

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

REPLY SUBMISSIONS
TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

June 1, 2011

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DELIVERED JUNE 1, 2011

A. INTRODUCTION

1. Toronto Hydro-Electric System Limited (“THESL”) files these reply submissions in respect of its application to the Ontario Energy Board (the “Board”) pursuant to the Board’s *Conservation and Demand Management Code for Electricity Distributors* issued September 16, 2010 (the “Code”) seeking an order granting approval of funding for various conservation and demand management (“CDM”) programs.
2. THESL has reviewed the submissions of Board staff, the Ontario Power Authority (“OPA”), Energy Probe Research Foundation (“Energy Probe”), the Vulnerable Energy Consumers’ Coalition (“VECC”), the Low-Income Energy Network (“LIEN”), the School Energy Coalition (“SEC”), the Association of Major Power Consumers in Ontario (“AMPCO”), the Consumers Council of Canada (“CCC”), and the Independent Electricity System Operator (“IESO”). THESL received no submissions from any other party in this proceeding.
3. THESL confirms and adopts the submissions it made in its May 9, 2011 Argument-in-Chief and has limited this reply to responding directly to the parties’ submissions noted above. Capitalized terms used in this reply but not otherwise defined herein shall have the meaning ascribed to such terms in THESL’s Argument-in-Chief.

4. It is worth noting at the outset that:

- (a) ***Established (Issue 1.2)*** – None of the parties have objected to THESL's submission that the relevant OPA Programs have been established in accordance with Section 3.1.1 of the Code. None of the parties have suggested that the timing of THESL's Application was inappropriate. THESL filed the final OPA Program Schedule, for the Low-Income Program, on May 19, 2011 in response to Undertaking J2.3, and various parties have included reference to this and other OPA Programs in their submissions.
- (b) ***EM&V Plans (Issue 1.5)*** – None of the parties have suggested that THESL has failed to appropriately apply the OPA's EM&V Protocols when developing its draft EM&V plans for the Proposed Programs.
- (c) ***HR Plan (Issue 2.1)*** – None of the parties have objected to THESL's proposed HR plan to employ incremental staff on a contractual basis for the Proposed Programs. Board staff agree that the plan is appropriate and that the costs for these employees should be recovered from the Global Adjustment mechanism (Board staff at pages 14-15). Board staff suggest, and THESL agrees, that the HR plan should be adjusted to reflect only those staff required to implement the programs that are ultimately approved by the Board. THESL submits that SEC's concern related to staffing of its OPA funded programs is outside of the scope of this proceeding (SEC at para. 11).
- (d) ***Program Savings (Issue 3.1)*** – None of the parties have suggested that THESL's calculated energy and peak demand savings targeted from the Proposed Programs are incorrect.
- (e) ***Cost Effectiveness*** – Except for one limited concern expressed by SEC, which is addressed in paragraph 32 below, none of the parties raised any concerns with the

PAC and TRC models THESL used to assess the cost effectiveness of the Proposed Programs.

B. THE PROPER ROLE OF THE OPA

5. THESL's Application in this proceeding has become a *de facto* "test case" for the distribution sector as a whole. Consistent with the role of this Application as a test case, the parties have raised two issues of broader public policy which the Board is now being asked to address. The first relates to the proper role of the OPA in this and future applications for Board-Approved Programs, which THESL will address in this section. The second, which THESL addresses in the section below, relates to the criteria the Board will use to assess non-duplication as between educational programs, on the one hand, and the OPA Programs and the associated PAB, on the other.
6. Several parties have argued that the OPA should be required to provide meaningful advice on the issue of duplication in future applications for Board-approved Programs (CCC at para. 23, VECC at page 5). Consistent with its cooperative role in this proceeding, the OPA has indicated that it would be pleased to do so (OPA at para. 5).
7. SEC suggests that there may also be an appropriate role for the OPA in determining the appropriate mix issue going forward (SEC at para. 15). SEC bases this suggestion on its concern that there is not sufficient information to make a determination on whether the mix of THESL's Proposed Programs and OPA Programs is appropriate. THESL notes that SEC did not ask the OPA's witness for her view on the appropriate mix issue when given the opportunity to do so (Transcript, Volume 3, Page 132). THESL submits that there is sufficient information in this proceeding for the Board to make a determination on the appropriate mix issue. The evidence is clear. THESL is participating in all (100%) of the available OPA Programs (Exhibit J, Tab 6, Schedule 10) and the OPA Programs alone are insufficient for THESL to meet its CDM Targets (Exhibit J, Tab 2, Schedule 6 and Transcript, Volume 2, Page 7, Line 25). To make up for this shortfall and to avoid the risk of THESL not meeting its mandatory CDM Targets, the only option available to

THESL is to apply for new Board-approved Programs, which it has done with the Proposed Program. SEC's suggestion that THESL should do 'more of' the OPA Programs is clearly based on SEC's misunderstanding of the evidence in this proceeding: THESL is in fact doing all that it can with existing OPA Programs.

8. The OPA suggests, as does Board staff, that it would be helpful to have clear direction from the Board on the information that the Board would require and the criteria that the OPA should apply to address the duplication issue (OPA at para. 6, Board staff at page 15). THESL agrees.
9. There is currently no guidance available in the Board's CDM Code or filing guidelines on the information that the Board requires to prove non-duplication. THESL submits the Board need not amend its CDM Code to require an applicant to obtain and file an OPA opinion on the issue of duplication, as was suggested by AMPCO (AMPCO at para. 36), nor should the Board prejudge future applications by ruling that they will not be considered if they fail to produce a written opinion from the OPA on duplication, as was suggested by CCC (CCC at para. 48). However, THESL submits that it would be helpful to the administrative efficiency of future proceedings if the Board could clearly list the information it finds helpful in assessing non-duplication for the benefit of future applicants. THESL submits that the information it provided in this proceeding is sufficient to prove non-duplication of the Proposed Programs. As a result, the Board might identify the OPA Program Schedules, an OPA opinion letter, and/or an OPA witness panel as helpful to demonstrate non-duplication. While not binding on the discretion of future panels, THESL agrees with Board staff that this would promote administrative efficiency in future proceedings. Notably, it would help avoid some of the procedural challenges THESL experienced as a "test case" applicant in this proceeding, as described in paragraphs 10-16 of THESL's Argument-in-Chief.
10. In the meantime, it would clearly be unfair to THESL to impose after-the-fact evidentiary requirements not set out in the existing CDM Code. THESL, and any applicant, has the right to know the case it must meet and the Board cannot change that case at the

conclusion of a proceeding in which an applicant rightly relied upon the Board's own published guidelines on filing requirements.

11. THESL submits that it would also be helpful if the Board would articulate the criteria that it considers as relevant in assessing the non-duplication of the Proposed Programs. While not binding on future panels, THESL submits that these criteria will be helpful to future applicants in preparing programs for Board approval and for the OPA in assessing those programs for duplication. THESL submits that the OPA has developed a helpful "purposive" framework for assessing whether non-educational programs are non-duplicative. However, as explained in the section below, THESL submits that the OPA's approach in respect of educational programs is not helpful in respect of the issue of duplication.
12. Finally, THESL will briefly reply to the allegations and mischaracterization of the evidence contained in CCC's submissions. CCC suggests that THESL had discussed its residential Proposed Programs with the OPA as of December 2010 and that this discussion continued through the months of January and February of 2011 (CCC at paras. 27-28 and again at paras. 40-41). CCC relies on these assertions to argue that the OPA failed to fulfill its obligations in this proceeding (CCC at para. 39), and that the OPA was either indifferent or careless in respect of its responsibilities (CCC at para. 44).
13. THESL submits that CCC has mischaracterized the evidence in this regard. The evidence is that THESL participated in the development of the OPA Programs as a member of the Ministry's Energy Committee Working Group beginning in December of 2009, and later as a member of the OPA/EDA working group. Separate from this process, THESL completed its design of the Proposed Programs in December of 2010. However, THESL did not submit its Proposed Programs to the OPA for review and consideration until March of 2011 (Transcript, Volume 2, Page 26, Line 10 to page 32, Line 9). This is consistent with the OPA's recollection of events as well (Transcript, Volume 3, Page 58, Line 25 to Page 59, Line 6 and Page 61, Line 24 to Page 70, Line 12).

14. THESL notes that the OPA will not have an opportunity to respond to CCC's allegations that it was indifferent or careless or that it failed to fulfill its obligations. THESL submits that the Board should reject these spurious and unwarranted allegations. THESL submits that both it and the OPA have acted with reasonable diligence and effort to ensure that the Board is equipped with the best information possible to assess the issue of duplication in the circumstances.

C. THE THREE EDUCATIONAL PROGRAMS

15. The second issue of public policy that the Board has been asked to address relates to what criteria it will use to assess the issue of duplication as between the Outreach and Education Programs, on the one hand, and the OPA Programs and the associated PAB, on the other. There is no clear consensus as between the parties on how to best approach this issue. Board staff, AMPCO and SEC oppose the approval of THESL's three educational Proposed Programs, while EP and LIEN support approval of these Proposed Programs. CCC opposes approval of the Community Outreach and Education Initiative, while VECC supports approval of this Proposed Program.
16. THESL submits that the OPA's April 21, 2011 letter does not directly address and is not determinative of the issue of duplication in respect of the Outreach and Education Programs. The pre-filed evidence of Ms. Julia McNally (emphasis added) supports this conclusion (See Exhibit K2.1, Page 3, Lines 17-23):

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.

17. The OPA expressly did not venture an opinion on whether the Outreach and Educational Programs are duplicative. Instead, the OPA has asked for the Board's guidance on this issue. The OPA had several opportunities to provide a clear expression if its opinion was that the educational programs were duplicative, and did not do so. Contrary to the allegations of intervenors, this can only be understood as a statement by the OPA that it did not find those programs duplicative. If anything, the OPA's opinion should be taken as an endorsement of the types of activities in THESL's Outreach and Education Programs in-so-far as the OPA implicitly recognizes the value of these activities in finding that they could be funded by PAB.
18. THESL submits that the principal policy issue for Board to determine is whether the *possible availability* of PAB funding for the *types of educational activities* described in the Proposed Programs, in and of itself, constitutes duplication of the OPA Programs.
19. In deciding this issue, THESL submits that there are two related factors that the Board should consider that have not been raised by any of the other parties.
20. First, the Board's CDM Code expressly allows for Board-approved educational CDM programs (Section 4. 3 and Subsections 4.1.2 and 4.1.4). The Board in developing its own Code clearly saw merit in allowing for educational CDM programs which have an intrinsic value that cannot always be measured in a tangible or immediate way.
21. Second, THESL submits that the only practical interpretation of the OPA's method of analysis is that any type of marketing, outreach and educational activity would, in the OPA's opinion, potentially have PAB available to fund it. The evidence on this matter is clear. The OPA's view is that under the Master CDM Program Agreement, LDCs have been afforded considerable degree of flexibility in determining what marketing initiatives they can allocate PAB funding to (Transcript, Volume 3, Page 49, Lines 7-10). In addition, the OPA believes that there is almost always an element of overlap between education on the one hand, and marketing, on the other (Transcript, Volume 3, Page 50, Lines 16-26). Given this, it is not surprising that the OPA has concluded that PAB

funding is potentially available to LDCs for all marketing, outreach and education initiatives (Transcript, Volume 3, Page 52, Lines 16-24):

MS. McNALLY: [...] So it is not that these programs, as a complete set, would be payable under PAB. **It is that the LDCs have been given PAB funding, and with that PAB funding they can do marketing and outreach and education for their consumers.** So they can take that money and they can allocate it to activities like those described in the programs.

22. CCC (at para. 53) and Board staff (at pg. 5) argue that the Proposed Programs cannot be considered non-duplicative if the program elements can, in theory, be funded through PAB. THESL submits that the Board should reject this simplistic approach because of its undesirable and unintended consequences. If the Board accepts this reasoning, no proposed educational programs will ever be considered non-duplicative because all LDC marketing, outreach and educational activities can potentially be funded through PAB. The Board would in effect be ruling that no LDC may ever rely on the educational provisions of the Board's CDM Code, and the important policy objectives of allowing for educational CDM initiatives will never be achieved.
23. THESL submits that its educational CDM programs play an important and essential role in promoting the understanding of energy issues and achieving the cultural and behavioural changes necessary to attain a culture of conservation. Without a strong education and outreach component of Provincial CDM strategy, it will be very difficult to drive the cultural change necessary to achieve the mandatory and aggressive CDM Targets and sustain those savings over the long-term. THESL submits that when deciding on the issue of duplication, the Board should recognize that the OPA's position is that PAB funding will always be available for educational and outreach programs, and the Board should focus its duplication inquiry on whether the Proposed Programs are, in-fact, incremental to the OPA's PAB funding. It is worth noting that is the approach the OPA itself took in the Hydro One proceeding (Exhibit K3.1 and in the Transcript, Volume 3, Page 108, Line 11 to Page 109, Line 22).

24. THESL submits that the evidence in this case is clear. The Educational and Outreach Programs are incremental to the OPA's allocated PAB funding, and are therefore non-duplicative of the OPA Programs. THESL submits that the Educational and Outreach Programs promote the understanding of energy issues and lead to behavioural changes that result in the overall reduction of electricity demand and consumption. THESL submits that the OPA does not have any equivalent stand-alone education and outreach programs (Transcript, Volume 3, Page 115, Line 18 to Page 116, Line 10).
25. THESL has serious concerns about its ability to actually pursue its proposed Educational and Outreach Programs if it is denied Board-approved funding and told to rely exclusively on PAB. First, the evidence on the record is that THESL's PAB funding has already been fully allocated to program administrative and business development activities directly related to the OPA Programs and designed to drive specific demand and energy savings for those OPA Programs (Exhibit J, Tab 8, Schedule 2 and Transcript, Volume 2, Page 17, Line 17-22 and Transcript, Volume 2, Page 88, Line 5 to Page 89, Line 13). Second, the OPA's total PAB budget has been fully allocated to all of the LDCs in the Province, and the OPA has at no time committed to providing THESL with additional or incremental PAB funding (Transcript, Volume 2, Page 41, Line 11-14). If THESL must use PAB to fund its Educational and Outreach Programs, THESL must necessarily remove resources that are currently allocated to drive specific demand and energy savings for the OPA Programs. Third, the OPA has at no time indicated that the activities that constitute THESL's Educational and Outreach Program will automatically and without doubt be eligible for approval under PAB (Transcript, Volume 2, Page 121, Line 10-20). To qualify for PAB funding, the expenses must qualify as "LDC Eligible Program Administrative Expenses" which in turn must be directly related to the OPA Programs. The evidence in this proceeding is that none of THESL's proposed Outreach and Education Programs are directly related to the OPA Programs, and in fact there are numerous material distinctions between these program groups (Exhibit K1.2 and K.1.3). This creates a significant degree of uncertainty for THESL, as it is not at all clear that the

OPA will fund the Education and Outreach Programs which are, by design, purely educational programs that are not tied directly to OPA Programs.

26. If the Board accepts that the Educational and Outreach Programs are in fact incremental, non-duplicative, educational programs pursuant to Section 4.3 of the Code, THESL suggests that the Board's inquiry will not stop there. It is still incumbent upon THESL to demonstrate that the Proposed Programs are appropriate and that the proposed spending amount is reasonable and appropriate. THESL will reply to the submissions of the parties in this regard below.
27. Board staff and AMPCO argue that an expenditure of approximately \$7.6M over 4 years on the Educational and Outreach Programs is excessive and does not represent good value for money (Board staff at pg. 5, AMPCO at para. 32). VECC argues that the proposed spending on the Consumer Outreach and Education Program of \$5.7 million over 4 years is not unreasonable (VECC at pg. 10-11). Neither AMPCO nor Board staff suggest an objective yardstick against which to assess the appropriate level of spending on purely educational programs in THESL's franchise area. Instead, they simply assert that the amount proposed is excessive and then once again refer to the theoretical presence of PAB funding.
28. THESL submits that the theoretical availability of PAB funding should not, in and of itself, lead to conclusion that the budgets for the Proposed Programs are unreasonable or inappropriate. Instead, THESL submits that the Board should establish an objective benchmark of what it considers a reasonable and appropriate amount to spend on purely educational initiatives in the LDC's service area. The evidence before the Board is that THESL has years of experience as a CDM leader delivering successful educational and outreach programs across the City of Toronto. THESL submits that it has built on its considerable experience to propose what, in its experience and judgement, represents a reasonable and appropriate amount of spending on the Proposed Programs. THESL submits that the Board should approve the proposed spending as reasonable and appropriate.

29. Board staff and SEC further argue that the efforts and costs associated with educating potential participants should be included directly in the design and delivery of each individual program for a more accurate depiction of each program's overall performance and cost effectiveness (Board staff at pg. 5, and SEC at paras. 28-32).
30. THESL submits that both Board staff and SEC have confused the principal purpose of the proposed Education and Outreach Programs, which is purely educational in nature, and THESL's efforts to cost effectively use the same resources to simultaneously cross-promote OPA and Board-approved CDM Programs. THESL submits that the OPA errs when it suggests that educational initiatives are equivalent to marketing initiatives. THESL submits that while both education and marketing initiatives may use similar media to reach customers, the message in educational programs (which is designed pursuant to Section 4.3 of the CDM Code "to promote the understanding of energy issues" in general) is fundamentally different than the message used in marketing initiatives (which is designed to drive sales to specific OPA Programs). THESL's Community Outreach and Education Program is principally an educational program. It targets Toronto's diverse population with face-to-face educational programs and hands-on electricity conservation and energy efficiency learning at Toronto's schools, retailers, community events, and at customers' door steps in hard-to-reach at-risk neighbourhoods – all with a goal of promoting further understanding of energy issues in general and behaviour change as it relates to conservation, energy efficiency, and time-of-use rates (Application, Tab 4). THESL's Business Outreach and Education Program and Greening Greater Toronto programs target commercial and institutional customers and building managers with targeted energy efficiency and conservation messages aimed at key decision makers (Application, Tab 1 and 6). THESL submits that while conducting its educational programs, it is the only sensible and cost effective use of resources to also identify potential leads for specific CDM programs if a customer expresses some interest. However this marketing is incidental to the primary purpose of the proposed Education and Outreach Programs, is included only for practical efficiency, and should not be a reason for denying approval of the Proposed Programs.

D. THE FIVE REMAINING PROGRAMS

1. Commercial Energy Management and Load Control Program

31. Board staff, AMPCO, LIEN and EP are all supportive of the Board providing its approval for the Commercial Energy Management and Load Control Program (Board staff at pages 6-7, LIEN at para. 49, EP at para 24, AMPCO at para. 18). No party opposes THESL's request for Board approval of this Proposed Program. THESL submits that the Proposed Program and the proposed budget of \$11,685,777 is reasonable and appropriate and the Board should therefore approve this Proposed Program.
32. SEC raised a concern about the calculation of cost effectiveness of demand response programs in general, but ultimately does not oppose approval of the Commercial Energy Management and Load Control Program (SEC at para. 38-40). In response to SEC's concern, THESL submits that the assumptions that SEC is concerned with are all inherent to the OPA's protocols and models. Specifically, pursuant to the OPA's protocols for assessing the cost effectiveness of load control and demand response equipment incentives, the cost effectiveness of that incentive is assessed based on an assumption that the equipment will continue to be used for its entire useful life. THESL did not create this assumption; it has simply applied the OPA's protocol to assess the cost effectiveness of its Proposed Programs. The OPA's assumptions are incorporated into hidden and password protected portions of the TRC and PAC models so that neither SEC nor THESL can access or modify the OPA parameters. If SEC has concerns with the OPA's protocols, THESL submits that SEC should raise those concerns directly with the OPA - this is not the appropriate forum to address those concerns. Finally, THESL notes that the assumption that demand response and load control equipment will continue to be used for its entire useful life is consistent with THESL's experience with its *peaksaver* program, where customers continue to use load control devices long after the one-time incentive is paid. THESL notes that customers benefit from ongoing cost savings that are distinct from any incentives paid by using these devices.

2. Commercial, Institutional and Small Industrial Monitoring and Targeting Program

33. Board staff, AMPCO, LIEN and EP are all supportive of the Board providing its approval for the Commercial, Institutional and Small Industrial Monitoring and Targeting Program (Board staff at pages 7-8, LIEN at para. 49, EP at para 24, AMPCO at para. 18). No party opposes THESL's request for Board approval of this Proposed Program. THESL submits that the Proposed Program and the proposed budget of \$5,501,410 is reasonable and appropriate and the Board should therefore approve this Proposed Program.

3. Multi-Unit Residential Demand Response Program

34. Board staff, AMPCO, LIEN and EP are all supportive of the Board providing its approval for the Multi-Unit Residential Demand Response Program (Board staff at pages 10-12, LIEN at para. 49, EP at para 24, AMPCO at para. 18). No party opposes THESL's request for Board approval of this Proposed Program. THESL submits that the Proposed Program and the proposed budget of \$19,914,690 is reasonable and appropriate and the Board should therefore approve this Proposed Program.
35. SEC raised a concern about the calculation of cost effectiveness of demand response programs in general, but ultimately does not oppose approval of the Multi-Unit Residential Demand Response Program (SEC at para. 38-40). THESL addresses SEC's concern at paragraph 32 above.
36. VECC does not oppose the Multi-Unit Residential Demand Response Program, but instead argues that the Board should direct THESL to broaden the scope of the program to include more rental units with in-suite air conditioning (VECC at pg. 13-14).
37. In its oral Decision in a motion brought by Pollution Probe in this proceeding, this Board panel held (Motion Hearing Transcript, Volume 1, Page 57, Line 28 to Page 58 Line 6):

The Board is here considering a collection of very specific programs, each with its own budget and attributes.

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

38. THESL submits that the Board should reject VECC's request that the Board direct THESL to expand the scope of its Proposed Program. VECC's proposal is premature and inappropriate. The Proposed Program was designed to target a very specific market of multi-unit residential buildings with centralized cooling and other centralized non-essential electrical loads. The Proposed Program is not designed to target decentralized, in-suite cooling units, which would be more appropriately addressed through the OPA *peaksaver* program.

4. Hydronic System Balancing Program

39. Board staff is supportive of the Board providing its approval for the Hydronic System Balancing Program, but only insofar as it is offered to the multi-unit residential building sector and only if THESL re-runs and passes the TRC and PAC tests again when the Proposed Program is revised to focus only on this sector (Board staff at pages 9-10).
40. Board staff is concerned that elements of the Proposed Program can be funded by the OPA's Equipment Replacement Incentive Initiative ("ERII") for the office, institutional and hospital sectors, and that funding approval by the Board is therefore not necessary.
41. THESL submits that Board staff's concern is premised on an incomplete understanding of the nuanced distinguishing features between ERII and the proposed Hydronic System Balancing Program. THESL is concerned that Board staff may have drawn an incorrect conclusion about the differences between the programs based on an incomplete cross examination, and that this conclusion does not conform with the evidentiary record before the panel.

42. THESL notes at the outset that the evidence before the panel is clear. The OPA, as the architect of the OPA Programs, is best positioned to provide an expert opinion on the issue of duplication. It is the OPA's opinion that the Hydronic System Balancing Program is not duplicative of ERII, or any other OPA Program. This opinion evidence is detailed in Exhibit K1.1 and was supported by the pre-filed and oral evidence of Ms. Julia McNally who explained the OPA's principled and purposive review of the Proposed Program. The OPA does not limit its opinion on non-duplication to only the multi-unit residential building sector, as is implied by Board staff. Instead, the OPA includes in their letter a condition that THESL will work closely with the OPA to develop a new ERII worksheet for the multi-unit residential building market. This is consistent with THESL's past role as a CDM market leader – the OPA wants to learn from THESL's experience to help improve a Province-Wide Program. This condition cannot be read, in THESL's submission, to limit the OPA's very clear opinion that the Proposed Program as a whole is non-duplicative.
43. Board staff rely principally on evidence drawn from an examination of THESL staff, the purpose of which was, presumably, to clarify whether the OPA thought about the office, institutional and hospital sectors when arriving at its conclusion that the program was non-duplicative (Transcript, Volume 3, Page 16 at Line 15 to Page 18 at Line 1). This is, of course, hearsay evidence - THESL cannot speak to what the OPA actually considered in making its assessment. However, in response to examination by the Board panel the OPA's witness clarified that in arriving at its opinion the OPA did in fact understand that the Hydronic System Balancing Program targeted more than just the multi-unit residential building market (Transcript, Volume 3, Page 81, Line 13-23). The OPA's witness further clarified that the condition was included in the letter to help the OPA develop a new ERII worksheet for the multi-unit residential building market, and not to suggest that the OPA only thought about this one sector when arriving at its conclusion that the Proposed Program is non-duplicative (Transcript, Volume 3, Page 81, Line 1-12).

44. Board staff relies upon an exchange where the THESL witness was never asked to list all of the distinguishing features between ERII and the Hydronic System Balancing Program. Instead, the question was posed to the witness in a way that he provided a non-exhaustive illustrative example of an easy to understand distinguishing feature. Specifically (emphasis added):

MR. MILLAR: Again, I may have to ask the OPA these questions.

Are office, institutional and hospital sectors included in the OPA's province-wide program?

MR. MARCHANT: Yes.

MR. MILLAR: So in that sense, are those elements of your program duplicative?

MR. MARCHANT: I mean, in terms of the market sectors, this program overlaps with other programs, but there is key distinguishing features with this program, which includes the audit or the system assessment incentive and the actual targeting of specific equipment within these buildings.

[...]

MR. MILLAR: Does the current OPA program allow them to target hydronic systems?

MR. MARCHANT: I mean, it could apply under ERII. It just there is no -- there's no provision in the province-wide programs for the assessment component.

(Transcript, Volume 3, Page 18, Line 24 to Page 19, Line 27).

45. THESL submits that the fact that its witness, while under cross-examination, chose a single example to illustrate an easy to understand distinguishing feature between ERII and the Proposed Program is not sufficient evidence to arrive at the conclusion, as Board staff has done, that funding approval by the Board is not necessary because of duplication with ERII.
46. In response to Board Staff IR#4, THESL provided a more comprehensive concordance of the differences between ERII and the Proposed Program. In summary, while the programs may overlap in respect of a limited number of target markets, the programs differ in respect of:

- (a) scope (ERII audit funding does not allow for hydronic system assessments and the retro-commissioning funding applies to the chilled water plant only whereas the Proposed Program applies to all hot and cold water hydronic main pumps and booster pumps);
 - (b) marketing approach (the Proposed Program uses targeted marketing of key facility owners/managers and institutions and specific hydronic equipment within those buildings while ERII has a much broader target market and larger range of equipment replacements and, by necessity, must take a more generic approach to its marketing); and
 - (c) incentives (the Proposed Program offers a system assessment funding to demonstrate the savings of new hydronic system that does not exist under ERII).
47. The evidence before the Board is clear. THESL submits, and the OPA agrees, that the Proposed Program is non-duplicative. All of the parties have had the opportunity to compare directly the OPA Program Schedule for ERII (which is found at Schedule C-2 to the Master CDM Program Agreement) with the details of the Proposed Program. In addition, THESL has provided in its responses to written interrogatories a concordance of the key differences between ERII and the Proposed Program. THESL submits that the concern that has been raised by Board staff is based on a partial and incomplete understanding of the key distinguishing features between ERII and the Proposed Program.
48. THESL submits that the Proposed Program and the proposed budget of \$4,720,167 is reasonable and appropriate and the Board should therefore approve the Hydronic System Balancing Program in its entirety, and should reject Board staff's proposal to narrow the scope of the Proposed Program. THESL notes that AMPCO, LIEN and EP are all supportive of the Board providing its approval for the Hydronic System Balancing Program (LIEN at para. 49, EP at para 24, AMPCO at para. 18) and that no other party opposes THESL's request for Board approval of this Proposed Program.

5. Flat Rate Water Heater Conversion & Demand Response Program

49. LIEN, EP and AMPCO are supportive of THESL's proposed Flat Rate Water Heater Conversion Program (LIEN at para. 49, EP at para. 24, AMPCO at para. 18).
50. CCC opposes the Flat Rate Water Heater Program (CCC at paras. 58-60) on the basis that THESL has "for all intents and purposes" cancelled the flat rate water heater program, and that offering incentives to customers to withdraw from a program that is no longer offered is not consistent with the intent of the CDM Directive or CDM Code. Board staff is also not supportive of THESL's propose Flat Rate Water Heater Conversion Program (Board staff submissions pages 8-9), for much the same reason.
51. Both CCC and Board staff suggest that THESL refused to provide an answer to undertaking J3.1 as to whether THESL can unilaterally cease offering the flat rate for water heaters. THESL submits that this is not a fair or correct reading of its response. THESL does not know whether *in theory* it legally has the right to unilaterally cease offering the flat rate for water heaters. The flat rate for water heaters was approved by the Board in RP-2000-0021/EB-2000-0077/EB-2000-0335 (See specifically pages 6 to 7 of THESL's approved Schedule of Rates). It is simply not clear to THESL that it could unilaterally cease to offer its flat rate without the Board first approving the discontinuation of this rate. As a result, in response to Undertaking J3.1 THESL has laid out a plan to seek Board approval to cease offering the flat rate for water heaters as part of its next cost of service rate application. Because THESL actually plans to seek Board approval before discontinuing the flat rate service effective May 1, 2015, THESL responded that the theoretical question asked by Board staff was not relevant. *In practice*, THESL will seek Board approval before discontinuing the flat rate service.
52. THESL submits that the Board should reject the adverse inference proposed by Board staff and CCC suggesting that THESL does have the ability to unilaterally discontinue its flat rate water heater service. Their positions on this issue improperly presume that Board approval for discontinuation is not necessary, which is not THESL's position, and would

place both THESL and the Board panel in this proceeding in the untenable position of acting on a material issue that could dramatically effect specific customers before the evidence on this issue is properly and completely heard.

53. It is worth noting that the owners of flat-rate water heaters have not done anything wrong. They installed a flat rate water heater at a time when doing so was a legally permissible and commercially viable option. It is only now, after an evolution of policy thinking in the industry has focused on the concerns of cost causality, peak system demand and time-of-use rates, that these flat rate customers have come under increased scrutiny. The evidence is clear. THESL has not cancelled its flat rate water heater service and THESL does not intend to do so without first seeking Board approval to end a Board-approved service offering.
54. Both CCC and Board staff argue that a Board-approved CDM Program is not the appropriate vehicle to transition customers from flat rate water heater service to a metered service. THESL acknowledges that one side-effect of THESL's Proposed Program is to mitigate the disruptive effects of forcibly transitioning some flat rate customers to metered service. However, THESL submits that this is not the principal purpose of the Proposed Program.
55. The purpose of the Proposed Program is to transition 80% of the roughly 5,500 flat rate water heater customers onto metered service and a *peaksaver* load-control device to achieve 10.2 GWh of net cumulative energy savings, 0.3 MW of peak demand savings and develop 1.49 MW of additional demand response capability. Board staff argue that converting customers to metered service does not, in itself, represent a conservation activity. This is contrary to the evidence before the Board that conservation savings are directly attributable to such a conversion (Appendix A of the Application for the Flat Rate Water Heater Conversion Program shows, based on measured data from actual conversions from unmetered to metered service, an average reduction in electricity consumption of 20.5% which is directly attributable to the conversion). The position is also contrary to the principle of both the Province and the Board that metered service, and

in fact time-of-use metered service, does exert an economic signal that favours conservation. It is simply implausible for Board staff to assert that transitioning from un-metered service to metered service is not conducive to conservation.

56. THESL submits that Board staff is ignoring very real cumulative energy savings, peak demand savings and additional demand response capability offered by the Proposed Program. In addition, without the Proposed Program, these customers are not eligible to participate in *peaksaver*. The Proposed Program will help drive savings by educating these customers about TOU rates, the benefits of shifting usage to help manage their electricity bills, and the advantages of using electricity wisely and promoting electricity conservation. The Proposed Program is cost effective, with an anticipated TRC and PAC benefit-to-cost ratios of 1.9 and 1.7 respectively when including the effect of the *peaksaver* conversion, and 1.8 and 1.7 respectively when excluding the effect of the *peaksaver* conversion.
57. VECC does not oppose the Flat Rate Water Heater Conversion Program, but instead argues that THESL should be required to: (i) emphasize in its communications the importance of conservation and behaviour change and the related risk of cost increases; (ii) actively promote conversions to gas water heating in partnership with Enbridge, and provide equivalent incentives; (iii) link the program with the distribution and installation of water saving devices; and (iv) analyse a lower level of incentive of 10-15 c/kWh and re-file a modified program (VECC at pages 12-13).
58. In reply, THESL submits that: (i) it has always intended to focus its messaging on the importance of conservation and behaviour change and will include a discussion of the related risk of cost increases; (ii) it would be an inappropriate use of its monopoly position to actively promote a business opportunity for Union or Enbridge, although THESL has previously (See Undertaking J3.2) and will continue to inform customers about alternative fuels such as natural gas, solar, propane or oil available from other vendors and THESL will not inhibit a customer from making a choice to switch to an alternative fuel source (Transcript, Volume 2, Page 162 Line 4 to Page 163, Line 23); (iii)

THESL has already committed to analysing and proposing the suggested improvements as part of its next tranche of CDM programs for Board approval in the fall, with a view to not further delaying the approval and implementation of the Proposed Program as-is (Transcript, Volume 2, Page 177, Line 28 to Page 178, Line 22); and (iv) it explored a range of possible incentive levels before settling on 20 c/kWh as an appropriate level to drive the desired behaviour change while remaining cost effective, with positive TRC and PAC test results. THESL wishes to remind the Board of its concerns in respect of timing as outlined at paragraph 17 of its Argument-in-Chief. THESL submits that it is simply too late to make fundamental changes to its Proposed Programs and further delay the implementation of these programs.

59. THESL submits that the Proposed Program and the proposed budget of \$1,227,853 is reasonable and appropriate and the Board should therefore approve this Proposed Program.

E. PROGRAM DEVELOPMENT AND APPLICATION COSTS

60. SEC argues that THESL "may" not be entitled to recovery any of its program development, planning and application costs. SEC suggests that application costs would not qualify as "amounts approved by the Board for conservation and demand management programs" under Section 78.5 of the *Ontario Energy Board Act, 1998* nor would these costs qualify as "program expenditures" under Section 5.4 of the CDM Code on the basis that THESL's regulatory costs (including intervenor and legal costs) "have nothing to do with the planning or implementation of any of THESL's CDM programs within the meaning of the OEB Act or Code" (SEC at para. 18-21).
61. THESL submits that SEC's legal reasoning is difficult to follow and its conclusion is not at all plausible. THESL submits that SEC errs when it suggests that these costs "have nothing to do" with the Proposed Programs, when in fact THESL's proposed application costs are directly related to, and would not have been incurred except for, the Proposed Programs. THESL is going to incur these costs because it must complete the process

established by the CDM Code to obtain Board approval for the Proposed Programs. As a result, THESL submits that these costs do qualify as “program expenditures” under Section 5.4 of the CDM Code and once approved by the Board would qualify for recovery under Section 78.5 of the *Ontario Energy Board Act, 1998*.

62. Board staff support THESL’s request to recover its forecast 2011 application costs (\$145,000) as costs directly related to the Proposed Programs that are incremental to other regulatory amounts currently recovered through distribution rates by THESL. (Board staff at page 13)
63. Board staff goes on to argue that THESL's 2010 planning and development costs (\$158,199) and the 2011 forecasted application support costs (\$40,250) should not be approved by the Board. Board staff acknowledge that these functions were “helpful” to THESL in preparing and defending its Application, but Board staff asserts that these activities should have been completed by existing THESL staff and the costs should have been recovered through distribution rates. (Board staff at page 13)
64. Board staff raised this issue for the first time in their submissions. They did not raise the issue in written IRs or during the oral hearing, when THESL could have led evidence to address this concern. However, Board staff now argues that there is no clear evidence that these costs were incremental to THESL.
65. THESL submits that in drawing this conclusion, Board staff failed to make reference to the publically accessible evidence available in THESL's Application for 2010 distribution rates in EB-2009-0139. While not on the record in this proceeding, this material is publicly available and accessible to all of the parties, and THESL would expect Board staff to conduct an inquiry into exactly what was and was not included in THESL's approved 2010 distribution revenue requirement before asserting that THESL's requested costs should already be covered through existing distribution rates.

66. In its Application for rates effective May 1, 2010 in EB-2009-0139, under the heading "ITEMS EXCLUDED FROM REVENUE REQUIREMENT", THESL indicated that no new CDM costs were proposed for inclusion in its 2010 revenue requirement. Specifically, Exhibit A1, Tab 1, Schedule 1, Page 15, Lines 7-15 provides:

"ITEMS EXCLUDED FROM REVENUE REQUIREMENT"

Conservation and Demand Management

THESL remains committed to a cost-effective, inclusive approach to CDM program development and implementation, and will file with the Board its proposals at the appropriate time as determined by the Board. Some OPA funding remains available to THESL for 2009 and 2010. Therefore, THESL is not proposing new 2010 CDM programs for approval in this Application. THESL intends to file a comprehensive CDM program proposal in due course."

67. THESL settled many of the issues in the EB-2009-0139 proceeding and the settlement agreement was ultimately accepted by the Board in its Decision dated April 9, 2010. THESL submits that the evidence is clear that its 2010 distribution rates were set on the basis that none of its CDM costs, including program development and application costs, would be included in 2010 rates. This is consistent with the evidence in this proceeding that THESL will not recover any CDM related costs from distribution rates (Exhibit J, Tab 3, Schedule 8). The evidence is also clear that THESL did not recover any of its costs for the Proposed Programs from the OPA (See the February 25, 2011 Addendum).
68. At no time did Board staff, the Board or any other party for that matter, raise any concerns with THESL's proposal not to include any new CDM costs in its 2010 revenue requirement during the EB-2009-0139 proceeding.
69. As a result, all of THESL's planning and development costs and forecasted application support costs have been incurred as part of THESL's unregulated business, as per the CDM Code, and are not being recovered under existing distribution rates or under OPA funding. If the costs are not approved by the Board, the costs will be left to the account of THESL's shareholder. THESL submits that this would result in a grossly unfair outcome, making THESL's shareholder solely responsible for costs of planning, developing and

applying for the Proposed Programs that are necessary to meet mandatory CDM Targets. THESL submits that these costs are more than just “helpful”. The Proposed Programs would not exist had THESL not incurred the necessary planning and development costs and this Application would not be before the Board had THESL not incurred the necessary application costs. THESL has designed a bundle of innovative new programs that comply with the CDM Code, and THESL has incurred considerable expense (including the rapid preparation of draft EM&V plans) to present a full and complete Application to the Board. THESL submits that it needs certainty that it will recover these costs. If the Board fails to approve these costs, it would significantly discourage any future innovation of new CDM programs.

70. THESL submits that Board staff’s concern that the planning and development costs (\$158,199) and the forecasted application support costs (\$40,250) were recovered through existing distribution rates is unfounded. The evidence in EB-2009-0139 demonstrates that 2010 distribution rates were set by explicitly excluding those costs from revenue requirement. THESL submits that, much like its forecast 2011 application costs (\$145,000), which the Board staff supports recovery of, its planning and development costs and forecasted application support costs are directly related to the CDM Programs arising from the CDM Code and are incremental to other amounts currently recovered through distribution rates.
71. Finally, SEC expressed a concern that if the Board approves THESL’s proposed program development and planning costs that those costs have not been properly accounted for within the TRC and PAC test calculations for each of the Proposed Programs. (SEC at para. 22-23)
72. THESL submits that its 2010 and 2011 application, development and planning costs are not directly attributable to a particular Proposed Program. Instead, they were incurred in developing, planning and applying for the bundle of eight Proposed Programs as a whole, and therefore it is difficult to properly allocate those costs to a program specific TRC and PAC test. THESL notes that it will incur these costs regardless of whether the Board

approves none, some or all eight of the Proposed Programs. As a result, the amount attributable to each Proposed Program depends, in part, on the Board's Decision in this matter. Put simply, the costs are common to all the Proposed Programs and there is no non-arbitrary way of allocating them to specific Proposed Programs. Finally, it is worth noting that the portfolio of Proposed Programs results in net benefits of over \$27 million for both TRC and PAC (Exhibit J, Tab 1, Schedule 1), and that the costs of \$343,449 will not change the outcome of that assessment in any material way.

73. For the foregoing reason, THESL submits that it is appropriate for the Board to approve recovery of THESL's 2010 and 2011 program development, planning, and application costs in this Application. THESL notes that the Board panel considering the Application is also best positioned to properly assess the planning, development and application costs associated with the Proposed Programs.
74. Finally, THESL submits that its program development, planning, and application costs are reasonable and appropriate. No party has suggested that THESL's program development, planning and applications are unreasonable, particularly given the Application's role as a "test case" for the distribution sector as a whole and the lack of precedents for THESL to draw on.

F. PAYMENT SCHEDULE

75. THESL agrees with Board staff's submissions regarding the appropriate payment schedule. THESL recognizes that the Board may not decide on any specific payment schedules in its Decision and that instead the Board may direct the IESO and Board staff, and THESL to work together in a timely manner to develop an agreed upon payment schedule that would be administered by the IESO. THESL has had an opportunity to review the IESO payment proposals for the fixed and variable charges, and THESL finds that the proposals are acceptable to THESL and should be approved by the Board with an additional administrative control element. THESL submits that the Global Adjustment is a large pool of funds which is currently comprised of multiple components of costs and

charges, and that therefore it would be beneficial from a control perspective for the IESO to include a specific charge type in its settlement system to clearly identify CDM payments for Board-approved CDM Programs.

G. CONCLUSIONS

76. For all of the foregoing reasons, including those specified in its Argument-in-Chief, THESL requests that the OEB approve its eight Proposed Programs and budgets as requested in the Application together with the other relief as requested in THESL's submissions.

All of which is respectfully submitted this 1st day of June, 2011.

*Original signed by John A.D. Vellone for J.
Mark Rodger*

J. Mark Rodger

Original signed by John A.D. Vellone

John A.D. Vellone

Counsel to Toronto Hydro-Electric System Limited

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