

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

AND IN THE MATTER OF an application by Essex Powerlines Corporation for an order approving a Smart Meter Disposition Rate Rider (“SMDR”) and a Smart Meter Incremental Revenue Requirement Rate Rider (“SMIRR”), each effective January 1, 2015;

AND IN THE MATTER OF an application by Essex Powerlines Corporation for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2015.

REPLY SUBMISSIONS OF ESSEX POWERLINES CORPORATION

Introduction and Background

1. These are the reply submissions of Essex Powerlines Corporation (“**EPL**”) to the submissions of Energy Probe, School Energy Coalition (“**SEC**”), the Vulnerable Energy Consumer’s Coalition (“**VECC**”) and Board Staff.
2. EPL has requested the Board permit EPL to correct both the accounting error and the impact of the error that was included in customer bills commencing May 1, 2014. EPL is of the view such a request does not offend the treatment against rate retroactivity. Nor does the request offend the principles of the Retail Settlement Code (“**RSC**”). Further, a complete correction eliminates the potential future problem of continuing the balances until final disposition of the accounts.
3. It is clear that the Board’s treatment,¹ and that of other regulators,² of retroactivity and errors brings together a number of competing principles which must be weighed against

¹ Ontario Energy Board, see for example: EB-2009-0063, Decision and Order (“**Brant County**”). EB-2010-0090, Supplemental Partial Decision and Order (“**Hydro Hawkesbury**”). Re Natural Resource Gas Ltd., Board Review Decision, April 19, 2004. *Natural Resource Gas Ltd. v. Ontario Energy Board* [2005] OJ No. 1520 (Div. Ct.) (“**NRG**”). EB-2005-0013/0031, Decision and Order, (“**Great Lakes**”). EB-2009-0113, Decision and Order (“**North Bay**”).

² See for example: *Re Section 101 of the Public Utilities Act* (1998) CanLII 18064 (NL C.A.); *Epcor Generation Inc. v. Alberta (Energy and Utilities Board)*, 2003 ABCA 374 (CanLII).

one another in consideration of the specific circumstances presented to the regulator. As such, it is important that the particular facts in the current situation are understood.

4. During the Smart Meter and IRM application, EPL discovered an error in the way costs were allocated to two variance accounts from the Independent Electricity System Operator (“IESO”) Global Adjustment and the Hydro One Networks Inc. power bills. The allocation errors occurred during the years 2011, 2012 and 2013. The 2011 and 2012 amounts were recorded but did not impact customer bills until May 1, 2014 – the current effective rate order. The 2013 balance has not impacted customer bills.
5. On February 26, 2015, EPL filed a request with the Board to immediately cease collecting the rate rider which was to dispose of the balances from the years 2011 and 2012 which EPL had begun to collect from customers for electricity consumed on or after May 1, 2014. This has mitigated the extent of any actual impact felt by the customers. The Board, on February 27, 2015 granted an order to prevent the error from being applied to bills on or after February 1, 2015.
6. Further, while the Board asked 2 specific questions, EPL is providing some additional context as that is relevant to any further consideration of these matters. In the end, EPL is requesting the Board issue a decision and order:
 - a. Approving the correction of the account balances for the years 2011, 2012, and 2013;
 - b. Approving the refund of the over-billed amount from May 1, 2014 to January 31, 2015 of approximately \$7,095,054 to RPP customers over 2 years ; and
 - c. Approving the collection of the under-billed amount from May 1, 2014 to January 31, 2015 of approximately \$6,448,046 from Non-RPP customers over 4 years.
7. If a new or additional deferral/variance accounts is required to implement the above relief, EPL would request such accounts be ordered by the Board.
8. EPL believes such a resolution is consistent with regulatory principles, corrects the errors and does not cause undue customer impacts. EPL acknowledges that the attached rate generator information has not been subject to cross-examination but are provided to support the contention that EPL’s request does not violate the principle of retroactive ratemaking.

2011 and 2012

9. It is important to note that during each of the years, 2011, 2012 and 2013 there was no actual collection error in the amounts from customers with respect to the allocation error. Customers were paying the correct amount until May 1, 2014.
10. In EB-2012-0123, EPL had applied for disposal of the Group I DVA balances. EPL’s Group 1 Account balances, including interest until April 30, 2013, was projected to be \$263,305 which represented a credit of \$0.0005/kWh. Given the credit amount was

below the threshold, the Board determined that no disposition of the accounts was required at that time.³

11. A credit balance of \$4,592,942 for the Group 1 DVA was approved for disposition by the Board and was to be disposed of over 1 year effective May 1, 2014.⁴
12. The 2011 and 2012 original amounts and the corrected amounts for accounts 1588 and 1589 are summarized below:

Table 1 – 2011 & 2012 Balance Summary

2011 & 2012 Balances for Disposition in 2014 (excluding interest)		
	1588 Cost of Power	1589 Global Adjustment
2011 & 2012 Balances Approved by the Board	9,554,493	(8,731,842)
2011 & 2012 Balances Corrected & Proposed by EPL	2,664,924	(305,036)

13. The 1588 cost of power account disposition approved for 2014 included amounts owing of \$9,554,493 (excluding interest) and the 1589 Global Adjustment account disposition approved for 2014 was a refund of \$8,731,842 (excluding interest).

2013 and 2014

14. The 2013 1588 and 1589 amounts proposed originally and the proposed corrected amounts are summarized below:

Table 2 - 2013 Balance Summary

2013 Balances for Disposition in 2015 (excluding Interest)		
	1588 Cost of Power	1589 Global Adjustment
2013 Balances Originally Proposed to the Board	(7,027,455)	9,078,803
2013 Balances Corrected & Proposed by EPL	(4,442,136)	6,719,097

15. The evidence requested by the Board on February 6, 2015 and submitted by EPL on February 11, 2015 included 6 different rate models and corresponding bill impacts.
16. The bill impacts provided to the Board on February 11, 2015 reflected significant increases as high as 89% for disposition over one year and as low as 37.52% for disposition over 4 years for the GS>50 kW non-RPP rate class, for example. These percentages are high because of the transition from a negative to a positive rate rider and the fact the 2013 allocation adjustment was included. However, the 2013 balances have yet to be disposed of through a final order so there is no real impact for customers.

³ EB-2012-0123, Decision and Order, April 4, 2013, page 8.

⁴ EB-2013-0128, Decision and Rate Order, March 13, 2014, pages 5 and 6.

This reduces the bill impact considerably for customers as does the issuance of the order on February 27, 2015.

17. EPL has completed an additional analysis and proposal for the Board to consider and to clarify what the real impact is to the customers that were most affected. To accomplish this, EPL corrected the errors utilizing the Board rate model as if the error had not occurred to determine where EPL should have been in this process for the filing of the 2015 IRM rates. The results of which are shown in the corrected and current actual variance account balances in Tables 1 and 2 above. EPL has not included interest in these calculations and any interest would be calculated in accordance with the Board's decision.
18. To complete this additional analysis, EPL started with the 2012 opening balances and corrected the RPP and non RPP split of the global adjustment and during our review process it was determined that the 1590 Recovered Regulatory Asset Balances rate rider was not included in the approved model for the 2014 filing. Also, as included in the interrogatory responses to Board Staff, the disposition amounts for 2012 had not been moved to the 1595 account. The adjusted rate model continuity schedule for all these changes is shown below. The Board should note that the closing principal balance for 2013 that would have been proposed for disposal in 2015 rates for the 1588 (\$2,652,918) and 1589 (\$271,051) accounts are more reasonable. Also note, for the purposes of deriving the actual variance account balances and, therefore, the corrected 2015 Total Claim, we have adjusted the Principal Disposition amounts showing for 2014 since this rate rider has been discontinued as approved by the Board on February 27th, 2015 and therefore has an impact on the corrected 2015 Total Claim.

Table 3 – Corrected Continuity Schedule

Account Descriptions	Account Number	2012			2013			2014		2015 Claim	Total Claim
		Other 1 Adjustments during Q1 2012	Other 1 Adjustments during Q2 2012	Closing Principal Balance as of Dec-31-12	Opening Principal Amounts as of Jan-1-13	Transactions Debit/ (Credit) during 2013 excluding interest and adjustments ²	Closing Principal Balance as of Dec-31-13	Principal Disposition during 2014 - instructed by Board	Closing Principal Balances as of Dec 31-13 Adjusted for Dispositions during 2014		
Group 1 Accounts											
LV Variance Account	1550	708,191		726,325	726,325	609,899	1,336,224	537,752	798,472		798,472
Smart Metering Entity Charge Variance	1551					46,737	46,737		46,737		46,737
RSWA - Wholesale Market Service Charge	1590	(3,573,954)		(2,578,289)	(2,578,289)	(802,533)	(3,380,793)	(2,748,999)	(631,805)		(631,805)
RSWA - Retail Transmission Network Charge	1584	347,134		(795,852)	(795,852)	(186,637)	(982,539)	279,864	(1,262,403)		(1,262,403)
RSWA - Retail Transmission Connection Charge	1586	(1,267,076)		(926,718)	(926,718)	(1,336,054)	(2,262,772)	(999,713)	(1,293,059)		(1,293,059)
RSWA - Power (excluding Global Adjustment)	1588	9,554,488	(5,178,750)	2,664,924	2,664,924	(12,006)	2,652,918	7,036,054	(4,442,136)		(4,442,136)
RSWA - Global Adjustment	1589	(8,731,842)	5,178,750	(305,036)	(305,036)	576,087	271,051	(6,448,046)	6,719,097		6,719,097
Recovery of Regulatory Asset Balances	1590	(1,684,689)		(1,684,689)	(1,684,689)	0	(1,684,689)	0	(1,684,689)		(1,684,689)
Disposition and Recovery/Refund of Regulatory Balances (2008) ¹	1595			0	0				0		0
Disposition and Recovery/Refund of Regulatory Balances (2009) ¹	1595			0	0				0		0
Disposition and Recovery/Refund of Regulatory Balances (2010) ¹	1595			0	0				0		0
Disposition and Recovery/Refund of Regulatory Balances (2011) ¹	1595			0	0				0		0
Disposition and Recovery/Refund of Regulatory Balances (2012) ¹	1595			0	0				0		0
RSWA - Global Adjustment	1589	(8,731,842)	5,178,750	(305,036)	(305,036)	576,087	271,051	(6,448,046)	6,719,097		6,719,097
Total Group 1 Balance excluding Account 1589 - Global Adjustment		4,084,039	(5,178,750)	(2,594,270)	(2,594,270)	(1,630,644)	(4,274,914)	4,193,938	(8,468,882)		(8,468,882)
Total Group 1 Balance		(4,647,743)	0	(2,899,308)	(2,899,308)	(1,104,557)	(4,003,853)	(2,254,078)	(1,749,785)		(1,749,785)
LRAM Variance Account	1588			0	0			0	0		0
Total including Account 1588		(4,647,743)	0	(2,899,308)	(2,899,308)	(1,104,557)	(4,003,853)	(2,254,078)	(1,749,785)		(1,749,785)

19. The corrected claim for 1588 and 1589 is lower than what was submitted to the Board on February 11, 2015. The total deferral account disposition amounts now show that, in total, the disposition is an overall credit in the amount of \$1,749,795.
20. Despite the overall credit, we must consider the fact that the 1588 and 1589 variances are settled with different types of customers (RPP and non-RPP). The claim (not including interest) for 2015 rates for account 1588 is a refund of \$4,442,136 and for account 1589 an amount owing of \$6,719,097. These amounts essentially reverse the effects of the incorrect billing that occurred during 2014 for the RPP and non RPP customers as a result of the accounting error.
21. Also, since EPL eliminated the 2014 rate rider, we have reduced the disposition amount in the model above for the actual amounts disposed. This affects all variance accounts but the most significant impact is on the RPP and non RPP customers. See Table 4. To illustrate the impact of this change, we have included the rate impacts that would result from our revised model. These include a 4 year disposition for non RPP customers and 2 year for RPP customers. The non RPP customers would now see a Total Bill increase in the 4% range that is well under the Board's materiality limit of 10%. This is more reasonable and provides assurances to the Board that customers are not significantly impacted.

Table 4 – Customer Bill Impact Summary

Customer Bill Impact Effective May 1st, 2015						
2015 RPP Bill Impacts - Over 2 Years						
Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	(6.44)	-21.01%	(7.84)	-6.52%
GS-50	2,000	0	(16.68)	-23.64%	(19.76)	-6.78%
GS50 - 2,999	1,198,113	2968	(9,922.40)	-71.52%	(12,932.50)	-7.28%
UMSL	2,000	0	(15.66)	-20.10%	(20.81)	-6.27%
Sentinel Lights	36	0.1	(0.26)	-5.94%	(0.34)	-3.57%
Street Lights	36	0.1	(0.24)	-4.82%	(0.27)	-2.93%

Customer Bill Impact Effective May 1st, 2015						
2015 Non RPP Bill Impacts - Over 4 Years						
Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	6.20	20.23%	5.57	4.56%
GS-50	2,000	0	14.92	21.14%	13.74	4.64%
GS50 - 2,999	1,198,113	2,968	8,184.18	58.25%	7,796.58	4.31%
UMSL	2,000	0	15.73	20.12%	14.66	4.34%
Sentinel Lights	36	0.1	0.33	7.53%	0.33	3.44%
Street Lights	36	0.1	0.31	7.35%	0.31	3.26%

22. The nature of the correction of the errors is different than other cases that have come before the Board in that EPL has not been enriched or deprived by these mistakes. Rather EPL is simply trying to correct a cost allocation error that ultimately is impacting customers and which can be done with reasonable impacts to the customers involved.
23. Accounting entries are required to correct deferral account balances. The rate riders issued from the incorrect account balances in the 2014 IRM filing are wrong and should be corrected.
24. The accounting error affected two different classes of customers on a flow through charge. These variance accounts are specifically designed to protect both the customer and the distributor.

Retroactivity: Does the issuance of the final order EB-2013-0128 preclude correction?

25. EPL submits that there are exceptions to the rule against retroactivity and the list of exceptions is not closed. For example, the concept of a variance account is an exception or the Board's Z-factor process is retroactive ratemaking as utilities must incur costs.
26. EPL would submit that the relief sought is not inconsistent with the principle of rate retroactivity but rather the other principles guiding the Board in the present situation necessitate correction.
27. The other principles or facts that support correction include:

- a. the OEB Act, section 78(3), obligates the rates to be “just and reasonable” and the existing rates were based upon an error which EPL submits should be corrected;
 - b. the cost of power variance accounts, which includes the accounts in question, are intended to be a “pass-through” without profit for the utility;
 - c. the Board’s policy in the RSC is to permit a correction to cover a two year period for customers; and
 - d. retroactivity is ultimately a fairness issue balancing the interests of customers and the utility.
28. The Board’s statutory mandate is to establish just and reasonable rates. EPL would submit that an error discovered which impacts rates currently in effect and having commenced less than 1 year ago should be corrected. To do otherwise would not be “just” in the circumstances.

78(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor’s obligations under section 29 of the *Electricity Act, 1998*. 2009, c. 12, Sched. D, s. 12 (1).⁵

29. The purpose of the variance accounts is to track the cost of power and ensure the customer pays the correct amount for the power consumed. Commodity is not intended to enrich or deprive a utility and so the Board should, in considering the recourse, look to satisfy these objectives.
30. It is instructive to consider the language in the Sub-section 78(3.3) of the OEB Act which mandates, note the use of the word “shall”, that rates reflect costs.

(3.3) In approving or fixing rates under subsection (3.1),

(a) the Board shall forecast the cost of electricity to be consumed by the consumers to whom the rates apply, taking into consideration the adjustments required under section 25.33 of the *Electricity Act, 1998* and **shall** ensure that the rates reflect these costs; and⁶

31. EPL would submit the failure to correct the allocation error and the consequent bill impacts would deviate from the principle provided in the statute quoted above. There may be situations where the error is so removed that it should not be corrected, but given the rates have only been in effect for a few months, this is not such a situation.

⁵ *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, section 78(3).

⁶ *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, section 78(3.3).

32. EPL submits the RSC provides useful guidance to the present situation and provides for a two year period for which errors are to be corrected. The rationale for the applicability of the RSC is provided below.
33. The Board, in Brant County, specifically considered the issue of retroactivity and made this observation:

Doctrinally, in the context of utility rate regulation, the retroactivity principle is described by Penning in this way:

"...the rule is concerned more with issues of fairness, both to customers and to utility shareholders. The customer-related fairness issue is often referred to as the 'inter-generational equity' problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to attract and maintain reasonably-priced equity investment in a utility, shareholders require some certainty that matters already dealt with by the regulator have some degree of finality associated with them."⁷

34. The intergenerational equity concern is not significant given the recency of events. The general concern of fairness includes factors discussed below such as arbitrariness and the principle enunciated for "billing errors" provided in the RSC. In the present situation, one group of customers has been over-billed and the second group of customers has been under-billed. To date, EPL has been held whole in respect of the allocation error.
35. As such, to correct the imbalance between customers, EPL has suggested that the correction be made to refund the amount over two years and collect the amount that was under-billed over four years.
36. EPL would submit that leaving the status quo correction, or even a partial correction, would not be appropriate in the circumstances. The status quo is based upon an error and would leave some ratepayers being advantaged and some being disadvantaged and incorrect balances in the accounts to be disposed of at some future date which may be unfair to those future customers.
37. A partial correction would presumably take the utility from its current position of being whole and place it into a deficiency if forced to refund but prohibited from recovering. This would be unfair as it would compound the existing error by acknowledging the error but ignoring the solution.

Do the Provisions of the Retail Settlement Code apply?

⁷ OEB, EB-2009-0063, Decision and Order, paragraph 73, quoting from *Re Section 101 of the Public Utilities Act* (1998) CanLII 18064 (NL C.A.).

38. EPL submits the RSC should apply or the principles of the RSC should apply. If the Board determines the “error” is not a “billing error”, then EPL would submit the expectations regarding recovery/repayment espoused by the RSC could be transferred to other errors.
39. Board Staff has submitted that the “error” is not a “billing error” but it is rather an “accounting error”. Board Staff goes on to submit that the situation does not qualify for any exceptions to the rule against retroactivity. Board Staff take the position that any correction would violate the rule against retroactivity. As such, Board Staff is suggesting that a customer, in receipt of his January bill, knowing there is an error in the bill has no recourse. What if the customer did not pay the amount that was in error? Would the utility be within its rights to pursue payments that are owed as a result of an acknowledged error? It’s EPL’s submission, such a result would be inappropriate.
40. EPL understands Board Staff’s position to be that the rate order was final; the approved rates were applied to the correct consumption quantities so there is no “billing error”. This ignores the inextricable link between the allocation and the customer’s bills.
41. As such, EPL submits that failure to correct the allocation error and the incorrect amounts paid is not a proper result. If the allocation error is not corrected then it will be perpetuated until the deferral and variance account is finally disposed of as the amounts in the account do not disappear. This would have an unpredictable result at that time. Further, correcting the accounting angle without correcting the billing error would be fixing half the problem.
42. As noted the RSC does not define billing error. It is interesting that the Retail Settlement Code excludes errors which have involved Measurement Canada from being part of the billing errors addressed by the RSC. Measurement Canada – who has responsibility for the acceptability and accuracy of meters – has specific provisions for situations where there has been inaccurate measurement of the energy consumption. That is not an issue in the present situation.
43. EPL notes that the RSC does not speak to the cause of the erroneous bill but rather speaks to the issue of “under-billed amounts” and “over-billed amounts”. EPL submits the wording of the RSC is sufficiently broad to cover any situation which has resulted in either over or under billing customers.
44. EPL would note that the Board, in Brant County, stated:
- “[83] For the reasons indicated above, the Board does not believe that the rule against retroactivity prevents the Board from correcting certain billing errors.”⁸
45. Section 7.7.7 provides a two year limitation period which permits the over or under billing to be corrected. As noted, customers were actually impacted for electricity consumed

⁸ EB-2009-0063, Decision and Order, page 23, paragraph 83.

since May 1, 2014 – less than 10 months ago and well under the two year period of the RSC.

Arbitrariness

46. EPL would note that Energy Probe has listed several reasons as to why it agreed with EPL's request and agrees with the comments made by Energy Probe.⁹ Of note, the Energy Probe asserts that failing to correct the situation would be arbitrary. EPL agrees and asserts that arbitrary results are to be avoided.
47. If the amounts had not been disposed of in EB-2013-0128, but rather were carried over then there would be no question regarding the ability to fully correct the error. As such, the right to recovery in this case is dependent upon the fact that the balances in the other variance accounts were sufficient to warrant disposition. Had the balance been less than the threshold as it was the prior year, there would be no issue about recovery.
48. The correction of the error removes the arbitrariness of the discovery of the error and the issue of the impact of the various deferral/variance account balances.

Asymmetry – Customer and Utility

49. EPL submits that prior cases are different where the Board has determined that a utility is not permitted to recover for under-billing or must return over-billed amounts. In those cases, the utility was either not being permitted to collect something it had omitted to collect or had inadvertently collected amounts to which it was not entitled.
50. For example, North Bay was not permitted to recover where it had failed to correctly bill customers. The Board prevented North Bay from improving its then present financial position – there was no evidence of financial distress on the part of the utility – and collect the under-billed amounts.
51. Where the utility was enriched by over-collecting, in the aggregate, the Board has required the utility to refund such amounts. Therefore, the Board did not permit the utility to retain the benefit of the error.
52. In the present situation, EPL has collected the appropriate amounts in the aggregate. The utility was neither enriched nor was it deprived of its appropriate recovery as it relates to the allocation error.
53. The error comes from the allocation split in the two sub-accounts. As such, the over/under recovery from the various customers is inextricably linked together. To provide an asymmetric response would require de-linking the allocation.
54. EPL submits that such a treatment would be to compound the existing error with a correction that would create another error. Further, an asymmetric treatment would put

⁹ Energy Probe Submissions, February 23, 2015, page 3.

EPL into a financially worse position – it would be financially harmed by such treatment. EPL submits that a regulator’s decision should not result in harm.

55. If the Board decides that an asymmetric resolution is the responsibility of EPL, this would be a significant cash flow impact to EPL. This would negatively affect all customers.
56. What is clear is the rather unique factual scenario which has unfolded in the present circumstances. In most cases involving billing errors or other errors, the utility has either been enriched by collecting revenue which it was not entitled to collect or seeking to recover revenue that it had in error omitted to collect. However, in the present situation, EPL is currently whole, having collected the proper amount to remit to the IESO in respect of the Global Adjustment but having allocated the charges incorrectly to its customers.

Summary

57. EPL would note that SEC has jumped to the conclusion that EPL was not an innocent party. With respect EPL disagrees, while there was an error, there is no evidence to assert the level of blameworthiness that SEC has in its submissions. Mistakes may happen without negligence and the law, especially for regulated industries, recognizes that a person can be duly diligent yet still have the misfortune of committing the *actus reus* of an offence. However, where the person took reasonable steps in the circumstances the law does not convict and punish the person.

58. EPL requests that it is proper to fix the accounting errors that affected the applicable rate riders and that customers’ bills should be corrected for both the amounts that were over or under billed. Since this error affected two different customer types and EPL itself did not gain by this error, then it is proper and fair to correct both customer types and not subject EPL to any asymmetric risk.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ESSEX POWERLINES CORPORATION
By its Counsel

A handwritten signature in black ink, appearing to read "Scott Stoll", written in a cursive style.

Scott A. Stoll