mistake.

In support of its position, Essex Powerlines submits that the amounts in each of 2011 and 2012 are material; that the error is a continuing error into a period which is still interim (i.e. 2013 has not been disposed on a final basis of yet); and that the error relates to variance accounts which it submits are specifically intended to provide protection to both the utility and the ratepayer to variability in costs and revenues. Essex Powerlines suggests that if the error is not corrected, the balances in the current accounts would be settled in the future when there may be a greater adjustment required.

## Submission

Section 36(2) of the *Ontario Energy Board Act, 1998* (the “Act”) authorizes the Board to set “just and reasonable” rates. The power to establish and dispose of amounts contained in deferral and variance accounts, such as the Group 1 DVAs at issue in this proceeding, also arises from the Board’s rate making powers. It is a well-known principle that economic regulatory tribunals like the Board must exercise their rate making authority on a prospective basis (unless the governing statute specifically contemplates otherwise).<sup>5</sup>

Generally speaking a tribunal cannot exercise its authority retroactively by making “out of period” determinations. There are several justifications for this principle: first, both distributors and consumers are entitled to certainty respecting the rates for which they are responsible, and should generally not be made to “top-up” or adjust down those rates after they have already been paid. Second, charging consumers through current rates for out of period costs will likely result in intergenerational inequity, whereby the consumers that were responsible for the costs may not be the same consumers paying the costs. Third, it prevents tribunals from improperly disgorging distributors of any legitimate over-earnings after the fact.

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<sup>5</sup> It should also be noted that the determination of whether a rate is retroactive in nature falls directly within the Board’s expertise. The extent to which any particular rate is retroactive or not is largely dependent upon the facts. It is a clear rate-making issue, and rate making is at the core of the Board’s expertise and its home statute(*Epcor Generation Inc. v. Alberta (Energy and Utilities Board)*, 2003 ABCA 374).

Over the years, the Board has expressed the foregoing sentiments in a number of its decisions. For example, in a 2006 decision which considered the topic in some detail, the majority of the hearing panel of the Board stated:

...the Board does not endorse retroactive ratemaking. The Board must be mindful of the negative implications of retroactive rates. When investors and consumers cannot be assured that final rates are indeed final, the resultant risks increases costs for everyone. In addition, intergenerational inequities arise, with today's consumers paying the costs of past events. In this case, it is not appropriate for either the utility or its ratepayers to bear the implications of a retroactive rate change. To burden the utility would be contrary to the regulatory compact. To burden the ratepayers would be wrong, especially given the length of the retroactivity.<sup>6</sup>

As such, when an issue is raised through an application which suggests that a party is requesting to adjust amounts already considered through previous final rate orders, there is a concern about rate retroactivity since a final rate order may not be varied. And, while there are a limited number of exceptions to the rule against retroactivity<sup>7</sup>, Board staff submits that none of them apply in this case. It is also worth noting that the Act provides that balances in deferral and variance accounts should be reviewed by the Board at least annually and, from this, the Board can infer that there is a policy against adverse impacts and inter-generational inequity that might be caused by out of period rate adjustments.<sup>8</sup>

In this proceeding, Essex Powerlines is requesting that the Board approve the proposed adjustment and re-allocation between RPP and non-RPP customers of approximately \$11.6 million in total. The total amount attributable to the 2011 and 2012 rate years is \$5,178,750.

Board staff agrees with Essex Powerlines' claim that the amounts in each of 2011 and 2012 are material. Board staff notes that Essex Powerlines has a distribution revenue requirement of \$11,977,909 as approved in its previous cost of service proceeding (EB-

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<sup>6</sup> Decision and Order, EB-2005-0013/0031, February 24, 2006 (re: Great Lakes Power Limited)

<sup>7</sup> For example, deferral and variance accounts do not violate the rule against retroactivity because they are identified by the Board on a prospective basis. Although the exact amounts ultimately held in the deferral accounts are not known prospectively, the Board identifies up-front that the revenues/costs that enter these accounts are "encumbered", and subject to future disposition. Deferral accounts are regarded as "accepted regulatory tools" to be operated as part of rate-setting powers.

<sup>8</sup> Decision and Order, EB-2005-0013/0031, February 24, 2006 (re: Great Lakes Power Limited)

2009-0143). This results in a materiality threshold is approximately \$59,889. Board staff disagrees, however, with Essex Powerlines' submission that the error is akin to a billing error and that it should be characterized as a continuing error into a period which is still interim. On the contrary, the error at issue is properly characterized as an "accounting error". This is because the evidence on the record indicates that Essex Powerlines accurately billed its customers in 2011 and 2012 based on the Board-approved rates. In other words, one could only characterize this as a billing error had Essex Powerlines inaccurately billed its customers with a different rate than that required by the Board's rate order, or had it not charged any rate at all. Moreover, in Board staff's view, the rules against retroactivity are not impacted by the fact that an accounting error has continued from a prior period of rate finality into a period in which rates are still interim. Finally, Board staff submits that even if the Board finds this error to be a billing error, Essex Powerlines can only go back two years from the date it became aware of the error.<sup>9</sup>

In this proceeding, the Board has learned that the amounts recorded in Essex Powerlines' Group 1 DVAs for 2011 and 2012 were incorrect after it had disposed of the balances through a final rate order. This scenario has occurred before the Board in the past and, depending on the circumstances, the Board has dealt with this situation in a number of ways.

In the Board's Decision and Order in the EB-2009-0113 proceeding<sup>10</sup>, the utility sought a retrospective change to the balance of a deferral account that had been cleared by the Board when the utility later discovered that it had made an error in its entries into the account, and had thereby not recovered all of the money that it should have had the error not been made. Citing the rule against retroactivity, the Board denied this request, although it held that making correct entries into the deferral account was the utility's responsibility and that had the error resulted in a loss for rate payers it might have allowed the correction. The Board indicated that it is not rational to conclude that the Board's desire to maintain the use of deferral accounts suggests that the final disposition of deferral accounts is anything less than final. The Board stated that it is not driven by a need for a symmetrical treatment of ratepayers and utilities in situations where correction of utility mistakes is required. The Board stated that the utility has

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<sup>9</sup> Retail Settlement Code, Page 46, Section 7.7.7 states that: "Where the distributor has under billed a customer or retailer, the maximum period for which the distributor is entitled to be paid is 2 years. Where the distributor has over billed a customer or retailer, the maximum period of over billing for which the distributor or retailer is entitled to be paid is 2 years."

<sup>10</sup> Decision and Order, EB-2009-0013, September 8, 2009 (re: North Bay Hydro)



control of its books and records and has the responsibility to ensure mistakes do not occur. For this reason, the Board stated that it could find in favour of the ratepayer in certain situations and not find in favour of the utility if the utility was in the same situation.

In the EB-2011-0038 proceeding<sup>11</sup>, the utility sought to retroactively alter the entries in a deferral account where an error was discovered after the accounts were cleared by a final order of the Board. The utility sought to re-state the balance in a deferral account by almost \$2 million on account of entry errors it had made over the previous three years. That account had been cleared by a final rate order in each of those three years. The Board approved the utility's proposal, and the retroactive adjustment was made.

In the Board's Decision and Order in the EB-2010-0090 proceeding<sup>12</sup>, the Board allowed for an after the fact (i.e. after a final rate order had cleared the deferral accounts) correction to deferral account balances where an entry error by the utility resulted in one class of ratepayers improperly paying for costs that were properly the responsibility of another class of ratepayers.

The Alberta Court of Appeal reached a similar conclusion to the Board's Decision and Order in EB-2009-0113 in *Calgary (City) v. Alberta (Energy and Utilities Board)*<sup>13</sup>. In that case, the Court of Appeal overturned a decision by the tribunal which had permitted a utility to correct errors it had made in recording deferral account balances. The Court held that the errors were entirely attributable to the utility, and it should not be permitted to recover revenues lost on account of the errors after the fact. Board staff notes that a key issue for the Court was whether the parties were aware that after the fact adjustments might be made from time to time.

In the Board's Decision and Order in the EB-2014-0043 proceeding<sup>14</sup>, the Board permitted the utility to refund over \$10 million to customers (an amount that had not previously been paid out due to the utility's own unintentional error). Acknowledging that the utility's adjustment would be out-of-period, the Board stated "there is no disadvantage to customers from this approach ... [a]n out-of-period adjustment can be

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<sup>11</sup> Decision and Order, EB-2011-0038, January 20, 2012 (re: Union Gas Limited)

<sup>12</sup> Decision and Order, EB-2010-0090, July 6, 2011 (re: Hydro Hawkesbury Inc.)

<sup>13</sup> *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132

<sup>14</sup> Decision and Order, EB-2014-0043, April 10, 2014 (re: Enbridge Gas Distribution Inc.)

justified if it ensures a utility does not profit on account of its own errors.”

Board staff submits that what is most relevant in this proceeding is that the amounts brought forward by Essex Powerlines for disposition contain two years’ worth of balances which were disposed by final rate order (and one year which has yet to be disposed); and, there is no evidence on the record that indicates there may have been any expectation by, or notice to, the utility’s stakeholders (the Board, consumers, shareholders, etc.) regarding possible future adjustments to the 2011 and 2012 balances, once they were disposed on a final basis.

Essex Powerlines ultimately submits that if the Board does not approve the proposed adjustment to the 2011 and 2012 Group 1 DVAs, ratepayers who overpaid would benefit to the detriment of ratepayers that had underpaid. In Board staff’s view, short of requiring Essex Powerlines’ shareholder to reimburse (whether in whole or in part) ratepayers who overpaid, there is nothing the Board can do in this proceeding to correct that. If the Board were to accept Essex Powerlines’ proposal, it would be partaking in retroactive ratemaking whereby Essex Powerlines current and future customers may incur costs or enjoy credits not generated by them, but by the 2011 and 2012 generation of Essex Powerlines’ customers.

In the alternative, if the Board finds the error to be a billing error, then the Board could decide to order Essex Powerlines to correct the error and adjust the charges to customers, subject to the limits set out in section 7.7.7 of the Retail Settlements Code.

Notwithstanding Board staff’s legal analysis on retroactivity, staff is concerned with the impact this error has had on a significant number of customers. In the event that the Board decides to remedy the error in some fashion, Board staff recommends that the Board could bi-furcate this aspect of the proceeding, including the issuance of a separate Notice.

Finally, Board staff submits that, no matter how the Board proceeds, directing Essex Powerlines to fund the entire amount that is the subject of the 2011 and 2012 rate years (approximately \$5 million) would be potentially harmful to Essex Powerlines’ financial position. As noted previously, Essex Powerlines’ materiality threshold is approximately \$60,000.

All of which is respectfully submitted