



## Jay Shepherd

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**BY EMAIL and RESS**

April 3, 2014  
Our File: EB20130147

Ontario Energy Board  
2300 Yonge Street  
27th Floor  
Toronto, Ontario  
M4P 1E4

**Attn: Kirsten Walli, Board Secretary**

Dear Ms. Walli:

**Re: EB-2013-0147 – Kitchener-Wilmot Hydro Inc. – Notice of Motion**

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Rule 42 of the Board's *Rules of Practice and Procedure*, enclosed please find the Notice of Motion on behalf of SEC.

Yours very truly,  
**Jay Shepherd P.C.**

*Original signed by*

Mark Rubenstein

cc: Applicant and Intervenors (by email)

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

**AND IN THE MATTER OF** an Application by Kitchener-Wilmot Hydro Inc. for an Order or Orders approving just and reasonable rates and other service charges for the distribution of electricity to be effective as of January 1, 2014.

**AND IN THE MATTER OF** Rule 42 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

## **NOTICE OF MOTION**

The School Energy Coalition (“SEC”) will make a motion to the Ontario Energy Board (“the Board”) at its offices at 2300 Yonge Street, Toronto, on a date and at a time to be fixed by the Board.

### **PROPOSED METHOD OF HEARING:**

SEC has no preference in the method of hearing this motion.

### **THE MOTION IS FOR:**

1. A review and variance of the Decision and Order dated March 20, 2014 in EB-2013-0147 (the “Decision”) in which the Board determined that it was not necessary to consider any working capital allowance (“WCA”) percentage other than 13%;
2. An order:
  - a) making revised findings on the appropriate test year WCA percentage by relying on the existing record in EB-2013-0147, including all pre-filed evidence, interrogatory responses, hearings transcripts, and final arguments; or
  - b) remitting the issue of the appropriate test year WCA percentage back to the Board panel in EB-2013-0147, so that they may make revised findings on the issue, relying on the existing record in EB-2013-0147, including all pre-filed evidence, interrogatory responses, hearings transcripts, and final arguments.
3. An order that SEC satisfies the “threshold test” in Rule 45.01 of the OEB’s *Rules of Practice and Procedure*; and

4. An order that SEC be eligible for an award of costs on this motion in accordance with the *Practice Direction on Cost Awards*.

## **THE GROUNDS FOR THE MOTION ARE:**

### ***The Proceeding***

1. Kitchener-Wilmot Hydro Inc. (“KWHI”) filed an application pursuant to Rule 78 of the *Ontario Energy Board Act, 1998* for an order approving distribution rates and charges for electricity distribution, to be effective January 1, 2014. On July 22 2014, the Board issued a Notice of Application.
2. SEC was granted intervenor status in the proceeding.
3. The Board made provisions for written interrogatories and responses, as well as the holding of a Technical Conference which occurred on October 28, 2013.
4. Following a Board established Settlement Conference on November 7-8, 2013, a proposed partial settlement agreement was filed. Included in the unsettled issues was Issue 2.2: “Is the working capital allowance for the test year appropriate” (“the WCA percentage issue”).
5. The Board held an oral hearing on the unsettled issue, including the WCA percentage issue and then heard written final submissions from all parties.
6. The Board issued its Decision on March 20, 2014.

### ***The Decision***

7. The Board disagreed with intervenors and accepted KWHI’s argument that it has responded to all relevant Board direction from its previous proceeding, and accepted KWHI’s interpretation that the Board’s April 12, 2012 satisfied the Board’s expectations in previous cost of service decision (EB-2009-0267). The Board found that it was not required to file a lead/lag study in support of its application. SEC does not challenge this finding.
8. With regard to the specific WCA percentage that KWHI should utilize, the Board found that (p.9):

Based on the finding above, and in recognition of section 2.5.1.3 of the *Filing Requirements for Electricity Distribution Rate Applications*, which establishes the Board’s expectation with respect to the WCA and allows for the default 13% approach in the absence of previous direction by the Board to undertake a lead/lag study; the Board does not find it necessary to

consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application. [emphasis added]

***Error in Law***

9. The Board erred by relying solely on section 2.5.1.3 of the *Filing Requirements for Electricity Distribution Rate Applications* (“Filing Requirements”) as binding its ability to determine an appropriate WCA percentage of any number but 13% in absence of a lead/lag study, which it found KWHI was not required to perform.
10. The Board’s Filing Requirements are akin to Board policies or guidelines. While the Board has the authority to issue non-statutory instruments such as filing requirements, they cannot be applied as if they were mandatory.
11. By not finding it “necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application”, the Board unlawfully fettered its discretion by relying on a non-binding document as if it were a binding instrument.
12. While the Board may consider the Filing Requirements in determining the appropriate test year WCA percentage, it was required to consider the specific facts presented and arguments made in the proceedings. Intervenors made a number of arguments, supported by the record and evidence in the proceeding, about how the Board’s default 13% WCA percentage is not appropriate for a utility such as KWHI that bills its customers on a monthly basis. While it may have been acceptable for KWHI to rely on the Filing Requirements for the purpose of the WCA applied for in its application, once intervenors including SEC raised specific issues with the percentage during the proceeding, the Board was required to consider those arguments in determining the appropriate percentage.
13. The motion satisfies the “threshold test” set out in Rule 45.01. The error in law raises material questions as to the correctness of the Board’s Decision. It is an identifiable error, which resulted in the Board failing to address a material issue, and the review could result in the varying of the Decision. This motion does not seek to re-argue the appropriate WCA percentage. It only seeks to review and vary the Decision as to require the Board to consider the evidence and arguments of intervenors, and make specific findings on the WCA percentage issue which it failed to do in the Decision.

14. The OEB's *Rules of Practice and Procedure*; and

15. Such grounds as counsel may advise and the Board may permit.

**THE FOLLOWING DOCUMENTARY MATERIAL AND EVIDENCE WILL BE RELIED UPON  
AT THE HEARING OF THE MOTION:**

1. The Record in EB-2013-0147;
2. SEC's submissions on this motion to be delivered in accordance with the Board's procedural order or orders; and
3. Such further and other material as counsel may advise and the Board may permit.

**April 3, 2014**

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**AND TO: Intervenors**