ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION

IN THE MATTER OF
Pollution Probe's motion to review the
Board's Issues List Decision

Board File Number: EB-2011-0011

April 1, 2011

Introduction

On March 22, 2011, Pollution Probe filed a notice of motion to review the Board's issues list decision dated March 11, 2011 (the "Issues Decision" or the "Decision on Issues"). The notice of motion seeks an order of the Board varying the parts of the decision determining that the two new issues proposed by Pollution Probe were outside the scope of the Board's review in the proceeding.

On March 25, 2011, the Board issued Procedural Order No. 2, in which it required interested parties to pre-file written submissions by April 1, 2011. On March 31, 2011, the Board set a date of Tuesday, April 5, 2011 for the oral hearing of the motion. What follows are the written submissions of Board staff.

Background

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

On February 18, 2011, the Board issued Procedural Order No. 1 in which it set out dates for parties to file written submissions on the draft issues list.

The Board received comments from the Green Energy Coalition, Pollution Probe, the School Energy Coalition ("SEC") 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 to Review parts of the Board's Decision on Issues. Within its submission, Pollution Probe noted that its motion meets the threshold requirements as the grounds of the motion raise a question as to the correctness of the decision, the issues raised could results in the Board varying its decision, that there are identifiable errors in the decision as findings conflict with Ministerial Directives, the Board's statutory mandate, the Board's inclusion of other related issues, and a Board decision in the Hydro One Board-Approved CDM Program proceeding (EB-2010-0331/0332).

Board Staff Submission

Board staff submits that the motion does not raise a legitimate question as to the correctness of the Board's decision, and that the motion should be dismissed.

Rule 42 Motions

Pollution Probe has filed this motion pursuant to Rule 42 of the Board's *Rules of Practice and Procedure* (the "Rules"). Rule 44.01 states:

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

Pollution Probe does not directly address Rule 44.01 in its submissions. It does state that the grounds it relies upon raise a question as to the correctness of the decision, but it does not allege any specific error in fact, change in circumstances, new facts that have arisen, or facts that were not previously placed in evidence on the proceeding and could have been discovered by reasonable diligence. A failure to identify or raise any of these issues is not necessarily fatal to a motion to review, however, as the list of acceptable grounds in Rule 44.01 is not necessarily exhaustive ("which grounds **may** include").

Regardless, it is Board staff's position that a motion to review must point to some clear grounds, and cannot be viewed as simply an opportunity to re-argue an issue in the hope of achieving a different result. This issue was addressed in the Board's decision on several review motions in the Natural Gas Electricity Interface Review. In that decision, the Board held that: "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."[1] Although these comments were made in a decision relating to the Rule 45 "threshold" issue, it is Board staff's position that they apply equally on a review of the merits (Procedural Order No. 2 did not request submissions on the threshold issue, and Board staff have therefore not made any).

As more thoroughly described below, Board staff submits that it is not clear that Pollution Probe has raised any grounds that properly challenge the correctness of the decision. Much of the argument in the notice of motion was either made in Pollution Probe's original submissions on the issues list, or could have been. Pollution Probe may disagree with the Board's findings, but this alone is not sufficient grounds for a successful motion to review.

[1] EB-2006-0322/0338/0340, Decision with Reasons dated May 22, 2007, p. 18.

Regulatory Context

Before responding directly to Pollution Probe's submissions, it is helpful to review the regulatory framework for the current proceeding. Toronto Hydro is required, as a condition of its license, to meet certain CDM targets over a four year period. It can achieve these targets by using OPA Programs, by using programs approved through applications before the Board, or through some combination of the two. The Board has no authority over OPA programs whatsoever, and a utility is not required to apply for any Board-Approved programs at all if it can achieve its full targets through OPA programs. A utility can make more than one application for Board approval of programs as its needs may require; in other words Toronto Hydro will have the opportunity to apply for more Board-Approved CDM Programs at a later date if it chooses to do so. Applications for Board-Approved CDM Programs are considered within the context established by the Board's CDM Code.

The Proposed Issues

In its written submissions on the issues list, Pollution Probe requested that two issues be placed on the final issues list:

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

2) Proposed issue 3.4 – Should Toronto Hydro be encouraged to propose additional Board-Approved CDM Programs?

The Board declined to include either of these issues on the final issues list, determining that both were outside the scope of its review in the proceeding.

Pollution Probe's arguments can broadly be categorized under three main headings: the Issues Decision conflicts with the Minister's Directives and was not in accordance with the policies of the Government of Ontario; the exclusion of Pollution Probe's proposed issues will limit the amount of information relating to OPA programs on the record and thereby prevent the proposed programs from being considered in their full context; and that the Issues Decision is both internally inconsistent and inconsistent with previous Board practice.

Conflict with Ministerial Directive and Government Policy

It is Board staff's submission that the Issues Decision conflicts with neither Ministerial Directives nor with government policy.

Pollution Probe points to section 3(b) of the Minister's March 31, 2010 Directive (the "Directive"), which states that a distributor's license is to be conditional upon delivering a mix of CDM Programs "as far as is appropriate and reasonable". Pollution Probe suggests that this phrase, in particular the words "as far as" places a requirement upon the Board to ensure that distributors conduct as much CDM as possible. Therefore, Pollution Probe argues, the issue of whether Toronto Hydro should conduct more Board-Approved CDM Programs should be within the scope of this proceeding.

Board staff disagrees with this assertion for a number of reasons. Section 3(b) relates to amendments the Board was required to make to distributors licenses. The Board amended the licenses and included the following provision: "The licensee shall make its best efforts to deliver a mix of CDM Programs to all consumer types in the Licensee's service territory."[2] This is a requirement of the distributor, not of the Board. Section 3(b) does not relate to achieving (or over-achieving) targets at all; it is a provision designed to ensure that all consumer types are eligible for CDM programs as far as is reasonable. Pollution Probe's

[2] This provision is typically section 21.3 of all distributors' licenses.

attempt to convert this into a provision requiring the Board to consider requiring a distributor to do additional Board-Approved CDM Programs is simply not supported by a plain reading of the ordinary meaning of the section. Board staff notes that there are in fact sections of the Directive dealing with exceeding the CDM targets, and these are discussed below.

Pollution Probe also cites a Ministerial Directive to the OPA dated February 17, 2011, which directed that the (yet to be filed) Integrated Power System Plan ("IPSP") shall seek to exceed and accelerate the achievement of CDM targets if this can be done in a feasible and cost effective manner. Needless to say, a directive to the OPA is not a directive to the Board, and the current proceeding is not related to the IPSP. Further, the CDM targets referred to in the February 17 directive are targets for the OPA to achieve, and are not the same as the CDM targets referred to in the Directive to the Board (although of course there would be overlap). In short, this directive is of little or no relevance to the current proceeding.

There is no requirement, or even suggestion, in the Directive that the Board include Pollution Probe's proposed issues in this proceeding. Similarly, no governmental policy mandates or otherwise requires that Pollution Probe's issues be added to the issues list.

Board staff does not dispute that, through various directives, statements, and policy initiatives, the government has clearly expressed its view that the promotion of CDM is important. This does not mean, however, that in every discrete application for Board approved CDM programs, the Board must consider whether additional CDM should be required. Staff submits that Pollution Probe has not demonstrated that there is reason to doubt the correctness of the Issues List Decision on this ground.

Inconsistency with issues added under section 3.2 and prior Board practice

Pollution Probe alleges that the Board acted inconsistently by adding an issue proposed by SEC while excluding the proposed Pollution Probe issues. The SEC issue (which is included on the final issues list as issue 3.2) is: "Has Toronto Hydro adopted an appropriate mix of OPA programs and Board-Approved CDM Programs." In Pollution Probe's view, it is inconsistent for the Board to allow a review of the OPA/Board-Approved CDM Program mix, and yet not allow an examination of whether additional Board-Approved CDM Programs should be undertaken. Any review of program mix that does not allow for an order requiring more Board-Approved CDM Programs would be meaningless, in Pollution Probe's submission.

Board staff disagrees with this position. It is submitted that the reason that the Board added issue 3.2, and decided that information relating to OPA programs provide an important context for applied-for utility-specific programs, as was the case in the Hydro One CDM proceeding, was to allow parties to explore whether the proposed programs are duplicative of OPA programs, and whether the costs are appropriate. With respect to cost effectiveness, the idea is that parties will be entitled to explore whether OPA programs provide better "bang for the buck", and if so to ask Toronto Hydro why its proposed programs are necessary and appropriate. There is no suggestion that this issue is meant to open a discussion regarding whether Toronto Hydro should undertake additional Board-Approved CDM Programs. In other words, there is no inconsistency.

Although the Directive permits the Board to approve CDM programs even where a distributor has (or is expected to) exceed its targets, this does not amount to a requirement to do so. Board staff submits that the Board was well within its rights to exclude this issue and there are no reasonable grounds to believe that this decision was incorrect.

Establishment of proper "context"

Pollution Probe makes several references to the need for full information concerning OPA programs in order to provide appropriate context for the current proceeding.

At paragraph 13 of the notice of motion, Pollution Probe quotes section 2(c) of the Directive, which provides that the Board shall "have regard to information obtained from the OPA", in support of its position. This submission is unhelpful for two reasons: first, no one is suggesting that information about OPA programs will be excluded from the current proceeding. In fact, several issues explicitly allow for an examination of information from or relating to the OPA and its programs (for example 1.3, 1.4, 1.5, 3.2). More importantly, Pollution Probe failed to quote section 2 (c) in its entirety, which begins: "**In establishing CDM targets for each distributor**, the Board shall have regard to information obtained from the Ontario Power Authority, 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." (Emphasis added.) In other words, the Board is directed to have regard to information obtained from the OPA only with regard to setting the CDM targets which are incorporated in the licenses. This section has no application with regard to the Board's consideration of applications for Board-Approved CDM Programs.

Pollution Probe continues with the theme of needing information about OPA programs to provide context for the application in paragraphs 14 and 15. This argument ignores two factors: first, as noted above, information about the OPA and its programs is not excluded from this proceeding, and second, neither of the issues proposed by Pollution Probe actually relate directly to the relevance of OPA information. Even if Pollution Probe's issues had been added, the Board has no authority over ordering either Toronto Hydro or the OPA to increase the

participation rates for Toronto Hydro's OPA programs. These programs are delivered on a contractual basis between Toronto Hydro and the OPA. It is not clear that adding Pollution Probe's issues would provide any useful additional context or information that would be helpful in this proceeding.

A similar point is made at paragraph 10 of the notice of motion, where Pollution Probe states that by excluding its issues, the Board has prevented an examination of the CDM programs "in their context as a whole" and that this may impair the Board's ability to determine if enough CDM is occurring in accordance with the directives and license requirements." In Board's staff submission, the purpose of this proceeding is not to determine if the applicant is going to achieve its CDM targets. Rather, it is to determine if the six proposed programs are appropriate. Pollution Probe's arguments concerning context do not give rise to a concern that the Issues Decision was not correct.

Conclusion

For the reasons described above, Board staff submits that Pollution Probe has not demonstrated that there are grounds to believe the Issues Decision was incorrect, and the motion should be dismissed.

All of which is respectfully submitted,

April 1, 2011