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BY EMAIL and RESS

September 8, 2015
Our File: EB20150240

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2015-0240 – Essex Powerlines Motion to Review – SEC's Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to the *Notice of Motion to Review, Notice of Motion Hearing, and Procedural Order No 1,* enclosed please find SEC's submissions.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Intervenors (by email)

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EB-2015-0240

ONTARIO ENERGY BOARD

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 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;

AND IN THE MATTER OF a motion to review under Rule 41.01 of the *Rules of Practice and Procedure*.

SUBMISSIONS OF THE SCHOOL ENERGY COALITION

PART I- OVERVIEW

1. These are the submissions of the School Energy Coalition ("SEC") in response to the motion initiated by the Ontario Energy Board (the "Board") to review the *Partial Decision and Order* in EB-2014-0301/0072, issued on March 25, 2015 (the "Partial Decision").

2. Essex Powerlines ("EPL") provided incorrect information in its application to the Board as to the allocation of costs between Regulated Price Plan ("RPP") and non-RPP customers due to its own accounting errors in various deferral and variance accounts ("DVA"). Based on the information provided, the Board set final rates for each customer group. Those rates overcharged the RPP customers, and undercharged the non-RPP customers. In its subsequent application for rates, EPL sought to recover the undercharged amount from the non-RPP customers, and refund a similar amount to the RPP customers.

3. SEC submits there is no basis to vary the Partial Decision. The Board correctly applied the law, which requires that the case be treated as raising two distinct issues:

a. ***Is the Board authorized to order the collection of the undercharged amounts from non-RPP customers?*** The Board correctly determined that it was legally prohibited from doing so by the application of the rule against retroactive ratemaking. The non-RPP customers paid final rates authorized by the Board, and those rates are deemed to be just and reasonable. As between those customers and EPL, the customers were entitled to the protection of the rule against retroactive ratemaking, and the utility who was the source of the error was not.

b. ***Is the Board authorized to order repayment of the overcharged amounts to the RPP customers?*** The Board correctly determined that, in law, this was a separate question, and the rule against retroactive ratemaking did not prohibit refunding these amounts. As between those customers and EPL, EPL was not entitled to the protection of the rule against retroactive ratemaking, if it was found to be negligent. That negligence would have resulted in overpayments by the innocent RPP customers, and the law, equity, and good policy all allowed the Board discretion to order that those overpayments be refunded. While in its Final Decision the Board did not so order, it had that discretion to do so if it had considered it appropriate to exercise it.

4. Furthermore, while errors as significant as the ones in this proceeding are unfortunate, they cannot simply be corrected in a proceeding for rates a year later, by recasting the mistake in a utility's own application as a billing error, or through the Board's limited jurisdiction through Rule 41.02.

PART II – BACKGROUND

5. EPL brought an application for its annual Price Cap Incentive Rate-setting adjustment for the 2015 rate year (EB-2014-0072).[1] During the reply submission on its application, EPL for the first time informed the Board that it had discovered an error relating to the allocation of the IESO Global Adjustment power billings (DVA Account 1588 and 1589) for the 2011, 2012 and 2013 years. This error led to a misallocation of approximately $11.5M in costs between RPP and non-RPP customers. To correct for its error, EPL proposed an adjustment to rates, beginning in 2015, to credit those customers who had overpaid (RPP) and to debit those who had underpaid (Non-RPP).

[1] The Board combined the matter with EB-2014-0301, EPL's application for its final smart meter installation cost application.

6. Faced with this new information in a reply submission, the Board panel required EPL to file new evidence, and deemed as intervenors in the proceeding parties who had intervened in EPL's last cost of service application.[2] It then sought submissions from the parties on a threshold question about the Board's legal ability to make the proposed adjustments, in light of the rule against retroactive ratemaking:[3]

> Should the Board consider an adjustment to the 2011 and 2012 DVA (Deferral and Variance Account) balances which were disposed of on a final basis as part of Essex Powerlines Corporation's 2014 IRM proceeding (EB-2013-0128)? Would any such adjustment violate the legal requirements considering retroactive ratemaking?

7. The question arose because, while the 2013 amounts could be corrected (the DVA balances for that year had not been cleared on a final basis), the 2011 and 2012 balances had been cleared on a final basis as part of EPL's 2014 IRM decision (EB-2013-0128) and were included in a rate rider that commenced on May 1 2014 and would terminate on April 30 2015.[4]

8. Ultimately, after a request brought from EPL, the rate rider was stayed effective February 1, 2015, leaving approximately $3.7M at issue related to 2011 and 2012 amounts that had already been cleared on a final basis.[5]

9. In its Partial Decision the Board as a preliminary matter found that the errors were not billing errors, and so the *Retail Settlement Code* did not apply, as EPL had complied with the Board's Rate Order. The Board then went on to determine that one part of EPL's proposed adjustment to 2011 and 2012 balances that had already been cleared – the proposed recovery of undercharged amounts from non-RPP customers - violated the rule against retroactive ratemaking. The Board determined that non-RPP customers should not have to pay more now due to EPL's error as they "would have had no way of knowing that a future adjustment would be made to rates that were declared final over a year ago".[6]

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[2] *Procedural Order No. 2* (EB-2014-0301/0072), February 6 2015, p.2
[3] *Procedural Order No. 2* (EB-2014-0301/0072), February 6 2015, p.3
[4] *Rate Order* (EB-2014-0072/0301), February 27 2015, p.2
[5] *Rate Order* (EB-2014-0072/0301), February 27 2015, p.2
[6] *Partial Decision and Procedural Order No.3* (EB-2014-0301/0072), March 25 2015 ["*Partial Decision*"], p.7

10. With respect to RPP customers who had overpaid due to the rate error, the Board determined that the rule against retroactive ratemaking does not necessarily apply. This is because RPP customers were innocent third parties, and there is precedent for requiring a utility to repay money to customers "if negligent or if the utility would profit on account of its own errors". [7] While noting that "in situations where errors are the result of a utility's negligence, the Board could impose financial consequences on the utility", it stated that it was apprehensive to do so in this case. [8] It ordered EPL to answer further questions and to attend an oral hearing so as to allow the Board to render a final decision. [9]

11. The evidence was that upon moving to time-of-use ("TOU") pricing, EPL switched to a new electronic form to allocate costs between RPP and non-RPP customers. The new form that EPL created had a formula error[10] which the staff member with responsibility to review it did not notice because the split between RPP and Non-RPP customers matched the amounts that were on and not on TOU pricing.[11] As EPL's witness admitted, "[i]t is the wrong logic".[12] Since the same form was used every month, and the formula error not discovered until this proceeding, costs were similarly misallocated every single month. While the VP Regulatory Affairs has at all times had overall responsibility for Deferral and Variance Accounts, this person did not undertake a detailed review of the form or the amounts in each account every month. The VP Regulatory Affairs only reviews the amounts at the financial statement level.[13]

12. The evidence is that EPL only monitored the overall balances of <u>its</u> deferral and variance accounts, rather than the individual allocations to them.[14] From EPL's point of view, it is the overall balances that matter. It wants to ensure that it recovers the full amount of money that it is owed from its customers. It would appear that not as much effort is put in to ensuring that the recovery comes from the correct customers. As became clear in the proceeding, making sure

[7] *Partial Decision*, p.7
[8] *Partial Decision*, p.7
[9] *Partial Decision*, p.8
[10] Tr.1, p.50 (EB-2014-0301/0072)
[11] Tr.1, p.43 (EB-2014-0301/0072)
[12] Tr.1, p.52 (EB-2014-0301/0072)
[13] Tr.1, p.43. Response to VECC Supplementary Question No. 3 (EB-2014-0301/0072)
[14] Response to SEC Supplementary Question No. 2(b) (EB-2014-0301/0072)

that the utility has full recovery is only part of the utility's responsibility. At least equal in importance is rigour in allocation to customers and customer groups, so that the right people pay.

13. Based on its review of the evidence, the Board expressed that it was "very concerned about the regulatory accounting controls in place".[15] It made a specific finding that "Essex Powerlines demonstrated carelessness towards ensuring proper regulatory accounting procedures and controls."[16] It explained that EPL's small size was "no excuse for not implementing all accounting practices properly with sufficient review and oversight".[17] The Board noted that it "expects management to provide adequate controls and oversight, commensurate with the millions of dollars that flow through Group 1 DVAs, in particular Accounts 1588 and 1589."[18] EPL's conduct during the proceeding itself led the Board "to question whether Essex Powerlines understands the gravity of the errors."[19]

14. While ultimately not requiring that EPL credit the entire amount back to RPP customers as proposed by intervenors, the Board ordered EPL's shareholder to pay the costs of a full audit of its DVA accounts.[20] More significantly, it denied EPL's request for a rate increase based on the Board's Price Cap IR formula.[21] The Board reasoned that the Price Cap IR option is predicated on an outcome based approach to ratemaking which provides value to customers. The evidence in the proceeding related to the errors demonstrated that "Essex Powerlines has neither demonstrated the desired outcomes nor provided value to its customers."[22]

PART III- ISSUES AND ARGUMENT

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?

[15] *Decision and Order* (EB-2014-0301/0072), June 9 2015 ["*Final Decision*"], p.13
[16] *Final Decision*, p.12
[17] *Final Decision*, p.13
[18] *Final Decision*, p.13
[19] *Final Decision*, p.7
[20] *Final Decision*, p.14
[21] *Final Decision*, p.14
[22] *Final Decision*, p.14

15. SEC submits that it is important to separate out the two distinct issues that arise in the Board's question.

16. The first, which the Board seemed to more fully explain in the *Notice of Motion to Review, Notice of Motion Hearing, and Procedural Order No 1* (the "*Notice*") is "[a]re rates that cause significant inequalities between groups of customers because the rates were based upon an error just and reasonable?"[23] This question in essence asks whether the Board's 2014 IRM decision, which included the error, was reasonable, and if so can it be corrected. This is not as a matter of law an issue related to the Partial Decision.

17. The second issue is, did the Board err in its application of the rule against retroactive ratemaking to EPL's proposed adjustments to be made to amounts that had been cleared on a final basis in the EPL's 2014 IRM decision? As discussed below, this devolves into two sub-issues, one relating to the customers who were overcharged, and the other to the customers who were undercharged.

The Board cannot vary the 2014 IRM Decision

18. There was an error - caused by EPL - in the allocation of amounts between Account 1588 and 1589. That error caused the rates approved in the 2014 IRM decision to charge RPP customers too much, and the non-RPP customers too little, relative to the rates that would have been charged if the error had not occurred. These facts are not disputed.

19. The Board's findings in the Final Decision were that these errors were based on EPL's carelessness and poor oversight. In hindsight, the 2014 rates which included the error would have been considered unjust and unreasonable if the error had been known at the time. However, hindsight is not part of the allowed legal analysis. The statutory scheme for ratemaking does not allow the Board to "remedy a deficiency in a rate order through later measures".[24] Rates <u>are</u> just and reasonable until they are adjusted prospectively.[25] This is settled law.

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[23] *Notice of Motion to Review, Notice of Motion Hearing, and Procedural Order No 1* ["*Notice*"], p.4
[24] *Bell Canada v. Bell Aliant Regional Communications*, [2009] SCC 40 ["*Bell 2"*], para. 63
[25] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission),* [1989] 1 S.C.R. 1722 [*Bell 1*], p.1761

20. The discovery that the 2014 rates were set based on an error that if known at the time would have been considered unjust and unreasonable or unjustly discriminatory does not mean that the Board can go back now (or at the time of the Partial Decision) and vary the 2014 IRM decision. While the Board has the authority to review, vary, or suspend past decisions, that authority is limited. To review and vary a decision, the Board would, in absence of a Rule 42 motion to review being brought by EPL (which it did not), use its own authority under Rule 41.01.

21. The Board has never had a review of the EB-2013-0128 decision before it, and it is not now in a position to carry out such a review. It did not do so in the past, nor has it done so as part of this review proceeding. It has never sought submissions on that issue, nor provided notice of a review of the 2014 IRM decision, as is required.

22. Nor could it have. While Rule 43.01 allows the Board to review and vary past decisions, that is a power derived from section 21.2(a) of the *Statutory Powers Procedure Act* ("*SPPA*"). Section 21.2(b) of the *SPPA* requires that "[t]he review shall take place within a reasonable time after the decision or order is made".[26] Neither the timing of the Partial Decision, nor the current review, if either had in fact sought to review the 2014 IRM decision, would meet the requirement to have been carried out within a reasonable time.

23. The Board has said that the determination of what is a reasonable time will vary with the circumstances in each case.[27] SEC submits that central to that determination in this situation must be the prejudice faced by the parties and the discoverability of the error. These two factors operate in different ways, depending on whether the issue is the non-RPP customers, for whom a retroactive charge is proposed, or the RPP customers, for whom a retroactive credit is proposed.

24. The 2014 IRM Decision and Rate Order was issued on March 13, 2014. The rates had been effective and in place for nine months when the Partial Decision was made. A review at the

[26] *Statutory Powers Procedure Act*, R.S.O. 1990 c. S-22, 21(a),(b)
[27] *Decision and Order* (EB-2003-0268 - Sithe Energies), October 31 2003, para. 21

time of the Board's Partial Decision, or more pertinently now, some 17 months later, cannot be considered within a reasonable time after the order was made. In this case, the prejudice to consumers is very significant. The rate impacts demonstrate the significant amount of money that Non-RPP customers would have to pay, due to EPL's own errors, based on consumption decisions they made long ago.

25. Discoverability is somewhat different. The error could only have been discovered by EPL. Protection of the RPP customers would allow the Board to review the 2014 IRM decision a reasonable time after the RPP customers could have first known about it. It is a different situation for Non-RPP customers, because a "reasonable time" is not extended during the period. EPL could have discovered their own error, but did not due to their own carelessness and complete lack of adequate oversight. EPL were in a position to protect themselves. They did not. The RPP customers were not in a position to protect themselves, because the correct information was not provided to them.

26. In determining the meaning of "a reasonable time" in this situation, the Board should also be informed by similar review or appeal timelines provided for under the Rules and the *OEB Act*. These are legislative expressions of reasonableness in analogous situations. A party may only bring a motion to review under 40.01 within 20 days of a Board decision or order.[28] An appeal to the Board from an order made by delegated authority has to be made within 15 days.[29] An appeal of a Board order to the Divisional Court must be made within 30 days.[30]

Board did not err in its adherence to the rule against retroactive ratemaking

27. SEC submits that in the absence of any review and variance of the 2014 IRM decision , those rates are deemed in law to be just and reasonable regardless of whether, after the fact, it is found that they would not have been just and reasonable had different evidence been available at that time.

[28] Ontario Energy Board, *Rules of Practice and Procedure*, Rule 40.03
[29] *Ontario Energy Board Act*, 1998, SO 1998, c 15, Sch ["*OEB Act*"], s.7(1)
[30] *OEB Act*, s.33(2)

28. To reach back and determine whether rates previously made final are just and reasonable would invoke the rule against retroactive ratemaking. The Board did not err in its application of the rule against retroactive ratemaking to EPL's proposed adjustments[31]. The rule against retroactive ratemaking is not a discretionary decision by the Board; if it is found to be applicable, it prevents the adjustment from being made unless there is a recognized exception to the rule.[32] There is none here.

29. The Ontario Court of Appeal recently, in *Union Gas v. Ontario Energy Board,* summarized the rule succinctly:

> It is well established that an economic regulatory tribunal, such as the Board, 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.[33]

30. The Supreme Court has been clear that the rule against retroactive ratemaking requires that utility regulators can only act prospectively in setting rates, and may not establish rates that recover expenses or costs incurred in the past, and not recovered through the rates during that period.[34] This is not a guideline. It is a legal restriction on the scope of the Board's authority.

31. The rule recognizes the principle in ratemaking that rates are presumed to be final, and are just and reasonable until altered. [35] As the Board has previously stated, "the principles of certainty and finality are a necessary component of effective rate regulation."[36] Moreover, intergenerational equity concerns exist for consumers if final rates can later be adjusted, as

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[31] The rule against retroactive ratemaking applies not just to retroactive rates, which is to replace or substitute past rates, but also retrospective ratemaking which imposes on the utility's current consumers adjustments made to recover amounts that a regulator believes could have been incurred by previous generations of consumers. Retrospective ratemaking can also be retroactive ratemaking, since it is creating obligations in one rate period based on transactions that should have been included in a past rate period. (See *Calgary (City) v. Alberta (Energy and Utilities Board)* 2010 ABCA 132 ["*Calgary*"], paras 46-49; *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453 ["*Union Gas*"], para. 82)

[32] *.ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 ["*ATCO SCC 2006*"], para 71; *Decision and Order* (EB-2005-0031 - Great Lakes Power), February 24 2006, p.8.

[33] *Union Gas*, para. 82

[34] *Northwest Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, p.691; *Bell 1*, p.1749; *ATCO SCC 2006*, para. 71

[35] *Partial Decision*, p.6

[36] *Decision and Rate Order* (EB-2013-0119 - Chapleau PUC), March 13 2014, p.8*; Decision and Order* (EB-2013-0022 - Veridian), April 25 2013, p.10

yesterday's customers may not be today's customers.[37] To do so has been held as "most unreasonable".[38]

32. In the Partial Decision, the Board correctly determined that the rule did apply, since the 2011 and 2012 DVA balances were disposed of on a final basis.[39] It correctly determined that this prohibited the adjustments that would require Non-RPP customers to pay more. With respect to RPP customers, the Board also correctly determined that the rule does not prohibit a refund to them. They were innocent third parties and the Board has the discretion to require a utility to refund if it acted in a negligent manner.[40]

33. The Board was also correct not to treat the adjustments that would impact rates for RPP and Non-RPP customers as one question. Each requires its own analysis. As the Board found, "it is not driven by the need for symmetrical treatment of customers and utilities in final rate situations."[41]

34. In Sioux Lookout Hydro's 2014 IRM application, the Board rejected a request to correct an error made in the clearance of a deferral and variance account in a previous application. The Board was clear that even in situations where there is no doubt that rates are based on an error, the rule against retroactive ratemaking applies:

> The courts have made it very clear that retroactive rate-making, the adjustment to rates after a final rate order has been issued, is not allowed. Rather, the principles of certainty and finality are a necessary component of effective rate regulation. To allow Sioux Lookout to correct an error after a final rate order was issued would be contrary to the legal principles upon which the Board performs its legislated mandate.[42]

35. In *Calgary (City) v. Alberta (Energy and Utilities Board)*, the Alberta Court of Appeal dealt with a request to correct a utility accounting error in a deferral account, after final disposition.[43] In that respect, it was very similar to this case. The Court of Appeal decided

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[37] *Partial Decision*, p.60-67; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission),* 2014 ABCA 28 "*ATCO 2014*"], para. 51
[38] *R v. Board of Public Utilities Commissioners* (1966), 60 D.L.R. (2d) 703, para. 25
[39] *Partial Decision*, p.6
[40] *Partial Decision*, p.7
[41] *Partial Decision*, p.7
[42] *Decision and Order* (EB-2013-0170 - Sioux Lookout), March 13 2014, p.8
[43] *Calgary*, paras. 46-49

against allowing the adjustment, but with the judges split on the use of the rule against retroactive ratemaking. The majority found that retroactively truing-up a gas commodity deferral account after it had already been cleared, to correct for accounting errors, did not constitute retroactive ratemaking. This is not based on an exception to the rule, but rather because based on the history of the use of the particular account, and past Alberta Energy and Utilities Board ("AEUB") practice, the parties knew that there could be a continued true-up of the gas commodity accounts. The actual label of final or interim was not determinative on those particular facts.[44] Here, there is no factual dispute that the balances were declared final, and were really intended to be final.

36. Even without a finding that the rule against retroactive ratemaking applied, the majority allowed the appeal, and denied recovery from the undercharged customers on the basis that the AEUB decision to allow for recovery was unreasonable. There was a compelling reason that on the facts the error should not be passed on to customers:

> As the Board intimated, there are compelling reasons why this sort of loss should be borne by shareholders rather than long-after-the-fact consumers. Shareholders have the ability to control or at least influence ATCO's management practices. Consumers do not. Requiring consumers rather than shareholders to bear most of the loss does not encourage utilities to conduct operations in a careful, time-sensitive way. The Board itself appropriately observed at p. 5 of the DGA Decision that allowing ATCO (full) recovery "could be considered ... a reward for poor management.[45]

37. In a set of comprehensive concurring reasons in the *Calgary* case, Mr. Justice Côté took a different view from the majority. He found that the adjustment for the accounting errors would be retroactive ratemaking, and thus prohibited on that basis.[46] It should be noted that in that case there was also a credit to other customers. However, the decision by the regulator to allow that credit was not appealed.[47] The end result in the case was that the credit to some customers was allowed, but the charge to other customers was not allowed.

[44] *Calgary*, paras. 58-60
[45] *Calgary*, para. 73
[46] *Calgary*, para. 183
[47] *Calgary*, para. 235

38. Here, in the *Notice* the Board has said it is not disputing that finding that the 2011 and 2012 DVA balances had already been disposed of on a final basis.[48] There is no history in Ontario of further adjustments to final RSVA DVA accounts. The process for disposition of these accounts is clear, and all parties assume it to be final. The Board has previously rejected proposals by distributors for adjustments to other DVA accounts after final disposition.[49] In short, in Ontario unlike in Alberta, final means final. It is therefore clear that seeking to recover amounts from ratepayers to correct for the EPL error invokes the rule against retroactive ratemaking.

39. SEC submits that completely aside from the rule against retroactive ratemaking, it is not good regulatory policy to allow EPL to recover from the non-RPP customers. SEC agrees with the majority's decision in *Calgary* that it is not one customer group who should have to pay to keep a utility whole if it has to credit customers that were overcharged due to an error caused by the utility. Utilities are expected to be able to do the bookkeeping properly. Board expects that the correct accounting entries have been made, and that the evidence provided to the Board will be accurate. Customers have no visibility of these potential errors. The Board does not conduct a financial audit of the utility when it comes in for rate adjustments, and should not have to do so.

40. The importance of the correct price of electricity seen through Board-approved rates is fundamental to the proper functioning of the electricity system. Consumers make consumption decisions based on the price of electricity at any given time. The Board has stressed the importance of price signals in determining consumption decisions.[50] The Ontario Energy Board Act's objectives for electricity of promoting economic efficiency[51] and electricity conservation and demand management[52] would seem to indicate a heighted focus on price signals in Ontario. Non-RPP customers, including schools, would have consumption decisions based on the rates that were in place and which were in part based on the clearance on a final basis of the 2011 and 2012 DVA balances.

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[48] *Notice*, p.3
[49] *Decision and Rate Order* (EB-2013-0119 - Chapleau PUC), March 13 2014, p.8
[50] *Decision with Reasons* (EB-2013-0321 - Ontario Power Generation), November 20 2014, p.134
[51] *OEB Act*, s.1(1)(2)
[52] *OEB Ac*t, s.1(1)(2)

41. Since customers change between periods, there the significant harm of intergenerational inequity caused by retroactive ratemaking. For customers like schools, while the customers may not have changed, their students have, and the addition of out of period costs, when not expected, can have a significant effect on operations, as the additional amounts have not been budgeted. Something has to be cut to find the money.

42. The *OEB Act* itself recognizes the importance of maintaining intergenerational equity especially as it relates to deferral and variance accounts. The Act requires that the amounts be reviewed at least annually, and a determination made if the amounts should be reflected in rates. [53] The Board has inferred that these specific provisions recognize "there is a policy against adverse impacts and inter-generational inequity that might be caused by out-of-period rate adjustments."[54]

43. The issue of retroactive credits is a somewhat different. The Board correctly recognized in the Partial Decision that it would not be retroactive ratemaking for the Board to use its discretion to order credits going forward in limited circumstances such as this. The Board has the authority to do so when it finds that the utility has acted negligently or if the utility would profit on account of its own errors.[55]

44. This should not come as much of a surprise, since utilities have a significant asymmetry of information over ratepayers and the Board. They should not be allowed to benefit from their mistakes which, outside of an external audit being conducted, would be undetectable to intervenors, the public, or the Board. As the Board recognized, utilities have ultimate control over their accounting records and they must bear the onus of ensuring they are correct:

> Utilities such as Essex Powerlines have ultimate control of their books and records and therefore bear the responsibility of ensuring that there are no mistakes in their filings with the Board. Errors crystalized in final rates can have long term adverse impacts on consumers. In situations where errors are the result of a utility's negligence, the Board could impose financial or other consequences on the utility. For example, the Board could

[53] *OEB Act*, s.78(6.1-6.2)
[54] *Decision and Order* (EB-2005-0031 - Great Lakes Power), February 24 2006, p.8.
[55] *Decision and Order* (EB-2014-0043 – Enbridge) April 10 2014; *Decision and Order (*EB-2005-0031 - Great Lakes Power), February 24 2006, at p.17

> order the utility to repay customers, deny the accrual of interest on outstanding balances or deny the inflation adjustment to base rates.[56]

45. The Board's statement is entirely consistent with those made in its previous decisions.[57]

46. Further, the issue of potential retroactive ratemaking, as applied to credits, has to be viewed in the context of the Board's statutory objectives for electricity. The protection of consumers with respect to price is a key part of the Board's role. [58] SEC submits that a broad interpretation of the retroactivity rule must in law be applied when determining whether ratepayers can be charged for previous amounts, while a more narrow interpretation is appropriate if the issue is providing ratepayers with a credit to refund amounts they were overcharged by a negligent utility.

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

a. Nullity?

b. Extraordinary Circumstances?

47. SEC submits the Board sufficiently considered all of the *relevant* exceptions to the rule against retroactive ratemaking.

48. The main recognized exceptions to the rule against retroactive ratemaking are:

a. if rates are interim,[59] or

b. if the amounts that underlie the retrospective adjustments were part of a deferral or variance account that "encumbers" past amounts with the expectation of all parties that they will be adjusted in the future.[60]

49. The overarching principle is the knowledge of the utility and consumers that rates may change retrospectively.[61] The Alberta Court of Appeal recently summarized what is the essential

[56] *Partial Decision*, p.7
[57] See *Decision and Order* (EB-2009-0013 – North Bay Hydro), September 8 2009, p.8; *Decision and Order* (EB-2014-0043 - Enbridge) April 10 2014; *Decision and Order* (EB-2005-0031 – Great Lakes Power), February 24 2006, p.17
[58] *OEB Act*, s.1(1)(1)
[59] *Bell 1*, p. 1761
[60] *Bell 2*, para. 63; *Epcor Generation Inc. v. Alberta (Energy and Utilities Board)*, 2003 ABCA 374, para 2
[61] *Bell 2*, para. 61

inquiry in determining if a ratemaking decision that impacts on past rates is impermissible: "the critical factor for determining whether the regulator is engaged in retroactive ratemaking is the parties' knowledge." [62]

50. In this case, there was no real dispute that the 2011 and 2012 DVA balances had been cleared on a final basis, a finding which this Notice recognizes and this proceeding is not reviewing.[63] Thus the two main exceptions did not apply.

51. Consistent with the principle behind those exceptions to the rule, is that a utility should have knowledge that if they make accounting or similar errors in limited circumstances which results in customers overpaying, then the Board has the discretion to order it to pay a credit. The Board has said on numerous occasions that utilities should be aware that accounting errors that it makes, when based on findings of negligence, may result in a credit going forward.[64] This is because they control their books. There is no requirement for symmetrical treatment.[65] As noted previously by Vice Chair Kaiser in dissent (on the issue of whether retroactive ratemaking was engaged on the facts, not its scope):

> There is ample authority in the regulatory jurisprudence that credits going forward do not constitute retroactive ratemaking". This is particularly the case where it reflects a one time fixed amount adjustment to an overpayment that the tribunal finds unjust.[66]

52. The exception of nullity, insofar it can be considered an exception to the rule, or a more general legal rule, has no application in this case. The exception to the rule (or rule itself) is that if the original decision is found to be a nullity – i.e. it is duly quashed - a regulator can then set rates retroactively to the point of the original decision.[67] The underpinning to this exception is that since the original decision was determined to be a nullity, there would not have been a final disposition of the amounts at issue, and so a new panel can put itself in the place of the original

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[62] *ATCO 2014*, para 58. See also *Milner Power Inc. Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology ATCO Power Ltd*. (Alberta Utilities Commission, Proceeding 790), January 20 2015 ["*Milner Complaint*"], para. 194-195
[63] *Notice*, p.3
[64] *Decision and Order* (EB-2014-0043 - Enbridge), April 10 2014; *Decision and Order* (EB-2009-0013 – North Bay Hydro), September 8, 2009, p.10; *Decision and Order* (EB-2005-0031), February 24 2006, p.17
[65] *Partial Decision*, p.7; *Decision and Order* (EB-2009-0013 – North Bay), September 8, 2009, p.8
[66] *Decision and Order* (EB-2005-0031 – Great Lakes Power), February 24 2006, p.21, citing *New York Water Service Corp v. Public Service Commission*, 208 N.Y.S. 2d 587 (1960) see *ATCO SCC 2006*, para. 137
[67] See *TELUS Communications Inc.* v. *Canadian Radio-Television and Telecommunications Commission (CRTC)*, 2004 FCA 365, para 42; *Milner Complaint*, paras. 209-212

panel. This is similar to the situation where a court on appeal quashes a Board decision on appeal. Since the 2014 IRM decision is not being challenged, let alone being nullified, and cannot be (as discussed earlier), this exception does not apply.

53. The *Notice* also raises the exception of "extraordinary circumstances".[68] SEC is not aware of any judicial or regulatory decisions in Canada that recognize an exception of the rule of retroactive ratemaking for "extraordinary circumstances". SEC submits there is no such exception to the rule, and there is no basis on the facts of this case to create a new one.

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?

54. The Board was correct in determining that the accounting error was not a billing error, and thus the *Retail Settlement Code* did not apply.

55. A billing error occurs when the customer is charged an amount other than the approved rate (or no rate at all), or the consumption data billed is different from what is recorded on the meter.[69]

56. Neither of these situations is what occurred. EPL charged the correct approved rate, and there is no allegation that the consumption recorded and billed was incorrect. Customers paid what the Board required them to pay under EPL's tariff, which was the rate the Board approved. The issue is that after the fact, it was determined that the approved rate was based on incorrect factual evidence provided to the Board. What occurred was a rate error and not a billing error.

57. The *Retail Settlement Code*, in part, sets out the minimum obligations that a distributor must meet in its financial settlement costs with consumers.[70] Section 7.7 sets out the rules governing billing errors. While "billing error" is not specifically defined in the *Retail Settlement*

[68] *Notice*, p.4
[69] Section 7.7 of the *Retail Settlement Code* only to "billing errors in respect of which Measurement Canada has not become involved". This would indicate billing errors do not include disputes about the accuracy of the meter Those disputes are handled by Measurement Canada pursuant to the *Electricity and Gas Inspection Act*, R.S.C., 1985, c. E-4.
[70] *Retail Settlement Code*, s.1.1

Code, there is no mention of approved rates being wrong, only how much a customer was billed relative to approved rates.

58. A review of the dispute resolution process for billing errors confirms the intent of the *Retail Settlement Code* to not be applicable to issues involving the approved rates. Section 9 requires that any dispute under the code be settled pursuant to the mechanism set out in the distributor's license. That process, similar for all other electricity distributors, includes a provision that all unresolved complaints be referred to an independent third party complaints resolution service provider selected by the Board.[71] While the Board has never selected a third-party resolution service, and so it is the Board who acts to resolves disputes, the intent of the code is clear that the billing errors would be handled on an individual basis, eventually through a third-party dispute resolution process.

59. A dispute about the correctness of the Board's approved rate could never be determined in such a way. To do so, would involve an impermissible delegation of its authority for rate-setting. A change in the rates can only be done by way of an order under section 78(3) of the *OEB Act*. While the management committee may delegate any authority of the Board to an employee of the Board (Section 6(1) of the *OEB Act*), the person must still be an employee of the Board. A third-party dispute provider would not be an employee of the Board. More importantly, the provisions of a code enacted under s.70.1 of the *OEB Act*, cannot set rates. Only the Board can set rates under s.78(3), in a hearing.

60. Furthermore, the process under the *Retail Settlement Code*, and the distribution licenses, contemplates customer and the utility will come to some form of resolution of their dispute without the need for a third-party to intervene. A rate error cannot be resolved in such a way. A utility cannot charge customers any rate other than those rates specified in its Tariff of Rates and Charges.[72]

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[71] Essex Powerlines Corporation, Electricity Distribution Licence (ED-2002-0499) s.16.1(e)

[72] See i) *OEB Act*, s.78(2):

> "No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract".

ii) EPL's 2014 Tariff of Rates and Charges:

61. This all follows common sense. The Board has processes to adjust a utility's approved rates. The process follows, as it must, the statutory requirements under the *OEB Act* and/or the *SPPA* (as incorporated in the Board's *Rule of Practice and Procedure*). The Board also has to deal with situations in which it has approved rates, but the there is a dispute about the application of those rates to its customers. That is about compliance with Board's orders, not whether the orders were right in the first place.

4. Rule 41.02 provides: The Board may at any time, without notice of a hearing of any kind, correct a typological 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?

62. SEC submits that Rule 41.02 of the Rules of Practice and Procedure do not allow for the Board to make the adjustment as originally proposed by EPL. The Board was correct in its Final Decision that "[t]o use this rule in the case of Essex's Powerlines' allocation of costs associated with Group 1 DVAs would equate the misallocation to a minor error needing correction". The Board recognized, "[t]he errors made by Essex Powerlines were not minor and impact its customers in a material way."[73]

63. The clear wording of the rule applies to typographical, calculation or similar errors made in the Board's orders or decisions, not in the underlying applications for requested relief. The purpose behind the rule is to allow for the Board to correct errors that it made that do not reflect its intention in the decision. This does not apply to errors made by the applicant in its application. To do so would turn the rule from allowing the Board to amend its decision to fix simple clerical errors to one that allows it to make significant substantive changes, without a review such as this one. The issue in this proceeding is a significant and substantive error made by EPL alone. EPL provided incorrect evidence to the Board. The Board did not make the error. EPL made the error.

> "No rates and charges for the distribution of electricity and charges to meet the costs of any work or service done or furnished for the purpose of the distribution of electricity shall be made except as permitted by this schedule, unless required by the Distributor's License or a Code or Order of the Board, and amendments thereto as approved by the board, or as specified herein." (*Decision and Rate Order* (EB-2013-0128 - EPL), March 13 2014, Appendix A Tariff of Rates and Charges)

[73] *Final Decision*, p.7

64. The Board has not utilized Rule 41.02[74] to do more than correct typographical errors in its decisions, or errors related to the implementation of its decision in final rate orders. In fact, when requested to do more than that, it has refused.[75]

65. SEC recognizes that in the Partial Decision, the Board on its own initiative, without seeking submissions from the parties, relied on Rule 41.02 to correct an implementation error affecting the disposition of Account 1590.[76] The difference in that case is the Board found that the issue was "due to a model error" that did not flow through the credit to the rate rider calculation. [77] The Board created the model. The error is one that the Board made, not EPL. Because of that, Rule 41.02 can be applied to correct the error.

66. Further, SEC submits that there should be a temporal aspect to the determination if Rule 41.02 applies. EPL was seeking to correct errors that were first entered into DVA accounts beginning in 2011 and disposed of on a final basis in 2014. Even when the Board has utilized Rule 41.02 to make a correction, it has done so very soon after its issuance. Utilizing it now would involve making corrections to errors that were included in rates on a final basis more than a year ago. The magnitude alone of the correction, caused in part by the length of time it persisted, should make any potential correct ineligible under Rule 41.02

67. Moreover, even if the Board were to determine that Rule 41.02 allows for the error to be corrected, SEC submits the Board may not do so as to require an adjustment to rates for Non-RPP customers. Rule 41.02 is permissive; it does not require a correction. The time that has elapsed since the rates were declared final, the magnitude of the error, and the Board's findings with respect to EPL's conduct, are factors that would indicate the Board should not exercise that discretion. In addition, the principles which underlie the rule against retroactive ratemaking, while lessened, will still be present. The Board has recognized even in situations where it is

[74] The current version of Rule 41.02 was previously Rule 43.02 before the revision to *the Rules of Practice and Procedure* made on April 24, 2014.
[75] For example, see *Decision and Order* (EB-2014-0291 - NRG), May 7 2015, p.2; *Notice of Motion to Review, Notice of Motion Hearing, and Procedural Order No.1* (EB-2012-0206 - Union Gas), May 2 2012, p.2
[76] *Partial Decision*, p.8
[77] *Partial Decision*, p.8

permissible to set rates retrospectively, such as where interim rates have been declared, that in some cases it would not be just and reasonable to do so. In the recent OPG Payment Amounts Decision, the Board chose not to set an effective date for rates back to when interim rates were declared, even though it could have, in part on the basis that it "would result in some level of inter-generational inequity."[78] This is consistent with the Board's general practice.[79]

PART IV – ORDER REQUESTED

68. For all of the above reasons, SEC respectfully requests that the Board dismiss the motion to review

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 8, 2015

Original signed by

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Mark Rubenstein
Counsel for the School Energy Coalition

[78] *Decision with Reasons* (EB-2013-0321 – Ontario Power Generation), November 20, 2014, p.136
[79] For example, see *Decision and Order* (EB-2012-0165 - Sioux Lookout), August 22 2013, p.3; *Decision and Order* (EB-2013-0139 - Hydro Hawkesbury), January 30 2014, p.3; *Decision and Order* (EB-2012-0133 - Centre Wellington), May 28 2013, p.2; *Decision and Order* (EB-2013-0130 - Fort Francis), August 14 2014, p.3