Ontario Energy Board

Commission de lénergie de l'Ontario

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 Ltd. for an Order or Orders granting approval of initiatives and amounts related to the Conservation and Demand Management Code;

AND IN THE MATTER OF a Notice of Motion by Pollution Probe Research Foundation for review of parts of the Board's Decision on Issues and Cost Eligibility issued on March 11, 2011;

AND IN THE MATTER OF Rules 42, 44 and 45 of the Board's *Rules of Practice and Procedure*.

NOTICE OF HEARING AND PROCEDURAL ORDER NO. 3

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 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, in which it set out the dates for parties to file comments on the draft Issues List.

The Board received comments from the Green Energy Coalition, Pollution Probe, School Energy Coalition and Toronto Hydro. On March 11, 2011, the Board issued its Decision on Issues. Within the Board's decision, it accepted or modified several of the

proposed issues submitted by parties. The Board found, however, that the two new issues proposed by Pollution Probe were out of the scope of the Board's review in the proceeding and therefore did not accept the suggestions.

On March 22, 2011, Pollution Probe filed a Motion for Review of parts of the Board's Decision on Issues. Pollution Probe requested that the Board hold an oral hearing for this motion.

On March 25, 2011, the Board issued Procedural Order No. 2 which informed parties that the Board had accepted Pollution Probe's request for an oral hearing and requested that parties pre-file their submissions with the Board by April 1, 2011. In Procedural Order No. 2 the Board informed parties that it would notify them of the time and date of the hearing in subsequent procedural orders.

The Board considers it necessary to make provisions for the following procedural matters related to this proceeding. Further procedural orders may be issued from time to time. The Notice of Motion is attached to this Notice of Hearing and Procedural Order No. 3 as Appendix A.

THE BOARD THEREFORE ORDERS THAT:

1. An Oral Hearing on the motion filed by Pollution Probe will be held at the Board's offices located at 2300 Yonge Street, Toronto, Ontario on the 25th floor in the **West Hearing Room** commencing on **Tuesday, April 5, 2011** at 9:30 a.m.

If you have a user ID, please submit your submission through the Board's web portal at www.errr.ontarioenergyboard.ca in searchable/unrestricted PDF format. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. You may also send your submission by e-mail to the following address: boardsec@ontarioenergyboard.ca . Additionally, two paper copies are required and should be sent to the addresses below. Those who do not have Internet access are asked to submit their submissions on a CD or diskette in PDF format, along with seven paper copies by 4:45pm on the date indicated, and copy all parties. Parties must also include the Case Manager, Josh Wasylyk josh.wasylyk@ontarioenergyboard.ca and Board Counsel, Michael Millar michael.millar@ontarioenergyboard.ca on all electronic correspondence related to this case.

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attn: Kirsten Walli
Board Secretary

Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto March 31, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

of the

Procedural Order No. 3 and

Notice of Motion as filed by Pollution Probe Research Foundation

Toronto Hydro-Electric System Limited

Board File No.: EB-2011-0011

EB-2011-0011

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 Toronto Hydro Electric System Inc. for an Order or Orders granting approval of initiatives and amounts related to the Conservation and Demand Management Code (the "Toronto Hydro 2011-14 CDM Application").

MOTION RECORD

(Pollution Probe Motion to Review Parts of Issues List Decision)

March 22, 2011

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Counsel for Pollution Probe

Motion Record Index

EB-2011-0011

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 Toronto Hydro Electric System Inc. for an Order or Orders granting approval of initiatives and amounts related to the Conservation and Demand Management Code (the "Toronto Hydro 2011-14 CDM Application").

NOTICE OF MOTION
(Pollution Probe's Motion for Review of Issues List Decision)

THE INTERVENOR, POLLUTION PROBE, will make a motion to the Board on a date and time to be determined by the Board, at the Board's Hearing Room, 25th Floor, 2300 Yonge Street, Toronto, Ontario, M4P 1E4.

PROPOSED METHOD OF HEARING: The motion is to be heard:

[ ] in writing because it is ;

[ ] in writing as an opposed motion;

[X] orally.

THE MOTION IS FOR:

1. An Order that the Board review and vary the parts of the *Decision on Issues and Cost Eligibility* (the "*Issues List Decision*") determining that:

(a) the additional issue proposed by Pollution Probe to investigate the proposed participation rates for Toronto Hydro's OPA CDM Programs is outside the scope of this hearing;

(b) the additional issue proposed by Pollution Probe to allow parties to question whether or not Toronto Hydro should be encouraged to propose more Board-Approved CDM Programs is outside the scope of this hearing; and

(c) Toronto Hydro's budget for OPA CDM programs is outside the scope of this hearing; and

2. Such further and other relief as counsel may request and that seems just to the Board.

THE GROUNDS FOR THE MOTION ARE:

A. Overview

1. Pollution Probe seeks an Order that the Board review and vary the parts of *Issues List Decision* determining that issues related to 1) the OPA CDM Programs and 2) whether Toronto Hydro should propose more Board-Approved CDM programs are outside the scope of the hearing. Pollution Probe submits that the Board erred as these exclusions cannot be justified. In particular, these determinations conflict with Ministerial Directives, the Board's statutory mandate, the Board including an issue regarding whether there is an appropriate mix of Board-Approved and OPA CDM Programs, and a Board decision in the Hydro One 2011-14 CDM case.

2. Pollution Probe thus submits that this motion meets the threshold requirements as:

(a) the grounds (detailed below) raise a question as to the correctness of the decision;

(b) the issues raised are such that a review on those issues could result in the Board deciding that the relevant parts of the decision should be varied;

(c) there are an identifiable errors in the decision as the relevant findings conflict with Ministerial Directives, the Board's statutory mandate, the Board including an issue regarding whether there is an appropriate mix of Board-Approved and OPA CDM Programs, and a Board decision in the Hydro One 2011-14 CDM case; and

(d) The alleged errors are material and relevant to the outcome of the decision, and if the errors are corrected, the reviewing panel would change the outcome of the decision.

3. Detailed grounds are provided below.

B. Detailed Grounds

4. On March 11, 2011, the Board released the *Issues List Decision* in this matter. As part of that *Decision*, the Board determined that it would add an issue intended to examine whether Toronto Hydro has selected an appropriate mix of Board-Approved and OPA CDM Programs. However, it also determined that an examination of the proposed participation rates and budgets for the OPA CDM Programs was outside the scope of this hearing. It also determined that the question of whether or not Toronto Hydro should be encouraged to propose more Board-Approved CDM Programs was also outside the scope of this hearing.

5. For the reasons below, Pollution Probe submits that the Board erred with respect to these parts of the *Issues List Decision* as they cannot be justified, and these parts of the decision should be accordingly reviewed and varied.

6. These parts of the *Issues List Decision* determining that the above issues were outside the scope of this hearing are final decisions given that the exclusions limit the corresponding questions and examination during this proceeding.

7. These exclusions conflict with the Minister's Directives. Pursuant to sections 27.1 and 27.2 of the *Ontario Energy Board Act, 1998*, the Board is required to implement applicable directives by the Minister; the Board does not have discretion in this regard. In this case, the applicable Directive to the Board dated March 31, 2010 clearly states at section 3(b) that a distributor's license is to be conditional upon delivering a mix of CDM Programs "*as far as* is appropriate and reasonable [emphasis added]". The Minister did not simply say "appropriate and reasonable" or "just and reasonable"; the requirement upon distributors was instead of a significantly higher onus as they must deliver a mix of CDM Programs "*as far as* is appropriate and reasonable". The Board thus needs to conduct corresponding inquiries and examination to ensure that distributors (including Toronto Hydro) are meeting this high requirement.

8. This important requirement is reinforced by section 6(c) of the same Ministerial Directive which states that the consideration of CDM Programs or funding is not precluded on the basis that CDM Targets have been or are expected to be exceeded. The Minister's recent Directive dated February 17, 2011 to the Ontario Power Authority regarding an Integrated Power System Plan also reinforces this high requirement as:

> The Plan shall *seek to exceed and accelerate* the achievement of these CDM targets if this can be done in a manner that is feasible and cost-effective. [emphasis added]

9. It is thus in accordance with the policies of the Government of Ontario that distributors (including Toronto Hydro) conduct CDM "*as far as is* appropriate and reasonable" and that distributors "seek to exceed and accelerate" the achievement of CDM targets where feasible and cost-effective. Therefore, when the Board carries out its review of this application in accordance with the Board's

statutory objectives, the Board is to be guided by promoting CDM in a manner consistent with these polices.

10. However, Pollution Probe submits that the Board's decision to exclude certain issues instead does the exact opposite. The exclusions prevent an examination of the CDM Programs in their context as a whole, and it is important to be able to do this to determine if enough CDM is occurring in accordance with the Directives and license requirements. It has also been long-standing Board practice that hearings examine whether a distributor should be doing more CDM. Although the CDM context has changed, this underlying key issue is still present; otherwise the Board's review is unduly limited to simply the programs proposed by the distributor.

11. This inconsistency becomes more apparent in light of the fact that the Board added Issue 3.2 in order to examine the mix of CDM Programs, yet the Board will not examine whether more Board-Approved CDM Programs should be done. Any examination of the mix requires examining whether more Board-Approved CDM should be done; otherwise, any review of the mix can only be limited and cursory. The Board thus must be able to examine whether additional Board-Approved CDM should be ordered.

12. As an additional part of this context, it is important to remember that the Board needs to examine information about the OPA programs as part of this proceeding. Pollution Probe agrees that the Board does not approve the OPA CDM Programs themselves, but the Board's recent decision in the Hydro One 2011-14 CDM case reinforces the practical reality that relevant information about the OPA programs is still within the scope of the proceeding. As the Board noted:

> … *Parties argued, however, that the OPA programs were relevant from the point of view of determining relative cost-effectiveness of applied-for utility programs*, the size and scope of the gap between the capacity and energy reductions that can be achieved by using the OPA programs, and the overall utility-specific energy and capacity targets and whether, of course, utility programs are duplicative.

> *The Board … 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. [emphasis added]

13. It is also important to remember that section 27.2(3) of the *Ontario Energy Board Act* may require the OPA to provide information to the Board, and that section 2(c) of the Minister's Directive to the Board dated March 31, 2010 provides that the Board shall have regard to information obtained from the Ontario Power Authority. The statutory and legal framework thus contemplates that the Board will be considering information from the OPA as part of its analysis and review in this proceeding.

14. As the Board noted in the Hydro One 2011-14 CDM case, the traditional "just and reasonable" approach from rates cases may not be perfectly applicable in these CDM applications. The Board instead found that "it will use its usual analytical approach" to reviewing such CDM applications. In other words, the Board "balance[s] the need for economic efficiency and the protection of consumers, with respect to prices, with the rest of the legislative scheme and the terms of the directive." It is thus important that the Board have the relevant information before it about the OPA CDM Programs as well as information (and argument) about whether additional Board-Approved CDM should be encouraged as well.

15. Pollution Probe also submits that although the application is for 2011-14, there is no guarantee that the Board will approve all three years if the Board finds the application wanting or in need of improvement. For example, the Board could only approve in its final decision only some of the years that were originally applied for, as the Board did in the Toronto Hydro rates case for 2008-2010 (EB-2007-0680). It is thus important that the Board have access to full contextual information in order for the Board to decide what to do. It is accordingly premature to assume that the Board will approve any or all of the requested years,

and the Board needs to be able to examine and understand the context fully in order to make multi-year approvals.

16. Similarly, by varying the *Issues Decision* to include these issues, the Board does not automatically determine that the Board will require additional CDM programs; it simply means the Board will examine the issue and make a determination as part of the hearing based on the evidence and argument. This is also in accordance with the CDM Code, which states in section 3.4.1 that the Board will "make *any* determinations it considers appropriate. [emphasis added]" In other words, the CDM Code is clear that the Board is not limited to simply approving the proposed programs or what determinations the Board will make. The Board could thus make approvals conditional on Toronto Hydro meeting some requirement (such as additional CDM). There is also nothing in the CDM Code that precludes an examination of these issues.

17. Pollution Probe thus submits that the relevant parts of the *Issues List Decision* be reviewed and varied so that the issues are declared to be within the scope of the proceeding. Pollution Probe submits that a review is particularly appropriate here as this is one of the first CDM applications coming for approval under the new legislative and regulatory framework, and there thus may be previously unknown or unforeseen implications of the *Issues List Decision.*

18. Pollution Probe particularly relies on sections 1(1), 27.1, and 27.2 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B and Rules 42-45 of the Board's *Rules of Practice and Procedure*.

19. Such other grounds as counsel may submit and the Board accepts.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. *Decision on Issue and Cost Eligibility* [Motion Record, Tab 2];

2. Statutory Excerpts [Motion Record, Tab 3];

3. Minister's Directive to Board dated March 31, 2010 [Motion Record, Tab 4];

4. Minister's Directive to OPA dated February 17, 2011 [Motion Record, Tab 5];

5. Excerpts from Decision on March 7, 2011 in Hydro One 2011-14 CDM case (EB-2010-0331/0332) [Motion Record, Tab 6];

6. CDM Code issued September 16, 2010 [Motion Record, Tab 7];

7. Excerpt from the Board's *Rules of Practice and Procedure* [Motion Record, Tab 8];

8. Excerpt from *Decision and Order on Motion to Review and Vary* in EB-2009-0038 [Motion Record, Tab 9];

9. Excerpt from *Decision and Order* in EB-2007-0797 [Motion Record, Tab 10];

10. Excerpt from *Motions to Review the [NGEIR] Decision – Decision With Reasons* in EB-2006-0332/0338/0340 [Motion Record, Tab 11];

11. Original Submissions by Pollution Probe on Issues List [Motion Record, Tab 12];

12. Original Submissions by the Green Energy Coalition on Issues List [Motion Record, Tab 13]; and

13. Such further and other documentary evidence as counsel may wish to use and this Honourable Court may accept.

March 22, 2011

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Counsel for Pollution Probe

TO: **APPLICANT AND INTERVENORS**
per Intervenor List dated February 28, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

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 ("CEEA") 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?

STATUTORY EXCERPTS – Prepared on behalf of Pollution Probe

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

4. To facilitate the implementation of a smart grid in Ontario.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the Electricity Act, 1998. 2004, c. 23, Sched. B, s. 1.

Conservation directives

27.1 (1) The Minister may issue, and the Board shall implement, directives that have been approved by the Lieutenant Governor in Council that require the Board to take steps specified in the directives to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources. 2002, c. 23, s. 4 (4).

Publication

(2) A directive issued under this section shall be published in *The Ontario Gazette*. 2002, c. 23, s. 4 (4).

Directives re conservation and demand management targets
27.2 (1) The Minister may issue, and the Board shall implement, directives that have been approved by the Lieutenant Governor in Council that require the Board to take steps specified in the directive to establish conservation and demand management targets to be met by distributors and other licensees. 2009, c. 12, Sched. D, s. 7.

Directives, specified targets
(2) To promote conservation and demand management, a directive may require the Board to specify, as a condition of a licence, the conservation targets associated with those specified in the directive, and the targets shall be apportioned by the Board between distributors and other licensees in accordance with the directive. 2009, c. 12, Sched. D, s. 7.

Same
(3) A directive made under subsection (2) may require the OPA to provide information to the Board or to the Ministry about the conservation targets referred to in subsection (2) or the contracts referred to in subsection (5). 2009, c. 12, Sched. D, s. 7.

Directives re distributors
(4) Subject to subsection (7), a directive may require the Board to specify, as a condition of a licence, that a distributor may meet, at its discretion, any portion of its conservation target by seeking the approval of the Board for the conservation and demand management programs to be offered in its service area. 2009, c. 12, Sched. D, s. 7.

Directives, contracting with the OPA
(5) A directive may require the Board to specify, as a condition of a licence, that a distributor meet, at its discretion, any portion of its conservation target by contracting with the OPA to meet the target through province-wide programs offered by the OPA. 2009, c. 12, Sched. D, s. 7.

Public reporting
(6) To promote a culture of conservation and demand management, a directive may require the Board to specify, as a condition of a licence, that the licensee make public, by such means and at such time as specified in the directive, the steps that the licensee has taken to meet its targets and the results that have been achieved in meeting those targets. 2009, c. 12, Sched. D, s. 7.

Hearings
(7) A directive may specify whether the Board is to hold a hearing, the circumstances under which a hearing may or may not be held and, if a hearing is to be held, the type of hearing to be held. 2009, c. 12, Sched. D, s. 7.

Publication
(8) A directive issued under this section shall be published in *The Ontario Gazette*. 2009, c. 12, Sched. D, s. 7.

Ontario
Executive Council
Conseil des ministres

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le con- sentement du Conseil des ministres, décrète ce qui suit:

WHEREAS it is desirable to achieve reductions in electricity consumption and reductions in peak provincial electricity demand.

AND WHEREAS the Minister may, with the approval of the Lieutenant Governor in Council, issue directives under section 27.1 of the *Ontario Energy Board Act, 1998* in order to direct the Board to take steps to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources.

AND WHEREAS the Minister may, with the approval of the Lieutenant Governor in Council, issue directives under section 27.2 of the *Ontario Energy Board Act, 1998* in order to direct the Board to establish conservation and demand management targets to be met by distributors and other licensees.

NOW THEREFORE the Directive attached hereto is approved and shall be and is effective as of the date hereof.

Recommended: _____
Minister of Energy and Infrastructure

Concurred: _____
Chair of Cabinet

Approved and Ordered: MAR 3 1 2010
Date

_____
Lieutenant Governor

O.C./Décret : 437/2010

MINISTER'S DIRECTIVE

TO: THE ONTARIO ENERGY BOARD

I, Brad Duguid, Minister of Energy and Infrastructure, hereby direct the Ontario Energy Board pursuant to sections 27.1 and 27.2 of the *Ontario Energy Board Act, 1998*, as described below.

The Board shall take the following steps in order to establish electricity conservation and demand management ("CDM") targets to be met by licensed electricity distributors ("distributors") within the timeframe specified herein:

1. Subject to paragraph 5, the Board shall, without a hearing and in accordance with the requirements of this Directive, which relate to the conservation and demand-management targets to be met by distributors and other licensees including the OPA, amend each distributor's licence to add a condition requiring the distributor to achieve reductions in electricity consumption and reductions in peak provincial electricity demand through the delivery of CDM programs ("CDM Programs") by the amounts specified by the Board (the "CDM Targets"), over a four-year period beginning January 1, 2011.

2. In establishing CDM Targets for each distributor, the Board shall:

   (a) ensure that the total of the CDM Targets established for all distributors is equal to 1330 megawatts (MW) of provincial peak demand persisting at the end of the four-year period and 6000 gigawatt hours (GWh) of reduced electricity consumption accumulated over the four-year period;

   (b) specify for each distributor, a CDM Target for the reduction of provincial peak electricity demand and a CDM Target for the reduction of electricity consumption, each of which must be greater than zero; and,

   (c) have regard to information obtained from the Ontario Power Authority ("OPA"), developed in consultation with distributors, regarding the reductions in provincial peak electricity demand and electricity consumption that could be achieved by individual distributors through the delivery of CDM Programs.

3. The Board shall amend the licence of each distributor as follows:

   (a) by adding a condition that specifies each distributor must meet its CDM Targets through:

   (i) the delivery of Board approved CDM Programs delivered in the distributor's service area ("Board-Approved CDM Programs");

(ii) the delivery of CDM Programs that are made available by the OPA to distributors in the distributor's service area under contract with the OPA ("OPA-Contracted Province-Wide CDM Programs"); or,

(iii) a combination of (i) and (ii)

(b) by adding a condition that specifies that the distributor must deliver a mix of CDM Programs to all consumer types in the distributor's service area, whether through Board-Approved CDM Programs, OPA-Contracted Province-Wide CDM Programs or a combination of the two, as far as is appropriate and reasonable having regard to the composition of the distributor's consumer base;

(c) by adding a condition that requires the distributor to comply with rules mandated by a code issued by the Board.

4. The Board shall amend licenses of distributors to ensure that:

(a) distributors utilize the same common Provincial brand (which includes any mark or logo that the Province has used or is using, created or to be created by or on behalf of the Province, and which will be identified to the Board by the Ministry as a provincial mark or logo for its conservation programs) with all Board-Approved CDM Programs;

(b) that the brand identified in (a) shall be the same brand utilized by the OPA and distributors for OPA-Contracted Province-Wide CDM Programs, once those programs have been created; and,

(c) that the brand shall be used by distributors in conjunction with or co-branded with distributor's own brand or marks.

and the Board shall, upon receipt of written direction from the Ministry, which may be issued from time to time, and as a condition of license, require any one or more distributors to cease using the Provincial brand described in this paragraph at such time or in such way as may be specified in such direction.

5. The Board shall not amend the licence of any distributor that meets the conditions set out below:

(a) with the exception of embedded distributors the distributor is not connected to the Independent Electricity System Operator (IESO)-controlled grid; or,

(b) the distributor's rates are not regulated by the Board.

6. The Board shall issue a code that includes rules relating to the reporting requirements and performance incentives associated with CDM Programs and to the planning, design, approval, implementation and the evaluation, measurement and verification ("EM&V") of Board-Approved CDM Programs and to such other matters as the Board considers appropriate.

   In developing such rules, the Board shall have regard to the following objectives of the government in addition to such other factors as the Board considers appropriate:

   (a) that Board-Approved CDM Programs shall not duplicate OPA-Contracted Province-Wide CDM Programs that are available from the OPA at the time of Board approval;

   (b) that the Board shall encourage opportunities for coordinating CDM Programs between the distributor and other relevant entities such as other electricity distributors, natural gas distributors and the OPA;

   (c) that the Board shall not preclude consideration of CDM Programs or funding for CDM Programs on the basis that a distributor's CDM Targets have been or are expected to be exceeded;

   (d) that a tiered performance incentive mechanism shall be available to distributors for verified electricity savings with incentives beginning to accrue once a distributor meets 80% of each CDM Target; performance incentives shall not be offered for electricity savings achieved beyond 150% of each CDM Target;

   (e) that Board approval for funding of any given Board-Approved CDM Program shall correspond to the period in which the Board-Approved CDM Program is offered, provided that the period is no longer than the period for which CDM Targets are established;

   (f) that the Board shall require distributors to use OPA cost-effectiveness tests, as modified by the OPA from time to time, for assessing the cost-effectiveness of Board-Approved CDM Programs;

   (g) that the Board shall require distributors to use the OPA protocol process and third-party vendor of record list, as modified by the OPA from time to time, when conducting EM&V of Board-Approved CDM Programs;

   (h) that the Board shall consider the definition of CDM to be inclusive of load reduction from initiatives, such as geothermal heating and cooling, solar heating and fuel switching, but exclusive of initiatives that are associated with the OPA Feed-in Tariff Program and the OPA Micro Feed-in Tariff Program; and,

(i) that all Board-Approved CDM Programs shall utilize the same common provincial brand (which includes any mark or logo that the Province has used or is using, created or to be created by or on behalf of the Province, and which will be identified to the Board by the Ministry as a provincial mark or logo for conservation) used for OPA-Contracted Province-Wide CDM Programs, once such programs are created, and used in conjunction with or co-branded with any brand or mark used by the distributor.

7. The Board shall not approve CDM Programs until OPA-Contracted Province-Wide CDM Programs have been established.

8. The Board shall, in approving Board-Approved CDM Programs, continue to have regard to its statutory objectives, including protecting the interests of consumers with respect to prices.

9. The Board shall conduct, or cause to be conducted, targeted audits of EM&V carried out by the distributor or third-parties on behalf of the distributor, as necessary.

10. The Board shall annually review and publish the verified results of each individual distributor's CDM Programs and the consolidated results of all distributor CDM Programs, both Board-Approved CDM Programs and OPA-Contracted Province-Wide CDM Programs and take steps to encourage distributors to improve CDM Program performance.

11. The Board shall permit distributors to meet a portion of their CDM Targets through the delivery of CDM Programs targeted to low-income consumers.

12. The Board shall have regard to the objective that lost revenues that result from CDM Programs should not act as a disincentive to a distributor.

Minister of Energy and Infrastructure

Ministry of Energy

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Ontario

FEB 1 7 2011

MC-2011-625

Mr. Colin Andersen
Chief Executive Officer
Ontario Power Authority
1600–120 Adelaide Street West
Toronto ON M5H 1T1

Dear Mr. Andersen:

In my capacity as the Minister of Energy and pursuant to the authority granted to me under subsection 25.30(2) of the *Electricity Act, 1998*, I am providing the Ontario Power Authority (OPA) with direction for the preparation of an integrated power system plan (the "Plan"). This Supply Mix Directive replaces the Supply Mix Directive issued on June 13, 2006 and the Supply Mix Directive issued on September 17, 2008.

Pursuant to this Authority, I hereby direct the OPA to prepare a Plan to meet the government's goals as set out in this Supply Mix Directive as follows:

Demand

In developing the Plan, the OPA shall use a medium electricity demand growth scenario. This scenario balances the expected growth in residential and commercial sectors with modest, post-recession growth in the industrial sector. Under this scenario, Ontario's demand would grow moderately (approximately 15 per cent) between 2010 and 2030, based on the projected increase in population and conservation as well as shifts in industrial and commercial needs.

It is feasible that technological changes could drive higher electricity demand growth through, for example, greater adoption of electric vehicles and the potential electrification of public transit. The Plan needs, therefore, to have the flexibility to accommodate the potential for a higher growth outcome.

Conservation

The OPA shall plan to achieve through Conservation and Demand Management (CDM) a peak demand reduction target of 7,100 megawatts (MW) and an energy savings target of 28 terawatt-hours (TWh) by the end of 2030. Further, the OPA shall plan to achieve interim CDM targets as follows: 4,550 MW and 13 TWh by the end of 2015; 5,840 MW and 21 TWh by the end of 2020; and 6,700 MW and 25 TWh by the end of 2025. These interim CDM targets are to serve as milestones to measure progress towards the overall 2030 CDM target.

The Plan shall seek to exceed and accelerate the achievement of these CDM targets if this can be done in a manner that is feasible and cost-effective. The targets are to be measured from a base year of 2005.

.../cont'd

The above-noted targets shall also include electricity savings forecasted through the implementation of codes, standards, regulations and other initiatives that are progressive and reasonable based on OPA analysis.

Consistent with my directive to the Ontario Energy Board (OEB) dated March 31, 2010, the definition of CDM should be inclusive of load reduction from initiatives such as geothermal heating and cooling, solar heating and fuel switching and customer-based generation for the purpose of load displacement. The definition should be exclusive of generation that is contracted-for under the OPA's Feed-in Tariff (FIT) and microFIT Programs and other generation that is separately metered for the purpose of injecting electricity into the transmission system or a distribution system.

Nuclear

The OPA shall continue to plan for nuclear generation to account for approximately 50 per cent of total Ontario electricity generation. To this end, the Plan shall provide for the refurbishment of 10,000 MW of existing nuclear capacity at the Bruce Nuclear Generating Station and the Darlington Nuclear Generating Station as well as the procurement of two new nuclear generating units (about 2,000 MW) at the Darlington site. The Government will pursue this procurement where it can be achieved in a cost-effective manner.

Nuclear refurbishment is a complex task and Ontario will need a coordinated plan for refurbishment that takes into account various considerations. To this end, the OPA shall continue to work with Ontario Power Generation (OPG), Bruce Power, and the Ministry of Energy to ensure that the Plan includes an updated coordinated refurbishment schedule.

Coal Phase-out and Potential Conversion

Since 2003, Ontario has shut down eight coal-fired generating units, including the recent closures of two units each at OPG's Nanticoke and Lambton Generating Stations. The shutdown of two additional units at the Nanticoke Generating Station will take place before the end of 2011.

The Government's commitment to replace all coal-fired generation by the end of 2014 will be met. The OPA shall work with the Independent Electricity System Operator (IESO) and OPG to determine opportunities for advancing the closure of additional units.

The Government has directed the OPA to negotiate with OPG for a contract for biomass fuelled generation from the 215 MW Atikokan Generating Station in Northwestern Ontario. It is expected that this plant could be operating on biomass by 2013.

Two units at OPG's Thunder Bay Generating Station are to be converted to run on natural gas over the period leading up to 2014. Opportunities to co-fire with biomass will continue to be examined.

In developing the Plan, the OPA shall assess the conversion of some or all of the remaining units at Lambton and Nanticoke to natural gas under a range of different scenarios for nuclear generation and system peaking requirements. The government will make a decision on conversion of some or all of these units in 2012. This decision will be made once planning work on continued operation of the operating units at the Pickering Nuclear Generating Station

.../cont'd

and the refurbishment of the remaining units at the Bruce and Darlington nuclear generating stations is further advanced, providing better information on the availability of nuclear capacity.

In order to plan properly for the possibility of conversion, the government anticipates that planning and approval work for the natural gas pipeline infrastructure required to Nanticoke will begin soon.

Renewables - Hydroelectric Resources

New hydroelectric developments are underway by OPG, including the Niagara Tunnel and the 440 MW Lower Mattagami redevelopment as well as additional private sector developments. The Plan shall allow for future hydroelectric development where it is cost-effective to build and to connect to the transmission system.

The Plan shall provide for installed hydroelectric capacity to reach 9,000 MW by 2018. The OPA shall continue to explore cost-effective opportunities for further hydroelectric development and maximize existing hydroelectric resources. Additional cost-effective hydroelectric resources should be developed if they are identified. It is expected that the Plan shall provide for hydroelectric generation to account for approximately 20-25 per cent of total Ontario electricity generation.

Renewables Other Than Hydroelectric (Wind, Solar, Bio-energy)

The June 2006 Supply Mix Directive required that the OPA plan to use the existing base of 7,850 MW of renewable energy (hydroelectric generation) and to double this capacity to 15,700 MW by 2025 including hydroelectric, wind, solar, and bio-energy.

Since then, there have been a number of renewable energy procurements through initiatives such as the Renewable Energy Supply (RES) programs (RES I, II and III), the Renewable Energy Standard Offer Program and the FIT Program. As a result of these successful procurements, as well as the Green Energy Investment Agreement, the additional renewable capacity expected to come into service is greater than the levels envisaged in 2006. Based on forecast assessments of what the system can accommodate, the OPA shall plan for 10,700 MW of renewable energy capacity, excluding hydroelectric, by 2018.

The government will look for opportunities to incorporate additional capacity from renewables into the Plan taking into consideration the cost-effectiveness for Ontario electricity consumers, planned transmission additions, and electricity demand growth.

It is expected that the Plan shall provide for renewables, excluding hydroelectric, to account for approximately 10-15 per cent of total Ontario electricity generation by 2018.

Natural Gas

Natural gas will continue to play a strategic role in Ontario's supply mix by complementing intermittent supply from sources such as wind and solar, meeting local and system requirements, and ensuring that adequate capacity is available as nuclear plants are modernized. The OPA shall continue to plan on natural gas usage for these strategic purposes.

.../cont'd

The 2007 Integrated Power System Plan submitted to the OEB included a forecasted need for three additional gas plants in the Province, including one in the Kitchener-Waterloo-Cambridge area and one in the southwest GTA. Due to changes in demand along with the addition of approximately 8,400 MW of new supply since 2003, the outlook has changed and two of the proposed plants, including the proposed plant in Oakville, are no longer required. A transmission solution to maintain reliable supply in the southwest GTA will be required.

As indicated in the 2007 Plan, procurement of a natural gas-fired plant in the Kitchener-Waterloo-Cambridge area is still necessary to ensure adequate regional electricity supply.

Transmission

The government recognizes the need to pace transmission upgrades and the importance of striking a balance between a clean economy and limiting ratepayer cost burdens. Long-term planning for transmission should allow for the expansion of the system to include renewables in order to foster a cleaner economy and should also be able to adjust if conditions change.

The Plan shall include the five priority transmission investment projects identified by the OPA for system reliability, serving new load and renewables incorporation out to 2018. For the purposes of preparing the Plan, the OPA shall assume these projects will proceed. These priority projects are:

- Device(s) to enhance transfer capability, such as series or static var compensation, or other similar devices, in Southwestern Ontario
- Upgrading existing line(s) west of London;
- A new line west of London;
- Enhance the East West tie along the east shore of Lake Superior through a new line; and
- New line to Pickle Lake.

The OPA, as the provincial transmission planner shall define and make recommendations about the scope and timing of these transmission projects on the basis of their rationale, as part of the Plan. The OPA shall also immediately work in cooperation with Hydro One and make recommendation(s) on the scope and timing of transmission projects to be undertaken by the transmitter pursuant to an amendment of the transmitter's licence conditions resulting from a directive issued to the OEB by the Minister of Energy in early 2011.

In addition to this, the OPA shall identify other cost-effective transmission and distribution solutions through ongoing decision processes – integrated planning and economic tests – and maximize use of the existing system.

The OPA shall develop a plan for remote community connections beyond Pickle Lake, including consideration for the relevant cost contributions from benefiting parties, such as the federal government. This plan may also consider the possibility of interim solutions as appropriate that reduce consumption of diesel fuel.

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Smart Grid

The OPA shall give planning consideration to the Smart Grid developments that are taking place in Ontario. The OPA should also ensure that distribution level investment associated with smart grid and renewable connections is considered in the context of the Plan.

Reliability and Operability

The Plan shall consider potential electricity storage, the availability of imports from other jurisdictions and other methods in order to meet Ontario's reliability and operability requirements throughout the duration of the Plan.

The economics of storage technologies will depend on the differential between peak and off-peak costs, the capital and operating costs of the storage facility and the relative costs of other peak managing options. Examination of storage opportunities should include a determination as to whether the customer and system benefits exceed the development and operating costs of the storage system.

Impacts of the Plan on Electricity Consumers

The government recognizes that electricity investments are important for individual and business consumers from a variety of perspectives, including cost. The OPA shall develop the Plan mindful of total bill impacts and the impact that the costs associated with the choices it makes within the Plan has on electricity rates generally.

Consultation

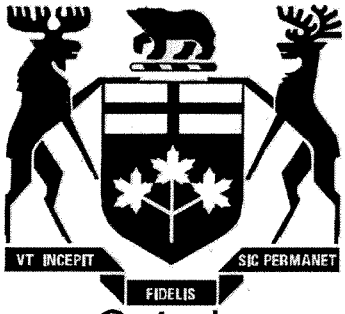
Ontario's Aboriginal peoples play an important role in the development of Ontario's electricity system. The Government will retain responsibility for addressing Aboriginal economic opportunities in the energy sector. The Government expects the OPA to carry out the procedural aspects of any Crown duty to consult First Nation and Métis communities in developing the Plan.

Regulatory Observance

The Plan shall comply with Ontario Regulation 424/04 (Integrated Power System Plan) made under the *Electricity Act, 1998*, and all other applicable statutory and regulatory requirements, as amended from time to time.

Sincerely,

Brad Duguid
Minister



Ontario

ONTARIO ENERGY BOARD

FILE NO.: **EB-2010-0331**
EB-2010-0332

VOLUME: **2**

DATE: **March 7, 2011**

BEFORE:	**Marika Hare**	**Presiding Member**
	Paul Sommerville	**Member**
	Karen Taylor	**Member**

EB-2010-0331
EB-2010-0332

THE 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 Hydro One Brampton Networks Inc. for an Order or Orders granting approval of initiatives and amounts related to the Conservation and Demand Management Code.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Monday, March 7, 2011,
commencing at 9:34 a.m.

VOLUME 2

BEFORE:

MARIKA HARE	Presiding Member
PAUL SOMMERVILLE	Member
KAREN TAYLOR	Member

A P P E A R A N C E S

MICHAEL MILLAR JENNIFER LEA	Board Counsel
JOSH WASYLYK	Board Staff
MICHAEL ENGELBERG	Hydro One Brampton Networks Inc. and Hydro One Networks Inc.
BASIL ALEXANDER	Pollution Probe
JACK HUGHES	Canadian Manufacturers & Exporters (CME)
JAY SHEPHERD MARK RUBENSTEIN	School Energy Coalition (SEC)
SHELLEY GRICE	Association of Major Power Consumers of Ontario (AMPCO)
JULI ABOUCHAR JUDY SIMON	Low Income Energy Network (LIEN)
CHRISTINE DADE	PowerStream

ALSO PRESENT:

IAN MALPASS	Hydro One Networks Inc.

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Monday, March 7, 2011

--- Upon commencing at 9:34 a.m.

DECISION:

MS. HARE: Please be seated.

Good morning. We are reconvening today in the case of Hydro One Brampton, EB-2010-0331, and Hydro One Networks, EB-2010-0332, with respect to six CDM programs.

On Friday, March 4th, we heard submissions on four preliminary questions. The Board has considered the submissions and has the following comments.

With respect to the decision framework, as a preliminary matter, the Board has been asked to provide parties with guidance as to what the decision framework will be applied to evidence in this case.

We heard submissions which ranged from adoption of the "just and reasonable" approach appearing in section 78.3, which governs the Board's determination of rate cases and rate orders, to "as far as appropriate and reasonable", which is language which appears in the Minister's directive of March 2010.

All parties are agreed that in performing its review, the Board should be guided by the objectives appearing in section 1, section 1 of the OEB Act, which, among other things, requires us to have regard for economic efficiency.

The directive in paragraph 8 also requires the Board to explicitly have regard to the interests of consumers with respect to prices in its decisions respecting proposed Board-approved CDM programs.

It is clear from submissions that there is no unequivocal or clear-cut path to a determination of what the appropriate decision framework ought to be.

While our decisions in this case will end up as a burden to ratepayers, the method by which that occurs is very different than is the case in a normal rate case. And, therefore, the "just and reasonable" approach may not be perfectly applicable.

The "as far as appropriate and reasonable" approach is really not a decision framework at all. It has no history of interpretation which would help us in applying it.

The Board is also of the view that if the Minister had wanted the Board to use a novel decision framework, he would have been far more explicit in his directive.

A number of parties also indicated that they were unable to see any material difference between the decision frameworks being proposed.

In the end, the Board has determined that it will use its usual analytical approach with respect to costs to the proposals being made in this case, as it does in all other cases that come before it.

We will balance the need for economic efficiency and the protection of consumers, with respect to prices, with the rest of the legislative scheme and the terms of the directive.

In our view, this is the kind of review the public and the Minister expect us to conduct with respect to these proposals.

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The second question was with respect to OPA programs and approvals. All parties were in agreement that the Board does not have the legislative mandate and the jurisdiction to consider the nature, adequacy and cost of the OPA province-wide CDM programs. Parties argued, however, that the OPA programs were relevant from the point of view of determining relative cost-effectiveness of applied-for utility programs, the size and scope of the gap between the capacity and energy reductions that can be achieved by using the OPA programs, and the overall utility-specific energy and capacity targets and whether, of course, utility programs are duplicative.

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.

The third question was whether the OPA programs are sufficiently established for the Board to review new CDM programs to be approved by the Board.

The Board is of the view that it remains an open question as to whether the OPA programs have been established and that this question will be determined as the evidence unfolds.

The Board is of the view that the programs were not

established in July or November 2010. From the Board's perspective, the OPA programs must be established, described and taken up in such a way that the Board can make a confident determination that the Board-approved CDM programs are not duplicative as per the Minister's directive.

The last question was with respect to the EM&V protocols. Section 3.1.4(a) of the Board's CDM Code requires an applicant for Board-approved CDM programs to file a program evaluation plan based on the OPA's EM&V protocols.

Although Hydro One Networks and Hydro One Brampton have filed a draft evaluation plan template for each program, they have not filed a complete evaluation plan.

Hydro One indicated in its evidence and at the technical conference that it will prepare a complete plan, with the assistance of a third-party expert, after Board approval of any programs.

The applicants indicated to the Panel, in its submission on the preliminary matters on Friday, that in the course of selecting a third-party expert, the applicant expected to obtain a wide variety of submissions as to how to deploy these programs that would result in totally different methods and means of evaluating those programs.

The applicants also stated that although it is only the method of deployment that may change, changes in deployment may affect some of the results in the uptake and success and speed with which some of the programs result in

savings as opposed to some of the other programs.

Moreover, the applicants revised their position with respect to the EM&V protocols set out in their evidence and at the technical conference, arguing that it is no longer planning to complete the protocols after approval, Board approval; that its EM&V protocol is in fact complete; and that the Board should hear evidence from the applicants' witnesses that the EM&V plan, as filed, satisfies the requirements of the Board.

The Board does not agree with this approach. The Board is of the view that in the absence of a complete evaluation plan for each program, the application is incomplete and the proceedings should be adjourned until the evaluation plan is filed.

Mr. Engelberg indicated that the Panel can elaborate on its plan during the hearing. The Board believes it has no latitude in this regard. The code clearly states that an evaluation plan must be filed with the application.

The Board, therefore, adjourns this hearing until the evaluation plan is filed.

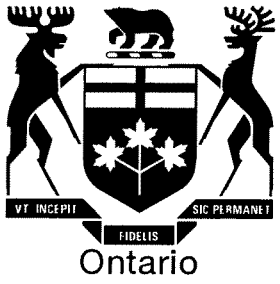
Are there any questions?

MR. SHEPHERD: Madam Chair, I advised Mr. Millar that I did have one matter to raise in light of the expectation of an adjournment; and, that is, on Friday, the applicants advised that they would provide us with certain documents that had been refused at the technical conference.

My understanding was that that agreement to provide them was conditional on this hearing proceeding today. I

Ontario Energy Board

Commission de l'énergie de l'Ontario



CONSERVATION AND DEMAND MANAGEMENT CODE

FOR ELECTRICITY DISTRIBUTORS

Issued: September 16, 2010

Table of Contents

APPENDICES

1. GENERAL AND ADMINISTRATIVE PROVISIONS

1.1 The Purpose of this Code

1.1.1 The purpose of this Code is to set out the obligations and requirements that licensed distributors must comply with in relation to the CDM Targets set out in their licences. This Code also sets out the conditions and rules that licensed distributors are required to follow if they choose to use Board-Approved CDM Programs to meet the CDM Targets.

1.2 Definitions

In this Code:

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

"Allocable Costs" means indirect costs (i.e., costs that would be incurred regardless of whether or not the Non Rate-Regulated Activities were undertaken);

"annual milestones" means the forecasted electricity savings (kWh) and peak demand savings (kW) that a distributor hopes to achieve each year in order to meet its CDM Targets;

"Annual Report" means the report that a distributor shall file with the Board each year that shows the distributor's progress in meeting the CDM Targets set out in its licence;

"attribution" means the division of CDM benefits between a distributor and another person;

"Board" means the Ontario Energy Board;

"Board-Approved CDM Programs" means a distributor's CDM Programs that have been approved by the Board in accordance with this Code and for which the IESO will make payments in accordance with section 78.5(1) of the Act;

"business day" means any day that is not a Saturday, a Sunday, or a legal holiday in the Province of Ontario;

"CDM" means conservation and demand management;

"CDM Programs" means programs that are designed to reduce electricity consumption and/or provincial peak electricity demand behind customers' meters and are either Board-Approved CDM Programs or OPA–Contracted Province-Wide CDM Programs;

"CDM Strategy" means the strategy that a distributor files with the Board that outlines how a distributor will meet the CDM Targets set out in their licences;

"CDM Targets" means the targets for reductions in provincial peak electricity demand and electricity consumption established in a distributor's licence;

"Code" means this Conservation and Demand Management Code;

"customer type" means a customer class, a customer sub-class, or a specific group of customers, including but not limited to, residential, commercial, industrial, or institutional customers;

"distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose;

"distributor" means a person who owns or operates a distribution system;

"Electricity Act" means the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

"electricity savings (kWh)" means the reduction in electricity consumption associated with the implementation of CDM Programs;

"EM&V" means Evaluation, Measurement and Verification;

"Environmental Attributes" means any certificates, credits, reduction rights, allocated pollution rights, emission reduction allowances, or any other benefit that relate to or result from a distributor's Board-Approved CDM Programs;

"Marginal Costs" means direct costs (i.e., costs that would be eliminated or reduced if the Non Rate-Regulated Activities were no longer undertaken);

"Non Rate-Regulated Activities" means activities that are carried out by a distributor but are not rate-regulated by the Board, including but not limited to, OPA-Contracted Province-Wide CDM Programs, Board-Approved CDM Programs, billing and collection for water and sewage, and distributor-owned generation;

"OPA" means the Ontario Power Authority;

"OPA-Contracted Province-Wide CDM Programs" means province-wide CDM programs that a distributor may undertake through a contract with the OPA;

"OPA EM&V Protocols" means the protocols and framework that the OPA has adopted for the evaluation, measurement and verification of OPA-Contracted Province-Wide CDM Programs;

"OPA's Cost Effectiveness Tests" means the cost effectiveness tests that the OPA has adopted for OPA-Contracted Province-Wide CDM Programs, including all related assumptions and avoided cost assessments;

"OPA's Measures and Assumptions Lists" means the OPA's collection of prescriptive and quasi-prescriptive input assumptions for electricity CDM measures;

"peak demand savings (kW)" means the reduction in a distributor's peak electricity demand persisting at the end of the four-year period that coincides with the provincial peak electricity demand that is associated with the implementation of CDM Programs; and

"service area" means the area in which a distributor is authorized by its licence to distribute electricity.

1.3 Application and Interpretation

1.3.1 All appendices attached to this Code form part of the Code.

1.3.2 Unless otherwise defined in this Code, words and phrases shall have the meaning ascribed to them in the Act or the Electricity Act, as the case may be. Headings are for convenience only and shall not affect the interpretation of this Code. Words importing the singular include the plural and vice versa. Words importing a gender include any gender. Words importing a person include (i) an individual, (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public corporate body; and (iii) any government, government agency or body, regulatory agency or body or other body politic or collegiate. A reference to a person includes that person's successors and permitted assigns. A reference to a body, whether statutory or not, that ceases to exist or whose functions are transferred to another body is a reference to the body that replaces it or that substantially succeeds to its powers or functions. Where a word or phrase is defined in this Code, the Act or the Electricity Act, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning. A reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision of that document. The expression "including" means including without limitation.

1.3.3 If the time for doing any act or omitting to do any act under this Code expires on a day that is not a business day, the act may be done or may be omitted to be done on the next day that is a business day.

1.4 To Whom this Code Applies

1.4.1 This Code applies to all licensed distributors that have CDM Targets as a condition of their licence.

1.5 Coming into Force

1.5.1 This Code comes into force on the date on which it is published on the Board's website after it has been issued by the Board.

1.5.2 Unless expressly provided otherwise, any amendments to this Code shall come into force on the date on which they are published on the Board's website after they have been issued by the Board.

1.6 Requirements for Board Approvals

1.6.1 Any matter under this Code requiring an approval, consent, or determination of the Board may be determined by the Board without a hearing or through an oral, written or electronic hearing, at the Board's discretion.

1.7 Timeframe for the Code

1.7.1 This Code applies to CDM Programs that start on January 1, 2011 and end on December 31, 2014 or occur anytime in between those two dates. All electricity savings (kWh) and peak demand savings (kW) resulting from CDM Programs must also occur within that timeframe.

2. CDM STRATEGY AND ANNUAL REPORTS

2.1 CDM Strategy Requirements

2.1.1 A distributor's CDM Strategy must provide a high level description of how a distributor intends to achieve its CDM Targets. The CDM Strategy must include:

(a) a high level description of a distributor's year by year plan, including annual milestones, for achieving its CDM Targets;
(b) a description of each of the CDM Programs, divided into OPA-Contracted Province-Wide CDM Programs and potential Board-Approved CDM Programs, that the distributor plans to undertake to achieve its CDM Targets including, where the information is available, a description of:

(i) the program name;
(ii) the year(s) the program is intended to be in operation;
(iii) the purpose of the program;
(iv) the target customer type(s); and
(v) where the information is available, projected budgets and projected results;

(c) confirmation that CDM Programs will be offered for all customer types in a distributor's service area, as far as is appropriate and reasonable having regard to the composition of the distributor's customer base;
(d) a section that details how, where applicable, the distributor will pursue administrative efficiencies and co-ordinate its CDM activities with other distributors, natural gas distributors, social service agencies, any level of government, government agencies, the OPA, and any other organizations; and
(e) a statement as to whether the distributor will offer CDM program(s) to low-income customers and the rationale for that decision.

2.1.2 Distributors shall file their CDM Strategy in the manner set out in Appendix B.

2.1.3 A distributor shall file its CDM Strategy with the Board by November 1, 2010.

2.1.4 After receiving an acknowledgement letter from the Board confirming that the CDM Strategy is complete, a distributor shall make its CDM Strategy available for public review at the distributor's offices. If the distributor has a website, the distributor shall also post its CDM Strategy on its website.

2.2 Annual Reports

2.2.1 A distributor shall file an Annual Report with the Board by September 30 of each year. The Annual Report shall cover the period from January 1 to December 31 of the previous year. The first Annual Report shall be filed by September 30, 2012 and shall cover the period from January 1, 2011 to December 31, 2011.

2.2.2 Distributors shall file their Annual Reports in the manner set out in Appendix C.

2.2.3 A distributor shall make its Annual Report available for public review at the distributor's offices. If the distributor has a website, the distributor shall also post its Annual Report on its website by September 30 of each year for the previous calendar year.

2.2.4 The Annual Report shall provide an overall review of the activities undertaken by the distributor in the calendar year in order to achieve its CDM Targets.

2.2.5 The Annual Report shall consist of the following sections for both Board-Approved CDM Programs and OPA-Contracted Province-Wide CDM Programs:

(a) an introduction that provides a general overview of the CDM Programs that the distributor offered in its service area;
(b) a description of the CDM Programs that the distributor offered in its service area, the targeted customer type(s) for each of the CDM Programs, the objectives of each of the CDM Programs, and any activities associated with the CDM Programs;

(c) a section that details the participation levels (i.e., the number of participants by customer type) for each of the CDM Programs that the distributor offered in its service area;
(d) a section that describes and details the funds the distributor spent on each of the CDM Programs offered in its service area;
(e) a section that describes and details the verified electricity savings (kWh) and peak demand savings (kW) based on the OPA EM&V Protocols;
(f) a section that states the balance in the distributor's CDM variance account that shows the distributor's total spending on all of its Board-Approved CDM Programs for the year applicable to the Annual Report;
(g) a section that summarizes the distributor's progress towards meeting its CDM Targets, an explanation of any significant variances between the annual milestones contained in the distributor's CDM Strategy and the verified results achieved by the distributor for the reporting year, and an explanation of the potential impact that the aforementioned significant variances may have with respect to the distributor meeting its CDM Targets;
(h) a section that details any changes or planned modifications to the distributor's CDM Strategy;
(i) a section that provides any additional information the distributor feels is appropriate, including but not limited to, recommending any improvements to its Board-Approved CDM Programs that could enhance program design, performance, and uptake by customers; and
(j) if the distributor has a pilot CDM program or an educational CDM program, a section that provides an explanation of the results of the program and describes how the data or information from the program may be used in the operations of, or planning frameworks for, future CDM initiatives.

2.3 Co-ordination with the OPA

2.3.1 Prior to applying for Board approval of any CDM Programs, a distributor must review the existing OPA-Contracted Province-Wide CDM Programs.

2.3.2 Distributors shall not apply for Board approval of CDM Programs that duplicate existing OPA-Contracted Province-Wide CDM Programs.

2.3.3 CDM Programs that will be considered duplicative of OPA-Contracted Province-Wide CDM Programs include, but are not limited to, CDM Programs that have:

(a) different customer incentive levels on products or services already offered through the OPA-Contracted Province-Wide CDM Programs;
(b) different qualification requirements to receive customer incentives or services already offered through the OPA-Contracted Province-Wide CDM Programs;

(c) different technology specifications for technologies already incentivized or utilized through the OPA-Contracted Province-Wide CDM Programs;
(d) different marketing approaches for promoting customer incentives or services already offered through the OPA-Contracted Province-Wide CDM Programs; and
(e) different budgets for delivering customer incentives or services already offered through the OPA-Contracted Province-Wide CDM Programs.

3. BOARD-APPROVED CDM PROGRAMS

3.1 Requirements

3.1.1 A distributor shall not apply for Board-Approved CDM Programs until the OPA has established its first set of OPA-Contracted Province-Wide CDM Programs.

3.1.2 Subject to the restrictions in sections 2.3.3 and 3.1.5, a distributor may apply to the Board for approval of CDM programs that are designed to assist the distributor in meeting the CDM Targets set out in its licence.

3.1.3 Board-Approved CDM Programs must end by December 31, 2014.

3.1.4 A distributor's application for a proposed Board-Approved CDM Program must include the following:

(a) a program evaluation plan, based on the OPA's EM&V Protocols, for each program;
(b) a benefit-cost analysis of each program which shall be completed by using the OPA's Cost Effectiveness Tests;
(c) a detailed explanation of the program's objective(s) and method of delivery;
(d) the types of customers targeted by the program;
(e) a forecasted number of participants that the distributor expects will participate in the program;
(e) the total projected peak demand savings (kW) and electricity savings (kWh) per year, or if the program is for less than one year, the total projected peak demand savings (kW) and electricity savings (kWh) for the duration of the program;
(f) a complete projected annual budget for each of the distributor's CDM Programs, including the following information:

(i) projected expenditures incurred on an annual basis, for each year of the CDM Programs, separated into customer incentive costs and program costs;
(ii) a division of program costs into Marginal Costs and Allocable Costs incurred as a result of program implementation;

(iii) information on the allocation of total expenditures incurred by targeted customer types for each direct projected expenditure; and
(iv) total projected expenditures for each program evaluation conducted; and

(g) a statement that confirms that the distributor has used the OPA's Measures and Assumptions Lists or if the distributor has varied from the OPA's Measures and Assumptions Lists, the distributor must:

(i) appropriately justify the reason for varying from the OPA's Measures and Assumptions Lists in the application;
(ii) provide the technical assumptions and substantiating data that the distributor used; and
(iii) provide a statement that the distributor has followed the OPA's EM&V Protocols for custom measures not included in the OPA's Measures and Assumptions Lists.

3.1.5 Distributors shall not apply for CDM Programs that:

(a) relate to a distributor's investment in new infrastructure or replacement of existing infrastructure;
(b) relate to any measures a distributor uses to maximize the efficiency of its new or existing infrastructure; or
(c) are associated with the OPA's Feed-in Tariff Program or the OPA's Micro Feed-in Tariff Program.

Any initiatives that are captured in (a), (b) or (c) above will not be considered CDM initiatives and are therefore not eligible for approval under this Code.

3.2 Re-Allocation of Funding Among Existing Board-Approved CDM Programs

3.2.1 A distributor must apply to the Board for cumulative fund transfers among the distributor's Board-Approved CDM Programs that exceed 30% of an approved budget for an individual CDM Program. An application to transfer more than 30% of a distributor's funds from an approved budget for an individual CDM Program shall include:

(a) current and proposed budgets for programs affected by the re-allocation;
(b) a description of the programs from which, and to which, funds are being re-allocated and the rationale for the re-allocation;
(c) confirmation that CDM Programs will still be offered for all customer types in a distributor's service area, as far as is appropriate and reasonable having regard to the composition of the distributor's customer base; and
(d) cost effectiveness calculations for all programs where re-allocation of funding has occurred and confirmation that the program receiving the additional funding is still cost effective.

3.3 CDM Programs for Low-Income Customers

3.3.1 A distributor may meet a portion of its CDM Targets through the delivery of CDM Programs targeted to low-income customers.

3.4 Board Approval

3.4.1 The Board will consider any application filed under section 3.1 and make any determinations that it considers appropriate. If the Board approves a CDM program pursuant to an application filed under section 3.1, such approval will include a determination regarding the amount and timing of payments to be made by the IESO under section 78.5 of the Act in relation to the Board-Approved CDM Program.

4. COST EFFECTIVENESS

4.1 Cost Effectiveness Tests

4.1.1 A distributor may only apply to the Board for the approval of CDM programs that are cost effective. Cost effectiveness shall be measured by using the OPA's Cost Effectiveness Tests.

4.1.2 Despite section 4.1.1, a distributor may apply to the Board for approval of CDM programs where cost effectiveness cannot be demonstrated if the program is:

(a) a pilot program;
(b) a low-income program; or
(c) designed for educational purposes.

4.1.3 A distributor shall use the OPA's Measures and Assumptions Lists to conduct the cost effectiveness tests. If the distributor is using custom measures that are not included in the OPA's Measures and Assumptions Lists, the distributor must appropriately justify the reason for varying from the OPA's Measures and Assumptions Lists in the application and provide a statement that the distributor has followed the OPA EM&V Protocols for the custom measures that are not included in the OPA's Measures and Assumptions Lists.

4.1.4 Although there is no requirement that pilot or educational CDM programs be cost effective, distributors shall provide, in addition to the requirements set out in section 3.1.4, adequate evidence (as described in sections 4.2 and 4.3) that the CDM programs will likely result in peak demand savings (kW) and/or electricity savings (kWh). The Board will take into consideration the cost and the number of pilot and educational CDM Programs that a distributor already has undertaken or plans to undertake when approving these CDM programs.

4.1.5 While low-income CDM programs do not have to be cost effective, distributors will have to run the OPA's Cost Effectiveness Tests for the low-income CDM programs and report the results to the Board as part of the application for Board approval of the low-income CDM program. Distributors shall also provide, in addition to the requirements set out in section 3.1.4, adequate evidence that the low-income CDM program will likely result in peak demand savings (kW) and/or electricity savings (kWh). The Board will take into consideration the cost and the number of low-income CDM Programs that a distributor already has undertaken or plans to undertake when approving the low-income CDM program(s).

4.2 Pilot CDM Programs

4.2.1 A pilot CDM program will only be eligible for approval by the Board if:

(a) it involves the testing, or evaluation of methodologies and/or technologies that are not generally in use in Ontario and that may serve as a model for other distributors or the OPA to use in future CDM development;
(b) it does not duplicate existing CDM pilot programs being undertaken by the OPA or other distributors; and
(c) the distributor has already applied to the OPA for CDM program funding and was not approved by the OPA.

4.2.2 A distributor shall provide a detailed description of the costs and benefits of the proposed pilot program and demonstrate how the pilot program will increase the collective understanding of the methodology and/or technology and its benefits as a CDM activity.

4.2.3 A distributor shall file with the Board a report on the expected outcome(s) and benefits of the pilot program (i.e., projected data or information to be produced by the program and how the data or information will be used in the operations of, or planning frameworks for, future CDM initiatives).

4.2.4 A distributor must specify the customer type(s) and the number of participants that will be targeted by the pilot program.

4.3 Educational CDM Programs

4.3.1 A distributor must demonstrate how the educational CDM program will promote the understanding of energy issues and lead to behavioural changes that result in the overall reduction of electricity demand and/or consumption.

4.3.2 A distributor must:

(a) identify the customer type(s) that will be targeted;
(b) specify the number of participants that will be targeted;

(c) explain why the educational CDM program is needed (i.e., why there is a need to educate the specified customer type(s) on the specified energy issues);
(d) articulate the educational approaches that will be utilized by the distributor (i.e., brochures, seminars, etc.);
(e) provide estimates of costs of the educational CDM program; and
(f) describe the anticipated benefits of the educational CDM program.

5. ACCOUNTING TREATMENT

5.1 A distributor shall follow all the Board's accounting policies and procedures specified for CDM activities.

5.2 A distributor shall use a fully allocated costing methodology for all CDM Programs. The fully allocated costing methodology that distributors must use for the CDM Programs it delivers is set out in Appendix A.

5.3 A distributor's program funding and program expenditures from all Board-Approved CDM Programs are to be kept separate from a distributor's program funding and program expenditures from all OPA-Contracted Province-Wide CDM Programs.

5.4 A distributor's program funding and program expenditures from all Board-Approved CDM Programs and all OPA-Contracted Province-Wide CDM Programs are to be kept separate from the distributor's distribution operations and shall not be included in the distributor's distribution revenue requirement.

5.5 A distributor shall track spending for its Board-Approved CDM Programs in a Board-Approved CDM variance account, which will be used to record the difference between the funding awarded for Board-Approved CDM Programs and the actual spending incurred for these programs. The disposition of the balance in this account shall be made at the time specified by the Board and in the manner specified by the Board.

5.6 A distributor shall not be the beneficiary of any Environmental Attributes that are related to or result from Board-Approved CDM Programs. Distributors shall hold any Environmental Attributes arising in relation to electricity savings from Board-Approved CDM Programs. Disposition of the benefits of the Environmental Attributes arising in relation to electricity savings from Board-Approved CDM Programs shall be determined by the Board at a later date.

6. PROGRAM EM&V

6.1 Independent Review

6.1.1 A distributor's results for its Board-Approved CDM Programs must be evaluated through an independent third party review. The review of a distributor's results for its Board-Approved CDM Programs must be done by an independent third party selected from the OPA's third party vendor of record list. The third party reviewer must use the OPA EM&V Protocols when conducting EM&V on Board-Approved CDM Programs.

6.1.2 The independent third party reviewer's report on the distributor's Board-Approved CDM Programs must be filed by the distributor with the Board at the same time the distributor's Annual Report is filed with the Board (i.e., by September 30 of each year). The independent third party reviewer's report shall cover the period from January 1 to December 31 of the previous year.

6.1.3 The distributor shall co-operate with any Board initiated audits and shall provide documentation as requested.

7. PERFORMANCE INCENTIVE

7.1 Eligible Programs

7.1.1 A distributor may apply for a performance incentive for its CDM Programs.

7.1.2 A distributor may only claim a performance incentive in relation to its contribution to the CDM Programs. In order for a distributor to claim 100% attribution of benefits, the distributor shall demonstrate that its role was central to the CDM Programs. Centrality is established by the distributor if its budgetary contribution was greater than 50% of program funding or, where the distributor's budgetary contribution was less than 50% of program funding, the distributor initiated the partnership, initiated the program or initiated the implementation of the program. If the distributor's budgetary contribution was less than 50 percent, the distributor shall provide supporting documentation outlining its role in the CDM Programs.

7.1.3 If a distributor's role does not meet the test for centrality set out in section 7.1.2, the distributor shall then submit a proposal for an attribution of benefits to the Board for approval and the Board will determine whether the proposal is acceptable.

7.1.4 If more than one distributor applies for an attribution of benefits for the same CDM Program, the total applied for between the distributors cannot exceed 100%.

7.1.5 A distributor will be deemed to meet the test for centrality when it is providing OPA-Contracted Province-Wide CDM Programs.

7.2 Calculation of the Performance Incentive

7.2.1 Performance incentive payments shall be made on the basis of a distributor's achieved verified results in meeting its CDM Targets. A distributor must provide verified results for both electricity savings (kWh) and peak demand savings (kW) at the time of its application to the Board for a performance incentive. The verification must have been completed by an independent third party selected from the OPA's third party vendor of records list.

7.2.2 A distributor may accrue a performance incentive once it meets 80% of each of its CDM Targets. Performance incentives shall not accrue for performance that exceeds 150% of each CDM Target.

7.2.3 A distributor's performance incentive shall be calculated across the distributor's entire portfolio of Board-Approved CDM Programs and OPA-Contracted Province-Wide CDM Programs. A distributor's performance incentive shall be calculated in the manner set out in Appendix D.

7.3 Board Approval

7.3.1 The Board will consider any application filed under section 7.1 and make a determination on the appropriate performance incentive based on the methodology established by this Code, including Appendix D. Performance incentives approved by the Board will include a determination regarding the amount and timing of payments to be made by the IESO under section 78.5 of the Act.

APPENDIX A

Fully-Allocated Costing Methodology for Non Rate-Regulated Activities

1. DEFINITIONS

In this Appendix:

"Cost Driver" means a measure used to allocate, to a Non Rate-Regulated Activity, the costs of any functions performed within the distribution company to undertake that Non Rate-Regulated Activity; and

"Fully Allocated Costs" means the sum of Marginal Costs and Allocable Costs.

2. COST ALLOCATION PROCESS

2.1 Marginal Costs can be directly assigned to Non Rate-Regulated Activities. Allocable Costs must be allocated, using a Cost Driver, to determine the proportional share of the Allocable Costs attributable to Non Rate-Regulated Activities.

2.2 In order to determine the costs associated with Non Rate-Regulated Activities, a distributor shall use an activity analysis to assess the nature and extent of the functions being performed throughout the distribution company to undertake the Non Rate-Regulated Activities. The analysis must include the identification of all activities performed within the distribution company regardless of whether or not these activities directly or indirectly support Non Rate-Regulated Activities.

2.3 The activity analysis referred to in section 2.2 must include the following Marginal Costs and Allocable Costs, where applicable:

(a) all salaries and labour costs including benefits;
(b) contractor expenses;
(c) billing and collection;
(d) customer care, advertising, and marketing;
(e) administration and general expenses;
(f) IT costs;
(g) office equipment; and
(h) any other cost that a distributor can show is relevant and necessary for the program analysis.

2.4 A distributor must determine an appropriate Cost Driver for each Allocable Cost. Cost Drivers must be:

(a) representative of how costs are being incurred;
(b) implemented in a cost effective manner; and
(c) verifiable and justifiable.

The types of Cost Drivers that distributors may use are included below in sections 2.5 to 2.7.

2.5 A distributor may use headcount as a Cost Driver for the allocation of salaries, other labour related costs, administration and general expenses, and IT costs. This Cost Driver is based on the number of full-time equivalents needed to support the Non Rate-Regulated Activities. A distributor shall calculate full time equivalents in accordance with the following examples:

(a) if six employees each devoted 25 percent of their time to Non Rate-Regulated Activities, the full-time equivalent for those employees would be 1.5; and
(b) if six part-time employees each devoted 25 percent of their time to Non Rate-Regulated Activities, the part-time positions would first need to be translated into a full-time position (i.e., if an employee works 3 days per week, the full-time position would be 0.6) and then apply the percentage (i.e., 6 X 0.6 = 3.6 and 25 percent of 3.6 = 0.9) so the full-time equivalent would be 0.9.

2.6 A distributor may use time as a Cost Driver for the allocation of executive and administrative functions, legal services, and financial analysis because these functions are typically project specific. A distributor shall calculate the percentage of time to be allocated to Non Rate-Regulated Activities by using the base hours per employee. A distributor shall calculate the percentage of time in accordance with the following examples:

(a) if an employee's base hours are 40 hours per week and the employee actually worked 40 hours that week, which included 4 hours of his/her time on Non Rate-Regulated Activities, the allocation would be 10 percent; and
(b) if an employee's base hours are 40 hours per week and the employee actually worked 60 hours that week, which included 4 hours of his/her time on Non Rate-Regulated Activities, the allocation would still be 10 percent.

2.7 A distributor may use the frequency of an activity as a Cost Driver for the allocation of call centre costs and accounts payable processing because these activities can be repetitive in nature and consistent over time in terms of the level of effort required to provide the service. Call centre costs shall be allocated based on number of calls received in relation to Non Rate-Regulated Activities and accounts payable processing costs shall be allocated based on the number of invoices processed for Non Rate-Regulated Activities.

APPENDIX B

CDM Strategy Template

1. Distributor's Name:

2. Total Reduction in Peak Provincial Electricity Demand (MW) Target:

3. Total Reduction in Electricity Consumption (kWh) Target:

4. CDM Strategy

4.1 Provide a high level description of how the distributor plans to meet its CDM Targets over the 4-year period. The description must include the following elements:

(a) a division of the CDM Strategy into a year by year plan; and
(b) a statement of the annual milestones the distributor plans to achieve.

5. OPA-Contracted Province-Wide CDM Programs

5.1 Describe, to the extent known, the OPA-Contracted Province-Wide CDM Programs the distributor plans to undertake from 2011-2014. The following information must be provided for each program:

(a) program name;
(b) year(s) of operation for the program;
(c) program description (i.e., purpose of the program, target customer type(s));
(d) where the information is available, the projected budget;
(e) where the information is available, the total projected reduction in peak provincial electricity demand (kW); and
(f) where the information is available, the total projected reduction in electricity consumption (MWh).

6. Potential Board-Approved CDM Programs

6.1 Describe, to the extent known, the potential Board-Approved CDM Programs the distributor plans to undertake from 2011-2014. The following information must be provided for each program:

(a) program name;
(b) year(s) of operation for the program;
(c) program description (i.e., purpose of the program, target customer type(s));
(d) where the information is available, the projected budget;

(e) where the information is available, the total projected reduction in peak provincial electricity demand (kW); and

(f) where the information is available, the total projected reduction in electricity consumption (MWh).

7. Program Mix

7.1 Provide a description of how the distributor will ensure that CDM Programs will be offered for all customer type(s), including low income customers, in the distributor's service area, as far as is appropriate and reasonable having regard to the composition of the distributor's customer base.

If the distributor will not offer any CDM Programs to a particular customer type, the distributor must provide the rationale for why it is appropriate and reasonable not to have CDM Programs for that type of customer.

8. CDM Programs Co-ordination

8.1 Describe, where applicable, how the distributor will pursue administrative efficiencies and co-ordinate its CDM activities with other distributors, natural gas distributors, social service agencies, any level of government, government agencies, and the OPA.

APPENDIX C

Annual Report Template

1. BOARD-APPROVED CDM PROGRAMS

1.1 Introduction

1.1.1 Provide a general overview of all of the Board-Approved CDM Programs that are being offered in the distributor's service area.

1.2 Program Description

1.2.1 Provide a detailed description of each of the Board-Approved CDM Programs that are being offered in the distributor's service area. For each program, include the targeted customer type(s) for the Board-Approved CDM Program, the objectives of the Board-Approved CDM Program, and any other activities associated with the Board-Approved CDM Program.

1.3 Participation

1.3.1 Include the detailed participation levels (i.e., the number of participants by customer type) for each of the Board-Approved CDM Programs that the distributor offered in its service area.

1.4 Spending

1.4.1 Describe and detail the funds the distributor spent, both cumulatively and in the one year period applicable to the Annual Report, on each of its Board-Approved CDM Programs that the distributor offered in its service area.

1.5 Evaluation

1.5.1 Provide a detailed discussion that reports on the EM&V results for each of the distributor's Board-Approved CDM Programs using the OPA EM&V Protocols for peak demand savings (kW) and electricity savings (kWh).

1.6 CDM Variance Account

1.6.1 The distributor shall provide the Board with the balance in its CDM variance account that shows, as of December 31 of the year applicable to the Annual Report, the total spending on all of its Board-Approved CDM Programs.

1.7 Additional Comments

1.7.1 The distributor shall provide any additional information the distributor feels is appropriate, including but not limited to, recommendations for any improvements to its Board-Approved CDM Programs that could enhance program design, performance, and uptake by customers.

2. OPA-CONTRACTED PROVINCE-WIDE CDM PROGRAMS

2.1 Introduction

2.1.1 Provide a general overview of all of the OPA-Contracted Province-Wide CDM Programs that are being offered in the distributor's service area.

2.2 Program Description

2.2.1 Provide a detailed description of each of the OPA-Contracted Province-Wide CDM Programs that are being offered in the distributor's service area. For each program, include the targeted customer type(s) for the OPA-Contracted Province-Wide CDM Program, the objectives of the OPA-Contracted Province-Wide CDM Program, and any activities associated with the OPA-Contracted Province-Wide CDM Program.

2.3 Participation

2.3.1 Include the detailed participation levels (i.e., the number of participants by customer type) for each of the OPA-Contracted Province-Wide CDM Programs that the distributor offered in its service area.

2.4 Spending

2.4.1 Describe and detail the funds the distributor spent, both cumulatively and in the one year period applicable to the Annual Report, on each of the OPA-Contracted Province-Wide CDM Programs that the distributor offered in its service area.

2.5 Evaluation

2.5.1 Provide a detailed discussion that reports on the EM&V results for each of the distributor's OPA-Contracted Province-Wide CDM Programs using the OPA EM&V Protocols for peak demand savings (kW) and electricity savings (kWh).

2.6 Additional Comments

2.6.1 Provide any additional information related to the OPA-Contracted Province-Wide CDM Programs that the distributor feels is appropriate.

3. COMBINED CDM REPORTING ELEMENTS

3.1 Progress Towards CDM Targets

3.1.1 Provide a summary of the distributor's progress towards meeting its CDM Targets, an explanation for any significant variances between the annual milestones contained in the distributor's CDM Strategy and the verified results achieved by the distributor for the reporting year, and an explanation of the potential impact that the aforementioned significant variances may have with respect to the distributor meeting its CDM Targets.

3.2 CDM Strategy Modifications

3.2.1 Detail any changes or planned modifications to the distributor's CDM Strategy.

APPENDIX D

Performance Incentive Calculation

The performance incentive has six (6) ranges, as shown in the table below:

Performance Tiers			Performance Incentive	
Range	Range Begins	Range Ends	¢/kWh	$/kW
1	80%	up to 100%	0.30	13.50
2	100%	up to 110%	0.45	20.25
3	110%	up to 120%	0.75	33.75
4	120%	up to 130%	1.05	47.25
5	130%	up to 140%	1.35	60.75
6	140%	up to 150%	1.80	81.00

A distributor is only eligible for a performance incentive when it has reached 80% of **both** of its CDM Targets (i.e. the distributor has achieved 80% of its electricity (kWh) target **and** 80% of its peak demand (kW) target). Once a distributor has achieved 80% of **both** of its CDM Targets (i.e. the distributor has achieved 80% of its electricity (kWh) target **and** 80% of its peak demand (kW) target), the performance incentive will be calculated based on the range the distributor achieves in either of its electricity (kWh) target or peak demand (kW) target.

For example, if a distributor has achieved 145% of its peak demand (kW) target but only 100% of its electricity (kWh) target, the distributor will earn a performance incentive from Range 6 for its peak demand (kW) target and a performance incentive from Range 2 for its electricity (kWh) target.

Electricity (kWh) Target Performance Incentive

Range 1 begins when a distributor has reached 80% of its electricity (kWh) target. Range 1 is applicable to all kWh up to 100% of a distributor's electricity (kWh) target. For each kWh saved from 80% of a distributor's electricity (kWh) target up to, but not including 100% of a distributor's electricity (kWh) target, a distributor will earn 0.30¢/kWh.

Range 2 begins when a distributor has achieved 100% of its electricity (kWh) target. Range 2 is applicable to all kWh up to 110% of a distributor's electricity (kWh) target. For each kWh saved from 100% of a distributor's electricity (kWh) target up to, but not including 110% of the electricity (kWh) target, a distributor will earn 0.45¢/kWh.

Range 3 begins when a distributor has achieved 110% of its electricity (kWh) target. Range 3 is applicable to all kWh up to 120% of a distributor's electricity (kWh) target. For each kWh saved from 110% of a distributor's electricity (kWh) target up to, but not including 120% of the electricity (kWh) target, a distributor will earn 0.75¢/kWh.

Range 4 begins when a distributor has achieved 120% of its electricity (kWh) target. Range 4 is applicable to all kWh up to 130% of a distributor's electricity (kWh) target. For each kWh saved from 120% of a distributor's electricity (kWh) target up to, but not including 130% of the electricity (kWh) target, a distributor will earn 1.05¢/kWh.

Range 5 begins when a distributor has achieved 130% of its electricity (kWh) target. Range 5 is applicable to all kWh up to 140% of a distributor's electricity (kWh) target. For each kWh saved from 130% of a distributor's electricity (kWh) target up to, but not including 140% of the electricity (kWh) target, a distributor will earn 1.35¢/kWh.

Range 6 begins when a distributor has achieved 140% of its electricity (kWh) target. Range 6 is applicable to all kWh up to 150% of a distributor's electricity (kWh) target, where the performance incentive is capped. For each kWh saved from 140% of a distributor's electricity (kWh) target up to 150% of the electricity (kWh) target, a distributor will earn 1.80¢/kWh.

Peak Demand (kW) Target Performance Incentive

Range 1 begins when a distributor has reached 80% of its peak demand (kW) target. Range 1 is applicable to all kW up to 100% of a distributor's peak demand (kW) target. For each kW saved from 80% of a distributor's peak demand (kW) target up to, but not including 100% of a distributor's peak demand (kW) target, a distributor will earn $13.50/kW.

Range 2 begins when a distributor has achieved 100% of its peak demand (kW) target. Range 2 is applicable to all kW up to 110% of a distributor's peak demand (kW) target. For each kW saved from 100% of a distributor's peak demand (kW) target up to, but not including 110% of the peak demand (kW) target, a distributor will earn $20.25/kW.

Range 3 begins when a distributor has achieved 110% of its peak demand (kW) target. Range 3 is applicable to all kW up to 120% of a distributor's peak demand (kW) target. For each kW saved from 110% of a distributor's peak demand (kW) target up to, but not including 120% of the peak demand (kW) target, a distributor will earn $33.75/kW.

Range 4 begins when a distributor has achieved 120% of its peak demand (kW) target. Range 4 is applicable to all kW up to 130% of a distributor's peak demand (kW) target. For each kW saved from 120% of a distributor's peak demand (kW) target up to, but not including 130% of the peak demand (kW) target, a distributor will earn $47.25/kW.

Range 5 begins when a distributor has achieved 130% of its peak demand (kW) target.

Range 5 is applicable to all kW up to 140% of a distributor's peak demand (kW) target. For each kW saved from 130% of a distributor's peak demand (kW) target up to, but not including 140% of the peak demand (kW) target, a distributor will earn $60.75/kW.

Range 6 begins when a distributor has achieved 140% of its peak demand (kW) target. Range 6 is applicable to all kW up to 150% of a distributor's peak demand (kW) target, where the performance incentive is capped. For each kW saved from 140% of a distributor's peak demand (kW) target up to 150% of the peak demand (kW) target, a distributor will earn $81.00/kW.

written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

40. Media Coverage

40.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

40.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

PART VI - COSTS

41. Cost Eligibility and Awards

41.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

41.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 41.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

PART VII - REVIEW

42. Request

42.01 Subject to **Rule 42.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.

42.03 The notice of motion for a motion under **Rule 42.01** shall include the information required under **Rule 44**, and shall be filed and served within 20 calendar days of the date of the order or decision.

42.04 Subject to **Rule 42.05**, a motion brought under **Rule 42.01** may also include a request to stay the order or decision pending the determination of the motion.

42.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

42.06 In respect of a request to stay made in accordance with **Rule 42.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

43. Board Powers

43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

43.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

44. Motion to Review

44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

45. Determinations

45.01 In respect of a motion brought under **Rule 42.01**, 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.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0038

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 Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities;

AND IN THE MATTER OF an application by Ontario Power Generation Inc. pursuant to Rule 42 of the *Rules of Practice and Procedure* for an Order varying part of the Ontario Energy Board's Decision with Reasons made November 3, 2008.

BEFORE: Howard Wetston
Presiding Member and Chair

Pamela Nowina
Member and Vice Chair

DECISION AND ORDER ON MOTION TO REVIEW AND VARY
(Notice of Motion filed January 28, 2009)

On January 28, 2009, Ontario Power Generation Inc. ("OPG") filed a Notice of Motion (the "Motion") for a review and variance of the Ontario Energy Board's (the "Board") Decision with Reasons dated November 3, 2008, file number EB-2007-0905 ("Payments Decision"). The Motion has been assigned file number EB-2009-0038.

submission and the Brief of Authorities was devoted, was referred to as an alternative argument in the reply submission, and was characterized as OPG's 'fifth' argument at the oral hearing.[6]

A similar evolution occurred in the relief sought. In the Previous Motion OPG requested the establishment of a tax loss variance account that would record any variance between the tax loss mitigation amount which underpins the draft rate order for the test period and the tax loss amount resulting from the re-analysis of the prior period tax returns based on the re-calculation of the tax losses required by the Board in the Payments Decision.[7]

In the Motion, OPG requested the establishment of a variance account to record the revenue requirement reduction of $342 million incorporated in the test period payment amounts with the disposition of the account to be conducted in conjunction with the consideration of the analysis of prior period tax returns in OPG's next case.[8] In the reply submission, OPG explained the establishment of the variance account was to record the difference between the revenue requirement reduction of $342 million embedded in the test period payment amounts and the amount of regulatory tax losses recalculated in accordance with the Board's directions.[9]

While the Board appreciates that arguments and positions evolve in response to arguments posed by others, it reminds all parties that those who seek relief from the Board must ensure the clarity and consistency of the materials they file. This is fundamental to effective adjudication and informed decision making. It also encourages meaningful participation by all parties in the regulatory process.

FINDINGS

The Threshold Question

The Procedural and Substantive Issues related to the Threshold Question

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[6] Reply submission, para. 79; Oral Hearing Transcript, pp. 25-28.

[7] OPG Compendium of Evidence, Tab 1, Previous Notice of Motion, p. 12.

[8] OPG Compendium of Evidence, Tab 1, Notice of Motion, p. 2.

[9] Reply submission, para. 34.

Rule 45.01 states that in respect of a motion to review brought under Rule 42.01, 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.

In determining the threshold question the Board considers the grounds for the motion, described in Rule 44.01 (a):

> Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The list of grounds set out in Rule 44.01(a) is not exhaustive but rather illustrative.[10]

In the *Natural Gas Electricity Interface Review Decision* ("NGEIR Review Decision")[11] the Board determined that the threshold question requires the motion to review to meet the following tests:

- the grounds must raise a question as to the correctness of the order or decision;
- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision as a review is not an opportunity for a party to reargue the case;
- in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made

[10] *Natural Gas Electricity Interface Review Decision*, May 22, 2007, EB-2006-0322/0338/0340. p.15.

[11] *Ibid.*

inconsistent findings, or something of a similar nature; it is not enough to argue that conflicting evidence should have been interpreted differently; and

- the alleged error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.[12]

The Board's Finding on the Threshold Question

The Board is satisfied that the grounds put forward by OPG meet the tests as set out in the NGEIR Review Decision.

OPG has raised questions regarding the correctness of the finding that there was no connection between the mitigation offered by OPG and its regulatory tax losses, and the ordering of certain revenue requirement reductions after making that finding.

The Board is persuaded that those findings are inconsistent with the evidence; that those inconsistent findings are material and relevant to the outcome of the decision; and that if varied or changed, those findings would change the outcome of the decision.

The threshold having been met, the Board will proceed to consider the merits of the Motion.

The Merits of the Revenue Requirement Reduction

The Board must decide if the panel in the Payments Decision erred in

a) finding that OPG's proposal to eliminate an income tax provision in the test period was 'simply mitigation', and unrelated to regulatory tax losses;

b) finding that there was no connection between the tax loss benefits and OPG's proposed carry forward or acceleration of a revenue reduction of $228 million;

[12] *Supra.*, pp. 17-18.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0797

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 Hydro One Networks Inc. for the review and approval of connection procedures;

AND IN THE MATTER OF an application by Great Lakes Power Limited for the review and approval of connection procedures;

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

BEFORE: Pamela Nowina
Vice Chair and Presiding Member

Paul Sommerville
Member

Ken Quesnelle
Member

DECISION AND ORDER

INTRODUCTION

On September 6, 2007, the Board (the "Connection Procedures panel") issued its Decision and Order in relation to applications by Hydro One Networks Inc. ("Hydro One") and Great Lakes Power Limited ("GLPL") under section 6.1.5 of the Transmission System Code (the "Code") for the review and approval of their respective connection procedures (the "Connection Procedures Decision"). The file number assigned to Hydro One's application was EB-2006-0189 and the file number assigned to the application by

The Connection Procedures Decision also discussed two further matters that have been raised by parties to this proceeding. The first is the regulatory treatment of capital contributions paid by distributors to transmitters. The second is adjustments to cost responsibility that can and should be made where a transmitter's plans call for the installation of unique system elements as part of the proposed reinforcement of connection facilities.

THE THRESHOLD QUESTION

1. Scope of the Power to Review

Under Rule 45.01 of the Rules, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

The Notice and PO provided guidance in relation to this threshold question, based in part on the Board's May 22, 2007 Decision with Reasons on the NGEIR Motions (proceeding EB-2006-0322/EB-2006-0338/EB-2006-0340) (the "NGEIR Motions Decision"). Specifically, the Notice and PO indicated that the Board would wish to be satisfied that Hydro One's Motion to review raises a question as to the correctness of the Connection Procedures Decision, and is not being used as an opportunity to reargue the case.

The moving party must also satisfy the Board of the following:

- To the extent that an error in the Connection Procedures Decision is alleged:
  - that the error is identifiable, material and relevant to the outcome of the Connection Procedures Decision and that, if the error is corrected, the reviewing panel could change the outcome of the Connection Procedures Decision (in other words, there is enough substance to the issues raised that a review based on those issues could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended); and
  - that the findings of the Connection Procedures panel are contrary to the evidence that was before that panel, the panel failed to address a material

issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel.

- To the extent that the incompleteness of evidence is raised as a ground for review:

  - that the facts now sought to be brought to the attention of the Board could not have been discovered by reasonable diligence at the time; and

  - that those facts are material and relevant to the outcome of the Connection Procedures Decision and that, if considered by the reviewing panel, could change the outcome of the Connection Procedures Decision (in other words, the facts are such that a review based on a consideration of those facts could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended).

With one exception, the parties did not expressly take issue with the threshold test as articulated above. In its written summary of submissions and at the oral hearing, the EDA argued that the Board cannot limit its substantive jurisdiction through its procedural rules, and that the issue of whether there is a "question as to the correctness of the order or decision" goes beyond whether there was a simple error. If the implications of a decision were not matters before the Board at the relevant time, and have only emerged subsequently, it is in the EDA's view appropriate for the Board to reconsider the conclusions that were reached in the decision.

During the oral hearing, the OPA submitted that while reviews initiated by motion are subject to the constraints identified in Rule 44 of the Rules, the Board has a broader power to review under Rule 43.01. That broader power can be exercised even if the Board finds that the moving party has not made a case for review under Rule 44.

During the oral hearing, Board staff agreed that the Board has wide latitude in relation to reviews, under both Rule 43 and Rule 44. However, in the case of an applicant-driven motion to review, it is not sufficient to simply reargue the case, or to argue that a different outcome might have been preferred. The moving party must show that the decision at issue is incorrect in an identifiable, relevant and material way.

This panel acknowledges that the scope of the Board's power to review is broad, but remains of the view that a motion to review must raise a question as to the correctness of the decision at issue. The Board has previously indicated, in the NGEIR Motions Decision and in the Notice and PO, that the grounds for review set out in Rule 44.01 are not exhaustive. It may be that the emergence of previously unknown or unforeseen implications of a decision could be considered a ground for review. However, in the circumstances of this case this panel does not need to decide that issue given the findings below.

2. The Section 71 Issue

a. *Introduction*

Hydro One's Notice of Motion raised the following grounds for review in relation to the Section 71 Issue:

i. the Connection Procedures panel erred in that there was incomplete evidence and information, which evidence and information could not have been discovered by reasonable diligence at the time or which were otherwise not brought to the attention of the Connection Procedures panel, thereby raising a question as to the correctness of the Connection Procedures Decision;

ii. the Connection Procedures panel erred in that, because of the absence of evidence and information referred to in (i), the Connection Procedures panel failed to protect the interests of consumers (third parties to whom Hydro One provides services and Hydro One's ratepayers), thereby raising a question as to the correctness of the Connection Procedures Decision; and

iii. the Connection Procedures panel's interpretation of section 71 of the Act occurred in the absence of relevant evidence before it, thereby raising a question as to the correctness of the Connection Procedures Decision.

Hydro One's Motion in relation to the Section 71 Issue was supported by OPG, Bruce Power, the OPA, PWU, the EDA, CLD and the IESO. ECAO and Board staff submitted that the threshold for review has not been met on the Section 71 Issue.

Ontario Energy Board
Commission de l'Énergie de l'Ontario

EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

EB-2006-0322
EB-2006-0338
EB-2006-0340

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

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

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

In November of 2006 the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The NGEIR Decision addressed the key issues of natural gas storage rates and services for gas-fired generators, and storage regulation.

In the NGEIR Decision, the Board determined that it would cease regulating the prices charged for certain storage services but that the rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The Board received three Notices of Motion for review of certain parts of the NGEIR Decision. The Board held an oral hearing to consider the threshold questions that the Board should apply in determining whether the Board should review those parts of the NGEIR Decision and whether the moving parties met the test or tests.

The Board finds that the motions do not pass the threshold tests applied by the Board, except in two areas.

First, the Board finds that the decision to cap the storage available to Union Gas Limited's in-franchise customers at regulated rates to 100 PJ is reviewable.

Second, the Board finds that the decisions regarding additional storage requirements for Union Gas Limited's in-franchise gas-fired generator customers and Enbridge's Rate 316 are reviewable.

TABLE OF CONTENTS

Section A: Introduction

The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding[1] ("NGEIR"). Motions were filed by the City of Kitchener ("Kitchener") and the Association of Power Producers of Ontario ("APPrO"). There was also a joint notice by the Industrial Gas Users' Association ("IGUA"), the Vulnerable Energy Consumers Coalition ("VECC") and the Consumers Council of Canada ("CCC")

On January 25, 2007, the Board issued a Notice of Hearing and Procedural Order which established a schedule for the filing of factums by the moving parties, any responding parties' factums, and an oral hearing date for hearing the threshold question. On February 8, 2007, factums were filed by Kitchener, APPrO, IGUA, and jointly by CCC and VECC.

Responding factums were filed on February 15, 2007 by Board Staff, Union Gas Limited, Enbridge Gas Distribution Inc., Market Hub Partners Canada Ltd., School Energy Coalition, The Independent Electricity System Operator and BP Canada Energy Company.

In its Procedural Order No.2, the Board indicated that, at the upcoming oral hearing, parties should confine their submissions to the material in their factums and to responding to the factums of other parties. The Board also stated that parties should address only the issues set out in the Board's Procedural Order No. 1, namely:

1) What are the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision? and

2) Have the Moving Parties met the test or tests?

[1] EB-2008-0551 (November 7, 2006)

On March 5 and 6, 2007, the Board heard the oral submissions of all the parties with the exception of the Independent System Operator and BP Canada who had advised the Board that they would not be appearing at the oral hearing.

The NGEIR Decision

On November 7, 2006 the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The 123-page NGEIR Decision addressed the key issues of:

1) Rates and services for gas-fired generators, and

2) Storage regulation.

The parties reached settlements with Enbridge and Union on most of the issues related to rates and services for gas-fired generators. These settlements were approved by the Board. The oral hearing and the NGEIR Decision addressed the broad issue of storage regulation and any issues that were not settled in the settlement negotiations.

The issue concerning storage regulation was whether the Board should refrain from regulating the prices charged for storage services under section 29 (1) of the Ontario Energy Board Act, 1998. The Board found that the storage market is workably competitive and that neither Union nor Enbridge have market power in the storage market. The Board determined that it would cease regulating the prices charged for certain storage services; however, the Board found that rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The motions requested the following decisions made in the NGEIR Decision be either reviewed and changed; cancelled, or clarified, in a new Board proceeding:

Kitchener

- The aggregate excess methodology for allocating storage space
- The 100 PJ cap on Union's regulated storage

APPrO

- Whether short notice balancing service should be included on the tariffs of Union and Enbridge

IGUA/CCC/VECC

- Parts of the NGEIR Decision pertaining to storage, storage regulation and storage allocation be cancelled
- Review to be heard by a different Board panel

The parties outlined the grounds for the motions which included allegations of errors of fact and in some cases, errors of law.

Organization of the Decision

In this Decision, the Board organized the issues raised by the parties into sections that cover the same or similar topics. In each section following the section on the threshold test, the Board identifies the issue or issues raised, and makes a finding whether the issues are reviewable by applying the threshold test.

The sections of this Decision are:

A. Introduction (this section)
B. Board Jurisdiction to Hear Motions
C. Threshold Test
D. Board Process

E. Board Jurisdiction under Section 29
F. Status Quo
G. Onus
H. Competition in the Secondary Market
I. Harm to Ratepayers
J. Union's 100 PJ Cap
K. Earnings Sharing
L. Additional Deliverability for Generators and Enbridge's Rate 316
M. Aggregate Excess Method of Allocating Storage
N. Orders
O. Cost Awards

The Board has reviewed the factums and arguments of all parties but has chosen to set out or summarize the factums or arguments by parties only to the extent necessary to provide context to its findings.

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> > (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error of law or jurisdiction, including a breach of natural justice;

(ii) error in fact;

(iii) a change in circumstances;

(iv) new facts that have arisen;

(v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

(vi) an important matter of principle that has been raised by the order or decision;

(b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, ...

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4^{th}) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms..."

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference..."

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,..., make orders for (a) the exchange of documents, ..."

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out ... any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;..." While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1
>
> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act.*
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words "may include" in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board's rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word "shall".

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be "special". Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, 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.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, 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 reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

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February 28, 2011

BY COURIER (2 COPIES) AND EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
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Toronto, Ontario M4P 1E4
Fax: (416) 440-7656
Email: boardsec@oeb.gov.on.ca

Dear Ms. Walli:

Re: Pollution Probe – Submissions on Draft Issues List
EB-2011-0011 – Toronto Hydro – 2011-14 CDM Programs

We write to provide you with Pollution Probe's submissions regarding the draft Issues List pursuant to *Procedural Order No. 1*.

Summary

In summary, Pollution Probe supports the draft Issues List as proposed. Pollution Probe also submits that the following issues should be added to the final Issues List:

3.3 Are the proposed participation rates for Toronto Hydro's OPA-Contracted Province-Wide CDM Programs appropriate?

3.4 Should Toronto Hydro be encouraged to propose additional Board-Approved CDM Programs?

Pollution Probe's reasons for these proposed additions are as follows.

1. Help Exceed and Accelerate Achievement of Ontario's CDM Targets

First, in accordance with the Minister's recent Directive to the OPA, the proposed issues examine whether Toronto Hydro can help Ontario exceed and accelerate the achievement of Ontario's CDM targets in accordance with government policy.

As the Board is aware, Minister Duguid established a number of CDM targets for Ontario in the recent Directive to the OPA regarding the Integrated Power System Plan.[1] That Directive also states that "[t]he Plan shall seek to *exceed and accelerate* the achievement of these CDM targets if this can be done in a manner that is feasible and cost-effective [emphasis added]."

Pollution Probe thus submits that more aggressive participation targets for OPA-Contracted programs and/or additional Board-Approved CDM programs could correspondingly help Ontario to exceed and accelerate the achievement of Ontario's province-wide CDM targets, and the proposed issues should be accordingly examined in this proceeding.

2. Reduce Need for Higher Cost Supply Resulting In Lower Rates and Bills

Second, the proposed issues would examine whether increased CDM by Toronto Hydro can help reduce the need for higher cost electricity supply (and thus lead to lower electricity rates and bills).

Pollution Probe notes that Minister Duguid's CDM Directive to the Board specifically stated "that the Board shall not preclude consideration of CDM Programs or funding for CDM Programs on the basis that a distributor's CDM Targets have been or are expected to be exceeded".[2] In other words, a distributor's CDM targets are not determinative of the amount of CDM that distributor should do.

Pollution Probe submits that it is thus important to examine whether more aggressive or additional cost-effective Toronto Hydro CDM programs are thus in the interests of all Ontario electricity consumers, particularly since such additional CDM can reduce the need for higher cost electricity supply. As a result, larger budgets for cost-effective Toronto Hydro CDM programs could lead to lower electricity rates and lower electricity bills for all Ontario consumers, and the proposed issues should be accordingly examined in this proceeding.

Conclusion

In light of all of the above, Pollution Probe submits that the proposed issues should be added to the final Issues List. In the alternative, it would be acceptable if the Board determined that these proposed issues were covered under other issues on the final Issues List.

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[1] Dated February 17, 2011 and available online at:
http://www.powerauthority.on.ca/sites/default/files/new_files/IPSP%20directive%2020110217.pdf.
[2] Section 6(c). Dated March 31, 2010 and available online at:
http://www.oeb.gov.on.ca/OEB/_Documents/GEGEA%20Implementation%20and%20Readiness/minister_directive_20100423.pdf.

We trust these submissions are of assistance, and please do not hesitate to contact the undersigned if you wish to discuss this matter further.

Yours truly,

Basil Alexander

BA/ba

cc: Applicant and Intervenors

David I. Poch Barrister tel. (613) 264-0055 fax (613) 264-2878

24 February 2011

Ontario Energy Board
2300 Yonge St., 27th Floor
Toronto, ON
M4P 1E4

Attn: Ms Kirsten Walli
Board Secretary

By electronic filing and e-mail

Dear Ms Walli:

Re: EB-2011-0011 – THESL CDM - GEC submission on draft issues list

Pursuant to P.O. 1 in this matter GEC offers the following submission on the draft issues list:

While the question of the appropriateness of the budget for the nine proposed programs is included, there is need for an overarching issue as follows:

> *The appropriateness of the CDM budget in its entirety.*

This is suggested to permit discussion of the adequacy (or inadequacy or excessiveness) of the budget including non-program specific aspects and in the event that the nine programs are found to be insufficient to meet the Directive and/or the Board's objective "To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances".

Sincerely,

David Poch

Cc: all parties

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