



ONTARIO ENERGY BOARD

FILE NO.: EB-2011-0011

VOLUME: Motion Hearing

DATE: April 5, 2011

BEFORE: Marika Hare Presiding Member

Paul Sommerville Member

Karen Taylor Member

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 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.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Tuesday, April 5, 2011,
commencing at 9:36 a.m.

MOTION HEARING

BEFORE:

MARIKA HARE	Presiding Member
PAUL SOMMERVILLE	Member
KAREN TAYLOR	Member

A P P E A R A N C E S

MICHAEL MILLAR

Board Counsel

JOSH WASYLYK
VIIVE SAWLER

Board Staff

MARK RODGER

Toronto Hydro-Electric System
Limited

BASIL ALEXANDER

Pollution Probe

MARK RUBENSTEIN

School Energy Coalition (SEC)

MATT GARDNER
JUDY SIMON

Low Income Energy Network (LIEN)

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NO UNDERTAKINGS WERE FILED IN THIS PROCEEDING

1 Tuesday, April 5, 2011

2 --- Upon commencing at 9:36 a.m.

3 MS. HARE: Please be seated.

4 Good morning. My name is Marika Hare. With me is
5 Paul Sommerville and Karen Taylor on this panel.

6 We are convening today in the case of a motion filed
7 by Pollution Probe to review parts of the issues list
8 decision in the case of Toronto Hydro-Electric System
9 Limited's filing for Board-approved conservation and demand
10 management programs.

11 The Board has assigned the application docket number
12 EB-2011-0011.

13 On March 11th, 2011, the Board issued the issues list
14 decision in this proceeding. The Board determined, in that
15 decision, that an examination of the proposed participation
16 rates and budgets for the OPA CDM programs was outside of
17 the scope of this hearing.

18 It also determined that the question of whether or not
19 Toronto Hydro should be encouraged to propose more Board-
20 approved CDM programs was also outside the scope of this
21 hearing.

22 Pollution Probe's motion seeks the Board's review of
23 the issues list claiming it erred in its decision, and the
24 grounds raised a question as to the correctness of the
25 decision.

26 On April 1st, the Board received submissions on these
27 matters from Pollution Probe, Board Staff, Green Energy
28 Coalition, Ontario Power Authority, Low-Income Energy

1 Network, School Energy Coalition and Toronto Hydro.

2 The Board has found these submissions to be helpful in
3 understanding the positions of the parties. These written
4 submissions need not be repeated in their entirety.
5 Rather, the Board is interested in exploring certain
6 questions raised in the submissions. Highlights of the
7 submissions would be appreciated.

8 May I have appearances, please?

9 **APPEARANCES:**

10 MR. MILLAR: Good morning, Madam Chair, Members of the
11 Panel. Michael Millar, counsel for Board Staff, and I am
12 joined today by Josh Wasylyk.

13 MS. HARE: Thank you.

14 MR. ALEXANDER: Basil Alexander, counsel for Pollution
15 Probe.

16 MR. RUBENSTEIN: Mark Rubenstein, articling student,
17 School Energy Coalition.

18 MR. GARDNER: Matt Gardner, counsel for LIEN. Pardon
19 me, sorry.

20 MS. SAWLER: I was just to say Viive Sawler, Board
21 Staff.

22 MR. GARDNER: With me is consultant Judy Simon for
23 LIEN.

24 MR. RODGER: Good morning. Mark Rodger, counsel for
25 Toronto Hydro-Electric System Limited.

26 MS. HARE: Thank you. Mr. Alexander, we will hear
27 from you first.

28 MR. ALEXANDER: Thank you, Madam Chair.

1 **SUBMISSIONS BY MR. ALEXANDER:**

2 MR. ALEXANDER: For the Members of the Panel, Madam
3 Chair, I will obviously be referring to the double-sided
4 blue motion record which was filed. It was also
5 distributed as part of Procedural Orders Nos. 2 and 3. So
6 I would obviously ask that you make sure you have that in
7 front of you. I presume you have the tabbed versions we've
8 got, because I will be referring to the tabs in order to
9 make life easier for everyone.

10 So as noted in the summary, Pollution Probe has filed
11 this motion to review parts of the issues decision
12 regarding certain parts, specifically to vary it. And to
13 summarize as to where this comes from, this is coming from
14 whether the errors that are associated with the meanings of
15 the directives -- which we submit are legal errors given
16 the nature of the directives, and whether or not there are
17 unintended consequences that sort of follow through as a
18 result.

19 I take Madam Chair's point of not reading the
20 submissions or taking you through everything, but there are
21 certain things I would like to take you through, just so
22 you have it for your reference and know where they are.

23 MS. HARE: That's fine. Thank you.

24 MR. ALEXANDER: So obviously on a motion for review,
25 we've included as part of the motion record, as tabs 9
26 through 11, the three key decisions that have come out from
27 this Board regarding motions for review, and I would
28 suggest for you obviously at tab 8 is an excerpt from the

1 Board's Rules, and at page 66 of the motion record that is
2 really the starting point for the motion to review, which
3 Rule 44.01 sets out what is required for a motion for
4 review.

5 And then when we skip ahead to tab 9, which is the
6 Board's decision in EB-2009-0038, which was an application
7 by Ontario Power Generation for certain payments of its
8 facilities -- certain payments by its facilities in respect
9 to a motion in review, the Board summarized, I thought
10 quite nicely, at page 70, or page 9 of the decision,
11 several of the key things that are considered with respect
12 to the threshold question.

13 And I think the key points there are: Raise a
14 question as to the correctness of the order or the
15 decision; the issues must challenge the correctness of the
16 order or decision so that the decision should be varied,
17 cancelled or suspended. There must be an identifiable
18 error. Going to the fourth point, the Panel failed to
19 address a material issue or that the Panel made
20 inconsistent findings or something of a similar nature, and
21 that the alleged error must be material and relevant.

22 So I am taking that to you as -- just to have that for
23 your reference. I would submit that that has been met in
24 this case, given the grounds that we're going to talk
25 about.

26 And then the other thing that is also interesting that
27 I think is also applicable is I have included an excerpt
28 from EB-2007-0797 at tab 10 of the motion record, which is

1 a decision and order with respect to Hydro One Networks for
2 connection procedures, as well as Great Lakes Power
3 Limited.

4 If I go to page 75 of the motion record, which is page
5 9 of the decision, we obviously only included the relevant
6 excerpts of these decisions here.

7 The Board also noted in the second -- in the fourth
8 line from the bottom of that marked paragraph:

9 "It may be that the emergence of previously
10 unknown or unforeseen implications of a decision
11 could be considered a ground for review."

12 In my submission, that would also apply in this
13 situation, given the implications that I am going to talk
14 about that were discussed in more detail in the notice of
15 motion.

16 Here, what we're getting at with respect to the issues
17 that we are seeking to -- that we are seeking to have
18 varied is that we need to be able to examine CDM programs
19 as a whole in their totality, not just programs in
20 isolation. We need to be able to see the forest instead of
21 just the trees.

22 That's what we're concerned about, and we are
23 concerned that we are losing that, given the nature of the
24 issues decision, because the nature of the issues decision
25 says the questions we raised are out of scope.

26 They didn't say that the issues were -- that we could
27 get the information through other ways or that they would
28 be covered by an additional issue. The phrasing the Board

1 chose is that the issues were out of scope. So that is the
2 wording issue that really concerned us when we see this and
3 what caused us to bring these motions for review, which we
4 don't do lightly, obviously.

5 And the Board has historically looked at CDM programs
6 as a whole, in their totality. We look at: Should they be
7 doing more? This is an issue that's been consistently
8 looked at, and even though the regulatory context has
9 changed, it is in my submission that nature of that
10 overarching review is still there and still something that
11 should be looked at.

12 And my concern and Pollution Probe's submission is
13 that if we don't look at those issues, the review becomes a
14 series of check boxes in order to see -- in order to --
15 just simply whether or not certain things are met. It is
16 not substantive looking at the overarching forest rather
17 than just the trees.

18 For example, an example of that is Toronto Hydro in
19 their submissions says it is inevitable they're going to be
20 doing more, but the whole point is to look at the whole
21 context, because it is difficult to assess these programs
22 and the context of everything without looking at the
23 overarching picture.

24 And this is where the error comes in, and where the
25 unintended consequences come in, because I would submit
26 that is the unintended consequence of the Board's decision.

27 I would submit that given the nature of the government
28 directives and the policy directions that are there, there

1 is a misunderstanding of that and some of the Board's role
2 with respect to that.

3 And this Panel is familiar with the directives,
4 because this panel was obviously on the Hydro One decision.
5 So you are familiar with the panels that I have -- with the
6 two directives that I am going to take you to briefly. I
7 am not going to take you through them in the same detail I
8 did during the Hydro One hearing.

9 But at tab 4 is a copy of the Minister's directive to
10 the Board regarding CDM programs, and flipping ahead to
11 page 23 of the motion record, paragraph 3, the Board is
12 familiar with paragraph 3, because I have taken you to this
13 before:

14 "The Board shall amend the licence of each
15 distributor as follows..."

16 And then flipping ahead to page 24:

17 "By adding a condition that specifies that the
18 distributor must deliver a mix of CDM Programs to
19 all consumer types... as far as appropriate and
20 reasonable having regard to the composition of
21 the consumers, distributor's consumer base."

22 And I have reiterated with this Board before as to the
23 meaning of the words "as far as is possible" -- "as far as
24 is possible", "as far as is appropriate and reasonable",
25 because the Minister didn't need to include those words.
26 Those words need to have meaning.

27 And if we don't have a look at the forest instead of
28 just the trees, those words then become just words on the

1 licence. They aren't something that is actually looked at.
2 I would submit that this application is part of that
3 context of where you actually need to look at.

4 We need to be able to enforce these things and make
5 sure it is happening, because otherwise the review simply
6 becomes a check box. Is the distributor delivering a mix
7 of CDM programs to all consumer types?

8 That seems limiting. And I think that is not -- I
9 think what is -- the Minister intended by this is much more
10 than that. And I would submit it cannot be -- it has to be
11 much more, given the Minister's choosing of the words as
12 far as is appropriate and reasonable.

13 At tab 5, I have a copy of the IPSP directory and I
14 have taken the Board to it, but I am not going to take you
15 to it again, but at page 27 of the motion record, it has
16 the point of:

17 "The IPSP shall seek to exceed and accelerate the
18 achievement of CDM targets if this can be done in
19 a manner that is feasible and cost-effective."

20 While this is obviously with respect to the IPSP, it
21 is a government directive, and I would submit that the
22 directives are obviously examples of government policy and
23 what the government wants to do.

24 And this reinforces the whole point of being able to
25 look at the forest rather than each individual tree,
26 because otherwise what do we do? Do we bring applications
27 for each CDM program and just look at each CDM program? I
28 would submit not.

1 I would submit that what we do is look at the package
2 as it is here, and we sort of work through and we look at
3 the entire thing and we look at what Toronto-Hydro is going
4 to do.

5 I would submit these are also important and where
6 there are issues as well is with respect to your statutory
7 objectives.

8 And for your reference, the relevant excerpt is
9 included at tab 3 of the motion record, at page 20 of the
10 motion record. And the Board's obviously familiar with its
11 objectives that it carries out with respect to electricity
12 where the Board, in carrying out its responsibilities,
13 shall be guided by the following objectives. Obviously
14 there is issue number 3:

15 "To promote electricity conservation and demand
16 management in a manner consistent with the
17 policies of the Government of Ontario."

18 In my submission, these are the issues that are at
19 play here, and the issues that were not materially
20 considered.

21 The other two objectives that are here that the Board
22 is also well aware of, number 1 and number 2, also apply,
23 in order to protect the interests of consumers with respect
24 to prices and also to promote economic efficiency and cost-
25 effectiveness, because we're not proposing to not do cost-
26 effective CDM programs.

27 At the same token, this isn't just about prices and --
28 it is also about cost-effectiveness, because we're talking

1 about the net bill and avoiding cost of supply, because in
2 the context of CDM, the avoided costs of supply is so
3 significant that that is one of the things that gets thrown
4 into the test and gets considered. And I would submit that
5 is one of the reasons why the government policy is to seek
6 and accelerate CDM, even if it is beyond the targets.

7 I think that is reinforced also by the CDM directive
8 to you, yourself, where there is the section at tab 4, at
9 page 25, at paragraph 6(c), where:

10 "The Board shall not preclude consideration of
11 CDM programs or funding for CDM programs on the
12 basis that a distributor's CDM targets have been
13 or are expected to be exceeded."

14 So this goes to the whole point of being able to look
15 at what is CDM and where we're going. And to be clear,
16 this is about the scope of the questions what we examine in
17 the hearing. This isn't a decision, now, that Toronto-
18 Hydro must do more CDM, but this allows us to examine it as
19 part of the hearing. And that is the important part that
20 we need to -- that I need to reinforce at this stage.

21 What we actually decide is later, once the Board has
22 heard the evidence and made the decisions and everything,
23 but this is about the scope of what goes on in that
24 context.

25 As part of that, the OPA information is needed in
26 order to assess that totality as a whole, which is why
27 those parts have been included as part of this motion to
28 review.

1 We're not suggesting that we evaluate or review
2 specific OPA programs, but the question is what is being
3 done overall, because we need to understand what is
4 happening overall.

5 And this goes back into a submission I made to this
6 Panel before, where even though the application is for
7 programs for 2011 to 2014, the Board may -- the Board has
8 discretion as to what it actually may approve.

9 In the CDM Code itself, which is -- a copy of which is
10 located at tab 7 of the motion record -- and I am going to
11 take you to page 50 of the motion record, where we talk
12 about Board approval -- the Board clearly indicates that
13 the Board will make determinations that it considers
14 appropriate, which I submit is within the Board's general
15 purview of what it normally does. But part of that may be
16 that the Board may say at the end of the day -- and we
17 don't know. It is premature to make decisions at this
18 stage, but the Board may say at the end of the day that:
19 We're not going to approve programs for the entire period.
20 We may say: It is okay for a year or two, but you have to
21 come back with something else. Or we're going to suggest
22 that: Here is some suggestions you need to do.

23 So that is part of what is going on. You may say that
24 what you're doing with the OPA is not good enough. You may
25 do more. Or you may say that what you're doing with the
26 OPA is good enough. That is fine. But that is the whole
27 point, is we need to be able to examine that information as
28 part of the context of this hearing, which gets back to the

1 whole idea of being able to assess -- in order to be able
2 to assess the trees, we need to look at the forest as a
3 whole.

4 I'm going to also submit it is appropriate because one
5 of the things that the CDM Code actually requests and
6 considers as part of its reporting is including some of
7 these kinds of information as part of its reporting in some
8 of the things that gets done here. It is also in the act
9 as part of information that is going to be provided here.
10 So I think it is appropriate and it's within the scope to
11 be looking at some of this.

12 I want to be clear we're not suggesting the Board is
13 going to review or approve specific OPA programs, but what
14 we're looking at is being able to consider the totality.

15 The other reason that this is important is, when you
16 look at the Board's inclusion of issue 3.2 -- and a copy of
17 the issues decision or the relevant extract is included at
18 tab 2 of the motion record, and if I take you to page 11 of
19 the motion record or page 2 of the decision, which is the
20 part where the Board decided to include an issue to examine
21 the appropriate mix of Board-approved and CDM programs,
22 this goes back to my point of it is being out of the scope
23 versus the inclusion of this issue.

24 So we've got this conflict, in my submission, as to
25 what is going on, because if we aren't looking at the
26 totality and we aren't looking at the whole, then it just
27 becomes: What exactly are you looking at when you are
28 looking at the mix? And these are the issues that are at

1 play here. Is it just there is a mix, and that's it? We
2 need to be able to look at the whole in order to be able to
3 do that.

4 I have also included at tab 6 the relevant extract
5 from the -- this Board's decision. It is actually this
6 Panel, obviously, from the Hydro One decision. And if I
7 can take you to page 2 of the decision, which is page 36 of
8 the motion record -- and the Board's obviously familiar
9 with this decision in the Hydro One case -- the Board,
10 starting at line 22, indicates how it is -- how it intends
11 to approach CDM applications and programs here, where:

12 "We will balance the need for economic efficiency
13 and the protection of consumers with respect to
14 prices with the rest of the legislative scheme
15 and the terms of the directive."

16 I submit that that is part of the reason why we put
17 this forward, is that you have a conflict here between
18 saying certain things are out of scope in terms of you
19 being able to do that kind of review.

20 As well, I would submit that there is a conflict when
21 I flip the page to page 37, and I quoted this in my -- in
22 the motion record, and this is page 3 of that decision,
23 about what information about the OPA programs was relevant
24 and should be included.

25 And this was the point of -- the parties had made
26 various submissions about the points of it, and the -- why
27 information needed to be included as part of it. And
28 starting at line -- that is detailed at lines 6 to 12.

1 Then at lines 13 to 20, the Board agrees with the
2 parties that:

3 "Information relating to OPA programs provide
4 important context for the applied-for utility-
5 specific programs that will assist the Board in
6 applying its usual analytical framework with
7 respect to costs and in particular whether the
8 applied-for programs are duplicative as per the
9 Minister's directive."

10 So I would submit this is why you need this
11 information and why you need to be able to see the forest
12 as well as just the trees.

13 And this is all-important, because we're still
14 obviously early on in this new scheme. This is one of the
15 first cases with respect to the CDM applications in this
16 new regulatory framework.

17 So this is going to set the tone and direction for
18 going with the rest of the CDM applications.

19 So that is the main substance of my submissions. As a
20 final closing point, I would submit that these issues are
21 difficult and important and new, as I have indicated,
22 particularly because we're going to be setting -- this sets
23 the context for a lot of the CDM applications that are
24 going to be coming forward.

25 Obviously, Board decisions are not technically binding
26 upon the Board, but they are going to be persuasive
27 particularly in this context, so we would ask for costs in
28 the normal course, as we go, when we file our cost claim.

1 And hopefully the Board has found it helpful and that an
2 award of costs would be appropriate in this context.

3 Subject to any submissions from the Board, those would
4 be my submissions.

5 MS. HARE: The Panel does have some questions.

6 MR. SOMMERVILLE: Mr. Alexander, you have asked the
7 Board to include an issue that relates to the investigation
8 of the participation rates in the OPA programs. What do
9 you mean by that?

10 MR. ALEXANDER: What we were concerned about is
11 getting information about the participation rates. We were
12 not going to -- one of the -- using that information as to
13 whether or not additional CDM should be done.

14 So it wasn't saying whether or not the OPA program
15 participation rate is -- should be changed, or anything
16 like that. But what we wanted to know was what -- get some
17 basic information about the participation rates. That was
18 the intent of the issue.

19 MR. SOMMERVILLE: Okay. So you simply want to know
20 what the anticipated influence of the OPA program is?

21 MR. ALEXANDER: For the -- in order to be able to look
22 at the totality and see whether or not the Board should be
23 encouraging additional --

24 MR. SOMMERVILLE: That is the investigation you're
25 talking about is, it is really just taking the OPA
26 participation rate as it has been stated within the OPA
27 programs. They have an anticipated participation rate.
28 You are not quarrelling with that. You are not going to

1 seek to look into that.

2 You are simply saying, Here's the OPA participation
3 rate, and what does that mean in terms of the penetration
4 or influence of this OPA program on the market?

5 MR. ALEXANDER: That would be correct. I think we may
6 ask some follow-up questions of: Have you asked if you
7 should be doing different participation rate or not, but I
8 don't think we would go beyond that, just to get a sense of
9 what -- because it is an OPA contract.

10 So it would be -- that would be the kind of thing we
11 would just want to know. What has been there? We are not
12 looking at changing the participation rate or anything like
13 that.

14 MR. SOMMERVILLE: I think my friend has or my
15 colleague has a follow-up question to that.

16 MS. TAYLOR: Sorry, there is really -- I appreciate
17 your indulgence here, because I am having trouble with the
18 concept of participation rate as it is being used. So when
19 I sit and I look at it, there is sort of three levels of
20 participation rate. There is the participation rate that
21 is used to populate the calculations for certain projects
22 or certain programs, sort of uptake, if that is analogous.

23 Then there is the participation rate in terms of the
24 number of different OPA programs that you take, and then
25 there is the participation rate in aggregate in terms of
26 how that bulks up to how much OPA programming you're doing
27 in aggregate.

28 So I am not quite sure, when you say "participation

1 rate", what level you're talking about. If you could
2 please clarify that for me?

3 MR. ALEXANDER: Using your phraseology, Ms. Taylor, I
4 would suggest the uptake. What is the uptake that people
5 are being -- "penetration rate" I believe is the phrase
6 that Mr. Sommerville used.

7 MS. TAYLOR: So it is the micro level?

8 MR. ALEXANDER: Yes.

9 MS TAYLOR: It is the first level within a specific
10 program, what Toronto Hydro assumes and would use to
11 populate the numbers; is that right?

12 MR. ALEXANDER: That would be the idea.

13 MS. TAYLOR: Okay, thank you.

14 MS. HARE: Mr. Alexander, I understand the point
15 you're making about needing to look at the CDM programs as
16 a whole, but you didn't take us to page -- in your
17 compendium, page 45, which is the CDM Code, and it talks
18 about the fact that distributors, all distributors, have to
19 file their CDM strategy. And, in fact, those have been
20 filed and are posted for anyone to look at, and then they
21 will have to file annual reports.

22 So my question to you is: Does that not provide the
23 forest?

24 MR. ALEXANDER: Only in a limited sense, because what
25 we need to do is we need to be able to -- the CDM
26 strategies are simply filed and the reports are simply
27 filed. It is the review and the enforcement part; that is
28 the whole point.

1 And where the Board actually approves things is with
2 respect to the applications. So that is the distinction I
3 would draw between the two.

4 So it is the whole idea of we need to be able to
5 actually see that as far as -- as far as is appropriate and
6 reasonable is actually occurring, and that happens in this
7 context of when the -- when they come to the Board to
8 actually seek approval, would be my submission.

9 MS. HARE: I would like to ask you next, issue 3.2,
10 what do you think is included in mix of programs, the issue
11 that is already on the issues list? What do you think is
12 included in that?

13 MR. ALEXANDER: I am just pulling it out to get the
14 exact wording.

15 MS. HARE: Yes, sure.

16 MR. SOMMERVILLE: Your tab 2, page 17.

17 MR. ALEXANDER: Thank you, Mr. Sommerville.

18 It is possible that the issues we've raised could be
19 included under issue 3.2. The concern, though, is what the
20 Board said in the decision, which is that the issues that
21 we said -- the issues we asked to be raised were declared
22 to be outside the scope of the hearing.

23 So that is where the concern is. We have often asked
24 that, where we say, This is an issue we would like to
25 explore in our issues submission. In the alternative, and
26 it is actually in our submissions, if it is covered under
27 another issue, that's fine. We want that to be clear.

28 The issue here is the issues decision says the issues

1 we wish to explore is outside the scope of the proceeding.
2 So that is the concern that sort of comes in. If the Board
3 clarifies and indicates that the issues we wish to explore
4 in these things are included under the mix, then, you know,
5 that practically addresses the concern I have, because then
6 even if there is not a separate issue, it is included in
7 that context.

8 That is what we originally asked for as a potential
9 option. The problem is the wording of the existing issues
10 list says it is outside of the scope, without those kind of
11 caveats or without any explanation or justification along
12 those lines.

13 MS. HARE: Thank you.

14 MR. SOMMERVILLE: The language "as far as appropriate
15 and reasonable" that appears in the directive you endow
16 with considerable importance. It is your view that that
17 really means that there is kind of an unlimited ceiling
18 with respect to CDM programs, that "as far as reasonable
19 and appropriate", that's what the Board should be doing.

20 I think that is where you rest your argument, that the
21 Board should adopt an issue that would allow the Board to
22 make a decision about the applicant engaging in further CDM
23 programs. Is that fair?

24 MR. ALEXANDER: I think that is fair, and I think the
25 difference here is, unlike before, we haven't had this
26 directive where the Minister has said: Conduct programs as
27 far as is appropriate and reasonable.

28 There is obviously a number of caveats in that. There

1 are other factors that get in. It is not just a complete
2 unlimited ceiling. There has to be issues of cost-
3 effectiveness. There would be other things that would be
4 put into that, obviously.

5 MR. SOMMERVILLE: You don't see those words "as far as
6 reasonable and appropriate" modifying the term "mix". You
7 see it as really a quantum of CDM activity?

8 MR. ALEXANDER: That would be my interpretation of it.
9 Otherwise -- because the Minister could have accomplished
10 the same thing without including the words "as far as".

11 MR. SOMMERVILLE: Well, I just wanted to be fair about
12 what your interpretation of that phrase is and where it
13 appears and how you -- what you think it means in terms of
14 the overall scheme.

15 Just the only other point I wanted to raise - and this
16 is really just in terms of clarification - is the
17 question -- you raised the question of the cost of supply
18 is an element of effectiveness, cost-effectiveness.

19 Do we have any evidence on that score in this
20 proceeding that you are aware of?

21 MR. ALEXANDER: My understanding is it is included as
22 part of the test for assessing CDM programs.

23 So it is -- there isn't specific evidence on cost of
24 supply, but when you do the cost-effectiveness analysis of
25 the CDM program test part, it is included as part of that.

26 MR. SOMMERVILLE: So when you say avoided cost or cost
27 of supply, that is what you're referring to?

28 MR. ALEXANDER: Hmm-hmm.

1 MR. SOMMERVILLE: Now, do you see coming out of this
2 proceeding an order, if we were to adopt the issue that you
3 would like us to adopt, which is: Have they done enough
4 CDM? Should they do more? Do you see a direction coming
5 from the Board to that effect arising from this proceeding,
6 that we would direct the applicant to engage in more CDM
7 activity?

8 MR. ALEXANDER: I think the issue that we put forward
9 is that: Should the Board encourage Toronto Hydro to do
10 more? So it would be an encouragement to say, You should
11 come back and do more.

12 So I would submit that that is an option that is
13 available.

14 MR. SOMMERVILLE: Not a direction, but an
15 encouragement?

16 MR. ALEXANDER: The way the issue is phrased, I don't
17 think that limits the Board. I think if the Board feels
18 that a direction is appropriate, given the nature of the
19 licence requirements and given everything else that is at
20 play, I think that is an option to the Board. But whether
21 or not the Board would go that far is a different issue.

22 MR. SOMMERVILLE: Thank you.

23 MS. HARE: Thank you. The Board would next like to
24 hear from any party that substantially agrees with
25 Pollution Probe's motion. I think that would be LIEN. Mr.
26 Gardner?

27 **SUBMISSIONS BY MR. GARDNER:**

28 MR. GARDNER: Thank you very much.

1 LIEN supports Pollution Probe's position that the CDM
2 programs should be looked at as a whole and in their
3 totality.

4 We see the issues in this motion as procedural in
5 nature, and posing sort of issues and question of fairness,
6 potentially. And we submit that to the extent to which the
7 OPA programs are to be analyzed, we're only saying that
8 that is the extent necessary in these proceedings, in this
9 proceeding and in CDM proceedings going forward, because we
10 think that would actually promote efficiency, analyzing
11 them as a whole going forward, and that would promote
12 efficiency for the Board and assist the Board in actually
13 coming to a fair and full review and approval of CDM
14 programs going forward.

15 From LIEN's perspective, the Board cannot fairly
16 review and approve Toronto Hydro's Board-approved programs
17 without adequate and full evidence. And we submit that
18 that full evidence includes looking to a certain extent --
19 as I already said -- at these OPA programs, because they
20 are, indeed -- the CDM programs, the Board-approved
21 programs, are complementary to the OPA programs.

22 Specifically without a sense of participation rates at
23 the uptake level -- as Mr. Alexander said -- and the budget
24 required to implement the Board-approved and OPA programs,
25 in accordance with these participation rates, the Board
26 cannot fairly review Toronto Hydro's programs.

27 Now, for context, LIEN's position has been more or
28 less crystallized over the past week, because we received a

1 letter from OPA -- I think a week ago, I believe it was --
2 that confirmed that the low-income program would actually
3 be launched in May; the OPA low-income program, that is.

4 So with that said, this is new information to LIEN,
5 and such new information -- well, additional information
6 will come to light over the next month as we start to
7 explore and find out the details of this program.

8 So this is no longer academic to LIEN; this is an
9 actual issue that we can analyze in the context of CDM
10 programs, Board-approved programs, going forward, and
11 compare to -- so we can take this OPA program that is
12 actually going to be launched and now analyze it in the
13 same sort of review process with the CDM programs.

14 So we feel that this is a new piece of information,
15 meeting the test for rule 44.01 and allowing us to actually
16 look at that and look at the OPA -- the Board-approved
17 programs in one total package.

18 This new information will undoubtedly affect how
19 Toronto Hydro's Board-approved programs relating to low-
20 income are implemented, particularly given the significant
21 low-income consumer population in Toronto.

22 As the details of this program, the OPA low-income
23 program, are finalized, Toronto Hydro will inevitably need
24 to compare, as we are doing, Toronto Hydro will need to
25 compare its programs -- community outreach and education,
26 in-store engagement, the flat-rate water heater conversion
27 and demand response program, all the ones that actually
28 involve low-income -- to the low-income program of the OPA,

1 to make sure that it is indeed -- their programs are indeed
2 complementary, and not duplicative of the OPA program.

3 So these are all -- this new information particularly
4 meets this test, in our minds, and hence we believe that as
5 a total package, the OPA programs, to the extent required,
6 should be looked at within these proceedings.

7 MS. HARE: Mr. Gardner, my understanding is that there
8 are no low-income programs that Toronto Hydro has applied
9 for in this application.

10 MR. GARDNER: Not specifically low-income by name, but
11 there certainly are low-income elements within their
12 programs, as I already mentioned, those three in
13 particular.

14 MS. SIMON: There are -- and we would like to say, to
15 Toronto Hydro's credit, they have done some targeted
16 marketing of unidentified -- 13 priority neighbourhoods,
17 which Toronto Hydro has indicated are vulnerable
18 neighbourhoods.

19 We need some more information on what that means, but
20 certainly Toronto Hydro has disaggregated their approach
21 and their Board-approved programs, which LIEN would like to
22 explore further in the proceeding.

23 And so that does become relevant to the low-income
24 program of the OPA.

25 MS. HARE: Thank you, Ms. Simon.

26 Mr. Rodger, maybe you could address in your comments
27 to what extent these -- you would consider these low-income
28 programs. That would help me understand how LIEN can

1 compare something to what you have actually applied for.

2 MS. TAYLOR: I do have -- just bear with me. I am
3 trying to articulate this in a proper manner.

4 I wasn't clear from your submission whether what you
5 are asking the Board to do is -- are you asking us to add
6 an issue relating to the low-income, because it's not...

7 You are shaking your heads.

8 MR. GARDNER: No, we --

9 MR. TAYLOR: But I don't see how that relates to what
10 Mr. Alexander has asked for, and again, this whole notion
11 of new information if they have not filed any specific low-
12 income.

13 And I appreciate there are low-income elements, but
14 whether the OPA has or has not established the low-income
15 program...

16 MR. GARDNER: I think we're supporting Mr. Alexander's
17 position and we are using the low-income as an example,
18 because that is obviously what we're dealing with and we
19 are thinking about going forward with this, but I think
20 that we are essentially just giving context or an example
21 to his position, that CDM programs cannot be analyzed
22 within sort of a vacuum. They have to be analyzed with --
23 keeping the OPA programs in mind to a certain extent, and
24 CDM in general to a certain extent.

25 MS. TAYLOR: Okay. Thank you.

26 MR. GARDNER: Sorry if that is not clear, but I think
27 that was our intention.

28 MS. TAYLOR: Thank you.

1 MS. HARE: Thank you.

2 Mr. Millar, what is the order next, you or Mr.
3 Rubenstein?

4 MR. MILLAR: I had agreed to go next, Madam Chair, if
5 that suits.

6 **SUBMISSIONS BY MR. MILLAR:**

7 MR. MILLAR: Madam Chair, Members of the Panel, you
8 will have received our prefiled submissions on Friday. I
9 don't intend to go through those in any great detail. I
10 will try to touch on the highlights and then perhaps
11 address some of the issues arising from questions from the
12 Panel.

13 The first area that I touched on, that other parties
14 perhaps didn't touch on as much, is what a rule 42 motion
15 is. I didn't directly address the threshold issue per se,
16 but I did have some discussion regarding when a rule 42
17 motion is appropriate and when it may not.

18 Mr. Alexander, in fact, did address this more perhaps
19 in his oral comments than he did in the written.

20 But I would remind the Panel that the appropriate
21 grounds are -- for a rule 42 motion are, in fact, set out
22 in rule 42. And although they are not exhaustive, it's in
23 rule 44.01:

24 "Errors of fact, change in circumstances, new
25 facts that have arisen, or facts that were not
26 previously placed in evidence in the proceeding
27 and could not have been discovered by reasonable
28 diligence at the time."

1 As I read through Pollution Probe's materials, and
2 listening to Mr. Alexander this morning, it is still not
3 entirely clear to me that they have identified an error of
4 the Board -- if I can put it that way -- that relates
5 directly to any of those points, or indeed really to an
6 analogous error.

7 I heard Mr. Alexander this morning state that, I think
8 with regard to the directives and the legislation, the
9 Board had made what amounted to a legal error.

10 I didn't see that actually in his written materials,
11 and I stand to be corrected; perhaps it is there. But this
12 is the first I think I have heard that.

13 As I will discuss in my discussion on the merits, I
14 don't think there is a legal error here. So although he
15 has stated that this morning, I still don't think that gets
16 us over the hump.

17 I also heard just now from LIEN, mentioning new
18 information, new facts that have arisen. That is indeed
19 one of the grounds under rule 44.01. I don't see that
20 directly referenced in their prefiled submissions.

21 It appears to relate to a letter that they received
22 from the OPA, indicating that a low-income program, I
23 guess, is coming, but is not -- is not finished, is not
24 prepared yet.

25 So I am not sure what to say about that. I am not
26 sure that that is a fact that would have altered the
27 Board's decision had it known so beforehand. I am not sure
28 how that helps the Board. If LIEN -- if you need more

1 information from LIEN on that, that would be fine from me.
2 But from what I have heard, I don't see that as a new fact
3 that gives rise to a reviewable error, if I can put it that
4 way.

5 MR. GARDNER: Sorry, Michael, to interrupt. If it is
6 possible, we can file that with the Board. That is no
7 problem. It is a letter from Michael Lyle of OPA dated --
8 it was just last week, so it was around the same time as...

9 MR. MILLAR: I am in the Panel's hands. If you wish
10 to have that, I have no objection.

11 MS. HARE: Do you have that with you, Mr. Gardner?

12 MR. GARDNER: I don't believe I have a copy with me,
13 but I certainly can file it or I can have it --

14 MS. SIMON: We can have it printed if you would help
15 us.

16 MR. SOMMERVILLE: If you file it with us, filing it
17 with us does not import that we necessarily consider it to
18 be inherently relevant to what we're considering today.

19 MR. GARDNER: Right. Okay, we will have it printed.
20 Thank you.

21 MR. MILLAR: I will continue. Just to finish up on
22 rule 42, Mr. Alexander took you to a number of cases.
23 Indeed, I quoted some of those cases myself in my material.
24 I don't think there is any disagreement between us on what
25 the appropriate test should be on a motion to review.

26 We both agree it shouldn't just be an opportunity to
27 reargue a case before the Panel and hope for a different
28 result.

1 I would also suggest that rule 44 -- or, pardon me,
2 rule 42 motions, these don't amount to a hearing de novo.
3 It is not an opportunity to simply reargue the case, as the
4 Board has been clear.

5 There is an important reason for that. There should
6 be some level of finality to Board decisions. So absent a
7 clear error on the Board's part, or something like new
8 information that has a relevant impact on the decision, the
9 Board should be very cautious about allowing motions to
10 review unless there is a very good reason to do so.

11 So I will move, now, to the merits of the case.
12 Again, I detail much of this in my -- in fact, I detail all
13 of it in my prefiled submissions. I won't spend a lot of
14 time on it here. I set out the legislative framework --
15 pardon me, the regulatory framework, because it comes from
16 a number of sources.

17 I think that is important to consider here, especially
18 in hearing my friend's remarks earlier. They're quite
19 right that ideally you would have a complete and holistic
20 look at all CDM programs and how they all fit together and
21 whatnot. But I am not sure that is the situation we're in
22 here, frankly.

23 The way the system is set up is there are OPA programs
24 over which the Board has no control whatsoever, and then
25 there is an opportunity for parties to file for Board-
26 approved programs. Toronto Hydro has done so. Hydro One
27 has done so. Doubtless other parties will, as well.

28 But, indeed, there is no requirement at all that a

1 party come to the Board for approval for CDM programs.

2 There may be any number of utilities that we hear nothing
3 at all from.

4 So, frankly, the regulatory framework is such that it
5 doesn't allow us a holistic review of all programs. And,
6 in my view, if that was the intent of the legislature,
7 perhaps they would have either given the whole basket to
8 the OPA or the whole basket to the Board, or made it clear
9 that the Board has some oversight review for OPA programs,
10 but, frankly, that is simply not the case.

11 So we are where we are. We have an application for a
12 distinct set of programs from Toronto Hydro. As I will
13 discuss in a moment, there is certainly relevance to what
14 the OPA is doing, and indeed there will be, I suspect,
15 quite a bit of discussion and evidence related to OPA
16 programs in this proceeding, but that does not amount to
17 any approval authority for the OPA programs, and, indeed,
18 there is limited relevance to what we can use that for in
19 this proceeding.

20 I will discuss that a bit more fully in just a moment.

21 I have categorized Pollution Probe's arguments into
22 three buckets. These are my own designations, and,
23 frankly, there is probably some leaking from those buckets,
24 but it was the best way I could come up with to deal with
25 these.

26 The first one is that Pollution Probe -- this is the
27 one perhaps I will focus on most. Pollution Probe suggests
28 that the Board's decision is inconsistent with the

1 Ministerial directives and government policy.

2 It is my submission that the examples provided by
3 Pollution Probe don't support this argument. Probably it
4 would be best to turn to tab 4 of Mr. Alexander's
5 materials. Here's the directive, the Minister's directive
6 to the Board itself.

7 And there was some discussion relating to -- if you
8 turn to page 24 of the motion record, Mr. Sommerville had
9 an exchange with Mr. Alexander on this.

10 This relates to the meaning of the words "as far as is
11 appropriate and reasonable", and I have to say I simply
12 take a different view from Mr. Alexander regarding what
13 this section is addressing and what it is not addressing.

14 If you flip back to the page before, you will see that
15 this is from section 3 of the directive. Section 3 is
16 about amendments to distributors licences. It is not about
17 exceeding -- or I suppose it is about hitting a CDM target
18 to the extent that we are putting CDM -- we are mandated to
19 put the CDM targets into the licences.

20 But it is not about exceeding targets. That is
21 actually dealt with separately in the directive. And if
22 you look at (b) itself, my submission is, frankly, that the
23 plain and ordinary meaning of this is that it is focussed
24 on trying to ensure that distributors don't focus all of
25 their CDM attention on a single customer class.

26 I think it is fairly well known that, for example, you
27 can often get a lot of CDM for relatively small dollars by
28 going after large industrial customers, for example. You

1 usually get high cost-benefit ratios on that.

2 I say that as a general matter, not necessarily with
3 respect to this application.

4 So my view is that the government was mindful of that.
5 They realize everyone is paying for these programs and they
6 wanted to ensure that, to the extent possible, all customer
7 types were captured within the CDM umbrella.

8 Now, again, as I say, a distributor is not required to
9 come to the Board at all, so it can't have been the intent
10 of this section that the Board require that to happen
11 through individual CDM applications.

12 Again, they might get into a licence problem at the
13 end of the process. That might be where the Board would
14 have some oversight of this, but not on individual
15 applications.

16 And with respect to the words "as far as is
17 appropriate", frankly, my reading of that is, I would
18 suggest to you, a simpler one than Mr. Alexander's, and
19 that is that the government recognized that there may be
20 some cases -- notice it doesn't say customer class. It
21 says customer types. I think I better read that before I
22 say -- it doesn't say...

23 Yes, the consumer base. Yes, I'm sorry, it does say
24 consumer types. The reason I think it doesn't say consumer
25 class is that there are certain groups of consumers that
26 are not a class, and perhaps the most prominent example of
27 that would be low-income.

28 If it said customer classes, there would be no

1 requirement to do low-income programs. But by saying
2 customer types, consumer types, what the directive
3 recognized is there may be -- there might be some small
4 distributors that have a single GS over 50 customer,
5 something like that, and it may be that for whatever reason
6 that customer doesn't want CDM programs. They're not able
7 to tailor something for them.

8 So there is an escape valve in there to recognize
9 there may be circumstances where, for whatever reason, a
10 particular distributor cannot design or provide a program
11 to every single customer type.

12 I think that is the plainest and simplest meaning of
13 that section, and I encourage the Board to adopt that.

14 Again, quickly on the same directive, if you look at
15 page 25, section 6(c), this was referred to by both
16 Pollution Probe and GEC. This is the statement that the
17 Board won't preclude consideration of CDM programs because
18 the targets are going to be exceeded.

19 In my view, that doesn't amount to a requirement, in
20 any sense, that this issue be addressed in each and every
21 single application before the Board for CDM programs.

22 Mr. Alexander also discussed the OPA directive, which
23 I believe is at the next tab, and, again, I won't discuss
24 that in detail, except to say that, as Mr. Alexander notes,
25 this is not a directive to the Board. It is a directive to
26 the OPA.

27 I don't disagree with him that the government is
28 signalling that generally it thinks CDM is a good thing and

1 should be encouraged, but by no means does that amount to a
2 directive or even a suggestion that this has to be
3 considered in each and every single application for Board-
4 approved CDM programs.

5 It is a big jump to get there, in my submission.

6 The second bucket of issues, if I can put it that way,
7 is Pollution Probe's suggestion that the exclusion of its
8 issues is not consistent with the Board's decision to
9 include similar Schools issues - that is 3.2, I believe -
10 and that it is also inconsistent with previous Board
11 decisions and cases where similar types of issues were
12 allowed in.

13 My suggestion is it is not inconsistent with the
14 Board's decision to allow in the Schools question. There
15 is some similarity between the two issues, and I tend to
16 agree with Schools when they state that much of the
17 information that Pollution Probe seems to be concerned with
18 could probably be squeezed under 3.2, and indeed I suspect
19 much of it will.

20 But the Board was clear in the Hydro One case, which
21 Mr. Alexander took you to, that OPA programs are relevant.
22 And they're relevant for two reasons, generally.

23 One is to ensure there is no duplication. I think
24 everyone agrees with that.

25 And second, the Board suggested that it would be
26 helpful to look at OPA programs, to ensure, I suppose, that
27 the applicant's programs are providing good value for
28 money. So frankly, there will be a great deal of

1 information about OPA programs on the record and -- to be
2 used for that purpose.

3 So I suggest there is no need to make any change, I
4 guess is what I'm saying.

5 And then the third bucket I have -- and I think it is
6 related to the second one -- is that the OPA suggests in
7 several places that more information on the OPA programs is
8 needed for proper context. That word appears several
9 times.

10 Again, I am a bit unclear as to precisely what
11 information it is that Pollution Probe thinks that it needs
12 that it cannot get with the Issues List as it stands.

13 Again, there will be plenty of information about OPA
14 programs on the record. Doubtless, parties will make
15 arguments on that.

16 And simply to state the word "context" without
17 providing concrete examples of exactly what information it
18 is that is required, I don't think that is enough.

19 Issues 1 and 3 on the current issues list actually
20 have a lot of issues -- leave a lot of scope for OPA-type
21 information. So my submission to you is that -- that it is
22 not necessary to add the issues Pollution Probe speaks to.

23 I think I have probably taken even a little more time
24 than I thought I would. Subject to any questions you may
25 have, Madam Chair, Members of the Panel, those are my
26 submissions.

27 MS. HARE: Thank you.

28 MS. TAYLOR: I am not sure if, really, this is a

1 question that you can answer, so if you feel that you
2 shouldn't or you can't, please say so.

3 Do you believe -- so Mr. Alexander has argued that the
4 specific wording in our Decision that we said, these -- as
5 he's phrased them, they are out of scope or beyond the
6 scope -- necessarily, then, precludes them from being
7 included in Issue 3.2.

8 Do you agree with that?

9 MR. MILLAR: I think it is helpful probably to look to
10 the specific issues that he actually -- that Pollution
11 Probe posed. Those would be his proposed 3.3 and 3.4.

12 They're doubtless in his motion record, but I have
13 them on page 5 of my submissions.

14 The first is:

15 "Are the proposed participation rates for Toronto
16 Hydro's OPA-contracted province-wide CDM programs
17 appropriate?"

18 I suppose I do tend to agree with Mr. Alexander when
19 he says you've made a specific finding that that particular
20 issue would be outside of the scope of the proceeding.

21 I suppose you could clarify that through a decision
22 here, if that wasn't your intention. But I don't disagree
23 with him, that that appears to be the impact of that.

24 And then 3.4, again, I think that is a clearer case.
25 I agree with Mr. Alexander. The issue states:

26 "Should Toronto Hydro be encouraged to propose
27 additional Board-approved CDM programs?"

28 I agree with Mr. Alexander that that does not fall

1 under Issue 3.2 or any of the one series of issues.

2 So I think the short answer is I tend to agree with
3 Mr. Alexander there. Again, if the Board didn't intend
4 that, certainly it could clarify that through this
5 Decision. But I don't think he is wrong to suspect that.

6 MS. TAYLOR: Thank you.

7 MS. HARER: Thank you, Mr. Millar.

8 Mr. Rubenstein?

9 **SUBMISSIONS BY MR. RUBENSTEIN:**

10 MR. RUBENSTEIN: Thank you very much.

11 Broadly, we are in support of Board Staff's
12 submissions on their latter two buckets that Mr. Millar
13 discussed.

14 We would submit that the broad intent behind the draft
15 issues that Pollution Probe's motion seeks to include, by
16 this motion to review and vary the issues decision, are
17 already adequately included within the scope of the final
18 list decision, especially final issue 3.2.

19 The inclusion of OPA -- of what the degree to which
20 OPA programs should be addressed in this proceeding is
21 obviously at issue.

22 The question for the Board was: What is the line to
23 draw?

24 We think that issue 3.2 provided the proper line.

25 With respect to each of the specific findings in the
26 decision that Pollution Probe seeks to review and vary, the
27 first being the proposed participation rates for Toronto
28 Hydro's OPA CDM programs are outside of the scope of the

1 proceeding, with the discussions that the Panel had earlier
2 with Mr. Alexander, it clarifies as well for us what was
3 specifically meant by the term "participation rates" and
4 that being sort of the uptake, the micro level.

5 We would say that the Board -- that this would be
6 included within final Issue 3.2 and would be allowed to be
7 investigated for the purposes of providing context for the
8 overall Board-approved programs, as well as if the numbers
9 are unreliable that might have an effect on the Board-
10 approved programs.

11 I mean, the Board has the ability to provide guidance
12 and opinion if it finds that these numbers are unreliable,
13 but it couldn't order an increase in the participation
14 rates. It has no ability to order any increase in
15 participation rates to the OPA programs specifically.

16 With respect to the second issue, whether or not
17 Toronto Hydro should be encouraged to propose more Board-
18 approved CDM programs, that it's outside of the scope of
19 the hearing, we would take the position that the Board can
20 order THESL to do more of its Board-approved programs and
21 to modify its Board-approved programs, but not to order
22 Toronto Hydro to do more Board-approved programs, you know,
23 distinctly new programs.

24 So we would agree, generally, with Pollution Probe, if
25 the wording is to encourage, but it couldn't order them to
26 do so.

27 We think in many cases, the Board might want to
28 encourage or provide guidance to Toronto Hydro if it

1 rejects some of its programs or it feels there is a sub-
2 class of ratepayers, or there's a, you know, a geographic
3 area that is not being met. That would be within the
4 context that the Board could make rulings on.

5 With respect to the third issue, that Toronto-Hydro's
6 budget for OPA CDM programs is, by itself, outside the
7 scope of this proceeding, again, we would look at final
8 issue 3.2.

9 By addressing the appropriate mix, it necessitates a
10 review of the OPA programs for the purposes of providing
11 context, providing a comparator to the Board-approved
12 programs, but an independent review of the size and
13 composition of THESL's OPA programs would be outside the
14 scope of this proceeding.

15 With respect to the issues that were brought up by
16 LIEN about looking at the duplication, we would say that
17 could fall within final issue 3.2, but would -- or at least
18 how SEC viewed the draft issues list within final issue
19 1.3, as a necessary method of finding out if there is a
20 duplication between the OPA-contracted programs and the
21 proposed Board-approved programs.

22 Those are my submissions, subject to any questions.

23 MS. HARE: Thank you.

24 MR. SOMMERVILLE: Mr. Rubenstein, I sense a
25 distinction between the point of view that you have
26 expressed about the nature of the, quote, investigation
27 into the OPA participation rates.

28 I thought I understood Mr. Alexander -- and you can

1 correct me if I am wrong, Mr. Alexander -- I thought I
2 understood Mr. Alexander to say that the participation
3 rates of the OPA programs are relevant and important, but
4 not that they ought to be investigated, but not that they
5 ought to be tested in this proceeding for whether they are
6 correct or incorrect, or whatever. But that they should be
7 taken as a given and -- to use your word -- with respect to
8 the balance of your submissions, as a comparator for the
9 Toronto programs.

10 Am I misunderstanding that?

11 MR. RUBENSTEIN: I might have not been clear with my
12 submissions. I think we would broadly support that view,
13 that it needs to be used as a comparator.

14 But I mean, the Board, while doing so, we think would
15 be free to provide guidance if it felt in many ways that if
16 the -- if the participation rates were an assumption that
17 Toronto Hydro is providing in many cases, and it felt --
18 and it was -- if it was an assumption that was providing
19 another context and Board approved programs, it could
20 provide an opinion, but could not make any sort of findings
21 or order in that regard.

22 MR. SOMMERVILLE: I don't think anyone is suggesting
23 that the participation rates that are projected for Toronto
24 Hydro's programs are, in any degree, outside the scope of
25 this proceeding. They could be investigated. They can be
26 vetted, if you like.

27 MR. RUBENSTEIN: For sure.

28 MR. SOMMERVILLE: But the distinction is: Should the

1 OPA participation rates be so vetted?

2 The Board's stated position in the issues decision was
3 that they ought not to be.

4 MR. RUBENSTEIN: I think directly, no. We think that
5 the Board should not -- if the purpose of any sort of
6 investigation of those participation rates were for the
7 findings within the context of the OPA programs.

8 But if the purpose was to looking at it as a
9 comparator, and it is the same numbers that would be used
10 for other sorts of programs, it could opine in that regard.

11 MR. SOMMERVILLE: Thank you.

12 MS. HARE: Thank you. Mr. Rodger.

13 **SUBMISSIONS BY MR. RODGER:**

14 MR. RODGER: Thank you, Madam Chair.

15 So Toronto Hydro filed a written submission on this
16 motion on April 1st, and our position remains the same as
17 it was with that letter. We believe that Pollution Probe's
18 motion should be denied, and our reasons are spelled out.

19 Just to respond to some of the themes that have been
20 raised this morning, on the first question - that is,
21 proposed issue 3.3:

22 "Are the proposed participation rates for Toronto
23 Hydro's OPA-Contracted Province-Wide CDM Programs
24 appropriate?"

25 We believe what Pollution Probe is attempting here is
26 to try and do indirectly what they can't do directly. This
27 Board has no authority over OPA programs whatsoever.

28 Now, the participation rates, Toronto Hydro is a taker

1 of those participation rates in the contracted programs.

2 As we know, there was a contract entered into between the
3 OPA and Toronto Hydro.

4 My understanding is that the OPA's participation rates
5 were set on a province-wide basis using the total resource
6 cost test and that from that global Ontario-wide
7 participation rate, there was some proportion allocated to
8 Toronto Hydro. But, as I say, we're a taker of that rate.
9 We didn't have any input into that.

10 So, again, since the Board has no jurisdiction to
11 these OPA programs, it goes beyond this Board's
12 jurisdiction to look at those rates in this hearing. That
13 would be our view.

14 So even the characterization of the issue, Toronto
15 Hydro's OPA-contracted province-wide participation rates,
16 is a misnomer. These are the OPA's participation rates as
17 applicable to Toronto Hydro. So, in our view, this issue
18 is clearly out of scope.

19 With respect to the second issue, 3.4:

20 "Should Toronto Hydro be encouraged to propose
21 additional Board-Approved CDM Programs?"

22 Again, our view is this should be rejected.
23 Essentially what I think the parties are asking for is that
24 Toronto Hydro be used as a bit of a test case to have a
25 generic discussion around CDM.

26 And, in our view, that is not going to help anybody.
27 It is going to be a big consumption of valuable hearing
28 time.

1 To give you a flavour, I thought the submission of
2 LIEN highlighted Toronto Hydro's concern. Just on page 2
3 of their submission, when they're talking about this issue,
4 I am just going to read the last sentence of paragraph 3 on
5 page 2. It says.

6 "Any additional programs or program concepts
7 identified that should be further considered by
8 Toronto Hydro in the future will help to minimize
9 the number of non-participants, and achieve
10 greater demand and energy savings."

11 So to me the words "any additional programs", "program
12 concepts", that this becomes kind of, you know, an academic
13 almost debate about what could, should possibly be doable.

14 That is not the purpose of this hearing.

15 This hearing came about, as others have mentioned, to
16 deal with specific programs that Toronto Hydro has
17 developed. My friend, Mr. Millar, is quite right when he
18 said Toronto Hydro is under no obligation to come to the
19 Board with additional programs. It could have said, We're
20 just going to deal with the OPA's province-wide programs,
21 and that's it, and there would be no review by this Board
22 or anybody else.

23 But Toronto Hydro has identified gaps, as we have said
24 in the evidence. Toronto Hydro obviously believes in this
25 program, so it has put forward a first round of programs to
26 get this program started.

27 And that is the other point, Madam Chairman, why we
28 think having a contained hearing on the programs before you

1 is important, because, you know, we have -- Toronto Hydro
2 has a mandatory CDM target established.

3 The clock is now ticking for this first three years of
4 the program, and Toronto Hydro wants to get on with it. We
5 want to get these first series of programs vetted by the
6 Board, approved and launched.

7 As I say in my letter, we will be back. There will be
8 additional programs, but this is a first to get this thing
9 started, since time is running out, frankly, when there is
10 a lot of work to be done to try to get a foothold in this
11 area.

12 So to broaden this hearing with people's ideas, as
13 good as they might be, this is just not the forum to have
14 that generic discussion about what could be done.

15 So for these reasons, we also think that issue 3.4
16 proposed by Pollution Probe should be rejected, as well.

17 Now, just to follow up on a couple of other points,
18 this is with respect to the LIEN submissions, where they
19 have advised us that counsel for the OPA has sent a letter,
20 that there may be another -- there may be a new LIEN
21 program. I am certainly not aware of that or the details.

22 It sounds like at this stage, unless I am corrected,
23 that it may not even be a program yet, but an intention to
24 create a program.

25 But LIEN is quite right that elements of some of the
26 programs that Toronto Hydro has put forward in the
27 application do deal and are targeted with low-income
28 consumers. And just to give you one example, for the

1 record, it is Toronto Hydro's Community Outreach and
2 Education Initiative. There is -- part of that is
3 described on page 7, known as the Toronto Police Outreach
4 Program, where Toronto Hydro will be -- working with
5 various groups, the police, the Toronto Anti-Violence
6 Intervention Strategy, and the goal here is to bring
7 education and information to high volume, hard-to-reach, at
8 risk neighbourhoods within Toronto for targeting about
9 conservation.

10 So this is certainly an area that LIEN can explore at
11 the hearing. I know we've got some interrogatories, out of
12 the 600 we have already answered, on this area. So there
13 is nothing about the existing issues list that the Board
14 has already approved that would somehow preclude or prevent
15 LIEN from exploring what we have done here, and if there is
16 any further information from the OPA by the hearing beyond
17 this letter, they could certainly bring that in to compare
18 it.

19 We take that issue about the mix of programs being
20 just for that purpose, to make sure that Toronto Hydro is
21 not duplicating an OPA program, because we have no desire
22 to do that.

23 So I don't see how an issue has to be changed in order
24 to get the kind of avenues of inquiry that LIEN would like
25 to pursue in this proceeding.

26 Subject to any questions, those are my submissions,
27 Madam Chair.

28 MS. HARE: Thank you. Mr. Alexander, do you want to

1 say something or are you ready to go for reply, because I
2 was going to suggest a 15-minute break, give you a couple
3 of more minutes to gather your thoughts. Hopefully it
4 gives LIEN an opportunity to get us the letter. So we will
5 be back at 11 o'clock.

6 --- Recess taken at 10:45 a.m.

7 --- On resuming at 11:00 a.m.

8 MS. HARE: Thank you. Please be seated.

9 Okay, Mr. Alexander.

10 **FURTHER SUBMISSIONS BY MR. ALEXANDER:**

11 MR. ALEXANDER: Thank you, Madam Chair.

12 I know LIEN has circulated the letter, so I don't know
13 if you wish to deal with that first, before I deal with
14 reply or how you would like to proceed. I am in the
15 Board's hands.

16 MS. HARE: Does anybody want to make any comments
17 about the letter?

18 MR. MILLAR: The letter has been filed, Madam Chair,
19 as you requested. We can give it an exhibit number.

20 MS. HARE: Sure.

21 MR. MILLAR: Exhibit KM1.1.

22 **EXHIBIT NO. KM1.1: LETTER FROM MICHAEL LYLE.**

23 MR. MILLAR: But I don't have any comments on the
24 letter.

25 MS. HARE: Mr. Rodger, do you have any comments on the
26 letter? Questions?

27 MR. RODGER: Just to say, Madam Chair, that it appears
28 that the author of the letter, Michael Lyle, is indicating

1 that a new OPA program for low-income single family homes
2 is scheduled to launch in May 2011, and that is all the
3 detail. I certainly haven't seen any detail beyond that.

4 MS. HARE: Okay. Mr. Gardner, do you want to comment?

5 MR. GARDNER: Just a quick comment.

6 That in itself is indicating that there will be more
7 information to come, and I think LIEN submits that
8 "scheduled to launch" is as close to being something that
9 is definitive and going to happen in May as you can get, up
10 to "established" and established, as OPA actually says in
11 the final paragraph on page first going to the second page,
12 is up to the Board.

13 So LIEN submits that it is fairly definitive and that
14 we expect more details to come, and that is part of our
15 earlier submission.

16 MR. SOMMERVILLE: Just in terms of its actual
17 relevance to what we are deciding here today, Mr. Gardner,
18 I am going to suggest that it is pretty marginal in
19 relevance. Is that a -- I don't mean to denigrate or
20 diminish the content of the letter or the program, but as
21 far as what we have to decide, it is not really on the
22 point, is it?

23 MR. GARDNER: I can see that it is marginal, in the
24 sense that we're one party with one very concentrated
25 objective here, and that what we're doing is using it as
26 sort of an example to show that there might be new
27 information for us, in particular, and therefore we need to
28 look at -- as I submitted earlier -- OPA programs to a

1 certain extent so that we can analyze their complementarity
2 with and to the Board-approved programs for Toronto Hydro.

3 Certainly we don't have much information on it right
4 now. That is obvious. But we expect to have much more,
5 going forward in the next month, and therefore, it will
6 become crucial as this proceeding continues for us to
7 analyze that, for the Board and other parties to analyze
8 the programs as they come out through the OPA and compare
9 them to the CDM programs, the Board-approved programs that
10 are to be approved, or -- ask you to be approved here by
11 Toronto Hydro.

12 Is that clear? Sorry, its --

13 MR. SOMMERVILLE: I know your intention.

14 My question is simply how it relates to how we -- how
15 we go about approving these budgets for these Board-
16 approved programs.

17 And I have your answer, and we will address it.

18 MR. GARDNER: Okay. One more comment is that
19 obviously, as Mr. Rodger has expressed, there are 13
20 priority neighbourhoods that Toronto Hydro is targeting
21 here. So I think that it is quite relevant to their
22 specific programs and the budgets and participation rates
23 and everything that goes along with that. That is our
24 submission.

25 MS. HARE: Thank you.

26 MR. SOMMERVILLE: The province-wide program? The
27 anticipated province-wide program, is that what you think
28 is relevant?

1 MR. GARDNER: The fact that there is obviously a --

2 MR. SOMMERVILLE: That's what the letter says.

3 MR. GARDNER: Right, and I understand that. What I'm
4 saying is there is a significant low-income aspect to the
5 Board-approved programs on the agenda in this proceeding,
6 and that given what we have said already, those need to be
7 compared to the OPA's low-income objectives and programs as
8 well.

9 Now that they are coming to fruition, that is
10 something that needs to be taken into account for this
11 proceeding.

12 MR. SOMMERVILLE: Okay. So as a comparator with
13 respect to participation rates --

14 MR. GARDNER: Absolutely.

15 MR. SOMMERVILLE: -- you would want to perhaps use
16 this program that's anticipated, if it happens to arrive in
17 time, to look at the Toronto Hydro low-income or -- I am
18 not sure whether it is low-income or neighbourhoods at
19 risk. I am not sure that those two terms are actually
20 synonymous, but --

21 MR. GARDNER: We don't know complete -- I will just --
22 that is exactly what we're saying. Just to comment on that
23 aspect, Toronto Hydro specifically uses the words "low-
24 income." "Under-serviced low-income," I think is the
25 phrase, something to that effect, in their community
26 outreach and education initiative.

27 So -- but yes, exactly what you just said. That is
28 exactly what we're seeking.

1 MR. SOMMERVILLE: As a comparator along the same lines
2 as I think we have been talking about. Okay.

3 MR. GARDNER: Thank you.

4 MS. HARE: Mr. Alexander?

5 MR. RODGER: If I could, Madam Chair -- sorry to
6 interrupt -- just through you to Mr. Sommerville, again,
7 just to respond.

8 I still don't believe that, because of this letter
9 that LIEN has filed, there is a need to change the issues
10 list.

11 If the program is issued by the time we start our
12 hearing at the end of April, my friend can certainly bring
13 it in as a way to compare what Toronto Hydro is posing to
14 the new program, but what we would not want to happen,
15 Madam Chair, is that somehow Toronto Hydro be held to a
16 moving target and having our own programs delayed because
17 of unfolding events from the OPA.

18 I think that would be our only concern.

19 MS. HARE: That thought struck me as I was listening
20 to Mr. Gardner.

21 My understanding was that this issuance of low-income
22 programs by the OPA is not new. We have heard about this
23 for the past six months, that they were going to look at
24 low-income programs. So I am not sure that anything in
25 that letter tells us anything different than what we have
26 known for a long time.

27 I specifically asked whether or not you had low-income
28 programs, because I agree with Mr. Sommerville, that I

1 don't think vulnerable neighbourhoods and low-income are
2 necessarily the same thing, but we can deal with that in
3 the hearing.

4 I would think your challenge will be to then convince
5 the Board that we go ahead with what now might be a low-
6 income program, in the absence of OPA-established programs.
7 But you may think about whether or not they are synonymous.

8 And I don't think that is relevant to what we're
9 talking about today, so sorry about that.

10 MR. ALEXANDER: As always, I am in the Board's hands
11 as to what issues it wishes to explore.

12 In reply, I will try to be selective in my comments
13 and not repetitive of my argument-in-chief.

14 I'll try to do this in order, based on my notes, so I
15 will start with Mr. Millar's comments.

16 One of the things that Mr. Millar said is that it is
17 not clear that we identified what the error of the Board
18 was, or the analogous error.

19 For clarity, I think that is actually covered pretty
20 much by what is in our notice of motion. In particular, I
21 will take you to the motion record, tab 1, page 2 of the
22 notice of motion.

23 The summary - it is actually summarized, I thought,
24 quite well in the overview as to what we were seeking.

25 It specifically said what parts of the issues list --
26 what parts of the issues list decision that we were looking
27 at. It is also in the Order sought above.

28 Then we submit that the Board erred, as these

1 exclusions cannot be justified, and in particular, the
2 determinations conflict with Ministerial directives, the
3 Board's statutory mandate, and the Board including the
4 issue, as well as the Hydro One decision.

5 So I submit that we actually set out the error quite
6 clearly as to what it was, and then in the rest of our
7 notice of motion, which I -- which were essentially our
8 submissions, outlined the grounds and what constitute the
9 error or the analogous error.

10 Mr. Millar did concede that under rule 42, the list is
11 not exhaustive. And I submit that we meet the analogous
12 issue, as well as the issue of there is unintended
13 consequences -- as we've talked about -- regarding the
14 decision of the Board saying things were out of scope.

15 With respect to the nature of the error as to whether
16 or not it is legal or not, part of the issue that is
17 associated with that -- and we were very clear in the
18 notice of motion that one of the foundations of the error
19 is the directives, and part of the question is: What,
20 exactly, are the directives? Because they're not evidence
21 that are in a standard issue. They're documents that are
22 issued pursuant to the statute, so they're more akin to a
23 regulation. So the point is the directives are the
24 foundation of the error, and because they are issued
25 pursuant to statute, they're not regulations -- because
26 they're explicitly excluded from being regulations -- but
27 they have a legal nature to them.

28 Whatever else you may want to call them, that was the

1 point of where they were coming from and why I used that
2 term, not to use it beyond that as a statutory
3 interpretation or any of that kind of stuff. It is the
4 nature of the document that causes the error, which is the
5 cause of the analogous error.

6 With respect to -- Mr. Millar also made a comment that
7 there is no requirement to come for approval to the Board,
8 and a number of utilities will -- may not come to the Board
9 for things.

10 Well, the reality is that the Board deals with things
11 based on what people come to you for. If they want a rate
12 increase, they come and apply for a rate increase. If they
13 want to build transmission lines, whether it be directed to
14 things, they come and apply to you. If they want to
15 connect something, they come and apply to you.

16 And the Board conducts the review based on what the
17 application is before it.

18 So in my submission, the Board does what it does based
19 on what comes before it, and that is the nature of where we
20 go and the Board deals with things in that context.

21 Obviously Mr. Millar and I disagree about the
22 interpretation and the plain and ordinary meaning of the
23 directive. I think I have taken you through that
24 extensively. I don't think I need to do that again.

25 Obviously we submit it is more than just the customer
26 base and that is the plain and ordinary meaning of the
27 language, but I will not take you through that wording
28 again, or just the customer classes or any of those kind of

1 things.

2 With respect to the IPSP directive and the part that
3 we are referring to, we're using that -- you know, and what
4 that is, the whole point of that point is that it is
5 reflective of government policy, and that is where it ties
6 into your Board objective about promoting CDM in accordance
7 with government policy.

8 I think it would be very difficult to say that a
9 statement in a directive, whether it to be the OPA or to
10 the Board, is not reflective of government policy until
11 that directive has either been rescinded or changed in
12 another way.

13 That was the point of bringing that statement to you.
14 The statement speaks for itself and the Board will take
15 from that what it wishes.

16 With respect to the Hydro One decision, since this was
17 the Panel that was -- actually made the decision, I presume
18 you know what you meant by the decision, but in my
19 interpretation of page 3, I would submit that it is broader
20 than just the two issues that Mr. Millar raised.

21 When the decision was read orally, it outlined a
22 number of things as to what are those issues. I think that
23 everything that gets listed there ties into the two summary
24 issues that were put in. I think the context needs to be
25 read in that context.

26 For reference, that is at page 37 of the motion record
27 at page 3, the marked paragraphs that are there.

28 Mr. Millar made also a comment about, without concrete

1 examples, we have not -- it is not enough at this stage.
2 Well, the reality is this is a final decision, in my
3 submission, because by saying it is not within scope, we
4 can't explore. This isn't like we're at the end of a rates
5 decision or the application and everything has been decided
6 and we have a record and we can do everything forward.

7 This is before interrogatories. This is before all of
8 that that has come in. This is the timing when we bring it
9 in.

10 So all of that process is yet to occur in the
11 proceeding. So that is what is going to occur. We have
12 been working towards that in that way. So I think that is
13 the other consideration the Board needs to have with
14 respect to that.

15 Finally, with respect to Mr. Rodger's comment, Mr.
16 Rodger made some comments about a generic discussion on
17 CDM, as well as generic as to what could be done.

18 I want to be clear here. We're talking about this in
19 the context of Toronto Hydro. Toronto Hydro is one of
20 Ontario's largest distributors. They obviously provide CDM
21 to millions of -- CDM and programs to millions of people.
22 We're not talking about a generic issue.

23 Now, there may be some implications that come from
24 this, but the focus of proceeding, as it is for all of the
25 Board's decision, is that particular utility and the
26 application that is before it. And that is the nature of
27 what we're doing.

28 Subject to any questions from the Board, those would

1 be my submissions in reply.

2 MS. HARE: The Panel has no questions.

3 We will take a break, including a lunch break, until 1
4 o'clock and expect to return with an oral decision.

5 --- Recess taken at 11:13 a.m.

6 --- Upon resuming at 1:05 p.m.

7 **DECISION:**

8 MS. HARE: Thank you. Please be seated.

9 The Board has reached a decision in this case.

10 The Board agrees it is important to have an
11 understanding of the totality of the CDM plans being
12 pursued by distributors.

13 For this reason, the CDM Code specifically includes a
14 requirement for a CDM strategy which includes both OPA and
15 proposed OEB programs, to be produced and filed with the
16 Board.

17 About 80 distributors did file their CDM strategies in
18 November, and these were reviewed by a Panel of the Board.

19 The CDM Code also requires that an annual update of
20 the CDM strategy be filed, and posted publicly on
21 individual distributor's websites, and all will be posted
22 on the Board website.

23 Therefore, the Board does not accept that the
24 opportunity to review a distributor's entire CDM plan is in
25 the context of a filing for Board-approved programs.

26 The fact is that the Board, in this proceeding, is
27 considering a specific suite of CDM programs, which have
28 specific budgets, specific attributes and which relate,

1 each in their own particular way, to the OPA province-wide
2 programs.

3 The specific penetration of the OPA province-wide
4 programs -- that is the projected uptake of those programs
5 by consumers or the participation rates -- is relevant to
6 the Board's consideration of the Toronto Hydro proposed
7 programs which have been filed for Board approval.

8 That issue, in the Board's view, is included in issue
9 3.2, and indeed is included in a number of other issues on
10 the issues list.

11 But Pollution Probe requested the addition of an issue
12 relating to the investigation of participation rates, and
13 this is properly excluded. Investigation of the
14 participation rates is outside the scope of this case.

15 Pollution Probe clearly stipulated that their interest
16 was in the projected participation rates of the OPA
17 province-wide programs, so that the question of mix of
18 programs could be assessed. The participation rates
19 adopted by the OPA can be used to provide a comparison in
20 context for the proposed Board-approved programs, and
21 therefore are inside the scope of this case.

22 With respect to Pollution Probe's request that the
23 Board adopt an issue -- or rather, issues which would open
24 an inquiry as to whether the Toronto Hydro should undertake
25 more CDM programs that they have here applied for, it is
26 the Board's view that it would be entirely inappropriate
27 for it to embark on any such inquiry.

28 The Board is here considering a collection of very

1 specific programs, each with its own budget and attributes.

2 To contemplate a direction from the Board that the
3 utility should expand its programs is premature, and it is
4 the proper subject of compliance activity, which would
5 arise should the utility fail to meet its licence condition
6 and CDM targets.

7 The Board does not agree that the language "as far as
8 reasonable and appropriate" which appears in paragraph 3b
9 of the Minister's directive to the Board has anything like
10 the effect argued for by Pollution Probe. It is the
11 Board's view that the phrase modifies the mix of programs,
12 and not the quantum of programs or CDM effects.

13 The Board considers the proposed issue relating to the
14 Toronto Hydro budget for the OPA province-wide programs to
15 be out of scope, to the extent that what is sought is an
16 opportunity to investigate how that budget was set, or the
17 magnitude or adequacy of that budget, but the budget is
18 relevant as a comparator or to establish context for the
19 proposed Board-approved programs.

20 Finally, with respect to the letter filed by LIEN from
21 the OPA, the Board is of the view that it is entirely
22 directly not relevant to the motion before us, and does not
23 provide new information.

24 Moreover, the Board is of the view that this letter is
25 not sufficient to determine that the OPA's low-income
26 programs are established for the Board's purposes.

27 The Board considers that this motion really represents
28 a substantial repetition of the argument made by Pollution

1 Probe when the issues list was first being considered.
2 Pollution Probe has not introduced any new evidence or
3 circumstance which would, of itself, justify a
4 reconsideration of the Board's issues decision, nor has it
5 succeeded in convincing the Board that the issues decision
6 is in any degree in conflict with or contrary to any of the
7 governing regulations, statutes or directives to which the
8 Board is bound.

9 Pollution Probe has failed to demonstrate that there
10 is an error of law in the Board's approach to the issues
11 list.

12 Much of its submissions with respect to legal error
13 rests on what the Board has found to be an overly expansive
14 reading of the term "as far as is appropriate and
15 reasonable."

16 Accordingly, the Board concludes that the applicant,
17 Pollution Probe, has failed to meet the threshold required
18 for consideration of the merits of the motion.

19 The motion is, accordingly, dismissed.

20 The Board will consider costs related to this motion
21 separately, and would ask parties to submit their cost
22 claims within seven days.

23 Parties are invited to comment on whether the cost of
24 the motion should be allocated in the normal manner, or
25 whether there should be a different approach taken.

26 Are there any questions?

27 Thank you to all parties, then.

28 --- Whereupon the hearing concluded at 1:14 p.m.