Jay Shepherd
Professional Corporation
2300 Yonge Street
Suite 806, Box 2305
Toronto, ON M4P 1E4

BY EMAIL and RESS

October 2, 2015
Our File: EB20150240

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2015-0240 – Essex Powerlines Motion to Review – SEC Reply 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 reply submissions.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

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

T. (416) 483-3300 F. (416) 483-3305
mark.rubenstein@canadianenergylawyers.com
www.canadianenergylawyers.com

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*.

REPLY SUBMISSIONS OF THE SCHOOL ENERGY COALITION

PART I – OVERVIEW

1. Pursuant to the *Notice of Motion, Notice of Motion Hearing, and Procedural Order No. 1*, these are the reply submissions of the School Energy Coalition ("SEC"). These reply submissions should be read in conjunction with SEC's initial submissions on this Motion to Review.

2. SEC submits there is no basis, in law or in policy, to vary the *Partial Decision and Order* in EB-2014-0301/0072, issued on March 25, 2015 (the "Partial Decision"). The Board correctly applied the law of retroactive ratemaking to the facts of the case. While the error made by Essex Powerlines Corporation ("EPL") is unfortunate, it does not mean that the Board should succumb to temptations provided by some parties to bend the rule against retroactive ratemaking (either through expanding its scope, or creating a new exception). Nor should the Board try to correct the error through means that are inappropriate (the Retail Settlement Code or Rule 41.02).

3. To take any of these steps would lead to significant harm, most significantly to Non-Regulated Price Plan ("RPP") customers who include schools, but also to the principles on which the Board's decisions are based. The Non-RPP customers made consumption decisions based on rates which are not disputed, and the Board is not questioning[1], included amounts that made up Deferral and Variance Accounts ("DVA") that were cleared on a final basis. The harms on which the rule against retroactive ratemaking is premised - finality[2] and intergenerational equity[3] - are very present, and cannot be ignored. The Board recognized that in the Partial Decision.[4]

PART II – REPLY

Questions 1 and 2 – Scope and Exceptions of the Rule against Retroactive Ratemaking

4. The Board's ability to set rates involves balancing many factors and interests, but the rule against retroactive ratemaking is not one of those factors to be balanced. It is a legal restriction, not merely a guideline or other consideration. The Board does not have the authority to adjust rates retroactively in situations where such an adjustment would fall within the scope of the rule, unless it comes within an exception to the rule.[5] In this regard, SEC agrees with EPL.[6]

5. In the Partial Decision, the Board correctly determined that the rule against retroactive ratemaking prohibited the Board from collecting any additional amounts from Non-RRP customers. This is the basic rule, and no exceptions applied to lessen its mandatory nature.

6. The Board also correctly determined that, with regard to RPP customers, it did have the authority to require EPL to credit those customers on the facts of the case. The principles underlying the rule did not require symmetrical treatment. Ultimately, in the Final Decision, the

---

[1] *Notice of Motion to Review, Notice of Motion Hearing, and Procedural Order No 1* ["*Notice*"], p.3
[2] *Decision and Rate Order* (EB-2013-0119 - Chapleau PUC), March 13 2014, p.8*; Decision and Orde*r (EB-2013-0022 - Veridian), April 25 2013, p.10
[3] *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission),* 2014 ABCA 28 ["*ATCO 2014*], para. 51
[4] *Partial Decision and Procedural Order No.3* (EB-2014-0301/0072), March 25 2015 ["*Partial Decision*"], p.6-7;
[5] There is confusion in the language in many decisions on retroactive ratemaking. Some consider certain situations where the rule does not apply as exceptions, others treat them as simply contours that define its general scope. See for example, *Northland Utilities et al v. NWT Public Utilities Board,* 2010 NWTSC 92, para 5, regarding the exception for deferral accounts, compared to *Bell Canada v. Bell Aliant Regional Communications,* [2009] SCC 40 the leading authority on the issue, in which the Supreme Court makes no reference to it being an exception. Further, see the discussion in *Calgary (City) v. Alberta (Energy and Utilities Board),* 2010 ABCA 132 beginning at para. 163.
[6] EPL Submissions, para. 9

Board chose not to require EPL to credit the over-collected amount to RPP customers, but it correctly determined that it had the power to do so.

7. SEC disagrees with Board Staff's view that the Board should take into account, in determining whether the rule against retroactive ratemaking applies, the facts that the errors occurred in pass-through accounts and that the utility did not profit from the error.[7] SEC submits that while these are relevant considerations for some purposes, they are not relevant in determining whether or not the rule applies.

8. The fact that EPL did not profit from its error is of no relevance to the proposal to require Non-RPP customers to pay, in the future, for amounts that perhaps should have been, but were not, included in past rates (i.e. after they have had to make consumption decisions). There is no recognized exception, nor any rebuttable presumption as suggested by Board Staff, for errors from which the utility does not profit.

9. Where the lack of profit is a relevant consideration for the Board is in determining whether it will require a utility to credit customers who have otherwise overpaid due to the error. This is because the Board, in determining if it will require a credit the customers, must balance the objective to "protect the interest consumers with respect to price"[8] and the objective to "facilitate the maintenance of a financially viable electricity industry."[9] While recognizing the possibility that a credit could be ordered, in the Final Decision, the Board ultimately did not require EPL to credit RPP customers.

10. As discussed in SEC's initial submissions, rates that allow for retroactive credits due to a utility's errors, do not engage the rule against retroactive ratemaking for the same policy reasons as other judicially confirmed exceptions, such as interim rates or deferral accounts. That is, did the ratepayers and/the utility have knowledge that rates may change? The central rationale that defines the scope and exceptions to the rule against retroactive ratemaking is that of the parties' knowledge that rates may change retrospectively.

[7] Board Staff Submissions, p.23
[8] *Ontario Energy Board Act*, 1998, SO 1998, c 15, Sch ["*OEB Act*"], s.1(1)(1)
[9] *OEB Act*, s.1(1)(2)

11. In this case, the knowledge is that of the regulated utility. A utility is expected to know that when it makes errors that harm its ratepayers, in certain circumstances, its rates may have to be adjusted to fix those errors. They cannot rely on rates being final to protect them, as if once something has gotten by the Board (intentionally or unintentionally), they are no longer accountable for their own errors. The Board has repeatedly stressed to utilities that they – not the Board – are in control of their books.

12. Ratepayers, on the other hand, are almost never in a position to know if a utility has made an accounting error. They have no visibility to see it and should not be responsible for it. When costs are included in rates, or DVA balances are cleared on a final basis, the ratepayers' expectation is that they will not be responsible for any additional charges sometime in the future. They have paid what they were required to pay. They make consumption decisions based on the fact that those amounts are in rates on a final basis. If accounting errors, even when made totally innocently, were a basis to allow rates to be increased, then there would never truly be final rates for ratepayers. A customer would always have to worry that its utility may have made an accounting error and could come back to ask for more.

13. To combat that the Board, and the intervenors who represent ratepayers, would have to review DVA balances and costs forensically in every case. This would be both impractical and cost-prohibitive.

Extraordinary Circumstances Is Not A Recognized Exception

14. SEC submits that there is no exception to the rule against retroactivity for "extraordinary circumstances". Both Board Staff and EPL cite, as the source of the exception, a Supreme Court of Utah decision in *MCI Telecommunications v. Public Service Commission*[10] which was referred to in the Board's decision in EB-2014-0043 (the "Enbridge Decision").

15. In the Enbridge Decision, the Board did not actually cite the "extraordinary circumstances" exception as its basis for finding but, consistent with past decisions, it stated that

[10] *MCI Telecommunications v. Public Service Commission,* 840 P. 2d 765 (Utah 1992)

"that an out-of-period adjustment can be justified to ensure a utility does not profit on the account of its own errors."[11] In that case, similar to here, the utility made an unintentional error in the calculation of certain account balances. The rationale is consistent with this country's courts' recognition that the policy rationale that allows for exceptions to the rule against retroactive ratemaking is knowledge. In that case, Enbridge knew that where it makes an accounting error in its favour, it may be required to correct that error by way of a credit to the overcharged customers. As proof of this knowledge, it brought the application to the Board to credit the amounts itself. A broad based exception for "extraordinary circumstances" would not be consistent with the underlying rationale for exceptions to the rule in Canada – a party's knowledge of rates may be adjusted retrospectively.

16. What is important about the Enbridge Decision is that the Board recognizes the credit exception to the rule, i.e. where errors are made by a utility, credits to ratepayers do not offend the rule against retroactive ratemaking. In EB-2014-0043, Enbridge would have profited from the error, so the entire amount was credited. That is not a requirement – and in circumstances where the utility did not profit, the Board has the discretion whether or not to apply the exception. In the Enbridge case, the exception was applied. In EPL, the Board exercised its discretion not to order the credit.

17. In contrast to the claim by EPL that the "decision was not an argued case and its precedential value is limited"[12], the Board specifically sought submissions in that proceeding from parties about the implications of the rule against retroactive ratemaking.[13] The decision in that case was based on a fully-argued issue.

Nullity Exception Does Not Apply

18. Staff submits that the question for the Board is "whether the final rate order which was made based on a misallocation error gives rise to the Panel having rendered a decision in the

[11] *Decision and Order* (EB-2014-0043 – Enbridge), April 10 2014, p.2
[12] EPL Submissions, para. 19
[13] *Decision and Order* (EB-2014-0043 - Enbridge), April 10 2014, p.2

absence of evidence".[14] If so, Staff reasons the decision could be a nullity, and the Board would be able to correct the error.[15]

19. With respect, that is not the law. While nullity is an exception to the rule against retroactive ratemaking, there is no freestanding jurisdiction for the Board to declare a past decision a nullity. The Board cannot simply determine, in any proceeding it wishes, that a past decision is a nullity, whether for the reasons Staff sets out in their submissions, or for any other reason. The Board can cause a decision to become a nullity, but only in specifically allowed circumstances: exercise of the authority to review and vary past decisions[16], or through internal appeals[17]. This has been confirmed just recently by the Supreme Court in a decision involving the Board.[18] The only other circumstance in which a decision will be a nullity is as a result of decisions on appeals[19] or judicial reviews to the Divisional Court. These circumstances are the full scope of the nullity exception and the Board has no power or jurisdiction to expand that scope. Only the Legislature can do so.

20. As SEC submitted in its initial submissions (see paragraphs 21-26), the Board does not have the authority to review and vary the 2014 IRM decision any more. It is no longer a "reasonable time" after the issuance of that decision. The decision to set rates for 2014 cannot be turned into a nullity through a motion to review and vary, and the internal appeals available to the Board are not applicable here. Therefore, the 2014 IRM decision can only become a nullity through a decision by a court of competent jurisdiction. No appeal or judicial review of the 2014 IRM decision has been sought.

21. The *ATCO Gas South* decision cited by Staff, which resulted in a reimbursement to ATCO by ratepayers, was in response to a Court of Appeal decision which nullified part of a

[14] Board Staff Submission, p.13
[15] *Ibid*
[16] Ontario Energy Board, *Rules of Practice and Procedure,* Rules 40.03, 41.02, 41.03
[17] For example, see *OEB Act*, s.7(1)
[18] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para. 65: "The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, 'absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done'."
[19] *OEB Act*, s.33

previous Alberta Utilities Commission decision ("AUC").[20] The AUC did not, on its own, years later, determine that the previous decision was a nullity and make the correction. It was implementing a decision of the Court of Appeal.[21]

22. Staff refers to a previous Burlington Hydro decision (EB-2012-0081) where the Board determined that a previous order it had made was a nullity based on lack of evidence.[22] A careful look at that decision is required for a couple of reasons.

23. First, the case has nothing to do with any exception to the rule against retroactive ratemaking. The Board was exercising its authority under the Rules to initiate a review of the previous decision. It was entitled to do so.

24. Second, contrary to Board Staff's interpretation, the Board makes no reference to lack of evidence being the basis for calling the previous decision a nullity. Indeed, the issue was not that Burlington Hydro misled (unintentionally) the Board by explicitly saying certain costs were not included in its application and later approved, when in fact they had been.[23] Those facts were true, but they were not the basis for the decision. The Board instead determined – quite correctly – that it did not have the legal authority to approve recovery of those costs by Burlington Hydro, since the underlying activities were of the exclusive jurisdiction of the Smart Meter Entity pursuant to O. Reg. 393/07, and so those costs could only be recovered by it.[24] The impugned decision was a nullity, if at all, because it was not within the Board's jurisdiction to make it.

25. The situation here is not similar. In EPL's 2015 IRM proceeding, the Board was not seeking to review and vary the 2014 IRM decision, nor could it have done so. Further, no one

[20] *ATCO Gas South (Re)*, [2010] AEUBD No. 522 ["*ATCO Gas South*"], paras. 1, 99
[21] *ATCO Gas South*, para. 99
[22] Board Staff Submission, p.10-11
[23] *Decision on Motion and Order* (EB-2013-0186 – Burlington Hydro), April 25 2013, p.5
[24] The Board states in its findings that "[i]n other words, had the Board known that these costs were included in the application, the Board would have disallowed recovery consistent with prior decisions for other distributors on this particular matter and Guideline G-2011-0001." Guideline: Smart Meter Funding and Cost Recovery – Final Disposition (G-2011-0001), December 15 2011, p.18-19 states that in an application a distributor must include: "for any costs incurred that are associated with functions for which the SME has the exclusive authority to carry out pursuant to O. Reg. 393/07, the basis on which recovery of those costs is allowed under applicable law". This suggests that the Board believes that without reference to an applicable law, it does not have the authority to award distributors the recovery of costs of activities over which the SME has authority under O.Reg. 393/07.

has alleged that the Board had no jurisdiction to make an order as to 2014 EPL rates, or to clear the DVA on a final basis. Clearly, this was within the Board's jurisdiction. Lack of jurisdiction by an administrative decision maker is a much narrower concept than a decision that is incorrect.[25] The law has considerably evolved on this point.[26] It is no longer arguable in that "getting it wrong" is an error that goes to jurisdiction.

Question 3: Error was not a Billing Error under the Retail Settlement Code

26. There appears to be general agreement amongst the parties, with the exception of Energy Probe, that the errors made by EPL that were incorporated into the rates set by the Board, are not billing errors, and thus the Retail Settlement Code ("RSC") does not apply.

27. Energy Probe submits that the error can be considered a billing error, although it has provided no justification for such an interpretation of the RSC. SEC submits that Energy Probe's interpretation is inconsistent with the meaning and purpose of a billing error under RSC, and also with the Distribution System Code ("DSC"). The DSC requires that a distributor must provide accurate bills to its customers and the Board.[27] An inaccurate bill would be a bill that was provided in error. An inaccurate bill, one that is in error, is one that does not "contain […] correct customer information, correct meter readings, and correct rates that result in an accurately calculated bill".[28] There is no suggestion from any party that the incorrect rate was billed.

28. It is, in fact, common ground in this case that the bills issued to customers by EPL were accurate and complete, consistent with the rate orders applicable to them. It was not the bills that were wrong. It was the approved rates that were wrong.

29. Regardless, even if the error could be considered a billing error, for the reasons set out in SEC's initial submissions, the RSC cannot, as a matter of law, be used to adjust rates set by the

[25] *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 21, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, para. 33
[26] *Ibid*
[27] Ontario Energy Board, *Distribution System Code* ["*DSC*"], s.7.11
[28] *DSC*, s.7.1

Board, nor can it, as EPL correctly argues[29], oust the rule against retroactive ratemaking. The rule is not the Board's rule to oust.

Question 4: Rule 41.02 Cannot Be Used to Correct the Error

30. As discussed in detail in SEC's initial submissions, Rule 41.02 cannot be used to correct EPL's accounting error. The error is not minor in scope, either in quantum or effect. This is what Rule 41.02 was meant to remedy, a typographical error, error of calculation, or similar errors. The Board was correct to reject such an attempt to stretch its authority.[30]

31. EPL has attempted to use the 'accidental slip rule' to broaden the Board's authority under Rule 41.02 to allow the Board to correct the error. This expansion is incorrect.

32. The accidental slip rule is a common law exception to the *functus officio* rule, which provides that after a final decision is rendered by an administrative decision maker, its authority ends with respect to the dispute and it cannot vary its order.[31] The Board does not, and cannot, rely on the accidental slip rule for its authority to vary previous decisions. It already has an express authority to vary, with restrictions, under the *Statutory Powers and Procedure Act* ("*SPPA*").[32] The *SPPA* provides the Board with the authority to vary its previous decisions by way of its general power to review and vary (Section 21.2(a), incorporated in Rules 41.01 and 42), and its more limited power to correct typographic and similar errors (Section 21.1(a) incorporated as Rule 41.02). These statutory based powers supplant – and circumscribe - any common law exceptions to the *functus officio* rule.

33. The use of the accidental slip rule to define the scope of Rule 41.02 is also inappropriate for broader reasons. The cases cited by EPL in support of the rule are good examples of why that is the case. They involve what are essentially private disputes between parties, where any harm or prejudice that comes from a varying of the original decision is limited to the specific parties who took part in that proceeding.

[29] EPL Submissions, para.19
[30] *Decision and Order* (EB-2014-0301/0072 – Essex Powerlines), June 9 2015 ["*Final Decision*"], p.7
[31] *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848, p. 861-62
[32] *Statutory Powers Procedure Act*, R.S.O. 1990 c. S-22, s.21.1(a), 21.2(a)

34. The facts of this case are very different, and so is the Board's mandate. A rate proceeding is not primarily an adjudication of issues between the parties before it, but also rather the application of the Board's statutory mandate to set just and reasonable rates. It is why, for example, the Board, when accepting a settlement agreement, must ensure that the terms are in the public interest. Moreover, in both cases cited, the errors that were put before the decision-maker were those for which both parties shared responsibility. In *Grier*, the error was in an agreed statement of facts[33]; in *Kingston*, the error was in a settlement agreement.[34] Here, the error was solely the fault of EPL.

35. The decision in *Mike Little Gas Co. v Public Service Commission*[35], discussed by Board Staff[36], is an example of the type of error that Rule 41.02 was meant to address. In that case, the Public Service Commission itself had issued an order (similar to the Rate Order) with a typographic error, such that the order did not reflect the actual decision it had reached only days earlier. The court agreed that it did not violate the rule against retroactive ratemaking for the Public Service Commission to correct the problem. The Board in this case correctly pointed out in the 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".[37]

36. There is one other key difference here. While in *Mike Lake*, the Court found that the correction did not implicate any of the other harms associated with retroactive ratemaking, the facts are different in the present circumstances. Here, the original panel recognized in the Partial Decision that the harms do exist.[38] Moreover, in *Mike Lake*, it is ratepayers who were harmed by the error completely, which is different for Non-RPP customers here.

---

[33] *Grier v. Metro International Trucks Ltd.*, [1996] O.J. No. 538, para. 8
[34] *Kingston (City) v. Ontario (Mining & Lands Commissioner* (1977), 18 O.R. (2d) 166, p.2
[35] Board Staff states this is a 2011 case from the Supreme Court of Alaska. This is incorrect. The case (and the citation reference) is in fact a 1978 decision of the Kentucky Court of Appeal *Mike Little Gas Co. v. Public Service Commission*, 575 S.E. 2d 926 (KY. Ct. App. 1979)
[36] Board Staff Submissions, p.20-21
[37] *Final Decision*, p.7
[38] *Partial Decision*, p.7

PART III – RELIEF SOUGHT

37. For all of the above reasons, and those in SEC's initial submissions, the Board should dismiss the motion to review.

PART VI – COSTS

38. SEC hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this proceeding. It is submitted that SEC has participated responsibly, in a manner designed to assist the Board as efficiently as possible.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 2, 2015

Original signed by

_____

Mark Rubenstein
Counsel for the School Energy Coalition