EB-2008-0154

ONTARIO ENERGY BOARD

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 Union Gas Limited for an order or orders amending or varying the rate or rates charged to customers as of July 1, 2008.

AND IN THE MATTER OF an Application by Union Gas Limited for an order or order amending or varying the rate or rates charged to customers as of July 1, 2007.

AND IN THE MATTER OF Rules 7, 42, 44.01, and 45.01 of the Board's *Rules of Practice and Procedure*.

ARGUMENT OF THE CITY OF KITCHENER

August 1, 2008

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INTRODUCTION

1. This Argument is submitted on behalf of the City of Kitchener ("Kitchener") to respond to the argument-in-chief of Union Gas Limited ("Union") filed in support of its motion to review the Board's decision in EB-2008-0034 (the "2007 Deferral Decision") on the ground that it is incorrect and, alternatively, to review the Board's decision in EB-2007-0598 (the "2006 Deferral Decision") on the ground that it is inconsistent with the 2007 Deferral Decision and that this inconsistency presents a good reason to question its validity.

Kitchener's position

2. As argued below, Kitchener submits that Union's motion should be dismissed on the following grounds:

(a) neither of the Deferral Decisions should be regarded as incorrect and therefore the threshold test established by Rule 44.01(a) is not met;

(b) even if one or both of the Deferral Decisions are incorrect, the Board should exercise the discretion provided by s.21.2(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.s. 22 (the "*SPPA*") to reject the motion because the matter lacks sufficient importance to warrant reconsideration given that both decisions only affect the limited transitional period following NGEIR and do not affect the ongoing regulation or interests of either Union or any of its customers;

(c) Union failed to bring its motion within a reasonable time after the 2006 Deferral Decision was made in August 2007 as required by s.21.2(2) of the *SPPA*. Accordingly, the jurisdiction to review the 2006 Deferral Decision under the *SPPA* has lapsed.

ARGUMENT

Jurisdiction and the threshold tests for a review

3. Absent statutory authority, and subject to limited exceptions, the general rule is that administrative adjudicators have no inherent jurisdiction to reconsider their decisions. For the Board, the only source of its jurisdiction to reconsider is s.21.2(1) of the *SPPA* which provides in part:

> s.21.2(1) - a tribunal may, if it considers it advisable and its rules made under s.25.1 deal with the matter, review all or part of its own decision or order and may confirm, vary, suspend or cancel the decision or order.
>
> s.21.2(2) - a review shall take place within a reasonable time after the decision or order is made.

4. Rules 42 to 45 perfect the Board's jurisdiction under s.21.2(1) of the *SPPA* and provide the procedural mechanisms for bringing the review to the Board. As outlined in the Board's decision in EB-2006-0322, EB-2006-0338 and EB-2006-0340 (the "NGEIR Review Threshold Decision") the threshold requirement under the Board's rules is that the decision be incorrect. In this respect Rule 42.01(a) provides that the motion to review must:

> Set out the grounds for the motion that raise a question as to the correctness of the order or decision…

As argued below, Kitchener submits that neither of the Deferral Decisions should be regarded as incorrect.

5. In addition to the test of correctness, however, two additional grounds for rejecting the motion are raised by the circumstances of this case. The first additional ground or threshold issue rests on the Board's discretion to reject a review where the Board does not consider a review "advisable". This discretion comes from s.21.2(1) of the *SPPA* and is independent of the test of "correctness" established by the Board's rules. In other words, a component of the jurisdiction to review given by the *SPPA* is the requirement that the Board must consider a review "advisable". Kitchener submits that the Board should not fetter this discretion by limiting reviews only to a consideration of "correctness". Indeed one can foresee a number of situations where the Board, as here, could well consider a review not to be "advisable" even though the decision in question is incorrect. On this point Kitchener argues below that even if the Board considers one or both of the Deferral Decisions to be incorrect, the motion should be rejected because this is not a matter of sufficient importance to warrant a review and interrupt the regulatory process. Rather, the Deferral Decisions address transitional questions only and not matters which affect the ongoing interests of Union or its customers.

6. The second additional ground on which to reject Union's motion relates to the requested review of the 2006 Deferral Decision. As noted, Kitchener will argue that this component of Union's motion was not brought within a reasonable time as required by s.21.2(2) of the *SPPA* and that accordingly the jurisdiction to review under the *SPPA* has lapsed.

7. Kitchener's argument will address each of the above three issues in turn.

The 2007 Deferral Decision is Correct

8. The first reason for rejecting a review of this decision is that it is a correct interpretation of the transitional mechanism contained in the NGEIR decision. The critical wording of that decision is contained at page 107 and reads as follows:

> "For 2007, forecast margins (on long term and short term transactions) now included in the determination of Union's rates will remain unchanged. After 2007, Union's share of long-term margins will be as follows: 2008 - 25%, 2009 – 50%, 2010 – 75%, 2011 and thereafter – 100%

It will be seen from the above wording that the transition formula is a simple one based on a declining sharing percentage of the revenue from ex-franchise transactions. The formula does not contain, as Union argues, a second element which would subdivide the ex-franchise revenues further depending on whether or not they are generated from pre or post NGEIR transactions.

9. It seems to Kitchener that the error in Union's argument lies in its erroneous interpretation of the word "now" appearing outside of the brackets in the above quoted portion of the NGEIR decision, as if it modified "long term and short term transactions" that appear within the brackets. Clearly this is an erroneous interpretation. The word "now", outside the brackets, modifies the words "forecast margins", also outside of the brackets. If the NGEIR panel had intended to apply the transition only to pre-NGEIR transactions, it would have been necessary for it to move the brackets so that the sentence would read:

> "For 2007 forecast margins (on long-term and short-term transactions now included in the determination of Union's rates) will remain unchanged".

In addition, it is likely that the NGEIR panel would have clearly stated that the transitional formula contains both a division of transactions element as well as a declining percentages element if Union's interpretation was the Board's intended meaning.

10. The second reason for rejecting a review of the 2007 Deferral Decision is that it specifically addressed the interpretation which should be given to the transitional formula established in NGEIR and in particular it addressed the requirement that all long term transactions, both pre and post-NGEIR be recorded to calculate the balance in account 179-72 (see pages 7 and 8 of EB-2007-0034). Accordingly, it can be seen that Union's motion is essentially an attempt to re-argue the position it took in the 2007 deferral proceeding. Clearly the Board should not agree to review a prior decision in order to allow a party to re-argue its case. This point was made at page 18 of the NGEIR review decision when the Board stated:

> The Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to re-argue the case.

The 2006 Deferral Decision should not be regarded as incorrect

11. The 2006 Deferral Decision dealt with the accounting treatment, for regulatory purposes, of a single expense incurred during the transition period contemplated by the NGEIR decision. Union did not regard the decision to be incorrect at the time it was made.

12. It is submitted that Union's contention of an inconsistency with the 2007 Deferral Decision does not necessarily lead to the conclusion that the 2006 Decision must be incorrect. First, the two decisions dealt with different issues. Secondly, and in any event, Board regulation has always been, and must

necessarily continue to be, a work in process. For example, the Board first approved the creation of the delivery commitment credit ("D.C.C.") and then subsequently approved its elimination in a series of decisions between EBRO-462 in 1990 and RP-2002-0130 in 2003. While it is possible to detect an inconsistency in the approval and subsequent elimination of the D.C.C., it cannot be said that any of the Board Decisions in the series of cases which dealt with it are incorrect. Similarly, Kitchener submits that any apparent inconsistency between the two deferral decisions should not necessarily lead to the conclusion that one of them is incorrect.

The Board should exercise its discretion under s.21.2(1) of the *SPPA* to reject the motion

13. On this point it is observed that the jurisdiction to review, granted by s.21.2(1) of the *SPPA* is discretionary and therefore can only be exercised if, in the words of the provision, the Board "…considers it advisable…" Kitchener submits that not every decision of the Board which is arguably incorrect should reviewable. Kitchener submits that the discretion to review should, in a word, be applied with discretion. In other words, the Board should not lightly interrupt the ongoing regulatory process unless the situation cries out for a correction. Kitchener submits that neither of the review decisions raised issues or matters of significance to the regulation of financial interests of Union or the interests of its customers sufficient to warrant a review. Rather, even if either or both Deferral Decisions are incorrect, they only apply to a limited period between 2008 and 2010. Further, the financial impact of the decisions diminish each year.

14. In this respect, the two Deferral Decisions can be contrasted with NGEIR where the review applications addressed a decision which effected a tremendous change in the regulation of storage in Ontario. Also, it had a huge financial implication for the regulated customers into an indefinite future. Ultimately, these applications were unsuccessful. It is submitted therefore that Union's

application, raising as it does, issues of little or no ongoing importance, should also be unsuccessful.

The Motion to review the 2006 Deferral Decision was not brought within a reasonable time as required by s.21.2(2) of the *SPPA* and accordingly the jurisdiction under the *SPPA* has lapsed

15. Kitchener submits that the provision which governs the timeliness of a motion to review one of the Board's decisions is s.21.2(2) of the *SPPA*. This is a jurisdictional provision which is expressed in mandatory terms. It requires that:

> The review shall take place within a reasonable time after the decision or order is made.

16. Accordingly, if the review is not applied for and does not take place within a reasonable time after August 17, 2007, when the 2006 Deferral Decision was made, the Board has no jurisdiction to review it.

17. It is submitted that when the Board's jurisdiction to review a particular case has lapsed for a failure to comply with s.21.2(2), the failure cannot be cured by Rule 7.01 of the Board's rules. In any event, this rule by its own terms allows the Board to extend a time limit under the Rules. It does not allow an extension under s.21.2(2) of the *SPPA*.

18. It is further submitted that it should not be open to a party which declined to apply for a review within a reasonable time to simply wait upon future decisions to see if an inconsistency arises. On this point, as argued above, the Board deals with many issues which undergo a development or alteration over a series of cases. In these situations, the Board's treatment of an issue at the end of the series of cases may not be fully consistent with the treatment given in the earlier cases of the series. This situation should not invite parties before the Board to bring delayed motions to review.

Conclusion

19. Based on the forgoing submissions, Kitchener respectfully submits that Union's application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1ST day of August, 2008.

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Per Alick Ryder, counsel to the Corporation
Of the City of Kitchener