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October 2, 2015

VIA COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Essex Powerlines Corporation ("Essex Powerlines") Second Submissions
re: Motion to Review
Board File No. EB-2015-0240**

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

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

If there are any questions, please contact the undersigned.

Yours very truly,

AIRD & BERLIS LLP



Scott Stoll

SAS/bm

cc: *Board Counsel, Maureen Helt (via email)*
All Intervenors (via email)
Co-Counsel, George Vegh (via email)

Encl.

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

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

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

Essex Powerlines Corporation's Second Submissions on Motion to Review

1. These are the Reply Submissions of Essex Powerlines Corporation ("Essex Powerlines") in respect of submissions made to the Ontario Energy Board's (the "OEB" or the "Board") in respect of its motion to review its Procedural Order No. 1 in EB-2014-0301/EB-2014-0072 (the "Procedural Order No. 1"), made in the context of Essex Powerlines' 2015 rates case.
2. In its original submissions on the motion, as in its submissions in the proceeding, Essex Powerlines submitted that Rule 41.02 is the most relevant and appropriate grounds for the Board to correct the error in this case. This is because it is consistent with the relevant legal authorities and it most accurately captures and corrects the errors that occurred in this case.
3. These Reply Submissions are confined to material issues that Essex Powerlines believes that the Board ought to consider in making its determination. For the sake of brevity, Essex Powerlines will not reply to all submissions that it has concerns with.

Board Staff Submissions

4. Board Staff submissions contain two arguments which contradict each other. First, it bases the rule against retroactive rate making in the Board's statutory authority. It states: "There is no specific statutory provision that would allow the OEB to set rates retroactively and therefore, the rule against retroactive ratemaking applies."¹ This proposition is supported by express authority of the Supreme Court of Canada² and Essex Powerlines agrees with it. As noted in Essex Powerlines' original submissions, the rationale for this restriction is that, after setting rates, the Board is functus and it does not have the authority to retroactively amend them. The Supreme Court of Canada recently confirmed this rule in its decision in *Ontario Energy Board v. Ontario Power Generation, Inc.*, where it stated:

"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.'"³

5. However, Board staff then goes on to suggest that the rule against retroactive rate making is simply a "presumption" that the Board can set aside. Board staff refers to an academic article in support of that proposition.⁴ Board staff is therefore urging the Board to treat the legal restriction identified by the Supreme Court of Canada as a mere presumption that the Board can set aside in its discretion. This is clearly incorrect.

¹ Board Staff submissions, p. 5.

² See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, at para. 71 and *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684.

³ *Ontario Energy Board v. Ontario Power Generation Inc.*, [2015 SCC 44] (September 25, 2015), paragraph 65.

⁴ Board Staff submissions, p. 22.

6. With respect to Rule 41.02, that Rule permits the Board to “correct a typographical error, error of calculation or similar error made in its orders or decisions.” Essex Powerlines submits that this is the appropriate Rule to rely upon in this case. Board staff suggests that the Board may only use this power where “the error is a minor error”.⁵ With respect, the Rule does not refer to a “minor” error. Further, neither s. 21.1 of the *Statutory Power Procedures Act* (which mirrors Rule 41.02) nor the cases where the courts have applied that provision restrict its scope to “minor” errors.⁶ Board Staff’s introduction of that qualification is clearly incorrect.
7. The reason why Board staff apparently proposes such a limitation is that “if there is a substantive issues [sic] then a hearing should occur as parties’ interests will be impacted.”⁷ However, that consideration is relevant where the facts underlying the error are, or would have been contentious. Where, such as here, the error was merely incorporated from an error in the evidence – and not contested by the parties or decided upon by the Board - there is no reason to not carry out the correction. This factor is recognized in Macauley’s *Practice and Procedure in Administrative Tribunals* where the author states:

“It is important to note that in these cases the substance of the decision-maker’s decision was not being changed. In each case it could be argued that the decision-maker had intended to, or had, awarded the thing in question which had been omitted from the implementation of the court’s intention by error.”⁸

⁵ Board Staff submissions, p. 19.

⁶ See: *Grier v. Metro International Trucks Ltd.*, [1996] O.J. No. 538 and *Kingston v. Ontario (Mining & Lands Commissioner)* (1977), 18 O.R. (2d) 166 (Div. Ct.).

⁷ Board Staff submissions, p. 20.

⁸ Macauley’s *Practice and Procedure in Administrative Tribunals*, at p. 27A-33, emphasis added.

SEC Submissions

8. SEC submits that Rule 41.02 is inapplicable in this case because the error was initially made by the applicant, and not the Board.⁹ However, the cases where the Divisional Court has applied the law in this area are based on errors in the evidence which went unchecked –which is precisely the case here.¹⁰ As Macaulay's *Practice and Procedure in Administrative Tribunals* notes, this rule applies to "cases where the applicant has accidentally mislead or failed to provide a decision-maker with the correct facts."¹¹ There is simply no basis for the restriction that SEC is proposing in its submissions.

VECC Submissions

9. VECC argues that Rule 41.02 does not apply in this case because it can only operate prospectively and an error in a final decision cannot be made subject to it without violating the rule against retroactivity. This proposition is implausible. Rule 41.02 is an exception to the rule against retroactivity. By definition, its operation will always be retroactive.
10. Finally, VECC argues in support of its position by reference to the "Filed Rate Doctrine" in American law. Essex Powerlines has no specific submissions on that doctrine as described by VECC. However, Essex Powerlines submits that it is not necessary or helpful to review American law on this issue when the Canadian law – as confirmed by the highest court in the country is so unequivocal: A statutory tribunal lacks legal

⁹ SEC Submissions, paragraph 63.

¹⁰ *Grier v. Metro International Trucks Ltd.*, [1996] O.J. No. 538 and *Kingston v. Ontario (Mining & Lands Commissioner)* (1977), 18 O.R. (2d) 166 (Div. Ct.).

¹¹ Macauley's *Practice and Procedure in Administrative Tribunals*, at p. 27A-33.

authority to set rates on a retroactive basis unless there is specific statutory authorization for it do so.

Costs and Implementation Issues

11. Essex Powerlines submits that it is reasonable that parties are responsible for their own costs in this Board initiated proceeding. Essex Powerlines has inferred from Procedural Order No. 1 that its motivation in revisiting the issues with submissions on broader considerations of rate retroactivity is to not only reconsider the Essex Powerlines decision, but to assist the industry in managing similar issues in the future. As such, while using the Essex Powerlines situation as a factual premise, the motion has taken on characteristics and considerations of a generic hearing. Essex Powerlines has incurred significant costs through EB-2014-0301 and EB-2014-007 and submits that given the costs it has already incurred and the nature of this motion it is entirely appropriate for intervenors to bear their own costs in this proceeding.
12. Essex Powerlines would request that any changes to its current rates resulting from the Board's decision in this proceeding be implemented January 1, 2015. This date is requested to coordinate billing changes with the implementation of the changes to the debt retirement charge thereby reducing the number of billing changes that customers will experience.¹²

¹² O. Reg. 493/01 *Debt retirement charge — Rates and Exemptions*, as amended.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: October 2, 2015

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AND TO: Intervenors of Record