Ontario Energy Board
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

Commission de l'énergie de l'Ontario
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone; 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273

Ontario

BY EMAIL

May 22, 2012

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: London Hydro Inc.
Motion to Review and Vary Board Decision EB-2011-0181
Board Staff Submission
Board File No. EB-2012-0220

In accordance with the Notice of Motion to Vary and Procedural Order No.1, please find attached the Board Staff Submission in the above proceeding. Please forward the following to London Hydro Inc. and to all other registered parties to this proceeding.

As a reminder, London Hydro Inc.'s Reply Submission is due by May 25, 2012.

Yours truly,

Original Signed By

Georgette Vlahos
Analyst, Applications & Regulatory Audit

Encl.

ONTARIO ENERGY BOARD

STAFF SUBMISSION

London Hydro Inc.
Motion to Review and Vary Board Decision
EB-2011-0181

EB-2012-0220

May 22, 2012

Board Staff Submission
London Hydro Inc.
EB-2012-0220

Introduction

On April 25, 2012, London Hydro Inc. ("London Hydro") filed with the Ontario Energy Board (the "Board") a Notice of Motion to Review and Vary (the "Motion") the Board's Decision and Order dated April 4, 2012 in respect of London Hydro's 2012 Incentive Regulation Mechanism ("IRM") rate application (EB-2011-0181).

The Motion seeks to vary the Board's 2012 IRM Decision and Order so that London Hydro may recover a Lost Revenue Adjustment Mechanism ("LRAM") amount of $202,820.96, which represents the difference between London Hydro's total LRAM claim of $355,473.45[1] and the amount approved for recovery of $152,652.49 for 2010 lost revenue related to 2010 CDM programs. The grounds for the Motion is an alleged inconsistency between the 2012 IRM Decision and Order and the Board's decision in Bluewater Power Distribution Corporation's ("Bluewater Power") 2012 IRM application (EB-2011-0153) and an alleged error in rejecting interrogatory responses from London Hydro's 2009 cost of service proceeding, which London Hydro believes provide sufficient indication that London Hydro's cost of service application did not include lost revenue from CDM programs deployed in 2009 and persistence from 2009 programs in 2010.

On May 7, 2012, the Board issued its Notice of Motion to Vary and Procedural Order No. 1 (the "Notice") which established a due date for London Hydro to file additional evidence in support of its motion and due dates for submissions on the threshold question and the merits of the Motion.

On May 14, 2012, London Hydro submitted additional evidence in support of its Motion.

The purpose of this document is to provide the Board with the submissions of Board staff based on its review of the evidence submitted by London Hydro.

[1] EB-2011-0181, Interrogatory Responses, #12(a)

The Threshold Issue

Under Rule 45.01 of the Board's *Rules of Practice and Procedure,* the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. Section 45.01 of the Board's Rules of Practice and Procedure (the "Rules") provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Rule 44.01(a) provides the grounds upon which a motion may be raised with the Board:

> Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The threshold test was articulated in the Board's decision on several motions filed in the *Natural Gas Electricity Interface Review Decision* ("NGEIR Review Decision")[2].

The Board, in the NGEIR Decision, stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raised a question as to the correctness of the order or the decision, and whether there was enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision.

Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an "identifiable error" in the decision for which review is sought

2 Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006-0332/0338/0340, May 22, 2007, p. 18 and recently applied in EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012).

and that "the review is not an opportunity for a party to reargue the case"[3].

Board staff submits that there is no identifiable error in the Board's original decision to warrant review and the threshold test has not been met. London Hydro's Notice of Motion and additional filed evidence alleged an inconsistency between the Board's decision in London Hydro's 2012 IRM application and the decisions in Bluewater Power's, West Coast Huron Energy Inc.'s ("West Coast Huron") and Enersource Hydro Mississauga Inc.'s ("Enersource") 2012 IRM applications. However, as will be indicated below, the 2008 and 2009 COS applications of those other distributors specifically indicated, in the Settlement Agreement or Board decision, that their load forecasts did not reflect in any way specific electricity conservation programs. Accordingly, in Board staff's view the evidentiary basis for the decision in London Hydro's application is distinguishable from the evidence in the Bluewater Power, West Coast Huron and Enersource applications such that there is no inconsistency in the decisions as alleged in the Motion.

Board staff therefore submits that the Board should not proceed with a review of the original decision as the 'threshold test' for review has not been met. In the event that the Board does decide to review the original decision, Board staff submits that, for the reasons set out below, London Hydro's application is distinguishable from that of the other applications discussed and the Board's decision in London Hydro's application is not inconsistent with the Board's decisions in the other applications.

Submission

The Board's *Guidelines for Electricity Distributor Conservation and Demand Management* (the "Guidelines") issued on March 28, 2008 outline the information that is required when filing an application for LRAM. Board staff's position in London Hydro's 2012 IRM proceeding noted that section 5.2 of the Guidelines states the following with respect to LRAM claims:

> Lost revenues are only accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as

3 NGEIR Decision, at pages 16 and 18

> the savings would be assumed to be incorporated in the load forecast at that time[4].

In its Motion, London Hydro states that it interpreted the Board's CDM Guidelines as set out above, but that it was under the impression that section 5.3 of the CDM Guidelines took precedence over section 5.2. Section 5.3 of the CDM Guidelines state:

> When applying for LRAM, a distributor should ensure that sufficient time has passed to ensure that the information needed to support the application is available[5].

Board staff submits that the CDM Guidelines' primary intent was that lost revenues would only be accruable until the time that the distributor rebased, at which point lost revenues would have been incorporated into the distributor's load forecast. Board staff further submits that to proceed with what essentially becomes a true-up of the effects of CDM activities embedded in a rebasing year would be contrary to the expectations of section 5.2 of the CDM Guidelines and contrary to the regulatory principle that precludes retroactive adjustment to final rates unless specifically addressed in a prior Board decision. This position was supported by the Board in its decision on Hydro Ottawa Limited's 2012 cost of service application (EB-2012-0054)[6].

In both its 2012 IRM proceeding and its Motion, London Hydro argued that it advised parties through the interrogatory phase of its 2009 cost of service proceeding EB-2008-0235 (the "2009 COS Application") that it was not proposing to include any lost revenues in its load forecast related to CDM programs delivered after 2007.

Board staff submits that there is no reference in the Board's decision in London Hydro's 2009 COS Application accepting London Hydro's proposal to not include any lost revenues beyond those associated with 2007 CDM programs in its load forecast. Nor is there any indication in that decision that London Hydro was not including any lost revenues for CDM activities after 2007 because it would be filing for LRAM to recover these lost revenues at a future date. Specifically, as referenced in its notice of motion,

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[4] Section 5.2: Calculation of LRAM, *Guidelines for Electricity Distributor Conservation and Demand Management* (EB-2008-0037)
[5] Section 5.3: Calculation of LRAM, Guidelines for Electricity Distributor Conservation and Demand Management (EB-2008-0037)
[6] Ontario Energy Board Decision and Order, Hydro Ottawa Limited, EB-2012-0054, December 28, 2011, page 24

London Hydro only touched on this issue in response to an LPMA interrogatory in the COS proceeding, stating that "it cannot advise at this time that it will not file an LRAM or SSM at some time in the future for lost revenues that may occur for the period after 2008 for CDM programs implemented after 2008"[7].

In its decision in the 2009 COS Application the Board did not explicitly accept the approach that London Hydro is now advocating. Board staff submits that a distributor simply noting, in an interrogatory response, that it cannot advise if it will file for lost revenues for a period of CDM activity is not justification or rationale for not including a CDM component in its load forecast. Nor does it lead to the conclusion that the Board did not intend to treat the approved load forecast as final in all respects.

In Board staff's submission on Thunder Bay Hydro Electricity Distribution Inc.'s ("Thunder Bay") 2012 IRM application, the issue was whether the Board-approved 2009 load forecast for Thunder Bay included any CDM effects. Board staff noted that the fact that a load forecast was adjusted by the Board does not necessarily mean that no CDM savings are imputed in the final forecast approved by the Board[8].

In Thunder Bay's application, the Board agreed with Board staff that an adjustment to remove a proposed CDM impact does not mean that there are no CDM effects reflected or imputed in the load forecast. The Board also referred to the Hydro Ottawa decision (EB-2011-0054) where the Board found that there is no true-up of the effects of CDM activities embedded in a rebasing year. The Board actually went further and also noted that the recovery of approximately $61,897 of LRAM associated with 2008 CDM activities persisting in 2009 and 2010 in a prior Thunder Bay application is not determinative. The Board noted that there was no indication that the Board, at that time, turned its mind to the issue of whether CDM was reflected in the 2009 load forecast. The Board therefore was of the view that there is no reasonable basis to vary from the 2008 CDM Guidelines.

Accordingly, Board staff submits that London Hydro's 2009 COS Application cannot be said to form the basis for allowing London Hydro a future LRAM filing date for lost revenues that should have been factored into its load forecast in the 2009 COS Application.

[7] LPMA Interrogatory Response #45, London Hydro Inc., EB-2009-0235
[8] EB-2011-0197, Pages 14-17

In its additional evidence filed May 14, 2012, London Hydro notes that in the original Motion material, London Hydro had mentioned the Board's Decision and Order in Bluewater Power's 2012 IRM Application (EB-2011-0153). In its additional evidence, London Hydro notes the Decisions and Orders in two other 2012 IRM applications (i.e. West Coast Huron and Enersource) in which the Board allowed recovery of LRAM-related amounts of the kind requested by London Hydro and rejected by the Board in its 2012 IRM Application.

Board staff submits that London Hydro's situation is not comparable to that of Bluewater Power, West Coast Huron or Enersource. It was clearly stated in both Bluewater Power's and Enersource's Settlement Agreements in their 2009 and 2008 COS applications respectively[9], that their revised load forecasts did not reflect in any way specific electricity conservation programs, and these agreements were approved by the Board. With respect to West Coast Huron, in the Board's decision in its 2009 cost of service application, EB-2008-0248, the Board specifically acknowledged that the load forecast for the 2009 test year did not include CDM effects[10].

In all applicable 2012 IRM applications, the Board identified the above conditions as the test for allowing true ups to previously approved load forecasts. In Board staff's view, London Hydro does not meet this test. Board staff notes that in many of the Board's decisions and orders[11] in the 2012 IRM process, the Board disallowed LRAM claims for the rebasing year as well as persistence of prior year programs in and beyond the test year on the basis that the applicants did not meet this test and therefore these savings should have been incorporated into the applicant's load forecast at the time of rebasing.

All of which is respectfully submitted

[9] EB-2008-0221 and EB-2007-0706 respectively
[10] EB-2008-0248, Decision and Order, Page 6
[11] For example, EB-2011-0154 (Brant County Power).