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EB-2015-0240

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.

Submissions of the Vulnerable Energy Consumers Coalition (VECC)

Introduction and Background

1. **The Ontario Energy Board has commenced a proceeding to review the partial Decision and Order in EB-2014-0301 & EB 2014-0072 issued on March 25, 2015.**

2. **The order of March 25, 2015 concerned the Board's previous Decision and Rate Order of March 13, 2014 emanating from the regulatory filings of Essex Powerlines Corporation (Essex). In those filings, Essex had used settlement forms that Essex had submitted to the Independent Electricity System Operator to determine the RPP and non-RPP split for the IESO's Global Adjustment and Hydro One Network Inc.'s power billings. Data errors in these forms resulted in a formula that misallocated amounts between RPP and non-RPP customers deposited in Group 1 Deferral and Variance Accounts (DVAs), Numbers 1588 and 1599.**

3. **The misallocation set out above resulted in the amount of approximately $11.5 million mistakenly credited to non-RPP customers, and the equivalent amount mistakenly collected from RPP customers.**

4. **The 2011 and 2012 Group 1 DVA balances received final clearance and were reflected in rates by the Board's Decision and Rate Order of March 13, 2014 entered in the Board proceeding EB 2013-0128. The 2011 and 2012 Group 1 DVA balances were disposed of by a rate rider that billed or credited customers for the period between May 1, 2014 and January 30,2014 (the error was discovered in January 2015 and the final three months of the rate rider were cancelled by the Board).**

5. **Essex has sought to simply retroactively adjust the allocation made in the DVAs between RPP and non-RPP customers after final clearance had been accomplished and then make a readjustment to the rates to reflect such adjusted allocation retroactively undoing the effect of the aforesaid rate rider.**

6. **Such relief was denied to Essex by the Board, first by way of Procedural Order 3 in EB 2014-0301, EB-2014-0072, and subsequently in the final order of June 9, 2015.**

7. **The current proceeding has been convened by the Board by way of the Notice of Motion of August 10, 2015 to consider the rejection of the relief requested by Essex by the Board's Decisions aforesaid by answering four questions:**

    1. **Did the OEB err in its rigid adherence to the rule against retroactive ratemaking when balancing the principles of just and reasonable rates and unjust discrimination to reasonable rates.**

2. **Did the OEB err in failing to sufficiently consider the exceptions to the rule against retroactive ratemaking including:**

    a. Nullity ?

    b. Extraordinary circumstance ?

3. **Did the OEB err in not finding that the accounting error is a billing error under the section 7.7 of the Retail Settlement Code?**

4. **Rule 41.02 provides: The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions. Does Rule 41.02 of the OEB's Rules of Practice and Procedure allow the OEB to correct such an error?**

Discussion of Issues

8. **The Board has also noted in the Notice of Motion of August 10, 2015 that the reasons for this review stem from the Board's opinion that the range of considerations giving rise to its original decision was too narrow. The Notice of Motion references both the principles behind the rule against retroactive ratemaking along with what is termed the overarching principle that rates , once set, are constituted to be "just and reasonable". The Board then moots the situation where an error causes the rates to be fall out of the just and reasonable range and states a concern that the "competing interests" that arise from the principles aforesaid should be fully considered. VECC's submissions shall attempt to address the Board's questions and the operative rationale behind its answers .**

9. **The Board's first question in paragraph 7 of the Notice of Motion, sets forth the necessity of a kind of balancing exercise between the rule against retroactive ratemaking and the principles of just and reasonable non-discriminatory rates. With respect, the question appears to confuse the proper task before the Board in**

this case of applying principles derived from well-established legal precedents to the facts at hand with one in which the result involves a more wide ranging consideration of the equities.

10. The rule against retroactive rates is an accepted feature of ratemaking for regulated utilities both in Canada and in the United States. In Canada, the Supreme Court of Canada has noted with respect to rates set by the former Public Utilities Board of Alberta :

> **"The Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. It is quite a different thing to design a future rate to recover for the utility a 'loss' incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods.[1]**

11. *In City of Calgary et al v. Madison Natural Gas Co. Ltd. Et al.*[2] , the Alberta Court of Appeal was called upon to determine whether the respondents received monies in excess of the rate of return fixed by the Board of Public Utilities Commissioners under the terms of the Natural Gas Utilities Act. Notwithstanding the presence of a surplus, and the existence of very wide powers under the relevant statute to determine just and reasonable prices paid to natural gas producers, the Court agreed with the Board had no jurisdiction to deal with the surplus:

> **"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**

[1] *Northwestern Utilities Limited and The Public Utilities Board of Alberta ,v.*The City of Edmonton, [1979] 1 S.C.R. 684 at 691
[2] [1959] A.J. No. 56

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."[3]

12. The Supreme Court of Canada also considered this issue in *Bell Canada v. Canada et al.*,[4] **where a reduction of final telephone rates was ordered altering the interim rates had been previously ordered by the regulator , the Canadian Radio-Television Telecommunications Commission (CRTC). The interim order was held to provide an exception to the principle of prospective ratemaking. The judgement of the court noted:**

> **"Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion. The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits."**[5]

[3] *City of Calgary v. Madison Natural Gas Company* — [1959] A.J. No. 56; 19 D.L.R. (2d) 655; 28 W.W.R. 353;p.5
[4] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission* [1989] 1 S.C.R. 1722
[5] Ibid at para 37

13. It is clear from these Canadian decisions that retroactive ratemaking is not permitted as a general rule. The ordinary requirement of establishing just and reasonable rates will not be sufficient to either compel a review or institute such possible remedial action concerning rates previously ordered unless a mechanism such as an interim order exists to enable retrospective ratemaking. The mere authority on the part of a tribunal to review, rescind or vary an order on a prospective basis does not carry with it a the jurisdiction to make a new order with retrospective effect without the use of a mechanism previously in place that connotes the possibility of a future change to the rate order on that basis.

14. In the United States, the prohibition against retroactive ratemaking is part of the "Filed Rate Doctrine". The doctrine protects the regulator's authority and promotes certainty and predictability in rates. The Supreme Court of the United States judgement in *Arkansas Louisiana Gas Corp. v. Hall* noted:

> **"Under the filed rate doctrine , the Federal Power Commission alone is empowered to make that judgement of the reasonableness of rates , and until it has done so, no other rate than the one on file may be charged."[6]**

The Court stated in its Decision that not only could a regulated seller of natural gas not collect a rate other than that set by the Commission, the Commission itself could not set a rate increase for gas already sold.[7]

15. The effect of the doctrine prevents regulators from taking action inconsistent with a previously established rate. In *Columbia Gas Transportation Corporation v. FERC,* [8] the courts declined to give effect to a Commission surcharge on past gas purchases to make up for a supplier shortfall from the forecast of pass-through costs, and to make purchaser/users pay the actual costs of supply passed through from a past period.

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[6] *Arkansas Louisiana Gas Corp v. Hall* 453 U.S. 571, 581,582.
[7] Ibid at p.578
[8] *Columbia Gas Transmission Corp v. FERC 831* F. 2nd 1135

16. In addition to noting the necessity of purchasers knowing the cost of what they are purchasing in advance, the court in the *Columbia c*ase rejected the principle that retroactive ratemaking could be justified by the application of the principle of "just and reasonable" rates :

> **"While section 601 permits a pipeline to recover any amount paid for natural gas that "is deemed to be just and reasonable for purposes of sections 4 and 5 of [the NGA]," id. § 3431(c)(2)(A), we read nothing in the language of the section to warrant a resort to retroactive as opposed to prospective rate increases."[9]**

17. The U.S. adherence to the filed rate doctrine, and its prohibition on retrospective ratemaking has been resistant to any alteration based on circumstances that, if known at the time of the filing giving rise to the order sought to be varied, would likely have resulted in different rates. For example, the failure of the utility to depreciate its rate base plant with the result that the utility claimed an income tax expense higher than taxes actually paid was not sufficient to allow an attempt to compensate ratepayers through a reduction in rate base:

> **"Just as there is no recovery of reparations for rates charged under a Commission order later held to be invalid, there can be no retroactive adjustment in this case simply because the Commission has now decided to treat tax benefits differently."[10]**

18. The Supreme Court of the United States has affirmed the applicability of the file rate doctrine even where anti-trust violations were alleged, the rates being immune from such challenge despite the probable effect of such conduct on the justness and reasonableness of such rates.[11]

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[9] Ibid at p.6
[10] *Citizens Utilities Co. v. Illinois Commerce Commission*, 124 Ill. 2nd 195 (1988) at p. 9 (Supreme Court of Illinois)
[11] *Square D Co. v. Niagara Tariff Bureau Inc.* 476 U.S. 409 (USSC) (1986)

19. As well, billing errors by the utility cannot be ultimately corrected on the basis of the balance of equities. The general utility rule provides that in instances of a mistaken under billing of a customer by a public utility, the public utility not only holds the right, but the obligation, to collect the underpayment. Neither the reason for the under-billing, nor the impact on the customer will mitigate the effect on the operation of this rule.[12]

20. It is also to be noted, this strict approach to the filed rate doctrine helps to prevent sweetheart deals by the regulated utility, particularly with non-arm's length utility customers or affiliates, where the deals have not been given final rate approval by the regulator. Any such deal, not in accordance with filed rates, will, upon disclosure, result in the utility being compelled to collect the foregone rates.

21. It is thus evident that the statutory obligation to produce just and reasonable rates, on both sides of the border, is insufficient to allow a regulator to review, and retroactively change a rate order. It is also impermissible to use the statutory regulatory objectives as power-conferring provisions[13].

22. There must be a recognized exception to enable a regulator to change rates such that the change will have retroactive effect. These exceptions have been mostly driven by the desire to get rates right by delaying the determination of final rates until actual numbers are known. The prospect that rates may change must be inherent in the description and use of the exception.

23. The exceptions, in fact, conform to the principles and objectives of the filed rate doctrine and the prohibition against retroactive ratemaking, by alerting the regulated utility and its customers that the rates may change upon receipt of up to date information for the period for which rates are now being charged.

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[12] *West Penn Power Co.* v. v. *Nationwide Mutual Insurance Co.,* 209 Pa Super 509

[13] *Barrie Public Utilities v. Canadian Cable Television Association* 2003 S.C.R. 476 at para 22

24. For example, in the *Bell Canada* [14]case discussed previously, the Commission's declaration of rates as interim meant that the final rates might be subject to change when further information was received. The use of deferral accounts to deposit rates collected from ratepayers for future disposition by the regulator was similarly approved by the Supreme Court of Canada in *Bell Aliant* [15]with the Court noting that deferral accounts are "accepted regulatory tools" that " enable a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year".[16]

Hence, in the words of Abella J.:

> **"These (deferral) account funds can be properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision."[17]**

25. Most recently, in its decision in *Union Gas Ltd. v. Ontario (Energy Board)*[2015] O.J. No. 3276, the Ontario Court of Appeal has affirmed the exception of "encumbered funds", where, through the use of a deferral account, interim order, or the terms of an IRM agreement, the funds are encumbered with the fact that a further determination by the regulator is to made that may have retrospective affect altering rates.[18]

26. The *Union Gas* decision set out the main policy reason behind the exceptions to rate decisions with retroactive effect when it quoted with approval from the decision of the Alberta Court of Appeal in *Atco Gas and Pipelines Limited v. Alberta (Utilities Commission*). 2014 ABCA 28 at para 56:

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[14] Ibid at footnote 3
[15] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764
[16] Ibid at para 454.
[17] Ibid at para. 63
[18] *Union Gas Ltd. V. Ontario (Energy Board)[2015}]O.J. No. 3276 at p.17*

> **"…the critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties knowledge [that rates were subject to change]."**

27. **In this proceeding, it can be said that no such expectation of future change arose when the 2011 and 2012 DVA accounts were cleared, and the rate rider applied. There was no Board ordered procedure for a reexamination of the rates so derived and a true-up, and the expectation of all stakeholders must have been that these rates were final.**

28. **If there was no further encumbering of the monies disposed of in these DVA accounts though interim orders, further deferral accounts, or otherwise, there can be no adjustment to the rates made by the Board now on a retrospective basis. As well, as the case law shows, the requirement for the production of just and reasonable rates cannot reach back to have retrospective effect on the subject amounts.**

29. **The Notice of Motion of August 10, 2015, however, suggests that possible further exceptions to the rule against retro-active ratemaking may exist if the rates based on a "nullity", or there exist "extraordinary circumstances".**

30. **According to Black's Law Dictionary, a nullity is defined as:**

> **Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect.**[19]

[19] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed at http://thelawdictionary.org/nullity/

31. **In *Trusts and Guarantee Co. v. National Debenture Corp* [1946] 3 D.L.R. 28 (OCA), Hogg J.A. noted with approval the case of Hewgill v. Chadwick (1899) 18 P.R. 359 where Ferguson, J. at p. 364, spoke of the terms "irregularity" and "Nullity" as follows:**

> **"Again where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such error is an irregularity. But where the proceeding itself is altogether unwarranted and different from that which, if any, ought to have been taken, then the proceeding is a nullity."**

32. **In order to constitute a nullity, there must have been no authority on the part of the Board to issue its Decision and Order of March 2014, and that decision was thus of no effect. As the above-noted case indicates, it is more likely that any error was merely in the manner taking it and thus an irregularity. The fact that the utility supplied the incorrect information and misallocated dollar amounts did not strip the Board of its authority to clear the DVA accounts and adjudicate the rate results.**

33. **Nor did the mismatch of the DVA accounts constitute some kind of rare result of forces acting outside the realm of foreseeability creating an "extraordinary result". Neither of these suggested exceptions are tenable in fact or law for the situation herein.**

34. **With respect to Question 3 posed herein, if the Board does not have the authority to alter a rate order retroactively on the basis of its own statutory powers, it cannot do so by access to rules made by its own rule making authority under the System Code. The Board may correct an error within the contemplated meaning of the section, but it cannot invoke retrospective effect for its correction. VECC also agrees with**

the submissions of SEC herein to the effect that the circumstances of the regulatory malfeasance of Essex are clearly beyond the ambit of this section.

35. With respect to Question 4, this section of the Rules, 41.02, draws upon the Board's statutory authority to allow corrections to its orders in a limited range of situations. It is also subject to the operation of the rule against retroactive ratemaking, so its impact can be prospective only, particularly where the correction a rate that has been determined by the evidence submitted and filed accordingly.

Conclusions

36. In its Notice of Motion of August 10, 2015, the Board seeks to determine whether further adjustments should be made to the 2011 and 2012 DVA balances, presumably in the manner suggested by Essex. The adequacy of the penalty levied by the Board to compel compliance by Essex as a result of the Board's finding of demonstrable carelessness in regulatory accounting as part of the Decision of June 9, 2015 is not an issue raised by the Notice of Motion and will not be addressed by VECC unless directed to do so by the Board.

37. The answer to the Board's query is thus a definitive no. To do so would engage the Board in an exercise of retroactive ratemaking that cannot be justified by the application of the facts of this case to settled law. In particular, there is no exception to the application of the fixed rate rule and/or the prohibition against retroactive ratemaking that would allow the Essex proposal to be approved.

Respectfully submitted this 8th day of September 2015

Michael Janigan
Counsel for VECC