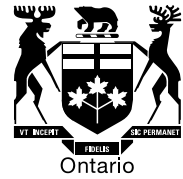


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BY E-MAIL

October 2, 2015

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Ontario Energy Board Motion to Review
Essex Powerlines Corporation (EB-2014-0301/EB-2014-0072)
Ontario Energy Board File No. EB-2015-0240**

Please find attached OEB staff's reply submission with respect to the motion to review the decision relating to Essex Powerlines Corporation (EB-2014-0301/EB-2014-0072).

Yours truly,

Original signed by

Lynne Anderson
Vice President, Applications

Attach

**MOTION TO REVIEW
ESSEX POWERLINES CORPORATION
2015 DISTRIBUTION RATES
(EB-2014-0301/EB-2014-0072)**

EB-2015-0240

OEB Staff Reply Submission

October 2, 2015

1 INTRODUCTION

On August 10, 2015, the Ontario Energy Board (OEB) initiated a proceeding on its own motion to review the Partial Decision and Procedural Order No. 3, issued on March 25, 2015, in the Essex Powerlines Corporation (Essex Powerlines) 2015 rate proceeding.¹

In the 2015 rate proceeding, Essex Powerlines identified a misallocation between two variance accounts in the period 2011-2013. The misallocation is the result of errors in the settlement forms that Essex Powerlines submitted to the Independent Electricity System Operator for pass-through costs. The 2011 and 2012 balances were declared final in the 2014 IRM decision² and were approved for clearance in rate riders effective May 1, 2014 to April 30, 2015.

In the Partial Decision and Procedural Order No. 3, the OEB found that it would be retroactive ratemaking to correct the misallocation. However, as the error was identified in January, 2015, the rate rider was declared interim, and there was a correction for the February 1, 2015 to April 30, 2015 period in the final decision of the 2015 rate proceeding.

In the current motion, the OEB made provision for submissions on the finding with respect to retroactive ratemaking and the misallocation error. A correction of the remaining misallocation error would credit regulated price plan (RPP) customers with \$3,614,779 and debit non-regulated price plan (non-RPP) customers by an equal amount.

Submissions were filed by Essex Powerlines, Energy Probe Research Foundation (Energy Probe), School Energy Coalition (SEC), Vulnerable Energy Consumers Coalition (VECC) and OEB staff. Essex Powerlines and Energy Probe submitted that it would be appropriate to correct the misallocation error. VECC and SEC disagreed.

¹ EB-2014-0301/EB-2014-0072

² EB-2013-0128

2 SUBMISSIONS FILED ON ISSUES

2.1 Issue 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?

Essex Powerlines submitted that the OEB has the power to correct errors in final rate orders. However, Essex Powerlines stated that “the rule against retroactive ratemaking is not a component of a balancing exercise” and submitted that the misallocation should be resolved under rule 41.02 of the OEB’s Rules of Practice and Procedure. Energy Probe submitted that, while retroactive ratemaking should be avoided, there are exceptions where known errors should be corrected.

Both VECC and SEC submitted that correcting the misallocation was not appropriate. VECC submitted that, “The ordinary requirement of establishing just and reasonable rates will not be sufficient to ... compel a review ... to enable retrospective ratemaking.”

SEC submitted that, “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.” SEC notes that the OEB has not provided notice of review of the 2014 IRM decision (issued March 13, 2014) and that the reasonable time to have done so has elapsed. SEC also points out that the OEB stated in the notice of motion that it did not dispute the finding that the 2011 and 2012 DVA balances had already been disposed on a final basis. SEC does however distinguish between the meaning of “reasonable time” for RPP customers and non-RPP customers, stating that the OEB has some discretion on the issue of retroactive credits.

OEB staff’s position remains that the essential principle of the rule against retroactive ratemaking applies unless one of the exceptions to the rule applies and this in turn depends on the particular facts of the case.

2.2 Issue 2

Did the OEB err in failing to sufficiently consider the exceptions to the rule against retroactive ratemaking including: (a) Nullity (b) Extraordinary circumstance?

Nullity

The definition of nullity was central to the submissions on this issue.

Essex Powerlines submitted that “nullity” is a characteristic of a decision found to have been made without jurisdiction. Nullity is not the grounds for an exception to the rule against retroactivity. However, the term may be understood by others, including the OEB, to have a different meaning.

Similarly, VECC submitted that nullity does not apply to the misallocation error, stating that, “In order to constitute a nullity, there must have been no authority on the part of the Board to issue its Decision and Order of March 2014, and that decision was thus of no effect.”

OEB staff provided that, “A nullity of a decision or part of decision arises when a tribunal or court makes a decision and that decision is not based on the evidence before the tribunal or court.”

SEC stated that nullity has no application in this case as the 2014 IRM decision is not being challenged (as noted above in section 2.1 of this submission). OEB staff notes that rule 41.01 of the OEB’s Rule of Practice and Procedure states the following:

The OEB may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

OEB staff disagrees with the submission of SEC that nullity has no application as the 2014 IRM decision is not the subject of the motion to review. In OEB staff’s submission it is open to the OEB in this motion to review to determine whether or not the Panel made an error in EB-2014-0301/EB-2014-0072, the 2015 rate proceeding. The basis of that error being that the final rate order in the 2014 IRM decision is a nullity as it was a decision made without jurisdiction.

It was and is OEB staff’s position that, if the 2014 IRM decision was determined to be a nullity, the decision would be reviewable.

Extraordinary Circumstance

Essex Powerlines submitted that it would be not be prudent for the OEB to find an extraordinary circumstance in this case because it is not relevant to the facts under consideration. VECC stated that the misallocation error did not represent a rare result or

extraordinary circumstance. 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”.

Similarly, OEB staff submitted that there have not been any cases in which the OEB had deliberated on extraordinary circumstances. OEB staff notes that Essex Powerlines referred to the *MCI Telecommunications v. Public Service Commission* case (MCI) in its submission as the Utah Court held that it would adopt “extraordinary circumstances” as a basis for permitting retroactive rates. Essex Powerlines stated that the OEB referred to MCI in the Enbridge EB-2014-0043 proceeding but observed that the matter was unargued and the precedential value is limited. OEB staff further notes that the OEB’s reference to MCI in the Enbridge proceeding was with respect to the principle that a utility should not benefit as a result of its own errors, and not to the matter of extraordinary circumstances.

Energy Probe was the only party to view that the misallocation error does represent an extraordinary circumstance on the basis that the misallocation represents a significant inequity between groups of consumers and the OEB has the power and authority to correct such an error under rule 41.02.

OEB staff further submits that the use of extraordinary circumstance, as an exception to the rule against retroactive ratemaking, is usually tied to unforeseen events such as extreme weather conditions, and other extraordinary events which are the typical bases for the exception.³

2.3 Issue 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?

Essex Powerlines, SEC and VECC agreed that rule 7.7 of Retail Settlement Code (RSC) does not appear to be relevant to the misallocation error.

Energy Probe noted that the RSC has no definition of billing error and submitted that the OEB was too narrow in its determination that the misallocation error was not a billing error. 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.

³ Re Kansas City Power & Light Co., 75 Pub.Util.Rep. 4th (PUR) 1, 38-41 (Mo.Pub.Serv.Comm.1986) (severe ice storm); Re Kansas City Power & Light Co., 55 Pub.Util.Rep. 4th (PUR) 468, 480-81 (Mo.Pub.Serv.Comm.1983) (power outage caused by interruption of water supply to boiler).

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.

OEB staff agrees with Energy Probe that there is no definition of billing error in the RSC. Should the reviewing panel consider the Essex Powerlines misallocation error as a billing error, OEB staff notes that the RSC sets out timelines for addressing billing errors.

2.4 Issue 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?

The OEB's 2014 IRM order (EB-2013-0128) "incorporated the erroneous information, not because it was persuaded to, but because the information was provided in error."⁴ While the OEB in the 2015 rate proceeding found that rule 41.02 did not apply to the misallocation as the costs were not minor, Essex Powerlines submitted that rule 41.02 does not address the magnitude of errors.

Essex Powerlines submitted that rule 41.02 is the most relevant and appropriate grounds for the OEB to correct the error in this case. As in its submissions in the main case, Essex Powerlines referred to Macauley's Practice and Procedure in Administrative Tribunals describing the accidental slip rule as applying to "cases where the applicant has accidentally mis[led] or failed to provide a decision-maker with the correct facts."

Energy Probe submitted that rule 41.02 allows for correction of the misallocation error. "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."

SEC submitted that, "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." VECC submitted that rule 41.02 only allows corrections in a limited range of situations. The OEB staff submission was

⁴ Submissions of Essex Powerlines, p10

similar, noting that the practice of the OEB to date has been to not apply rule 41.02 where the error is one which is substantive in nature.

SEC also submitted that while Rule [41.01] allows the OEB to review and vary past decisions, that is a power derived from the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (SPPA). OEB staff agrees with SEC, however, staff also notes that section 21.2 of the SPPA gives tribunals the power to make rules under section 25.1 of the SPPA to deal with reviews of all or part of its own decisions.

21.2(1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

(2) The review shall **take place within a reasonable time** after the decision or order is made.

(3) In the event of a conflict between this section and any other Act, the other Act prevails.

OEB staff submits the determination of what is a “reasonable time” depends on the circumstances of the particular case. It is clear on the facts of this case that the misallocation error only came to light late in the 2015 rate proceeding (EB-2014-0301/EB-2014-0072). Further Rule 1.03 of the OEB Rules of Practice provides that the OEB “may dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.” OEB staff submits that the 2014 rates (EB-2013-0128) were based on a misallocation error that if known at the time would have been considered unjust and unreasonable or unjustly discriminatory. This was also acknowledged by SEC in its submission⁵ however SEC then submits that despite this fact the OEB cannot now go back and vary the decision. OEB staff submits that it is open to the OEB to make this determination.

OEB staff also submits that while it is not disputed that the OEB and utility regulators in general can only act prospectively in setting rates, there is nothing in the *Ontario Energy Board Act, 1998* (OEB Act) which limits the OEB from correcting an unjust and unreasonable rate set in the past. Section 78(3) of the OEB Act mandates that the OEB set rates that are “just and reasonable”. Unjust and unreasonable rates compromise the OEB’s statutory objective of protecting the interests of consumers with respect to prices

⁵ Submission of the School Energy Coalition at para 20

and the adequacy, reliability and quality of electricity service.

All of which is respectfully submitted