**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

Ontario

**EB-2014-0155**

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

**AND IN THE MATTER OF** an application by Kitchener Wilmot Hydro Inc. for an order approving or fixing just and reasonable distribution rates effective January 1, 2014;

**AND IN THE MATTER OF** a Motion to Review and Vary by School Energy Coalition pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2013-0147.

**BEFORE:** Christine Long
Presiding Member

Ken Quenelle
Vice Chair

Allison Duff
Board Member

# DECISION AND ORDER
# ON NOTICE OF MOTION TO REVIEW AND VARY

**July 31, 2014**

On April 3, 2014, the School Energy Coalition ("SEC") filed a Motion for a 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 "Application"). The Board has assigned the Motion file number EB-2014-0155.

In the Motion SEC asks the Board to make an Order:

a) to make revised findings on the appropriate test year Working Capital Allowance ("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.

SEC is also asking the Board to find that its Motion satisfies the "threshold test" in Rule 45.01 of the OEB's *Rules of Practice and Procedure* (the "Rules").[1]

The Board, as set out in its Notice of Motion and Procedural Order No. 1, determined that the most expeditious way of dealing with the 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*, and the merits of the Motion.

## BACKGROUND

The Motion seeks a review and variance of the Decision in KWHI's cost of service proceeding in which the Board determined 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 the Application, KWHI proposed a WCA percentage of 13%, relying on the Board's letter of April 12, 2012 ("Board Letter").[2] The Board Letter provided the Board's rationale for changes to the 2013 Filing Guidelines for electricity and transmission distribution applications. The Board Letter stated that a distributor had two approaches available to calculating its WCA: filing a lead-lag study, or using a 13% default value. The 13% default WCA percentage was incorporated into section 2.5.1.3 of the *Filing Requirements for Electricity Distributors* (the "Filing Requirements"). A distributor who had been directed by the Board to carry out a lead-lag study, or had voluntarily carried out a lead-lag study, was not allowed to use the default percentage.

[1] SEC's Motion was filed on April 3, 2014 and references Rules 44 and 45 of the *Rules of Practice and Procedure*, updated on January 17, 2013. The Board issued updated *Rules of Practice and Procedure* on April 24, 2014. Rules 43 and 45 have been renumbered as, respectively, Rules 42 and 43 but are otherwise unchanged. In this *Decision on Notice of Motion to Review and Vary*, references are to the Rules as documented in the January 17, 2013 version of the *Rules of Practice and Procedure*.

[2] Letter of Ontario Energy Board, *Re: Update to Chapter 2 of the Filing Requirements for Transmission and Distribution Applications – Allowance for Working Capital,* dated April 12. 2012

The intervenors disputed whether KWHI had responded appropriately to previous Board directions, alleging that the Board Letter did not amount to a "Board led process". Thus, their argument was that KWHI was required to file a lead-lag study to support its WCA. They also argued that regardless of the previous Board decision, the KWHI WCA should be less than 13%, to account for KWHI's intention to move its remaining (i.e., Residential and General Service < 50 kW) customers from bi-monthly to monthly billing.[3]

Intervenors provided detailed submissions and calculations on the WCA percentage for KWHI, including why the 13% default factor set out in the Board's Letter and Filing Requirements is not appropriate for a distributor on or moving to monthly billing for all customers.[4]

Energy Probe's submission was that the default 13% WCA set out in the Board's Letter and Filing Requirements was based on lead-lag studies done by distributors who billed bi-monthly. Energy Probe explained in detail why it was not appropriate for a distributor like KWHI who was moving to monthly billing to rely on the WCA percentage of 13%. SEC and VECC made similar submissions.[5]

In this Motion, SEC submitted that the Board's reliance on the 13% default WCA, combined with the Board's apparent failure to consider the evidence put forward by the intervenors with respect to an alternative WCA, leaves a question for this reviewing Panel as to whether or not the Board, in reaching its Decision, felt bound to apply the 13% default value. In reaching a determination on this matter, this reviewing Panel has considered the submissions of the parties (intervenors and KWHI) as well as those of Board staff.

## ISSUES

There are two issues in this Motion:

1. Has the threshold test been met?
2. If the answer to the above is yes, did the Board fetter its discretion in the Decision with respect to determining the WCA thereby making an error in law?

[3] Written Submissions of School Energy Coalition, para. 12
[4] *Ibid.*, para. 13
[5] *Ibid.*, paras. 13 and 14

## THRESHOLD TEST

Section 44.01 of the Rules provides that:

> 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[.]

Under section 45.01 of the Rules, 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. Section 45.01 of the 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.

The Board has considered previous decisions of the Board 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* (the "NGEIR Review Decision").[6] 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 is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision.

SEC, VECC and Energy Probe all argued that the Board fettered its discretion in its decision making thereby committing an error of law which would raise a question as to

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

the correctness of 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 disagreed with SEC in the latter's allegation that the Board had fettered its discretion in its decision making and thereby had committed an error of law.

The Board agrees with the submission of SEC that an error in law raises a material question as to the correctness of the Board's Decision. Such an error, could result in the varying of the Decision. As a result, the Board finds that the threshold test has been met in this case given the potential for an error in law. The Board will proceed to consider the merits of the motion.

## MERITS OF THE MOTION

### *Submissions of the Parties*

In its submission, KWHI set out some of the background with respect to its decision to apply a 13% WCA. Section 2.5.1.4 of the Filing Requirements issued June 28, 2012 (Allowance for Working Capital) – corresponding to section 2.5.1.3 of the July 17, 2013 version of the Filing Requirements – states, in part:

> In a letter dated April 12, 2012, the Board provided an update to electricity distributors and transmitters on the options established in the June 22, 2011 cost of service filing requirements for the calculation of the allowance for working capital for the 2013 rate year. The applicant may take one of two approaches for the calculation of its allowance for working capital: (1) the 13% allowance approach; or (2) the filing of a lead/lag study.

The only exception to the above requirement is if the applicant has been previously directed by the Board to undertake a lead/lag study on which its current working capital allowance is based. Since KWHI was not directed to do a lead/lag study, KWHI had the choice of option (1) or option (2), and chose option (1); KWHI chose to rely on the 13% WCA approach.

While the Board may consider the Filing Requirements in determining the appropriate WCA percentage for setting rates in the test year, SEC argued that the Board erred in failing to consider the specific facts presented and arguments made in the proceeding by all parties.

SEC submitted that the Board committed an error of law by fettering its discretion in stating that it did "not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application".

SEC argued that the Board erred by relying solely on section 2.5.1.3 of the 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 the Board found that KWHI was not required to perform. SEC noted that 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 the Filing Requirements, they cannot be applied as if they were mandatory.

Energy Probe submitted that it may have been acceptable for KWHI to rely on the Filing Requirements for the purpose of the WCA applied for in its Application. However, once intervenors, including Energy Probe, raised specific issues with the percentage during the proceeding, the Board was required to consider those arguments in determining the appropriate WCA percentage. Energy Probe made a number of arguments, citing the record and evidence in the proceeding, concluding that the Board's default 13% WCA percentage is not appropriate for a distributor such as KWHI that bills its customers on a monthly basis.

VECC adopted SEC's argument with respect to an error of law providing the basis for the motion to review and establishing the threshold test alleging that the Board chose automatically to adopt the 13% default value for the WCA.

Board staff submitted that the Board did not fetter its discretion. Board staff further submitted 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 exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions.[7]

Board staff submitted that the statement by the Board in the Decision 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

[7] *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.)*

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 submitted that this is not what the Board stated. Further, Board staff submitted 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, as filed in EB-2013-0147, that the 13% default should not be applied in this case. Nowhere in the Decision did the Board state that it was bound by the 13% set out in the Filing Requirements.

## *BOARD FINDINGS*

The Board has considered all of the submissions and agrees with the parties on the principal point that it can establish guidelines, policies and other non-binding instruments and that it can utilize those instruments to inform its decision-making. However, those instruments cannot be treated as binding.

As the Federal Court of Appeal stated in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*:

> Nonetheless while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. 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[.][8]

While it is clear from the record that the intervenors made significant arguments about alternative appropriate WCA values during the original proceeding, it is not clear from the Decision that the original panel took these arguments into consideration in rendering the Decision. It is also not clear whether the original panel felt bound to apply the 13% set out in the Filing Requirements. The Board acknowledges and accepts Board staff's statement that nowhere in the Decision does the original panel explicitly state that it was bound by the Filing Requirements. However, it is also not clear whether the Board considered the detailed submissions regarding alternative WCA values in coming to the Decision.

[8] Federal Court of Appeal Decision in *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 20007 FCA 198 at para 66, quoted in SEC Submission, May 12, 2014, page 7

The submissions put forward by the intervenors in respect of an alternative WCA must be considered by the Board, and it must be clear that the Board has done so. Having heard the evidence in question, the original Panel is in the best position to make a finding in concordance with the findings in this Decision. As such, the Board will remit this matter back to the original panel. The Board will issue a Decision as to the appropriate value for KWHI's WCA.

## COSTS

In its Motion, and subsequent filings, SEC sought approval for recovery of eligible costs. Energy Probe and VECC also claimed eligibility for cost recovery in their submissions. KWHI requested an opportunity to make submissions on claimed costs once the amounts were known.

The Board finds that the intervenors are entitiled to their reasonable costs incurred for participation in the hearing of the Motion. Claims for costs and submissions on cost claims should be filed as ordered below. A decision regarding the amount of the cost awards approved will be issued subsequently. KWHI shall pay any Board costs of and incidental to this proceeding upon receipt of the Board's invoice.

## THE BOARD THEREFORE ORDERS THAT:

1. The proceeding will be remitted back to the original panel.

## COST AWARDS

1. Intervenors shall file with the Board and forward to Kitchener-Wilmot Hydro Inc. their respective cost claims by **August 14, 2014**.

2. Kitchener-Wilmot Hydro Inc. shall file with the Board and forward to intervenors any objections to the claimed costs by **August 28, 2014**.

3. Intervenors shall file with the Board and forward to Kitchener-Wilmot Hydro Inc. any responses to any objections for cost claims within by **September 4, 2014**.

4. Kitchener-Wilmot Hydro Inc. shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number EB-2014-0155, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date.

**ISSUED** at Toronto, July 31, 2014

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary