



**PUBLIC INTEREST ADVOCACY CENTRE
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May 22, 2012

VIA MAIL and E-MAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge St.
Toronto, ON
M4P 1E4

Dear Ms. Walli:

**Re: Vulnerable Energy Consumers Coalition (VECC)
London Hydro Inc.
Notice of Motion to Vary, EB-2012-0220
Submissions of VECC**

Please find enclosed the submissions of VECC in the above-noted proceeding. We have also directed a copy of the same to the Applicant.

Thank you.

Yours truly,

(ORIGINAL SIGNED BY)

Michael Janigan
Counsel for VECC
Encl.

cc: London Hydro Inc.
Mr. Mike Chase

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by London Hydro Inc. for an order or orders approving or fixing just and reasonable distribution rates and other charges, to be effective May 1, 2012.

AND IN THE MATTER OF a Motion to Review and Vary by London Hydro Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's decision and Order in proceeding EB-2011-0181.

FINAL SUBMISSIONS

On Behalf of The

Vulnerable Energy Consumers Coalition (VECC)

May 22, 2012

Vulnerable Energy Consumers Coalition (VECC)

Final Submissions

1 Motion To Vary

- 1.1 On April 25, 2012 London Hydro Inc. ("London Hydro Inc.") 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 grounds for the Motion include an alleged inconsistency between the EB-2011-0181 decision and Order and the Board's decision in Bluewater Power Distribution Corporation's ("Bluewater") 2012 rate application (EB-2011-0153).
- 1.2 The Motion seeks to vary the Board's EB-2011-0181 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 adjusted LRAM claim of \$355,473.45 (including carrying charges) and the amount approved for recovery of \$152,652.49 for 2010 lost revenue related to 2010 CDM programs.
- 1.3 The Motion also alleges that the Board erred in rejecting interrogatory responses from London Hydro's 2009 Cost of Service (COS) proceeding, which London Hydro believes provide sufficient indication that London Hydro's COS application did not include lost revenue from CDM programs deployed in 2009 and persistence from 2009 programs in 2010.
- 1.4 Given the narrow scope of the Motion, the Board has determined that the most expeditious way of dealing with this Motion is to consider concurrently the threshold question of whether the matter should be reviewed (as contemplated in the Board's Rules of Practice and Procedure) and the merits of the Motion.¹

2 Threshold Question

- 2.1 Section 44.01 of the Board's Rules of Practice and Procedure (the "Rules") requires that "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;

¹ PO#1 dated May 7, 2012, Page 2

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;”

- 2.2 London Hydro submits that the threshold question should be answered in the affirmative.²
- 2.3 London Hydro identifies errors in the Board’s April 4, 2012 decision – both errors in fact (in denying the requested relief in the face of the interrogatory responses in London Hydro’s 2009 COS application that clearly indicate that London’s COS application did not include lost revenue from CDM programs deployed in 2009 and persistence from 2009 programs in 2010 and that those matters be addressed at a later date) and errors in the application of the Board’s March 28, 2008 *Guidelines for Electricity Distributor Conservation and Demand Management* (EB-2008-0037).
- 2.4 London Hydro also submits that the Board’s decision raises a concern about regulatory consistency in that the principles applied by the Board in the London Hydro decision (April 4, 2012) appear to have departed from those applied in the Bluewater decision (March 22, 2012). London Hydro submits that this regulatory inconsistency is a reasonable ground for review.³
- 2.5 VECC makes the following points on the threshold question.
- 2.6 First, VECC does not agree that regulatory inconsistency satisfies the threshold for a motion to review, particularly when previous Board decisions have not always been consistent. VECC notes as did London Hydro in its submissions⁴, that panels of the Board are not and cannot be thought to be bound to the decisions of proceeding panels. Each panel must make its decision on the basis of the facts before it and the relevant policies and principles affecting the decision.⁵
- 2.7 VECC cautions that if the Board allows this Motion in part on the basis of regulatory inconsistency, other parties will look to vary Board decisions on the ground of regulatory inconsistency and will inevitably rely on past Board decisions that support their alternative view.
- 2.8 Second, VECC does not agree an inconsistency has occurred to warrant a review.
- 2.9 VECC submits that the London Hydro decision is not inconsistent with the Bluewater decision. It is distinct from this decision, and consistent with many

² London Hydro Inc., Supplementary Motion Record dated May 14, 2012, Page 4, Paragraph 6

³ London Hydro Inc., Motion Record dated April 24, 2012, Page 9, Paragraph 13

⁴ London Hydro Inc., Motion Record dated April 24, 2012, Page 8, Paragraph 12

⁵ EB-2011-0256 decision, Bluewater Motion, Page 5

recent Board decisions and orders where the Board disallowed LRAM claims for the rebasing year and beyond on the basis that these savings should have been incorporated into the applicant's load forecast at the time of rebasing.

- 2.10 The London Hydro decision is also consistent with the Hydro Ottawa decision. In the Hydro Ottawa decision (EB-2011-0054), the Board disallowed a true-up of the effects of CDM. The Board noted firstly, that the Board's CDM Guidelines do not consider symmetry with respect to LRAM; and secondly, that there have been expectations related to LRAM including no-true up of the effects of CDM activities embedded in a rebasing year.⁶
- 2.11 The Board has determined it appropriate to deviate from the 2008 CDM Guidelines and approve an LRAM recovery only in cases where it was clear in the application or settlement agreement that an adjustment for CDM was not being incorporated into the load forecast specifically because of an expectation that an LRAM application would address the issue. For the reasons noted below, VECC submits that London Hydro's circumstances do not meet this exception. Accordingly, VECC submits the Board's original decision does not contain errors in fact and errors in the application of the Board's guidelines.

3 Merits of the Motion

- 3.1 In EB-2011-0181, London Hydro originally requested the recovery of an LRAM claim of \$291,455 based on final 2009 OPA CDM program results and estimated 2010 OPA CDM program results. Upon receipt of final OPA CDM results from the OPA, London Hydro updated its request for OPA CDM programs implemented in 2009 and 2010 to \$355,473.45, including carrying charges. This was London Hydro's first application for a rate rider to recover lost revenues. London Hydro did not request the recovery of lost distribution revenues with respect to CDM programs prior to 2009.⁷
- 3.2 The Board's *Guidelines for Electricity Distributor Conservation and Demand Management* (the "CDM Guidelines") issued on March 28, 2008 outline the information that is required when filing an application for LRAM or SSM.
- 3.3 The Board's CDM Guidelines state "The LRAM is determined by calculating the energy savings by customer class and valuing those energy savings using the distributor's Board-approved variable distribution charge appropriate to the class. The calculation does not include any Regulatory Asset Recovery rate riders, as these funds are subject to their own independent true-up process. Lost revenues are only accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as the savings would be assumed to be

⁶ EB-2011-0054 Hydro Ottawa decision, Page 24

⁷ EB-2011-0181 application, Pages 15-16

incorporated in the load forecast at that time.”⁸

- 3.4 In its decision regarding London Hydro’s 2012 rate application, EB-2011-0181, the Board approved an LRAM recovery of \$152,652.49 representing lost revenues from 2010 CDM programs in the year 2010, as the Board determined that London was under IRM in this year and London has not otherwise received LRAM compensation for this year. The Board also noted the 2010 CDM programs were not reflected in the last, Board-approved load forecast. The Board did not approve LRAM arising from CDM programs deployed in 2009 and persistence from 2009 programs in 2010, as these amounts should have been reflected in the 2009 load forecast at the time of rebasing, consistent with the 2008 CDM Guidelines. Absent specific language otherwise in the Board’s decision EB-2008-0235, there is no reasonable basis upon which to diverge from the 2008 CDM Guidelines.⁹
- 3.5 VECC notes that London Hydro indicates it was guided by the Board’s CDM Guidelines (EB-2008-0037) in preparing its EB-2011-0181 application.¹⁰
- 3.6 London Hydro’s rates were last rebased in 2009 (EB-2008-0235) and its load forecast was updated for rates effective May 1, 2009.
- 3.7 In its EB-2008-0235 decision, the Board accepted London’s load forecast and customer count forecast.¹¹ VECC notes the EB-2008-0235 decision does make reference to CDM programs not included in London Hydro’s load forecast or London Hydro’s intent to file a future LRAM application to address this issue. The Board noted in its London Hydro LRAM decision, that there was no specific language in the EB-2008-0235 decision to warrant deviating from the 2008 CDM Guidelines.
- 3.8 In its final submissions, VECC noted that in other recent decisions, the Whitby Hydro decision (EB-2011-0206) and the Hydro One Brampton decision (EB-2011-0174), the Board disallowed LRAM claims in the rebasing year and beyond for CDM programs implemented prior to (and including) the rebasing year. VECC submitted that in accordance with the Board’s guidelines and recent decisions, energy savings from London Hydro’s CDM programs deployed in 2009 are not accruable in the years 2009 and 2010 as these savings should have been incorporated in the 2009 load forecast at the time of rebasing.”¹²
- 3.9 In its submission, Board Staff stated:

⁸ Guidelines for Electricity Distributor Conservation and Demand Management (EB-3008-0037), Page 18

⁹ EB-2011-0181 decision, Page 15

¹⁰ EB-2011-0181 application, Page 15

¹¹ EB-2008-0235 decision and Order, Page 6

¹² EB-2011-0181 VECC Final Submission, Page 5

“In cases in which it was clear in the application or settlement agreement that an adjustment for CDM was not being incorporated into the load forecast specifically because of an expectation that an LRAM application would address the issue, and if this approach was accepted by the Board, then Board staff would agree that an LRAM application is appropriate. London may want to highlight in its reply whether the issue of an LRAM application was addressed in its cost of service application. In the absence of the above information, Board staff does not support the recovery of the requested lost revenues in 2009 for 2009 CDM programs, or the persisting lost revenues from 2009 CDM programs in 2010 as these amounts should have been built into London’s last approved load forecast.”

- 3.10 London Hydro submits its response to Board Staff Interrogatory No. 34 and London Property Management Association (LPMA) Interrogatory No. 45 in EB-2008-0235 make it clear that lost revenue from 2009 programs deployed in 2009 and persistence from 2009 programs in 2010 were not included in the 2009 Test Year load forecast and that they may be the subject of a future LRAM application.¹³
- 3.11 VECC does not agree that these interrogatory responses make this clear or provide adequate justification for the Board to deviate from the 2008 CDM Guideline and approve this LRAM recovery first sought by London Hydro in its original application (EB-2011-0181) and subsequently in this Motion.
- 3.12 In its response to Board Staff Interrogatory No. 45, London indicates it believes the revised load forecasts used to develop its 2009 revenue requirement will incorporate the impacts of CDM programs undertaken during the period 2005 to 2008. London Hydro further states 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.”¹⁴
- 3.13 VECC submits that London Hydro’s response is imprecise and does not specifically specify that the forecast does not reflect in any way 2009 CDM programs and that a future LRAM application would specifically address the issue. In the absence of this specific information, it is VECC’s view that London Hydro has not provided sufficient indication that its COS application did not include lost revenue from CDM programs deployed in 2009 and persistence from 2009 programs in 2010.

Regulatory Consistency

- 3.14 London Hydro also submits that the Board’s London Hydro decision raises a concern about regulatory consistency. Specifically London Hydro references

¹³ London Hydro Inc., Motion Record dated April 24, 2012, Page 5, Paragraph 6

¹⁴ EB-2008-0235, Response to LPMA Interrogatory 45

recent Board decisions for Bluewater Power Distribution Corp. (``Bluewater``), West Coast Huron Energy Inc. (``WCH``) and Enersource Hydro Mississauga Inc. (``Enersource``) regarding approved LRAM recovery.¹⁵ London Hydro believes it is appropriate that its LRAM request be treated in a similar manner to that of Bluewater, WCH and Enersource.

- 3.15 In the Bluewater decision (EB-2011-0153) dated March 22, 2012, the Board acknowledged and accepted the provision in the Settlement Agreement relating to EB-2008-0221, which states: "For the sake of clarity, the revised forecast does not reflect in any way specific electricity conservation programs". In its decision, the Board deviated from the 2008 CDM Guidelines and approved an LRAM claim in 2010 for CDM impacts that accrued prior to the rebasing year as the Board accepted that they were not included in the load forecast at that time.
- 3.16 London Hydro submits that contradictory decisions in the London Hydro and Bluewater cases were issued on almost identical facts.¹⁶
- 3.17 In the Enersource decision (EB-2011-0100), the Board stated, "In general, the Board is of the view that LRAM is accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time. However, as set out in the Settlement Agreement and the transcript from the oral hearing in EB-2007-0706, in which the Settlement Agreement was accepted by the Board, it is apparent that the intent was to remove the CDM effects from the load forecast and defer consideration of those CDM effects to a future LRAM proceeding. As such, the Board is of the view that it is appropriate to deviate from the 2008 CDM Guideline and approve the LRAM recovery sought by Enersource in this application."
- 3.18 In the decision of the Board in WCH's 2009 COS application, EB-2008-0248, the Board specifically acknowledged that the load forecast for the 2009 test year did not include CDM effects. The Board stated that, "[w]hile the Board notes that customer count may be overestimated and the absence of broader economic and CDM effects..."¹⁷ As such, the Board is of the view that it is appropriate to diverge from the 2008 Guideline.¹⁷
- 3.19 London Hydro acknowledges that the Board's decision in London Hydro's 2009 COS application did not contain comments similar to WCH and Enersource. However, London Hydro submits that its responses to Board Staff Interrogatory No. 34 and LPMA Interrogatory No. 45, provide similar confirmations that its requested lost revenue from CDM programs deployed in 2009 and persistence from 2009 programs in 2010 were not included in the 2009 Test Year load

¹⁵ London Hydro Inc., Supplementary Motion Record dated May 14, 2012

¹⁶ London Hydro Inc., Motion Record dated April 24, 2012, Page 9, Paragraph 13

¹⁷ EB-2011-0203, WCH decision, Page 11

forecast.

VECC's Position

- 3.20 For the reasons noted in section 2 above, VECC submits the London Hydro decision is not inconsistent with the Bluewater, WCH and Enersource decisions. Rather, London Hydro's circumstances are distinct from that of Bluewater, WCH and Enersource.
- 3.21 The circumstances of Bluewater, WCH and Enersource are similar. Based on provisions in settlement agreements in previous COS applications (Bluewater and Enersource) or a previous COS decision (WCH), the Board accepted that the load forecast did not include an adjustment for CDM. VECC does not agree that the London Hydro and Bluewater cases were issued on almost identical facts. VECC submits London Hydro's application does not reference a previous settlement agreement or decision for the Board to rely on and accept that the load forecast did not include lost revenue from CDM programs deployed in 2009 and persistence from 2009 programs in 2010. Rather, London Hydro is asking the Board to rely on its 2009 COS interrogatory responses. For the reasons noted in paragraphs 3.10 to 3.13 above, VECC submits London Hydro's interrogatory responses do not provide an adequate explanation for not including CDM programs in its load forecast.
- 3.22 VECC does not agree there has been an error of fact in the Board's decision regarding its review of interrogatory responses or its application of the Board's CDM Guidelines.
- 3.23 VECC submits that the Board is correct in its original decision and that there is no reasonable basis for the Board to vary from the existing CDM Guidelines which state that lost revenues are accruable until new rates are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time.¹⁸
- 3.24 In summary, VECC submits that for the reasons noted above the threshold test has not been met and London Hydro's Motion to Vary should be denied.

4 Recovery of Reasonably Incurred Costs

- 4.1 VECC submits that its participation in this proceeding has been focused and responsible. Accordingly, VECC requests an order of costs in the amount of 100% of its reasonably-incurred fees and disbursements.

All of which is respectfully submitted this 22nd day of May 2012.

¹⁸ EB-2011-0199 decision, Page 15