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

**AND IN THE MATTER OF an application by Essex Powerlines Corporation for an order approving Distribution Rates for May 1, 2018.**

## Essex Powerlines Corporation's Reply Submissions on Unsettled Issues

## Introduction and Background

1. These are the Submissions of Essex Powerlines Corporation ("EPLC") in reply to the submissions of Board Staff, the School Energy Coalition ("SEC") and the Vulnerable Energy Consumers Coalition ("VECC").

Board Staff Submissions

2. EPLC acknowledges that Board staff's submissions provide a thorough analysis of how the DVA balances in question operate and propose a logical and practical outcome. Board staff correctly concludes that the issue here is less about rate retroactivity than about the appropriate treatment of the residual balance of the subaccount of Account 1595. As Board staff notes:"…since the issue in this case relates to the balances in subaccounts of Account 1595, and as there have been no OEB orders that dispose of the residual balances in those subaccounts on a final basis, whether for 2012, 2014 or 2015, there is no issue of retroactive ratemaking in this case." (at pp. 14-15)

3. As a result, given that Account 1595 has not been finally disposed of, retroactivity issues do not arise. There is no reason not to clear the residual balance of that account in the normal course. As Board staff notes (at p. 15):

> "OEB staff submits that if the OEB approves Essex Powerlines' proposal to finalize the interim dispositions, the rate payers as well as the utility would be held whole,

and the OEB staff agrees that those interim dispositions should be finalized" (emphasis added).

4. OEB staff further notes, that, because EPLC erred in duplicating the disposition of the amounts set out in Table 2 of staff submissions, the consequences to rate payers was the inclusion of carry charges of $22 thousand in Account 1595 (2014). OEB staff submits that this amount be incurred by the shareholder, and not the ratepayers. EPLC agrees that this amount – reflecting the incremental costs of the error – should not be borne by rate payers.

5. The consequence of Board staff's submissions is that EPLC's total responsibility for the errors in its applications would be a total of $182,000, representing the $22 thousand in carrying charges and the OEB's denial of $160 thousand in a base revenue requirement for 2015. Because the base 2015 revenue requirement continues to apply for subsequent years, EPLC's lost revenues are cumulative from that time forward.

6. EPLC submits that this outcome is the most consistent with setting a just and reasonable rate: it keeps rate payers whole and visits the financial consequences of the error on EPLC.

SEC's Submissions

7. In contrast to the Board staff proposal, which is aimed at keeping rate payers' whole, SEC's proposal aims to prevent the recovery of over-payments to customers, even though there was no entitlement to those amounts and EPLC will not benefit from the recovery of those amounts. In other words, instead of keeping all parties whole, SEC is proposing a wealth transfer to customers. SEC supports this position by arguing for an asymmetric approach to retroactive rate making and by disagreeing with Staff's submission. Each will be addressed in turn.

**Asymmetric Retroactive Ratemaking**

8. All parties are agreed that, as a general matter of law, unless there is an exception, the Board cannot set rates on a retroactive basis. SEC argues that this is a one way street: the Board may adjust rates retroactively where it would harm shareholders but may not do so when it harms ratepayers.

9. EPLC submits that this is incorrect. This general rule applies regardless of whether the beneficiary of retroactive rate making is the customers or utility shareholder. This proposition was unequivocally put forward by a majority of the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board):*[1]

> "From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern, 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-735).

10. As is clear from the above quotation, the Supreme Court of Canada did not grant greater leeway for retroactive rate-making depending on whether the customer or the utility would financially benefit. Just as the Board must be even-handed when setting rates on a prospective basis, it must be even-handed when approaching a retroactive adjustment. Asymmetrical and opportunistic rate making in the manner proposed by SEC does not result in a just and reasonable rate.

[1] [2006] S.C.J. No. 4, at para. 71.

11. SEC relies on two decisions for the proposition that retroactive rate making is permissible if it benefits customers: EB-2005-0031 ("*Great Lakes*"), and EB-2014-0043 ("*Enbridge*"). Neither of these cases stand for that proposition.

12. In *Great Lakes*, the issue was whether a customer who was mistakenly included in the wrong customer class could get recovery for the difference of the amount it actually paid and the amount it would have paid if it was included in the correct rate class. The majority decision was clear that the restrictions on retroactivity applied regardless of who would benefit from the adjustment:[2]

> "When investors and consumers cannot be assured that final rates are indeed final, the resultant risks increases costs for everyone. In addition, intergenerational inequities arise, with today's consumers paying the costs of past events. In this case, it is not appropriate for either the utility or its ratepayers to bear the implications of a retroactive rate change. To burden the utility would be contrary to the regulatory compact. To burden the ratepayers would be wrong, especially given the length of the retroactivity (emphasis added).

13. Further, even the dissenting opinion by Mr. Kaiser (which is quoted from in SEC's submissions) does not support the asymmetry proposed by SEC. That opinion emphasizes the fact that the customer (Boniferro) was charged the incorrect rate, and that correction had to be fixed: "it [i.e., the rate] was not meant to apply to Boniferro and should not have been applied to Boniferro."[3]

14. The dissenting decision would have allowed the customer to recover the cost of being over-charged by the mistaken classification because, if it did not, the utility would be unjustly enriched. In this case, the opposite would hold true, if EPLC cannot recover the costs from customers who were under charged because of the mistake, then EPLC would be unjustly deprived of that amount and the customers would be correspondingly unjustly enriched by that amount.

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[2] *Great Lakes*, p. 7 (Majority Decision)
[3] *Great Lakes*, p. 15 (Minority Decision)

15. The *Enbridge* case also does not support SEC's position. In *Enbridge*, the Board corrected an out of period adjustment because Enbridge committed an unintentional error which resulted in over $10 million being incorrectly recovered from customers. The Board permitted the correction because "An out of period adjustment can be justified if it ensures that a utility does not profit on account of its own errors."[4]. There is no suggestion here that EPLC profited from its error. Thus recovering these amounts from customers would lead to the same result here as it did in the *Enbridge* case: to put the parties in the same position they would have been if an error had not been made.

**Board's Power to Correct Errors Underlying a Decision**

16. SEC also argues that the Board's power to correct errors that underlie decisions is not applicable on three grounds: (i) that the common law power of an adjudicator to correct an error underlying a previous decision was somehow supplanted by the *Statutory Powers Procedure Act* ("SPPA"); (ii) that the Board's public interest mandate distinguishes it from the decision-makers in *Grier* and *Kingston;* and (iii) that this power only applies to mutual errors, and not errors provided by one party. Each is addressed in turn.

17. With respect to (i), SEC provides no authority for the proposition that the common law power of a tribunal to correct a calculation error has been supplanted by the SPPA. The Board's power to correct calculation errors underlying a decision is found in both ss. 21.1(a) of the SPPA and Rule 41.02 of the Board's Rules of Practice and Procedure. It clearly has the power to correct underlying errors in calculation and has done so in the past (for example, in the *Enbridge* decision).

[4] *Enbridge*, p.2

18. With respect to (ii), the decision makers in *Grier* and *Kingston* were not private adjudicators. They are also statutory bodies that exercise public interest jurisdiction: the decision maker in *Grier* acted under the *Employment Standards Act* and the decision maker in *Kingston* was the Mining and Lands Commissioner, who acted under a number of statutes, including the *Mining Act*.

19. As for (iii), there is nothing in these cases that suggest that the correction of errors that underlie decisions need be mutual. To the contrary, in *Kingston*, the Divisional Court expressly referred to correcting a factual error that was made "through inadvertence or negligence of **one** of the parties, or their representatives".[5] Further, Macaulay and Sprague note that this rule "has been applied to cases where **the applicant** had accidentally mislead or failed to provide a decision-maker with correct facts."[6]

20. As a result, none of the grounds for distinguishing these cases has any merit.

21. SEC also asserts that EPLC is claiming that the decision closing the deferral accounts was wrong and is seeking a change, as opposed to proposing that the error underlying the deferral accounts should be corrected. Macaulay and Sprague address the difference between correcting errors and re-arguing a decision as follows:

> "It is important to note that in these cases the substance of the decision-makers 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. In *Chessum* the Court expressly noted that the 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."[7]

[5] (1977), 18 O.R. (2d) 166 (Div. Ct.) (emphasis added)
[6] Macauley's Practice and Procedure in Administrative Tribunals, at p. 27A-32 (emphasis added)
[7] Macauley's Practice and Procedure in Administrative Tribunals, at p. 27A-33

22. EPLC is **not** claiming that the Board erred in concluding the balance in the deferral account should be closed. Rather, the error was with respect to the calculation of that balance. If the correct balance had been recorded in the first place, that is the quantum of the account that would have been closed.

**SEC's Position on the Board Staff Submissions**

23. SEC disagrees with Board staff's submissions respecting clearing Account 1595, which records uncollected amounts after variance account balances are recovered. However, Board staff's proposed approach to this issue was approved by the Board in *ELK Energy Inc.*[8] and, as indicated, it is a method which keeps all parties whole, which is a feature of just and reasonable rates.

VECC Submissions

24. VECC supports SEC's position. It emphasizes the inter-generational concerns, particularly given the length of time since the original application was filed in 2014. EPLC acknowledges that inter-generational equity is a concern. It has done all it could be address this issue promptly. The length of time to have this finally resolved also included the time frame for the Board's own motion (19 months – August 2015, to March, 2017) and the time of conducting the audit (26 months – January, 2016 to March, 2017).

25. EPLC also notes that the movement of customers in and out of a service area always occurs when there is a clearance of a DVA.

26. VECC's proposal to segregate customers from different periods is not a principled or practical approach to this issue of intergenerational equity (which, as noted, applies in other circumstances as well) and should not be adopted as a precedent.

[8] EB-2016-0066 (November 2, 2017).

27. Among the practical challenges of implementing such an approach would involve a determination of which customers moved in and out of the franchise, which moved within the franchise, and manual calculations of the monthly adjustments that would be attributable to each individual customer in light of its monthly payments.

**Conclusion**

28. For the foregoing reasons, EPLC submits that the error addressed in the Unsettled Issue should be corrected because it is the only outcome that is consistent with the Board's obligation to set just and reasonable rates.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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**AND TO:** Intervenors of Record