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Ontario

BY EMAIL

June 3, 2013

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: Milton Hydro Distribution Inc.
Motion to Review and Vary Board Decision EB-2012-0148
Board Staff Submission
Board File No. EB-2013-0193

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. This document is also being forwarded to Milton Hydro Distribution Inc. and to all other registered parties to this proceeding.

As a reminder, Milton Hydro Distribution Inc.'s Reply Submission is due by June 10, 2013.

Yours truly,

Original Signed By

Kelli Benincasa
Analyst, Applications & Regulatory Audit

Encl.

ONTARIO ENERGY BOARD

STAFF SUBMISSION

Milton Hydro Distribution Inc.
Motion to Review and Vary Board Decision
EB-2012-0148

EB-2013-0193

June 3, 2013

Board Staff Submission
Milton Hydro Distribution Inc.
EB-2013-0193

Introduction

On April 25, 2013, Milton Hydro Distribution Inc. ("Milton 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, 2013 in respect of Milton Hydro's 2013 Incentive Regulation Mechanism rate application (EB-2012-0148) (the "Decision").

The Motion seeks to vary the Board's 2013 IRM Decision and Order so that Milton Hydro may recover a Lost Revenue Adjustment Mechanism ("LRAM") amount of $107,762 for 2010 CDM programs persistent into 2011 and 2012. The Motion alleges that the Board failed to take into consideration the facts presented in its 2011 Cost of Service Rate Application (EB-2010-0137) and 2013 IRM3 Application (EB-2012-0148) in relation to Milton Hydro's responses to Board staff and intervenor interrogatories and Milton Hydro's submission. Milton Hydro proposed that the Motion be heard by way of a written hearing and the LRAM claim be recoverable through a class specific rate rider over a one year period.

Milton Hydro submits that there is a question of correctness of the Decision.

On May 14, 2012, the Board issued its Notice of Motion to Vary and Procedural Order No. 1 which established a due date for Milton Hydro to file additional evidence in support of its motion. The Board also stated that given the narrow scope of the Motion, it will hear submissions of the threshold question of whether the matter should be reviewed and, if it determines that the threshold has been met it will then consider the merits of the motion.

On May 22, 2013, Milton 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 with respect to the threshold question.

The Threshold Question

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; and
> (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")[1].

The Board, in the NGEIR Review 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 Review 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"[2].

1 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).

2 NGEIR Decision, at pages 16 and 18

In demonstrating an error, the moving party must show the findings are contrary to the evidence, the panel failed to address a material issue or something of a similar nature. The alleged error must be material and relevant to the outcome of the decision.

Board staff submits that there is no identifiable error in the Board's Decision to warrant review and the threshold test has not been met.

Milton Hydro's Notice of Motion alleged a question of correctness of the Decision and Order, issued April 4, 2013, based on an error in fact. Milton Hydro stated that the Board, in making its Decision, failed to consider Milton Hydro's 2011 Cost of Service Application in its entirety. In other words the Board failed to consider the "complete record" in making its Decision. Milton Hydro submits that the Board erred in fact in failing to take into consideration the facts presented by Milton Hydro in Exhibit 3-Operating Revenue. Milton Hydro states that it clearly set out the fact that it did not include 2010 CDM results in its 2011 cost of service load forecast in its detailed explanation of the forecast methodology and distribution revenue provided in Exhibit 3 – Operating Revenue.

Board staff submits that the above facts do not satisfy the condition established by the Board in determining the validity of LRAM persistence claims post rebasing. Several 2012 IRM decisions denied LRAM claims associated with the persistence of CDM activity into a rebasing year and beyond. In making these decisions the Board noted that in the absence of explicit language in either the decision and order and/or the settlement agreement that CDM was not taken into account in the load forecast of the last rebasing year, all CDM persistence effects for programs deployed up to and including the test year are deemed to have been taken into account, regardless of whether the evidence of the subject rebasing application indicates otherwise. Below is an excerpt from Innisfil Hydro's 2012 IRM decision (EB-2011-0176). The Board made this same finding in over 25 LRAM decisions in 2012 and 2013 where the LRAM claim was denied or reduced, and Board staff submits that the circumstances for these denials or reductions are similar to Milton's:

> The Board notes that the 2008 CDM Guidelines state 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. The Board is of the view that

> absent specific language in the decision and order relating to Innisfil Hydro's 2009 cost of service application (EB-2008-0233) that CDM effects are not reflected in the Board-approved load forecast, there is no reasonable basis to deviate from the 2008 CDM Guidelines.

Board staff notes that in its 2012 IRM application, Innisfil provided actual and forecast volumetric data to demonstrate that CDM impacts were not included in Innisfil Hydro's 2009 load forecast. It is noteworthy that notwithstanding this evidence, the Board made the above finding and highlighted the fact that lost revenues are only accruable until a utility rebases; with the only exception being if the Board specifically acknowledged in a decision or order; or as the Board stated in the Enersource Hydro Mississauga Inc.'s ("Enersource") decision noted below, if there was an explicit statement in a settlement agreement which the Board accepted that CDM was not taken into account in the load forecast.

In Milton Hydro's 2011 cost of service decision, there is no explicit statement that Milton Hydro's 2011 forecast did not include the impact of the persistence of legacy CDM programs, nor is there such a statement in the settlement agreement accepted by the Board. In other applications such as Bluewater Power Distribution Corporation, and Enersource's settlement agreements in their 2009 and 2008 COS applications respectively,[3] it was clearly stated that their revised load forecasts did not reflect in any way specific electricity conservation programs, and these agreements, and subsequent LRAM claims, were approved by the Board.

In Enersource's settlement agreement from EB-2007-0706, which was accepted by the Board, the following clearly discusses that lost revenues from test year programs will be dealt with through future applications:

> "The originally proposed reduction to the forecast throughput in the 2008 Test Year attributable to the effects of Conservation and Demand Management has been eliminated. Recognizing that there is considerable uncertainty with respect to the programs that will be offered, the customer groups that will be targeted by these programs, the role of the Ontario Power Authority, the level and accessibility of funding that will be made available by the government or government agencies, and the results attainable Enersource has agreed to remove this adjustment. Enersource expects that any 2008 Test year lost

3 EB-2008-0221 and EB-2007-0706 respectively

> revenue attributable to CDM will be eligible for recovery through the Lost Revenue Adjustment Mechanism and that this issue will be dealt with through a future application."

In Enersource's 2012 IRM decision (EB-2011-0100), the Board approved Enersource's LRAM request even though Enersource had rebased during the interim. The Board stated in its Decision:

> "The Board will approve Enersource's revised LRAM claim of $860,339, representing lost revenues arising from persistence of 2005-2009 CDM programs in 2010 and lost revenues from 2010 CDM programs in 2010. 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…."

Board staff submits that the Board has provided relief and approved LRAM amounts to those distributors whose decisions on their rebasing applications contain an explicit statement that the Board-approved load forecast excludes CDM impacts (or in the event that the case was settled, that the agreement, accepted by the Board, contains a similar statement). The Board has also remained consistent in denying requests for amounts post rebasing where there were no statements regarding the treatment of LRAM associated with the persistence effects of the legacy period, in the Board's decision or the settlement agreement.

Board staff submits that regardless of whether Milton Hydro explicitly identified an absence of CDM impacts in its load forecast in the application, the Board in its rebasing decision approved the total forecast as all-encompassing and complete, given that there was no language to the contrary. As noted above, the Board in many decisions has determined that in the absence of an explicit statement to the contrary in a decision or settlement agreement, the load forecast is deemed to be just and reasonable for rate-

making purposes and more importantly, final in all respects. Board staff therefore submits that there is no error in fact and that the 'threshold test' for review has not been met.

All of which is respectfully submitted