

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, pursuant to section 36(1) of the Ontario
Energy Board Act, 1998, for an order or orders approving
or fixing just and reasonable rates and other charges for
the sale, distribution, transmission and storage of gas as of
January 1, 2009.**

**ARGUMENT IN CHIEF OF THE
CITY OF KITCHENER**

Introduction

1. The position of the City of Kitchener in this application can be summarized as follows:

(a) Kitchener opposes the z factor treatment of the cost consequences of adopting International Financial Reporting Standards (IFRS).

(b) The Board's Decision of November 19, 2008 in EB-2008-0304 which approved Union's application in that case directed Union to reduce its rates by \$1.3 million per year effective January 1, 2009. Kitchener submits that this Decision remains in force and should be honoured in the Order establishing rates for 2009.

(c) Kitchener does not oppose the other changes proposed by Union in its application for 2009 rates as submitted in its Argument in Chief.

Argument

2. Kitchener opposes the z factor treatment of Union's IFRS conversion costs on two grounds as described in the following paragraphs:

Union is not entitled to claim z factor treatment for the years 2011 and 2012

3. The definition of a z factor for the purposes of determining rates for the remainder of the IR term is contained in section 6 of the Board approved Settlement Agreement in EB-2007-0606. Respecting the materiality threshold the agreement provides at p.17:

The cost increase/decrease must meet the materiality threshold of \$1.5 million annually per z factor event (i.e., the sum of all individual items underlying the z factor event).

4. Kitchener accepts that the IFRS costs represent a single z factor event. However, the agreement requires the threshold to be met **annually**. Accordingly, IFRS costs in any year which do not meet the threshold do not qualify as a z factor. In other words, it is an annual threshold which cannot be met by adding up the costs over a number of years. Accordingly, the IFRS costs in any year which do not meet the \$1.5 million threshold do not qualify as a z factor.

5. The IFRS conversion costs asserted by Union are set out in Table 1 at p. 6 of Exhibit A, Tab 1. Assuming the Board accepts these numbers, this table shows that the threshold of \$1.5 million is met for the years 2009 and 2010 but not in the years 2011 and 2012. Accordingly, Kitchener submits that Union has

not met the requirements of the Settlement Agreement for z factor treatment for the years 2011 and 2012.

Union has not discharged its onus of establishing the threshold in any year of the IR term

6. The second and perhaps more important ground for opposing Union's proposed z factor treatment of the IFRS costs is that, in Kitchener's submission, Union has not discharged the onus on it of establishing the threshold in any year of the IR term, even in the years 2009 and 2010 where Union has asserted costs of \$1,511,000 and \$1,510,000 respectively (Exhibit A, Tab 1, p.6, Table 1).

7. In this respect, Kitchener observes that Union carries the onus of showing the threshold has been met (*OEB Act*, s.36(6)). In Kitchener's submission, the application of the onus provision of the *Act* is particularly important here where there is no oral hearing and therefore no opportunity to test Union's evidence by cross-examination.

8. Kitchener submits that the evidence provided by the interrogatory responses discloses a number of reasons why the Board is not in a position to confirm the reliability of the costs Union has asserted for the years 2009 and 2010. For example:

- A. Union's IFRS conversion costs in Table 1 of Exhibit A, Tab 1 are forecasted and not actual. Forecasted costs are subject to judgment and, in this case, the judgment of both Union and Ernst & Young. According to Exhibit B6.1(c), Ernst & Young did not provide Union with a report outlining its cost estimates. Absent evidence from both Ernst & Young and Union as to the manner in which judgment was exercised in developing their forecasts, and absent the opportunity to test their evidence by cross-examination,

it cannot be said that the costs claimed in Table 1 have been established to a degree of reliability necessary for a Board Decision. On this point, it is also observed that the costs asserted in Table 1 barely exceed the threshold for the years 2009 and 2010. It can be assumed therefore that the exercise of judgment was critical to achieving the threshold. Finally, it is noted that it was Union that asked the Board to proceed without a technical conference, a settlement conference, or an oral hearing (see Union's letter to the Board dated November 17, 2008). In cases where an applicant seeks to avoid subjecting itself to face to face explanations, the applicant surely has an obligation to provide a full explanation as to how it arrived at the numbers it puts before the Board. This Union has failed to do.

- B. Union is proposing to share IFRS costs with Westcoast only, and not with any other affiliate companies. The fairness of Union's proposal to limit the sharing in this way has not been addressed by Union in its evidence and, of course, the intervenors have not had any opportunity to challenge Union's proposal in cross-examination. Union has merely stated its position in Exhibit B5.1(h). It has not justified it.
- C. Union acknowledges that IFRS costs in 2008 should be excluded from z factor treatment. Accordingly, any costs included in 2009 to 2012 resulting from costs spent in 2008 should be excluded. It is clear from the response to Exhibit B5.1(b) corrected that the capital investments of \$592,000 in 2008 are fully depreciated over the 2009 to 2012 period. Excluding the depreciation related to 2008 investments will reduce the 2009 and 2010 costs below the threshold.

9. Given the above, Kitchener respectfully submits that Union has failed to discharge the onus of demonstrating that the costs it asserts for 2009 and 2010 can be accepted by the Board with confidence and that, accordingly, z factor treatment is not appropriate for any of the remaining years of the IR term.

The reduction of \$1.3 million as ordered in EB-2008-0304

10. As noted above, the Board's Decision dated November 19, 2008 in EB-2008-0304 approved Union's application in that case and directed Union to reduce its rates by \$1.3 million per year effective January 1, 2009.

11. Following receipt of this Decision, Union advised the Board by letter dated December 1, 2009 that it did not intend to comply with the Board's Order in this respect for the reasons outlined in Union's letter. However, on December 19, 2008, the Board advised both Union and Westcoast that if Union does not intend to honour the rate reduction of \$1.3 million, it must bring an application to vary the Board's Decision under Rule 42 of the Board's Rules of Practice and Procedure. Absent such an application and a favourable response to it by the Board, Kitchener submits that the Order requiring the rate reduction continues in affect. Accordingly, if Union has not filed an application under Rule 42 at the time the Board decides the instant application, Kitchener respectfully submits

that the \$1.3 million reduction should be ordered in this proceeding.

All of which is respectfully submitted.

City of Kitchener by its counsel,
RYDER WRIGHT BLAIR & HOLMES LLP

Per:

"Alick Ryder"

Alick Ryder