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May 24, 2011

BY EMAIL & COURIER

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge St, Suite 2701  
Toronto ON M4P 1E4

Dear Ms. Walli:

**Board File No. EB-2011-0011**  
**Toronto Hydro-Electric System Limited – 2011-2014 CDM Programs**  
**Final Argument of Energy Probe**

Pursuant to the Direction of the Board at the Oral Hearing on May 3, 2011, please find attached the Final Argument of Energy Probe Research Foundation (Energy Probe) in the EB-2011-0011 proceeding for the Board's consideration.

Should you require additional information, please do not hesitate to contact me.

Yours truly,

David S. MacIntosh  
Case Manager

cc: Glen Winn, Toronto Hydro-Electric System Limited (By email)  
Mark Rodger, Borden Ladner Gervais LLP (By email)  
John Vellone, Borden Ladner Gervais LLP (By email)  
Olena Loskutova, Consultant to Energy Probe (By email)  
Norm Rubin, Senior Consultant to Energy Probe (By email)  
Interested Parties (By email)

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**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 Limited Inc. for an Order or Orders granting approval of initiatives and amounts related to the Conservation and Demand Management Code.

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**Final Argument On Behalf Of**

**Energy Probe Research Foundation**

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**May 24, 2011**

## **Final Argument On Behalf Of Energy Probe Research Foundation**

### **How these Matters came before the Board**

1. On January 10, 2011 Toronto Hydro-Electric System (the "Applicant" or "Toronto Hydro"), filed an application with the Ontario Energy Board (the "Board") seeking an order granting approval of funding for nine individual conservation and demand management ("CDM") programs pursuant to the Board's *Conservation and Demand Management Code for Electricity Distributors* (the "Code").
2. The Board assigned file number EB-2011-0011 to the Application and on January 24, 2011 issued a Notice of Application and Hearing. Energy Probe Research Foundation ("Energy Probe") filed a Notice of Intervention on February 3, 2011.
3. On February 18, 2011 the Board issued Procedural Order No. 1 and listed the programs for which the Applicant sought approval:
  - Business Outreach and Education;
  - Commercial Energy Management and Load Control;
  - Commercial, Institutional and Small Industrial Monitoring and Targeting;
  - Community Outreach and Education Initiative;
  - Flat Rate Water Heater Conversion and Demand Response;
  - Greening Greater Toronto Commercial Building Energy Initiative;
  - Hydronic System Balancing Program;
  - In Store Engagement and Education Initiative; and,
  - Multi-Unit Residential Demand Response.

4. Procedural Order No. 1 noted that the Applicant was seeking approval for \$56.3 million in total to be funded by all provincial ratepayers through the Global Adjustment Mechanism for electricity (the "GAME") and provided a Draft Issues List. Parties were provided with an opportunity to file written submissions on the Draft Issues List.

5. A schedule for the filing of Interrogatories and Response by the Applicant was provided in Procedural Order No. 1, along with the schedule for an Oral Hearing, to commence April 28, 2011. The Decision on Issues was rendered on March 11, 2011.

6. On March 22, 2011, Pollution Probe filed a Motion for Review of parts of the Board's Decision on Issues. On March 25, 2011 Procedural Order No. 2 provided a schedule for parties to pre-file submissions in the Matter. ????

7. On April 1, 2011, Toronto Hydro informed the Board that it was withdrawing the In-Store Engagement and Education Program because that program was covered by one of the remaining eight programs (the "Proposed Programs").

8. Procedural Order No. 3, issued by the Board on March 31, 2011, ordered the Motion to be heard on April 5, 2011.

9. At the end of the Motion Hearing, the Board concluded that Pollution Probe failed to meet the threshold required for consideration of the merits of the motion. The motion was dismissed.

**10. On April 21, 2011, the Ontario Power Authority (“OPA”) sent a letter, signed by Julia McNally on behalf of her vice-president, to the Applicant stating that the first 4 programs listed above in Paragraph 3. were payable through the existing Program Administration Budget (“PAD”) provided under the OPA-Contracted Province-Wide Conservation Programs (“OPA Province-Wide Programs”). The other 5 programs were considered by the OPA to be not duplicative of the OPA Province-Wide Programs.**

**11. Also on April 21, 2011, the Applicant filed its CDM Program Evaluation Plans and corrections to its evidence and interrogatory responses. On April 26<sup>th</sup> the Applicant produced and circulated copies of the OPA’s Program Schedules that comprise attachments to the Master CDM Program Agreement between the OPA and Toronto Hydro. Specifically, these were copies of schedules pertaining to the OPA’s Residential Program, the Commercial and Institutional Program and the Industrial Program.**

### **The Oral Hearing**

**12. On April 28, 2011, after approximately an hour dealing with preliminary issues, the Board directed the Applicant to encourage the OPA to provide a witness or witness panel to testify in respect of its April 21<sup>st</sup> letter referred to in Paragraph 10 above. Further, due to a substantial amount of new evidence being recently filed with the Board, the Hearing was adjourned until May 2<sup>nd</sup>.**

**13. On May 2, 2011, Toronto Hydro presented two panels to the Board: Panel One to speak to issues related to the Applicant’s strategy and program development, and to its proposed education and information programs; and, Panel Two to speak to all other proposed programs.**

**14. The course of the day was taken up by intervening parties cross-examining both panels. Mr. Chris Tyrrell, the Toronto Hydro vice president and chief conservation officer was on both panels, adding continuity.**

**15. For the first half hour on May 3, 2011, Board counsel and the Board Panel asked questions of the Applicant's Panel Two. During the rest of the day, the OPA Panel was on the witness stand.**

**16. It was unfortunate that the OPA chose to supply only one witness for its panel in that the sole witness had no personal knowledge of the interaction between Toronto Hydro and the OPA in respect of the Proposed Programs during the critical time period, January to March 2011, that intervenors were interested in pursuing to determine when the OPA was aware of the content of the Toronto Hydro programs. After pages of back and forth between Mr, Warren and Ms. McNally in the Transcript, the knowledge base of the sole witness is revealed:**

MR. WARREN: I'm sorry, I don't want to beat a dead horse and this is the last time I will go at the old nag, but my question was: Was the OPA aware of the residential programs and the potential overlap as of the end of December 2010? Yes or no?

MS. McNALLY: I guess I find it difficult to answer that question, because I am not sure who the OPA is, in what capacity. So, again, all I can say is that the residential working group, I wasn't part of it. I don't know what was discussed, but the purpose of the residential working group was to develop the province-wide programs, not the tier 2/tier 3 programs, Board-approved. Those were up to each of the individual LDCs to develop on their own, and that we were approached in March by Mr. Tyrrell for Toronto Hydro and requested at that time that we provide an assessment of the duplication at that time.

(Transcript Volume 3 Page 68)

## **The OPA Evidence**

**17. In the April 21, 2011 letter from the OPA to Toronto Hydro (Exhibit No. K1.1), the following statements are made by Mr. Andrew Pride, the OPA vice president of its Conservation Division:**

The OPA has reviewed Toronto Hydro's evidence related to nine proposed CDM programs that have been submitted to the OEB for approval. The nine programs under review are:

1. Greening Greater Toronto Commercial Building Energy Initiative
2. Business Outreach and Education
3. In Store Engagement and Education
4. Community Outreach and Education Initiative
5. Commercial, Institutional and Small Industrial Monitoring and Targeting
6. Flat Rate Water Heater Conversion and Demand Response
7. Multi-Unit Residential Demand Response
8. Hydronic System Balancing
9. Commercial Energy Management and Load Control

The OPA is of the opinion that programs 1 – 4 above are payable through the existing Program Administration Budget provided under the Province-Wide Programs.

The OPA is of the opinion that the remaining five programs (programs 5 - 9 listed above) proposed by Toronto Hydro are not duplicative, based on the following reasons and the conditions which have been agreed to by Toronto Hydro:  
(Exhibit No. K1.1, Page 1)

**18. In the April 19, 2011 *Witness Statement for Julia McNally*, the evidence provided for clarification in respect of the OPA providing an opinion on whether the programs proposed by Toronto Hydro are, or are not, duplicative is summed up in the last three paragraphs as follows:**

The activities proposed to be included in Toronto Hydro's four marketing and outreach programs are all activities that could *in theory* be funded using PAB funding.

The challenge for the OPA in providing a more definitive opinion on programs 1-4 results from the complexity of comparing a stand-alone program to a component of an OPA-Contracted Province-Wide. *The OPA therefore did not venture an opinion on whether or not this constitutes duplication for the purpose of the Code.*

We look to the Board for guidance on this issue.  
(Exhibit K2.1, emphasis added)

**19. And then we can look to the Examination-in Chief of the OPA Witness Panel, Ms. McNally, by Mr. Vegh to provide further clarification in respect of the OPA providing an opinion on whether the programs proposed by Toronto Hydro are, or are not, duplicative:**

And there is two points I think it is important for me to clarify.

First, that when we mentioned that the programs could be funded, what we meant was that the activities within the programs could be funded. It is that type of activity, the marketing and outreach activities.

And the second piece is that -- so it is activities, not program.

The second piece is that it is not that the LDCs could apply for marketing and outreach programs. It is that the PAB they are allocated, the existing PAB, can be used for marketing and outreach programs, like those listed in these programs.

So that is our -- that was what we were communicating in the letters. As I said, two categories we felt the direct savings were not duplicative based on our reasons and the conditions, and in the second category, in the absence of guidance from the Board, we really felt we couldn't provide an opinion to compare a standalone program against an element of a program.

(Transcript Volume 3 Page 36)

**An Assessment on the Duplication Issue**

**20. It is the submission of Energy Probe that the Board should accept the evidence that the OPA has provided and reiterated repeatedly over the course of its filed evidence and oral testimony: the OPA has no opinion or is unable to provide an opinion on whether or not the marketing and outreach programs of Toronto Hydro as filed with the Board are duplicative in respect of the OPA Province-Wide Programs.**



**21. That leaves the Board to assess whether the Applicant's marketing and outreach programs are incremental or duplicative, as it should be.**

**22. While the OPA was unable to venture an opinion in this proceeding, there is little doubt that it will provide the Board with a purposive solution to its own dilemma. The following is an excerpt from OPA Argument-in Chief in EB-2010-0279, the OPA Fees Review:**

39. Another theme of questions during the oral hearing concerned the role of the OPA in assisting with the Board's consideration of whether there is duplication among CDM programs proposed by electricity distributors for Board approval and the OPA contracted Province-wide programs. The OPA will present its *proposals on the substantive role that it should play* with regard to reviewing Board-approved CDM programs in its forthcoming submission in EB-2011-0011. The OPA is of the view that its recommended approach can be accommodated within its proposed 2011 operating budget. (Argument-in Chief, OPA, EB-2010-0279, May 17, 2011)

**23. It is the submission of Energy Probe that Toronto Hydro has met the key objectives of the Minister's Directive as outlined in the Board's Code. Further, Energy Probe submits that the Applicant's marketing and outreach programs are incremental as opposed to duplicative and the Board should so determine.**

## **Conclusion**

**24. Energy Probe is supportive of the Toronto Hydro Application, as was expressed to the Board on the second day of the Hearing:**

MS. HARE: Thank you. I understand Energy Probe has no cross-examination; is that correct?

MR. MACINTOSH: Madam Chair, Energy Probe finds itself in general support of the applicant's programs and funding requests, but do not wish to conduct friendly cross.

**25. Toronto Hydro has been a conservation program leader among electricity distributors and it appears to Energy Probe that it is continuing in that vein with its prefiled Strategy and Proposed Programs in respect of the 2011-2014 Board-Approved Conservation and Demand Management Programs.**

**26. Energy Probe submits that the Board should approve the Proposed Programs and the funding requests supporting those programs.**

**27. In its Decision and Order, Energy Probe requests that the Board elaborate on its reasons for its decisions on duplication issues to provide other LDCs with a guide for submitting their own programs for approval and funding.**

#### **Costs**

**28. Energy Probe submits that it participated responsibly in this proceeding. Energy Probe requests the Board award 100% of its reasonably incurred costs.**

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**May 24, 2011**