



EB-2014-0301
EB-2014-0072

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 to be 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.

BEFORE: Marika Hare
Presiding Member

Allison Duff
Member

PARTIAL DECISION and PROCEDURAL ORDER No. 3
March 25, 2015

Background

On September 23, 2014, Essex Powerlines Corporation (Essex Powerlines) filed an application seeking approval for its final smart meter installation costs and on September 26, 2014, Essex Powerlines applied for an annual Price Cap IR adjustment to rates for the 2015 rate year. The Board decided to hear these applications together.

The Board approved the Vulnerable Energy Consumers Coalition (VECC) as an intervenor and found VECC eligible to apply for an award of costs in relation to Essex Powerlines' request for smart meter cost recovery.

Board staff and VECC filed interrogatories and submissions. In its reply submission, Essex Powerlines included new information relating to an error that it claimed not to have known about before the application was filed or the interrogatory responses were provided. As framed in the Board's Procedural Order No. 2:

The error relates to the allocation of the Independent Electricity System Operator's ("IESO") Global Adjustment and Hydro One Network Inc.'s power billings for the 2011, 2012 and 2013 rate years. The allocation affects Regulated Price Plan ("RPP") and non-RPP customers (i.e. those purchasing electricity from a retailer or making individual arrangements for power procurement). To correct the error, Essex Powerlines proposed an adjustment and re-allocation between RPP and non-RPP customers of approximately \$11.5 million. The proposed accounting adjustments are a credit to Account 1588 and a debit to Account 1589, both variance accounts. As a result of these proposed adjustments, some customers would receive a credit refund and others would have a debit balance owing.

The Board stated that it generally does not accept new information provided in reply submissions and, therefore, reopened the record of this proceeding. Procedural Order No. 2 also required Essex Powerlines to file the following new evidence:

- Any relevant material from prior Board proceedings
- Details regarding the source of the error
- The process followed to determine the correcting accounting entries
- Calculations supporting the correcting accounting entries for each year separately (2011, 2012 and 2013)
- Any required changes to the Rate Generator Model
- The proposed bill impacts and rate mitigation strategy if the errors from all 3 years are corrected collectively (2011-2013)
- The proposed bill impacts and rate mitigation strategy if only the errors from 2013 were corrected

With this broader potential impact on rates than had been anticipated when the application was received, 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 Board invited the intervenors and Board staff to consider and provide written submissions on the following questions:

*Should the Board consider an adjustment to the 2011 and 2012 DVA (Deferral and Variance Account) 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?*

Finally, the Board indicated that following its determination of whether or not the 2011 and 2012 DVA balances are within the scope of this proceeding, an opportunity would be afforded to the intervenors and Board staff to examine the new evidence filed by Essex Powerlines.

On February 11, 2015, in response to Procedural Order No. 2, Essex Powerlines submitted the breakdown, per year, as follows:

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

Subsequently, Essex Powerlines submitted a request to cease the rate riders related to the disposition of the 2011 and 2012 DVA balances yet to be billed to customers. Although the error continued in 2013, disposition had not been ordered by the Board and no rate riders had been established. Essex Powerlines indicated that as the existing rate riders were partly based on the error, ceasing the rate riders would mitigate any further impacts of the error until the Board determined the appropriate remedy. The rate riders had been approved as part of Essex Powerlines' 2014 IRM Decision (EB-2013-0128), to commence on May 1, 2014 and terminate on April 30, 2015. The Board

accepted the request and issued an Order to stay the rate riders effective February 1, 2015.

Essex Powerlines filed the new evidence requested by the Board in Procedural Order No. 2, including six different rate models and corresponding bill impacts. Essex Powerlines adjusted its continuity schedules to account for the discontinuation of the rate riders, reduced the claimed balances in Accounts 1588 and 1589 from what was filed in February 11, 2015 and further updated its 2015 total claim. Essex Powerlines maintained its proposal to dispose of the credit in Account 1588 over a two-year period and dispose of the debit in Account 1589 over a four-year period.

Positions of the Parties

Essex Powerlines submits that correcting the error from 2011 and 2012 would not violate the rule against retroactive ratemaking as it related to a billing error, citing the Board's Brantford Power decision in EB-2009-0063 as precedent. The significance of recognizing the error as a billing error, is that the Retail Settlement Code would apply and adjustments would be permitted. According to Essex Powerlines, customers are innocent third parties that should neither be advantaged nor disadvantaged as a result of a mistake.

Essex Powerlines also indicates that the *Ontario Energy Board Act, 1998*, at s. 78(3), obligates the Board to set rates that are "just and reasonable" and because the existing rates were based upon an error, the rates should be corrected; the variance accounts in question were intended to be a "pass-through" without profit for the utility; the pass-through accounts were established to protect both the utility and the customer from variability in revenues and costs; the Retail Settlement Code permits corrections to cover a two-year period for customers; and retroactivity is ultimately a fairness issue balancing the interests of customers and the utility.

Energy Probe, the School Energy Coalition (SEC), VECC and Board staff each filed a submission in response to the Board's questions.

Energy Probe generally supports the submissions of Essex Powerlines; namely, that the error can be treated as a billing error and that the rule against retroactivity does not prevent the Board from correcting certain billing errors. Energy Probe states that the

Board should consider an adjustment to the 2011 and 2012 DVA balances as proposed by Essex Powerlines.

VECC, SEC and Board staff take the position that the Board's acceptance of Essex Powerlines' proposal would violate the rule against retroactive ratemaking.

The submissions of SEC and Board staff provide a detailed synopsis of the law on retroactivity, citing the well-established rule adopted by the Board and its underlying rationale. Both SEC and Board staff submit that while there are exceptions to the rule of retroactive ratemaking, the exceptions are not applicable to the 2011 and 2012 DVA balances. Their view is that the 2011 and 2012 DVA amounts were cleared for those years on a final basis, and they are no longer interim or encumbered. In essence, the books are closed for those years, in contrast to the 2013 DVA balances for which the rates remain interim.

SEC and Board staff both disagree with Essex Powerlines' submission that the error is akin to a billing error. In Board staff's view, short of requiring Essex Powerlines' shareholder to reimburse RPP customers who overpaid, there is nothing the Board can do in this proceeding to correct the accounting error for the 2011 and 2012 DVA balances that have been disposed. However, the option of requiring the shareholder to reimburse RPP customers would be potentially harmful to Essex Powerlines' financial position, given its materiality threshold is approximately \$60,000. SEC suggests a similar potential remedy and submits that, based on the record of this proceeding and in law, the Board could reasonably exercise its discretion to order repayment by the shareholder of Essex Powerlines of the overcharged amounts to its RPP customers, even though the effect would be to create a loss that would be borne by the utility and its shareholder.

While SEC recognizes that the nature of the error does not create any windfall for Essex Powerlines, it notes that the utility is not simply an "innocent party". On the contrary, SEC submits that Essex Powerlines' wholly inadequate bookkeeping procedures caused significant harm to many of the utility's past and current customers. In SEC's view, it is not prudent management for utilities to lack the proper mechanisms to verify entries in retail settlement variance accounts, through which millions of dollars are moved annually.

VECC supports the detailed analysis on rate retroactivity provided in Board staff's submission. VECC also submits that a separate proceeding should take place to revisit the error and to arrive at a fair credit payable by Essex Powerlines' to its RPP customers without disabling the utility.

Board Findings

The first issue to deal with is to determine whether or not the error is a billing error. The Board finds that it is not. A billing error typically occurs when a utility charges a rate that is inconsistent with a rate order or, for example, if the utility fails to charge a rate at all. In this case, the Board's Rate Order disposing the 2011 and 2012 DVA balances was issued on a final basis on March 13, 2014. The evidence in this proceeding is that Essex Powerlines has complied with that Rate Order. As it is not a billing error, the Retail Settlement Code does not apply.

The Board finds that this case is not analogous to the Brant County Power dispute cited by Essex Powerlines. In the Brant County Power proceeding, the Board resolved a billing dispute regarding the rate classification of one particular customer.¹ The Board indicated that it was not varying the rate. The Board determined, among other things, that the customer, Brant County Power should have to pay RTS rates for previous periods for which it had not been billed by the utility, Brantford Power. Because of the ongoing billing dispute, the utility and the customer were aware that the issue would likely be subject to adjustment in a subsequent proceeding. The Board indicated that where there is a billing error, the Board can levy a penalty in terms of loss of interest if there is an element of negligence on the part of the utility resulting in the error.

Having found that the error by Essex Powerlines is not a billing error, the Board must now determine whether Essex Powerlines' proposal to correct the error violates the rule against retroactive ratemaking. The Board finds that it does.

The overarching principle with respect to ratemaking is that once rates are set, they are constituted to be just and reasonable. At least two key principles behind the rule against retroactive ratemaking are relevant to this proceeding. First, both distributors and consumers are entitled to rate certainty and rates should not increase or decrease

¹ EB-2009-0063, Decision and Order, August 10, 2010, see pages 17-21.

after they have already been paid. Second, there is a risk of inter-generational inequity when consumers responsible for incurring costs are not the same consumers paying the costs out of period.

Essex Powerlines' proposal would require the Board to change rates that were declared final, based on an after-the-fact discovery of accounting errors embedded in those rates. To do so would constitute retroactive ratemaking. The Board therefore rejects Essex Powerlines' proposal to adjust the 2011 and 2012 DVA balances which were disposed on a final basis. The Board will not require Essex Powerlines' non-RPP customers to repay the under-collected amounts from 2011 and 2012. The non-RPP customers would have had no way of knowing that a future adjustment would be made to rates that were declared final over a year ago.

The Board recognizes that RPP customers overpaid for the disposition of the 2011 and 2012 DVA balances. RPP customers paid for the error made by Essex Powerlines. Does the rule against retroactive ratemaking prohibit the refund of money to customers because rates were declared final? RPP customers are innocent third parties. There is Board precedent for requiring a utility to repay money to customers if negligent or if the utility would profit on account of its own errors (EB-2009-0013 and EB-2014-0043). In other words, the Board is not driven by a need for symmetrical treatment of customers and utilities in final rate situations.

Utilities such as Essex Powerlines have ultimate control of their books and records and therefore bear the responsibility of ensuring that there are no mistakes in their filings with the Board. Errors crystalized in final rates can have long term adverse impacts on consumers. In situations where errors are the result of a utility's negligence, the Board could impose financial or other consequences on the utility. For example, the Board could order the utility to repay customers, deny the accrual of interest on outstanding balances or deny the inflation adjustment to base rates. In this proceeding, the Board is apprehensive that repayment, requiring the utility to bear all the cost of its errors, may have a material financial adverse effect on the viability of the utility. The Board appreciates that the DVA accounts in question were pass-through accounts for the utility and its customers. The Board also notes that while Essex Powerlines made the error, it appears that it was not enriched by it.

The Board would benefit from oral testimony from Essex Powerlines' staff in order to render a final decision. The Board will convene an oral hearing on April 14, 2015.

Overall, the Board is concerned with Essex Powerlines' bookkeeping procedures and internal controls in order to prevent and detect errors. In addition to the errors affecting DVA Accounts 1588 and 1589, Essex Powerlines provided new evidence that a model implementation error affected the disposition of the balance in Account 1590. This account had an approved credit balance of approximately \$1.5M to be returned to customers as part of the utility's 2014 IRM proceeding. However, due to the model error, the credit was not included in the rate rider calculations. The incorrect rate riders were prepared by Essex Powerlines and approved by the Board on a final basis.

The Board finds that the model implementation error affecting Account 1590 is akin to a calculation error and that it would benefit the utility if not corrected. In accordance with section 41.02 of the Board's *Rules of Practice and Procedure*, the Board directs the utility to bring this amount forward in its continuity schedules (with additional carrying charges) with disposition over a one-year period commencing May 1, 2015.

With the stay of the rate riders disposing the 2011 and 2012 DVA balances, a residual amount remains in Account 1595 (2014). The residual amount is the result of yet-to-be billed February, March and April 2015 consumption. The Board requires additional evidence in order to decide how this residual amount will be disposed on a go forward basis. In the interim, no further interest or carrying charges will be accrued to this residual amount.

Given the numerous changes and updates to the evidence filed in this proceeding and the findings in this Partial Decision, the Board requires a clean set of revised continuity schedules to prepare for the oral hearing. The additional evidence will be provided by Essex Powerlines in response to the questions in Appendix A.

Parties wishing to supplement Appendix A with additional questions may do so in accordance with the timelines suggested below.

THE BOARD ORDERS THAT:

1. Parties wishing to supplement Appendix A with additional questions shall do so by sending the additional questions to Essex Powerlines and copying the Board by **March 27, 2015**.
2. Essex Powerlines shall file its responses to the questions, as set out above, with the Board on or before **April 7, 2015**.
3. An oral hearing shall be convened on **April 14, 2015** starting at 9:30 a.m. The oral hearing will be held in the OEB's West Hearing Room at 2300 Yonge Street, 25th Floor, Toronto.

All filings to the Board must quote the file numbers EB-2014-0301 and EB-2014-0072 and be made electronically through the Board's web portal at www.pes.ontarioenergyboard.ca/eservice/ in searchable / unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Georgette Vlahos at georgette.vlahos@ontarioenergyboard.ca and Board Counsel, Richard Lanni at richard.lanni@ontarioenergyboard.ca.

ADDRESS

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DATED at Toronto, March 25, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

To

Partial Decision and Procedural Order No. 3

Essex Powerlines Corporation

EB-2014-0301

EB-2014-0072

March 25, 2015

Appendix A

With respect to the deferral and variance account (DVA) continuity schedule:

1. Please provide an updated DVA continuity schedule beginning from January 1, 2010 for the requested disposition of 2013 Group 1 DVAs reflecting this Partial Decision:
 - a. With no adjustments to the 2011 and 2012 balances of Accounts 1588 and 1589;
 - b. With correcting adjustments to the 2013 balances of Accounts 1588 and 1589 made in the Other Adjustment column;
 - c. With the inclusion of the credit balance in Account 1590, to be disposed over a one-year period commencing May 1, 2015; and
 - d. With the inclusion of any true-up of the residual balance in Account 1595 (2012) (i.e. for the rate riders which have already expired).
2. If there any differences between the 2013 RRR balances and the DVA continuity schedule balances, please explain.
3. If there are any differences between the Board approved December 31, 2012 principal and interest balances in EB-2013-0128 and the balances in the DVA continuity schedule, please explain.
4. Provide a summary consumption report by customer class supporting the correct allocation between RPP and non-RPP for 2011, 2012 and 2013.

With respect to Account 1595 (2014), which is not included in the DVA continuity schedule:

5. Please provide the residual balance in Account 1595 (2014) (i.e. the remainder after the 2014 DVA rate riders were stopped in February 2015).
6. Confirm the credit balance in Account 1590 is excluded from Account 1595 (2014) (i.e.: as it is already included in the DVA continuity schedule referenced above).
7. Provide the proposed correction of the RPP and non-RPP misallocation to the residual balance in Account 1595 (2014) and explain how the proposed correction was calculated.

With respect to the potential new rate riders and bill impacts:

8. Please provide a one-page summary of the calculated rate riders for each of the following:
 - a. Disposition of the 2013 Group 1 DVA balances by customer class,

excluding Accounts 1588 and 1589. Please provide rate riders based on a one-year period effective May 1, 2015;

- b. Disposition of the 2013 Account 1588 balance (only) by customer class. Please provide rate riders based on a one to four year disposition period, effective May 1, 2015;
 - c. Disposition of the 2013 Account 1589 balance (only) by customer class. Please provide rate riders based on a one to four year disposition period, effective May 1, 2015.
9. Please provide a summary of the overall bill impacts by customer class for the rate riders with the two and four year disposition periods proposed by Essex Powerlines for Accounts 1588 and 1589 respectively. The bill impacts must take into account the proposed price cap adjustment and the approximate SMDR and SMIRR based on what Essex Powerlines filed in its reply submission. The bill impacts should show the dollar and percentage change from rates as of January 31, 2015 to May 1, 2015 and the change from rates as of April 30, 2015 (after the rate riders were stayed) to May 1, 2015. Essex Powerlines should not make any annual adjustments to the models or DVA continuity schedule as proposed in its reply submission of January 19, 2015.