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BY E-MAIL

September 8, 2015

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Ontario Energy Board Motion to Review
Essex Powerlines Corporation (EB-2014-0301/EB-2014-0072)
Board File No. EB-2015-0240

Please find attached OEB staff's submission with respect to the motion to review the decision relating to Essex Powerlines Corporation (EB-2014-0301/EB-2014-0072).

Yours truly,

Original signed by

Lynne Anderson
Vice President, Applications

Attach

MOTION TO REVIEW

ESSEX POWERLINES CORPORATION

2015 DISTRIBUTION RATES

(EB-2014-0301/EB-2014-0072)

EB-2015-0240

Staff Submission

September 8, 2015

TABLE OF CONTENTS

1 NATURE OF THE MOTION - OVERVIEW

On August 10, 2015, the Ontario Energy Board (OEB) initiated a proceeding on its own motion to review the Partial Decision and Procedural Order No. 3, issued on March 25, 2015, in the Essex Powerlines Corporation (Essex Powerlines) 2015 rate proceeding. The OEB determined that it would like to hear further submissions on whether it is appropriate to make an adjustment to correct a misallocation error between the 2011 and 2012 balances of two Group 1 Deferral and Variance Accounts (DVA): Account 1588 – RSVA Power, and Account 1589 – RSVA Global Adjustment.

OEB staff has reviewed the Essex Powerlines 2015 rate proceeding record. The 2011 and 2012 misallocation totaled $5,178,750. The 2015 rate proceeding decision, issued on June 9, 2015, corrected for recovery of the misallocation during a 3 month stub period, reducing the error by $1,563,971. However, the balance of the misallocation was considered part of the final 2014 rates, confirming the findings in the Partial Decision and Procedural Order No. 3.

In the current motion proceeding, the OEB has made provision for submissions on the finding with respect to retroactive ratemaking and the remaining misallocation error. A correction of the remaining misallocation error would credit regulated price plan (RPP) customers with $3,614,779 and debit non-regulated price plan (non-RPP) customers by an equal amount. OEB staff provides the following submission on the issues set out in the current motion.

2 BACKGROUND

The OEB combined the Essex Powerlines applications for 2015 rates (annual Price Cap Incentive Rate-Setting Adjustment – EB-2014-0072) and final smart meter cost recovery (EB-2014-0301) into a single proceeding (the 2015 rate proceeding). The disposition of 2013 year end Group 1 DVA balances was part of the Essex Powerlines application for 2015 rates.

Following interrogatories and submissions, Essex Powerlines filed its reply submission on January 20, 2015. Essex Powerlines identified a misallocation between two Group 1 variance accounts for the years 2011, 2012 and 2013 and proposed that the error be corrected. The two accounts are:

- 1588 – RSVA Power (affecting RPP customers)
- 1589 – RSVA Global Adjustment (affecting non-RPP customers)

The OEB had approved disposition of 2012 year end balances for Group 1 accounts in the Essex Powerlines 2014 rate proceeding (EB-2013-0128). Rate riders to recover the balances were approved for a one-year period from May 1, 2014 to April 30, 2015. The 2012 year end balances reflected the misallocation error in accounts 1588 and 1589 for the years 2011 and 2012. Based on Essex Powerlines evidence, the rate riders approved in the 2014 rates proceeding over-collect $5,178,750 from RPP customers and under-collect $5,178,750 from non-RPP customers.[1]

On February 6, 2015, the OEB reopened the record of the proceeding to enable the filing of new evidence and for the filing of submissions on the misallocation matter. The submissions addressed whether the OEB should consider an adjustment to the 2011 and 2012 account balances and whether that adjustment would violate the legal requirements concerning retroactive ratemaking.[2]

At Essex Powerlines' request, the OEB issued a Rate Order on February 27, 2015 that stopped the application of the rate riders approved in the 2014 rate proceeding effective February 1, 2015.

The OEB determined in Partial Decision and Procedural Order No. 3 dated March 25, 2015 that the 2011 and 2012 $5,178,750 misallocation error identified by Essex Powerlines is not a billing error.

[1] Essex Powerlines Submission, Table 1, January 20, 2015. The 2013 misallocation was determined to be $6,419,261, for a total 2011-2013 misallocation of $11,598,011

[2] Submissions were filed by OEB staff, Energy Probe Research Foundation, School Energy Coalition and Vulnerable Energy Consumers Coalition

The OEB also determined that Essex Powerlines' proposal to correct the error violates the rule against retroactive ratemaking and on that basis rejected Essex Powerlines' proposal to adjust the 2011 and 2012 DVA balances which were disposed on a final basis. The OEB ordered an oral hearing to assist with clarification of the record and asked parties to comment on whether or not there should be a financial consequence for Essex as a result of the error.

On April 2, 2015, Essex Powerlines filed a Notice of Motion (Essex Motion) to review the OEB's March 25, 2015 decision. Having found that the 2011 and 2012 balances were final, the Essex Motion stated that OEB was deprived of jurisdiction to consider whether Essex Powerlines should be required to reimburse customers for amounts that they have overpaid for that period. In Procedural Order No. 4, the OEB ordered that the Essex Motion be placed in abeyance pending its decision on the 2015 rates proceeding.

Following the oral hearing on April 14, 2015, and submissions from parties and OEB staff, the OEB issued its Decision and Order on 2015 rates on June 9, 2015.

OEB Decision June 9, 2015,

In its Decision and Order, the OEB summarized the nature of the error as follows[3]:

> In its reply submission to the Price Cap IR application, Essex Powerlines included new information relating to an error that it discovered in the 2011, 2012 and 2013 rate years. The source of the error occurred in the settlement forms that Essex Powerlines submitted to the Independent Electricity System Operator's (IESO) which are used to determine the RPP and non-RPP split for the IESO's Global Adjustment and Hydro One Network Inc.'s power billings.
>
> The forms used at that time were the IESO's, and the forms required that Essex Powerlines input an allocation formula that the IESO then used to bill the Global Adjustment. Staff at Essex Powerlines made a data input error in this formula.
>
> The error affected RPP and non-RPP customers as follows:

[3] Decision and Order, EB-2014-0301/EB-2014-0072

Table 2: Annual Breakdown of Misallocated Amounts

	Under-collected from Non-RPP	Over-collected from RPP
2011	$1,561,164	$1,561,164
2012	$3,617,586	$3,617,586
2013	$6,419,261	$6,419,261
Total	**$11,598,011**	**$11,598,011**

The OEB found that the disposition of 2011 and 2012 balances, except for account 1588 and 1589, for the period February 1 to April 30, 2015, should continue as approved in the 2014 rates proceeding. The OEB approved a correction related to the misallocation in accounts 1588 and 1589 for the rate rider collection period February 1 to April 30, 2015. That correction effectively credited account 1588 with $1,563,971 and debited account 1589 by $1,563,971.[4] The OEB also approved disposition of 2013 account balances that reflect correctly allocated amounts between RPP and non-RPP customers. Four rate riders are described on page 10 of the decision:

- Rate Riders 1 and 2 dispose of 2013 year end balances for all accounts except 1588 and 1589. Rate Riders 1 and 2 also complete the disposition 2012 year end balances in accounts 1588 and 1589, corrected for the misallocation for the rate rider collection period February 1 to April 30, 2015.
- Rate Riders 3 and 4 dispose of 2013 year end balances in accounts 1588 and 1589 on a correctly allocated basis.

All of the approvals of balances and rate riders are on an interim basis. The OEB ordered a complete audit to ensure that all accounts entries and balances (not just Group 1) are accurate for 2013 and on a go forward basis.

[4] Decision and Order, EB-2014-0301/EB-2014-0072, page 8, June 9, 2015 and OEB Staff Submission, EB-2014-0301/EB-2014-0072, page 4, April 30, 2015

3 THE ISSUES

In the Motion to Review the OEB has asked OEB staff and the parties to consider the following issues:

3.1 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?

3.2 Did the OEB err in failing to sufficiently consider the exceptions to the rule against retroactive ratemaking including: a) Nullity, and b) Extraordinary circumstance?

3.3 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?

3.4 Can Rule 41.02 of the OEB's Rules of Practice and Procedure be used to correct the error?

Each of the above issues is addressed below.

3.1 Adherence to Retroactive Ratemaking

Issue 1 - Did the OEB err in its adherence to the rule against retroactive ratemaking when balancing the principles of just and reasonable rates and unjust discrimination to reasonable rates?

OEB staff submits that it is helpful to set out the underlying rationale for the rule against retroactive ratemaking first as it sets out the appropriate context to consider the issue of just and reasonable rates and unjust discrimination to reasonable rates.

Underlying Rationale for the Rule against Retroactive Ratemaking

The rule against retroactive ratemaking is relevant to the OEB's mandate in the context of the setting of rates. The OEB is empowered under sections 36(2) and 78(3) of the *Ontario Energy OEB Act, 1998* (Act) to "approve or fix just and reasonable rates". The rate setting adopted by the OEB under the Act is a positive approval scheme, whereby rates are set based on a test year, but on a prospective or forward-looking basis. There is no specific statutory provision that would allow the OEB to set rates retroactively and therefore, the rule against retroactive ratemaking applies.

OEB staff submits that the following principles, as established through the case law, underlie the rule against retroactivity:

1. *Rates are required to be set on a prospective basis such that the costs included in setting the rates charged to customers relate to the time period in which the costs are incurred by the utility and the related services are provided to customers.*

2. *Once a rate is set on a final (as opposed to an interim) basis, the rate order is legally binding on both the utility and its ratepayers and the utility and its ratepayers are entitled to rely on the rate order.*[5]

OEB staff submits that there are several justifications for the above noted principles of the rule against retroactive ratemaking: first, both distributors and consumers are entitled to certainty respecting the rates they are responsible for, and should generally not be made to "top-up" or adjust down those rates after they have already been paid.[6] Second, charging consumers through current rates for out of period costs will likely result in intergenerational inequity, whereby the consumers that were responsible for the costs may not be the same consumers paying the costs.

The principles behind the retroactivity rule were set out by the Newfoundland Court of Appeal in *Re: Board of Commissioner of Public Utilities*[7] at page 25.

> …the rule is concerned more with issues of fairness, both to customers and to the utility shareholders. The customer-related fairness issue is often referred to as the "inter-generational equity" problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to attract and maintain reasonably-priced equity investment in a utility, shareholders require some certainty that matters already dealt with by the regulator have some degree of finality associated with them.

The *Newfoundland* case questioned the importance of intergenerational equity at page 28.

[5] *Bell Canada v. Canadian Radio-Television & Telecommunication Commission* [1989] 1 SCR 1722 at 1762-3; *ATCO Gas & Pipelines Ltd. v. Alberta Energy & Utilities Board* [2006] 1 SCR 140, 263 D.L.R. (4th) 193 ; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684; *Re Coseka Resources Ltd. And Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R.

[6] *Calgary (City) v. Alberta (Energy and Utilities Board*), 2010 ABCA 132, para. 47.

[7] *R. v. Board of Public Utilities Commissioners* (1966), 60 D.L.R. (2d) 703 (N.B.S.C.A.D.)

> While it is true that any rebate would not, because of the fluid nature of the customer base, result in a return to exactly the same body of consumers who had paid the original rates, this is not an insuperable objection to using this type of mechanism. Penning observes:
>
> > As a practical matter, however, at least some of this concern appears misplaced. By far the majority of today's rate payers for the majority of regulated public service utilities were also yesterday's rate payers – especially since the time frames at issue are typically not more than a year or two. So the unfairness argument about cost allocation loses some of its force.

In a very recent decision of the Ontario Court of Appeal in *Union Gas v. Ontario Energy Board* 2015 ONCA 453 at paragraphs 82 – 87 it stated:

> It is well established that an economic regulatory tribunal, such as the OEB, operating under a positive approval scheme of ratemaking must exercise its rate-making authority on a prospective basis. Generally speaking, absent express statutory authorization, such a regulator may not exercise its rate-making authority retroactively or retrospectively.
>
> In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, ("*Bell Canada 1989*"), at p. 1749, Gonthier J. writing for the court, characterized retroactive ratemaking as ratemaking the purpose of which "is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive."
>
> At p. 1759 of the same case, Gonthier J. explained that "the power to review its own previous final decision on the fairness and reasonableness of rates would threaten the stability of the regulated entity's financial situation."
>
> From the ratepayers' perspective, retroactive ratemaking may create unfairness because it "redistributes the cost of utility service by asking today's customers to pay for the expenses incurred by yesterday's customers": *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323, at para. 51.

Nonetheless, courts have recognized qualifications on the principle against retroactive ratemaking. There are a number of regulatory tools that permit out of period adjustments that do not run afoul of the general rule against retroactive rate making:

deferral accounts, interim rate orders, as well as the well established exceptions to the rule which include nullity, extraordinary circumstances and misconduct on the part of the utility.

This submission only considers the exceptions of nullity and extraordinary circumstance and these are dealt with in section 3.2 below.

Just and Reasonable Rates & Unjust Discrimination to Reasonable Rates

The setting of just and reasonable rates is one of the OEB's core powers and is at the very heart of the OEB's jurisdiction and that power of the OEB is one which should be interpreted in a fair, large, and liberal manner. [8] That applies to the actual level of the rates as well as the time period during which the rates are in effect. In considering the error made by Essex Powerlines it is arguable that a just and reasonable rate was not in effect during the period May 1, 2014 and January 31, 2015.

When considering the issue of just and reasonable rates and unjust discrimination the Supreme Court of Canada's decision in *Kenora (Town) Hydro Electric Commission and Vacationland Dairy Co-operative Ltd* [9] provides some helpful discussion.

This appeal concerned the validity of the defence of equitable estoppel to a claim by a public utility to recover amounts not collected because of a billing error. Some of the facts are as follows: Vacationland operated a dairy in the Kenora region and purchased its electrical power from the Hydro Electric Commission of the Town of Kenora (Kenora Hydro). Kenora Hydro was created as a public utility commission in 1966. In 1966, Kenora Hydro took over the supply of electricity to Vacationland without a written contract. In 1979, following a fire at its plant, Vacationland required an updating of its electrical service. Kenora Hydro installed the new electrical service which included a new meter head.

Kenora Hydro notified the town of the changes to be made for future billing purposes. This information was recorded by a town employee on a public utility order, and subsequently transferred to a metering card used by the town for billing. However, in transposing the embossed information to Vacationland's billing card, an error was made and the billing multiplier was recorded as 200 rather than 400. As a result of

[8] See, respectively, *Union Gas Ltd. v. Ontario (Energy Board)*, [1983] O.J. 3191 (Ont. Sup. Ct.) para 42; *Garland v. Consumers' Gas Company*, [2000] O.J. 1354 (Ont. Sup. Ct. Jus.), paras. 45-46 (overturned on separate grounds); *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, [2008] O.J. 1970 (Ont. Div. Ct.), paras. 38, 56.
[9] *Kenora (Town) Hydro Electric Commission and Vacationland Dairy Co-operative Ltd* (1992) 7 O.R. (3d) 385 Ontario Court of Appeal

that clerical error, Vacationland was under-billed by one-half of its actual consumption of electricity from January 1, 1980 to November 30, 1986.

The error was discovered in October 1986 when Vacationland, which was planning a further expansion of its facilities, requested that Kenora Hydro review its electrical requirements. Vacationland did not dispute the fact that it was billed some $52,470 less than it should have been for that period of electricity consumption, but argued that Kenora Hydro was estopped from claiming a reimbursement. The trial judge gave effect to the defence against Kenora Hydro's claim and dismissed the action.

The Ontario Court of Appeal unanimously dismissed the appeal by the appellants, Kenora Hydro and the Corporation of the Town of Kenora from the decision of the trial judge, who had held that Kenora Hydro was estopped from recovering from the respondent Vacationland Dairy Co-operative Ltd. because of its own negligence in miscalculating the amounts owing. The Supreme Court upheld the decision of the Ontario Court of Appeal.

OEB staff submits that while the case as a whole is distinguishable from the facts in Essex Powerlines, it does provide helpful analysis of the concepts of the responsibility of a utility to charge just and reasonable rates and to ensure non-discriminatory access.

In Essex Powerlines' case, the accounts in question are pass-through costs. OEB staff submits that commodity pass-through accounts are unique for several reasons. These ongoing variance accounts track the difference between the utility payments to the market suppliers and payments recovered from customers for the energy commodity. The utilities provide services for the conveyance of electricity or natural gas commodity; however, the energy commodity costs are not marked-up and are passed-through to their customers at cost. As such, these accounts are outside the revenue requirements of distribution rates of utilities. The ratemaking process is designed to ensure that there is no gain or loss for the energy commodity costs. The commodity pass-through variance accounts serve as an important mechanism in this process for the pass-through of the energy commodity costs.

Electricity distributors, such as Essex Powerlines, as part of the electricity commodity settlement process are required to submit monthly estimations to the IESO based on a number of the variables such as the global adjustment rate, and the sales volumes to RPP customers in the appropriate tier. Estimates are expected to be trued-up on a timely basis in the subsequent months. As the IESO does not set requirements for the frequency and the time periods of these true up adjustments, it is left to individual distributor's internal policies and procedures to address these (e.g. perform the true-up adjustments monthly, quarterly or annually).

As noted above, Essex Powerlines made a misallocation error between two Group 1 variance accounts for the years 2011, 2012 and 2013 and proposed that the error be corrected. The two accounts are:

- 1588 – RSVA Power (affecting Regulated Price Plan (RPP) customers)
- 1589 – RSVA Global Adjustment (affecting non-RPP customers)

OEB staff submits that the essential principle of the rule against retroactive ratemaking would dictate that when the amounts in a variance account are disposed of on a final basis, the final rate order cannot be changed to correct for the error unless one of the exceptions to the rule against retroactive ratemaking applies.

3.2 Exceptions to the Rule Against Retroactive Ratemaking

Issue 2 - Did the OEB err in failing to sufficiently consider the exceptions to the rule against retroactive ratemaking including: a) Nullity, and b) Extraordinary circumstance?

As noted above there are exceptions to the application of the rule against retroactive ratemaking in instances where there have been found to be exceptional circumstances or the rate was found to be a nullity.

Nullity

A nullity of a decision or part of decision arises when a tribunal or court makes a decision and that decision is not based on the evidence before the tribunal or court. For example, if the OEB had determined a final rate and it was determined after the fact that the evidence relied on to set that final rate was not credible, was false or did not exist, the final rate would not be considered to be just and reasonable and would be set aside as a nullity.

The OEB has had some experience with this exception. On April 8, 2013, Burlington Hydro Inc. (Burlington Hydro) filed a letter with the OEB stating that in its Decision and Order (EB-2012-0081) dated June 21, 2012, the OEB approved the disposition and recovery of its smart meter deployment costs effective July 1, 2012 which included a projection of costs to be paid to the smart meter entity (SME) from appropriate customer rate classes. Burlington Hydro requested direction from the OEB regarding the accounting procedure it should follow in order to avoid an over recovery of SME costs.

To address this matter, the OEB initiated a review on its own motion (EB-2013-0186) of the Decision and Order in EB-2012-0081.

In the evidence filed with the OEB in the main proceeding, Burlington Hydro informed the OEB of the following:

> No cost is included for which the Smart Meter Entity has exclusive authority to act pursuant to O. Reg. 393/07. However, by letter dated April 24, 2013, Burlington Hydro informed the OEB that the SME costs had been included in the model within the category of "WAN Maintenance" under the heading of "2012 and Later Forecast Costs". The total amount included in the model was $555,660.

The issue that the OEB addressed in its motion Decision was the potential for an over recovery of costs relating to the SME. The OEB found that Burlington Hydro misled the OEB by stating that no cost for which the SME has exclusive authority to act pursuant to O. Reg. 393/07 was included in the EB-2012-0081 proceeding. In other words, had the OEB known that these costs were included in the application; the OEB would have disallowed recovery consistent with prior decisions for other distributors on this particular matter.

The OEB found that this was grounds for a nullity with respect only to the costs related to the recovery of the SME charge and cancelled the related rate riders approved in the EB-2012-0081 proceeding.

OEB staff submits that the OEB in the Burlington Hydro case decided to vary its decision by setting aside that part of its decision which was rendered in the absence of any evidence to support it and, therefore, in excess of jurisdiction and in violation of the fundamental duties imposed upon it by the Act.

In *TELUS Communications Inc. v. Canada (Radio-television and Telecommunications Commission)*[10] the Federal Court of Appeal was asked to determine if the Telecom Decision CRTC 2003-54 was illegal as retroactive rate setting or merely the restoration of the *status quo ante* of rates applicable to certain conduit types owned by TELUS Communications. The Federal Court of Appeal allowed a retroactive alteration of rates however they noted:

[10] *TELUS Communications Inc. v. Canada (Radio-television and Telecommunications Commission)* (F.C.A.) [2005] 2 F.C.R. 388; 2004 FCA 365

> The CRTC did not retroactively or retrospectively set rates…Rather, it varied its decision by setting aside that part of its decision which was rendered in the absence of any evidence to support it and, therefore, in excess of jurisdiction and in violation of the fundamental duties imposed upon it by the Act. The effect, as it appears from paragraph 54 of its decision, was simply to restore the status quo ante which the invalid decision had altered. There was no setting of rates…" (at paragraph 40)

The Alberta Utilities Commission applied the same reasoning in *ATCO Gas South (Re),* [2010] AEUBD No 522, to allow retrospective rate adjustments where a past decision was nullified. In this case, however, the decision did not merely return rates to the *status quo*; new rates were set prospectively, with the express goal of "reimburs[ing] ATCO for the under collections" that resulted from the nullified decision.

In a very recent decision of the Alberta Utilities Commission 2015 LNAUC 55, *Milner Power (RE),* the Court stated:

> A fifth judicially recognized exception to the general principle against retroactive ratemaking and, more generally, retroactive decision-making by administrative tribunals, relates to any final (as opposed to interim) decision or order made by an administrative tribunal that is subsequently determined to be a nullity**.** In the past, courts have found administrative decisions to be nullities if they were ultra vires, that is, made in excess of jurisdiction.
>
> The complainants in this proceeding rely on the Federal Court of Appeal's decision in *Telus* as authority for the proposition that an administrative tribunal decision found to be a nullity is of no force or effect (i.e., amounts to "no disposition at all in law"). Thus, replacing it with a decision that complies with applicable legislation does not constitute **r**etroactive ratemaking. The complainants argue that because the Commission has found the Line Loss Rule to be unlawful from the very outset, it must be held to be a nullity and a new Line Loss Rule that does comply with the governing legislation and regulations should be substituted it its place.
>
> The Commission, in reviewing relevant judicial authorities, finds that a significant reconsideration (and narrowing) of Canadian law on the issue of what constitutes jurisdictional error began with the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. That decision was issued subsequent to the Federal Court of Appeal's decision in *Telus* and was followed by several more decisions of the Supreme Court in which it was held that true instances of jurisdictional error are rare. For example, Rothstein J., speaking for a majority of the

> Supreme Court in *Alberta (Information and Privacy Commissioner)* v. *Alberta Teachers' Association*, 2011 SCC 61 (at paragraph. 33), held that:
>
> > As this Court explained in *Canada (Canadian Human Rights Commission), "Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General*), 2011 SCC 1, [2011] 1 S.C.R. 3, at paras 33-34; *Smith v. Alliance Pipeline Ltd.*, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36).

In OEB staff's submission the question then becomes whether the final rate order which was made based on a misallocation error gives rise to the Panel having rendered a decision in the absence of evidence. If the OEB finds that the previous decision (i.e. the decision in the Essex Powerlines 2014 rate proceeding), in whole or in part, was a nullity, the decision would be reviewable and the OEB would be entitled to proceed to take appropriate corrective measures. OEB staff submits that the OEB has a statutory duty to set rates which are just and reasonable and if the OEB finds that the rates set were not just and reasonable it has the authority to take corrective action.

Extraordinary Circumstance

Another exception to the rule against retroactivity is the extraordinary circumstance exception derived from U.S. case law. In essence the exception is that retroactive ratemaking is allowed when there are extraordinary and unforeseeable expenses or revenues. This is because by definition the extraordinary and unforeseeable expenses or revenues cannot be taken into account in the ratemaking process and "justice and equity require that adjustments be made for unforeseen windfalls or disasters not caused by the utility."[11]

In a case before the Utah Public Utilities Commission (UPUC)[12], the Utah Industrial Energy Consumers (UIEC) filed an application submitting that the rule against retroactive ratemaking is not a bar to its application based on the extraordinary circumstances exception. The UIEC submitted that its Renewable Energy Credit revenues in question likely are in part the result of unforeseen events producing

[11] *BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH*, DOCKET NO. 88-049-18, ISSUED: August 31, 1998
[12] *Supra,* Note 11

extraordinary effects. In considering the meaning of extraordinary effects the UPUC noted at page 4:

> The UIEC argued that the Commission, in considering requests for deferred accounting, has previously found that regulatory accounting has somewhat different purposes and objectives than financial accounting. "Regulatory accounting is a tool to arrive at the regulatory objective of just and reasonable rates." Accordingly, "ratemaking rules and principles have application and may be given greater weight than [financial] accounting rules and principles in considering whether to issue an accounting order." UIEC believes the pertinent ratemaking principles, as distinct from financial accounting standards, support the imposition of the requested accounting order.

In deciding to hear the application the UPUC considered the timing of key events and circumstances and stated:

> One of our fundamental objectives is the establishment of just and reasonable rates. In pursuit of that objective we must not be thwarted by rigid adherence to particular interpretations of financial accounting standards, especially where those standards may have been designed to achieve somewhat different purposes. This case presents allegations of unforeseen and extraordinary events producing an extraordinary windfall for the Company. We further have allegations the windfall, or at least the timing of UIEC's ability to challenge it, may be at least partially the result of the Company's alleged knowing failure to disclose to the Commission relevant information in prior rate cases. Under these circumstances, we have a duty to investigate UIEC's allegations.

There have not been any cases where the OEB has specifically deliberated and made determinations on what would classify as extraordinary and unforeseeable expenses or revenues. In the North Bay Hydro decision[13] the OEB did state that the utility had not demonstrated any financial hardship that may have been as a result of the incorrect balances being cleared. It is not clear that had financial hardship been demonstrated that the OEB would have permitted a retroactive adjustment to North Bay Hydro's rates on the basis of an extraordinary circumstance.

[13] *North Bay Hydro Distribution Ltd.* No. EB-2009-0113

3.3 Billing Error

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?

Another category of error that may be brought to the attention of the OEB, although infrequently, is whether or not there has been a billing error. This is really a distinct category from accounting errors as there is a specific provision in the OEB's Retail Settlement Code (RSC)[14] which contemplates this type of error and provides guidance on how to treat this type of error.

Section 7.7 of the RSC establishes the criteria for the correction of billing errors. For both over billing and under billing circumstances, the maximum period for which the correction will be made is two years. OEB staff disagreed with Essex Powerlines' submission that the misallocation error is akin to a billing error and that it should be characterized as a continuing error into a period which is still interim. OEB staff submitted[15]:

> On the contrary, the error at issue is properly characterized as an "accounting error". This is because the evidence on the record indicates that Essex Powerlines accurately billed its customers in 2011 and 2012 based on the OEB-approved rates. In other words, one could only characterize this as a billing error had Essex Powerlines inaccurately billed its customers with a different rate than that required by the Board's rate order, or had it not charged any rate all.

OEB staff submitted that a billing error is not the same thing as a rate error. As noted in OEB staff's submission in the Brant County Power/Brantford Hydro case[16], the issue was about Board-approved rates that should have been charged, but were not. It was not about whether the rate itself was correct. A correction of a billing error is not retroactive ratemaking, since the result is not basing future rates on past costs. A billing adjustment is about ensuring a customer was charged properly the approved rate. In the 2015 rate proceeding, Essex Powerlines was seeking to recover amounts it believes should have been included in previous rates, but were not.

While staff still views the Essex situation as not a billing error as set out in the RSC, the question for the panel to consider is whether this accounting error, which is not described in the RSC, can be treated in a similar manner as a billing error.

[14] Ontario Energy Board Retail Settlement Code
[15] OEB Staff Submission, EB-2014-0072/EB-2014-0301, February 23, 2015, page 8
[16] EB-2009-0062 *Brant County*

3.4 Rule 41.02 of the OEB's Rules of Practice and Procedure

Issue 4 - Rule 41.02 provides: The OEB 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?

OEB staff submits that the question to consider in determining whether or not the OEB can rely on Rule 41.02 in correcting the error is how to characterize the misallocation associated with the disposition of Group 1 DVAs in 2011 and 2012. As set out above, the source of the error occurred in the settlement forms that Essex Powerlines submitted to the IESO which are used to determine the RPP and non-RPP split for the IESO's Global Adjustment and Hydro One Network Inc.'s power billings.

The forms used at that time were the IESO's, and required that Essex Powerlines input an allocation formula that the IESO then used to bill the Global Adjustment. Staff at Essex Powerlines made a data input error in this formula. The error affected RPP and non-RPP customers. In considering the nature of the error in this proceeding the OEB, in its Decision and Order dated June 9, 2015, referenced the submissions of Essex Powerlines in its Argument in Chief, wherein Essex maintained the view that the amounts over and under-billed to customers should be corrected in full (i.e. including the already settled amounts). Essex submitted that the OEB could correct the error of the misallocation of the riders associated with the disposition of Group 1 DVAs in 2011 and 2012 through application of Rule 41.02 of the *Rules of Practice and Procedure*. In its reply submission, Essex Powerlines indicated that the OEB did not address this argument in the Partial Decision and Procedural Order No. 3.

The OEB found that:

> This was not an oversight by the OEB in Procedural Order No. 3. The OEB's view was that the application of Rule 41.02 was not applicable in this case.
> …
> Rule 41.02 of the *Rules of Practice and Procedure* is used in the case of a minor administrative error. The rule specifically states "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". 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.

Ultimately, the OEB allowed for the recovery of the corrected stub period amounts as the rate riders were ceased when the error was brought forth. A correction of the remaining misallocation error, characterized by the OEB as a regulatory accounting error, in the amount of $3,614,779, was not permitted as the OEB held it would constitute retroactive ratemaking.

In the 2015 rate proceeding, Essex Powerlines identified the account 1588 and 1589 misallocation error, as well as an error affecting account 1590. This account had an approved credit balances of $1.5 million to be returned to customers as part of the 2014 IRM rates proceeding. However, due to an error, the credit was not included in the rate rider calculations, and the incorrect rate riders were approved by the OEB on a final basis. In the Partial Decision and Procedural Order No. 3, issued on March 25, 2015, the OEB found that the account 1590 error was akin to a calculation error. The partial decision cited rule 41.02, and directed Essex Powerlines to bring the amount forward for disposition.

Generally speaking, the OEB has not allowed for the correction of regulatory accounting errors in cases where it would result in retroactive ratemaking. The principle that has been articulated by the OEB in many of these instances is that a utility is responsible for ensuring it maintains proper books and records. For example, in Atikokan Hydro's rate proceeding EB-2011-0293[17], Atikokan Hydro recorded a debit principal balance of $9,985 for the OEB cost assessments in Account 1508 sub-account - Other Regulatory Assets Cost Assessment for the period of 2006 to 2009. Atikokan Hydro also recorded a debit principal balance of $149,054 for pension costs contributions to OMERS in Account 1508 sub-account OMERS for the period of 2006 to 2011, for an aggregate total of $159,039. Atikokan Hydro confirmed that the costs for OEB cost assessments and pension costs contributions to OMERS were not included in Atikokan Hydro's 2008 Cost of Service rate application, as would have been the normal treatment, and therefore were not recovered in the 2008 rates. The OEB denied the request for OMERS contributions for the period 2006 to 2011 and OEB cost assessments for the period 2006 to 2009 as being out of period. In reaching this Decision the OEB rejected the Vulnerable Energy Consumers Coalition's submission that the OEB was partially responsible for this omission because its accounting rules are unduly onerous and confusing for small utilities. The OEB stated that "while regulatory accounting can be a complicated process, accounting errors and revisions are rarely as extensive with other

[17] *Atikokan Hydro (EB-2011-0293),* 2012 LNONOEB 296 at para 108.

utilities, even those of similar size to Atikokan. In the end, Atikokan's management must take responsibility for understanding and adhering to the rules and guidelines of operating in this regulated sector."[18]

Another case involving an accounting error was the Decision of the OEB in Orangeville Hydro Limited (EB-2012-0159). Orangeville Hydro stated that the balance in Account 1521 to the end of April 2012 was calculated as a credit balance of $10,354.43 in its 2012 IRM proceeding and that it had cleared that amount. However, an error occurred in the calculation and the amount should have been a credit of $854.41. The OEB did not allow for a retroactive adjustment as a matter of principle noting that a utility has control of its books and records and has the responsibility to ensure that mistakes do not occur even though the amount was not material.[19]

The above two cases provide guidance to the OEB with respect to mistakes made in the accounting process by a utility. It is clear that the OEB has taken the position that the utility has the responsibility to maintain its books and records and the rule against retroactive ratemaking is intended to provide an incentive to utilities to ensure that their accounting and books and records are accurate at the time they come before the OEB with a rate application.

In its 2009 cost of service application, *North Bay Hydro* [20] requested the recovery of certain pass through costs which were not recovered earlier due to an error in accounting. The main issue in the application was whether the request would result in retroactive ratemaking. North Bay Hydro noted the "pass through" nature of the accounts in its application should be considered and that the balances represent its true costs.

The OEB noted that the purpose of the account is to track the variance with intent to dispose of the balances in a manner that keeps the applicant whole. However, once the rates, including any associated riders from the clearance of the Retail Settlement Variance Accounts (RSVAs) or any other account, have been determined to be final, the OEB has little, if any, power to alter these rates retroactively.

[18] *Supra,* at para. 116
[19] See also Northern Ontario Wires ("NOW") EB-2008-0238 –NOW applied for 2009 distribution rates. As part of the application, NOW sought disposition of Account 1571. OEB staff and intervenors took the position that account 1571 pre-market opening energy variance account should not be considered for disposition as it was out of period. The account had been discontinued and the entire balance was the result of NOW's earlier omission of interest that was allowed by the OEB in a previous decision. The OEB did not allow adjustment for error and found that disposition at such a late stage would constitute retroactive ratemaking.
[20] *North Bay Hydro Distribution Ltd. (Re*), 2009 LNONOEB 40

The applicant submitted that the rationale for allowing the prior period adjustment is that RSVA balances are intended to be a "pass through" and are exempt from any retroactive concern.

The OEB stated that it did not differentiate its treatment of the RSVA accounts from any other component of the approved rates in its consideration of retroactivity. The reasonable rate-payer confidence in the continuation of rates deemed final are diminished equally irrespective of the impetus of the retroactivity.

The OEB stated at paragraph 38:

> The application of sound rate setting principles results in a fair and transparent process that protects the interests of both ratepayers and the utility alike. While North Bay is to be commended for its efforts, there is a basic expectation that a licensed franchise holder will provide the OEB with an accurate account of its financial affairs for rate setting purposes.

Application of the Facts in this Case

OEB staff submits that the question of determining whether the error is a minor error needing correction and one which falls under the ambit of Rule 41.02 is a difficult one. OEB staff submits that there are some cases in which the OEB could correct an erroneous rate—such as correcting a typographical error of its own. For example in the *Waterloo North Hydro Inc*. proceeding, EB-2011-0221, Waterloo North Hydro Inc. (WN Hydro) filed an application under section 78 of the Act, seeking approval for changes to the rates that WN Hydro charges for electricity distribution to be effective May 1, 2011.

The OEB issued its Decision and Order on the Application on April 27, 2011. The OEB issued is final Rate Order on May 18, 2011, approving an implementation date of June 1, 2011 with rates effective May 1, 2011. On May 19, 2011 the OEB issued a Revised Rate Order correcting a data entry error on the Tariff of Rates and Charges.

On June 3, 2011, WN Hydro filed a letter with the OEB requesting a Motion to Review and Vary the Board's May 19, 2011 rate order in order to correct a transposition error on the approved Tariff of Rates and Charges, specifically for the Embedded Distributor customer class.

WN Hydro indicated in its June 3, 2011 letter that it had inadvertently transposed the two rates intended to dispose of the 2010 balance for the Global Adjustment Sub

Account (RPP customers only), and the 2010 balance for the Deferral and Variance Accounts, for the Embedded Distributor class.

The OEB allowed for a correction to the error by utilizing Rule 41.02 of the OEB's Rules of Practice and Procedure which states that 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.

Generally speaking the practice of the OEB to date has been to not apply Rule 41.02 where the error is one which is substantive in nature[21]. The rationale being that as the Rule can allow the OEB to "at any time, with or without a hearing of any kind" correct an error, if there is a substantive issues then a hearing should occur as parties' interests will be impacted.

OEB staff has reviewed the jurisprudence and has found some discussion of the ability of a tribunal to correct an error when that error is considered to be a procedural mistake. For example, in *Mike Little Gas Co. v. Public Service Commission*[22], a decision of the Supreme Court of Alaska in 2011, the court approved a commission's amended order, issued nearly three months after its original order, correcting a clerical error in the first order.

In this case a gas company applied for a rate of "$3.5752 for two Mcf's of natural gas" and the agency issued an order incorrectly setting the rate at "$3.5752 per Mcf for the first two Mcf's." This error would have had a significant impact on the revenue collected by the utility—but the court recognized it was essentially a typographical error, and it was an error made by the Commission itself. Under these circumstances, the Commission was permitted to correct the error. The court rejected the retroactive ratemaking challenge, holding that the amended order was merely a *nunc pro tunc* order, not a new rate order. In other words the court corrected an order previously made which was improperly entered or expressed. Further, the court reasoned that it would be unfair to permit the utility to enjoy a windfall profit at the expense of other ratepayers.

The court found the rate correction in *Mike Little* was entirely consistent with the underlying reasons for the rule against retroactive ratemaking: (1) the court found the

[21] NRG Decision EB-2014-0291 - The OEB decided that revisiting the $150,000 award to IGPC would amount to a substantive change. Revisiting the dollar amount of the award could not be considered a typographical error, error of calculation or similar error contemplated by Rule 41.02 of the Board's Rules of Practice and Procedure. As a result, the OEB determined that it would re-hear the issue by way of a motion to review.

While rule 41.02 is referred to in EB-2014-0291, it was the EB-2012-0406/ EB-2013-0081 panel that stated: The Board agrees with Board staff that a determination on this issue would amount to a substantive change that is not contemplated by Rule 43.01 of the Board's Rules of Practice and Procedure.

[22] 574 S.E. 2d 926 (KY. Ct. App. 1978)

parties were not justified in relying on the incorrect order issued just days earlier; (2) permitting the correction of the order did not encourage sloppy or inefficient estimates by the utility; and (3) the correction was not shown to implicate any of the other harms associated with retroactive ratemaking.

4 OTHER PERSPECTIVES ON THE RULE AGAINST RETROACTIVE RATEMAKING

OEB staff has set a summary of the jurisprudence dealing with the rule against retroactive ratemaking including those cases wherein courts and tribunals have held that certain types of errors can be corrected, and those cases where the rule prohibited such a correction. What is clear is that the rule itself has been applied in a manner that has not always been consistent. As noted by a well known author on matters concerning retroactivity, Stefan Kreiger, stated:

> At the most, this analysis suggests that there should be a rebuttable presumption against retroactive ratemaking, not a complete prohibition. Undoubtedly, the public utility regulatory system can maintain its legitimacy only if parties can reasonably rely on the fact that, in most instances, utility commissions will not alter the prices paid for utility service retrospectively. Moreover, the system will fail to provide proper economic incentives to utilities if commissions regularly allow recoupments of past losses or frequently grant ratepayers recurrent refunds for prior utility gains. Under our current regulatory system, however, neither of these policies is absolute.
>
> …
>
> For these reasons, commissions and courts should apply a presumption against retroactivity but analyze the particular circumstances of the case to determine if the presumption should apply. They should first consider the rationality and legitimacy of the expectations of the in regard to previously approved rates. They should then examine the potential effects of retroactive relief on economic incentives for the utility. If it appears that reliance on the prior rates was not rational or legitimate and that a retroactive remedy would not create substantial efficiency disincentives, courts should allow such relief. [23]

[23] *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. ILL. L. REV. 983. Stefan H. Krieger, *(1991) University of Illinois Law Review,* page 1044. Stefan Kreiger is a Professor of Law at Hofstra University and his article on Retroactive Ratemaking has been referred to extensively by US courts and commissions.

5 CONCLUSION

The rule against retroactive ratemaking was designed to ensure the integrity of the ratemaking process and to provide utilities with the incentive to operate efficiently. Exceptions to the rule against retroactive ratemaking exist where there is a breakdown in that system.

In the 2015 rate proceeding Essex asked to correct a misallocation error with respect to variance accounts for pass-through costs. The majority of the jurisprudence on the rules against retroactive ratemaking relates to deferral accounts and mistakes, and accounting errors which result in changes to the revenue requirement. That is not the type of mistake in this circumstance. This is not a case where a utility has benefitted from an over collection. Rather, the error is a misallocation between two sub-accounts which resulted in some customers over-paying and some customers under-paying. As a result OEB staff submits that while the presumption against retroactivity applies the OEB could examine the particular circumstances in this case to determine if the presumption should be rebutted. It is relevant for the panel to take into consideration that the accounts in question are a pass through with no profit to the utility, that a correction of the accounting error would result in customers paying costs that were legitimate and that section 78 (3) of the OEB Act requires that the rates be “just and reasonable”. If the OEB finds that the presumption should be rebutted then it is OEB staff’s submission that the OEB could refer to these factors to take corrective measures to redistribute the amounts over and under collected from ratepayers to reflect legitimate costs for providing electricity service.

All of which is respectfully submitted