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PUBLIC**

February 23, 2010

Delivered by Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

**Re: Horizon Utilities Corporation – Z-Factor Application
Board File No.EB-2009-0332**

We are counsel to Horizon Utilities Corporation. ("Horizon Utilities") in the above captioned matter.

Please find accompanying this letter Horizon Utilities' Reply Argument. This unredacted document is being delivered in confidence. Horizon Utilities will be providing a redacted version of the submission. However, in the interest of providing the submission in as timely a manner as possible, we are distributing the unredacted version now to Board staff and parties that have signed the Board's form of Declaration and Undertaking with respect to confidentiality.

Should you have any questions or require further information, please do not hesitate to contact me.

Yours very truly,
BORDEN LADNER GERSAIS LLP

Original Signed by James Sidlofsky

James C. Sidlofsky
JCS
Encl.

Vancouver
Toronto
Ottawa
Montréal
Calgary



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cc. Martin Davies, Ontario Energy Board
John G. Basilio, Horizon Utilities Corporation
Indy J. Butany-DeSouza, Horizon Utilities Corporation
Individuals that have signed the Board's form of Declaration and Undertaking
with respect to confidentiality

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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 Horizon Utilities Corporation for an order approving the recovery of certain amounts related to an unforeseen loss of revenue to be effective January 1, 2010.

HORIZON UTILITIES CORPORATION ("HORIZON UTILITIES")

[REDACTED] REPLY ARGUMENT
DELIVERED FEBRUARY 23, 2010

Introduction:

1. Horizon Utilities Corporation ("Horizon Utilities") is a licensed electricity distribution company operating in the City of Hamilton and the City of St. Catharines under Ontario Energy Board (the "OEB" or the "Board") Electricity Distribution Licence ED-2006-0031.
2. On September 3, 2009, Horizon Utilities made an Application to the OEB for an order or orders pursuant to Section 78 of the *Ontario Energy Board Act, 1998*, as amended (the "OEB Act") approving or fixing just and reasonable rates for the distribution of electricity.
3. Specifically, Horizon Utilities applied for an order or orders granting approval for the recovery of certain amounts (approximately \$2.85 million¹ as filed) related to an unforeseen and material loss of revenue outside of the control of management due to a change in operations on the part of one of its Large Use customers (referred to in this submission as the "Subject Customer"). The Application pertains to the May 1, 2008 – April 30, 2011 period. Horizon Utilities has experienced a material and general decline in load (and associated revenue)

¹ Manager's Summary, p. 7, para. 2.6, Table 3

across its Large User and General Service > 50 kW classes during the current economic downturn² – for example, in response to Board Staff interrogatory #4(b), Horizon Utilities advised that it anticipates a utility-wide revenue deficiency of approximately \$3.5 million in 2009 – but to illustrate the significance of the reduction related to the Subject Customer, the forgone revenue from that customer represented approximately 51% of the overall forgone revenue from Horizon Utilities' Large User class over the May 2008 – June 2009 period.³

4. The events surrounding the decline in the Subject Customer's load are discussed in the Manager's Summary accompanying the Application and in Horizon Utilities' confidential response to U.S. Steel Interrogatory #4. In the spring of 2009, the Subject Customer announced plans for an indefinite shutdown of its Hamilton operations. The Subject Customer's load subsequently dropped to approximately 10% of the level incorporated into the load forecast (based on 2006 actuals) used in Horizon Utilities' 2008 forward test year cost of service application. As the Board is aware, Horizon Utilities' distribution rates for the 2008 test year and the Incentive Regulation Mechanism ("IRM") years prior to its next rebasing are based on the rates established in the 2008 application.
5. In support of this Application, Horizon Utilities provided specific details, data, and relevant calculations together with plans for addressing the material unforeseen event and support for the Rate Rider. This Application included the manner in which Horizon Utilities proposes to allocate the Rate Rider to the various customer classes and the rationale for the selected approach.
6. With the passage of time through the interrogatory and hearing process, Horizon Utilities has updated its request for relief based on more current information regarding the Subject Customer's load. Initially, Horizon Utilities' Z-factor claim of \$2,850,486 was based on actual forgone revenue for the period May 1, 2008

² See Horizon Utilities' response to Board Staff interrogatory #10(b).

³ Manager's Summary, p. 5, para. 2.4

through June 30, 2009, and an anticipated distribution revenue deficiency for the period July 1, 2009 to April 30 2011, calculated based on the difference in the 2008 OEB-approved load forecast and a baseline volume of 12,000 kW, based on 9,000 kW, being the load established during the Subject Customer's shutdown, adjusted by an additional 3,000 kW for the announced startup of a small portion of the Subject Customer's operations. In response to Board Staff interrogatory #6, Horizon Utilities provided an updated version of Table 3 of the Manager's Summary that included updated actual demand data for the Subject Customer for the July – October 2009 period. In preparing that revised Table 3, Horizon Utilities also updated the estimated load for the Subject Customer from the 12,000 kW used in the Application to [REDACTED], for the November 2009 – April 2011 period. With those adjustments, the total forgone revenue for the three rate years was reduced to \$2,318,032.⁴ Horizon Utilities provided an updated calculation of its proposed distribution rate riders resulting from the updated load estimate as part of its response to VECC interrogatory #4(b).⁵ In both the original Application and the responses to interrogatories, Horizon Utilities assumed an implementation date of January 1, 2010. Finally, in response to Undertaking J1 given during the hearing, Horizon Utilities has:

- recalculated both the fixed and variable riders using a twelve month recovery period recognizing that it is more customer-friendly to have this rider come into force coincident with revised rates on May 1, 2010 for the 2010 rate year;
- incorporated the Subject Customer's actual November and December 2009 load data into the calculation; and
- based the forgone revenue estimate for the January 2010 – April 2011 period on the December 2009 actual demand of 44,000 kW, an increase

⁴ See Horizon Utilities' response to VECC interrogatory #4.

⁵ See "Updated Revised Table 5", provided in response to VECC interrogatory #4

over the demand figure used in Updated Revised Table 3 and Updated Revised Table 5 provided in response to VECC interrogatory #4.⁶

7. With these further updates, the total actual (May 2008 – December 2009) and estimated (January 2010 – April 2011) forgone revenue for the three rate years is \$2,191,246.⁷
8. Horizon Utilities delivered its Argument-in-Chief on Friday, February 5, 2010. The Board had also directed Board Staff ("Staff") and intervenors to deliver their submissions by Friday, February 12, 2010, with Horizon Utilities' reply argument due Friday, February 19, 2010. Staff submissions and those of the Consumers Council of Canada ("CCC"), Energy Probe ("EP") and the Vulnerable Energy Consumers Coalition ("VECC") were received on that date. The submissions of the School Energy Coalition ("Schools") were delivered on the Monday, February 15, 2010 Family Day statutory holiday for reasons provided in e-mail correspondence from counsel to Schools. On Wednesday, February 17, 2010, counsel to Horizon Utilities advised the Board that Horizon Utilities may require until Tuesday, February 23, 2010 to deliver its reply argument.
9. In this reply submission, Horizon Utilities repeats and relies upon the submissions made in its Argument-in-Chief. It has attempted to avoid repeating that submission here, except to the extent necessary to respond to Staff and intervenor submissions. This submission has been organized according to the following themes:
 - (a) A Z-factor event has occurred;
 - (b) Horizon Utilities has met the Board's tests for Z-factor eligibility;
 - (c) Applications for Z-factor relief are appropriate with respect to events occurring in both rebasing and IRM years;

⁶ Argument-in-Chief, p.6, para. 13

⁷ See Horizon Utilities' responses to VECC interrogatory #4 and Undertaking J1.

- (d) The forward-looking revenue losses should be recoverable;
 - (e) The December 23, 2008 notice and the timing of the Application were appropriate;
 - (f) Increases in the Subject Customer's load since mid-2009 should not be a basis for denial of Z-factor relief;
 - (g) Horizon Utilities has undertaken appropriate mitigation measures; and
 - (h) The forgone revenue should be allocated across all customer classes.
- (a) **A Z-factor event has occurred:**
- 10. In the intervenor submissions, the focus has tended to be on whether the Board's eligibility criteria for Z-factors have been met in this case. Horizon Utilities submits that they have, but acknowledges that not all intervenors agree.
 - 11. Staff have taken a different approach. Staff suggest⁸ that Horizon Utilities has failed to meet a threshold test of whether a Z-factor event has occurred. In support of the existence of this test, Staff cite the Board's Report on *3rd Generation Incentive Regulation for Ontario's Electricity Distributors* (the "3GIRM Report"), and more particularly, Staff refer to the Board's characterization of Z-factor events as those "genuinely external to the regulatory regime and beyond the control of management and the Board."⁹ (Staff emphasis)
 - 12. The implication of this Staff approach is that an event could meet all of the Board's Z-factor criteria but fail to be treated as a Z-factor. In effect, that is the position Staff have now taken in this proceeding. Prior to the filing of the Application, Horizon Utilities staff met with Board Staff to discuss the loss of the Subject Customer's load, and Board Staff suggested that this matter be addressed by way of a Z-factor application.¹⁰ In the Staff submission, Staff

⁸ See pages 5-7 of the Staff submission dated February 12, 2010.

⁹ Staff submission, at p.6

¹⁰ See Horizon Utilities' response to CCC interrogatory #7 and Tr. Vol.1, p.75, lines 13-14 and p.110, lines 8-10.

clearly agree that the materiality and prudence criteria have been met.¹¹ Staff also acknowledge, with respect to the causation test, that Horizon Utilities has established that the loss of revenue from the Subject Customer is outside the Large User load base upon which rates for 2008 and the 3rd Generation IRM period have been set¹² (this appears to be the key element of the causation test as set out in the 3GIRM Report). In Staff's view, however, the causation test has not been met because the amount is not directly related to the Z-factor event. The amount is not directly related to the Z-factor event because, in Staff's view, there is no such event. It appears from the submission that if Staff believed that a Z-factor event existed, then this test would also have been met.

13. Horizon Utilities discussed at length in its Argument-in-Chief the ways in which the event that is the subject of this Application has satisfied the Board's eligibility criteria. Horizon Utilities will discuss these criteria further below in response to the various submissions in that regard. On the question of whether this event can satisfy all of the Board's tests but still not be considered a Z-factor event, Horizon Utilities has the following comments:
14. First, in their submission, Staff appear to base their assertion that there has been no Z-factor event on the fact that customer losses and gains are an ongoing part of normal utility operations. Horizon Utilities notes that intervenors have suggested that that load will be gained or lost over time, and that this is a business risk for which distributors are compensated. Staff submit¹³ that "genuinely external to the regulatory regime" requires the event or occurrence to be one which is not experienced frequently and ordinarily as part of the utility's operations. Given the frequency of Large Use customer revenue losses which it has experienced, and that such losses are predictable during periods of

¹¹ Staff submission, at p.9.

¹² Staff submission, at p.8.

¹³ Staff submission, at p.7

economic downturn, Staff submits that Horizon has failed to establish that a Z-factor event has occurred.”

15. Horizon Utilities has never disputed the suggestion that utilities will gain and lose customers on an ongoing basis. Horizon Utilities indicated in its Application and during the course of this proceeding¹⁴ that it has experienced other reductions in load during the period addressed in the Application, and Horizon Utilities has acknowledged that not all reductions in load will trigger a Z-factor application. In fact, Horizon Utilities itself, in limiting its claim to revenue lost and to be lost in relation to the Subject Customer, has acknowledged that not all losses related to reductions in load would trigger applications to the Board for relief. However, what distinguishes the loss of the Subject Customer's load from other reductions experienced by Horizon Utilities, and what renders this event “genuinely external to the regulatory regime”, is its severity. As acknowledged by Staff, the loss of revenue in this case is material. In the period covered by this Application, Horizon Utilities will have lost over \$2 million in distribution revenue from a single customer. Horizon Utilities submits that it is not reasonable to expect a distributor of Horizon Utilities' size to plan for losses of this kind in the normal course of its operations. Among the factors that make this event extraordinary are:

- (a) the unique size and impact of the Subject Customer relative to other Horizon Utilities customers (similar to the area affected by a severe weather event in the more typical Z-factor application);
- (b) the severity of impact of the drop in Subject Customer's load, which is not frequent and ordinary in the context of more usual or historical load variability (similar to the severity of the extraordinary weather event); and

¹⁴ See Horizon Utilities' responses to Board Staff interrogatory # 4(a) and CCC interrogatory #6, and Tr. Vol.1, p.37, lines 1-24 and p.40, lines 3-12.

- (c) the fact that the decline in load occurred during a sharp decline in economic conditions (a “one in one hundred year event”) not generally experienced in several decades (similar to the extraordinary and unusual nature of a severe weather event in the context of the frequency in which one would expect such an event to occur).
16. Second, Horizon Utilities submits that the Staff position, if accepted by the Board, could be used to arbitrarily deny any application that relates to an event that otherwise meets the Board’s criteria. For example, weather-related events such as ice storms are typically cited as examples of events that could qualify for Z-factor treatment. In fact, during second generation performance based regulation, Z-factor events were limited to “changes in tax rules and natural disasters”.¹⁵ In the past, the Board has allowed recovery of costs related to winter storms.¹⁶ However, even in the context of natural disasters, the Board’s tests for Z-factor eligibility have to be met. This clearly suggests that it is incumbent on the distributor to do a certain degree of planning for storm-related costs – as the Board is well aware, distributors including Horizon Utilities budget significant amounts for reactive maintenance. Applying Staff’s reasoning, even if a major storm event – the most typical of Z-factor events – met all of the Board’s eligibility requirements, relief should be denied on the basis that harsh weather is experienced frequently and ordinarily in the course of the utility’s operations and the event is therefore not genuinely external to the regulatory regime. Under the Staff approach, it is difficult to see what could be properly considered an “extraordinary event” for which Z-factor relief would be available.

¹⁵ Report of the Board on Cost of Capital and Second Generation Incentive Regulation for Ontario’s Electricity Distributors, at p.34:

http://www.oeb.gov.on.ca/documents/cases/EB-2006-0088/report_of_the_board_201206.pdf

¹⁶ See, for example, EB-2007-0514 (Canadian Niagara Power Inc. – Fort Erie), EB-2007-0595 (CNPI – Port Colborne), EB-2007-0571 (Peterborough Distribution Inc.) and EB-2007-0551 (Lakeland Power Distribution Ltd.)

17. Finally, Horizon Utilities is concerned that Staff have mischaracterized the Board's treatment of Z-factors. Staff have presented the words "genuinely external to the regulatory regime and beyond the control of management and the Board" as a threshold test for eligibility, while omitting the context within which those words were used. At paragraph 17 of its Argument-in-Chief, Horizon Utilities quoted the full paragraph from which Staff took those words:

"The Board has determined that the eligibility criteria [Causation, Materiality and Prudence, addressed at pages iv and v to the Appendix to the 3GIRM Report and pages vi and vii of Appendix B to the Supplemental 3GIRM Report] are sufficient to limit Z-factors to events genuinely external to the regulatory regime and beyond the control of management and the Board."

18. Horizon Utilities submits that it is the Board's eligibility criteria, and not a new threshold test created by Staff, that will establish the existence of a Z-factor. Where the board's three tests are met, there is a Z-factor event. The 3GIRM Report makes no mention of a threshold test, and the eligibility criteria – Causation, Materiality, and Prudence – are clearly explained in the Appendices to the 3GIRM Report and the Supplemental 3GIRM Report. With respect, the approach suggested by Staff, with its new threshold test, is not reasonable. It effectively ignores the Board's criteria and the significance the Board itself gave to them, and it lends itself to arbitrary decision making in that the criteria, if they now have any significance at all, can be ignored at any time. The Staff comment later in their submission¹⁷, that "...large customer revenue losses could be a Z-factor event if the loss of revenue from a particular customer could be shown to have a significant enough impact on the utility to qualify as genuinely external to the normal regulatory experience" only serves to increase the potential for arbitrary results.
19. As discussed in the Manager's Summary and its Argument-in-Chief, Horizon Utilities submits that the event in question has met the Board's eligibility criteria for Z-factors. Horizon Utilities submits that this has been confirmed by Staff (with

¹⁷ Staff submission, at p.15

respect to causation, Staff acknowledge that the amount claimed is clearly outside of the base on which 2008 and 3GIRM rates have been set, and Horizon Utilities notes that there has been no suggestion by Staff that the amounts claimed do not relate to the loss of revenue from the Subject Customer), and that a Z-factor event has occurred. Horizon Utilities urges the Board to reject what appears to be a new test proposed by Staff that is outside of current Board policy. However, even if the Board were to accept the Staff suggestion that another test exists, Horizon Utilities has met it. An event of this kind – a decline (by the spring of 2009) of over 90% of the load from the Subject Customer, during a "one in 100 year decline in the economy" as discussed by Horizon Utilities' Senior Vice President and Chief Financial Officer – is both genuinely external to the regulatory regime and beyond the control of management and the Board.

20. At pages 10 to 13 of their submission, Board Staff discuss the matter of "financial impairment" – in that regard, Staff comment on Horizon Utilities' deferral of certain projects in order to address the loss of revenue from the Subject Customer, and on Horizon Utilities' intention to file a forward test year cost of service distribution rate application later this year for rebasing in 2011.
21. Horizon Utilities discussed the deferrals in its Argument-in-Chief, in the context of the Board's materiality criterion.¹⁸ At paragraph 30 of the Argument-in-Chief, Horizon Utilities submitted that:

"With respect to the portion of the test relating to a significant influence on the operation of the distributor, the evidence indicates that notwithstanding approximately \$700,000 in deferrals of training and development expenditures and deferrals of new hires and the filling of vacant positions,¹⁹ Horizon Utilities' 2008 actual OM&A expenditures exceeded 2008 Board-approved OM&A by approximately \$1 million.²⁰ Horizon Utilities had taken steps to defer certain 2009 projects valued at approximately \$2.1 million (approximately \$1.5 million in OM&A and approximately \$600,000 in capital) that would not result in significant business or operational risk

¹⁸ Argument-in-Chief, pages 12-14, at paras. 30-32

¹⁹ See Horizon Utilities' response to VECC interrogatory #5(b).

²⁰ See Horizon Utilities' response to Board Staff interrogatory #4(a) (updated version of Table 1 from EB-2007-0697, Exhibit A, Tab 2, Schedule 4, page 1 of 1).

in the very short term.²¹ For the most part, these deferrals do not create any permanent savings – rather, they simply postpone necessary expenditures to a subsequent year. In the case of the \$515,000 in Human resources-related deferrals shown in Horizon Utilities' response to Board Staff interrogatory #5(a), approximately \$180,000 of that amount has been reallocated to contracted services.²² Horizon Utilities had determined through its normal budgeting process that these projects were necessary. They must still be completed soon, otherwise "other projects in the coming years' budgets will also be delayed and we are concerned that this will eventually lead to greater risks to reliability, customer service and productivity improvements."²³ Horizon Utilities notes that even with these deferrals, its revenue shortfall is not offset. For example, its capital expenditure deferrals of almost \$700,000 in 2009 are outweighed by increases of approximately \$2 million in 2009 capital spending due to increases in reactive maintenance and two significant capital programs going over budget.²⁴

22. At page 11 of their submission, Board Staff state that "based on the above instances, it is unclear exactly what the extent of the overall cuts undertaken by Horizon was, or even if on an overall basis there were cuts, and, if so, to what extent such cuts were specifically related to the revenue losses from the Subject Customer." Horizon Utilities submits that the answers to these questions are on the record in this proceeding. The cuts are not specifically related to the Subject Customer but have been undertaken on an enterprise-wide basis to address broad and related losses in revenue, most materially from the commercial class of customers. They are not sufficient to offset those losses, nor are they, for the most part, permanent cost reductions.
23. Staff suggest that there is no guarantee that a utility will achieve its allowed Return on Equity ("ROE").²⁵ Horizon Utilities has not suggested that there is any such guarantee.²⁶ During the hearing, Horizon Utilities' Senior Vice President and Chief Financial Officer confirmed that there is no guarantee in this regard:

MR. BUONAGURO: Well, there was an earlier answer from Mr. Basilio, I believe, where he was suggesting that the Board should be doing things to help it achieve the embedded ROE, the ROE, the allowed ROE.

²¹ See Horizon Utilities' response to Board Staff interrogatory #5(a).

²² See Tr. Vol.1, p.155, line 22 – p.156, line 8.

²³ Tr. Vol.1, p.38

²⁴ Tr. Vol. 1, pp.57-58

²⁵ Staff submission, at p.12.

²⁶ Tr. Vol.1, p.60, lines 27-28 and p.61, lines 1-8

MR. BASILIO: No. I think my suggestion was - and I think the Board does provide, you know, a framework for this - is the opportunity for utilities to achieve their rates of return on a sustainable basis, you know, broadly speaking.

And that is -- again, without trying to be presumptuous, the Board has created such framework because it believes that's in the best interests of a sustainable approach to distribution infrastructure in the province, a balanced, sustainable approach.

I don't think the Board should -- I mean, I certainly don't interpret that framework as a guarantee for that return. And I don't believe I said that. But you know the framework should provide for returns in support of sustainable distribution infrastructure investment.²⁷

24. Horizon Utilities understands that in the normal course, the Board's rate making regime provides the opportunity, and not the guarantee, of earning the requested ROE, and that there may be challenges in doing so -- the ability to earn the full ROE will depend in part on the assumptions made in the rebasing application corresponding to actual results -- but Horizon Utilities submits that the circumstances it currently faces make it impossible to earn anywhere near the full ROE. As noted by Staff, ROE for 2009 and 2010 are expected to be 6.29% and 6.11%, respectively, and for 2008, after adjusting for recoveries related to previous years, including recognition of revenue related to LRAM, SSM and Smart Meters, Horizon Utilities' ROE for 2008 (adjusted for LRAM/SSM, Smart Meters and an OMERS recovery) was 6.11%.²⁸ This Application is not about guaranteeing Horizon Utilities the 8.57% ROE it was allowed in its 2008 rebasing application -- as the Board is well aware from the evidence in this proceeding, the forgone revenue related to the Subject Customer represents only approximately one-half of the revenue lost from Horizon Utilities' Large User class in the retrospective period. Rather, as discussed at paragraph 10 of the Argument-in-Chief, "the Rate Rider will re-establish a significant portion of Horizon Utilities' OEB-approved Large User distribution revenue requirement that is required to carry on its operations and that is not being realized due to the unforeseen and significant reduction in the Subject Customer's activities in the Horizon Utilities service area."

²⁷ Tr. Vol.1, p.94, line 21 -- p.95, line 11

²⁸ See Horizon Utilities' response to Board Staff interrogatory #10(a).

25. In addition to their discussion of ROE, Staff suggest²⁹ that the cash flow impairment that Horizon Utilities has experienced does not constitute a form of financial distress such that it could be considered genuinely external to the normal regulatory regime. With respect to the Staff comments at page 12 of their submission, Horizon Utilities has not suggested that it is unable to finance its capital program as a result of the loss of revenue from the Subject Customer. At paragraph 32 of its Argument-in-Chief, Horizon Utilities acknowledged that "...the reductions in load and revenue related to the Subject Customer and others have not created a situation in which Horizon Utilities is no longer sustainable", however, Horizon Utilities went on to state that:

"revenue continues to be lost to a degree that could not have been anticipated, notwithstanding mitigation efforts (which represent postponements rather than reductions). Horizon Utilities is adversely affected by this reduction in revenue. Its bank indebtedness has increased by approximately \$30 million in the past year.³⁰ Its requirements for working capital have increased significantly; although the Z-factor application does not seek to recover such increase as might be allocated to the Subject Customer.³¹ The amount of financial capacity for future investments will decrease significantly due to the loss of equity against which Horizon Utilities can borrow.³² As Mr. Basilio testified, this situation "...is a detriment to the utility. It is not supportive of a sustainable utility with a view towards the long term."³³

26. As with the creation of a new test for Z-factor eligibility as discussed above, Horizon Utilities is concerned that Staff are creating an additional "financial distress" test as another barrier to access to Z-factor relief. In the past, the Board has allowed for the possibility of distributors coming forward to request relief from the Board where they are in "financial distress". For example, at paragraph 3.2.2 of its September 29, 2000 Decision on the Minister's Directive of June 7, 2000 (RP-2000-0069), the Board wrote the following with respect to the phasing in of the Market Adjusted Revenue Requirement in the initial establishment of unbundled distribution rates (in part):

²⁹ Staff submission, p.12

³⁰ Tr. Vol.1, p.62

³¹ Tr. Vol.1, p.74, lines 18-20

³² Tr. Vol.1, p.64

³³ Tr. Vol.1, p.65

The Board recognizes that there may be circumstances where the MARR phasing-in may result in financial distress for a utility. In the context of the phase-in period, financial distress generally does not mean below market returns, lower returns compared to other utilities, or loss of revenue due to restructuring, or from anticipated adverse business conditions. Financial distress generally means the inability to meet financial obligations incurred prudently. Should a utility perceive that it is in genuine financial distress, it has the opportunity at any time to make its case before the Board.

27. Horizon Utilities submits that such a "financial distress" standard was not incorporated into the Z-factor provisions of the Board's 1st Generation Rate Handbook (issued in March 2000 and revised in November 2000), notwithstanding that the Decision on the Minister's Directive did have impacts on the Handbook. Similarly, such a standard has not been a part of the Board's Z-factor criteria since that time. Horizon Utilities is concerned that as with the other new test being imposed by Staff, the imposition of a new "financial distress" test renders the Board's eligibility criteria, arrived at through a lengthy consultative process, meaningless. Once again, all of the Board's criteria can be met, but an application could still be denied based on arbitrary grounds. Once again, Horizon Utilities submits that it has met the Board's eligibility criteria and that the Board should grant the requested relief.
28. Finally, Horizon Utilities notes that at page 12 of their submission, Staff refer to cross-examination by VECC's counsel with respect to the deadband of ± 300 basis points mentioned in the 3GIRM Report, and Staff note that Horizon Utilities' projected ROEs for 2009 and 2010 are within the deadband. Staff go on to note that a utility earning above the deemed ROE but below the top of the deadband would not be expected to return its earnings.
29. With respect, Horizon Utilities submits that the deadband is not relevant to the Z-factor eligibility criteria, and instead appears to be yet another obstacle being created to prevent Z-factor relief. While it is not entirely clear why it is being raised, it would appear that the Staff implication is that only a situation in which a utility's returns fall below the deadband should be considered for Z-factor relief (similar to the "financial distress" comments discussed previously); or that

because earnings in excess of the deemed rate are not subject to sharing, then costs related to events that bring the utility's earnings below the deemed rate should not be recoverable (similar to the new Staff test related to "genuinely external to the regulatory regime" discussed previously). Horizon Utilities has four comments in this regard:

- (a) First, while the deadband is mentioned in the 3GIRM Report, it pertains to the Board's consideration of off-ramps from the IRM regime. Even during cross-examination in the hearing, the exchange was in the context of whether Horizon Utilities would be able to bring a rebasing application this year.³⁴ The 300 basis point deadband does not form part of the eligibility criteria for Z-factor events.
- (b) Second, the concept of earnings sharing has been considered by the Board on a number of occasions, and has been rejected by the Board on each occasion.³⁵ Horizon Utilities submits that the fact that earnings in excess of the deemed ROE are not subject to sharing is irrelevant to the question of whether Horizon Utilities should be permitted to recover forgone revenue related to this loss of load. If it were, then it is difficult to see how any distributor would be eligible for Z-factor relief, since in all cases, utilities are permitted to earn in excess of their deemed returns without sharing.
- (c) Third, and similarly, leaving aside the matter of earnings sharing, the suggestion that the Z-factor event must trigger incremental costs or revenue losses that bring the distributor's return below the deadband would eliminate even the more typical Z-factor claims and would render the Board's materiality threshold meaningless.

³⁴ Tr. Vol.1, pp.90-94

³⁵ For example, see pages 42-43 of the Board's 3GIRM Report and pages 37-38 of the Board's December 20, 2006 Report on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors.

(d) Finally, as discussed below in the context of the forward-looking revenue losses, moving out of the 3GIRM regime and making a cost of service application may address lost load on a going forward basis, but that does not address the lost revenue during the May 2008 – April 2011 period. Horizon Utilities submits that it is the Board's Z-factor mechanism that allows the opportunity to address that revenue loss.

(b) Horizon Utilities has met the Board's eligibility criteria for Z-factors.

30. Horizon Utilities' submissions with respect to how the Application has met the Board's eligibility criteria can be found at paragraphs 24 – 34 of the Argument-in-Chief, and those submissions remain applicable notwithstanding the submissions of the intervenors.

31. In the following paragraphs, Horizon Utilities will address a number of the matters raised by the intervenors with respect to the eligibility criteria. For the Board's convenience, the criteria are repeated here:

Causation – Amounts should be directly related to the Z-factor event. The amount must be clearly outside of the base upon which rates were derived;

Materiality – The amounts must exceed the Board-defined materiality threshold and have a significant influence on the operation of the distributor; and

Prudence – The amount must have been prudently incurred. This means that the distributor's decision to incur the amount must represent the most cost-effective option (not necessarily least initial cost) for ratepayers.

- **Causation**

32. None of the intervenors has suggested that the amount that is the subject of this Application is within the base on which Horizon Utilities' rates were derived. What they have suggested, though, is that any risk of a decline in load – even of the scale set out in this Application – should be borne entirely by Horizon Utilities.

33. As discussed above, Horizon Utilities accepts that a certain level of risk is appropriately borne by the distributor, whether it is for losses of load or severe weather events. As for what an appropriate level of risk should be, Horizon Utilities submits that the Board, in establishing the Z-factor eligibility criteria, has already determined that the materiality threshold represents a reasonable demarcation between a normal business risk to be borne by the distributor and an extraordinary event that will be eligible for relief.

- **Materiality**

34. Board Staff acknowledge that the amount claimed - \$2,318,032, as revised – exceeds the Board's materiality criterion. Schools³⁶ and VECC³⁷ submit that the forgone revenue for each year should be reduced by the corresponding reductions in working capital, and that if that is done, the materiality threshold is not met for 2009 or 2010, so that the claim should be denied in respect of those years.
35. Horizon Utilities disagrees. As discussed at paragraph 32 of the Argument-in-Chief, with the reduction in distribution revenue, Horizon Utilities' "bank indebtedness has increased by approximately \$30 million in the past year."³⁸ Its requirements for working capital have increased significantly; although the Z-factor application does not seek to recover such increase as might be allocated to the Subject Customer.³⁹ The amount of financial capacity for future investments will decrease significantly due to the loss of equity against which Horizon Utilities can borrow.⁴⁰ As Mr. Basilio testified, this situation "...is a detriment to the utility. It is not supportive of a sustainable utility with a view towards the long term."⁴¹ As discussed below, Horizon Utilities' commercial

³⁶ Schools submission, at p.4, para.21

³⁷ VECC submission, at p.6, para.31

³⁸ Tr. Vol.1, p.62

³⁹ Tr. Vol.1, p.74, lines 18-20

⁴⁰ Tr. Vol.1, p.64

⁴¹ Tr. Vol.1, p.65

distribution revenues are down by \$4.8 million in 2008 and \$2.2 million in 2009,⁴² and are projected to be down by \$2.5 million in 2010.⁴³ Horizon Utilities remains well behind its Board approved revenue requirement, and its overall forgone revenue, even with the various mitigation measures, remains far in excess of the amount attributable to the Subject Customer and being claimed in this Application. In its updated response to Schools Interrogatory #14, Horizon Utilities explained that, in fact, its working capital requirement has increased by \$17 million for the May 2008 to December 2009 period as a result of the loss of significant amounts of commercial load. Any attempt to impute savings in working capital based on a strict calculation of the working capital related to the Subject Customer is misleading when compared to the reality of actual changes in such for related periods, and is outweighed by Horizon Utilities' increased costs and by other revenue shortfalls across the utility.

- **Prudence**

36. As noted by Board Staff, "there is no evidence on the record in this proceeding which would suggest that imprudent actions by Horizon led to the loss of revenues from the Subject Customer." Horizon Utilities agrees, and as discussed in the Argument-in-Chief, it has acted prudently in several ways:

"...in deferring certain expenditures which it has determined may be deferred in the very short term without incurring any immediate risk to system reliability or customer safety. Although as noted above, for the most part, none of the expenditures can be eliminated, which means that they will have to be added to future expenditures. The deferrals have been more than offset by unavoidable increases in capital expenditures related to obligations to connect customers and reactive maintenance. Horizon Utilities also submits that it is acting prudently in making this Application, which has minimal impacts on its customers while recovering revenue necessary to maintain the safe and reliable supply of electricity to those customers. Finally, Horizon Utilities is acting prudently in accelerating the filing of its next forward test year cost of service rate application to this year, for implementation in May 2011. While this will not address the loss of revenue for the period prior to May 2011, it is hoped that this will address the reduction in load on a prospective basis."⁴⁴

⁴² Updated response to Schools interrogatory #14, January 27, 2010, at p.2

⁴³ Response to Board Staff interrogatory #10(b)

⁴⁴ Argument-in-Chief, at p.14, para.34

37. Contrary to VECC's suggestion that the prudence criterion has no application to revenue lost in association with reduced load,⁴⁵ Horizon Utilities believes that imprudent actions by a distributor could, in some cases, contribute to a reduction in load – for example, where a distributor allowed service reliability to deteriorate in relation to a large customer. However, that is not the situation in this case, and Horizon Utilities maintains that the prudence criterion is applicable and has been met.

(c) Applications for Z-factor relief are appropriate with respect to events occurring in both rebasing and IRM years.

38. CCC suggests that Z-factor relief should not be available for 2008, in part because the 3GIRM parameters are meant to apply to the incentive regulation period.⁴⁶
39. Horizon Utilities submits that the CCC position is not reasonable, nor is it supported by relevant case law. As discussed at paragraph 18 of Horizon Utilities' Argument-in-Chief,⁴⁷ the Board has provided for the treatment of unforeseen or extraordinary events outside of management's control through the application of Z-factor adjustments since the restructuring of Ontario's electricity sector and the rate making regime for Ontario's distribution utilities under the *Energy Competition Act, 1998*. As noted above, and as acknowledged by Board Staff, the amount claimed in this Application is clearly outside of the base on which both 2008 and 3GIRM rates have been set. Horizon Utilities submits that if an amount is outside of the base on which rates have been set, then the amount should be recoverable irrespective of whether the amount has arisen in a cost of service year or an IRM year.

⁴⁵ VECC submission, at p.3, para.10

⁴⁶ CCC submission, at p.5, para. 21

⁴⁷ See also Horizon Utilities' response to CCC interrogatory #3.

40. The Horizon Utilities position is supported by the Board's December 11, 2009 Decision in Toronto Hydro-Electric System Limited's Contact Voltage Z-factor application.⁴⁸ At page 5 of that Decision, the Board found:

"The Panel agrees generally with THESL that the procedural distinctions made by SEC and VECC are too technical in nature, and not of substance. A distributor has the legal right to bring an application to the Board for what it may consider to be extraordinary circumstances. A cost of service regime cannot bar a distributor from bringing applications for relief for what it considers to be a genuinely extraordinary event. The fact that the Board has not specifically enunciated the circumstances and criteria that would apply for distributors under a cost of service regime as it has done for an IRM regime, does not mean that the application brought by THESL should fail outright. Rather, the issue for the Panel is what should be the standards or criteria for assessing THESL's requested relief."

41. Later on the same page, the Board found that "assessment of the relief sought on the basis of the Z-factor criteria enunciated in the 3GIRM Report can be applicable to the relief sought in this case as the Applicant has done."
42. Similarly, Horizon Utilities submits that it is appropriate to assess the current Application on the basis of the Z-factor criteria set out in the 3GIRM Report.

(d) The forward-looking revenue losses should be recoverable:

43. Board Staff offer four reasons for denying the forward-looking component of the application:
- (a) There appears to be significant volatility in the Subject Customer's future load;
 - (b) Horizon Utilities is not pursuing this aspect of its Application aggressively;
 - (c) Horizon Utilities intends to apply for cost of service rate review later this year; and
 - (d) Because (i) amounts related to Z-factor events are to be recorded in Account 1572 and (ii) the Board's practice is to base recovery of balances

⁴⁸ EB-2009-0243 – available at:
http://www.oeb.gov.on.ca/OEB/_Documents/Decisions/Decision_THESL_%20contactvoltage_20091210.pdf

in Account 1572 on audited financial statements and (iii) the Board has not previously approved a forward-looking recovery, the Z-factor guidelines do not apply to forward-looking recoveries.

44. Horizon Utilities offers the following submissions in this regard.

- (a) First, Horizon Utilities acknowledges that there is uncertainty as to the Subject Customer's load in the January 2010 – April 2011 period. It is clear, though, that the load is expected to remain far below the load upon which Horizon Utilities' 2008 rates were based. Horizon Utilities has taken steps to protect its customers in this regard through the proposed variance account. Staff, in their submission, supported the use of a variance account.⁴⁹
- (b) Second, to be clear, while Horizon Utilities may not be pursuing the prospective aspect of the Application aggressively, it has never suggested that it does not wish to recover forgone revenues related to the loss of the Subject Customer's load for the January 2010 – April 2011 period. On the contrary, Horizon Utilities can confirm that it fully intends to seek that recovery from the Board. As discussed at paragraph 37 of the Horizon Utilities Argument-in-Chief, the approach proposed in the Application, based on recovery of actual forgone revenue and a variance account to track the difference between actual revenues and those based on a baseline load (now proposed to be [REDACTED] for the January 2010 – April 2011 period) is preferable to the alternative – a Z-factor application for revenue forgone to date based on actual results, to be followed by an almost identical application for similar relief based on a set of actuals for a later period – which creates unnecessary cost, complexity and a multiplicity of proceedings. Horizon Utilities submits that the proposed variance account provides an appropriate safeguard to ensure that it does

⁴⁹ Staff submission, at pp.16-17

not over- or under-recover the revenue lost as a result of changes in the Subject Customer's operations.

- (c) Third, it is correct that Horizon Utilities intends to file its cost of service application for rates effective May 1, 2011 later this year. However, as discussed at paragraph 31 of the Argument-in-Chief, this will allow Horizon Utilities to address the significant loss of load across the utility, including that of the Subject Customer, on a prospective basis, but the forgone revenue for the May 2008 – April 2011 period must still be addressed, and a forward test year application will not accomplish this.
- (d) Finally, Staff appear to be suggesting that the Board's accounting practices, and not its Z-factor policies, should be determinative of the availability of relief in respect of the prospective period. With respect, this approach is wrong in a number of ways. First, the Board has established policies related to Z-factor events, and those events have historically contemplated changes in tax policy that may have prospective consequences⁵⁰. The fact that an event with prospective consequences has not yet been the subject of an application for relief is irrelevant. Second, Horizon Utilities has proposed the use of a variance account specifically in order to true up actual revenue from the Subject Customer to the value used in calculating the Z-factor-related rate riders. This approach accomplishes exactly what Staff suggest is typically done with Z-factors – that is, that recovery is ultimately based on actual values. The Horizon Utilities approach as proposed in the Application addresses the Staff concerns. Board Staff agree that if the Application were allowed, a variance account would be appropriate.

45. For their part, CCC and VECC also submit that there should be no recovery in respect of prospective revenue losses. In CCC's case, the reason is because

⁵⁰ This is discussed in Horizon Utilities' Argument-in-Chief, at para. 36

2010 revenue losses are speculative.⁵¹ VECC attempts⁵² to create a distinction between forecasting amounts related to a Z-factor event (which VECC acknowledges may be appropriate) and forecasting a Z-factor event itself – that in future years the event of “reduced load” will manifest and will meet the materiality threshold.

46. In this regard, Horizon Utilities reiterates its submission that the event that is the subject of this Application is a single event, and that its proposed variance account should address any concern that the Subject Customer’s loads may increase beyond the [REDACTED] currently being proposed as the baseline. What is clear on the facts of this Application is that in a year, the Subject Customer’s load has only risen to approximately [REDACTED] of the approximately 100 MW/month level that formed the basis for Horizon Utilities’ 2008 and 3GIRM rates. Horizon Utilities suggests that it is extremely unlikely to expect that the Subject Customer’s monthly loads from now through April 2011 will approach that level – and if they do, excess recoveries will be returned to Horizon Utilities’ customers through the disposition of the variance account.

(e) The December 23, 2008 notice and the timing of the Application were appropriate:

47. At paragraphs 20 and 23 of the Argument-in-Chief, Horizon Utilities stated:

Horizon Utilities also submits that the making of adjustments to the Z-factor amount initially claimed is consistent with the Board’s approach as set out in its Filing Guidelines. In its comments regarding notice, the Board wrote: “Distributors are expected to report events to the Board promptly and apply to the Board for any amounts claimed under Z-factor treatment with the next rate application. This will allow the Board and any affected distributor the flexibility to address extraordinary events in a timely manner. **Subsequently, the Board may review and prospectively adjust the amounts claimed under Z-factor treatment.**” (Horizon Utilities’ emphasis)

In its Filing Guidelines⁵³, the Board indicates its expectation that distributors report events to the Board promptly. Horizon Utilities provided notice to the OEB on December 23, 2008 expressing its ongoing concerns regarding the announced shutdowns of three Large User Customers and

⁵¹ CCC submission, at p.8, para.26

⁵² VECC submission, at p.9, para.49

⁵³ Appendix B to the Supplementary 3GIRM Report

the consequences of the events and advised the OEB that "The persistence of the Large User shutdowns noted [in the letter] will result in a Z-factor claim by Horizon Utilities."⁵⁴ Subsequent to this notice, in the Spring of 2009, the Subject customer announced that its shutdown would be extended indefinitely.

48. Horizon Utilities notified the Board when it appeared that the Subject Customer's load was beginning to decline significantly. CCC submits⁵⁵ that "the December 23, 2008 "notice" has no legal status and no legal, or practical, effect. Horizon must either apply for Z-factor relief or not. It did not apply for that relief until some nine months after that "notice". The "notice" does not excuse the delay, or protect Horizon from the consequences of that delay." Horizon Utilities has the following comments in this regard.
49. Horizon Utilities agrees that the notice does not constitute an application, and that a distributor must either apply for relief or not. The notice is, however, an expectation of the Board, and Horizon Utilities submits that it has met that expectation. Horizon Utilities also applied for relief. Horizon Utilities cannot agree that there has been a delay as alleged by CCC. As CCC observes, by May of 2009, the Subject Customer's load was under 10,000 kW. The Application was filed in September, and Horizon Utilities' witness panel provided reasons for the timing of the Application. Additionally, Horizon Utilities explained its approach to the timing and filing of this Application in its response to CCC interrogatory #1. Horizon Utilities submits that the September 3, 2009 filing of the Application was not unreasonable under the circumstances. Moreover, if the Board's expectation is that the request for Z-factor relief will be made with the next rate application, the timing of the Z-factor application is entirely appropriate, as the Z-factor Application and Horizon Utilities' 3GIRM application were filed only days apart. It is the CCC approach, in which Horizon Utilities would have made an application much earlier, which is less consistent with the Board's

⁵⁴ A copy of Horizon Utilities' letter was provided in response to VECC interrogatory #2(a).

⁵⁵ CCC Submission, p. 5, para. 18

expectations. Horizon Utilities submits that the Board should disregard the CCC submissions with respect to delay in the filing of the Application.

50. On a related note, the EP submission⁵⁶ speaks to a steady decline in load since March of 2007, and questions whether there has been a triggering event for the Z-factor but Horizon Utilities submits that this is not accurate. As discussed by Horizon Utilities in its response to Schools interrogatory #1, there were declines in load on the part of the Subject Customer, but load rebounded in subsequent months. As Horizon Utilities has explained in the Manager's Summary and at paragraphs 6 and 36 of the Argument-in-Chief, the event consists of the both the past reduction in revenue due to a virtual shutdown of the Subject Customer's operations for a sustained period, and the anticipated forgone revenue through the 2010 rate year, since the load is still less than half of the expected load on which the 2008EDR application was based. The information with respect to the Subject Customer's activities that formed the basis for Horizon Utilities' decision to bring this Application was provided in response to U.S. Steel Canada Interrogatory #4. This is a prolonged event, but it is a single event.

(f) Increases in the Subject Customer's load since mid-2009 should not be a basis for denial of Z-factor relief.

51. EP has submitted⁵⁷ that the increase in load from the June 2009 low of 8,991 MW "does not seem to correspond well with the claim that the Subject Customer has ceased operations in Hamilton. Therefore, the contention that the triggering event was an indefinite shutdown of the Customer's Hamilton operations appears to Energy Probe to be suspect." EP goes on to submit⁵⁸ that "Without clear evidence that the Subject Customer will not further increase its load...the Applicant has not demonstrated causality sufficient to grant Z factor relief." EP does not distinguish between that portion of the Application that is based on

⁵⁶ EP submission, at p.6, para.24

⁵⁷ EP submission, at p.5, para.20

⁵⁸ *Ibid*, at p.5, para. 21

actual load and the prospective portion of the Application. In EP's view, the entire Application should be denied. Horizon Utilities has the following comments in this regard:

52. The Energy Probe position is similar to that of Board Staff, in that there is a suggestion that an applicant can meet the Board's Z-factor eligibility criteria but still be denied relief – here, there may be causality, but not enough causality. Horizon Utilities submits that this approach to the Board's criteria should not be accepted. As with the Staff position, it renders the Board's criteria largely meaningless, and creates the potential for arbitrary outcomes.
53. More particularly, Horizon Utilities reiterates that it has satisfied the Board's eligibility criteria for Z-factor relief. While Horizon Utilities [REDACTED] from approximately 9 MW to [REDACTED], it remains at less than one-half of the load upon which Horizon Utilities' 2008 rates were based. Even with increases in actual loads through December 2009, and even based on a load of 44 MW for the prospective portion of the claim, Horizon Utilities meets the Board's materiality test. The possibility that the load will increase between now and Horizon Utilities' rebasing effective May 1, 2011 is addressed through the use of the proposed variance account. That possibility should not form the basis for the denial of the Application.

(g) Horizon Utilities has undertaken appropriate mitigation measures:

54. At paragraph 30 of its Argument-in-Chief, Horizon Utilities explained the measures that it has taken to defer certain expenditures in order to deal with its loss of load:

With respect to the portion of the test relating to a significant influence on the operation of the distributor, the evidence indicates that notwithstanding approximately \$700,000 in deferrals of training and development expenditures and deferrals of new hires and the filling of vacant positions,⁵⁹ Horizon Utilities' 2008 actual OM&A expenditures exceeded 2008 Board-approved

⁵⁹ See Horizon Utilities' response to VECC interrogatory #5(b).

OM&A by approximately \$1 million.⁶⁰ Horizon Utilities had taken steps to defer certain 2009 projects valued at approximately \$2.1 million (approximately \$1.5 million in OM&A and approximately \$600,000 in capital) that would not result in significant business or operational risk in the very short term.⁶¹ For the most part, these deferrals do not create any permanent savings – rather, they simply postpone necessary expenditures to a subsequent year. In the case of the \$515,000 in Human resources-related deferrals shown in Horizon Utilities' response to Board Staff interrogatory #5(a), approximately \$180,000 of that amount has been reallocated to contracted services.⁶² Horizon Utilities had determined through its normal budgeting process that these projects were necessary. They must still be completed soon, otherwise "other projects in the coming years' budgets will also be delayed and we are concerned that this will eventually lead to greater risks to reliability, customer service and productivity improvements."⁶³ Horizon Utilities notes that even with these deferrals, its revenue shortfall is not offset. For example, its capital expenditure deferrals of almost \$700,000 in 2009 are outweighed by increases of approximately \$2 million in 2009 capital spending due to increases in reactive maintenance and two significant capital programs going over budget.⁶⁴

55. Horizon Utilities submits that it has acted responsibly in this regard, although it is clear that the deferrals do not offset Horizon Utilities' loss of revenue due to load reductions. It should be kept in mind that this Z-factor Application seeks to address only a portion of Horizon Utilities' overall revenue reductions. The CCC⁶⁵ and VECC suggestion⁶⁶ that Horizon Utilities has realized savings of \$320,000 in 2008 and 2009 related to deferrals in hiring and filling of vacancies and that these savings should be deducted from any Z-factor recovery is misleading. It assumes that were it not for the loss of the Subject Customer's load, Horizon Utilities would be achieving the full amount of revenue anticipated in its 2008, 2009 and 2010 revenue requirements. That is simply false – as noted above, the evidence is that Horizon Utilities' commercial distribution revenues are down by \$4.8 million in 2008 and \$2.2 million in 2009,⁶⁷ and are projected to be down by \$2.5 million in 2010.⁶⁸ Horizon Utilities remains well behind its Board approved revenue requirement, and its overall forgone revenue,

⁶⁰ See Horizon Utilities' response to Board Staff interrogatory #4(a) (updated version of Table 1 from EB-2007-0697, Exhibit A, Tab 2, Schedule 4, page 1 of 1).

⁶¹ See Horizon Utilities' response to Board Staff interrogatory #5(a).

⁶² See Tr. Vol.1, p.155, line 22 – p.156, line 8.

⁶³ Tr. Vol.1, p.38

⁶⁴ Tr. Vol. 1, pp.57-58

⁶⁵ CCC submission, at p.7, para.24

⁶⁶ VECC submission, at p.9, para.46

⁶⁷ Updated response to Schools interrogatory #14, January 27, 2010, at p.2

⁶⁸ Response to Board Staff interrogatory 10(b)

even with the various mitigation measures, remains far in excess of the amount attributable to the Subject Customer and being claimed in this Application.

56. At page 6 of its submission, CCC submits that Horizon Utilities “made no effort to obtain any financial relief from the subject customer once it was clear that the load was significantly dropping and the revenues would be out of line with the forecast embedded in rates. Before seeking recovery from its customers Horizon should have sought such relief.” EP proposed items such as standby fees, sureties to guarantee minimum loads, reconnection fees or retiring certain assets serving the Subject Customer.⁶⁹
57. Horizon Utilities submits that these comments misconstrue the options available in these circumstances. Horizon Utilities’ rates are established by the Board, and no distributor is permitted to charge rates except in accordance with an order of the Board, which is not bound by any contract.⁷⁰ The suggestion that Horizon Utilities can, on an *ad hoc* basis, create new charges to impose on a customer because that customer’s load has dropped is contrary to applicable legislation. This is not a situation in which a customer is defaulting on its bills, where disconnection followed by reconnection charges is a possibility, or where more frequent billing arrangements might be entered into, or security deposits might be required. The issue here is not one of defaults by the Subject Customer; it is one of a severe reduction in the Subject Customer’s load. In any event, those measures would be aimed at ensuring payment for what the customer owes based on its demand and consumption. They are not intended to increase the customer’s liability for distribution service.
58. As Horizon Utilities’ witness panel testified, the assets currently serving the Subject Customer are still required. As discussed at paragraph 41 of the Argument-in-Chief, “Put simply, the infrastructure servicing the customer does

⁶⁹ EP submission, at p.12

⁷⁰ Ontario Energy Board Act, 1998, subsection 78(2)

not change simply because its load declines;⁷¹ and even infrastructure that is being used less or is not being used at all still requires maintenance.⁷²

59. Horizon Utilities submits that the measures requested by CCC and EP are not reasonable in the circumstances of this Application, and should not be considered to be a basis for reducing or denying the Application.
60. Finally on this point, EP and CCC suggest that there has been little if any contact between Horizon Utilities and the Subject Customer. This is not correct. As Horizon Utilities' witness panel testified,⁷³ numerous discussions took place between Horizon Utilities and the Subject Customer, but the Subject Customer was not forthcoming with respect to its plans. What was clear, and remains clear, is that the Subject Customer's load has dropped dramatically from the level on which Horizon Utilities' 2008 and 3GIRM rates have been based.
- (h) The forgone revenue should be allocated across all customer classes by way of a fixed rate rider**
61. Horizon Utilities' submissions in support of allocation of the forgone revenue across all customer classes can be found at paragraphs 38 – 40 (pages 16 - 17) of the Argument-in-Chief, and its submissions in support of the use of a fixed rate rider (the use of which is supported by CCC) are at paragraph 41 (pages 17 - 18). Those submissions remain applicable notwithstanding the objections of certain intervenors. With respect to the EP submission that the forgone revenue should be allocated only to the Large User class, Horizon Utilities submits that that is inconsistent with both the Board's approach to cost of service applications, and with the Board's treatment of the forgone revenue in the Oakville Hydro Decision referred to in the VECC submission (EB-2004-0527), in which the revenue lost due to the significant restructuring of the operations of one of

⁷¹ Tr. Vol.1, p.36

⁷² Tr. Vol.1, p.135-136

⁷³ Tr. Vol.1, p.130, line 9 – p.132, line 16

Oakville Hydro's Large Use customers was allocated across all of Oakville Hydro's customer classes.

Conclusion

62. The Board has approved a level of revenue requirement for Horizon Utilities in order that Horizon Utilities may finance its investment in capital, operations, and maintenance expenditures in support of the safe and reliable supply of electricity. The significant reduction of the Subject Customer's load has resulted in Horizon Utilities not realizing its approved distribution revenue requirement to date, and it does not expect to do so through the 2010 rate year. The decline in the Subject Customer's load is one very significant part of a broader decline in commercial and industrial customers' loads. However, Horizon Utilities is seeking only to recover the forgone revenue attributable to the Subject Customer, in the amount of \$2,191,246 over the May 2008 – April 2011 period.
63. Horizon Utilities submits that this reduction in load and the resulting reduction in distribution revenue from the Subject Customer are clearly outside of the load forecast used in Horizon Utilities' 2008 EDR Application and the base on which Horizon Utilities' 2008 EDR and 3GIRM rates are derived. Throughout the Application and the proceeding that followed, Horizon Utilities has provided evidence on the impact of the load reduction on Horizon Utilities' distribution revenue, and Horizon Utilities has demonstrated that this event meets all of the Board's eligibility criteria to qualify for a Z-factor adjustment.
64. Horizon Utilities has proposed Rate Riders⁷⁴ that are just and reasonable, and respectfully requests that the Board approve the proposed Rate Riders effective May 1, 2010; and the proposed use of a variance account in respect of the January 2010 – April 2011 period.

⁷⁴ As set out in Horizon Utilities' response to Undertaking J1

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF FEBRUARY,
2010:

BORDEN LADNER GERVAIS LLP
Per:

Original signed by James C. Sidlofsky
James C. Sidlofsky
Counsel to Horizon Utilities Corporation

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