Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0220

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 by London Hydro Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review by the Board of its Decision and Order in proceeding EB-2011-0181 dated April 4, 2012.

BEFORE: Cynthia Chaplin
Vice Chair and Presiding Member

Paula Conboy
Member

DECISION AND ORDER
ON MOTION TO REVIEW
June 14, 2012

INTRODUCTION

On April 25, 2012, London Hydro Inc. ("London Hydro") filed with the Ontario Energy 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 IRM rate application (EB-2011-0181) (the "2012 IRM Decision"). The Board assigned the Motion file number EB-2012-0220.

For the reasons set out below the Board is declining to hear the Motion as it does not meet the "threshold test" for review that has been established by the Board and upheld by the courts.

The Board issued its Notice of Motion to Vary and Procedural Order No. 1 on May 7, 2012. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition ("VECC"), which was the only intervenor in London Hydro's 2012 rate application. The Board also determined that the most expeditious way of dealing with the Motion was 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.

The Board established a timetable for London Hydro to file any additional material in support of the Motion, written submissions by VECC and Board staff, and a reply submission by London Hydro.

London Hydro submitted additional material in support of its Motion on May 14, 2012. Board staff and VECC filed their submissions on May 22, 2012. London Hydro filed its reply submission on May 25, 2012.

BACKGROUND

On November 24, 2011 London Hydro filed an IRM application for the 2012 rate year. The application sought approval for changes to the rates that London Hydro charges for electricity distribution, to be effective May 1, 2012.

In its 2012 IRM application, London Hydro originally requested the recovery of an LRAM claim of $355,473.45 over a one-year period. London Hydro's LRAM claim included lost revenues for OPA CDM programs implemented in 2009 and 2010.

On April 4, 2012, the Board issued its 2012 IRM Decision. As part of that decision, the Board did not approve the LRAM claim as originally filed:

> The Board approves an LRAM recovery of $152,652.49 representing lost revenues from 2010 CDM programs in the year 2010, as London was under IRM in this year and London has not otherwise received LRAM compensation for this year. Furthermore, the 2010 CDM programs were not reflected in the last, Board-approved load forecast. The Board will 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[1].

NOTICE OF MOTION

London Hydro's Motion seeks to vary the Board's 2012 IRM Decision so that London Hydro may recover an additional LRAM amount of $202,820.96, which represents the difference between London Hydro's total adjusted LRAM claim of $355,473.45 and the amount already approved for recovery of $152,652.49.

London Hydro based its Motion on the following grounds:

1. The Board erred in determining that the denied lost revenue should have been reflected in the 2009 load forecast at the time of rebasing, which was not required by the 2008 CDM Guidelines.
2. Only in the draft January 5, 2012 Guidelines for Electricity and Conservation Demand Management did the Board indicate that it would be establishing stricter requirements in this regard. 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 of the cost of service application.
3. London Hydro's responses to interrogatories in the 2009 cost of service application made it clear 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.
4. London Hydro has alleged an inconsistency between the EB-2011-0181 Decision and the Board's decision in Bluewater Power Distribution Corporation's ("Bluewater Power") 2012 IRM application (EB-2011-0153).

POSITION OF PARTIES

Board staff and VECC submitted that the Motion does not meet the threshold test.

Board staff submitted that the evidentiary basis for London Hydro's 2012 IRM Decision is distinguishable from those of Bluewater Power, West Coast Huron Energy Inc. ("WCH") (EB-2011-0203) and Enersource Hydro Mississauga Inc. ("Enersource") (EB-2011-0100) such that there is no inconsistency in the decisions. Board staff noted that both Bluewater Power's and Enersource's Settlement Agreements explicitly stated that

[1] EB-2011-0181, Decision and Order at page 15

their revised load forecasts did not reflect in any way specific electricity conservation programs and that these agreements were approved by the Board. With respect to WCH, 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.

Board staff noted that London Hydro argued that it had advised parties through the interrogatory phase of its 2009 cost of service proceeding EB-2008-0235 that it was not proposing to include any lost revenues in its load forecast related to CDM programs delivered after 2007. Board staff submitted that there is no reference in the Board's decision on London Hydro's 2009 cost of service 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. Board staff submitted 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. Board staff argued 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.

VECC also submitted that the London Hydro 2012 IRM Decision is distinct from the Bluewater decision, and consistent with many 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.

VECC noted that the Board has determined that it is 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. VECC submitted that London Hydro's circumstances do not meet this exception. VECC did not agree that the interrogatory responses from London Hydro's previous cost of service proceeding make it clear or

provide adequate justification for the Board to deviate from the 2008 CDM Guidelines and approve this LRAM claim.

With respect to regulatory inconsistency, VECC noted that the London Hydro decision is not inconsistent with the Bluewater, WCH and Enersource decisions but rather it is distinguishable. VECC also submitted that regulatory inconsistency does not satisfy the threshold for a motion to review, particularly when previous Board decisions have not always been consistent. VECC noted that panels of the Board are not and cannot be thought to be bound to the decisions of preceding panels and that each panel must make its decision on the basis of the facts before it and the relevant policies and principles affecting the decision. VECC cautioned that if the Board allows the Motion to be heard solely on the basis of regulatory inconsistency, other parties will look to vary Board decisions on the same grounds and will inevitably rely on past Board decisions that support their alternative view.

In its reply, London Hydro quoted the Board's Decision on a Motion to Review Natural Gas Electricity Interface Review Decision[2] that, "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" and that correcting those errors and acknowledging that the 2009 test year load forecast did not include lost revenue from CDM programs deployed in 2009 would change the outcome of the Decision.

London Hydro addressed Board Staff's and VECC's comments that there was no indication in the 2009 cost of service 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 submitted that, what should be of importance to the Board is not whether the indication is in the application, a settlement agreement, the cost of service decision or somewhere else in the record of the proceeding as these criteria are not part of the Board's 2008 Guidelines.

London Hydro submitted that it would be inappropriate to reject the interrogatory responses in the 2009 cost of service application which perform the same function as statements in the application, a settlement agreement or a decision. They provide

[2] EB-2006-0322/0388/0340, May 22, 2007

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.

London Hydro submitted that there is no basis for a departure from the other IRM decisions referenced in its Motion material and that in the context of the merits of this Motion, it was clear that in the 2009 cost of service 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.

THE "THRESHOLD TEST"

Section 44.01 of the Board's *Rules of Practice and Procedure* (the "Rules") provides that:

> Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
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> 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:
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> 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.

Under section 45.01 of the Rules, 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 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.

The Board has considered previous decisions of the Board in which the principles underlying the 'threshold question' were discussed, namely in the Board's Decision on a Motion to Review Natural Gas Electricity Interface Review Decision (the "NGEIR Review Decision") and most recently in the Divisional Court's decision *Grey Highlands*

v. Plateau, in which the court dismissed an appeal of the Board's decision in EB-2011-0053.[3]

In the NGEIR Review Decision, the Board stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise 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. The Board also 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". The Board stated as follows:

> 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.[4]

In the *Grey Highlands v. Plateau* the Divisional Court dismissed an appeal of a Board decision where the Board determined that the motion to review did not meet the threshold test and the Board did not proceed to review the earlier decision. In upholding the Board's decision, the Divisional Court stated:

> The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.[5]

The Divisional Court also noted that the plain language of section 44.01 which enumerates the various grounds which the Board "may" consider in determining whether to hear a motion to review does not require the Board to consider other grounds, such as errors or law, and decided not to interfere with the Board's discretion in that regard. The court stated:

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[3] EB-2006-0322/0388/0340, May 22, 2007 at page 18 and EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012)
[4] Ibid., p. 18/
[5] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court) (*"Grey Highlands v. Plateau"*) at para 7

> We do not agree that the word "may" in Rule 44.01 requires the Board to consider errors of law. This is not consistent with the plain meaning of the rule or the nature of a review or reconsideration process. We see no reason to interfere with the Board's exercise of discretion.[6]

BOARD FINDINGS

The Board concludes that the Motion does not meet the threshold test.

London Hydro raises essentially two related grounds for the Motion. The first is that the Board applied the 2012 CDM Guidelines in reaching the 2012 IRM Decision, and not the 2008 CDM Guidelines. London Hydro maintains that it complied with the 2008 CDM Guidelines and that its LRAM claim is made in accordance with those guidelines. The second and related grounds are that London Hydro's circumstances are sufficiently similar to those of Bluewater, WCH and Enersource to warrant the same conclusion being reached by the Board.

With respect to the first grounds for the Motion, London Hydro takes the position that the Board erred in two respects:

- First, the Board erred in determining that the 2009 forecast should have included impacts from the 2009 programs. In London Hydro's view, the 2008 Guidelines do not require that the 2009 forecast take account of 2009 programs.

- Second, the Board erred in rejecting certain interrogatory responses from EB-2008-0235. London Hydro maintains that there was sufficient information on the record of the last cost of service rebasing, in the form of the named interrogatory answers, to conclude that 2009 CDM program impacts were not included in the load forecast at the time.

With respect to the first alleged error, the key provisions of the 2008 CDM Guidelines are sections 5.2 and 5.3. Section 5.2 of the 2008 CDM Guidelines states:

> 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.

[6] *Grey Highlands v. Plateau* at para 8

London Hydro maintains that it did follow the 2008 CDM Guidelines by excluding the impacts of 2009 CDM programs from its load forecast and cites section 5.3 of the 2008 CDM Guidelines in support, which states: "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 maintains that it concluded that based on this section it would be inappropriate to adjust the forecast for 2009 CDM programs. The Board does not agree that the provisions of the 2008 CDM Guidelines support this interpretation. Section 5.3 refers to timing for LRAM claims – not whether CDM impacts should be incorporated into load forecasts. Section 5.2, on the other hand, clearly contemplates that CDM impacts are to be incorporated into load forecasts. While it may not have been stated as a requirement, it is certainly clearly expressed as an expectation. The Board concludes that there is no error in the 2012 IRM Decision with respect to the interpretation and application of the 2008 CDM Guidelines.

With respect to the second alleged error set out above, while London Hydro maintains that it excluded the impact of 2009 CDM programs in accordance with its interpretation of the 2008 CDM Guidelines, there is insufficient evidence to support this claim. The Board in its 2012 IRM Decision acknowledged this evidence from the 2009 cost of service proceeding, but concluded as follows:

> The Board will not approve LRAM arising from CDM programs deployed in 2009 and persistence from 2009 programs in 2012, 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.

London Hydro is essentially rearguing its original case, given that the grounds raised are in substance the same as those made in the 2012 IRM proceeding. However, given that the 2012 IRM Decision does not explicitly assess the identified interrogatory answers, the Board has determined that a further examination of them is appropriate.

London Hydro identifies Board staff interrogatory #34 in support of its claim. This interrogatory answer estimates an LRAM claim for 2005-2007 of $617,000, but reiterates that no claim was being made. It presents an estimate of the impacts for 2005-2007 as requested. London Hydro now maintains that the 2008 program impacts were included in the forecast and the 2009 program impacts were not – however,

neither year is referenced in the interrogatory response. As a result, no conclusion can be drawn from this response with respect to the inclusion or exclusion of 2009 CDM program impacts in the forecast.

London Hydro also cites London Property Management Association interrogatory #45 in support of its claim. The answer reads:

> 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 2005-2008.
>
> 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.

The Board concludes that there is considerable ambiguity, based on this response, as to whether or not the 2009 load forecast incorporates impacts from programs implemented after 2008.

The first paragraph refers *only* to impacts related to 2005-2008 programs and the associated LRAM claim. Therefore, although London Hydro states, "the revised load forecasts used to develop its 2009 revenue requirement will incorporate the impacts of CDM programs undertaken during the period 2005-2008," this says nothing about whether the forecast incorporates the impacts of programs after 2008. The fact that the 2009 programs are not mentioned may be because this factor was not included in the forecast – but might also be because the factor was included in the forecast (as identified in the 2008 Guidelines), but not mentioned because the period under discussion in the paragraph is limited to 2005-2008.

In the second paragraph, London Hydro states it "cannot advise at this time that it will not file an LRAM or SSM at some time in the future". London Hydro asserts that this statement is sufficient confirmation that the impacts of the 2009 programs are not included in the load forecast. Again, there is no explicit statement to this effect, nor explicit mention of 2009 CDM programs in reference to a possible future LRAM claim. Rather the reference is to "programs implemented after 2008" which would include

2009, 2010, etc. And as the 2012 IRM decision makes clear, a claim for impacts of 2010 programs was made and was approved.

The Board concludes that the referenced evidence from the 2009 cost of service application does not substantiate the claim that 2009 CDM impacts were excluded from the load forecast and therefore the Board finds that there is no identifiable error in the 2012 IRM Decision.

As a result of this finding, the Board concludes that there is no need to consider the second grounds for the Motion, namely regulatory consistency, because the alleged similarity between London Hydro and Bluewater, Enersource and WCH (in respect of the treatment CDM effects in the load forecast) has not been substantiated.

The Motion is dismissed at the threshold question.

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit their cost claims no later than **7 days** from the date of issuance of this Decision.

2. London Hydro shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of this Decision.

3. VECC shall file with the Board and forward to London Hydro any responses to any objections for cost claims within **28 days** from the date of issuance of this Decision.

4. London Hydro shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, June 14, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary