



# ONTARIO ENERGY BOARD

**FILE NO.:** EB-2011-0011

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**VOLUME:** 1

**DATE:** April 28, 2011

<b>BEFORE:</b>	<b>Marika Hare</b>	<b>Presiding Member</b>
	<b>Paul Sommerville</b>	<b>Member</b>
	<b>Karen Taylor</b>	<b>Member</b>

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.

Hearing held at 2300 Yonge Street,  
25<sup>th</sup> Floor, Toronto, Ontario,  
on Thursday, April 28<sup>th</sup>, 2011,  
commencing at 9:31 a.m.

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VOLUME 1  
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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	Board Staff
VIIVE SAWLER	
MARK RODGER	Toronto Hydro-Electric System
JOHN VELLONE	Limited
DAVID CROCKER	Association of Major Power
SHELLEY GRICE	Consumers of Ontario
ROBERT WARREN	Consumers Council of Canada
JULIE GIRVAN	(CCC)
DAVID MacINTOSH	Energy Probe Research Foundation
MARK RUBENSTEIN	School Energy Coalition (SEC)
MICHAEL BUONAGURO	Vulnerable Energy Consumers
	Coalition (VECC)
MATT GARDNER	Low Income Energy Network (LIEN)
JUDY SIMON	

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U N D E R T A K I N G S

Description

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NO UNDERTAKINGS WERE FILED IN THIS PROCEEDING

1 Thursday, April 28, 2011

2 --- On commencing at 9:31 a.m.

3 MS. HARE: Please be seated.

4 Good morning. My name is Marika Hare. With me on the  
5 Panel are Paul Sommerville and Karen Taylor.

6 We are convening today to hear Toronto Hydro-Electric  
7 System Limited's application for Board-approved  
8 conservation and demand management programs. The Board had  
9 assigned the application docket number EB-2011-0011.

10 Toronto Hydro filed this application on January 10th,  
11 2011 seeking Board approval for nine individual CDM  
12 programs. These are: Business outreach and education;  
13 two, commercial energy management and load control; three,  
14 commercial, institutional and small industrial monitoring  
15 and targeting; four, community outreach and education  
16 initiative; five, flat rate water heater conservation and  
17 demand response; six, greening Greater Toronto commercial  
18 building initiative; seven, hydronic system balancing  
19 program; eight, in store engagement and education  
20 initiative; and, nine, multi-unit residential demand  
21 response.

22 The total amount requested for these nine programs  
23 over a four-year period was \$56.3 million. On April 1st,  
24 2011, Toronto Hydro indicated that program number 8, the in  
25 store engagement and education initiative, was being  
26 withdrawn. This reduced the amount requested to fund the  
27 remaining eight programs to \$52.1 million.

28 An issues list was finalized on March 11th, 2011.

1 This issues list delineates the scope of this proceeding.

2 May I have appearances, please?

3 **APPEARANCES:**

4 MR. RODGER: Good morning, Madam Chair. Mark Rodger,  
5 counsel for Toronto Hydro-Electric System Limited, and with  
6 me is my colleague, Mr. John Vellone.

7 MS. HARE: Thank you.

8 MR. CROCKER: I am David Crocker, and Shelley Grice  
9 and I are here for AMPCO.

10 MR. WARREN: Robert Warren for the Consumers Council  
11 of Canada with Julie Girvan.

12 MR. MACINTOSH: David MacIntosh, consultant for Energy  
13 Probe.

14 MR. RUBENSTEIN: Mark Rubenstein for School Energy  
15 Coalition.

16 MR. BUONAGURO: Good morning. Michael Buonaguro,  
17 counsel for VECC.

18 MR. GARDNER: Good morning. Matt Gardner for LIEN,  
19 and with me is Judy Simon.

20 MR. MILLAR: Good morning, Madam Chair. Michael  
21 Millar, counsel for Board Staff. I am joined today by Josh  
22 Wasylyk.

23 MS. HARE: Thank you. Are there any preliminary  
24 matters?^

25 **PRELIMINARY MATTERS:**

26 MR. RODGER: Yes. Thank you, Madam Chair.

27 There has been some series of correspondence over the  
28 past few days. I just thought I would take the Board

1 through that, and there is a couple of places where we hope  
2 we can mark some exhibits.

3 But just to complete the record on this, the first is  
4 a letter dated April 21st, 2011, and it is from me to the  
5 Board and all parties. And as part of this letter, we also  
6 attached Toronto Hydro's CDM program evaluation plans, and  
7 those have been marked as Exhibit K, tab 2, schedules 1 to  
8 9.

9 We have also -- we also attached a package of some  
10 corrections to the prefiled evidence. I am not sure  
11 whether, Madam Chair, you want to mark this bundle of  
12 corrections as a separate exhibit or just leave it as  
13 indicated in the filing.

14 MS. HARE: Mr. Millar, how are we marking these? The  
15 letter dated April 27th, 2011, is that K...

16 MR. MILLAR: We will call that K1.1, Madam Chair.

17 MR. RODGER: This is the April 21st?

18 MS. HARE: The 21st is K1.1, and then the 27th will  
19 be?

20 MR. RODGER: There actually is a few other letters,  
21 Madam Chair. The second one was the --

22 MS. HARE: Just one second. I need to get my binder.

23 MR. MILLAR: Mr. Rodger, just to be clear, the April  
24 21st letter we're referring to right now, that is the  
25 letter from you to the Board?

26 MR. RODGER: That's correct. And it identifies the  
27 two witness panels that Toronto Hydro is presenting. It  
28 attached the CDM program evaluation plans, and it also

1 attached certain corrections to the prefiled evidence.

2 MR. MILLAR: Madam Chair, I might suggest we don't  
3 need to mark that one as an exhibit for today's proceeding.  
4 It has been prefiled and I think it's already in the  
5 binders. I don't think it is necessary to give it a  
6 number. It would just add administrative hassle for the  
7 Board secretary's office.

8 MS. HARE: That is the letter of April 21st?

9 MR. MILLAR: With the attachments. So that will now  
10 be K1.1.

11 MR. RODGER: All right. Thank you. There is a letter  
12 that I would like to mark as an exhibit. This is also  
13 dated April 21st, 2011, and this is from the Ontario Power  
14 Authority to Toronto Hydro to the attention of Mr. Chris  
15 Tyrrell. If I could have a number for this one, please?

16 MR. MILLAR: Yes. That will be K1.1, the OPA letter  
17 of April 21st.^

18 **EXHIBIT NO. K1.1: LETTER DATED APRIL 21, 2011 FROM**  
19 **THE ONTARIO POWER AUTHORITY TO TORONTO HYDRO,**  
20 **ATTENTION CHRIS TYRRELL**

21 MR. RODGER: Then on April 26th, 2011 I sent another  
22 letter to the Board, and this was in response to a request  
23 from Board staff that we produce and circulate copies of  
24 the OPA's program schedules that comprise attachment to the  
25 master agreement, which we have done.

26 You will see in that letter, Madam Chair, that I have  
27 also -- we're claiming confidentiality on certain pricing  
28 information. Unredacted copies have gone out as of the

1 26th. I have one signed declaration from one of the  
2 parties, but I don't know, Mr. Millar or Madam Chair,  
3 whether this needs to be marked, as well.

4 MR. MILLAR: I would suggest it doesn't have to be  
5 marked, Madam Chair, but I am in your hands.

6 MR. BUONAGURO: Sorry, if I could just interrupt. On  
7 that particular filing, I don't have any of the paper from  
8 that, because I guess it was sent out earlier this week and  
9 I haven't been to my office. I did get some of the  
10 electronic filings, but I am not 100 percent sure if I have  
11 all of them.

12 Do you have an inventory so I know what I am supposed  
13 to have? I have the residential file, for example.

14 MR. RODGER: Yes. So the OPA schedules, there was  
15 three, the residential program, the commercial and  
16 institutional program and the industrial program. We have  
17 an extra copy here for my friend.

18 MR. BUONAGURO: Thank you.

19 MR. RODGER: Then on April 27th I sent another letter  
20 to the Board and copied all parties, and this was in  
21 response to a request from an intervenor about what Toronto  
22 Hydro's view was of the implications of the OPA letter, and  
23 we spell out our position there.

24 But we have also attached two tables, which show the  
25 differences in how Toronto Hydro's certain education  
26 programs are incremental to the province-wide programs.  
27 The panel can speak to those, but I am wondering if we  
28 could mark those two tables that are attached to my April

1 27th letter as an exhibit, please.

2 And, also, I have produced a larger copy of the first  
3 table. It was a little difficult to read in the version  
4 that was sent by e-mail, so you should have the larger  
5 table, as well. The first one, the larger one, is called  
6 "OPA Province-Wide Residential Program Comparison Table for  
7 THESL OEB Hearing".

8 MR. MILLAR: Madam Chair, would you like those marked  
9 separately?

10 MS. HARE: Yes, please.

11 MR. MILLAR: The first one, "OPA Province-Wide  
12 Residential Program Comparison Table" will be K1.2.^

13 **EXHIBIT NO. K1.2: TABLE ENTITLED "OPA PROVINCE-WIDE**  
14 **RESIDENTIAL PROGRAM COMPARISON TABLE".**

15 MR. MILLAR: And the chart entitled "OPA Province-Wide  
16 Business Program Comparison Table for THESL OEB Hearing", K  
17 1.3.^

18 **EXHIBIT NO. K1.3: CHART ENTITLED "OPA PROVINCE-WIDE**  
19 **BUSINESS PROGRAM COMPARISON TABLE FOR THESL OEB**  
20 **HEARING".**

21 MR. RODGER: Thank you.

22 And the final thing, Madam Chair, is that in various  
23 interrogatory responses, reference has been made to Toronto  
24 Hydro's conservation and demand management strategy 2011-  
25 2014. This was the document that was filed with the OEB  
26 back on October 22nd, 2010.

27 I don't think up to this point it has actually been  
28 made a formal exhibit, so if we could mark that, that might

1 be helpful in case anybody refers to it.

2 MS. HARE: Thank you.

3 MR. MILLAR: K1.4 is Toronto Hydro's CDM strategy.^

4 **EXHIBIT NO. K1.4: THESL CDM STRATEGY.**

5 MR. RODGER: Thank you. Those are the preliminary  
6 matters. Thank you, Madam Chair.

7 MS. HARE: Thank you. Mr. Warren.

8 MR. WARREN: Yes. Thank you, Madam Chair. I wonder  
9 if the Board Panel could turn up Exhibit K1.1, marked this  
10 morning. This is an April 21 letter from the Ontario Power  
11 Authority.

12 As the Board is aware or will be aware, I know, Issue  
13 1.3 on the Issues List is, and I quote:

14 "Do any of THESL's programs duplicate OPA-  
15 contracted province-wide CDM programs?"

16 Now, in the April 21 letter from the OPA, if I could  
17 take you to the penultimate paragraph on page 1, in which  
18 the OPA says:

19 "The OPA is of the opinion programs 1 to 4 above  
20 are payable through the existing program  
21 administration budget provided under province-  
22 wide programs."

23 My reading of that was that it meant what the OPA was  
24 saying was that the programs 1 through 4 were duplicative.

25 Confirmation of that appears to come from the  
26 succeeding paragraph, which reads, and I quote:

27 "The OPA is of the opinion that the remaining  
28 five programs (programs 5 to 9 listed above)

1           proposed by Toronto-Hydro are not duplicative."

2           So we have the OPA giving its opinion on one of the  
3 issues on the Issues List. I appreciate that they were not  
4 consciously doing that in the letter, but that is the  
5 effect of the letter, in my submission.

6           We then have Mr. Rodger's letter of late yesterday,  
7 with the attached tables, in which, as I take it, Mr.  
8 Rodger's client is taking issue with the OPA's position on  
9 whether programs, at least some components of programs 1  
10 through 4 are duplicative.

11           We then have as a result, in my submission, a, if you  
12 wish, a list, a contest between the OPA and the Applicant  
13 here with respect to one of the issues on the Issues List.

14           Now, in my respectful submission, it is -- sorry, let  
15 me say one other thing. I apologize.

16           If you look at April -- the April 21 letter from the  
17 OPA, it refers in the first paragraph to the 14 months that  
18 the OPA and THESL have been working together on the design  
19 of the programs. And I don't need to take you to them now  
20 unless you want me to.

21           Replete in the answers to interrogatories to questions  
22 posed by Board Staff and by my client, there are repeated  
23 references to the amount of work which the OPA and Toronto  
24 Hydro have done over the past 14 months in designing  
25 various programs.

26           So, A, it comes as something of a surprise that a mere  
27 seven days before the hearing, we have the OPA saying, in  
28 effect: Notwithstanding the level of cooperation over 14

1 months, we disagree with four of your programs.

2 The more important issue, in my respectful submission,  
3 is that it is effectively impossible, certainly for the  
4 intervenors, to deal with this contest, if you wish,  
5 without having the OPA present, or some indication of how  
6 these issues between the OPA and THESL are to be resolved.

7 What the April 21 letter is, in effect, is classic  
8 hearsay evidence. It is advanced for the truth of its  
9 content.

10 My friend Mr. Rodger yesterday joins issue on that by  
11 filing evidence. I don't quarrel with his entitlement to  
12 file evidence with that. The problem is that we have only  
13 one side of the debate, and we don't have the OPA here, A,  
14 to listen to that evidence to say: Do we agree or disagree  
15 with that evidence? And have us able to cross-examine the  
16 OPA.

17 Now, I don't have any mandate to frog-march the OPA or  
18 ask that the OPA be frog-marched here, but I say with  
19 respect it is effectively impossible for intervenors -- and  
20 I say with respect to the Board -- to come to terms with  
21 this fulcrum issue of the debate without having the OPA  
22 present. Otherwise we just have one side of the whole  
23 issue.

24 Those are my submissions, Madam Chair and Members of  
25 the Panel.

26 MS. HARE: Thank you.

27 Are there any other submissions on that issue? Mr.  
28 Crocker?^

1           **SUBMISSIONS BY MR. CROCKER:**

2           MR. CROCKER: Yes. Briefly, Madam Chair, I think the  
3 letter can be read with a slightly different interpretation  
4 to what the OPA might be meaning with respect to the first  
5 four programs.

6           Regardless of that, I don't think that is relevant for  
7 this discussion particularly, other than to say and to  
8 underline what Mr. Warren has said. It is fine for us to  
9 interpret, but in the grand scheme of things, I think, to  
10 resolve this issue properly you do need somebody from the  
11 OPA to indicate what they meant in this letter and its  
12 significance with respect to this hearing, particularly in  
13 light of the position of the Applicant in the letter that  
14 was circulated last night with the enclosures.

15          MS. HARE: Thank you.

16          Mr. Buonaguro?^

17           **SUBMISSIONS BY MR. BUONAGURO:**

18          MR. BUONAGURO: Thank you.

19          I think just to highlight -- and Mr. Crocker didn't go  
20 into it, but I will -- what I think he was referring to in  
21 terms of the different interpretation of the letter, when I  
22 read the letter -- and in particular on either side of the  
23 list of the programs 1 through 9, the letter says:

24                 "The OPA has reviewed Toronto Hydro's evidence  
25                 related to nine proposed CDM programs that have  
26                 been submitted to the OEB for approval."

27          Then it lists the nine programs, and then it says:

28                 "The OPA is of the opinion that programs 1 to 4

1           above are payable through the existing program  
2           administration budget provided under the  
3           province-wide programs."

4           When I read that -- and I think this is where Toronto  
5   Hydro apparently has a different opinion -- I read that to  
6   mean that the OPA has looked at the actual programs as  
7   they're conceived by Toronto Hydro in this application, and  
8   has said: You can get that money for those programs from  
9   us, through the program administration budget.

10          Which means that to the extent that there is any  
11   possible differences in structure or costs in the programs,  
12   the OPA has reviewed them and said: We're going to pay  
13   you, which would make it -- if that's the interpretation  
14   that the letter should be given, then the issue in this  
15   application with respect to those four programs is  
16   completely moot, because they will already have been  
17   approved by the OPA, and they're province-wide programs,  
18   even though there may be differences, which is what Toronto  
19   Hydro is, I think, highlighting in their additional  
20   evidence filed yesterday.

21          I may be wrong, but it highlights the point that the  
22   OPA needs to, at least at a minimum, clarify what they  
23   meant by that, because aside from there being a possible  
24   difference of opinion about how duplicative or non-  
25   duplicative the programs are, it goes further than that, in  
26   that the OPA may have said: We're going to fund you, in  
27   which case the Board doesn't have to -- potentially doesn't  
28   have to look at those programs at all.

1           So I think it is a critical first issue that has to be  
2 addressed, and we need some input from the OPA.

3           Thank you.

4           MS. HARE: Thank you.

5           Are there any other submissions on this issue before  
6 we go to Mr. Rodger?

7           Mr. Rubenstein?

8           MR. RUBENSTEIN: I would just like to say my reading  
9 of the letter was very similar to Mr. Buonaguro, that the  
10 OPA had said that they will pay for these programs. And if  
11 that is the case, then, well, obviously the issue of  
12 approving those programs becomes moot.

13          MS. HARE: Okay.

14          Mr. Rodger?^

15          **SUBMISSIONS BY MR. RODGER:**

16          MR. RODGER: Yes. Thank you, Madam Chair.

17          The purpose of my letter yesterday was to respond to  
18 an intervenor as to how the utility viewed this letter from  
19 the OPA, and as I spell out in that letter, we think the  
20 letter is useful to the Board. It is informative, but it  
21 is not determinative of the issues before you.

22          One of the implications of my friend's submission  
23 about, for example, the programs that the letter says are  
24 not duplicative, does that mean, then, we just can forget  
25 about reviewing any of those issues before this Board, that  
26 we would then discharge the onus? I would say no.

27          I would say that we, as Applicant, we still have to  
28 present our case, meet our onus, and that is what we are

1 prepared to do today.

2 So this assists the Board and it is helpful, but it is  
3 not -- doesn't do anything to remove the onus that is on  
4 the Applicant.

5 Now, in terms of this reference to programs 1 to 4,  
6 the reality is that we do have a disagreement with the OPA  
7 with respect to these programs. And as you will hear from  
8 the witnesses, the PAB budget which Toronto Hydro has been  
9 given through the OPA programs, that has all been fully  
10 allocated. And what we're asking for in this application  
11 are all incremental costs to what the OPA has already  
12 provided.

13 And yes, it does appear we have a disagreement on this  
14 issue, but as the adjudicator, that will be up to you to  
15 weigh the evidence. Presumably, if the OPA has an issue  
16 with this, then perhaps my friends are right, they would  
17 appear in opposition, but it is our case. We have evidence  
18 to put forward. And I don't think our submission would be  
19 that we don't think it is necessary to call the OPA to be a  
20 witness in this case.

21 We have the letter. Mr. Warren is right, it is  
22 hearsay, but as we know, the rules of evidence are not as  
23 strict as in a court. It could go to weight and relevance.  
24 It is clearly relevant. And I think the Board will have to  
25 decide for itself after it hears all of the evidence ^^^  
26 TAKE B ^^^ how it ultimately interprets and how it  
27 ultimately useful it finds this letter. ^^^ TAKE B ^^^  
28 ^28c^ It is clearly relevant, and I think the Board will

1 have to decide for itself, after it hears all the evidence,  
2 how it ultimately interprets and how ultimately useful it  
3 finds this letter.

4 So those would be my submissions, that we would  
5 proceed with the case, that you hear the evidence on all  
6 these issues, and then, like you do on the balance of the  
7 application, make your findings based on that evidence.^

8 MR. SOMMERVILLE: I take it that your comment extends  
9 to the balance of the letter from OPA, as well, that OPA's  
10 description of the programs and the OPA's intention to  
11 review the success or failure of some of these programs  
12 with a view to taking them up, that that is also -- how are  
13 we supposed to assess that?

14 MR. RODGER: Well, again, I think it is -- I think the  
15 letter speaks for itself. This is the OPA's opinion on  
16 these various programs.

17 I will say, as I spell out in my letter of April 27th,  
18 we have made one adjustment responding to the OPA's letter  
19 that a certain amount be deducted from the flat rate water  
20 heater conversion and demand response program.

21 MR. SOMMERVILLE: That predated that letter, though;  
22 right?

23 MR. RODGER: No, it roughly came out around the same  
24 time.

25 MR. SOMMERVILLE: Was the elimination of those costs a  
26 direct response to the letter, or was that independently  
27 undertaken?

28 MR. RODGER: These were discussions that led up to

1 this letter. So we were generally aware that this was  
2 going to be one of the -- the observations of the OPA  
3 contained in this letter.

4 MR. SOMMERVILLE: So officials of the applicant had  
5 discussions with the OPA with respect to the contents of  
6 this letter before it was actually produced by the OPA?

7 MR. RODGER: Well, I think in terms of the overall  
8 programs and how -- as the program indicates, this has been  
9 going on for some months now.

10 MS. HARE: Did you have discussions with the OPA,  
11 before you filed or any time after you filed, as to their  
12 opinion as to whether it is duplicative, these programs?

13 MR. RODGER: I think that is something you might want  
14 to put to the witnesses. I am not sure, Madam Chair.

15 MS. HARE: Okay, we will do that. What about the  
16 letter? Did you ask the OPA to send the letter? Is that  
17 something I should ask the witness, as well?

18 MR. RODGER: I think ask the witnesses, as well, yes.

19 MR. SOMMERVILLE: One further question, Mr. Rodger,  
20 and that has to do with the material that was filed in  
21 response to the Ontario Power Authority letter of April  
22 21st, which is Exhibit K1.1.

23 MR. RODGER: Yes.

24 MR. SOMMERVILLE: The Board Staff, in Interrogatory  
25 No. 4, asked for - what's the exact language that was used  
26 here - a concordance or mapping of the program.

27 I take it that what you filed yesterday is a further  
28 concordance or mapping; is that the idea?

1 MR. RODGER: That's right. It really goes to point  
2 out not only the differences between the two programs, but  
3 how Toronto's programs are incremental to what the OPA  
4 already has in place.

5 MR. SOMMERVILLE: So, in effect, we could regard that  
6 as a further and better response to Interrogatory No. 4?

7 MR. RODGER: That's correct.

8 MR. SOMMERVILLE: Okay. Which was filed yesterday?

9 MR. RODGER: That's correct.

10 MR. SOMMERVILLE: Thank you.

11 MS. HARE: One last question. Did the applicant go to  
12 any effort to try to get OPA to be a witness?

13 MR. RODGER: I don't know the answer to that, Madam  
14 Chair. Perhaps probably the best person to ask would be  
15 Mr. Tyrrell.

16 MS. HARE: Okay. We are going to take a 15-minute  
17 break. Actually, we will be back at 10:15.

18 --- Recess taken at 9:55 a.m.

19 --- On resuming at 10:22 a.m.

20 MS. HARE: Please be seated.

21 The Board considers it extremely advisable from the  
22 Applicant's point of view, and to ensure that this  
23 proceeding has an appropriate evidentiary basis, that a  
24 witness or witness panel from the Ontario Power Authority  
25 attend with respect to its letter of April 21, which today  
26 was given Exhibit No. K1.1.

27 To this end, the Board requires Toronto Hydro to use  
28 its best offices to encourage the OPA to provide such a

1 witness or witness panel.

2 Toronto Hydro will report back to the Board and all  
3 parties by 4:30 today on the outcome of its efforts.

4 In the event that the Applicant's efforts are  
5 unsuccessful, the Board will consider its next steps.

6 Secondly, there has been a significant amount of  
7 information filed in the last few days. This process is  
8 dependent on timely disclosure of evidence and the Board  
9 expects that standard to be maintained by all parties.

10 Parties, Staff and this Panel have not had sufficient  
11 time to review this material in the detail required for  
12 cross-examination.

13 For these two reasons, this hearing will stand down  
14 until Monday at 9:30 a.m.

15 Are there any questions?

16 We are going to adjourn for the day. Thank you.

17 --- Whereupon the hearing adjourned at 10:24 a.m.

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