

**THE ONTARIO ENERGY BOARD**

**IN THE MATTER OF** sections 25.20 and 25.21 of the *Electricity Act, 1998*;

**AND IN THE MATTER OF** a Submission by the Ontario Power Authority to the Ontario Energy Board for the review of its proposed expenditure and revenue requirements and the fees which it proposes to charge for the year 2011.

---

**Written Argument of  
The Consumers Council of Canada**

---

**WeirFoulds LLP**  
Barristers and Solicitors  
Suite 1600 Exchange Tower  
130 King Street West  
Toronto, Ontario M9N 2H6  
**Robert B. Warren**  
(416) 365-1110  
(416) 365-1876 (FAX)  
Counsel to the Consumers Council of Canada

## THE ONTARIO ENERGY BOARD

**IN THE MATTER OF** sections 25.20 and 25.21 of the *Electricity Act, 1998*;

**AND IN THE MATTER OF** a Submission by the Ontario Power Authority to the Ontario Energy Board for the review of its proposed expenditure and revenue requirements and the fees which it proposes to charge for the year 2011.

### WRITTEN ARGUMENT OF THE CONSUMERS COUNCIL OF CANADA

#### **I Introduction and Overview**

1. The Ontario Power Authority (“OPA”) has made a Submission to the Ontario Energy Board (“Board”) for the review of the OPA’s proposed expenditure and revenue requirements and fees which it proposes to charge for the year 2011.
2. The OPA’s proposed revenue requirement for 2011 is \$78.882 million and its proposed usage fee is \$0.514 per megawatt hour (MWh).
3. In addition to approval of the proposed revenue requirement and the usage fee, the OPA is seeking the following:
  - Approval of its proposed fees for electricity supply and capacity procurements and application fees for the Feed-in-Tariff program;
  - Approval of its proposed capital expenditures of \$2.2 million;

- Approval of its proposal to recover through fees the balances of the 2010 Forecast Variance Deferral Account;
- Approval to continue to recover the balance of Retailer Settlement Deferral Accounts over three years;
- Approval of the establishment of the 2011 Retailer Settlement Deferral Account, of the 2011 Government Procurement Costs Deferral Account, the 2011 Forecast Variance Deferral Account, and approval or continuation of accounts the Board deems appropriate; and
- Approval of all necessary orders or directions pursuant to the Ontario Energy Board Act, 1998 and execution of the approvals requested in the Business Plan.
- Approval to recover its fees from both domestic and export loads (**Exhibit A/T1/S1, page 2**)

4. This is the written argument of the Consumers Council of Canada (“CCC”) with respect to that Submission.

5. The OPA has, in its Argument in Chief (“AIC”), made submissions with respect to the issues of the jurisdiction of the Board, and the scope of its inquiry, in dealing with the OPA’s Submission. The CCC will, in the next section of this written argument, address those issues.

6. The CCC will then address the substantive issue, namely, whether the Board should approve the proposed expenditure and revenue requirements and fees.

## **II The Board’s Jurisdiction and the Scope of its Inquiry**

7. As the Board is aware, counsel for the OPA made extensive submissions on the scope of the Board’s inquiry, and on the Board’s jurisdiction, before the Board finalized its Issues List. The Board issued an “Issues Decision” which addressed the OPA’s arguments. Given those things, it is unclear why the OPA would choose to devote virtually its entire AIC to

submissions on the Board's jurisdiction and the scope of the Board's inquiry. However, since the OPA has, once again, raised the issues of jurisdiction and scope of inquiry, the CCC will have to address them herein.

8. The OPA's Submission is made pursuant to section 25.21 of the *Electricity Act, 1998* ("the Act"). Subsection 1 of that section requires the OPA to submit its proposed expenditure and revenue requirements for the fiscal year and the fees it proposes to charge during the fiscal year to the Board for review. Subsection 2 provides that the Board may approve the proposed requirements and the proposed fees or may refer them back to the OPA for further consideration with the Board's recommendations.

9. Section 25.21 of the Act also provides that the OPA cannot make its submission to the Board until after the Minister approves or is deemed to approve the OPA's proposed business plan for the fiscal year under section 25.22 of the Act.

10. In its AIC, the OPA implies that the Board's jurisdiction is limited because the Minister has approved the OPA's business plan. Regrettably, the OPA does not specify the ways in which it says that the Board's jurisdiction is so limited.

11. So the first question that arises is in what way, if at all, the approval of the business plan by the Minister limits the Board's jurisdiction, and the scope of its review, in dealing with the OPA's submission. The analysis of that question is, in turn, affected by the distinction between the OPA's proposed expenditure and revenue requirements and fees, on the one hand, and its charges, on the other.

12. Given that the Minister has approved the OPA's business plan, the CCC acknowledges that the Board cannot review that business plan to, for example, assess whether it represents an appropriate way to achieve, for example, the province's goals for energy conservation. The Board can, however, assess whether the proposed expenditures are necessary to carry out the business plan, and whether, given that business plan, they represent a prudent use of ratepayer money.

13. The CCC acknowledges the distinction between the OPA's "fees" and its "charges" made by the OPA in its AIC. The result of the distinction is that the Board is not

reviewing, for example, the OPA's expenditures and charges to acquire power or its expenditures and charges for its conservation programs. With respect to the latter, the result is that the prudence of the OPA's conservation's measures, *per se*, and of the approximately \$1.4 billion it proposes to spend on those measures for the next four years, is not subject to review by the Board.

14. Beyond these obvious points, however, it is unclear what the implications are of the OPA's argument on the distinction between "fees" and "charges". In the "Issues Decision" the Board expressed the view that "an assessment of the OPA's administrative fees must require an examination and evaluation of the management, implementation, and performance of the OPA's charge-funded activities". The Board further stated that it found that "an assessment of the performance of the OPA's charge-funded activities is a necessary, legitimate, reasonable tool for determining the effectiveness of the OPA's utilization of its Board-approved fees". (**Issues Decision and Procedural Order No. 2, EB-2010-0279, page 5**)

15. With respect to the OPA's CDM programs, the Board held that "part of assessing whether the OPA's proposed fees are reasonable and appropriate will necessitate an examination of the effectiveness of the OPA's delivery of CDM program". The Board also stated that it could reject the OPA's proposed fees and recommend that, among other things, the OPA return with "more robust internal control mechanisms as the circumstances might warrant".

16. The OPA's position is that the Board can only assess whether the proposed expenditure and revenue requirements and the fees the OPA proposes to charge are "appropriate" to accomplish the approved business plan.

17. Regrettably, the OPA makes no submissions as to what it believes is the test of what constitutes "appropriate". Does the OPA believe that it includes, for example, the question of whether its proposed expenditure and revenue requirements represent prudent use of ratepayer funds?

18. An indication of the OPA's position on these questions appears from responses of its witnesses to questions in cross-examination. In response to a question about how the Board

would know that the OPA, in meeting its targets, has done so in a way that achieves maximum benefit for ratepayer dollars, the OPA's witness stated as follows:

And again, I think it's that we have a mix of metrics and milestones, so there is qualitative and quantitative, and I think that one of the purposes of this process in this forum is for the OPA to report on its qualitative milestones, and provide some description about how we have performed that.

And of course, intervenors are then given an opportunity to ask interrogatories to get more detail.

So that is the process that has been set up, in order to explore the nature of the OPA's performance against its milestones. (emphasis added)

**(Tr 3, pages 103 and 104)**

19. The witness for the OPA, again in response to questions in cross-examination, said that, among other things, provisions of its "Master CDM Program Agreement" between the OPA and LDCs were intended to ensure "ratepayer value". **(Tr 3, pages 97-98)** The CCC submits that the Board can conclude from that that the OPA agrees that a prudent use of ratepayer funds is within the scope of the Board's inquiry.

20. The OPA also raises the issue of whether the Board can "order" the OPA to do anything. The OPA argues that the Board cannot do so.

21. The logic of the OPA's argument is the Board could not, for example, order the OPA to review LDC applications for Board-approved CDM programs in order to ensure that there is no duplication. That position is anomalous, in light of the fact that the OPA's witness conceded, that the OPA was awaiting some direction from the Board, in the Toronto Hydro-Electric System Limited (THESL) CDM proceeding, on the question of the OPA's role in assessing duplication. **(Tr 3, page 132)**

22. It is unclear, from the testimony of the OPA's witnesses and from the OPA's AIC, whether the OPA would feel itself bound by directions given by the Board, whether in this proceeding or in the THESL CDM proceeding and, if so, what distinction the OPA would draw between the Board directions and Board orders. The distinction is important because orders

would be binding on the OPA, whereas it would be in the OPA's discretion, whether, or to what extent, it followed the Board's directions.

23. The CCC acknowledges that the Board, within the terms of section 25.21, cannot issue a conditional approval. The result, unfortunately, is that, if the Board feels some of the proposed expenditure and revenue requirements or fees reflect an imprudent use of ratepayer funds, then it must send the OPA's submission back, with recommendations as to how it should be changed.

24. That the OPA has taken what amounts to an extreme view of the limits of the Board's jurisdiction, and the scope of its inquiry, is regrettable, not just because it may force the Board into not approving the Submission, but also because it reflects on the apparent unwillingness on the part of the OPA to operate in an open, transparent and cooperative way.

25. The central issue, for the CCC, is whether the mechanisms the OPA has in place, and the way OPA uses those mechanisms, allow the Board to be satisfied that the proposed expenditure and revenue requirements and fees represent a prudent use of ratepayer funds. These considerations are within the Board's jurisdiction, and form an essential part of the scope of its inquiry.

### **III Strategic Objective 2 — Conservation**

26. Strategic Objective 2 is described as follows: " Together with our partners, plan, procure and support the development of verified conservation/energy efficiency resources as identified in the integrated plan and its subsequent iterations. Building capability and enable partners to achieve targets and contribute to a culture of conservation in Ontario". (**Exhibit B/T2/S1, page 1**)

The 2011 budget proposed by the OPA to meet Strategic Object 2 is:

Compensation and Benefits	\$8.182 million
Professional and Consulting Fees	\$3.602 million
Conservation/Technology Funds	\$3.866 million
Operating/Administrative Expenses	<u>\$0.771 million</u>

TOTAL: \$16.421 million

**(Exhibit D/T2/S2, page 2)**

The OPA has identified six strategic initiatives that it will undertake in 2011.

These are:

- Managing the implementation of the OPA- Contracted Province Wide CDM Programs in partnership with the LDCs;
- Managing the implementation of the CDM initiatives for industrial transmission connected customers;
- Providing market leadership to support the delivery of OPA-Contracted Province-Wide CDM Program Initiatives;
- Providing significant support in the development of the updated Integrated Power System Plan;
- Supporting innovation in emerging technologies and conservation programs (Technology Development Fund and Conservation Fund);
- Providing evaluation measurement and verification and reporting of conservation programs.

27. The Conservation Fund provides funding for sector specific electricity conservation pilot projects in order to inform future conservation programs and build marketplace capability. The Conservation Fund will no longer be funded through the OPA's operating budget pursuant to a Directive issued on April 23, 2010, but will still be managed through by the conservation staff (**Exhibit B2/T2/S1**). The Technology Fund provides funding to support emerging technologies or applications that demonstrate potential to improve future electricity supply or conservation (**Exhibit B/T2/S1, page 12**).

28. Through a series of Directives the Minister of Energy has required that the OPA play a key role in coordinating and facilitating CDM in the Province. In the April 23, 2010



Directive the Minister directed the OPA to design, deliver and fund OPA-Contracted Province-Wide CDM Programs. In response to that Directive, the OPA and the Electricity Distributor's Association established working groups to develop a portfolio of programs targeting customers in consumer, commercial & institutional, industrial and low-income sectors (**Exhibit B/T2/S1, page 3**). The total forecast budget for the LDC programs over the four year period beginning in 2011 is \$1.4 billion (**Tr 2, page 109**) This does not include the incremental costs that will be incurred by the LDC's own Board-Approved programs (**Tr 3, page 90**).

29. In its pre-filed evidence the OPA acknowledges that it would be allocating significant resources in 2011 to working directly with the LDCs and coordinating and facilitating the implementation of the programs. In fact the primary focus of the conservation department will be continuing to develop, deliver and facilitate the LDC programs.

30. With respect to these initiatives the OPA has set specific ways in which it intends to ensure good governance of ratepayer dollars. The OPA asserts that it will, "work to ensure that ratepayer dollars are used effectively through quality assurance and quality control processes, financial and operational audits, standardized procurement practices and site inspections to ensure projects have been completed according to program guidelines. Monitoring of contract compliance and program spending will be performed by the OPA on an ongoing basis, beginning in Q1, 2011" (**Exhibit B/T2/S1, page 4**).

31. The OPA's testimony is that it achieves the goal of ensuring ratepayer value through the use of four mechanisms which are provided for in the "Master CDM Program Agreement" between the OPA and individual LDCs. The four mechanisms are:

1. The provisions for the change management process in Article 3;
2. The cost efficiency incentive mechanism in Articles 4.5 and 4.6;
3. The good governance provisions, including audit rights and record-keeping, in Article 7;
4. The evaluation, measurement and verification provisions in Article 9.

32. The first general observation is that these are merely provisions in an agreement. There is no independent evidence that, if these provisions are used, they would in fact ensure ratepayer value. There is no independent evidence, in other words, that these are the appropriate mechanisms.

33. The second general observation is that, even if the provisions are in theory appropriate, whether the use of these provisions would achieve ratepayer value will be a function of whether they are in fact used, how often they are used, and how they are used. There is no evidence on any of these points from the OPA.

34. To illustrate how essentially meaningless are the provisions of the Master CDM Program Agreement, by themselves, the CCC will use the example of the Good Governance provisions in Article 7. Those provisions allow the OPA to audit the books and records of the LDCs. In order to understand whether that provision would provide an effective means to ensure the prudent use of ratepayer funds, the Board needs to know the following, at a minimum:

1. Will the OPA audit the books and records of every LDC over the course of 2011?
2. If not, how many LDCs will the OPA audit?
3. If the OPA audits only a few LDCs, what will the results of those audits say about the prudent use of ratepayer funds generally? Is there, in other words, a representative sample that would provide the OPA with meaningful results?

35. The kind of simple, operational analysis suggested by the questions in the preceding paragraph can and should be applied to all of the Master CDM Program Agreement provisions that the OPA says will be used to ensure the prudent use of ratepayer funds. Yet the OPA has not undertaken that kind of analysis. Without it, the Board cannot know if the provisions will be effective.

36. There is also no evidence on how much it would cost OPA to use some or all of those mechanisms. There is no evidence, for example, that the \$16.4 million allocated for the conservation objective will be too much or too little for the exercise of those provisions.

37. There is no evidence of how the provisions are to work in practice. For example, there is no evidence of what the result would be if the LDC were to find, through the use of the good governance provisions, that one or more LDCs were not in fact exercising good governance.

38. There are both theoretical and practical problems evident when considering the exercise the rights provided for in the master agreement. The incentive mechanism provides one example.

39. The cost efficiency incentive is available to a LDC if it meets the four criteria set out in Article 4.5. One of those criteria is that “the LDC has used Commercially Reasonable Efforts to achieve the Electricity Savings Target and the Peak Demand Savings Target for such Registered CDM Program”.

40. The payment of the incentive will depend on the determination, in each case, of whether the LDC used “commercially reasonable efforts” to achieve the targets. An illustration of how fraught that exercise would be can be seen in the judicial consideration of similar terms.

41. In the case of *364511 Ontario Limited v. Darena Holdings Ltd.*, the Ontario Court of Appeal had to consider the meaning of the term “commercially reasonable efforts”. The Court found that it was neither necessary nor useful to define the term in terms of “good faith”, “*bona fides*” and “best efforts”. The Court also found that it was not sufficient for a party to have a doubt as to whether a certain result would be obtained; the party had to demonstrate that there was uncertainty that it was commercially unreasonable to proceed. (*364511 Ontario Limited v. Darena Holdings Ltd.*, 120 OAC 280 (“Darena Holdings”))

42. Simply applying the reasoning found in the Darena Holdings case would necessarily involve the OPA and individual LDCs in a complex exercise. Each case would have to be considered on its particular facts. According to the OPA’s witness, the OPA has put no thought into how it would use the term “commercially reasonable means”. (Tr 3, page 122 and following)

43. The CCC suggests that the incentive mechanism will be very costly to apply, and that the very complexity may serve as a disincentive to LDCs to claim the incentive.

44. Finally, on this point, the CCC suggests that there is no evidence as to whether the \$16.4 million allocated for conservation measures will be sufficient to deal with the resolution of complex disputes over whether LDCs have used commercially reasonable means to justify payment of the incentives.

45. The Milestones by which the OPA measures its activities are results-based and not activity-based. The OPA simply has to complete a number of specified tasks. There are no milestones to measure the extent to which the OPA is using ratepayer funds effectively and efficiently.

46. The Change Management Process, which has the potential to facilitate changes to LDC spending during the 2011–2014 period, remains largely undefined. **(Tr 3, pages 43 and 121)**

47. There is clearly confusion regarding the interplay between the efficiency incentive set out in the Master Agreement and Board-administered incentive that is tied to results. In fact there is an apparent conflict between these two incentives, which may well hinder the ability of the LDCs to exceed their targets. **(Tr 3, pages 52–60)**

48. One of the means that the OPA can use to ensure ratepayer value, or to put it another way, to ensure that there is a prudent use of ratepayer funds, is to ensure that there is no duplication between its province-wide conservation programs and the Board-approved CDM programs of LDCs.

49. The role of the OPA, in assessing whether there is duplication, was considered extensively in the recently completed application by THESL for approval of its Board-approved CDM programs. In this proceeding, the OPA's witness testified that the OPA was "anticipating that the decision in that case [the THESL case] would provide some guidance in moving forward on the issue". Further, in its AIC the OPA said that it would "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".

50. In the THESL proceeding, the CCC made submissions as to why the OPA was obligated to play a central role in assessing whether Board-approved CDM programs duplicated

its province-wide programs, and made recommendations as to the role that the OPA should be required to play in any application by a LDC for approval of its Board-approved CDM programs. Rather than repeat those submissions here, the CCC attaches to this written argument, as Appendix 1, its written argument in the THESL case.

51. Given the extreme view the OPA takes on the limits of the Board's jurisdiction in this case, it is unclear whether the OPA would consider the Board's findings and directions, if any, in the THESL CDM case to be binding on it in this case. Given that, the CCC asks that the Board exercise its powers under Rule 11 of its Rules of Practice and Procedure to order an amendment to the evidentiary record in this case by incorporating the evidentiary record in the THESL CDM case. The CCC further asks that the findings and directions, if any, in the THESL CDM case be incorporated by reference in this case.

52. The CCC submits that the OPA has not demonstrated that its budget for the conservation objective is, and will be, managed efficiently and effectively. There is no demonstration that the necessary protocols are in place to ensure value for the use of ratepayer funds.

53. The OPA is responsible for administering the LDC conservation initiatives with forecast spending of \$1.4 billion over the next four years. On the evidence, the Board cannot assess whether the revenue requirement, as proposed, is appropriate for the OPA in carrying out that role. The CCC is concerned with the lack of sufficient measures to protect the interest of ratepayers. The CCC submits that it is misguided for the OPA to simply say that its fees are justified because its revenue requirement is less than that for 2010.

54. Given the Board's limited jurisdiction regarding the approval of proposed expenditures and fees, the Board has two options. It can express its concerns with the OPA evidence and send the application back with recommendations as to how to address those concerns. The alternative is to approve the revenue requirement and fees as proposed. Unfortunately, rejecting this application mid-way through the first year of the LDC conservation initiative may well limit the ability of the OPA to carry out the Minister's directives and hinder the ability of the LDCs to deliver their CDM programs.

55. The CCC submits that the most practical option is for the Board to approve this Submission as proposed, despite the concerns regarding the lack of mechanisms to measure the efficiency and effectiveness of the OPA's activities. Although not binding on the OPA, the Board should set out its expectations as to what it requires to be put in place by the OPA to demonstrate it is acting in the best interests of Ontario ratepayers.

56. The records in this case, and in a recent THESL CDM and Hydro One Networks Inc. CDM applications, demonstrate that stakeholders are not happy with how the OPA is carrying out its many functions, particularly in the development and delivery of CDM programs. Although the concerns were articulated in a number of different ways, it is apparent that many stakeholders believe the OPA operates with insufficient transparency and accountability. Rather than focussing, as the OPA has chosen to do in this case, on what it believes are the significant limits on the Board's oversight powers, the OPA should focus on how it can make its decision making more transparent, and how it can include more stakeholders in that decision-making process.

#### **IV The Recovery of OPA Fees from Export Customers**

57. In its Procedural Order No. 2, the Board set out the issue, "Is the proposal to recover OPA fees from export customers reasonable and appropriate?" The OPA's pre-filed evidence on this issue was limited to the following paragraph:

The OPA proposes to recover the 2011 revenue requirement by establishing a \$0.523/MWh usage fee to consumers of electricity to be effective January 1, 2011. The usage fee is derived by dividing the net revenue requirement of \$79.9 million by the Ontario electricity forecast of 124.9 TWh less line losses of 3.1 TWh, plus electricity exports of 12.9 TWh, for a net forecast of 134.7 TWh. Assuming average consumption of approximately 1000 kWh per month, the total monthly bill impact of the OPA's fee on a residential customer is approximately \$0.52.

In past years, the OPA has recovered its fees from Ontario customers only. The addition of export volumes for calculating the usage rate considers that export customers also benefit from the planning, conservation and procurement activities undertaken by the OPA. The OPA therefore proposes to recover its fees from export customers, in addition to Ontario customers. This is

consistent with the practice used by the IESO for recovery of its fees. (**Exhibit D/T1/S1, page 2**)

58. In terms of the rationale for the OPA to introduce the change in the fee recovery at this time, it indicated that it undertook a review of its methodology in developing its usage rate and determined that it had been inconsistent with the IESO in its recovery of operating expenses from export volumes. (**Exhibit 1/T10/S2**) The IESO collects its operating fees from both export and domestic volumes.

59. In developing the proposal the OPA did not undertake any stakeholder consultation although they indicated that they "look forward to engaging in further dialogue with intervenors regarding the OPA's proposal". (**Exhibit 1/T8/S1-2**) In addition, the OPA did not carry out any studies that assessed the impact of its proposal on exporters. (**Tr. 2, page 29**)

60. HQ Energy Marketing ("HQEM") retained Elenchus present an expert opinion on the proposal. Elenchus concluded that given the OPA had not performed a cost allocation study based on cost causality principles to identify which customers or entities impose costs on the OPA and should be charged for the recovery, that the proposal should be rejected. (**Exhibit L1.1**) Elenchus acknowledged, however, that there are OPA costs that could be attributable to and recoverable from exporters. (**Tr 2, page 95**)

61. Elenchus also acknowledged that it had not conducted a survey of organizations like the OPA or independent system operators that provide a broad range of services and have attempted to isolate costs and benefits as between domestic and export customers. With respect to the IESO, which recovers its fees from both domestic and export customers, Elenchus agreed that the IESO's approach was not inconsistent with cost causality principles. (**Tr 2, page 75**)

62. The OPA filed evidence from Concentric Energy Advisors ("Concentric") addressed the issue as well. Specifically, Concentric assessed the ratemaking policy principles and industry precedents, both in Ontario and elsewhere in North America, associated with the application of the OPA's revenue requirements to both domestic and export volumes. (**Exhibit D/T1/S3**) Concentric's conclusion was that the OPA's proposal is consistent with its functional responsibilities that provide benefits to both domestic and export customers. It is also consistent with standards for other electric market and planning organizations that provide benefits to a

broad array of customers, requiring "suitably broad application of traditional cost allocation principles". (Exhibit D1/T1/S3, page 11)

63. The Council submits that like the IESO's costs, the OPAs costs and resulting fees are an integral part of managing and operating the Ontario electricity sector. There are some OPA costs, that may not directly impact or affect exporters, but that is the case for all of the stakeholders and customers that are a part of the Ontario electricity sector. For example, the CDM initiatives for the transmission connected customers, do not directly impact residential consumers. For the OPA to move to a complex cost allocation exercise like that proposed by Elenchus would be, from the Council's perspective, a slippery slope. Attempting to identify exactly what components of the OPA's revenue requirement directly benefit exporters, without a detailed consideration of how the other components of the OPA's impact other sectors would be unfair.

64. The Council support the OPA's proposal to recover its fees from export volumes. The proposal is consistent with the methodology established by the IESO, as like the OPA it is part of the overall Ontario electricity market structure. Attempting to differentiate between costs and benefits for each customer group served by the IESO and the OPA would be, from the Council's perspective be both unfair and unnecessary.

## **V Efficiency Metrics**

The OPA establishes annual targets for performance in two of the primary areas of its operations, Conservation and Generation. From the OPA's perspective the results forecast and achieved in these two areas provide "measurable bases against which the OPA can assess the efficiency with which it delivers on its mandate." The measures look at net annual peak demand reduction, net annual energy reduction, net annual energy reduction, renewable energy contracted under FIT and microFIT programs, in-service capacity under contract and all other generation contracted by the OPA (Ex. C/T1/S1/p. 2).

65. The Council agrees with the observations of Board Staff regarding the OPA's efficiency metric. Board Staff submitted that the efficiency metrics provide a very narrow view



if efficiency that relates only to the rate at which the OPA acquires conservation and generation resources. They provide no information regarding whether the resources acquired have been procured in an efficient manner that provide value for money for ratepayers, fulfill the OPA's mandate, or meet any of the OPA's strategic objectives (Board Staff Submissions, p. 8).

66. The Council submits that the OPA be encouraged by the Board to develop more meaningful metrics, ones that will allow the Board to assess whether the resources have been acquired in an effective and efficient manner. The OPA should be encouraged to retain outside consulting advice to devise both qualitative and quantitative metrics that will assist it and the Board in assessing its performance in a more meaningful way.

## **VI Relief Requested**

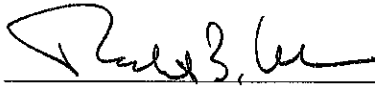
67. The CCC asks that the Board grant the following relief:

1. That the OPA's Submission be approved, with directions that the OPA do the following for its 2012 Submission:
  - (i) provide an opinion, from an independent expert, that the measures in the Master CDM Program Agreement are appropriate to ensure the prudent use of ratepayer funds;
  - (ii) that the OPA provide evidence as to how it would use the measures in the Master CDM Program Agreement to ensure that ratepayer funds will be used prudently;
  - (iii) that the OPA provide evidence of the cost of using the measures, in the Master CDM Program Agreement, to ensure that ratepayer funds are used prudently.
2. That the OPA follow the directions, if any, in the decision of the Board and the THESL CDM application with respect to assessing applications by LDCs for approval of Board-approved CDM programs for duplication.

**VII Costs**

68. The CCC asks that it be awarded 100% of its reasonably incurred costs for participation in this proceeding.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

A handwritten signature in black ink, appearing to read "Robert B. Warren", is written over a horizontal line.

Robert B. Warren  
Counsel to the Consumers Council of Canada

**APPENDIX 1**  
**(attached)**

**THE ONTARIO ENERGY BOARD**

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

**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.

---

**Written Argument of  
The Consumers Council of Canada**

---

**WeirFoulds LLP**  
Barristers and Solicitors  
Suite 1600 Exchange Tower  
130 King Street West  
Toronto, Ontario M9N 2H6  
**Robert B. Warren**  
(416) 365-1110  
(416) 365-1876 (FAX)  
Counsel to the Consumers Council of Canada

## **THE ONTARIO ENERGY BOARD**

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

**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.

### **WRITTEN ARGUMENT OF THE CONSUMERS COUNCIL OF CANADA**

#### **I Introduction and Overview**

1. Toronto Hydro-Electric System Limited ("THESL") applied to the Ontario Energy Board ("Board") for approval of eight (8) Conservation and Demand Management ("CDM") programs, at a total cost of approximately \$50.6 million.
2. These are the submissions of the Consumers Council of Canada ("Council") in that application.
3. This application is the first occasion on which the Board will fully consider an application for approval of a Local Distribution Company's ("LDC") CDM programs. The application of Hydro One Networks Inc. for approval of its CDM programs was withdrawn before the Board could consider it fully.
4. At its most basic level, the Board is only considering whether to approve THESL's CDM programs. However, the application provides the Board with the occasion to set out the principles by which it will consider whether to approve a LDC's CDM programs. In

addition, the application will provide the Board with an opportunity to prescribe guidelines for applications by other LDCs for approval of their CDM programs.

5. A central issue in this application is the relationship among LDCs, the Ontario Power Authority ("OPA") and the Board with respect to the design and approval of Board-approved CDM programs.

6. An understanding of the issues raised by the application requires a review of the background to the province's CDM initiatives. Council will begin these submissions with a review of that background.

## **II Background**

7. Directives issued by the Minister of Energy (the "Minister") to the Ontario Power Authority ("OPA"), and to the Board, set province-wide conservation targets, to be achieved by 2014.

8. The province-wide targets were allocated among LDCs by the Board. The LDC-specific targets were embodied as conditions in the licences of individual LDCs. Those LDC-specific targets were to be achieved by a combination of OPA province-wide programs, and to the extent necessary to accomplish the targets, the LDC-specific programs. The LDC-specific programs require Board approval, and are referred to, hereinafter, as Board-approved programs.

9. The OPA, in consultation with the LDCs, developed a budget to achieve the province-wide targets. That budget is approximately \$1.4 billion and was approved by the OPA board. That total budget was, in turn, allocated to the LDCs, to allow them to achieve their specific targets, in the form of a "program administration budget" ("PAB"). The PAB represents the funds available, from the OPA, for LDCs to achieve their prescribed targets using province-wide programs designed by the OPA.

10. If the LDCs believed that they could not achieve the prescribed targets, using the OPA's province-wide programs, and with the funding available through the PAB, they could design programs, and propose a budget for those programs, both to be approved by the Board.

11. The Minister issued a Directive to the Board, pursuant to sections 27.1 and 27.2 of the *Ontario Energy Board Act, 1998*. Among other things, the Directive required the Board to issue a code. The code was to include, among other things, rules relating to the approval of Board-approved CDM programs.

12. The Directive required the Board, in developing those rules, to have regard to a number of objectives including that the Board-approved CDM programs not duplicate OPA-contracted province-wide CDM programs which are available from the OPA at the time of Board approval.

13. Finally, the Directive required the Board, in approving Board-approved CDM program to continue to have regard to its statutory objectives, including protecting the interests of consumers with respect to prices.

14. Pursuant to the Minister's Directive, the Board issued its "Conservation and Demand Management Code for Electricity Distributors". That Code include the following provision:

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

### **III The Board's Jurisdiction**

15. The Board does not have jurisdiction over either the content or the cost of the OPA's province-wide programs. It cannot, in other words, assess whether those programs, or the \$1.4-billion budget for them, are prudent.

16. The Board must approve Board-approved CDM programs. The question is what criteria the Board can, and should, apply in deciding whether to approve those programs.

17. The amounts which the Board approves for Board-approved CDM programs are not recovered from the LDC's ratepayers directly. Rather, they are recovered through the Global Adjustment Mechanism. Because of that, the Board, in deciding whether to approve Board-approved CDM programs, is not determining whether the cost consequences of those programs

are just and reasonable. However, and as noted above, the Board must have regard to the impact of the cost of a LDC's CDM programs on the prices paid by consumers.

18. In deciding whether to approve Board-approved CDM programs, the Board is acting under the authority of the Minister's Directive and, consequently, the CDM Code issued pursuant to that Directive. Since the Directive, and the Code, prescribe that the Board cannot approve a LDC-specific CDM program if it duplicates an OPA province-wide program, that is an essential criterion which the Board must apply in deciding whether to approve a LDC-specific CDM program.

19. The Council acknowledges that duplication is not the only criterion that the Board can use in deciding whether to approve Board-approved CDM programs. However, the other criteria are largely administrative in nature in that they involve a determination of whether the LDC has met the checklist of requirements in the Board's CDM Code. The assessment of duplication requires the exercise of the Board's discretion.

20. The Council submits that duplication necessarily involves an imprudent use of ratepayer funds. It follows that an imprudent use of ratepayer funds has an adverse impact on the prices paid by consumers.

21. The Board's jurisdiction to approve LDC-specific CDM programs is not dependent on any action by the OPA. The OPA itself operates under a Ministerial Directive which requires it to develop CDM programs which meet the prescribed targets. It is the OPA's responsibility to develop the programs. As a practical matter, the OPA has the most knowledge of what the CDM programs consist of and what markets they address, and so forth. As a result, the OPA is in the best position to assess, as a matter of fact, whether Board-approved CDM programs duplicate the OPA's own province-wide programs.

22. The Minister's Directive to the OPA, dated April 23, 2010, requires the OPA to do the following:

1. Play a key role in coordinating and facilitating the successful implementation of the new CDM opportunities provided to LDCs through the *Green Energy and Green Economy Act, 2009*; and



2. Provide advice to the OEB on the administration of LDC CDM activities, including but not limited to the use of OPA cost-effectiveness tests and the OPA protocol process and third-party vendor of record lists in order to assess the cost-effectiveness of Board-Approved CDM Programs and to conduct Evaluation Measurement and Verification of board-approved CDM programs, as requested by the OPA.

23. The Council submits that the requirement that the OPA "play a key role in coordinating and facilitating" successful implementation of the new CDM opportunities and the requirement that it would provide advice to the OEB on the administration of LDC CDM activities necessarily requires the OPA to provide meaningful, timely advice to both LDCs and the Board on, among other things, whether Board-approved CDM programs duplicate OPA province-wide programs.

#### **IV THESL's Application**

24. THESL originally sought approval for nine (9) CDM programs. Two (2) of those programs were consolidated, with the result that THESL now seeks approval for eight (8) CDM programs. The total cost of those programs, over four years, is approximately \$50.6 million. THESL is also seeking approval to recover administrative costs, which it characterizes as "program expenditures", in the amount of \$343,449.00.

25. The programs for which THESL is now seeking approval are the following:

1. Business Outreach and Education Program;
2. Commercial Energy Management and Load Control Program;
3. Commercial, Institutional and Small Industrial Monitoring & Targeting Program;
4. Community Outreach and Education Initiative;
5. Flat Rate Water Heater Conversion & Demand Response Program;
6. Greening Greater Toronto Commercial Building Energy Initiative;

7. Hydronic System Balancing Program; and
8. Multi-Unit Residential Demand Response Program.

26. The evidence is that THESL was part of a working group, with the OPA and others, developing the OPA's province-wide programs. (Tr 2, page 28) THESL was simultaneously developing its own CDM programs. Those programs, which are the subject of this application, were completed by December 2010. (Tr 2, page 29)

27. The evidence is that the components of THESL's residential CDM programs were discussed with the OPA as part of the working group that THESL and the OPA participated in through 2010. (Tr 2, page 132) The evidence is further that the overlap between the OPA programs and the THESL residential programs would have been apparent as of the end of December, 2010. (Tr 2, page 132)

28. The evidence is that, in the months of January and February of 2011, THESL continued to discuss its CDM programs with the OPA. (Tr 2, page 133)

29. On March 7, 2011, THESL e-mailed the OPA requesting "a letter of support from OPA stating 'Toronto Hydro's OEB CDM program submissions are non-duplicative of the existing province wide programs' ". The e-mail went on to say that "while we don't believe the letter is an explicit Board Code filing requirement, fundamentally it is the basis of the review and would be very helpful to minimize the number of IRs and expedite the process". (Exhibit J3.4)

30. In response to that request, the OPA sent a letter to THESL, dated April 21, 2011. In that letter, the OPA indicated that it had reviewed THESL's evidence related to its then nine (9) proposed CDM programs and stated the following conclusions:

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

The OPA is of the opinion that the remaining five programs (programs 5-9 listed above) Toronto Hydro are not duplicative, based on the following reasons and the conditions which have been agreed to by Toronto Hydro.

(Exhibit K1.1)

31. In response to that OPA letter, THESL, on the eve of the opening of the oral hearing, produced a chart in which it compared OPA's province-wide residential programs with those being offered by THESL. (Exhibit K1.2) The purpose of the chart was to demonstrate that THESL's residential programs were non-duplicative, contrary to what had been asserted in the OPA's letter of April 21, 2011. (Tr 3, page 100)

32. At the Board's direction, the OPA had a witness, Julia McNally, appear at the oral hearing. Prior to her testimony, Ms McNally produced a witness statement. (Exhibit K2.1) In that witness statement, Ms McNally set out what she described as four components of an analytical framework used by the OPA in assessing whether THESL's CDM programs were duplicative of the OPA's province-wide CDM programs. Those components are:

1. Ensure Incremental MW and GWh and do not undermine Province-Wide programs — e.g. for programs that offer reduced consumption, does the program have the potential to deliver incremental savings beyond those targeted by OPA-Contracted Province-Wide CDM Programs?
2. Avoid Market Place Confusion — e.g. is the program likely to create confusion in the market place?
3. Ensure Prudent Use of Rate Payer Funds by Avoiding Duplication of Resources — e.g. will this program result in duplication of program administration efforts or costs?
4. Capture Regionally Specific Opportunities — e.g. does this program target end uses, behaviours, or customer groups that are specific to the LDCs region? (Exhibit K2.1, page 2)

33. Although the purpose of Exhibit K1.2 was to demonstrate that THESL's residential programs are non-duplicative, the information embodied in Exhibit K1.2 was never given to the OPA. (Tr 2, page 138)

**V                    Argument**

34.                The argument is divided into two parts. The first part deals with the role of the OPA, not just in THESL's application but, more broadly, in the application of all LDCs for approval of their CDM programs. The second part deals with THESL's CDM programs.

**(a)                The Role of the OPA**

35.                The Council submits that the evidence raises fundamental questions about the appropriate role of the OPA with respect to Board-approved CDM programs.

36.                The Council submits that it is part of the OPA's mandate to ensure that Board-approved CDM programs do not duplicate the OPA's province-wide programs.

37.                As noted above, the Minister's concern that there be no duplication was evident in terms of the Directive given not just to the Board but to the OPA itself. Given that, the Council submits that it was incumbent on the OPA to take every reasonable measure to ensure that THESL's CDM programs did not duplicate the OPA's province-wide programs, including, on its own initiative, advising the Board of its concerns about duplication.

38.                The Council further submits that the OPA is under an obligation to ensure that ratepayer funds are used prudently. The OPA acknowledged that, belatedly, when it responded to THESL's request that it comment on THESL's CDM programs. (**Exhibit K3.4, page 2**)

39.                The Council submits that the evidence in this application demonstrates that the OPA has failed to fulfil those two obligations.

40.                The evidence is that the OPA was aware of THESL's CDM programs from as early as the end of December, 2010. The Council submits that the Board should conclude from the evidence that the OPA was aware that some of THESL's CDM programs, and in particular, the residential programs, were duplicative of the OPA's province-wide programs. The Council submits that the evidence is clear that, had THESL not asked the OPA for a letter, the OPA would never have advised the Board of its concerns about duplication.

41.                The evidence is that the OPA continued to discuss the CDM programs, with THESL, during January and February of 2011. In addition, the OPA was aware that THESL had

applied to the Board for approval of its CDM programs. Indeed, the OPA itself intervened in the THESL application on February 7, 2011.

42. The OPA's intervention letter, which is Exhibit K3.3, indicates that the OPA "writes to communicate its intention to participate as an intervenor in this proceeding". The letter goes on to state the following:

Since its inception, the OPA has played a key role in designing and delivering conservation and demand management (CDM) program. On April 23, 2010, the Minister of Energy and Infrastructure issued a directive to the OPA outlining the requirements for strategic coordination of CDM programs with distributors and the Board. The OPA's interest in this proceeding is with respect to its role in coordinating and facilitating the successful implementation of the new CDM opportunities provided to LDCs through these green energy and green economy, at 2009. (Exhibit K3.3)

43. The OPA's witness, Ms. McNally, could not provide a coherent explanation of why the OPA intervened or what the OPA intended to accomplish by intervening. (Tr 2, pages 1-95).

44. Notwithstanding that intervention, the OPA delivered no evidence indicating its concern about a possible duplication between its province-wide program and some of THESL's CDM programs. As noted above, it was not until THESL asked the OPA for a letter approving its CDM program that the OPA even put its mind to the criteria by which to assess duplication and wrote a letter setting out its concern about duplication. That it was not until March of 2011, nearly a year after the Minister's Directives, and then in only in response to a request that it write a letter about duplication, that the OPA first put its mind to the criteria for assessing duplication is both astonishing and troubling. It suggests that the OPA was either indifferent to its responsibilities, or careless about how they were fulfilled.

45. The OPA's position is that the determination of duplication is a Board responsibility, as a result of the Board's CDM code, that the OPA has no role to play in assessing LDC applications. (Tr 3, page 72) At the same time, however, the OPA acknowledges that it is responsible for ensuring that ratepayer funds are used prudently. (Exhibit K3.4) It would seem to the Council to be self evident that, to the extent that LDC programs are duplicative of OPA

programs, ratepayer money is not being used prudently. In those circumstances, it does not matter whether ratepayer money is not being used prudently under an OPA program or a LDC program. It is just not being used prudently. Given that, it would seem to follow that the OPA has a central role to play in assessing LDC applications for approval of Board-approved CDM program.

46. The OPA could have filed evidence on duplication, as a party to the application. Indeed, the Council is puzzled as to why the OPA would otherwise intervene. Offering evidence on duplication is not inconsistent with the Board's role as the ultimate arbiter of whether there is duplication. The OPA knows, better than any other agency in the province, whether there is duplication with its own programs. The OPA can provide an essential evidentiary basis to assist the Board in determining whether, or to what extent, there is duplication.

47. The purpose of these submissions is not to criticize the OPA. However, the OPA's participation in THESL's application highlights the need for a clear and forceful expression of the OPA's obligation to assist the Board, LDCs and stakeholders by providing its assessment of whether Board-approved programs duplicate the OPA's province-wide program. The OPA must not only ensure that there is no duplication between its province-wide programs and LDC-specific programs, but also notify both the individual LDCs and the Board of any duplication as soon as it becomes aware of them.

48. The Council submits that the Board should, in its decision, do the following:

1. indicate that it expects all LDCs seeking approval of CDM programs to obtain, from the OPA, a written assessment as to whether, or to what extent, the LDC's Board-approved CDM programs duplicate OPA programs;
2. indicate that it expects the OPA to provide, in respect of every application by a LDC for approval of Board-approved CDM programs, a written assessment as to whether the LDC's Board-approved CDM programs are duplicative of OPA province-wide programs;

3. indicate that, in the absence of a written assessment from the OPA as to whether a LDC's Board-approved CDM programs are duplicative, an application for approval of those programs will not be considered.

(b) **THESL**

49. The submissions, in the preceding section, addressed the role of the OPA, both in THESL's application, and more broadly, in applications by LDCs for approval of Board-approved CDM programs. In fairness, it should be observed that THESL was equally responsible for, first, trying to eliminate any duplication between its programs and the OPA's province-wide programs and, having failed to do that, notify the Board of the OPA's concern about duplication.

50. If ratepayer funds are to be used prudently, it is incumbent on both the OPA and individual LDCs to work cooperatively to eliminate duplication between the OPA's province-wide program and individual LDCs Board-approved program.

51. The Council's concern is with THESL's CDM programs that apply to residential consumers, a particular Council's concern is with two programs, the Community Outreach and Education Initiative and the Flat Rate Water Heater Conversion and Demand Response programs.

52. The Community Outreach and Education Initiative is, as the name suggests, a CDM education program. Such programs are permitted under section 4.3 of the Board's CDM Code. THESL proposes to spend \$5.7 million on this program.

53. THESL continues to insist that the OPA has not found that its Community Outreach and Education Initiative is duplicative of OPA province-wide programs (**Argument-in-Chief, pp. 24**). That assertion, while understandable, is inconsistent with the evidence. The Council submits that the OPA's letter of April 21, 2011 is not ambiguous, and that the only reasonable interpretation of that letter is that the OPA finds that THESL's Community Outreach and Education Initiative is duplicative. The Council submits that there is simply no other way to reasonably interpret the OPA's statement that, in its opinion, four (4) of nine (9) THESL's CDM

3

programs, including the Community Outreach and Education Initiative, "are payable through the existing Program Administration Budget under province-wide program" (Exhibit K1.1)

54. THESL's attempt, as set out in Exhibit K1.2, to distinguish that program from OPA province-wide programs was never put to the OPA. The Council submits that, as a result, the OPA's expressed concern about duplication remains unchallenged.

55. The Council submits that it was incumbent on both the OPA and THESL to have advised the Board, and the parties, of the issue of duplication as soon as they were aware of that issue. What amounts to THESL's rebuttal of the OPA's concern about duplication, delivered on the eve of the opening of the oral hearing was never discussed with the OPA. As a result, the Board is still not aware of the OPA's final position on whether THESL's Community Outreach and Education Initiative Program is duplicative of OPA province-wide programs.

56. The Council acknowledges that THESL is obligated, by the terms of its licence, to meet its prescribed CDM targets. However, the obligation that THESL meet those targets does not require the Board to approve any CDM program that THESL proposes simply on the basis that it allows THESL to meet its target. The Board retains the discretion not to approve THESL's CDM program notwithstanding the terms of THESL's licence.

57. The onus is on THESL to prove, on a balance of probabilities, that, among other things, its CDM programs are not duplicative of the OPA's province-wide programs. The Council submits, with respect, that THESL has failed to discharge that onus with respect to its Community Outreach and Education Initiative. If, as the Council suggests, there remains a substantial doubt as to whether that program duplicates OPA's province-wide program, then, to protect the interest of consumers with respect to prices, the Board should not approve that program. The Council submits that THESL is able to conduct a community education program through the \$14 million available to it, for such purposes, under the OPA's PAB.

58. With respect to THESL's flat rate water heater conversion program, the evidence is that THESL proposes to close that program. THESL was asked whether it could unilaterally cease offering the flat rate for water heaters. Its response, in Exhibit J3.1, does not answer the



question. The Council submits that the only reasonable interpretation of that response is that THESL can in fact cease offering the flat rate water heaters program.

59. It is apparent, from the evidence, that THESL, for all intents and purposes, has cancelled the flat rate water heaters program. THESL has been informing its customers with the flat rate water heaters that it would no longer be offering service. Offering incentives to customers to withdraw from a program that is no longer offered is not a CDM program. Accordingly, that program should not be approved by the Board. Seeking approval for funds through the Global Adjustment Mechanism to facilitate the finalization of a LDC-specific program already cancelled is not consistent with the intent of the CDM directives.

60. The Council submits that it is incumbent on THESL to make a proposal, in its next rate application, as to how it proposes to move these customers off the flat rate program. THESL has indicated its intent to do so. (Exhibit K3.1) The Council acknowledges that, for some customers, the conversion costs could be significant. The Board should require THESL to develop a process for the conversion that provides customers with sufficient information about the cancellation of the program and the cost implications for those customers. Customers should be informed about how their bills may change, and the options for conversion which could include moving to natural gas.

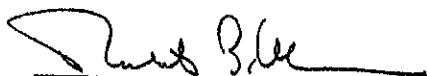
#### **VI Relief Requested**

61. The Council requests the Board deny approval of THESL's Community Outreach and Education Initiative and its Flat Rate Water Heater Conversion & Demand Response programs.

#### **VII Costs**

62. The Council asks that it be awarded 100% of its reasonably incurred costs for its participation in this proceeding.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



Robert B. Warren  
Counsel to the Consumers Council of Canada