



**EB-2013-0193**

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

**AND IN THE MATTER OF** a Motion by Milton Hydro  
Distribution Inc. pursuant to the Ontario Energy Board's  
*Rules of Practice and Procedure* for a review by the Board of  
its Decision and Order in proceeding EB-2012-0148 dated  
April 4, 2013.

**BEFORE:** Paula Conboy  
Presiding Member

Ellen Fry  
Member

Marika Hare  
Member

**DECISION AND ORDER  
ON MOTION TO REVIEW  
July 4, 2013**

**INTRODUCTION**

On April 25, 2013, Milton Hydro Distribution Inc. ("Milton Hydro") filed with the Ontario Energy Board (the "Board") a Notice of Motion to Review and Vary (the "Motion") the Board's Decision and Order dated April 4, 2013 in respect of Milton Hydro's 2013 IRM rate application, EB-2012-0148, (the "2013 IRM Decision"). The Board assigned the Motion file number EB-2013-0193.

The Board has determined the threshold question of whether the matter in the Motion should be reviewed on its merits, as provided for in section 45.01 of the Board's *Rules*

*of Practice and Procedure* (the “threshold question”). For the reasons set out below the Board has determined that the matter should not be reviewed.

The Board issued its Notice of Motion to Review and Procedural Order No. 1 on May 14, 2013. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition (“VECC”), which was the only intervenor in Milton Hydro’s 2013 rate application.

Milton Hydro submitted additional material in support of its Motion on May 22, 2013. Board staff and VECC filed their submissions on June 3, 2013. Milton Hydro filed a reply submission on June 10, 2013.

## **BACKGROUND**

On September 14, 2012 Milton Hydro filed an IRM application for the 2013 rate year. The application sought approval for changes to the rates that Milton Hydro charges for electricity distribution, to be effective May 1, 2013.

In its 2013 IRM application, Milton Hydro requested the recovery of lost revenues of \$107,762 using the Lost Revenue Adjustment Mechanism (“LRAM”). Milton Hydro’s LRAM claim included lost revenues for 2010 CDM programs persistent in 2011 and 2012.

On April 4, 2013, the Board issued its 2013 IRM Decision. As part of that decision, the Board denied the LRAM claim. The following is a key portion of the Board’s reasons for doing so:

Page 42 of Milton Hydro’s evidence for 2011 rates states: “Milton Hydro’s revenue forecast is based on the **forecasted** kWh, KW and customer counts for the 2010 Bridge Year and 2011 Test Year” (emphasis added).

There is no mention in this portion of the evidence that the load forecast was based on actual customer consumption and demand. This in fact, would be inconsistent with a “forecast”, which anticipates future loads, not actual loads from previous years. Milton Hydro, as an early implementer of CDM programs, should have been aware of the approximate potential forecast loss for 2011 as a result of conservation initiatives, even without the OPA report. Without an explicit

statement that the 2011 forecast did not include the impact of CDM, which there is not, the Board finds that the 2011 forecast must have taken load loss as a result of CDM into consideration. Therefore, the Board finds that no LRAM is available for 2011 or 2012 to account for the persistent impact of CDM programs implemented in 2010<sup>1</sup>.

Milton Hydro's Motion seeks to vary the 2013 IRM Decision to accept the LRAM claim that the Board denied.

## **POSITIONS OF PARTIES**

Milton Hydro submitted that the Board erred in fact in failing to take into consideration the evidence presented by Milton Hydro in its 2011 cost of service application. Milton Hydro stated that the evidence clearly showed that it did not include 2010 CDM results in its 2011 cost of service load forecast.

Board staff submitted that regardless of whether Milton Hydro explicitly identified an absence of CDM impacts in its load forecast in the application, the Board in its rebasing decision approved the total forecast as complete, given that there was no language to the contrary. The Board in over 25 LRAM decisions has determined that in the absence of an explicit statement to the contrary in a decision or settlement agreement, the load forecast is deemed to be just and reasonable for rate-making purposes and final in all respects. The 2008 CDM Guidelines state that lost revenues are only accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time. Board staff therefore submitted that there is no error in fact and that the threshold question for review has not been met.

VECC submitted that Milton Hydro's application and the Board's decision in the 2011 cost of service proceeding do not explicitly state that there was no CDM allowance for 2010 in the load forecast. On that basis VECC submitted that the 2013 IRM Decision did appropriately take into consideration the facts presented in Milton Hydro's 2011 cost of service application and there was therefore no error in fact. Accordingly, VECC also submitted Milton Hydro's Motion does not meet the threshold question and Milton Hydro's motion to vary should be denied.

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<sup>1</sup> EB-2012-0148, Decision and Order at page 10

In its reply, Milton Hydro submitted that the Motion does meet the threshold test. Milton Hydro submitted that its evidence makes it obvious that 2010 actual data is not used and therefore the persistence of 2010 OPA CDM programs is also not included. Milton Hydro further submitted that it had identified an error in the Board's decision. In its view, the decision is contrary to the evidence provided in Milton Hydro's Cost of Service Application.

## THE THRESHOLD TEST

Under section 45.01 of the Board's *Rules of Practice and Procedure* (the "Rules"), the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The Board has considered previous decisions in which the principles underlying the threshold question were discussed, namely the Board's Decision on a *Motion to Review Natural Gas Electricity Interface Review Decision* (the "NGEIR Review Decision") and the Divisional Court's decision *Grey Highlands v. Plateau*.<sup>2</sup>

In the NGEIR Review Decision, the Board indicated that "the review [sought in a motion to review] is not an opportunity for a party to reargue the case".

In the *Grey Highlands v. Plateau* the Divisional Court agreed with this principle. The court dismissed an appeal of the Board decision in EB-2011-0053 where the Board determined that the motion to review did not meet the threshold test. The Divisional Court stated:

The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.<sup>3</sup>

## BOARD FINDINGS

In the 2013 IRM Decision, the Board considered fully the evidence filed by Milton Hydro concerning its LRAM claim. This is illustrated by the portion of the 2013 IRM Decision

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<sup>2</sup> EB-2006-0322/0388/0340, May 22, 2007 at page 18 and EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012)

<sup>3</sup> *Grey Highlands (Municipality) v. Plateau Wind Inc.* [2012] O.J. No. 847 (Div. Court) ("*Grey Highlands v. Plateau*") at para 7

quoted above in the “Background” section. Milton Hydro had a full opportunity in that proceeding to argue its position concerning its LRAM claim.

Milton Hydro is now asking the Board to reconsider the conclusion that it reached in interpreting the evidence in the 2013 IRM Decision after considering the arguments of the parties in that proceeding. Accordingly, the Board considers that this Motion is an attempt by Milton Hydro to reargue its case. Therefore, the Board, in considering the threshold question provided for in section 45.01 of the *Rules* has determined that the matter in the Motion should not be reviewed on its merits, and dismisses the Motion.

### **COST AWARDS**

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit its cost claim no later than **7 days** from the date of issuance of this Decision.
2. Milton Hydro shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of this Decision.
3. VECC shall file with the Board and forward to Milton Hydro any responses to any objections for cost claims within **28 days** from the date of issuance of this Decision.
4. Milton Hydro shall pay the Board’s costs incidental to this proceeding upon receipt of the Board’s invoice.

All filings to the Board must quote file number **EB-2013-0193**, be made through the Board’s web portal at, <https://www.pes.ontarioenergyboard.ca/service> and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.ontarioenergyboard.ca](http://www.ontarioenergyboard.ca). If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at [BoardSec@ontarioenergyboard.ca](mailto:BoardSec@ontarioenergyboard.ca). All other filings not filed via the board’s web portal should be filed in accordance with the Board’s Practice Directions on Cost Awards.

**DATED** at Toronto, July 4, 2013

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary