



March 3, 2014

Ms. Kirsten Walli

Sent via EMAIL & COURIER

Attention: Board Secretary
Ontario Energy Board
P.O Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Re: Ontario Energy Board File Number EB-2014-0018

**Summitt Energy Management Inc. - Written Submission regarding
Written Hearing for The Corporation of the City of Kitchener – Utilities
Division Application for Gas Marketer Licence**

Dear Ms. Walli,

Summitt Energy Management Inc. ("Summitt Energy") has prepared this written submission in response to The Corporation of the City of Kitchener – Utilities Division ("the Applicant") application for a Gas Marketer Licence in accordance with section 50(1) the *Ontario Energy Board Act, 1998* ("OEB Act").

It is Summitt Energy's position that, in absence of any conditions imposed, granting the Applicant a Gas Marketer Licence ("Licence") under the aforementioned name, would be in direct violation of the *Affiliate Relationships Code for Gas utilities ("Affiliate Code")*¹ established under section 44(1) of the *Ontario Energy Board Act, 1998*.

It is Summitt Energy's position that the intent and spirit of the Affiliate Code is to, among other things, not permit a utility to directly benefit from the use of its name while marketing to consumers. Therefore Summitt Energy is of the opinion that the Applicant should not be granted a License under the name Kitchener Utilities².

¹ 2.5.3 A utility shall take all reasonable steps to ensure that an affiliate does not use the utilities name, logo or other distinguishing characteristics in a manner which would mislead consumers as to the distinction between the utility and the affiliate.

² Section 1.1 states "The principal objectives of the Code are to enhance a competitive market while, at a minimum, keeping ratepayers unharmed by the actions of gas distributors, transmitters and storage companies with respect to dealing with their affiliates. The standards established in the Code are intended to: (a) minimize the potential for a utility to cross-subsidize competitive or non-monopoly activities; (b) protect the confidentiality of consumer information collected by a transmitter, distributor or storage company in the course of provision of utility services; and (c) ensure there is no preferential access to regulated utility services.

Additionally, Summitt Energy presumes that, if granted a Licence, the Applicant intends to use the same staff, resources, equipment, materials and physical office location to operate as a Gas Marketer, potentially putting them in direct violation of sections 2.1 and 2.2 of the *Affiliate Code*. More specifically of concern for Summitt Energy is the potential sharing of confidential consumer information by Kitchener Utilities as the distribution company and the Applicant in order to obtain a competitive advantage in the marketplace. This would permit an unfair competitive advantage in the Ontario gas market, and would be a contravention of section 2.2.2 of the *Affiliate Code*³.

Summitt Energy is concerned that the applicant may not abide by the OEB Act, the *Affiliate Code* and the Code of Conduct for Gas Marketers as they have previously taken the position that the OEB Act does not apply to them, as they are instead governed by the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA"). Summitt Energy is of the position that, in accordance with section 128 of the OEB Act⁴, in fact the OEB Act supersedes section 53 of MFIPPA⁵.

Furthermore, it can be reasonably presumed that if Kitchener Utilities is of the view that the OEB Act does not apply to them, as they are governed by the MFIPPA that the Code of Conduct for Gas Marketers would also not apply to the Applicant. As such, it is Summitt Energy's position that granting a Licence to the Applicant would potentially not provide consumers with the legislative protections governed by the OEB Act and would not be in the best interests of the industry or consumers.

It is also industry experience, with respect to natural gas Marketers that Kitchener Utilities has historically not followed the same processes as stipulated in the Gas Distribution Access Rule ("GDAR") for the enrollment of customers. This is evident by Kitchener Utilities past and present enrollment practices, that are not consistent with industry practices as outlined in GDAR for natural gas Marketers to enroll Kitchener Utility consumers into alternative natural gas supply agreements. This has created a situation in the industry that does not allow for consumers to have the same choices for alternative natural gas supplier instead of standard system supply, which is in direct contradiction of section 1.1.1 of GDAR⁶.

A further concern is the conflict of purchasing the gas commodity through the same entity. This would create a direct conflict in the purchasing and allocation of commodity costs between system supply customers of Kitchener Utilities and direct purchase customers of the Applicant. The opportunity for

³ 2.2.2 Where a utility shares information services with an affiliate, all confidential information must be protected from access by the affiliate. Access to a utilities information services shall include appropriate computer data management and data access protocols as well as contractual provisions regarding the breach of any access protocols. Compliance with the access protocols and the Services Agreement shall be ensured as necessary, through a review which complies with the provisions of section 5900 of the Canadian Institute of Chartered Accountants ("CICA") Handbook. The Board may provide direction regarding the terms of the section 5900 review. The results of any review shall be made available to the Board.

⁴ 128. (1) In the event of conflict between this Act and any other general or special Act, this Act prevails. 1998, c. 15, Sched. B, s. 128 (1).
(2) This Act and the regulations prevail over any by-law passed by a municipality 1998, c. 15, Sched. B, s. 128 (2).

⁵ 53. (1) This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise. R.S.O. 1990, c. M.56, s. 53 (1).

⁶ 1.1.1 The purpose of this Rule is to: establish conditions of access to gas distribution services provided by a gas distributor; establish rules governing the conduct of a gas distributor as such conduct relates to a gas vendor; and establish Service Quality Requirements for natural gas distributors consistent with the guiding objectives outlined in section 2 of the Act.

cross subsidization is real and could be used for the benefit of shareholders of the Applicant at the expense of the system supply customers.

if the Applicant were granted a license to operate as a gas marketer, consumers would be subject to confusion as to who is their commodity supplier, Kitchener Utilities or the Applicant which would have the same or similar name. The applicant could also have access to confidential customer information as to whether consumers are being supplied by system supply or another marketer and the terms of the supply arrangements. This would provide an anti competitive playing field within the Kitchener market.

Taking this into account, along with the proposed name for the supplier Licence, would lead to confusion for consumers as they may be misled to believe that their supply contract and fixed rate agreement is in fact with the utility. Based on these considerations, it is Summitt Energy's position that granting a Licence to Kitchener Utilities would not be in the best interests of the consumer and would not foster competition within the industry.

In conclusion, the very first principle of the OEB Act with respect to natural gas is "*To facilitate competition in the sale of gas to users*". Based on the aforementioned, Summitt Energy is of the view that issuing a Licence to Kitchener Utilities would be a direct contradiction to the guidelines and principles of the OEB Act and a direct contradiction of Section 2.1 of the said Act⁷.

In the alternative, should the Applicant be granted a Licence, Summitt Energy would recommend that the Licence be placed under strict conditions, restricting the name of the Applicant from any reference to Kitchener Utilities, providing the appropriate prohibition on sharing of information, facilities, staff and resources, and strict requirements to protect customer information.

If the applicant is granted a license, both Kitchener Utilities and the Applicant must be subject to the GDAR rules to prevent anticompetitive in the marketplace. This would ensure that consumers would be protected and promote industry competition.

Respectfully submitted.

Sincerely,



Jeff Donnelly, Licensed Paralegal

Director, Regulatory Affairs & Compliance

Summitt Energy

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cc. The Corporation of the City of Kitchener – Utilities Division

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2.The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
1. To facilitate competition in the sale of gas to users.