



EB-2011-0011

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 Toronto
Hydro-Electric System Limited Inc. for an Order or
Orders granting approval of initiatives and amounts
related to the Conservation and Demand Management
Code.

**DECISION ON ISSUES
AND COST ELIGIBILITY**

Toronto Hydro-Electric System Limited ("Toronto Hydro") filed an application with the Ontario Energy Board (the "Board"), dated January 10, 2011 seeking an order granting approval of funding for nine individual conservation and demand management ("CDM") programs.

The programs for which Toronto Hydro seeks approval of are:

- Business Outreach and Education;
- Commercial Energy Management and Load Control;
- Commercial, Institutional and Small Industrial Monitoring and Targeting;
- Community Outreach and Education Initiative;
- Flat Rate Water Heater Conversion and Demand Response;
- Greening Greater Toronto Commercial Building Energy Initiative;
- Hydronic System Balancing Program;
- In Store Engagement and Education Initiative; and,
- Multi-Unit Residential Demand Response.

The Board assigned file number EB-2011-0011 to this application.

Procedural Background

The Board issued a Notice of Application and Hearing dated January 24, 2011 with respect to this proceeding.

On February 18, 2011 the Board issued Procedural Order No. 1. Within Procedural Order No. 1 the Board set out the dates for the Canadian Energy Efficiency Alliance (“CEEAA”) to respond to Mr. Parker Gallant’s objection to its cost eligibility request and comments on the draft Issues List to be filed by Monday, February 28, 2011.

Comments and Decision on Issues

Toronto Hydro and three other parties filed comments on the draft issues list. Toronto Hydro noted that it accepted the draft issues list. Toronto Hydro also filed an addendum to its application with information regarding additional CDM costs it hoped to recover in this proceeding.

School Energy Coalition (“SEC”) recommended that issue 2 – Staffing, be revised and re-titled Human Resources Plan with a consequent change being made to reflect this in issue 2.1. The Board views this as a positive revision to address the overall issue of human resourcing and CDM and accepts the recommendation. SEC also suggested revising issue 3.2 by dividing the issue into two discrete issues. Generally, the Board accepts SEC’s suggestions. First, the Board approves inclusion of an issue which is intended to examine whether Toronto Hydro has calculated the correct amount of savings targeted and expected from its proposed programs. Second the Board approves inclusion of an issue intended to examine whether Toronto Hydro has selected an appropriate mix of Board-Approved and OPA CDM Programs. This issue is not intended to permit a review of the OPA programs per se, other than to enable the Board to make an informed decision respecting the appropriate mix of OPA and Board-Approved programs. As the Board noted in a recent decision with respect to certain issues in a Hydro One Networks Inc./Hydro One Brampton proceeding:

The Board agrees that it does not have jurisdiction over the OPA programs, and agrees with parties that the information relating to OPA programs provide important context for the applied-for utility-specific programs that will assist the Board in applying its usual analytical framework with respect to costs, and, in particular,

whether the applied-for programs are duplicative as per the Minister's directive.¹

The Board will therefore modify issue 3 to include these revisions. The issue of duplication with OPA CDM Programs is already addressed under issue 1.

Pollution Probe also suggested two additional issues be included under issue 3. Pollution Probe suggested that an issue be added to investigate the proposed participation rates for Toronto Hydro's OPA CDM Programs and that a second issue be added to allow parties to question whether or not Toronto Hydro should be encouraged to propose more Board-Approved CDM Programs. The Board does not view these two proposed issues to be within the scope of the Board's review in the proceeding and does not accept these recommendations.

GEC proposed one additional issue to be included as a new issue 4. GEC recommended that the Board include an issue to review Toronto Hydro's CDM budget in its entirety. The Board believes that Toronto Hydro's budget for OPA CDM programs is outside the scope of this hearing.

Finally, in response to Toronto Hydro filing an addendum to its application seeking recovery of additional CDM Costs, SEC suggested two additional issues. The Board accepts these two recommendations and has included them as the new issue 5 – THESL's Additional CDM Costs. SEC also suggested adding a second issue to the program specific issues to ask if the proposed program itself is reasonable and appropriate. The Board accepts this recommendation as it feels that both the programs themselves and the budgets associated with THESL's proposed programs are within scope of this proceeding and appropriate to investigate.

Decision on Cost Eligibility

Procedural Order No.1 allowed the CEEA to file its response to the objection to its cost eligibility received from Mr. Gallant. The CEEA filed its response with the Board on Monday, February 28, 2011.

In its response, CEEA notes that its membership "represents a wide cross section of

¹ EB-2010-0031/0332, Decision on preliminary issues, Transcript Volume 2, p. 3.

energy sector stakeholders, including publicly owned companies, investor owned companies, institutions, foundations, associations and utilities”. Based on information provided by CEEA for the first time in this proceeding in its response to Mr. Gallant’s objection, CEEA’s membership can be broken down as follows:

1. 20 “corporate” members, approximately half (9) of which are energy sector participants (utilities, including Toronto Hydro, as well as one electricity generator). The majority of the remaining corporate members are either individual commercial enterprises or associations representing commercial enterprises. Also included are a college and a not-for-profit organization focused on initiatives related to climate change in Alberta. Representatives of the “corporate” members make up the majority of the members of CEEA’s Board of Directors.
2. 5 “non-profit” members, three of which participate with some frequency in the Board’s processes. The Board notes that, of those three, two in fact are intervenors in this proceeding and have individually been found to be eligible for an award of costs (Consumers Council of Canada and Pollution Probe).

The principal thrust of CEEA’s response is as follows: first, CEEA is an organization separate and distinct from its membership and that it, and not its members, is the “party” seeking costs; and second, as the “party” CEEA is eligible under section 3.03 of the Board’s *Practice Direction on Cost Awards* (the “Practice Direction”) because it primarily represents a public interest (energy efficiency) relevant to the Board’s mandate in this proceeding.

The Board does not agree that CEEA’s eligibility for cost awards should be determined without regard to its membership. To the extent that an entity’s membership is comprised largely of organizations that would themselves be ineligible for cost awards, so too should the entity be considered ineligible absent special circumstances. This approach is consistent with sections 3.05(b) and (c) of the Practice Direction, which clearly liken associations or groupings of participants to the participants themselves:

3.05 Despite section 3.03, the following parties are not eligible for a cost award:

...

- (b) Transmitters, wholesalers, generators, distributors, and retailers of electricity, **either individually or in a group**;
- (c) Transmitters, distributors, and marketers of natural gas, and gas storage companies, **either individually or in a group**;

...

(Emphasis added)

Under section 3.07 of the Practice Direction, a party that is *prima facie* ineligible under section 3.05 may be found to be eligible for costs where “special circumstances” exist, which is in keeping with the wholly discretionary nature of cost awards.

To be clear, once a party is found to be ineligible under section 3.05 of the Practice Direction, section 3.03 ceases to apply to that party because section 3.05 by its terms applies despite section 3.03. In other words, the proper question in such a case is not whether the party is eligible under section 3.03 by virtue of representing a public interest relevant to the Board’s mandate, but rather whether special circumstances exist that would cause the Board to exercise its discretion in favour of granting cost award eligibility to a party that would otherwise be ineligible.

The Board notes that a majority of CEEA’s members are either energy sector participants or entities representing commercial interests (directly or through a trade association). The former are ineligible under section 3.05 of the Practice Direction, and it has been the Board’s practice that the latter also generally be considered ineligible. Members representing a critical mass of CEEA’s membership are thus ineligible for an award of costs, and on that basis so too is CEEA. The Board does not believe that there are special circumstances that would justify a different outcome in the context of this proceeding.

The Board Orders That:

1. The Final Issues List (attached as Appendix A to this decision) is hereby approved for the Toronto Hydro-Electric System Limited Board-Approved CDM Program application.

Issued at Toronto, March 11, 2011.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

Issues Decision

Toronto Hydro-Electric System Limited

EB-2011-0011

Final Issues List

**Toronto Hydro-Electric System Limited (“THESL”)
Board-Approved CDM Program Application
EB-2011-0011**

Final Issues List

1. Compliance with the CDM Code

- 1.1 Has THESL complied with the CDM Code when developing its application for Board-Approved CDM Programs?
- 1.2 Is the timing of THESL’s application for Board-Approved CDM Programs appropriate?
- 1.3 Do any of THESL’s programs duplicate any OPA-Contracted Province-Wide CDM Programs?
- 1.4 Has THESL appropriately applied the OPA’s cost effectiveness tests when developing its proposed Board-Approved CDM Programs?
- 1.5 Has THESL appropriately applied the OPA’s EM&V Protocols when developing its proposed Board-Approved CDM Programs?

2. Human Resources Plan

- 2.1 Does THESL have an appropriate human resources plan for its nine proposed Board-Approved CDM Programs?

3. Program Savings

- 3.1 Has THESL calculated the correct amount of energy and peak demand savings targeted and expected from its proposed Board-Approved CDM Programs?
- 3.2 Has THESL adopted an appropriate mix of OPA programs and Board-Approved Programs?

4. Budget

- 4.1 Is the budget for THESL’s Board-Approved CDM Programs of \$56.3M reasonable and appropriate?

5. THESL’s Additional CDM Costs

- 5.1 Is it appropriate for THESL to recover its 2010 and 2011 CDM Program Development, Planning, and Application costs through this application?
- 5.2 Are THESL’s 2010 and 2011 Program Development, Planning, and Application costs reasonable and appropriate?

6. Program #1 – Business Outreach and Education

- 6.1 Is the proposed Business Outreach and Education program itself reasonable and appropriate?
- 6.2 Is the proposed budget of \$1.65M allocated to the Business Outreach and Education Program reasonable and appropriate?

7. Program #2 – Commercial Energy Management and Load Control

- 7.1 Is the proposed Commercial Energy Management and Load Control program itself reasonable and appropriate?
- 7.2 Is the proposed budget of \$11.69M allocated to the Commercial Energy Management and Load Control Program reasonable and appropriate?

8. Program #3 – Commercial, Institutional and Small Industrial Monitoring & Targeting

- 8.1 Is the proposed Commercial, Institutional and Small Industrial Monitoring & Targeting program itself reasonable and appropriate?
- 8.2 Is the proposed budget of \$5.50M allocated to the Commercial, Institutional and Small Industrial Monitoring & Targeting Program reasonable and appropriate?

9. Program #4 – Community Outreach and Education Initiative

- 9.1 Is the proposed Community Outreach and Education Initiative itself reasonable and appropriate?
- 9.2 Is the proposed budget of \$5.66M allocated to the Community Outreach and Education Initiative reasonable and appropriate?

10. Program #5 – Flat Rate Water Heater Conversion & Demand Response

- 10.1 Is the proposed Flat Rate Water Heater Conversion & Demand Response program itself reasonable and appropriate?
- 10.2 Is the proposed budget of \$2.68M allocated to the Flat Rate Water Heater Conversion & Demand Response Program reasonable and appropriate?

11. Program #6 – Greening Greater Toronto Commercial Building Energy Initiative

- 11.1 Is the proposed Greening Greater Toronto Commercial Building Energy Initiative itself reasonable and appropriate?
- 11.2 Is the proposed budget of \$0.30M allocated to the Greening Greater Toronto Commercial Building Energy Initiative Program reasonable and appropriate?

12. Program #7 – Hydronic System Balancing Program

- 12.1 Is the proposed Hydronic System Balancing Program itself reasonable and appropriate?
- 12.2 Is the proposed budget of \$4.72M allocated to the Hydronic System Balancing Program reasonable and appropriate?

13. Program #8 – In Store Engagement and Education Initiative

- 13.1 Is the proposed In Store Engagement and Education Initiative itself reasonable and appropriate?
- 13.2 Is the proposed budget of \$4.22M allocated to the In Store Engagement and Education Initiative reasonable and appropriate?

14. Program #9 – Multi-Unit Residential Demand Response

- 14.1 Is the proposed Multi-Unit Residential Demand Response itself reasonable and appropriate?
- 14.2 Is the proposed budget of \$19.91M allocated to the Multi-Unit Residential Demand Response reasonable and appropriate?