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April 2, 2015

VIA COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Essex Powerlines Corporation
Notice of Motion
Board File No. EB-2014-0072 & EB-2014-0301

Please find attached Essex Powerlines Corporation's Notice of Motion to review the Board's Partial Decision and Procedural Order No. 3 in the above noted hearing. This has been filed on RESS and two hardcopies have been couriered to the Board.

Also, please be advised that Mr. George Vegh should be added as co-counsel for Essex and should be copied on all future correspondence on this matter. Mr. Vegh's contact information is:

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If there are any questions, please contact Mr. Vegh or myself.

Yours very truly,

AIRD & BERLIS LLP

Scott Stoll

SAS/bm

cc: Case Manager, Georgette Vlahos *(via email)*
Board Counsel, Richrad Lanni (via email)
All Intervenors (via email)

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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 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.

NOTICE OF MOTION

The Moving Party, Essex Powerlines Corporation ("Essex Powerlines"), will bring a motion to the Board at a time and place to be determined by the Board Panel for an order granting a review of a part of the Board's Partial Decision and Procedural Order No. 3 ("**P.O. No. 3**") as more fully described below.

Essex Powerlines requests the following:

1. That the Board review the part of P.O. No. 3 in this matter in which the Board rejected a request from Essex Powerlines to make adjustments to Essex Powerlines' 2011 and 2012 Deferral and Variance Account balances (the "**2011 and 2012 DVA Balances**") on the grounds that these balances were "declared final"[1] and that such an adjustment "violates the rule against retroactive rate making".[2]

2. Essex Powerlines is not questioning the correctness of that portion of P.O. No. 3. However, P.O. No. 3 went on to state that, notwithstanding the above finding, the Board intends to review whether Essex Powerlines may nonetheless be required to reimburse customers for amounts that they may have overpaid during that period. The Board went on to direct Essex Powerlines to prepare evidence, answer interrogatories, and

[1] P.O. No. 3, p. 7
[2] P.O. No. 3, p. 6

attend at an oral hearing to provide evidence for the Board to consider in making this determination.[3]

3. This motion requests that the Board review and vary, suspend or cancel this portion of P.O. No. 3 described in paragraph 2 hereof on the grounds that the findings in paragraph are in error and are also are inconsistent with the findings described in paragraph 1. Specifically, the Board's finding that the 2011 and 2012 DVA Balances were final deprived the Board of jurisdiction to consider whether Essex Powerlines should be required to reimburse customers for amounts that they may have overpaid during that period.[4]

4. Essex Powerlines also requests stay or delay of the implementation of the steps described in paragraph 7 below pending the completion of this motion for review and any rehearing by the Board.

The Grounds for this motion are:

5. The determination that rates are final and that any adjustments violates the rule against retroactive rate-making results in a lack of jurisdiction to order any repayments respecting overpayments during that period. As a result, the consequence of making the finding that the rates are final is that the Board did not have jurisdiction to make the orders set out in paragraphs 1, 2, and 3 of P.O. No.3. These grounds are more fully addressed below.

6. Rules 40 and 42 of the Board's Rules of Practice and Procedure.

7. Essex Powerlines also requests a stay of the findings and orders described in paragraph 2 above pending a decision in this motion for review and specifically requests an order(s) of the Board staying or delaying:

[3] Those directions are set out in paragraphs 1, 2, and 3 of P.O. No.3.
[4] Essex Powerlines notes that these paragraphs also required the production of evidence that did not relate to the issue of adjustments to the 2011 and 2012 DVA balances. Essex Powerlines is not seeking a review of the decision to that extent.

a. Powerlines' obligation to respond to the interrogatories identified below:

Party		Questions Subject to Request for Stay
Board Staff		None.
VECC		All questions.
SEC		All questions.

b. the oral hearing of the evidence currently scheduled for April 14, 2015.

8. The remaining questions provided by the parties will be answered in accordance with P.O. No. 3 and Powerlines is of the view that the remainder of the proceeding may continue while this motion is considered.

Threshold Issue

9. The Board has addressed the threshold that must be met in a motion for review in EB-2007-0797 (the "**Interconnection Case**") as follows:

"The moving party must also satisfy the Board of the following:

- To the extent that an error in the [original decision] is alleged:
- that the error is identifiable, material and relevant to the outcome of the [original] Decision and that, if the error is corrected, the reviewing panel could change the outcome of the [original] Decision (in other words, there is enough substance to the issues raised that a review based on those issues could result in the reviewing panel deciding that the [original] Decision should be varied, cancelled or suspended); and
- that the findings of the [original] panel are contrary to the evidence that was before that panel, the panel failed to address a material issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel." [5]

10. The foregoing thus sets out two components, a materiality component and (relevant to this case) an inconsistent findings component. Both of these tests are met with respect to the errors alleged in this case.

11. In terms of the materiality component, the error alleged in this motion is that the panel indicated that it may require Essex Powerlines to reimburse overpayments from customers with respect to rates that the panel has declared to be final. The argument

[5] Interconnections Case, pp. 7-8 (emphasis added).

here is that the Board has no jurisdiction to require reimbursement with respect to any overpayment of final rates. Clearly, if the error is corrected, then this would lead to a different outcome.

12. In terms of the characterization of the error, Essex Powerlines submits that the decision contains an error in law[6] and specifically an error of inconsistent findings. Essex Powerlines' argument on these points is set out below.

Context and Background

13. This decision arose in the context of the Board's consideration of whether it could adjust DVA balances. Essex Powerlines proposed this adjustment because it had erroneously allocated the IESO's global adjustment and the Hydro One Network Inc.'s power billings for the 2011, 2012 and 2013 rate years. The result was a misallocation between two groups of customers: Regulated Price Plan ("**RPP**") customers overpaid and Non-RPP customers underpaid. The error relating to 2013 was corrected prior to the Board ordering a disposition or a rate rider and so is not an issue.

14. With respect to 2011 and 2012, the Board issued a procedural order inviting submissions on the question of whether any adjustments for those years "violate the legal requirements concerning retroactive ratemaking?"[7] The Board answered this question in the affirmative: "...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."[8]

15. The P.O. No. 3 went on to state:

> 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 under-collected amounts from 2011 and 2012.

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[6] The Board held that an alleged error in jurisdiction is sufficient to satisfy the threshold test for a review in the NGEIR Motion (EB-2006-0322, EB-2006-0338, and EB-2006-0340).
[7] Procedural Order No. 2.
[8] P.O. No. 3, p. 7

16. The P.O. No. 3 thus makes an unequivocal finding that an adjustment that would require customers to pay under-collected amounts would violate the rule against retroactive rate making. The P.O. No. 3, which described some previous Board practices in this area, did not address the legal consequences of this finding. In fact, it did not refer to any case law at all. This is where it erred.

Legal Implications of the Determination of Final Rates

17. The law is clear that the restriction on making retroactive adjustments to final rates is a legal matter, not just a matter of public utility regulation practice. More specifically, a regulator such as the Board does not have jurisdiction to adjust final rates to address issues of over and under recovery during the previous rate period.

18. This proposition was unequivocally put forward by a majority of the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*:[9]

> From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern, 1979,* p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-735).

19. In other words, once the Board determines that rates are final, it simply does not have the statutory authority to consider whether there should be repayment either to or from the utility.

[9] [2006] S.C.J. No. 4, at para. 71.

20. In *Northwestern Utilities Ltd.* v. *Edmonton*,[10] the Supreme Court of Canada approved of the following statement of the Alberta Court of Appeal in *City of Calgary and Home Oil Co.* v. *Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655 (at 661):

> The powers of the Natural Gas Utilities Board have been quoted above and the Board's function was to determine 'the just and reasonable price' or prices to be paid. It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board (emphasis added).

21. It is this finality that distinguishes a final order (such as the 2002 rate orders) from an interim order. As the Supreme Court of Canada stated in *Bell Canada* v. *CRTC*[11], "one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision....It is the interim nature of the order which makes it subject to further retrospective directions" (emphasis added).

22. A rate order may only be prospective in nature. It cannot be used to "recapture" over or under payments during a period in which a previous rate order was in place. Applying that here, the Board is not in a position today to require Essex Powerlines to repay any over-collected amounts to customers.

23. The error in P.O. No. 3 was that the decision failed to appreciate, or even acknowledge, the legal restrictions on making further adjustments based on its determination that the 2011 and 2012 DVA balances were disposed through final rate orders.

24. Instead of recognizing the legal implications of its findings, the Board treated the issue as one of regulatory practice:

[10] [1979] 1 S.C.R. 684
[11] [1989] 1 S.C.R. 1722

> 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 return 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.

25. This statement was made without any reference to the long standing and consistent precedent of the Supreme Court of Canada or, indeed, any Ontario court. It effectively grants the Board the right to have discretionary and asymmetrical treatment between both utilities and customers and between different types of customers (in this case, RPP and Non-RPP Customers) when it comes to retroactively setting rates. There is no legal basis for this.

26. The decision therefore is in error as it first makes a legal finding that the rates are final (finding 1) and then finds that the Board has discretion to make an adjustment (finding 2). This is both an error in law and is inconsistent: finding 2 is inconsistent with finding 1. It therefore clearly meets the inconsistent finding component of the threshold test stated in the Interconnection Case.

27. As noted in the above quotation, the Board refers to two of its previous decisions: EB-2009-0013 and EB-2014-0043. Neither of these decisions can be relied upon to depart from the precedent of the Supreme Court of Canada which holds that the Board lacks statutory jurisdiction to make changes to final rates. In addition, and in any event, those decisions are distinguishable.

28. In EB-2009-0013, the Board disallowed recovery of deferral account balances from customers for a period covered by a final rates order (for the period ending December 31, 2004) and indicated that deferral account balances owing from the utility for a period not covered by a final order may be ordered to be repaid (for the period January 1, 2005 to December 31, 2008). Both types of balances resulted from the same utility error. The utility therefore argued that they should be treated in the same way. In response, the Board stated that "the Board 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."[12] This is a fair enough statement of discretionary regulatory decision making. However, it did not purport to change the law on retroactive ratemaking.

29. Indeed, the reason why the Board's disallowed an adjustment during the first period and would have permitted an adjustment in the second period was entirely driven by the fact that the former rates were declared final and the latter were not. Thus, while the Board had some discretion with respect to the rates that were not final, it had no discretion with respect to final rates. According to the Board:

> once the rates, including any associated riders from the clearance of the RSVAs or any other account, have been determined to be final the Board has little, if any, power to alter these rates retroactively.[13]

30. The second case that the Board referred to was EB-2014-0043 where Enbridge Gas Distribution Inc. sought an order allowing it to refund money that was inadvertently not paid to customers due to errors in the calculation of account balances. The Board held that this was an acceptable out of period adjustment because "it ensures that a utility does not profit on account of its own errors."[14]

31. This was an unargued case and its precedential value is limited. Nevertheless, even if the Board can set aside a final rate order to ensure that a utility does not profit on account of its own errors (which does not sit well with the Supreme Court of Canada decisions referred to above), it still has no application here as Essex Powerlines did not profit from the errors: some customers overpaid and some underpaid. Essex Powerlines merely passed through the costs. This case therefore provides no authority for the Board to consider a reimbursement of costs for a closed period in this case.

[12] EB-2009-0113, p. 8.
[13] EB-2009-0113, p.6 (emphasis added).
[14] EB-2014-0043, p. 2.

Stay and Implementation

32. Essex Powerlines requests that the Board stay or delay the implementation of the steps identified in paragraph 7 above pending the completion of the review of this motion.

Stay

33. The Board's Rules reproduced below, permit the Board to grant a stay where there has been a motion to review brought forward such as this:

40.04	Subject, to Rule 40.05, a motion brought under Rule 40.01 may also include a request to stay the order or decision pending the determination of the motion.
40.05	For greater certainty, a request to stay shall not be made where a stay is precluded by statute.
40.06	In respect of a request to stay made in accordance with Rule 40.04, the Board may order the implementation of the order or decision be delayed, on conditions as it considers appropriate.

34. Absent a statutory prohibition that would prevent a stay from being granted, the Board should consider the request for a stay and determine the appropriate conditions, if any, which would be attached to the stay.

35. In determining whether a stay should be granted, courts and tribunals use the three-stage test set out in *RJR-MacDonald v. Canada (Attorney General)*[15] ("**RJR**") set out below:

    a. Is the issue to be decided serious?

    b. Would irreparable harm ensue if the injunction were not granted? and

    c. Does the balance of convenience favour the issuance of the stay? (the "**RJR Test**")

[15] *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraphs 332-334.

36. Even if the test for a stay is not satisfied, Rule 40.06 provides further discretion, beyond the requirements of the RJR Test, to permit the Board to grant a delay in the implementation of an order in circumstances such as the present.

Serious Issue

37. The Supreme Court of Canada, in RJR, stated that the determination of the first element of RJR Test of whether there is a serious issue to be decided by the Board does not require an indepth review of the merits of the case but applies a low threshold – essentially only frivolous or vexatious cases do not meet this first step.

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.[16]

38. The motion is neither frivolous nor vexatious and raises questions as to the exercise of the Board's jurisdiction in light of the inconsistency discussed above in paragraphs 9 to 23.

Irreparable Harm

39. Essex Powerlines will suffer irreparable harm in the absence of the granting of the stay as it will incur and be exposed to risk of additional costs for which it will not be able to

[16] *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraphs 337-338.

recover. It should be remembered that "irreparable" refers to the nature of the harm suffered rather than its magnitude.[17]

40. Should the matter proceed, Essex Powerlines, Intervenors and Board staff will be obligated to devote significant internal and external resources to preparing evidence and fully participating in the oral hearing. Essex Powerlines will be responsible for its costs and, likely for Intervenor costs as well. Yet Essex Powerlines would have no ability to recover any of these costs even if it were entirely successful as distributors, such as Powerlines, are not eligible for costs in Board proceedings. Therefore, through granting of the stay, Essex Powerlines would avoid bearing the burden of the full costs of the hearing if it were successful on its motion.

41. Further, if the proceeding continued and Essex Powerlines was obligated by the Board to reimburse the 2011 and 2012 DVA Balance to customers prior to the consideration of this motion, Essex Powerlines would not be entitled to recover of any monies paid should it ultimately be successful on this motion.

Balance of Convenience

42. The granting of the stay will also satisfy the third prong of the RJR Test which requires the consideration of the balancing of the interests of the parties should the stay be granted or refused.

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits".[18]

43. Granting a stay results in the most efficient use of the scarce resources of the Board, Intervenors and Essex Powerlines as it requires the parties to resolve the discrete legal issue raised in this motion prior to expending resources on the full oral hearing.

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[17] *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraphs 341.
[18] *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraphs 342.

44. Granting the stay results in a short delay in the proceeding while the Board considers the discrete legal issue in the motion. As such, the rights of ratepayers are fully protected and there is no harm to any party from the granting of the stay. In fact, granting the stay focuses the efforts on the discrete jurisdictional issue and provides the most effective use of resources.

45. Refusing the stay requires every party to devote significant resources to fully prepare for the remaining oral hearing. Essex would need to file evidence in response to interrogatories, prepare witnesses and participate in the oral hearing. Intervenors will need to consider the evidence, prepare cross-examination and argument. These costs and efforts will be unnecessary should Essex Powerlines be successful in its motion.

46. As such, the granting of the stay is not only the logical result, it meets the three requirements of the RJR Test.

Rule 40.06 Delay

47. Powerlines is of the view the Board's Rule 40.06 provides additional discretion to delay the implementation of P.O. No. 3. If the Board were to determine the test for a stay has not been satisfied, Essex Powerlines submits a delay is permitted under this discretion and appropriate in the circumstances.

48. The Board has the authority to control its own process and Rule 40.06 provides the Board with the authority to delay the implementation of P.O. No. 3 pending a determination of the jurisdictional issue.

49. In the present circumstances, a short delay to consider a discrete legal issue going to the jurisdiction of the Board should be considered prior to all parties, including the Board, expending significant resources to complete a hearing which may not be required.

Conclusion

50. For the foregoing reasons, Essex Powerlines respectfully requests that the Board review the part of P.O. No. 3 which found that, notwithstanding its finding that the rates relating to the 2011 and 2012 DVA Balances were final rates and could not be retroactively adjusted, the Board intends to review whether Essex Powerlines may nonetheless be required to repay some or all of any over payments from customers that were collected under these final rates.

51. Essex Powerlines also requests a stay or delay of the steps described in paragraph 7 hereof pending the completion of the review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: April 2, 2015

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AND TO: **Intervenors of Record**

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