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April 30, 2015

VIA E-MAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge St.
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: EB-2014-0301 – EB-2014-0072 Essex Powerlines Corporation

Please find enclosed the submissions of the Vulnerable Energy Consumers Coaltion (VECC) with respect to the above-noted proceeding. We have also directed a copy to the applicant as well as the list of intervenors via email.

Yours truly,

Michael Janigan
Counsel for VECC

Cc: Essex – Richard Dimmel – rdimmel@essexpowerlines.ca
Intervenors

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.

Submissions of the Vulnerable Energy Consumers Coalition (VECC)

1. Procedural Order No. 2 in the within proceeding reopened the record of the consolidated hearing to allow the Board to consider the issue of a misallocation of approximately $11.5 million between Regulated Price Plan (RPP) customers and non-RPP customers relating to the allocation of the

IESO's Global Adjustment and Hydro One Network Inc's power billings for 2011, 2012 and 2013 rate years.

2. In doing so, the Board requested new evidence on the circumstances giving rise to the misallocation, the process to correct the same, and the bill impacts associated with correction of the results of the misallocation to customers.

3. At the same time, the Board called for submissions from the parties on the proposal of Essex Powerlines Corporation (EPC) to make adjustments to the 2011 and 2012 DVA balances as part of the IRM proceeding to correct the problem, and whether the adjustment would constitute retroactive ratemaking.

4. Procedural Order No. 3 sets out the Board's ruling that the misallocation was not a billing error and that the proposed correcting adjustment of EPC would constitute retroactive ratemaking. The Board noted that if the misallocation was as a result of the negligence of EPC, it could impose financial consequences on the Company provided that it would not have a material adverse effect on the financial viability of the Company.

5. To determine the question of negligence and the disposition of Accounts 1595 and 1590, the Board ordered production of new continuity schedules and oral evidence to explain, in essence, the deviations from correct regulatory accounting practice and the tables setting out the overall bill impacts of the disposition of the aforementioned accounts.

6. In Procedural Order No. 4, the Board placed in abeyance a motion to review and vary brought by EPC its decision in Procedural Order No. 3 until after additional information had been filed, and it had determined the question of negligence and its consequences, if any. This motion may be brought back within 20 days of the Board's final decision pursuant to its hearing contemplated by Procedural Order No. 3.

7. The hearing took place on April 14, 2015. At the hearing, it was disclosed that the misallocation associated with RPP and non-RPP customers came about as a result of an error by a senior accounts payable file clerk (Tr. pp 42). :

> "MR. DIMMEL: Yes, the error occurred from a manual calculation that was input into the spreadsheet. And that was a one-time error that just perpetuated, because once it was in the spreadsheet, it was always used".

8. After submission by the file clerk, the spreadsheet error was not discovered despite various levels of review by the EPC business process analyst, then the operations and regulatory analyst, and finally a general oversight by the Vice-President of Regulatory Affairs. The allocation would have also been subject to a review in the audit. (Tr. pp43, 44)

9. The result of the events set out above is that there has been an over-collection of some $3,614,779 M from RPP customers.

10. Negligence should not be conflated with mismanagement or reckless behavior. It is simply the failure to meet the reasonable standard of care in carrying out its regulatory function of accounting and billing, as set out in Procedural Order No. 3, such standard of care being owed to its customers and the regulator.

11. In law, negligence can arise as a result of mere inadvertence[1] . As well, in cases where there has been an effort to distinguish criminal from non-criminal negligence, it is has been established that non-criminal or civil negligence does not require some intention or recklessness to bring about a result. In *R. vs. Mann*[2], the judgment reviewed the Supreme Court of Canada case of *O'Grady v. Sparling*[3] that had established the required distinction. In dealing with the requirements for non-criminal or civil negligence, Mr. Justice Haines stated:

> "This kind of culpability is negligence. It is distinguished from acting intentionally or recklessly in that it does not involve a state of awareness. It is the case where the actor inadvertently creates a risk of which he ought to be aware, considering its nature and degree, the character and purpose of his conduct, and the care that a reasonable person would exercise in his situation."[4]

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[1] *Lico v. Griffiths* 28 O.R.(3d)683(1996)(Ontario Court General Division)
[2] *R. v. Mann*,[1965]1 O.R.483 (H.C.J.)
[3] *O'Grady v. Sparling* [1960]S.C.R. 804
[4] Ibid at 2, p.8

12. Where negligence is established, the negligent party is responsible for all damages caused by the negligence that were reasonably foreseeable as a result of that party failing below the standard of care. The loss or damage caused must have been "a real risk", i.e. "one which would occur to the mind of a reasonable man ... and which he would not brush aside as far-fetched".[5]

13. VECC submits that the circumstances of the misallocation make it extraordinarily difficult to assert that ESG did not breach the standard of care reasonably expected of utilities notwithstanding the new variables in play and a new form (Tr. p.44). A finding of no negligence in the face of multiple levels of supposed review and oversight by EPC would subvert reasonable expectations of competence in reporting and accountability.

14. Similarly, there was a real risk of a misallocation occurring if the much reviewed calculation was implemented in rates. Such an occurrence was reasonably foreseeable. The overpayment of over 3.6 M by RPP customers constitutes the damages caused by EPC's negligence.

15. If negligence and the consequences of negligence are established, should the Board impose a penalty on EPC that is compensatory for all those consequences.

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[5] *Mustapha v. Culligan of Canada* Ltd, [1960] 2 S.C.R.804 quoting.the judgment in the case of Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty., [1967] A.C. 617, at p. 643).

16. VECC submits that the penalty that should be paid by EPC should result in EPC's RPP customers made whole unless there is evidence that this course of action will have an adverse effect on the financial viability of the Company.

17. It is to be noted that Sec 1 (1) of the *OEB Act* provides the objective that the Board must protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service. Neither customer overpayment nor financial impairment to the adequacy, reliability and quality of electricity should eventuate from the remedial efforts.

18. In attempting to achieve a balance between fairness to RPP customers and the Company's ability to effect relief, it is to be noted that EPC has been rather unhelpful in its insistence on re-litigating the previous ruling of the Board or attempting to advance the consideration of its previously filed Review and Vary Motion.

19. The evidentiary record is thus left with a variety of assertions of hardship that might come about as a result of a Board penalty. These hardships relate to either a potential breach of EDC's debt covenants, or potential problems with working capital.

20. VECC is not convinced by EPC's assertions of an inability to insulate RPP customers (or more precisely RPP customers from 2011, 2012, still attached to the EPC) from the financial effects of their over-payment. VECC believes that extending the penalty over a number of years would mitigate the effects upon the Company.

21. VECC submits that EPC's penalty should be paid from a firm percentage derived from its ROE and paid from its retained earnings (Tr. p.45).As Undertaking J3 sets out EPC's assertion that the amount of $380,000 from its ROE is the maximum that it believes it can pay annually without violating its current debt covenants. In VECC's view, a penalty extended over a number of years, should make the RPP customers whole from their overpayment resulting from the misallocation of the 2011 and 2012 and 2013 IESO global adjustment and Hydro One Network's power billings.

22. VECC takes no position on the disposition of accounts other than Accounts 1588 and 1589 and accepts the Company's corrected calculations associated with the overpayment by RPP customers reflected therein.

23. VECC requests the payment of 100% of its costs for its participation in the within matter.

Respectfully submitted this 30th day of April 2015

Michael Janigan

Counsel for VECC