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September 8, 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: Submissions on Review of Essex Powerlines Corporation ("Essex Powerlines")
Board File No. EB-2015-0240

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

Please find enclosed Essex Powerlines' Submissions to the OEB's Notice of Motion to Review, Notice of Motion Hearing and Procedural Order No. 1 dated August 10, 2015.

If there are any questions, please contact the undersigned.

Yours very truly,

AIRD & BERLIS LLP

Scott Stoll

SAS/bm

cc: *Board Counsel, Maureen Helt (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.

Essex Powerlines Corporation's Submissions on Review

1. These are the Submissions of Essex Powerlines Corporation ("Essex Powerlines") in response to the Ontario Energy Board's (the "OEB" or the "Board") motion to review its Procedural Order No. 1 in EB-2014-0301 and EB-2014-0072 (the "Procedural Order No. 1"), which was made in the context of Essex Powerlines' 2015 rates case.

2. In Procedural Order No. 1, the Board rejected a request by Essex Powerlines to adjust rates between two groups of customers – RPP Customers and Non-RPP Customers – in order to correct the result of an error that Essex Powerlines discovered in the calculation of those rates. Specifically, Essex Powerlines proposed this adjustment because it had erroneously allocated amounts in deferral accounts relating to 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: 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.

3. Essex Powerlines did not benefit from its error and it requested the Board to put the customers in the position they would have been if the error had not been made.

4. The Board rejected Essex Powerlines' submissions on the grounds that the order approving the disposition of deferral accounts was a final order and therefore could not be retroactively adjusted. Essex Powerlines commenced a motion requesting the Board to review Procedural Order No. 1. The Board deferred that motion pending the final disposition of the 2015 Rates Case, which was made by Decision and Order dated June 9, 2015. Essex Powerlines did not recommence the motion.

5. On August 10, 2015, the Board issued the Notice of Motion herein to Review Procedural Order No. 1. The Board invited submissions from all parties to this proceeding on the following issues:

    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 calculation or similar error made in its orders or decisions. Roes Rule 41.02 of the OEB's Rules of Practice and Procedure allow the OEB to correct such an error?

6. Essex Powerlines' submissions on these issues are set out below.

Issue 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?

7. For the reasons set out below, Essex Powerlines submits that the Board did and does have the power to correct errors in final rate orders. However, Essex Powerlines is concerned with the characterization of this authority in this question.

8. The question refers to balancing the rule against retroactive rate making against the principles of just and reasonable rates and unjust discrimination. With respect, this characterization does not take into account the legal basis for the rule against retroactive rate making and the exceptions to that rule.

9. The law is clear that the restriction on making retroactive adjustments to final rates is a legal restriction. It is not just a matter of balancing certain components public utility rate making, such as unjust discrimination: a regulator, such as the Board does not have jurisdiction to adjust final rates without specific legal authority.

10. 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)*:[1]

> "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;

[1] [2006] S.C.J. No. 4, at para. 71.

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).

11. In *Northwestern Utilities Ltd.* v. *Edmonton*,[2], 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).

12. It is this finality that distinguishes a final order from an interim order. As the Supreme Court of Canada stated in *Bell Canada* v. *CRTC*[3], "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).

13. Thus, the rule against retroactive ratemaking is not a component of a balancing exercise. In order to retroactively make an adjustment in rates, the Board must base that adjustment on a legally recognized exception to that rule. The exception that is most relevant in this case is identified in Issue 4 below (correcting errors). Before

[2] [1979] 1 S.C.R. 684.
[3] [1989] 1 S.C.R. 1722.

addressing that point in detail, these submissions will address the remaining issues in this review.

Issue 2: Did the OEB err in failing to sufficiently consider the exceptions to the rule against retroactive ratemaking?

Nullity

14. Essex Powerlines does not understand the concept of "nullity" to constitute an exception to the rule against retroactivity as the question suggests. A "nullity" is a way to characterize a decision of a tribunal that was found by a reviewing court to have been made without jurisdiction. As the authors of *Wade & Forsyth Administrative Law* explain:[4]

> "An act or order which is *ultra vires* is a nullity, utterly without existence or effect in law. That is the meaning of 'void', the term most commonly used. In several decisions the House of Lords made it clear that 'there are no degrees of nullity' and that errors such as bad faith, wrong grounds, and breach of natural justice all necessarily involve excess of jurisdiction and therefore nullity."

15. As a result, 'nullity' is a characteristic of a decision found to have been made without jurisdiction. It is not the grounds for an exception to the rule against retroactivity. It may be that this term is being used by the Board and understood by others to have a different meaning. If so, Essex Powerlines will address those arguments in its reply submissions if necessary.

Extraordinary Circumstances

16. The concept of "extraordinary circumstances" as a basis for adjusting rates was recognized by the Supreme Court of Utah in *MCI Telecommunications v. Public Service*

[4] *Wade & Forsyth Administrative Law (9th)* Oxford University Press, at pp. 300-301.

Commission.[5]*("MCI").* In *MCI*, the Utah Court held that it would adopt "extraordinary circumstances" as a basis for permitting a retroactive rate adjustment where there have been extraordinary and unforeseeable changes to the revenues or expenses that underlie approved rates, particularly where the impact of the changes was intentionally withheld by the utility. According to the Court:[6]

> "A utility that misleads or fails to disclose information pertinent to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected. The rule against retroactive rate making was not intended to permit a utility to subvert the integrity of the rate-making proceedings...If a utility misleads the Commission or Division by withholding relevant information, the rates fixed by the Commission cannot be based on reasonable projections of the utility's revenues and expenses. The rule against retroactive rate making was designed to ensure the integrity of the rate-making process, not to shelter a utility's improperly obtained revenues."

17. Essex Powerlines is not aware of any Canadian court which has adopted that decision. The OEB referred to *MCI* in 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."[7]

18. 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

[5] 840 P. 2d 765 (Utah 1992).
[6] 840 P. 2d 765 (Utah 1992) at p. 775 (citations omitted).
[7] EB-2014-0043, p. 2.

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. In light of the broader implications of adopting this doctrine, Essex Powerlines submits that it would be prudent for the Board to not rule on it in this case because it is not relevant to the facts under consideration.

Issue 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?

19. The issue of whether the error in this case is a billing error is completely distinct from the concept of an exception to the rule against retroactive rate making. Again, the rule against retroactive rate making is jurisdictional and the Board has no authority to depart from it outside of specific recognized circumstances as addressed more fully in these submissions. The Board clearly does not have the authority to pass a rule or code – such as the Retail Settlements Code – which would have the effect of eliminating the rule against retroactive rate making. Thus, if, and to the extent that the Board finds that the errors resulted from the implementation of final rate orders, then that finding cannot be set aside on the basis that the Retail Settlements Code permits corrections to billing errors. Given the finding in this case – which is supported by the record – that the deferral accounts were cleared in a final rate order, it does not appear that s. 7.7 of the Retail Settlements Code is relevant.

Issue 4: Does Rule 41.02 of the OEB's Rules of Practice and Procedure allow the OEB to correct the error in this case?

20. In Essex Powerlines' submission, Rule 41.02 is the most relevant and appropriate grounds for the Board to correct the error in this case. This is because it is consistent

with the relevant legal authorities and it most accurately captures and corrects the errors that occurred in this case.

21. The power to correct an error is an exception to the general rule that an administrative decision-maker has no ongoing power – or is *functus officio* – after it releases a final decision. In other words, as the Supreme Court of Canada put it, "As a general rule, once...a decision maker has reached a final decision in respect of a matter before it in accordance with its enabling statute, that decision cannot be revised."[8] In this case, the *functus* rule is why the Board does not have the authority to set retroactive rates.

22. However, an exception to this rule is that the decision-maker always maintains the power to correct an order to ensure that its original intention is reflected in that order. This power, called the "accidental slip rule" applies both where the error is in the Board's decision itself or, where, such as here, the error is in evidence that was incorporated into a Board decision.

23. Macauley's *Practice and Procedure in Administrative Tribunals* describes the accidental slip rule as applying to "cases where the applicant has accidentally mislead or failed to provide a decision-maker with the correct facts."

> "It is important to note that in these cases the substance of the decision-maker's decision was not being changed. In each case it could be argued that the decision-maker had intended to, or had, awarded the thing in question which had been omitted from the implementation of the court's intention by error."[9]

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[8] See: Macauley's Practice and Procedure in Administrative Tribunals, at p. 27A-5, citing *Chandler v. Association of Architects (Alta),* [1989] 62 D.L.R. (4th) 577 at 596.
[9] Macauley's Practice and Procedure in Administrative Tribunals, at p. 27A-33.

24. As this quotation demonstrates, the purpose of the rule is to implement what the decision would have been if the decision-maker was not mistaken as to an underlying fact.

25. The accidental slip rule has been applied by the Divisional Court with respect to tribunals that have the same power as that granted to the OEB in Rule 41.02. Thus, for example, in *Grier* v. *Metro International Trucks Ltd.*, an employment standards officer (the "ESO") had to determine a former employee's vacation pay entitlement. Having determined that the employee was entitled to vacation pay, the ESO erroneously determined a payment amount based on an employment period of two days instead of the actual employment period of one year and two days. The error in the decision arose from an error in an agreed statement of facts. After the decision was released, a party brought a motion to fix the error. The Divisional Court held that it was appropriate to do so:[10]

> "Under the ESA the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision.

26. Similarly, in *Kingston* v. *Ontario (Mining & Lands Commissioner)* (1977), 18 O.R. (2d) 166 (Div. Ct.), the Divisional Court stated:

> "Where an officer or tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out that the order, through inadvertence or negligence of one of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view is for the interested party to apply to the tribunal to have its order amended."

[10] [1996] O.J. No. 538, p. 7.

27. The Board thus has the power to amend its order to incorporate the correct information.

28. Applying that here, the Board's order clearing the 2011 and 2012 deferral accounts was based on erroneous information respecting those accounts. If the correct amounts had been provided to the Board, the Board would have cleared the accounts on that basis.

29. In other words, the Board's order incorporated the erroneous information, not because it was persuaded to, but because the information was provided in error. In this case, if the Board determines that perpetuating the error is not in the public interest the Board can legally correct the error.

30. The panel in Essex Powerlines' 2013 rates case dismissed these arguments on the grounds that the quantum of the error in this case was too large to constitute an error for the purposes of Rule 41.02:[11]

> To use this rule in the case of Essex Powerlines' allocation of costs associated with Group 1 DVAs would equate the misallocation to a minor error needing correction. The errors made by Essex Powerlines were not minor and impacted its customers in a material way. This does not fall within the category of changes that can be made by the OEB without a hearing.

31. With due respect to the panel that made this decision, this conclusion was clearly in error. Rule 42.01 addresses the types of mistakes that lead to errors in decisions ("typographical error, error calculation or similar error"), not their magnitude. Needless to say, a typographical error or error in calculation may be one that is quite large. For example, a few misplaced zeros can turn a thousand dollar error into a million dollar error.

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[11] Decision and Order in EB-2014-0301 EB-2014-0072, p. 7.

Consequences of a Rehearing

32. As the Board is aware, this review is limited to the issues identified by the Board and considered in Procedural Order No. 1. As a result, any decision released by the Board must be restricted to these issues. For this reason, Essex Powerlines has not submitted any additional arguments respecting the limits on the Board's jurisdiction to impose any other consequences on Essex Powerlines. Any consideration of those issues would be out of the scope of this review and the authority of the Board under this review.

33. Having said this, Essex Powerlines appreciates that any reconsideration of Procedural Order No. 1 will require implementation through new rate orders. Essex Powerlines commits to assist the Board in a practical and expeditious implementation of any new such orders in a way that minimizes impacts on customers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: September 8, 2015

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