

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Essex
Powerlines Corporation for an order approving a Smart Meter
Disposition Rate Rider (“SMDR”) and a Smart Meter
Incremental Revenue Requirement Rate Rider (“SMIRR”),
each to be effective January 1, 2015;

AND IN THE MATTER OF an application by Essex
Powerlines Corporation for an order approving just and
reasonable rates and other charges for electricity distribution to
be effective May 1, 2015.

**NOTICE OF MOTION TO REVIEW, NOTICE OF
MOTION HEARING**

**ENERGY PROBE RESEARCH FOUNDATION
 (“ENERGY PROBE”)**

WRITTEN SUBMISSIONS

September 8, 2015

A. Introduction

The Ontario Energy Board ("OEB") initiated a proceeding on its own motion to review the partial Decision and Order in EB-2014-0301 & EB-2014-0072 issued on March 25, 2015.

B. Background

On June 9, 2015 the OEB issued its Decision and Order in the Essex Powerlines Corporation (Essex Powerlines) combined proceeding for its final smart meter installation costs application (EB-2014-0301, the Smart Meter application) and for its annual Price Cap Incentive Rate-Setting adjustment application relating to rates for the 2015 rate year (EB-2014-0072, the Price Cap IR application). The OEB combined these proceedings.

Following the evidentiary phase of the combined proceeding, Essex Powerlines disclosed an error with the evidence filed in the Price Cap IR application. The error related to a misallocation between two Group 1 Deferral and Variance Accounts (DVA); Account 1588 – RSVA Power, and Account 1589 – RSVA Global Adjustment. In its reply submission dated January 20, 2015, Essex Powerlines submitted additional information confirming that it had incorrectly allocated costs in 2011, 2012 and 2013 between Regulated Price Plan (RPP) and non-RPP customers (i.e. those purchasing electricity from a retailer or making individual arrangements for power procurement).

The OEB reopened the record of the proceeding to enable the filing of new evidence and convened an oral hearing to consider the new evidence. The OEB invited intervenors and OEB staff to consider and provide written submissions on the following questions:

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 concerning retroactive ratemaking?

The OEB held an oral hearing and heard submissions from Essex Powerlines, OEB staff and intervenors on this single issue.

Essex Powerlines proposed an adjustment and re-allocation between RPP and non-RPP customers of about \$11.5 million to correct the error. The proposed accounting adjustments are a credit to Account 1588 and a debit to Account 1589, which are both variance accounts. As a result of these proposed adjustments, some customers would receive a credit refund while others would have a debit balance owing.

The OEB determined in its Partial Decision and Procedural Order No. 3 dated March 25, 2015 that the error by Essex Powerlines was not a billing error, and 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 went on to state that it would consider whether Essex Powerlines should be required to reimburse customers for amounts that they may have overpaid during that period.

On April 2, 2015 Essex Powerlines filed a Notice of Motion to review the OEB's Partial Decision and Procedural Order No. 3 (Motion).

The OEB issued Procedural Order No. 4, and ordered that the Motion be placed in abeyance to permit the OEB to complete the record of the current proceeding and preserve Essex Powerlines' right to file a dispositive motion if it so chose. To date no motion has been filed by Essex Powerlines.

In its April 23, 2015 submission Essex Powerlines asked the OEB that it be allowed correct the past billing impacts of the error, not perpetuate the error, and maintain Essex Powerlines' financial integrity in a manner that is fair in both principle and impact for all customers. The Panel rejected the request.

B. Submissions on Questions

In the August 10, 2015 Notice of Motion to Review, Notice of Motion Hearing, the OEB stated that it does not dispute the finding that the 2011 and 2012 DVA balances were declared final, but determined that it would like to hear further submissions on the issue of its finding that an adjustment to the 2011 and 2012 DVA balances is not appropriate in this case. The OEB invited submission from parties on four issues. These are the submissions of Energy Probe Research Foundation ("Energy Probe") with respect to those four issues.

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

Energy Probe submits that retroactive ratemaking should be avoided in almost all circumstances. However, there are exceptions where the Board should correct known errors and the inequities that they cause.

RPP and non-RPP customers have not been treated fairly as the result of the accounting error. All customers are promised that the commodity costs are pass through costs that reflect actual costs incurred. The OEB's rigid adherence to the rule against retroactive ratemaking when balancing the principles of just and reasonable rates is as equally responsible for the inequity that continues to exist between RPP and non-RPP customers, as is the original error committed by Essex Powerlines. When the error was discovered, Essex Powerlines proposed to correct the error. The OEB has not.

RPP customers were passed on more than their fair share of the pass through costs, while non-RPP customers benefitted from the recovery of less than their fair share of the same costs. Neither group of customers was responsible for this error.

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

- a. Nullity?**
- b. Extraordinary circumstance?**

Energy Probe submits that the Board erred by failing to sufficiently consider the exceptions to the rule against retroactive ratemaking in this instance because of an extraordinary circumstance that occurred.

Essex Powerlines made a significant accounting error that went undiscovered for several years.

Section 78(3) of the Act mandates that the OEB set rates that are "just and reasonable". The question then becomes are rates "just and reasonable" if they are based on an error that becomes known to the Board and the known implication is a significant inequity between groups of customers?

Having discovered the error, Essex Powerlines brought forward a proposal to correct the error and restore equity between the customer groups.

Energy Probe submits that the OEB should not blindly stick to the rule against retroactive ratemaking when it is aware of an extraordinary circumstance, such as the one that exists in this case. As noted above, Energy Probe submits that retroactive ratemaking should be avoided in almost all circumstances. However, there are exceptions where the Board should correct known inequities. Customers cannot be seen as having paid just and reasonable rates when the pass through costs allocated to them were clearly wrong. Energy Probe submits that the Board has the power and authority to correct such an error under Rule 41.02 of the OEB's Rules of Practice and Procedure (see question 4 below).

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?

The OEB found that a billing error typically occurs when a utility charges a rate that is inconsistent with a rate order or if the utility fails to charge a rate at all (Partial Decision and Procedural Order No. 3, page 6). Because Essex Powerlines complied with the Rate Order, the OEB found that it was not a billing error.

Energy Probe submits that the Board erred in not finding that the accounting error was a billing error under section 7.7 of the Retail Settlement Code. The OEB has applied a very narrow view of what constitutes a billing error.

Energy Probe submits that a billing error can be the result using a rate inconsistent with that in the rate order. However, there are many other circumstances that can lead to a billing error. Just ask Hydro One customers!

In addition to using an incorrect rate, billing errors can be the result of incorrect meter reads, incorrect line loss calculations and incorrect mathematical calculations. Billing errors can also be the result of placing the customer in a wrong rate class or billing the right amount, but to the wrong customer.

Energy Probe submits that billing errors can also be the result of accounting errors, as is the case with Essex Powerlines. The billing error for both RPP and non-RPP customers is directly attributable to an accounting error made by Essex Powerlines. There would not have been any billing error in the absence of the accounting error.

Energy Probe notes that there is no definition of "billing error" included in the Retail Settlement Code. The OEB definition used in the Partial Decision was arbitrary and too narrow. It failed to recognize that billing errors can be, and are, the result of more than just not using the correct rate applied to the correct volume.

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

Energy Probe submits that Rule 41.02 of the OEB's Rules of Practice and Procedure does allow it to correct the error in this case. Energy Probe submits that there is a clear error of calculation that Essex Powerlines has discovered and is attempting to correct.

The error of calculation referenced in Rule 41.02 cannot be narrowly defined as calculation errors made solely by the OEB. Energy Probe notes that the OEB does not make many (if any at all) calculations in its rate orders. Rather, the onus is on the utility to make the correct calculations that result in rates to be included in the rate orders. These calculations are not limited to the final set of calculations that arrive at a rate or rate rider.

These final calculations often are the result of simply dividing a dollar figure by a volumetric figure. Energy Probe submits that the calculations are far more complex than this. Dozens of calculations, and often more, are made before this simple division takes place. In the case of Essex Powerlines, the error was in the calculation of the amounts to be included in the variance accounts for RPP and non-RPP customers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 8, 2015

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