ONTARIO ENERGY BOARD

STAFF SUBMISSION

2014 ELECTRICITY DISTRIBUTION RATES APPLICATION -

Board Staff Submission

Motion to Review and Vary the Board's Decision and Order EB-2013-0147 by the School Energy Coalition

EB-2014-0155

May 21, 2014

The School Energy Coalition ("SEC") filed with the Ontario Energy Board (the "Board") on April 3, 2014 a motion for request to review and vary (the "Motion") the Board's Decision and Order dated March 20, 2014 in EB-2013-0147 (the "Decision") in respect of Kitchener-Wilmot Hydro Inc.'s ("KWHI's") cost of service application for rates to be effective January 1, 2014. The Board has assigned the Motion file number EB-2014-0155.

The Motion seeks a review and variance of the Decision in which the Board determined the appropriate working capital allowance ("WCA") for KWHI. In its Decision the Board stated that "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."

In its Notice of Motion to Vary and Procedural Order No. 1, issued May 1, 2014, the Board determined that the most expeditious way of dealing with this Motion is to consider concurrently the threshold question of whether the matter should be reviewed, as contemplated in the Board's *Rules of Practice and Procedure* (the "Rules"), and the merits of the Motion.

KWHI filed a letter in response to SEC's motion on April 14, 2014. SEC filed additional evidence in support of its Motion on May 12, 2014.

Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Rule 44.01(a) provides the grounds upon which a motion may be raised with the Board:

> Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Board staff has considered previous decisions in which the principles underlying the "threshold question" were discussed, namely in the Board's Decision on a Motion to Review Natural Gas Electricity Interface Review Decision[1] (the "NGEIR Review Decision").

In the NGEIR Review Decision, the Board stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there was enough substance to the issues raised such that a review based on those issues could result in the Board varying, canceling or suspending the decision.

Board staff agrees with SEC that the grounds for review listed in Rule 42.01 (a) are not exhaustive, and that an error of law is a proper ground for review. However, Board staff disagrees with SEC in the latter's allegation that the Board fettered its discretion in its decision making and thereby committed an error of law.

[1] *Motion to Review Natural Gas Electricity Interface Review Decision (EB-2006—322/0338/0340) , Decision with Reasons*

The Board did not Fetter its Discretion in determining the appropriate WCA

Board staff does not dispute the submission of SEC that it is well established law that, in the exercise of discretionary authority, discretion must be brought to bear on every case and that each case must be considered on its own merits.[2] However, Board staff does not agree with SEC's submission that the Board fettered its discretion in determining the appropriate WCA.

SEC argues that, 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, relying on a nonbinding document as if it were binding. SEC's argument is premised on its position that the Board treated the *Filing Requirements for Electricity Distribution Rate Applications* (the "Filing Requirements") as if they were binding on the Board panel.

SEC relies on a decision of the Federal Court of Appeal, *Thamotharem v. Canada (Minister of Citizenship and Immigration)* in support of its argument that the Board unlawfully fettered its discretion. Specifically, SEC references the following finding of the Court:

> Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered."[3]

While Board staff does not dispute the legal principle set out above, Board staff submits that it does not apply to the facts as set out in the Decision. Board staff submits that guidelines may validly influence a decision maker's conduct. The use of guidelines to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals

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[2] *(See, for example: Maple Lodge Farms v. Canada, [1982] 2 S.C.R. 2 and Dorothea Knitting Mills Ltd. v. Canada (Minister of National Revenue -- M.N.R.), [2005] F.C.J. No. 394, 295 F.T.R. 314 (F.C.T.D.)).*
[3] Thamotharem v. Canada (Minister of Citizenship and Immigration), 20007 FCA 198 at para 66

exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions.[4] Board staff submits that the Board properly considered the April 12, 2012 letter and the Filing Requirements when determining that it was not necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate.

Board staff submits that the findings made by the Board in its Decision support staff's argument that the Board did not fetter its discretion. In its Decision the Board stated, at page 9:

> On the matter of whether KWHI responded to all relevant Board directions from previous proceedings, the Board accepts KWHI's interpretation of the Board's April 12, 2012 letter as being reasonable and therefore does not find that KWHI was required to perform and file a lead-lag study in support of this Application.
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> 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]

Board staff submits that the statement by the Board that it "does not find it necessary to consider whether any WCA other that the default 13% used by KWHI is more appropriate" is very different from SEC's submission that the Board fettered its discretion by noting that it "does not need to consider any WCA percentage beside the 13% set out in the Filing Requirements." Board staff submits that this is not what the Board stated. Further, Board staff submits that SEC has failed to put forward any evidence that suggests the Board failed to keep an open mind when hearing arguments, as provided in the submissions of KWHI, registered intervenors and Board staff, that the 13% default should not be applied in this case. Nowhere in the Decision

[4] Ibid, at page 1

does the Board state that it was bound by the 13% set out in the Filing Requirements.

As evidence of the Board keeping an open mind, Board staff submits that the Board clearly considered arguments made by the intervenors about the WCA. Board staff points to the following arguments made by the intervernors and referenced by the Board in the Decision:

> Energy Probe submitted that KWHI should have consulted with Board staff prior to relying solely on the Board's letter of April 12, 2012, instead of conducting its own lead lag study. Energy Probe submitted that there was no proceeding or consultation conducted which gave rise to the Board's determination to make the default WCA factor 13%, instead of 15%, of the sum of the cost of power plus controllable expenses. Energy Probe submitted that KWHI should have conducted a lead-lag study and filed it as part of this Application since the distributor had decided to move to monthly billing.
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> …
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> VECC submitted that the Board's default approach of 13% as documented in the April 12, 2012 letter, and in the absence of company-specific information, was established based on the a number of lead-lag studies from distributors still doing bi-monthly billing for the majority of their customers. VECC submitted that "the Board's recommended use of the 13% WCA default value was a practical response to the evidence at hand rather than articulating a regulatory formula to be plugged in regardless of circumstances, such as the ROE formula."
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> SEC argued that the Board's previous decision contained a direction to KWHI to carry out a study and submitted that the 13% default WCA factor announced in the April 12, 2012 letter did not apply to KWHI.[5]

Board staff submits that the Board clearly was aware of and gave due consideration to arguments put forward about the appropriate working capital allowance, and determined, after considering the April 12, 2012 letter and the Filing Requirements that a default WCA of 13% was appropriate.

[5] Decision and Order EB-2013-0147, March 20, 2014, pg. 7

In further support that the Board did not fetter its discretion, Board staff points to the letter of April 12, 2012[6], wherein the Board stated the following:

> The Board has reviewed the approaches to the calculation of WCA and will not require distributors to file lead/lag studies for 2013 rates, unless they are required to do so as a result of a previous Board decision. However, the Board has reviewed the results of lead/lag studies filed by distributors in cost of service applications and in each of those cases both the applied-for WCA and the final Board-approved WCA have been lower than 15%. The Board has determined that it is not appropriate for a default value for WCA to be set at a higher level than those resulting from lead/lag studies.
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> Based on the results of WCA studies filed with the Board in the past few years, the Board has determined that the default value going forward will be 13% of the sum of cost of power and controllable expenses. This default value will be applicable to 2013 rate applications and beyond. Distributors still have the option of completing and filing a lead/lag study as part of a cost of service rate application for determination by the Board.

Board staff submits that the April 12, 2012 letter makes it clear that the Board, in determining that the 13% default was appropriate, considered the results of lead/lag studies filed by distributors in other cost of service applications and it was through that consideration that the Board determined 13% as appropriate. Board staff submits therefore that it was within the Board panel's discretion to consider the April 12, 2012 letter with the Filing Guidelines when determining that a 13 % WCA was appropriate in the case of KWHI. Board staff submits that the Motion should be dismissed.

– All of which is respectfully submitted –

[6] Ontario Energy Board letter dated April 12, 2012, A copy of the letter was included on pages 7-9 of the Energy Probe Compendium, Exhibit K1.2.