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May 7, 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: Reply Submissions of Essex Powerlines Corporation ("Essex Powerlines")
Board File No. EB-2014-0072 & EB-2014-0301**

We are co-counsel to the Applicant, Essex Powerlines Corporation ("**Essex Powerlines**"), in the above noted proceeding.

Please find enclosed Essex Powerlines' Reply Submissions to Board Staff and Intervenor submissions dated April 30, 2015.

If there are any questions, please contact the undersigned.

Yours very truly,

AIRD & BERLIS LLP



Scott Stoll

SAS/bm

cc: Case Manager, Georgette Vlahos (*via email*)
Board Counsel, Richard Lanni (*via email*)
All Intervenors (*via email*)
Co-Counsel, George Vegh (*via email*)

Encl.

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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 the Applicant Essex Powerlines Corporation ("**Essex Powerlines**").
2. Board Staff and Intervenor submissions in this Application addressed Essex Powerlines' submissions respecting various account balance issues and the consequences of its erroneous calculation of the allocation of costs between RPP and Non-RPP customers. Both of these categories of submissions will be addressed in turn.
3. In its April 23rd submission, Essex Powerlines brought forward a request that would correct the past billing impacts of the error, not perpetuate the error, and maintain Essex Powerlines' financial integrity in a manner that is fair in both principle and impact for all

customers. In order to ensure Accounts 1588 and 1589 are disposed of in a manner that achieves these objectives, Essex Powerlines has sought:

- a. Disposition of Account 1588 in the amount of (\$4,567,591) over a period of two years, being comprised of the amounts below:

Description	Amount ¹
May 1, 2014 to January 31, 2015- settled	(\$3,614,779)
February 1, to April 30, 2015 residual	\$2,762,600
Correction to misallocation of GA	(\$1,563,971)
2013 Balance	<u>(\$2,151,441)</u>
Total:	<u>(\$4,567,591)</u>

- b. Disposition of Account 1589 in the amount of \$6,908,196 over a period of four years being comprised of the amounts below:

Description	Amount ²
May 1, 2014 to January 31, 2015 - settled	\$3,614,779
February 1, to April 30, 2015 residual	(\$2,653,477)
Correction to misallocation of GA	\$1,563,971
2013 Balance	<u>\$4,382,923</u>
Total:	<u>\$6,908,196</u>

4. As Essex Powerlines noted, the customer impact, along with the disposition of the remaining deferral and variance accounts, results in all customers seeing a decreased bill which is summarized below:

¹ Exhibit K1_BdStaff Compendium_20150414 Tab 1, Tables 6, 3, 1 and 2.

² Exhibit K1_BdStaff Compendium_20150414 Tab 1, Tables 6, 3, 1 and 2.

2015 RPP BILL IMPACTS compared to 2015 Stayed Rates

Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	(9.18)	-29.95%	(10.97)	-9.13%
GS<50	2,000	0	(14.85)	-21.04%	(18.55)	-6.37%
GS 50 - 2,999	1,198,113	2,968	(15,539.28)	-112.00%	(20,384.42)	-12.38%
UMSL	2,000	0	(25.07)	-32.18%	(32.16)	-9.68%
Sentinel Lights	36	0.1	(0.43)	-9.66%	(0.55)	-5.56%
Street Lights	36	0.1	(0.36)	-8.99%	(0.47)	-4.84%

2015 Non-RPP BILL IMPACTS compared to 2015 Stayed Rates

Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	(3.26)	-10.64%	(4.95)	-4.06%
GS<50	2,000	0	0.34	0.53%	(3.10)	-1.07%
GS 50 - 2,999	1,198,113	2,968	(6,889.34)	-69.33%	(10,609.99)	-6.49%
UMSL	2,000	0	(9.87)	-13.84%	(14.99)	-4.54%
Sentinel Lights	36	0.1	(0.15)	-3.59%	(0.24)	-2.47%
Street Lights	36	0.1	(0.11)	-2.57%	(0.18)	-1.93%

5. Essex Powerlines would like to take the opportunity to clarify a concern³ of Board Staff wherein it was noted that the bill impacts (comparing to 2015 stayed rates) varied as compared to the supplemental questions of Procedural Order No. 3 and in Essex Powerlines' Argument-In-Chief.
6. Essex Powerlines agrees that Table 2 - Responses to Supplemental Questions and Table 3 - Argument in Chief, which provide 2015 Bill Impacts as compared to 2015 Stayed Rates, are different because they were prepared for different reasons and with different assumptions. Table 2, which is referred to in Essex Powerlines Response to Supplemental Questions of April 7th, 2015 as "Table 22", provides a direct answer to the specific questions posed in Question 9 of Appendix A to the Partial Decision and Procedural Order. As such, Table 2 does not include correcting for the settled amounts

³ Board Staff Submission, April 30, page 9.

for Accounts 1588 and 1589 (May 1, 2014 to January 31, 2015) nor does it include the residual for the stub period (February 1, 2015 to April 30, 2015). In contrast, Table 3 provides a comprehensive bill impact and includes the settled amounts for Accounts 1588 and 1589 (May 1, 2014 to January 31, 2015) and the residual for the stub period (February 1, 2015 to April 30, 2015). Table 3 re-affirms Essex Powerlines' initial position, and requests to correct the allocation error as well as adjust the current rate rider in an attempt to not compound the known error. These differences account for the variances between Table 2 and 3.

7. As Essex Powerlines previously noted, the error giving rise to this issue arose from an incorrect formula being used to allocate costs between RPP and non-RPP customers. The oral evidence⁴ described the switch in settlement forms which accompanied the change to TOU pricing and provided the opportunity for the error to occur. The evidence clearly states the formula was entered and reviewed by senior staff within Essex Powerlines. Further, the initial results were reviewed and a shift in results was identified by staff but the discrepancy was erroneously attributed to a different factor. Deferral and variance account balances were being monitored by Essex Powerlines at both a staff and executive level.⁵ Balances were audited by third parties and IRM flings by Board Staff – yet the error went undetected. A lack of oversight was not the issue but rather the ability to discern a particular movement in two accounts that were being subjected to multiple unpredictable variations.

⁴ Transcript Vol. 1, April 14, 2015, page 19, lines 10 to 13.

⁵ Essex Powerlines, April 7, 2015, Response to VECC#2.

8. Board Staff acknowledged⁶ the complex nature and intricacies of the Global Adjustment Settlement process with the IESO. However, as Essex Powerlines noted the Global Adjustment was just one of several factors that were moving independently and unpredictably. Other factors such as the new embedded generation from Hydro One, TOU pricing and the offsetting aggregate balances in prior years which deferred disposal of the accounts all served to mask the occurrence of the original error. Further, as the aggregate recovery of Global Adjustment was correct, there was no shortfall or over-recovery in settlement with the IESO which again served to hide the underlying error.
9. Essex Powerlines disagrees with Board Staff's submission that it has been careless, improperly using and has been unable to explain the balances in Account 1590.⁷ Board Staff's conclusions about the origin of the balances in Account 1590 are incorrect. Mr. Dimmel rejected the suggestion that Essex Powerlines was still using Account 1590 for transfers but acknowledged there were still dispositions. The disposition of Account 1590 refer to balances from December 31, 2004 and December 31, 2008 and the account has not been used since. The inclusion of Account 1590 in the continuity schedule was intended to portray the entire picture and confirms the position of Essex Powerlines. Essex Powerlines did not move the 1590 balance to 1595 because it was not disposed of and Essex Powerlines wanted to ensure that the Board was aware of this by including it separately on the continuity schedule.⁸

⁶ Board Staff Submissions, April 30, 2015, page 11.

⁷ Board Staff Submission, page 7.

⁸ April 7, 2015, Continuity Schedule to support Response to Supplemental Questions.

10. Essex Powerlines would submit that the analysis of imposing a “*penalty*” is much more complex than portrayed by Intervenor. If one considers the issue of the potential violation of debt servicing covenants, one cannot look at annualized numbers and draw any reasonable conclusion as suggested by SEC⁹. As noted in this proceeding, the numbers for Global Adjustment and other accounts have seen wide fluctuations. The debt servicing covenant must be observed at all times and therefore, one would have to consider the impact during the most vulnerable period of time for the utility – the time when it is operating at the closest point to the required debt servicing ratio. That is why Essex Powerlines has indicated that a financial penalty of \$380,000 would put it off-side its debt covenants. Any impact that would knowingly and intentionally put a utility off-side of its loan agreements would be contrary to the Board’s statutory objective of maintaining a financially viable industry.¹⁰

11. Leaving aside the jurisdictional issue, Essex Powerlines has been consistent in its statements that any amount of “penalty” in excess of \$380,000 will put Essex Powerlines off-side of its debt servicing covenants. Essex Powerlines is concerned that the imposition of a penalty, given the circumstances of this case, would increase the level of perceived risk of dealing with distributors. Such an increased risk could increase costs for all utilities and ratepayers going forward.

⁹ As a housekeeping note SEC has erred at page 3, paragraph 3 of its submissions. Essex Powerlines would note that it should read “RPP” customers not “non-RPP” customers.

¹⁰ *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B), subsection 1(1) paragraph 2.

12. Further, Essex Powerlines has already incurred significant costs to address the issues arising during this IRM process through the internal and third party resources that have been engaged to investigate the issue and participate in this proceeding. In addition, Essex Powerlines anticipates the Board will order the costs of Intervenor and the Board to be paid. It is likely that such costs will be approximately \$175,000 and Essex Powerlines will not be recovering these costs from customers. In addition, it is expected that any interest pertaining to the error will be to the account of Essex Powerlines.
13. Essex Powerlines has noted that the process in place during the time of the error had functioned for a decade without incident and there had been no prior suggestion by any party that Essex Powerlines' was anything but one of the most efficient utilities in the province (as per the Board's benchmarking).¹¹ The checks and balances that were in place have been enhanced as a result of the error. Essex Powerlines disagrees with VECC's characterization of the Accounts Payable Senior Clerk as a "file clerk".¹²

Consequences of Essex Powerlines' Error

14. Essex Powerlines' evidence and submissions in chief provided a full and detailed account of its errors. Essex Powerlines did not seek to evade responsibility for these errors and, in fact, brought them to the Board's attention in this application on a voluntary basis with a *bona fide* intention of correcting them so as to put all parties into the position they would have been if the error was not made.

¹¹ Essex Powerlines was classified in Group II in the "Empirical Research in Support of Incentive Rate-Setting: 2013 Benchmarking Update – Report to the Board", July 2014.

¹² Transcript Vol. 1, April 14, 2015, page 43, lines 1 to 2.

15. The Board has the express power to bring about this result through the use of Rule 41.02 of the Rules of Practice and Procedure. That Rule and the relevant case law in this regard were addressed in Essex Powerlines' submissions of April 23, 2015. Neither that rule nor the case law was addressed in Procedural Order No. 3 or in Board Staff and Intervenor submissions.¹³
16. Nonetheless, Board Staff and the Intervenors urge the Board to not fix the consequences of the error and, instead, they argue that the Board should punish Essex Powerlines by extracting a payment from its shareholder. The proposed payment ranges from \$1.1 million (Board Staff) to \$3.7 million (SEC, VECC and Energy Probe). The description of this payment is variously referred to as a "penalty" (Energy Probe, p.4), an award of damages for negligence (VECC, pp. 4-5), an exercise of the Board's discretion (SEC, p.3) and as a debit towards Essex Powerlines' return on equity (Board Staff, pp. 13-14).
17. In order for the Board to have such powers they would have to be explicitly or implicitly found in legislation. Neither is the case here.

¹³ Note, one intervenor argued that Essex Powerlines should not have made this point because it is essentially arguing its motion for review of Procedural Order No. 3. This is clearly not the case. The motion for review argues that the Board's decision respecting the consequences of its finding on jurisdiction was in error and thus should be reviewed under Rules 40 and 42. The argument in chief is that the Board has the authority to fix the underlying error in the Disposition Order under Rule 41.02. Further, the Board may exercise its powers under Rule 41.02 at any time and without a motion. As a result, both substantively and procedurally, the two arguments are distinct.

Lack of Explicit Authority to Impose Penalties, Award Damages or Appropriate a Portion of a Utility's Return

18. The Board's only power to order penalties is in Part VII.1 of the *OEB Act, 1998* which addresses compliance. There is nothing in the legislation to suggest that the Board has the power to impose penalties in any other circumstances.
19. There is similarly no statutory basis to support VECC's submissions that the Board has the authority to either make determinations on the tort of negligence or award damages for same.
20. The authority to award damages must be expressly provided for in legislation. The only references to damages in the *OEB Act, 1998* relates to damages in the use of land or expropriation context. Even in these limited contexts, any award of damages is to be made by the Ontario Municipal Board, not the OEB.¹⁴
21. There is also no legal basis for the argument that the Board somehow has discretion to make an ROE adjustment on the basis that a utility made an error. This argument effectively treats a utility's return as an account from which the OEB may withdraw funds at its discretion. This flies in the face of the fair return standard. As the Board has recognized: "Meeting the standard is not optional; it is a legal requirement."¹⁵ The Board cannot hold that the fair return standard is a binding legal requirement and also treat a utility's return as an amount over which it has discretion to appropriate.

¹⁴ See *OEB Act, 1998*, ss. 98(1.1), 102, and 100.

¹⁵ EB-2009-0084, Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, p. i.

22. There is therefore no express statutory authority for the Board to exercise any of the powers proposed by Intervenors and Board Staff in the rate setting context. There is equally no implied authority.

Lack of Implied Authority to Impose Penalties, Award Damages or Appropriate a Portion of a Utility's Return

23. The Supreme Court of Canada addressed the test for demonstrating implied legal authority in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*¹⁶ (“ATCO Gas”). In that case, the Supreme Court held that a public utility regulator did not have implied authority to allocate proceeds of the sale of utility assets without express statutory authority:¹⁷

“Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *Re National Energy Board Act*, [1986] 3 F.C. 275 (C.A.)).

...

It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.”

¹⁶ [2006] 1 S.C.R. 140.

¹⁷ *ATCO Gas*, paras. 77-80 (emphasis added).

24. There is no suggestion that implying an authority to issue penalties, award damages or appropriate a return is a practical necessity for the Board to fix consequences of mistakes. To the contrary, the courts have been clear that the existence of an express remedial power (here the power to correct an error in Rule 41.02) demonstrates that an alternative remedial power should not be implied (here the powers proposed by Intervenor and Board Staff).¹⁸
25. Further, the expansion of the Board's authority to new territories proposed in this case is more extreme than anything considered in *Atco Gas*. In *Atco Gas*, the regulator merely sought to allocate the proceeds of sale of assets, which is a much more mainstream exercise of public utility authority to be implied without express statutory authority. The Supreme Court would not allow that extension of a regulator's authority. In this case, the Intervenor and Board Staff are proposing much more extreme measures: damages, penalties and discretionary access to a utilities' return. Essex Powerlines is not aware of any case where the courts have recognized such an extension of authority under the name of "implied powers".
26. Finally, Board Staff and the Intervenor provide no legal authority for the extraordinary remedies they are proposing in this case. Instead, they are all premised on the view that the legal restrictions on the Board's authority to set just and reasonable rates are somehow eliminated if a utility makes an error. In other words, they suggest that the presence of the error by a utility somehow expands the Board's rate setting authority so that it has virtually unconstrained remedial powers.
27. This is clearly not the case. The Board's only authority is to set just and reasonable rates. The fact that a utility makes an error does not expand the Board's authority. When faced with an error (whether of a party's making or its own), the Board has the

¹⁸ See, for example, *ATCO Gas*, para. 73; *Re Broadcasting Regulatory Policy*, [2012] 3 S.C.R. 489 at para. 39 and 44; *Tetraault-Gadoury v. Canada*, [1991] 2 S.C.R. 22 at p. 33; *Westfair Foods Ltd. v. R.W.D.S.U* (1993), 15 Admin. L.R. (2d) 260 at pp. 270-271.

¹⁹ [2006] 1 S.C.R. 140, p. 39, para. 77-80.

power to fix the mistake and put the parties in the position they would have been if the mistake were not made in the first place.

28. Board Staff stated *"that allowing the riders to continue to overcollect from RPP and undercollect from non-RPP customers until the total remaining balance is drawn down would be an absurd result."* Essex Powerlines agrees with Board Staff that it would be an absurd result for the error to be perpetuated further with customers. However, Essex Powerlines would go further and state that failing to correct the entirety of the error is of the same nature as permitting the over/under recovery to continue and would therefore also be absurd. Essex Powerlines' position has been consistent to restore customers to the position it should have been in if the error had not occurred. Energy Probe supported correcting the error¹⁹ and noted the Essex Powerlines solution avoids the arbitrariness of a result that depends upon the timing of the discovery of the error.²⁰ It is respectfully submitted that this remedy is appropriate from both a legal and a fairness perspective.

29. Essex Powerlines acknowledges that an audit may provide customers with additional comfort that the error has been properly accounted for and corrected. Of course Essex Powerlines would provide the necessary access and support if the Board determines such an audit is required.


¹⁹ Energy Probe, Written Submissions, April 30, 2015.

²⁰ Energy Probe Submissions, February 23, 2015, page 3.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: May 7, 2015


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