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July 11, 2018
Our File: EB20170039

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2017-0039 – Essex Powerlines Corporation – SEC Public Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No.4, please find a redacted public version of SEC's submissions on the unsettled issue. SEC is also filing a confidential version which will be sent to the Board, the Applicant, and Board Staff only.

Additionally, SEC is also filing an electronic Book of Authorities. .

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

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

EB-2017-0039

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Essex Powerlines Corporation to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1st, 2018.

SUBMISSIONS OF THE

SCHOOL ENERGY COALITION

[PUBLIC VERSION]

A. Overview

1. These are the submissions of the School Energy Coalition ("SEC") on the unsettled issue in Essex Powerlines Corporation's ("EPLC" or the "Applicant") application for 2018 rates.

2. SEC submits the Board should deny EPLC's request to make final an adjustment it made to rates in its 2015 IRM application (EB-2014-0072/0301). The adjustment purports to correct a previous error in clearance of certain Deferral and Variance Accounts ("DVA") that were done on a final basis in its 2014 IRM application. To finalize the adjustment would be impermissible retroactive ratemaking. In contrast, the Board does have the discretion to order repayment of the amounts that were an over-collection from certain customers, and should exercise it.

3. Board Staff in its submissions has provided a very different view of the unsettled issue from EPLC. Staff's analysis is flawed and appears to misunderstand the relevant issue. SEC addresses both EPLC and Board Staff's submissions below.

B. Background

4. The central facts of the unsettled issue are not disputed. In its 2014 IRM application (EB-2013-0128), EPLC sought, and the Board approved, disposition of certain Group 1 DVAs which included, erroneously, a duplicate disposition of a net refund of $1.8M to customers that had been made in its previous 2012 IRM application (EB-2011-0166).[1] The disposition sought and approved by the Board was

[1] Interrogatory Response 9-SEC-44

done on a final basis.[2] Both the 2012 and 2014 amounts have now long been paid to or collected from customers.

5. EPLC sought in its 2015 IRM application (EB-2014-0301/0072) to correct the duplicative disposition, and included the reversal of entries in its DVA model, which it identified for the first time in its reply submissions.[3] The Board in its decision, with the exception of accounts related to smart meters, refused to grant any final disposition to DVA balances, and ordered a full audit of the accounts.[4] The DVA accounts were thus disposed in that proceeding, and were done on an interim basis.[5]

6. It is important to recognize that the net amount of $1.8M is properly made up of two distinct components: the duplicative collection from all customers of $1.5M, and a separate duplicative refund to non-RPP customers of $3.3M.[6]

7. The Audit Report, *Audit of Group 1 and Group 2 Deferral and Variance Accounts – Essex Powerlines Corporation*, which discussed the issue, concluded that since EPLC did not report the adjustment in the 2015 IRM application in a separate section titled 'Adjustments to Deferral and Variance Accounts' as required by the Board's Filing Requirements, the adjustment should be disallowed.[7]

8. SEC submits that, while EPLC should have adhered to the Filing Requirements in the 2015 IRM, it is not the reason the Board should disallow the adjustment. The Board should deny the adjustment because it is retroactive ratemaking. Even if EPLC had identified the adjustment pursuant to the Filing Requirements in the 2015 IRM, the Board would still have been required to disallow the adjustment on the basis that doing so was legally impermissible.

9. ***2015 IRM Application.*** Most of the focus of the 2015 IRM proceeding was on EPLC's other identified errors in its DVAs. During the review of the application, the Board had discovered that EPLC had misallocated amounts between RPP and Non-RPP customers that had been cleared on a final basis in the 2014 IRM proceeding. The Board took the unusual step of inviting intervenors from EPLC's previous cost of service application to intervene and provide submissions on the issue.[8] The Board determined that due to the rule against retroactive ratemaking, it could not require customers who were the beneficiaries

[2] *Ibid*, part (e)

[3] Interrogatory Response 9-SEC-46

[4] *Decision and Order* (EB-2014-0301/0072 – EPLC 2015 IRM), June 9 2015, p.13

[5] *Ibid*, p.15

[6] Interrogatory Response 9-SEC-44(a),(d)

[7] *Ibid*, part (h)

[8] *Partial Decision and Procedural Order No.3* (EB-2014-0301/0072 – EPLC 2015 IRM), March 25 2015, p.3

of the misallocation to repay amounts that had been declared final in a previous decision.[9] With respect to customers who had overpaid, it found that the precedents require a utility to repay money if it was negligent.[10] The Board stated that "[u]tilities such as Essex Powerlines have ultimate control of their books and records and therefore bear responsibility of ensuring that there are no mistakes in their filings with the Board."[11]

10. The Board made very critical findings of its accounting practices, finding that its non-adherence to the Accounting Procedures Handbook was "not acceptable". It found that it was "very concerned about the regulatory accounting controls in place" and that "[r]egardless of size, all distributors must establish controls to mitigate the risk of error or omission".[12] In ordering the audit of EPLC's DVAs, the second one in just two years, it did so on the basis of the "quality of evidence in [the] proceeding". The Board also required the costs to be entirely recovered by "the shareholder, none from its customers".[13]

11. Ultimately, the Board did not order EPLC to repay customers who overpaid, although it did determine that it would deny the Price Cap adjustment to base rates as "evidenced in the proceeding, with the errors made, the OEB finds that Essex Powerlines has neither demonstrated the desired outcomes nor provided value to its customers."[14]

C. <u>Law on Retroactive Ratemaking</u>

12. ***The Rule.*** The well-established rule against retroactive ratemaking is that the Board can only act prospectively in setting rates. That means the Board may not establish rates that recover expenses or costs incurred in the past and were not recovered through the final rates established for those past periods.[15]

13. One key principle behind the rule is that rates are presumed to be final, and are just and reasonable until altered. As the Board has previously stated, "the principles of certainty and finality are a

[9] *Ibid*, p.7
[10] *Ibid*
[11] *Ibid*
[12] *Decision and Order* (EB-2014-0301/0072 – EPLC 2015 IRM), June 9 2015, p.13
[13] *Ibid*, p.14
[14] *Ibid*, p.15
[15] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para. 82; *Decision and Order* (RP-2005-0013/EB-2005-0031 - Great Lakes Power), February 24, 2006, p.17, citing *Northwest Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, para. 71

necessary component of effective rate regulation."[16] Consumers make consumption decisions based on the price of electricity at any given time, and a utility similarly makes business decisions based on the revenue they expect to receive through those same rates. Further, intergenerational equity concerns exist for consumers as yesterday's customers may not be today's customers. To be able to adjust future rates for past costs has been held to be "most unreasonable".[17]

14. SEC notes that, in its decision in Kitchener-Wilmot Hydro's 2018 IRM, the Board indicated that it will look into these broader Group 1 accounting issues through a review of its directions. However, for now there was no change, and nor could there be one. In so far as a change in the way the Board clears these accounts may occur on a going forward basis, it cannot affect these past clearances, in respect of which the Board has not "recognize[d] the potential for ongoing adjustments to these accounts once final rates are approved".[18]

15. Therefore, these exceptions are not available for the amounts at issue in this proceeding. Those amounts were cleared on a final basis in EPLC's 2014 IRM application in 2013,[19] while the 'correcting' adjustment made by EPLC was done on an interim basis, and so can, and must, be reversed.

16. The rule against retroactive ratemaking does not allow for a discretionary application by the Board; if it is found to be applicable, it prevents the adjustment from being made unless there is a recognized exception[20] to the rule.[21] The Supreme Court of Canada has said the only generally accepted exceptions are a) rates have been declared interim, or b) a deferral or variance account "encumbers" past amounts with the expectation of all parties that they will be adjusted in the future.[22]

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[16] *Decision and Rate Order*, (EB-2013-0119 – Chapleau PUC) March 13 2014, p.8*; EB-2013-0022, and Orde*r (EB-2013-0022 – Veridian), April 25, 2013, p.10

[17] *R. v. Board of Public Utilities Commissioners* (1966), 60 D.L.R. (2d) 703, para. 25

[18] *Decision and Order* (EB-2017-0056, Kitchener-Wilmot Hydro Inc), March 1 2018 p.12-13

[19] Interrogatory Response 9-SEC-44(d)

[20] 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.

[21] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 ["*ATCO SCC 2006*"], para. 71; *Decision and Order* (EB-2005-0031 - Great Lakes Power), February 24 2006, p.8.

[22] *Bell Canada v. Canada (Canadian Radio Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764

17. Citing that decision, the Board in its decision in Kitchener-Wilmot Hydro's 2018 IRM proceeding, said that "[t]he OEB has not previously established an expectation that there could be subsequent adjustments related to a specific period of time once final tariffs have been approved to dispose of account balances for that period."[23]

18. ***Customers Who Have Been Overcharged.*** The analysis of retroactive ratemaking is somewhat different when it comes to refunds to overcharged customers. The Board has in the past concluded that it has authority to order *credits* going forward for a one-time adjustment to a past overpayment of costs that the regulator finds unjust, and that does not constitute retroactive ratemaking.[24] As noted previously by Vice Chair Kaiser in dissent (on the issue of whether retroactive ratemaking was engaged on the facts, not its scope):

> There is ample authority in the regulatory jurisprudence that credits going forward do not constitute retroactive ratemaking. This is particularly the case where it reflects a one-time fixed amount adjustment to an overpayment that the tribunal finds unjust.[25]

19. The overarching principle is the knowledge of the utility and consumers that rates may change retrospectively.[26] The Alberta Court of Appeal has summarized what is the essential inquiry in determining if a ratemaking decision that impacts on past rates is impermissible: "the critical factor for determining whether the regulator is engaged in retroactive ratemaking is the parties' knowledge."[27]

20. Consistent with the principle behind those exceptions to the rule, a utility knows that if they make accounting or similar errors in limited circumstances which results in customers overpaying, then the Board has the discretion to order it to repay the overcharge.[28] The Board's decision in EPLC's 2015 IRM decision makes this crystal clear:

> Utilities such as Essex Powerlines have ultimate control of their books and records and therefore bear the responsibility of ensuring that there are no mistakes in their filings with the Board. Errors crystalized in final rates can have long term adverse impacts on consumers. In situations where errors are the result of a utility's negligence, the Board could impose financial

[23] *Decision and Order* (EB-2017-0056, Kitchener-Wilmot Hydro Inc), March 1 2018, p.12

[24] *Decision and Order (*EB-2014-0043 - Enbridge*),* April 10 2014; *Decision and Order* (EB-2005-0031 - Great Lakes Power), February 24 2006, p.17

[25] *Decision and Order* (EB-2005-0031 – Great Lakes Power), February 24 2006, p.21, citing *New York Water Service Corp v. Public Service Commission*, 208 N.Y.S. 2d 587 (1960). Also see *ATCO SCC 2006*, para. 137

[26] *Bell Canada v. Bell Aliant Regional Communications,* 2009 SCC 40, para.. 61

[27] *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission),* 2014 ABCA 28, para.58

[28] *Decision and Order* (EB-2014-0043 - Enbridge), April 10 2014; *Decision and Order* (EB-2009-0113 – North Bay Hydro), September 8, 2009, p.10; *Decision and Order* (EB-2005-0031 - Great Lakes Power), February 24 2006, p.17

> or other consequences on the utility. For example, the Board could order the utility to repay customers, deny the accrual of interest on outstanding balances or deny the inflation adjustment to base rates.[29]

21. It further wrote that innocent third party customers can be treated differently from the utility:

> Does the rule against retroactive ratemaking prohibit the refund of money to customers because rates were declared final? RPP customers are innocent third parties. There is Board precedent for requiring a utility to repay money to customers if negligent or if the utility would profit on account of its own errors (EB-2009-0013 and EB-2014-0043). In other words, the Board is not driven by a need for symmetrical treatment of customers and utilities in final rate situations.[30] [emphasis added]

D. Analysis

22. ***2014 IRM balances were cleared on a final basis.*** Since there is no dispute that the 2014 IRM balances have been cleared on a final basis[31], the Board must determine if the adjustment made by EPLC on an interim basis in the 2015 IRM that it seeks to make final in this proceeding, constitutes retroactive ratemaking. If it is, then the Board is legally prohibited from making such an adjustment. If it is not, then the Board still must determine whether it should exercise its discretion to allow the adjustment.

23. In making this determination, it is important for the Board to determine the question separately for those to whom EPLC refunded twice (non-RPP customers) versus those from whom EPLC collected twice (all customers). This is because, as noted above, the rule against retroactive ratemaking is not strictly symmetrical. While the Board is prohibited from collecting, through future rates, additional amounts that should have been included in past final rates, the converse is not true. Refunds to ratepayers of amounts that should have not been included in past approved rates have been allowed in past cases.[32] Complicating matters is that there is an overlap in these categories, as non-RPP customers are also members of the second category.

24. With respect to the customers who had amounts refunded to them twice, the law is clear that requiring them to repay the amounts is impermissible retroactive ratemaking. There is no exception that can be applied, nor discretion whether to apply the rule. The Board must reverse the adjustment that was

[29] *Partial Decision and Procedural Order No.3* (EB-2014-301/0072 -- Essex Powerlines), March 25 2015, p.7

[30] *Ibid*

[31] Interrogatory Responses 9-SEC-45; 9-SEC-44(b),(c)

[32] See *Decision and Order* (EB-2014-0043 - Enbridge), April 10 2014; *Decision and Order* (EB-2009-0113 – North Bay Hydro), September 8 2009

made on an interim basis in the 2015 IRM proceeding. This would primarily impact customers in the GS>50 class.[33]

25. With respect to those customers who were, on balance, overcharged, primarily residential and GS<50 customers, the analysis is different. The Board does have the discretion to order that the correcting adjustment be made final. Consistent with its own comments in the decision in EPLC's 2015 IRM decision, where a utility is found to be negligent, it can be ordered to repay customers.[34] This is that situation.

26. The April 2016 *Audit of Deferral and Variance Accounts and the Associated Regulatory Procedurals, Control, and Oversight* ("Procedures, Controls and Oversight Audit")[35], reveals [redacted] The Procedures, Controls and Oversight Audit found:

[redacted]

[33] Interrogatory Response IR2-Staff-1(b)

[34] *Partial Decision and Procedural Order No.3* (EB-2014-301/0072 -- Essex Powerlines), March 25 2015, p.7

[redacted]

28. The second part of the audit process, the March 2017, *Audit of Group 1 and Group 2 Deferral and Variance Accounts – Essex Powerlines Corporation*, [redacted]

29. In the 2015 IRM proceeding, based on a fraction of the information now available to it regarding EPLC's accounting practices, the Board found that "Essex Powerlines demonstrated carelessness towards ensuring proper regulatory accounting procedures and controls.".[41] [redacted]

30. [redacted], and therefore should be permitted only to finalize the adjustment made in the 2015 IRM regarding a refund to those customers it collected from twice.

31. ***Kingston and Grier Have No Application***. EPLC cites the cases of *Grier v. Metro International Trucks Ltd*[42] and *Kingston (City) v. Ontario (Mining & Lands Commissioner)*[43] for the proposition that the Board has the authority to correct errors in previous decisions.[44] These cases have no application to these circumstances for a number of reasons.

32. First, they relate not to the issue of retroactive ratemaking, but the ability of an administrative decision maker to correct an error after it had disposed of the matter. Those cases relate to the 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.[45]

33. The *functus officio* rule is not engaged here. The *Statutory Powers Procedure Act*[46] provides the Board with the explicit 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). Not even EPLC is suggesting

[40] [redacted]

[41] *Decision and Order* (EB-2014-0301/0072 – EPLC 2015 IRM), June 9 2015, p.12

[42] *Grier v. Metro International Trucks Ltd.*, [1996] O.J. No. 538

[43] *Kingston (City) v. Ontario (Mining & Lands Commissioner* (1977), 18 O.R. (2d) 166

[44] EPLC Submissions, para. 16-18

[45] *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848, p. 861-62

[46] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22

the Board has the ability to use its general motion to review and vary authority, to correct the error in its 2014 IRM decision.[47] This statutory based authority of the *Statutory Powers Procedure Act* supplants and circumscribes any common law exceptions to the *functus officio* rule. Whereas the *Statutory Powers Procedure Act* applies to the Board, it did not in either *Grier* or *Kingston*.[48]

34. Second, the cited cases 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. The facts with respect to the unsettled issue in this case, and the broader scope of the Board's mandate, are very different from those cases. 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. Rate-setting is very different from a private dispute between two private parties. The impact of any adjustment is not actually symmetrical. Customers are not the same year after year, and those that are the same have different consumption patterns. These intergenerational equity concerns are central to the issue of retroactive ratemaking.

35. More importantly, 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[49]; in *Kingston*, the error was in a settlement agreement.[50] Here, the error was solely that of EPLC.

36. EPLC also quotes from Macaulay and Sprague's *Practice and Procedure in Administrative Law* that provides a similar view as *Grier* and *Kingston*. What EPLC does not quote is the very next sentence, in which the authors cite another case and state that this "accidental slip rule was not to be applied where an applicant had further information which showed the original decision to be wrong and was seeking a change."[51] That is exactly what happened. EPLC noticed when preparing its reply submissions in the

[47] Nor could the Board do so if it wanted. While Rule 41.02 allows the Board to review and vary past decisions, that is a power derived from section 21.2(a) of the *Statutory Powers Procedure Act* ("*SPPA*"). Section 21.2(b) of the *SPPA* requires that "[t]he review shall take place within a reasonable time after the decision or order is made". Neither at the time of the 2015 IRM decision (whose final decision was rendered in June 2015, approximately 14.5 months after the 2014 IRM decision was released), or now (over 4 years later), would the requirement to have been carried out within a reasonable time.

[48] *Kingston* was decided in 1977 which predates the existence of the *Statutory Powers Procedure Act*. *Grier* was a decision of a referee under section 65 of the previous version of the *Employment Standards Act* in force at the time of the decision. The *Statutory Power Procedures Act* explicitly did not apply to exercise of authority under section 65 pursuant to section 2(3) of the then *Employment Standards Act, RSO 1990.*

[49] *Grier v. Metro International Trucks Ltd.*, [1996] O.J. No. 538, para. 8

[50] *Kingston (City) v. Ontario (Mining & Lands Commissioner* (1977), 18 O.R. (2d) 166, p.2

[51] Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, s.27A.4(b)(ii)

2015 IRM proceeding, further information that it had made an error in its 2014 IRM proceeding and sought to change it.

37. ***Filing Requirements Do Not Indicate Retroactive Ratemaking Is Permissible.*** EPLC tries to have it both ways. On one hand, it in effect argues that the Board should ignore the Audit Report's recommendation that non-compliance with the Filing Requirements should be a basis to reject the 2015 IRM adjustment.[52] Yet, on the other hand, it cites the very same requirement on the Filing Requirement for the proposition that the Board can adjust balances that have been disposed on a final basis.[53]

38. The Filing Requirements are not binding on the Board. More importantly, as interpreted by EPLC, the direction in the Filing Requirements would be inconsistent with the law. It is not. Very often the Board disposes accounts on an interim, not final basis, and rightfully so, those adjustments should be identified. Moreover, the utilities should identify every adjustment it seeks to make, so the Board understands which ones it cannot approve due to the rule against retroactive ratemaking.

39. ***Rule 41.02 Not Applicable.*** EPLC argues the Board may correct the error through use of Rule 41.02. EPLC is mistaken, the Board cannot.

40. Rule 41.02 only allows the Board to "at any time, without notice or a hearing of any kind, correct a typographic error, error in calculation or similar error made in its orders or decision."[54] EPLC takes issue with the Board's comments in the 2015 IRM decision that the use of this rule can only be used to correct a minor administrative error. SEC submits that the Board was correct in that decision.

41. The issue is not the financial magnitude of the error, but the type of error. The Rule 41.02 was designed to correct minor errors *made by the Board* in their orders or decision, not those made by a utility in the underlying applications.[55]

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[52] EPLC Submissions, para. 8-9

[53] EPLC Submissions, para. 20-24

[54] Ontario Energy Board, *Rules of Practice and Procedure*, Rule 41.02

[55] The Board has consistently used Rule 41.02 to correct typographical and calculation errors in final tariffs implementing Board decisions. For example, Letter to Mr. Poulin (Hydro Hawkesbury) re: Correction to Rate Order, Hydro Hawkesbury Applications for Rates (EB-2017-0048), May 3 2018, correcting rate rider for approved refund amount was calculated on an annual basis instead of monthly basis.; See Letter to Ms. Donnelly (Ottawa Power River) re: Correction to Tariff of Rates and Charges, Ottawa River Power Corporation Applications for Rates (EB-2017-0070), April 26 2018. Correcting that MSC for certain classes was rounded to four decimal places instead of two decimal places; Letter to Ms. Hughes (Energy+ Inc.) Re: Correction to Tariff of Rates and Charges, Energy+ Inc. Application for Rates (EB-2017-0030), April 26 2018, correcting that a certain rate rider showed the billing in the Tariff on a kWh not KW basis.

42. The error in the 2014 IRM decision was not something in the Board's decision or order, but an error in EPLC's underlying application and the resulting request for relief. It is for the Board's administrative or calculation errors that it makes sense that the Rules allow the Board to fix the problem without notice or a hearing.[56] If the rule allowed the Board to go further and make substantive changes to the basis of its decision and the underlying information in the application, that would be a clear breach of procedural fairness to parties.[57]

43. The Board has not utilized Rule 41.02 to do more than correct typographical errors in its decisions, or errors related to the implementation of its decision in final rate orders. In fact, when requested to do more than that, it has refused.[58]

44. ***E.L.K. Settlement Was Very Different.*** EPLC also refers to the fact that the Board has approved corrections of errors that lead to unexpected residual account balances. It cites for that proposition, without providing the relevant details, the Board's approval of the settlement in the E.L.K. Energy 2017 rates application.[59] The issue in that proceeding is entirely different and was never about retroactive ratemaking.

45. In that proceeding, due to an error made by E.L.K., it had not actually billed certain customers an approved rate rider for certain DVAs. It was more akin to a billing error. Because of that, the unbilled amounts remained in account 1595, which acts as a residual account to ensure approved and cleared amounts are collected.[60] The errors in those approved amounts could be corrected, since E.L.K. never actually billed customers for them. Even though retroactive ratemaking was not an issue in E.L.K., the approved proposal *still* included a 10% 'penalty'.

46. The situation here is very different. EPLC did bill and collected/refunded the relevant customers the approved amounts, so there is no residual amount that had built up in account 1595 at that point.[61]

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[56] *Decision and Order* (EB-2014-0301/0072 – EPLC 2015 IRM), June 9 2015, p.7

[57] SEC recognizes that in the 2015 IRM proceeding, the Board on its own initiative, without seeking submissions from the parties, relied on Rule 41.02 to correct an implementation error affecting the disposition of Account 1590.76. The difference in that case is the Board found that the issue was "due to a model error" that did not flow through the credit to the rate rider calculation. The Board created the model. The error is one that the Board made, not EPL. Because of that, Rule 41.02 can be applied to correct the error. (See *Partial Decision and Procedural Order No.3* (EB-2014-301/0072 -- Essex Powerlines), March 25 2015, p.8)

[58] *Decision and Order* (EB-2014-0291-NRG), May 7 2015, p.2; *Notice of Motion to Review, Notice of Motion Hearing, and Procedural Order No.1* (EB-2012-0206 - Union Gas), May 2 2012, p.2

[59] EPLC Submissions, para. 27

[60] Settlement Proposal, EB-2016-0066, Revised October 5 2017, p.15-16

[61] EPLC claims that if it would not have discovered the error as part of its 2015 IRM, it would have had a residual account balance. It has provided no details for this assertion, and it makes little sense since by the time of the reply

Here the approved amounts are already gone, whereas in E.L.K., due to another error, they had not, and still remained in a DVA account.

E. Board Staff's View

47. While the central facts of what occurred are not in dispute, Board Staff has taken a different view from EPLC as to how the Board should consider the issue. Board Staff's submission is that the issue of retroactive ratemaking does not arise because in the 2012 IRM proceeding (EB-2011-0166), EPLC did not transfer the approved Group 1 balances to the Account 1595 (sub-account 2012). Since that sub-account has still not been cleared on a final basis, the Board is able to correct the duplicate disposition by reversing the original disposition.

48. SEC submits that Board Staff has misinterpreted the purpose of Account 1595, and its relevance to the issue of the duplicate disposition and retroactive ratemaking.

49. The process of disposing of DVAs in IRM proceedings involves the Board making a finding on the appropriateness of the balances of the various Group 1 DVAs, and then once those amounts have been determined, creating a rate-rider to allow for the amounts to be collected/refunded from/to customers.[62]

50. The utility then makes a corresponding entry into those Group 1 DVAs to reflect that the relevant amounts have been disposed. They also make a subsequent entry of those amounts into Account 1595. Since they are usually done at the same time, they may be considered a 'transfer' from an accounting perspective.[63] From a legal perspective, they are two distinct transactions which may have different consequences.

51. The specific purpose of Account 1595 is important. As the Board has described it, the "purpose of Account 1595 is to true-up between amounts approved for disposition and the amount actually disposed [emphasis added]".[64] The account is to ensure that ultimately the utility only recovers from/refunds to customers the approved disposition amount from the DVA.[65] This is achieved by having the actual amount disposed through rate riders draw down the balance in Account 1595. The remaining amount in

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submissions, the 2014 IRM amounts that had been cleared would have been nearly all paid out to customers during the previous year through approved rate riders.

[62] See for example *Decision and Order*, see *Decision and Order* (EB-2011-0166 – EPLC 2012 IRM), April 4 2012, p.8 and *Decision and Order* (EB-2013-0128 – EPLC 2014 IRM), March 13 2014, p.8. It is also clear from the Board's IRM Rate Generator Model where the rate riders for DVA disposition are calculated directly from the balances in the Group 1 DVA continuity schedules.

[63] *Decision and Order* (EB-2011-0166 – EPLC 2012 IRM), April 4 2012 p.8

[64] *Decision and Order* (EB-2017-0056, Kitchener-Wilmot Hydro Inc.), March 1 2018 p.6

[65] Ontario Energy Board, *Accounting Procedures Handbook,* Issues December 2011, p.39

any given year (i.e. the residual amount) is then transferred from the relevant subaccount to be disposed of in a future proceeding with the Group 1 DVAs. Contrary to what Board Staff suggests in their submission, the account's purpose is not to reconcile what *should* have been disposed of and converted into a rate rider, compared to what ended up happening. It is only to ensure that the utility collects/refunds over time, the exact amount that was approved for disposition. Account 1595 trues up only for variances between forecast and actual billing determinants. It does not true up for variances between approved and subsequently adjusted amounts for disposition.

52. In its 2012 IRM proceeding, the fact that EPLC did not transfer the approved amounts for disposition between the Group 1 DVAs and Account 1595 is irrelevant to the issue of retroactive ratemaking.

53. The double disposition error occurred in its 2014 IRM proceeding and had nothing to do with Account 1595. In that proceeding, since EPLC had not previously made the necessary entries into its various Group 1 DVAs reflecting the amounts disposed of in its previous IRM application (2012), it sought, and the Board approved, disposition of those amounts again. Both of these were done on a final basis.

54. The fact that EPLC did not "draw" down any amounts from Account 1595, because there was no amounts, in the subaccount, is not relevant. The impact of that is that by the time it sought disposition of these accounts in its 2014 IRM proceeding, EPLC would have had accumulated a large balance in Account 1595.[66] What EPLC would not have been able to do in 2014, or in the 2015 IRM proceeding, would be to collect that large balance in Account 1595. This is because doing so would not be correcting an error, but simply compounding the issue by making a second error. If the Board and parties had been properly alerted to the error, the only correction that could have been made was that the disposed of balance from the Group 1 Accounts in the 2012 IRM would have been properly made the baseline for Account 1595 so as to net out the large residual balance. But that would not have had any effect on the disposed of balances in the Group 1 DVAs either in 2012, or the double disposition in 2014. Those were cleared on a final basis, and to make any adjustments that would impact those balances would have been impermissible retroactive ratemaking.[67]

[66] One would have thought that this would have alerted EPLC to their being some issue that it should look into. If it had, they would have realized the error had occurred, and they would have not made the duplicate disposition in the 2014 application.

[67] Otherwise, realistically there could never be retroactive ratemaking with respect to any DVAs. Clearing them on a final basis would never have an impact, since Account 1595 would always provide a route to adjust those final clearances retroactively. That is not consistent with the intent of the legal rule, and would effectively render the rule

55. Claiming, as Board Staff does, that the 2015 adjustment was acceptable, since alternatively, the Board could have allowed EPLC to dispose of the residual balance in Account 1595, subaccount 2012, and it would have led to the same outcome, is simply incorrect.[68] If it had, it would have itself been an error.

F. Impact of the Error

56. SEC recognizes that the impact of the error is material and, at a minimum, would result in a net refund of $1.8M, if the interim 2015 IRM adjustment is reversed, and up to $4.8M, if the Board exercises its discretion to finalize only the refund to those customers who overpaid.

57. In its 2015 IRM proceeding, faced with a possible refund of $3.7M to customers due to another error, EPLC argued that this would lead to it being offside with its debt covenants and that it could only withstand any financial consequences in excess of $380,000.[69] The Board commented that it was "very concerned with the apparent risk" of its debt arrangements that would result in such a "thin margin of risk it can absorb".[70] The concern that EPLC can only absorb an annual loss of $380,000 is no more. EPLC now says that it can safely absorb an annual loss in excess of $2M.[71]

58. SEC agrees that the impact of an adjustment on the utility is an issue. However, it is also true that the amount to be adjusted is a lot of money for the customers as well. They did not make the error, but they are still being asked by EPLC to bear the multi-million cost of EPLC's error. SEC believes this is unfair.

59. Considering it has already made an adjustment in its 2015 IRM on an interim basis, and thus all that needs to be reversed is the adjustment for the over-refund to non-RPP customers, the result is only a $3.3M credit to those customers. SEC submits that it would be fair for the Board to require that adjustment to be made over a longer period than just one year to mitigate the cash flow impact. SEC would not oppose the credit to be paid out over the full IRM term (5 years). This would have an effect of a $660,000 credit (plus interest) to be paid to non-RPP customers each year. This would ensure there is no

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immune with respect to DVAs. Put another way, the Board should ask itself whether the courts have intended the rule against retroactive ratemaking to be inapplicable to final DVA clearances, simply because of the way they are cleared.

[68] Board Staff Submissions, p.14

[69] *Decision and Order* (EB-2014-0301/0072 – EPLC 2015 IRM), June 9 2015, p.15

[70] *Ibid*

[71] Settlement Proposal, filed April 13 2018, issue 5.1

adverse financial impact to EPLC that would threaten its financial viability, which was a concern of the Board in the 2015 IRM proceeding.[72]

G. <u>Relief</u>

60. Based on the foregoing, SEC submits that the Board should order reversal of the interim adjustment, and thus a $3.3 million credit to the non-RPP customers, to be cleared over five years, with interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 11, 2018

Original signed by

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Mark Rubenstein
Counsel for the School Energy Coalition

[72] *Partial Decision and Procedural Order No.3* (EB-2014-301/0072 -- Essex Powerlines), March 25 2015, p.7