

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Union Gas Limited (“Union”) for an order or orders approving a one-time exemption from Union Gas Limited’s approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations;

AND IN THE MATTER OF a motion brought by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. (“TransAlta”) seeking an order of the Ontario Energy Board requiring Union Gas Limited to provide full and adequate responses to certain interrogatories.

**SUBMISSION OF
CITY OF KITCHENER**

June 27, 2014

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Overview and Clarification

1. The City of Kitchener (“Kitchener”) has reviewed the motion filed by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. (“TransAlta”) on June 20, 2014, and its subsequent submission filed on June 25, 2014.

2. Kitchener supports the TransAlta motion, subject to one clarification. The TransAlta motion requests that Union be compelled to provide a response to Kitchener’s interrogatory at Exhibit B.Kitchener.2. Although Union begins its response to that interrogatory by stating that the interrogatory “is not relevant to Union’s proposal”, ultimately Union does provide an adequate answer.

3. However, Union refused to provide a response to Kitchener’s interrogatory at Exhibit B.Kitchener.3(c). Consequently, Kitchener is requesting that the TransAlta motion be amended to replace Exhibit B.Kitchener.2 with Exhibit B.Kitchener.3(c). This very minor amendment does not prejudice any other party, including Union, because those opposed to the TransAlta motion are scheduled to provide their submissions at a later date.

4. The remainder of this submission is organized into three parts:

- (a) the appropriate legal test for determination of the TransAlta motion;
- (b) the scope of this proceeding; and,
- (c) the relevance/helpfulness of the information sought in Exhibit B.Kitchener.3(c).

Appropriate Legal Test

5. The Board has previously employed a two-part test for motions to compel interrogatory responses. The Board will require a party to provide an interrogatory response if:

- (a) the interrogatory relates to an issue in the application before it; and,
- (b) the response is likely to adduce evidence that is relevant and helpful to the decision the Board must make.¹

First Part of Test – Scope of the Proceeding

6. Union has refused to provide a response to any interrogatory that does not pertain to those three specific penalty charges that it is willing to reduce (i.e., the T1/T2 Supplementary Inventory charge and the Rate 25 Unauthorized Overrun Gas Supply Commodity charge).

7. Union will no doubt take the position that other tariff-based penalty charges (such as those incurred by Kitchener) and other costs (such as those incurred by TransAlta) are beyond the scope of the proceeding – i.e., that such charges or costs are unrelated to the application that Union filed. In the absence of an issues list, Union has (in its interrogatory responses) decided that it can determine the scope of this proceeding.

8. The Board should not accept such a narrow construction of the issues at play in this proceeding, for several reasons:

- Same Factual Underpinning: The exceptional weather events that gave rise to the penalty charges in the T1, T2 and Rate 25 rate schedules and contracts (which Union is prepared

¹ Decision on Motion & Procedural Order No. 5, *Toronto Hydro Distribution Rates for 2010* (EB-2009-0139), p.2.

to reduce), also gave rise to penalty charges in other rate schedules and contracts, such as the T3 rate schedule and contract applicable to Kitchener.

- Same Type of Penalties: The penalty charges that Union is willing to reduce relate to banked gas purchases (T1/T2 Supplementary Inventory) and failing to maintain adequate storage levels (Rate 25 Unauthorized Overrun), both caused by anomalous winter weather conditions. The penalty charges levied on Kitchener, which Union is not prepared to reduce, arise from Kitchener withdrawing too much gas from storage (Unauthorized Withdrawal), due to those same cold weather conditions.
- Discriminatory Application of Tariff: Union is willing to lower penalty charges for some customers, but not Kitchener. Kitchener submits that it should not be up to Union to determine that, in anomalous circumstances, it can decide that some customers deserve a break from the strict application of Union's tariff but others do not. That decision should be up to the Board, and the Board should not be constrained in determining how Union's tariff gets implemented in such circumstances by the way in which Union frames its application.
- Regulatory Efficiency: Practically speaking, if the Board refuses to consider other penalty charges (such as those incurred by Kitchener under its T3 rate schedule), customers such as Kitchener will seek to have their issues dealt with by this Board via other routes (at Union's next rate proceeding, by a customer bringing a section 36 application, or via a request to the Board to commence a separate proceeding (*per* TransAlta's alternative relief request at para. 28 of its motion)). Addressing the other penalties (such as those levied on Kitchener) in these other ways would be inefficient for

the Board, Kitchener and any other aggrieved customers, and interested intervenors. The penalty charge levied on Kitchener under Rate T3 arises from the same circumstances that gave rise to those penalties that Union is willing to reduce. All the relevant factual evidence related to those circumstances, to Union's implementation of its tariff under those circumstances, and to the conduct of Union's customers in the face of the cold weather conditions will all be on the record in this proceeding. It makes sense to have the T3 penalty charge (and any other penalty charges flowing from the exceptional weather conditions) dealt with in the same proceeding as the penalty charges levied on Union's T1, T2 and Rate 25 customers.

- Discretion of Board Should not be Constrained: The Board has a broad mandate over natural gas matters in Ontario. In *Union Gas Ltd. v. Dawn (Township)*, the Ontario High Court of Justice stated:

It is clear that the legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario 'in the public interest' and hence must be classified as special legislation ... In my view the statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board ... These are matters that are to be considered in the light of the general public interest ...²

In Kitchener's view, the Board's broad public interest mandate argues in favour of not restricting the scope of the application to those particular charges that Union wants the Board to consider, but rather to allow for parties such as Kitchener with similar grievances attributable to identical circumstances to bring those forward.

² (1977), 76 D.L.R. (3d) 613, commencing at p.625.

9. For these reasons, Kitchener submits that the interrogatory posed by Kitchener in Exhibit B.Kitchener.3(c) falls within the appropriate scope of the proceeding.

10. With respect to the TransAlta interrogatories that form the bulk of TransAlta's motion, Kitchener recognizes that an order directing Union to answer these interrogatories would result in an expansion of this proceeding beyond penalty charges in Union's tariff (such as the T1, T2, Rate 25 and T3 charges) to encompass customer costs incurred as a result of Union's implementation of its tariff. Kitchener is support of this broader scope, for some of the reasons outlined in paragraph 8 (same factual underpinning, regulatory efficiency and broad Board discretion).

Second Part of Test – Relevance and Helpfulness of Information Sought

11. Kitchener's interrogatory at Exhibit B.Kitchener.3(c) asks how rates for Union's in-franchise interruptible storage service customers compare with the rates paid by firm storage service customers. It is an established principle of rate-making that rate levels among different customer classes vary according to level of service provided. More specifically, firm service (a higher level of reliability service) will always be more expensive than interruptible (assuming the service is the same, but for the interruptible component).

12. Kitchener is Union's only T3 customer, and the T3 service is a firm storage service. Kitchener's interrogatory at Exhibit B.Kitchener.3(c) is meant to adduce evidence as to how Union, during February and March 2014, was implementing its Priority of Service Guidelines (i.e., including interrupting storage withdrawals by its customers). Given that the Union penalty charges levied on Kitchener were determined by Union to be unauthorized withdrawal charges, the information being sought is relevant to the Board's determination that

the rate treatment of firm and interruptible in-franchise customers was just and reasonable under the circumstances where Union applied unauthorized withdrawal charges to some firm customers but maintained service to interruptible customers without curtailment or penalties.

13. For these reasons, Kitchener submits that the Board should direct Union to provide a response to Exhibit B.Kitchener.3(c).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 27, 2014



Osler, Hoskin & Harcourt LLP (Counsel to Kitchener)

per per: Richard J. King