



BY EMAIL and RESS

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2300 Yonge Street
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November 17, 2021
Our File: EB20210038

Attn: Christine Long, Registrar

Dear Ms. Long:

Re: EB-2021-0038 – Kitchener-Wilmot Hydro Inc. 2022 – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). These are SEC's submissions on the proposal by Kitchener-Wilmot Hydro Inc. ("KWHI") for approval to dispose of the balance in Account 1584, including \$5,991,524 that relates to previously unbilled amounts from the Independent Electricity System Operator ("IESO"), for network retail transmission service between 2015 and 2020.¹

SEC submits that amounts attributable to unbilled network retail transmission service in 2015, 2016, 2018 and 2019, and potentially 2017, may not be recoverable from ratepayers, as that would result in impermissible retroactive ratemaking. If the OEB disagrees and allows recovery, it should recover the balance over a 5-year period to mitigate the rate impact on customers. In doing so, it should require the IESO to recover those balances from KWHI on the same basis, so as to avoid the need for any interest to accrue and be passed on to ratepayers.

Background

In December 2020, the IESO informed KWHI that it had not billed it for one of its meter points since June 2015. This resulted in the IESO under-collecting from KWHI the amounts related to network retail transmission service rates ("RTSR"). KWHI's evidence, supported by the IESO on this point², is that the error was caused by the IESO making an input error into its own billing system.³

The result of this is that the IESO's monthly invoices to KWHI from June 2015 to November 2020 for network retail transmission services were incorrect, and understated the actual costs based on billable volumes by \$5,991,524.⁴ Network RTSR charges are collected from customers through billed RTSR charges. Variances between what is collected from ratepayers and what is billed from the

¹ OEB Staff-6

² SEC-1; VECC-3

³ Application, p.13

⁴ OEB Staff-6; VECC 5a

IESO are collected through Account 1584. Without Account 1584, there would be no mechanism for a distributor to record, and subsequently dispose, any variance between the Network RTSR charges collected from customers and that billed from the IESO, to do so would be retroactive ratemaking.

Rule Against Retroactive Ratemaking

The fact that the IESO did not bill KWHI for these amounts until 2020 is not relevant to the legal question relating to recovery of these past amounts. The amounts relate to a previous period expenditure, so the only way that these amounts can be recovered is if there is an exception to the rule against retroactive ratemaking.⁵ There are two general exceptions to the rule against retroactive ratemaking: rates were declared interim, and/or existence of a deferral account.⁶

Account 1584 is the method through which Network RTSR variances are able to be collected from customers while avoiding the legal prohibition against retroactive ratemaking. The problem with KWHI's proposal is that, for years 2015, 2016, 2018 and 2019, Account 1584 was disposed of on a final basis.⁷ That is, the account is no longer available for KWHI to attribute costs for those years. With respect to 2017, the evidence is a bit unclear, as KWHI states that it was cleared on an interim basis in EB-2018-0048. It is not clear to SEC whether there was a final disposition in EB-2020-0035 when the 2018 and 2019 balances were disposed of on a final basis. There is no disagreement with KWHI that the 2020 unbilled amounts are able to be recovered, as Account 1584 for that year has yet to be cleared.

<u>Year</u>	<u>IESO Unbilled Amounts (1)</u>	<u>Account 1584 Clearance Status (2)</u>	<u>Retroactive Ratemaking</u>
2015	\$613,014	Final basis in EB-2017-0056	Yes
2016	\$1,125,834	Final basis in EB-2017-0056	Yes
2017	\$1,033,041	Interim basis EB-2018-0048, unclear if on final basis in EB-2020-0035	Maybe
2018	\$1,064,120	Final basis in EB-2020-0035	Yes
2019	\$1,075,378	Final basis in EB-2020-0035	Yes
2020	\$1,080,136	Not cleared	No

SEC recognizes that this may seem to be unfair to KWHI. It is the IESO and not KWHI that is at fault for the under-billed amounts. Regardless of KWHI's ability to seek recovery from ratepayers, the IESO will still seek recovery of these balances from it, as settlement between a distributor as a market participant and IESO is governed by the Market Rules.⁸ There is no limitation period under the Market Rules for IESO to seek recovery of past under-billed amounts.⁹ At the same time, it is surely not customers who are responsible for the billing error and are now being asked to pay close to \$6M in extra costs, based on consumption decisions that occurred up to 6 years earlier.

Knowledge Exception.

In support of recovery of these balances, KWHI references the OEB's October 31, 2019 letter in which it noted that it will consider making retroactive adjustments to previously cleared "pass-

⁵ [Union Gas Limited v. Ontario Energy Board, 2015 ONCA 453](#), para. 87

⁶ [Union Gas Limited v. Ontario Energy Board, 2015 ONCA 453](#), para. 88-89

⁷ SEC-2

⁸ SEC-4

⁹ SEC notes that recently the Government introduced [Bill 13, Supporting People and Businesses Act, 2021](#). If enacted, the *Electricity Act* would be amended to include a new two-year limitation period that would likely apply to situations similar to that raised by this application.

through” variance accounts in certain circumstances.¹⁰ SEC agrees with KWHI that the factors listed in the letter would strongly militate towards allowing the adjustment, but the letter itself is not binding upon any OEB panel. It is not clear to SEC on what legal basis the OEB in this case can depart from the rule against retroactive ratemaking. The letter does not provide any legal analysis or discussion. The rule is not a discretionary consideration for the OEB, but a legal prohibition.¹¹

Some case law on retroactive ratemaking does note that the overarching principle is knowledge of the utility and consumers that rates may change retrospectively. 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.”¹²

In EB-2017-0056, KWHI sought retroactive adjustment to two previously disposed of RSVA Accounts. The OEB denied the adjustment, citing the same Alberta Court of Appeal decision, and stating that it had “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.”¹³ It went on to state that “[t]he OEB will be reviewing its directions for the RSVAs to determine if it is appropriate to recognize the potential for ongoing adjustments, given the nature of these accounts, even if a particular balance has been disposed on a final basis.”¹⁴ Presumably the OEB’s October 31, 2019 letter is that new direction, and now it establishes the expectation that retroactive adjustment may occur to Group 1 accounts cleared on a final basis.

It is not clear to SEC that this letter provides sufficient notice to customers to allow them to understand that amounts cleared on a final basis, may be changed later. When customers see the term ‘final’, they expect that to mean something, as compared to utilities, who have a significant advantage in how their rates are set.

Disposition Should Mitigate Bill Impact

If the OEB allows recovery from ratepayers of some or all of the unbilled amounts at issue, it should require disposition over a longer period than the 1 year proposed by KWHI. SEC submits that there are significant bill impacts associated with a 1-year disposition of an additional \$5.9M, and those impacts should be avoided.

KWHI’s rationale for a 1-year disposition period seems to be that it would avoid additional costs associated with interest that would accrue, and later be collected from ratepayers, from a longer disposition period.¹⁵ In response to SEC-4, the IESO, through KWHI, was asked if it would match collection from KWHI, on the same time frame as the OEB ordered KWHI to collect from ratepayers. IESO stated that “[i]f the OEB were to order a different time period for the recovery and invoicing of these amounts greater than the one-year period KWHI has applied for, the IESO would comply with

¹⁰ SEC-3; OEB Letter, [Re: Adjustments to Correct for Errors in Electricity Distributor “Pass-Through” Variance Accounts After Disposition](#), October 31, 2019

¹¹ [Union Gas Limited v. Ontario Energy Board, 2015 ONCA 453](#), para. 82. SEC does note that the analysis is different for retroactive adjustments for credits of which may not result in retroactive ratemaking. See for example [Decision and Procedural Order No.3 \(EB-2014-0301/0072\) March 25, 2015](#), p.7

¹² [ATCO Gas and Pipelines Ltd v Alberta \(Utilities Commission\), 2014 ABCA 28](#), para. 57

¹³ [Decision and Order \(EB-2017-0056\), March 1, 2018](#), p.12

¹⁴ [Decision and Order \(EB-2017-0056\), March 1, 2018](#), p.12

¹⁵ Application, p.14

such an order.”¹⁶ Similarly, in response to OEB Staff #7, the IESO stated “[i]f the OEB confirms that these amounts are due and owing by KWHI and does not issue an order for the IESO to align invoicing with KWHI’s collection, the IESO is required by the Market Rules to issue a single invoice for the entire amount of the unbilled historical amount.”¹⁷ On that basis, SEC submits the OEB should approve a disposition period of five years and order that no interest should accrue on the balance. It should also make an order for the IESO to align its collection from KWHI with this disposition period.

Summary

SEC submits that amounts attributable to unbilled network retail transmission service in 2015, 2016, 2018 and 2019, and potentially 2017, may not be recoverable from ratepayers as this may constitute retroactive ratemaking. If the OEB disagrees and allows recovery, it should recover the balance over a 5-year period, without interest, to mitigate the rate impact on customers, and similarly require the IESO to recover the unbilled amounts from KWHI over the same period and on the same basis.

Yours very truly,
Shepherd Rubenstein P.C.

Mark Rubenstein

cc: Ted Doherty, SEC (by email)
Applicant and intervenors (by email)

¹⁶ SEC-4

¹⁷ SEC-7b