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 OEB's Rules of Practice and Procedure.

REPLY SUBMISSIONS OF THE VULNERABLE ENERGY CONSUMERS COALITION (VECC)

1. **VECC has reviewed the initial submissions of Essex Powerlines (EPL), interested parties and Board Staff herein in response to the Board's motion to review the Partial Decision and Order in EB-2014-0301 & EB 2014-0072 issued March 25, 2015.**

2. **The grounds for review and variance of the aforesaid Order that have been explored in the Notice of Motion and submissions herein, are whether anything the circumstances giving rise to the original order of March 13, 2014 allow the Board to modify the long standing and well established rule that changes to rates by the regulator that have retroactive effect are prohibited unless they fall within a**

judicially recognized set of exceptions. These exceptions are chiefly concerned with circumstances where interim orders, variance accounts or some other measure has been used to set rates with the expectation that they may be altered later.

3. **VECC does not propose to review the lengthy list of jurisprudence that has articulated both the standard associated with the prohibition against retroactive ratemaking and the approval of the use of what the Ontario Court of Appeal has called "encumbered funds" to adjust rates retrospectively to better reflect the objective of "just and reasonable rates".[1]**

4. **This is a case where there were misallocations made in the filings of the regulated utility (EPL) that gave rise to a final rate order that featured a rate rider that incorrectly billed customers between May 1, 2014 and January 30, 2015. There is no suggestion that the OEB meant to issue a different rate rider than was opposed in the subject period. It was what was required by the filings of EPL.**

5. **The submissions contain a review of powers of the Board to correct billing errors pursuant to s. 7.7 of the Retail Settlements Code or errors within the meaning of Rule. 41.02. With respect to the proposed use of sec. 7.7, VECC agrees with the submissions of EPL that it can hardly be the case that sec. 7.7 of the Code can be interpreted as the Board giving valid jurisdiction to itself to overrule the rule against retroactive ratemaking. VECC also agrees with the submission of Board staff that the result here was not caused by a billing error although that was what eventuated. It was the misallocation that gave rise to a miscalculation of the final rates and the defective rate rider. Section 7.7 is of no assistance in this matter.**

6. **There is support expressed by EPL that Rule 41.02 can be applied and be curative of the original misallocation that gave rise to the final rates order of March 13,**

[1] *Union Gas Ltd. V. Ontario (Energy Board*) [2015] O.J. No.3276 at p. 17

2014. Board staff's submission is ambivalent on the use of this Rule and in their conclusions it is conceded that the Board may have to look to "particular circumstances" to rebut the ordinary presumption against retroactivity. VECC will touch upon the relevance of those "particular circumstances" later.

7. **Rule 41.02 provides: "The OEB may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions". The plain language of this Rule is that the error must have been made by the Board in its order or decision. Clearly, the Board, in this proceeding, cannot avail itself of the Rule and did not err in its Decision; the error was in the evidence and materials submitted by EPL to get the final rate order.**

8. **If Rule 41.02 is to be interpreted as encompassing any Board order based on faulty evidence or calculations of the regulated utility, one can expect numerous field days for future revisionist applications. These applications would be based on hindsight derived from the evidence disclosed in subsequent proceedings to the effect that the previous rates were based on Company mistakes, misallocations, miscalculations etc. The Board might have to have to develop a system of characterizing the errors as mistaken, careless, or misrepresentative, or intentional. The expectations of finality of rates would be seriously challenged and issues kept alive by inferring initial calculation errors**

9. **VECC submits the language of Rule 41.02 shows that the clear intention of the Rule is to deal with Board errors of a minor nature relating to a mistake of Board processing or issuance, not of substance. This Rule should not be used in this case to correct EPL evidentiary errors.**

10. The Kentucky case, *Mike Little Gas Company* [2], cited in the Board Staff submission is clearly a case of (easily identified) regulator typographic error on the face of the record, corrected in accordance with the governing statute. Its correction engaged none of the mischief contemplated by the bypassing of the retroactivity rule.

11. VECC notes that the Board staff has extensively discussed the issue of potential nullity. This is somewhat puzzling to VECC as it appears rather evident that, although the Company evidence involved misallocations, the Board had the jurisdiction to make the final rate order that it did. To allege that there is such a lack of evidence that the Decision of March 13, 2014 must be considered a nullity ousting the Board's jurisdiction, requires that the Decision is void ab initio because of a failure in the constitution of the tribunal and/or jurisdiction over subject matter of the decision:

> **"It is argued for the appellant that the effect is to avoid ab initio the decision of the committee. That must mean that the committee had no statutory authority to make any decision at all. If they had, then, although the decision they had made might be a bad one and one that could be quashed by the court by virtue of the supervisory jurisdiction over the proceedings of inferior tribunals, it would not be void ab initio but would be good until quashed. To make it void ab initio there must be some condition precedent to the conferment of authority on the Committee which has not been fulfilled. "[3]**

12. Clearly no such failure such as to oust the Board's jurisdiction has occurred – the Company's error may be grounds to set aside the order, but not to make the initial order a nullity from its inception.

---

[2] 574 S.E. 2nd 926 (Ky Ct. App. 1978)

[3] Ridge v. Baldwin, [1964] A.C. 40 at pp. 138-39:

13. VECC has also read SEC's submissions on the relevance of the nullity supposition to the circumstances of this case, and concurs with the conclusions reached in the SEC Reply.

14. While the finding of a misallocation, mistake, or failure of a reporting kind in a regulated utility's application for a final rate order is, thankfully, not a frequent occurrence, it hardly falls within the category of an extraordinary circumstance. The detailed and complex machinery of regulation can create mistaken filings by the regulated company. It does not seem reasonable that a mistake of this kind by the Company would allow the circumventing of the well-established rule against retroactivity.

15. VECC also can find no reason for interpreting the rule against retroactive ratemaking as being trumped by the consideration of who has benefited by the original order. This approach confuses the purpose of the rule with any potential remedial measures that might be taken to secure future compliance and the penalty that might be borne by the utility as a result of malfeasance.

16. The rule against retroactivity and the fixed rate doctrine are intended to establish clarity of expectation and protection of all stakeholders against unanticipated increase in rates. Where the circumstances are, as exist here, that remaking the faulty allocations may burden EPL's non-RPP class with a substantial increase to their bills, the reinforcement of certainty provided by this rule might provide greater overall fairness than ad hoc adjustments of the kind that are mooted by this motion.

17. Finally, the Board's statutory responsibility to produce just and reasonable rates does not differ or overrule in any sense the requirement that rates are not altered retroactively unless there are measures that have been put in place that connote the

fact that the rates may be the subject to change. This rule has been a cornerstone of utility regulation both in Canada and the United State in order to both protect the regulated utility and to provide certainty and security of supply to ratepayers.

18. **While the notion that a fix can be derived without breaking the regulatory framework might seem attractive for the relief of RPP customers that have borne the financial burden of the mistake , any solution that revisits the burden on the non-RPP customers is exactly the kind of mischief the rule was designed to avoid.**

19. **From a practical Ontario standpoint, even the appearance of retroactivity has been enough in the recent past to spur ratepayer protest, even where it was unwarranted. The delayed clearance on Union Gas PGVA accounts over a decade ago was a matter of considerable public outcry despite its overall adherence to the required process. The creation of more pathways to avoid the application of this seminal rule may erode the public confidence in the Board's reputation for well understood decision-making.**

20. **As EPL has noted[4], this proceeding is intended to address only the issues identified by the Board in Procedural Order No. 1 and will not be dealing with the consequences to EPL of confirmation of the Decision of March 25 2015.**

21. **VECC accordingly submits that the Motion for Review herein be dismissed. VECC requests that as its participation has been responsible, it be awarded 100% of the costs of its participation.**

All of which is respectfully submitted October 2, 2015

Michael Janigan

Counsel for VECC

[4] Para 32 of EPL submissions September 8, 2015