

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

**AND IN THE MATTER OF** an application by 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.

## **LONDON HYDRO INC. REPLY SUBMISSION**

**Delivered May 25, 2012**

### **INTRODUCTION:**

1. On November 24, 2011, London Hydro Inc. ("London Hydro") applied for distribution rates effective May 1, 2012 under the Board's 3rd Generation Incentive Regulation Mechanism ("IRM") rate making process (referred to in this submission as the "2012 IRM Application"). As part of that Application, London Hydro requested recovery of lost revenue through the Lost Revenue Adjustment Mechanism ("LRAM") process in accordance with the Board-issued *Guidelines for Electricity Distributor Conservation and Demand Management* (EB-2008-0037), dated March 28, 2008 (the "2008 Guidelines"). This was London Hydro's first application to recover lost revenues arising out of CDM activities. London Hydro initially applied for approval of the recovery of a total of \$291,455, based on Ontario Power Authority ("OPA") final 2009 program results for London Hydro, and estimated 2010 OPA CDM results. Upon receipt of final 2010 results from the OPA, London Hydro revised its request for recovery for OPA CDM programs implemented in 2009 and 2010 for an amount of \$355,473.45, including carrying charges. The Board assigned File No. EB-2011-0181 to the 2012 IRM Application.
2. At pages 15 and 16 of its 2012 IRM Application, London Hydro stated that "Although London Hydro is not requesting recovery of lost distribution revenues with respect to CDM programs prior to 2009, London Hydro is requesting a 2012 LRAM rate rider to recover lost distribution revenues associated with 2009 and 2010 CDM programs that were funded by the OPA." The

2009 savings results were verified by the OPA, and a copy of the OPA's report was included in the 2012 IRM Application as Appendix "F" thereto.

3. At page 8 of their submission on the 2012 IRM Application as it pertained to London Hydro's LRAM claim, Board Staff wrote:

"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."

4. As London Hydro indicated in its reply submission in the 2012 IRM Application, the 2008 Guidelines provided that "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". London Hydro reasonably believed in 2009 that it would not be appropriate, and that it would be inconsistent with the Guidelines then in place, to suggest adjusting its load forecast for planned but not realized CDM programs.

5. In response to and in satisfaction of the Board Staff request, London Hydro directed the Board in its reply submission to two interrogatory responses in its 2009 cost of service application (EB-2008-0235, referred to here as the "2009 COS Application") in which this matter was addressed:

- In Board Staff Interrogatory No. 34 in the 2009 COS Application, Board Staff acknowledged that "London Hydro states that it 'has elected not to file an application for a CDM-related lost revenue adjustment ("LRAM") or shared savings mechanism ("SSM") with this Application. Board staff recognizes that application for LRAM or SSM disposition is at the discretion of the distributor. However, significant build-up of a surplus or deficiency could be of concern if unaddressed.'" Board Staff requested that London Hydro provide its balances for LRAM and/or SSM as of December 31, 2008, with principal and carrying charges identified separately.<sup>1</sup> In its response to that interrogatory, London Hydro provided an estimate of the CDM energy savings that occurred for programs undertaken in 2005, 2006 and 2007. The load forecast for 2009 incorporated the impacts of these CDM programs for 2005, 2006 and 2007. The 2009 Board approved load forecast did not

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<sup>1</sup> London Hydro had initially indicated that it did had elected not to file an LRAM or SSM application as part of the 2009 COS Application at Exhibit 1, page 44 of the 2009 COS Application, available at: [http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/95219/view/London%20Hydro\\_APPL\\_20081208.PDF](http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/95219/view/London%20Hydro_APPL_20081208.PDF)

include any adjustments or proxies for CDM programs initiated after 2007.<sup>2</sup>

- Also in the 2009 COS Application, London Property Management Association's ("LPMA's") Interrogatory No. 45, and London Hydro's response, were as follows:

**"Ref: Exhibit 9, page 10**

London Hydro states that it has elected not to file a claim for Lost Revenue Adjustment or Shared Savings Mechanism with this Application. Does this mean that London Hydro will file a claim for the Lost Revenue Adjustment and/or Shared Savings Mechanism at some future time or is London Hydro indicating that it will not file for recovery of these historical amounts that it could have included in this Application at any time?

**RESPONSE:**

London Hydro does not intend to file an LRAM or SSM claim for any lost revenues incurred during the period 2005 to 2008 with this Application or any other application in the future, since London Hydro believes that 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 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."<sup>3</sup>

6. London Hydro submitted in its Notice of Motion that it was clear in the 2009 COS Application that the 2009 test year load forecast did not include forecasted 2009 program results, and that a future application may address programs implemented after 2009. London Hydro maintains that this is the case.
7. In its Decision on the 2012 IRM Application issued April 4, 2012, at page 15, the Board approved London Hydro's recovery of 2010 lost revenue related to 2010 CDM programs "as London was under IRM in this year and London has not otherwise received LRAM compensation for this year". However, the Board denied recovery of lost revenue 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. The Board approves a one year disposition period for the LRAM recovery of \$152,652.49."
8. On April 24, 2012, London Hydro delivered a Notice of Motion (the "Motion") for review and variance of that portion of the Board's Decision With Reasons dated April 4, 2012, in the 2012 IRM Application, relating to amounts recoverable under LRAM, and more particularly

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<sup>2</sup> See pages 7 and 8 of London Hydro's Reply Submission in the 2012 IRM proceeding, EB-2011-0181.

<sup>3</sup> Page 81 of London Hydro's Responses to LPMA Interrogatories, filed March 20, 2009

that London Hydro be permitted to recover additional LRAM amounts of \$202,820.96 representing the requested lost revenues in 2009 for 2009 CDM programs, or the persisting lost revenues from 2009 CDM programs in 2010.<sup>4</sup>

9. The Motion also sought certain other relief, including an order staying the operation of that portion of the Board's Decision dated April 4, 2012 pending the resolution of this Motion, or alternatively an order allowing the revenue requirement impact of the Motion to be tracked and recovered from ratepayers if the Motion is successful.
10. On May 7, 2012, the Board issued Procedural Order No.1 ("PO#1"), in which it ordered, among other matters, that "London Hydro shall file with the Board and deliver to VECC any additional material in support of its motion by no later than May 14, 2012". Board Staff and intervenors were directed to deliver their submissions, if any, by Tuesday, May 22, 2012, and London Hydro's reply submission, if any, was to be delivered by Friday, May 25, 2012.
11. London Hydro filed its additional motion material on May 14, 2012. The Board Staff submission was delivered during the afternoon of May 22, 2012, and the VECC submission was delivered during the evening of May 22, 2012.
12. London Hydro offers the following submissions in reply to the Board Staff and VECC submissions. London Hydro also repeats and relies on the submissions made in its original and supplementary motion material. London Hydro's comments will be set out as follows:
  - The Threshold Question;
  - The Merits of the Motion; and
  - Regulatory Consistency
13. London Hydro maintains that the Board erred in denying London Hydro recovery of the \$202,820.96 in CDM-related lost revenues that are the subject of this Motion, and that this amount is properly recoverable through an appropriate rider.

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<sup>4</sup> London Hydro's total adjusted LRAM claim was for \$355,473.45 (page 5 of London's Reply Submission to VECC Interrogatories). The Board approved the recovery of \$152,652.49 for 2010 CDM programs (page 15 of the Decision); the difference (or unapproved amount) is \$202,820.96.

**THE THRESHOLD QUESTION:**

14. At page 2 of PO#1, the Board advised 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.”
15. In its supplementary motion material, London Hydro advised that it would address any Board Staff and intervenor submissions in this regard in its reply submission, but that it had identified at paragraph 8 of its April 24, 2012 Motion what it respectfully submitted were errors in the Board’s April 4, 2012 Decision – both errors in fact (in denying the requested relief in the face of interrogatory responses in London Hydro’s 2009 cost of service application that clearly indicate 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 and that those matters may 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). London Hydro submitted that the threshold question should be answered in the affirmative, and reiterates that submission now.
- *Board Staff and VECC submissions*
16. Board Staff cite Rule 45.01 of the Board’s *Rules of Practice and Procedure* (the “Rules”), which 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”, as the basis for the Board’s consideration of the threshold question. London Hydro acknowledges that the Board may consider the threshold question.
17. Both Board Staff and VECC quote Rule 44.01(a), which provides as follows:
- “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.”
18. VECC immediately focuses on the matter of regulatory inconsistency in its discussion of the

threshold test. London Hydro will address that later in this submission.

19. Board Staff discuss the Board's articulation of the threshold test in its May 22, 2007 Decision on a number of review motions in respect of its Natural Gas Electricity Interface Review ("NGEIR") Decision (EB-2006-0332/0338/0340). Board Staff describe the Board's finding in that matter as follows:

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

20. Having cited the applicable Rules and described the Board's findings in the NGEIR Decision, Board Staff make the following submission at the beginning of the first complete paragraph of page 3 of their submission: "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." However, as is the case in the VECC submission, Board staff then focus on London Hydro's concerns about the inconsistency of the Board's Decision in the London Hydro Application with its Decisions in other cases cited by London Hydro. There is no discussion by either Board Staff or VECC about the various errors identified by London Hydro in its Notice of Motion in the context of the threshold question.

- *London Hydro's reply*

21. With respect to Rule 44.01(a) quoted above, London Hydro submits that its Notice of Motion complied with the Rule. London Hydro clearly set out the grounds for its Motion that raised a question as to the correctness of the Board's Decision. London Hydro submits that the grounds set out in Rule 44.01(a) should not be considered exhaustive, but in any event, the grounds for this Motion relate primarily to paragraph (i). At paragraph 8 of the Notice of Motion, London Hydro spoke to the various areas in which it submitted the Board had erred in its Decision. That paragraph is reproduced here for the Board's reference:

"8. London Hydro respectfully submits that the Board erred in its Decision as it related to LRAM, as follows:

- a) First, the Board erred in determining that the lost revenue from CDM programs deployed in 2009 and persistence from 2009 programs in 2010, should have been reflected in the 2009 load forecast at the time of rebasing. The 2008 Guidelines did not require that. While the 2008 Guidelines did

provide (at section 5.2) that “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 incorporated in the load forecast at that time”, they go on to provide (in section 5.3 – Timing) that “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.” London Hydro respectfully submits that it was correct and in compliance with the 2008 Guidelines.

- b) London Hydro notes that it is only in the Draft January 5, 2012 Guidelines for Electricity Conservation and Demand Management (the “Draft Guidelines”, issued in EB-2012-0003) that the Board would be establishing stricter requirements in this regard. Specifically, at page 10 of the Draft Guidelines, the Board writes:

“Distributors will generally be expected to include a CDM component in their load forecast in cost of service proceedings to ensure that its customers are realizing the true effects of conservation at the earliest date possible and to mitigate the variance between forecasted revenue losses and actual revenue losses. If the distributor has included a CDM load reduction forecast in its distribution rates, the amount of the forecast that was adjusted for CDM at the rate class level would be compared to the actual CDM results verified by an independent third party for each year of the CDM program (i.e., 2011 to 2014) in accordance with the OPA’s EM&V Protocols as set out in Section 6.1 of the CDM Code. The variance calculated from this comparison will result in a credit or a debit to the ratepayers at the customer rate class level in the LRAMVA.

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In the situation where the distributor has not included CDM impacts in its load forecast, the distributor is expected to make it clear in their rate application that CDM impacts have not been included, why they have not been included and whether the distributor intends to address CDM impacts through an LRAM.

- c) The Draft Guidelines would not apply to the current Application, but London Hydro notes in any event that it would be inappropriate to retroactively apply a stricter requirement to the London Hydro 2009 cost of service application than the requirement that existed at the time that cost of service application was filed and disposed of by the Board. The 2008 Guidelines did not require the statements and explanations of the kind contained in the Draft Guidelines where a distributor did not plan to include CDM impacts in its load forecast. London Hydro submits that its responses to interrogatories made it clear on the record of that proceeding that lost revenue from CDM 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.
- d) Finally, the Board erred in rejecting the interrogatory responses referred to above as a 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 and that those matters may be addressed at a later date. As noted in its response to LPMA Interrogatory No. 45 in that application, the revised load forecasts used to develop its 2009 revenue requirement would incorporate the impacts of CDM programs undertaken during the period 2005 to 2008, and programs implemented after 2008 may be the subject of future LRAM or SSM applications. If such an indication was required in the context of the 2009 cost of service application – and London Hydro submits that it is not clear from the 2008 Guidelines that it is required – then London Hydro submits that the interrogatory responses discussed above should be adequate for this purpose.”

22. London Hydro respectfully submits that there is no basis for the Board Staff assertion that “there is no identifiable error in the Board’s original decision to warrant review”. London Hydro has identified several errors. While regulatory consistency is an important element of this Motion, it

is not the only element.

23. As for whether these errors “warrant review”, London Hydro notes that at page 18 of the NGEIR Decision,<sup>5</sup> the Board wrote:

“Therefore, the grounds must ‘raise a question as to the correctness of the order or decision’. In the panel’s view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.”

24. London Hydro submits that the evidence before the panel in the 2012 IRM Application confirmed that in the 2009 COS proceeding, the 2009 test year load forecast did not include forecasted 2009 program results, and that a future London Hydro application may address programs implemented after 2009.
25. With respect to the materiality of the errors and their relevance to the outcome of the Decision, London Hydro submits that its LRAM claim was a significant element of its 2012 IRM Application, and in rejecting the evidence that the 2009 test year load forecast did not include lost revenue from CDM programs deployed in 2009, the Board reduced that claim by almost 60%. London Hydro submits that the errors are material and they are relevant to the outcome of the Decision.
26. Finally, London Hydro submits that (to use the words of the Board in the NGEIR Decision) “there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended”. London Hydro understands that the Board would have used the word “could” because this discussion involves the threshold question, and not the consideration of the merits of the motion themselves. London Hydro further submits, however, that correcting those errors and acknowledging that the

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<sup>5</sup> Available at:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/180773/view/dec\\_reasons\\_NGEIR\\_motion\\_EB-2005-0551\\_EB-2006-0322%20EB-2006-0338%20EB-2006-0340\\_20070522.PDF](http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/180773/view/dec_reasons_NGEIR_motion_EB-2005-0551_EB-2006-0322%20EB-2006-0338%20EB-2006-0340_20070522.PDF)



2009 test year load forecast did not include lost revenue from CDM programs deployed in 2009 would change the outcome of the Decision.

27. For all of the foregoing reasons, London Hydro reiterates that the threshold question should be answered in the affirmative.

**THE MERITS OF THE MOTION:**

28. London Hydro has discussed the errors it believes the Board has made in its Decision in the subject proceeding in its Notice of Motion and has repeated that discussion above for the Board's reference. London Hydro does not propose to repeat them here. London Hydro submits, though, that the errors relate generally to (a) the imposition of a requirement that that the lost revenue from London Hydro's CDM programs deployed in 2009 and persistence from 2009 programs in 2010, should have been reflected in the 2009 load forecast at the time of rebasing where the Board's Guidelines provided that a distributor should ensure that sufficient time has passed to ensure that the information needed to support the application is available; and (b) to the Board's disregard for the interrogatory responses referred to above as a 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 and that those matters may be addressed at a later date. London Hydro reiterates that it is appropriate, reasonable and necessary to correct those errors at this time.

- *Board Staff and VECC submissions*

29. As noted above, London Hydro will address the Board Staff and VECC comments about the consistency of the Board's Decision in the 2012 IRM Application with its Decisions in other proceedings (or the lack thereof) later in this submission.
30. As noted previously, in their submissions on the 2012 IRM Application, Board Staff suggested that it was necessary that there be an indication in the 2009 COS Application or settlement agreement in that proceeding 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. In its Decision in the 2012 IRM Application, the Board suggested that there must be specific language in the Decision on the prior cost of service application.
31. Board Staff and VECC reiterate these positions in their submissions in this Motion, and both assert that because these conditions are not met, the Motion should fail.

32. Board Staff also discuss<sup>6</sup> sections 5.2 and 5.3 of the Board's 2008 Guidelines, and their view of London Hydro's understanding of those sections, as follows:

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.

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).

33. VECC submits that London Hydro's response to LPMA Interrogatory No. 45 "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."

- *London Hydro's reply*

34. London Hydro will begin by addressing the Board Staff and VECC comments on the lack of an indication in the 2009 COS Application, settlement agreement or Decision 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. London Hydro will then address the Board Staff comments regarding sections 5.2 and 5.3 of the Guidelines.

35. First, London Hydro submits that what should be of importance to the Board is not whether the indication is in the application, a settlement agreement (there was no settlement conference in London Hydro's 2009 cost of service application, so this possibility did not exist for London Hydro), the cost of service decision or somewhere else in the record of the proceeding. Those criteria are not part of the Board's 2008 Guidelines – a requirement of this kind has only been formalized now in the context of the Board's Draft Guidelines, the final version of which were issued by the Board on April 26, 2012 (London Hydro has referred to these below as the "2012

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<sup>6</sup> See page 4 of the Board Staff submission of May 22, 2012

Guidelines”). As London Hydro discussed at paragraph 8(c) of its Notice of Motion, the 2008 Guidelines did not require the statements and explanations of the kind contained in section 13.2 of the 2012 Guidelines where a distributor did not plan to include CDM impacts in its load forecast. London Hydro submits that its responses to interrogatories (Board Staff #34 and LPMA #45) made it clear on the record of the 2009 COS Application that lost revenue from CDM 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. London Hydro submits that it is inappropriate to apply a requirement from the 2012 Guidelines retroactively to the 2008 Guidelines as they existed at the time of London Hydro’s 2009 cost of service application.

36. Similarly, it is inappropriate to reject London Hydro’s 2009 interrogatory responses that clearly indicate that lost revenue from CDM 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 on the basis that they were not located in specific areas of the record of the proceeding. London Hydro submits that the interrogatory responses perform the same function as statements in the application, a settlement agreement or a decision. In all cases, they provide confirmation on the public record that CDM 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.
37. Second, as noted above, Board Staff suggest that London Hydro was under the impression that section 5.3 of the 2008 Guidelines took precedence over section 5.2. London Hydro respectfully submits that this mischaracterizes London Hydro’s concern with the 2008 Guidelines and its attempt to comply with them. London Hydro submits that there is no issue of section 5.3 taking precedence over section 5.2 – both of these sections of the 2008 Guidelines can be complied with, and London Hydro complied with both. It made an LRAM claim in its 2009 COS Application related to CDM activities in respect of which results were known. It did not include in that claim activities in respect of which the results were unknown or estimated. As noted above, Board Staff assert 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.” London Hydro submits, however, that the Board Staff approach to these sections not only prioritizes section 5.2 over section 5.3 where the Board itself did not appear to have done so, but it would appear to render section 5.3 meaningless

as it would always be outweighed by section 5.2. London Hydro respectfully submits that this cannot have been the Board's intention when it included these sections in the 2008 Guidelines.

38. Board Staff also express a concern that what they suggest is 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." London Hydro submits that the 2012 IRM Application and this Motion do not represent a true-up of the kind described by Board Staff, because the CDM-related items that are the subject of this Motion were explicitly not embedded in the rebasing year. While this is not a case of a true-up, London Hydro observes that section 13.2 the 2012 Guidelines contemplate a form of true-up of forecasted to actual CDM effects similar to that criticized by Board Staff.<sup>7</sup>
39. London Hydro respectfully submits that on the merits of this Motion, the Board should review and vary that portion of the Board's April 4, 2012 Decision relating to amounts recoverable on account of LRAM, and more particularly that London Hydro be permitted to recover an additional LRAM amount of \$202,820.96 relating to CDM programs deployed in 2009 and persistence from 2009 programs in 2010.

**REGULATORY CONSISTENCY:**

40. In its original and additional Motion material, London Hydro referred to three other Decisions of the Board in which the Board allowed LRAM claims in IRM applications related to CDM programs implemented in a prior test year: Bluewater Power (EB-2011-0153); West Coast Huron Energy Inc. (EB-2011-0203); and Enersource Hydro Mississauga Inc. (EB-2011-0100). London Hydro's discussions of those cases will be found at pages 7-9 of the original Motion material (Bluewater) and pages 5-6 of the additional Motion material (West Coast Huron and Enersource). In short:
- the Board found in Bluewater's favour due to a statement in Bluewater's prior COS

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<sup>7</sup> Section 13.2 provides, in part, that "Distributors will generally be expected to include a CDM component in their load forecast in cost of service proceedings to ensure that its customers are realizing the true effects of conservation at the earliest date possible and to mitigate the variance between forecasted revenue losses and actual revenue losses. If the distributor has included a CDM load reduction forecast in its distribution rates, the amount of the forecast that was adjusted for CDM at the rate class level would be compared to the actual CDM results verified by an independent third party for each year of the CDM program (i.e., 2011 to 2014) in accordance with the OPA's EM&V Protocols as set out in Section 6.1 of the CDM Code. The variance calculated from this comparison will result in a credit or a debit to the ratepayers at the customer rate class level in the LRAMVA."

settlement agreement that “For the sake of clarity, the revised forecast does not reflect in any way specific electricity conservation programs.”

- the Board found in West Coast Huron’s favour on the basis that “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...’; and
- the Board found in Enersource’s favour based on a finding that “...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.”

41. London Hydro submits that its explanation of the treatment of its 2009 CDM programs, as discussed in the responses to Board Staff Interrogatory #34 and LPMA Interrogatory #45 in the 2009 COS Application, was at least as clear as the references accepted by the Board in the three cases mentioned above.

42. London Hydro discussed the importance of regulatory consistency at paragraphs 12 and 13 of its original Notice of Motion. Those comments are repeated here for the Board’s reference:

12. The Board has recognized the value of consistency in decision making. As it wrote in a Decision in EB-2011-0256, another proceeding involving Bluewater:

“...the Board recognizes the value of consistency in decision-making. Departures from established decisions should only be made on the basis of reasoned principle. However, 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.”<sup>8</sup>

13. London Hydro submits that consistency in decision-making is important to the integrity of the regulatory process and it should be abandoned only in the clearest of circumstances, that is, when circumstances of one case are clearly distinguishable from the other. The principles applied by the Board in the London Hydro Decision of April 4, 2012 appear to have departed from those applied in the Bluewater Decision of March 22, 2012. London Hydro recognizes that one panel of the Board cannot bind another. However, in these circumstances, where contradictory decisions were issued on almost identical facts, London Hydro submits that this regulatory inconsistency is a reasonable ground for review.

43. London Hydro wishes to clarify that the decision referred to in paragraph 12 of the original Motion material involved the Corporation of the Municipality of Bluewater. London Hydro

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<sup>8</sup> EB-2011-0256, Decision dated August 29, 2011, at page 5

reiterates the submissions made in its original Motion material.

- *Board Staff and VECC submissions*

44. Board Staff distinguish the cases referred to by London Hydro, essentially on the basis that in each of those cases, there was a reference to the exclusion of certain CDM effects in the settlement agreement and/or the Decision. Board Staff submit that because these conditions were not met in London Hydro's 2009 COS Application, London Hydro's motion should fail.
45. VECC takes a similar approach to that of Board Staff, and adds a caution 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."

- *London Hydro's reply*

46. As discussed above, the Board itself has recognized the importance of regulatory consistency. London Hydro has not suggested that the Board is bound by previous decisions, but London Hydro supports the Board's recognition of the value of consistency in decision-making, and its determination that departures from established decisions should only be made on the basis of reasoned principle.
47. London Hydro submits that there is no basis for a departure from the Decisions cited in its Motion material. In those cases, the Board determined that lost revenue from CDM programs deployed in the COS test year and persistence from those programs in following years were not included in the COS test year load forecast. London Hydro has submitted above, in the context of the merits of this Motion, that it was clear that in the 2009 COS proceeding that lost revenue from CDM 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. As London Hydro has previously submitted, it is neither reasonable nor appropriate to draw arbitrary distinctions between applications based on the location of the indication that CDM programs were not included in the COS forecast.
48. Accordingly, if it is appropriate to treat London Hydro consistently with other distributors in similar circumstances (London Hydro submits that it is), then the appropriate disposition of this Motion is to vary the 2012 IRM Decision and to allow the recovery requested by London Hydro.

49. With respect to the VECC “caution”, London Hydro submits that the matter before the Board involves the current Motion and the 2012 IRM Decision. It is appropriate that London Hydro seek the relief requested in this Motion. London Hydro respectfully submits that the idea that other distributors may seek the variance of other decisions should not be a basis for rejecting the current Motion.

**CONCLUSION:**

50. For all of the foregoing reasons, London Hydro respectfully submits that the threshold question has been answered in the affirmative, and that the Board should grant the relief requested in this Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25<sup>TH</sup> DAY OF MAY, 2012

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By its Counsel

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AND TO: Intervenor of Record