

**Ontario Energy Board**

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

**AND IN THE MATTER OF** a proceeding initiated by the Ontario Energy Board to make certain determinations respecting conservation and demand management (“CDM”) by Local Distribution Companies (“LDC”) activities as described in the Electric Distribution Rates (“ECR”) Handbook and Total Resource Cost (“TRC”) Guide pursuant to sections 19(4) and 78 of the *Ontario Energy Board Act, 1998*

**MOTION RECORD OF THE CONSUMERS COUNCIL OF CANADA**

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**I N D E X**

TAB A                      Written Submission of the Consumers Council of Canada

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### WRITTEN SUBMISSION OF THE CONSUMERS COUNCIL OF CANADA

#### I Introduction

1. On November 11, 2005, the Ontario Energy Board (“Board”) issued a Notice of Proceeding and Hearing initiating a proceeding to make certain determinations regarding conservation and demand management (“CDM”) activities undertaken by electric Local Distribution Companies (“LDCs”). The Board is seeking input on three issues.
2. The first issue is whether the Board should order a LDC to spend money on CDM programs in an amount that is different from an amount proposed by a LDC in a test year and, if so, under what circumstances. The second issue is whether the Board should require LDCs to demonstrate free-ridership levels for all CDM programs on a program by program basis. The third issue is whether the Board should order that a LDC should only be entitled to claim incremental benefits associated with its participation in a CDM program with a non-rate regulated third party.
3. This is the submission of the Consumers Council of Canada (“Council”) on the three issues.
4. By way of introduction, the Council represents the interests of residential consumers of electricity. Those consumers want a reliable supply of reasonably-priced electricity. They also

want electricity prices which are stable. To the extent that CDM measures help to lower electricity bills, residential consumers support them. In addition, to the extent that CDM measures help to ensure a reliable supply of electricity, residential consumers support such measures.

5. However, CDM measures must be cost-effective. Where there is duplication and overlap in the planning and delivery of CDM programs, the resulting inefficiency adds unnecessarily to the cost of those measures. The Council recognizes the importance of pursuing CDM in Ontario, but submits that the credibility of these initiatives will depend upon their actual success and the extent to which they are pursued in a cost-effective manner.

6. As a result of a Government initiative, Ontario LDCs were, effective April 1, 2005, permitted to receive the final instalment of their allowable return on equity subject to a requirement to reinvest an amount equal to one year's incremental return on CDM programs. The CDM spending is to take place during the period 2005-2007. The CDM spending expected during this period is approximately \$165 million.

7. It is important for the Board, in considering the issues in this proceeding, to start from the position that the Ontario electric LDCs are new to CDM initiatives. A significant amount of CDM is being undertaken by LDCs in this "transitional" period. Until the results of current programs have been assessed, and until the LDCs have an opportunity to gain experience with program development and delivery, it may well be premature to mandate additional spending. It would be wasteful to require additional spending in circumstances where a LDC may be unable to spend those funds in a way that generates effective and sustainable results. The Board should assume that the LDCs that choose not to undertake additional spending in 2006 took that position for valid reasons.

8. It is imperative that LDCs keep the administrative costs of their CDM initiatives at a reasonable level. It is also important to ensure that the costs incurred reflect the results achieved.

9. The costs of all OEB processes are ultimately borne, in substantial measure, by residential consumers. To the extent that the OEB must involve itself in the design and implementation of CDM measures, those costs will be borne, again in substantial measure, by residential consumers. Given that, it is essential that the OEB ensure that its processes deal only

with issues that fall within its jurisdiction and that the processes do not add unnecessarily to the cost burden borne by residential consumers.

10. The Board must also consider the fact that CDM initiatives are being undertaken by a number of other entities including the Ontario Power Authority (“OPA”), the Ontario Government, the federal Government, and the natural gas utilities. It is essential that there be a coordinated and consistent approach to CDM among those entities. Until the OPA’s Conservation Bureau sets out its mandate and detailed plans, mandating further CDM by the electric LDCs may result in duplication and overlap.

11. The Council continues to support cost-effective CDM and demand side management initiatives. In pursuing those initiatives there must be a framework in place that allows for the delivery of cost-effective programs while minimizing the regulatory and administrative burden to the extent possible.

## **II Issue One**

12. Question One is whether the Board should order a LDC to spend money on CDM measures in an amount that is different from the amount proposed by a LDC in a test year and, if so, under what circumstances.

13. The Council assumes that the question is whether the Board should order a LDC to spend more on CDM measures than the LDC proposes. The Board can, and should, order a LDC to spend less than it proposes, in circumstances where the proposed expenditures are not prudent, and where the resulting rates would not be just and reasonable. The Board can, and should, do that in carrying out its statutory obligations under section 78 of the Ontario Energy Board Act (OEB Act).

14. The question, then, is whether the Board should order a LDC to spend more money on CDM measures than the LDC proposes. To address that question it is necessary to ask, first, whether the Board has the jurisdiction to do so.

15. In analysing the Board’s jurisdiction, it is necessary to begin by examining what the Board would be doing were it to order a LDC to spend more on CDM measures. The Council

submits that the Board would, first, have to determine that the proposed expenditure was inadequate. That determination would, the Council submits, be based on one of two things, as follows:

1. The Board would apply criteria for the level or sufficiency of CDM expenditures developed or mandated externally, either by the Minister or the OPA; or
2. The Board would be applying criteria for the level or sufficiency of CDM expenditures which it had developed internally, that is by itself, either in relation to an individual LDC or in relation to all LDCs.

16. Since, to the Council's knowledge, neither the Minister nor the OPA have prescribed a minimum level of expenditures by LDCs on CDM measures, the question becomes whether the Board has the authority to itself require a LDC to spend an amount on CDM measures above the amount proposed by the LDC.

17. The Council submits that the Board does not have the jurisdiction to order a LDC to spend money on CDM programs in an amount that is different from the amount proposed by a LDC in a test year. In addition, the Council submits that, even if the Board were to have some power to order a LDC to spend money on CDM programs, it should refrain from exercising that power, in deference to the power which the legislature has granted to the OPA and the Minister.

18. The Council also submits that the Board should not order a LDC to spend money on CDM programs in an amount that is different from an amount proposed by a LDC in a test year because of the practical problems for both the OEB and the LDCs that would necessarily arise from the Board doing so.

**(a) The limits on the Board's jurisdiction**

19. The Board can only do what the legislature has authorized it to do. In addition, the Board must exercise the powers it has been given in a way which is consistent with the purpose and structure of its own Act and any related Acts, and which respects the power granted to other institutions.

20. The OEB Act grants the Board two primary powers in relation to LDCs. One is the power to licence a LDC as a distributor, pursuant to section 70 of the OEB Act. The second is to approve rates, pursuant to section 78 of the OEB Act.

21. The OEB Act confers no powers on the Board in relation to CDM. The Board's objectives, as set out in section 1 of the OEB Act, require the Board not to ensure that CDM programs exist, or that they meet certain criteria, but only that they promote economic efficiency and cost effectiveness. Section 1 presumes the existence of CDM measures, and only requires that the Board be guided by the principles of economic efficiency and cost effectiveness when considering those CDM measures.

22. Subsection 71(2) of the OEB Act, and the parallel provision in the Electricity Act ("EA"), subsection 29.1(1), permit LDCs to engage in CDM activities. Neither section grants the Board, directly or by necessary implication, the power to require a LDC to spend any particular amount on its CDM activities.

23. The Board, in its Decision and Order in EB-2005-0315, held that the Board had the power to approve the cost consequences, for recovery in rates, of CDM measures, but did not have the power to insist that the LDCs engage in any particular CDM program. The Board, in that case, did not decide whether it had the power to order a LDC to spend more on CDM measures. We submit, however, that the Board's analysis of the limits of its powers applies to the latter, as well.

24. Again, the starting point is an analysis of what the Board would be doing were it to order a LDC to spend more on CDM measures. As noted above, such an order would have to be based on a determination that the program proposed by a LDC was not adequate to achieve some pre-determined target. In order to require more spending, the Board would have to have evidence that spending on other programs, or the same programs differently configured, would achieve the targets. Accordingly, while the Board could require more spending without requiring the LDC to engage in a particular CDM program, the reality is that the Board would have particular programs in mind when it ordered more spending. The difference, therefore, between ordering more spending and ordering that a LDC engage in a particular program is largely, if not wholly, artificial. If, as the Board has already ruled, it does not have the power to do one, it does not have the power to do the other.

25. There is an argument that the OEB's power to approve rates contains within it the incidental power to require more spending by a LDC. For example, the Board might conclude that the spending levels proposed by a LDC were not adequate to ensure the reliable delivery of electricity. In those circumstances, the Board could, arguably, require a LDC to spend more in order to ensure the reliable delivery of electricity.

26. We do not believe, however, that the Board has that incidental power with respect to CDM measures. The legislature has granted responsibility for CDM measures to the OPA and the Minister. It has also, as noted below, granted the OPA powers to fulfil that responsibility. Given that, the Board's powers with respect to CDM measures are limited and specific, and relate only to the approval of the recovery in rates of the cost consequences of CDM measures.

27. The limits on the Board's power, with respect to CDM measures, which we submit are apparent within the four walls of the OEB Act, are also apparent when considering the Board's powers in relation to the powers of other institutions.

28. The EA creates a structure of decision-making in the electricity sector, and assigns responsibility for decisions to four institutions. They are the Minister, the Board, the OPA, and the Independent Electricity System Operator ("IESO"). Each institution is responsible for discrete areas of decision-making within the electricity sector. And, while the Board has certain oversight or review powers over decisions made by the OPA and the IESO, it cannot, in the areas of conservation and demand management, substitute its views for those of the OPA.

29. Subsection 25.2(1) of the EA states that among the objects of the OPA, are the following:

(b) to conduct independent planning for electricity generation, demand management, conservation and transmission and develop integrated power system plans for Ontario;

(g) to engage in activities that promote electricity conservation and the efficient use of electricity.

30. The Board does not have similar objects. Indeed, as noted above, the Board's objects with respect to CDM measures are very narrow. The inescapable conclusion is that the legislature

intended the OPA, and not the Board, to have primary responsibility for all matters related to CDM, including prescribing levels of spending and the implementation of particular CDM measures.

31. Subsection 25.2(5) of the EA grants the OPA certain powers, including the following:

(d) to enter into contracts relating to the procurement of reductions in electricity demand and the management of electricity demand to assist the Government of Ontario in achieving goals in electricity conservation;

(e) to take such steps as it considers advisable to facilitate the provision of services relating to,

- (i) electricity conservation and the efficient use of electricity,
- (ii) electricity load management, or
- (iii) the use of cleaner energy sources, including alternative energy sources and renewable energy sources;

32. The Board does not have similar powers. Again, the inescapable conclusion is that the legislature intended that the OPA, and not the Board, have primary responsibility for CDM measures.

33. The EA grants the Board certain oversight responsibilities with respect to the activities of the OPA. They include the following:

- (a) Pursuant to section 25.30, the Board must review the OPA's integrated system plan, which may include measures for management of electricity load. In exercising that power of review, the Board cannot substitute its own views, for those of the OPA, on demand management;
- (b) Pursuant to section 25.31, the Board must review the OPA's procurement processes for, among other things, contracts for the procurement of means to management electricity demand. The Board does not have the power, however, over the substance of those contracts. The Board cannot, in other words, substitute its opinion for that of the OPA on what the appropriate demand management ought to be.

34. The Board must respect the areas of decision-making responsibility which the legislature has granted to other institutions. The legislature did not intend the Board to have the power to mandate demand management activities. Those powers lie with the OPA and the Minister. So, if the Board were to mandate that a LDC spend a particular amount on CDM measures, it would be exercising a power granted to the OPA and the Minister.

35. As a practical matter, if the Board were to require LDCs to spend a certain amount of CDM measures, or to engage in particular CDM programs, the result might be the creation of obligations which are in conflict with CDM obligations created by the Minister of the OPA. The legislature must be taken to have intended, by the structure of decision-making it created, to want to avoid the risk of such conflicts.

36. We also do not believe that the Board has the power to fill any perceived vacuum with respect to CDM measures. For example, the fact that the Minister or the OPA have not mandated particular spending levels or CDM programs for LDCs does not mean that the Board has the power to do so. Nor do we think that broad, generalized statements from government officials about the need to create a “conservation culture” are authority for the Board to mandate any particular level of CDM spending. This is particularly so where section 27 of the OEB Act authorizes the Minister to issue policy directives which the Board must follow. The Minister has not issued such a policy directive on CDM measures.

37. As noted above, the Council believes that the legislature intended the OPA, and the Minister, have primary responsibility for the design and implementation of CDM measures. The Council believes that central planning and control are in the best interests of LDCs and their ratepayers. CDM measures should, to the extent possible, be uniform across the province. In addition, the costs of CDM measures, which are intended to benefit all ratepayers, should be born equitably by all ratepayers. Those objectives of fairness and uniformity are best achieved through central planning by the OPA. By contrast, planning and implementation directed by the OEB on an individual LDC basis will almost certainly result in uneven CDM programs, the costs of which are not equitably distributed.

**(b) Practical Considerations**

38. Even if the Board determined it had the jurisdiction to mandate additional spending in 2006 the Council submits there are a number of practical reasons why the Board should not require LDCs to spend more on CDM measures in 2006. Those considerations are the following.

- The Board in its Rate Handbook Decision stated, “The Board agrees that mandating spending is not appropriate, as distributors have already made commitments for a three-year period.” (Report of the Board, p. 104). In addition the Board established that, “A distributor may apply for approval of additional spending (above the 3<sup>rd</sup> tranche) as part of its 2006 distribution applications, but this spending must meet the Total Resource Cost test established in the Board Conservation Manual.” (p. 105). It was on that basis that the Ontario LDCs developed their plans for 2006.
- To ask the LDCs to now revisit their plans would be unfair. They developed their plans on the basis of the Board’s earlier decision. The 2006 rate year is just beginning. If the Board were to decide now that it will mandate additional spending, the level of spending must be determined for each LDC. It would then be incumbent on the LDCs to evaluate how to spend that money in the most cost-effective way possible. They would then be required to apply for Board approval. From a practical perspective we may be well into 2006 before any additional plans can be finalized.
- To consider the appropriate level of spending in each and every rate proceeding would unnecessarily delay the implementation of 2006 rates and introduce the potential for rate retroactivity.
- There is no evidence before the Board as to what “additional” spending would be required. Any evidence before the Board on this issue has not been tested in an oral proceeding. It is inappropriate to simply rely on spending levels in other jurisdictions. The Board considered the issue of a mandatory spending target in

its review of the Rate Handbook and rejected it. To assume “more is better” without clear evidence to support that approach would be irresponsible.

- Mandating additional spending without a consideration of how that spending fit into the plans of the Conservation Bureau may result in duplication and a wasting of resources.
- The LDCs are new to CDM development and delivery. A prudent approach would be to allow them to gain experience, and assess that experience before mandating additional spending.
- The fact that very few LDCs have requested approval of additional spending is evidence that additional CDM activities beyond the third tranche programs are not manageable.

39. For all of these reasons, the Council submits that the Board, as a practical matter, should not order a LDC to spend money on CDM programs in an amount that is different from the amount proposed by the LDC in a test year. The Board should adopt this approach until the results of the transitional period have been evaluated. The Council expects that the Board will, in the interim, work on developing a regulatory framework for CDM activities that balances the need for effective oversight and the protection of ratepayer interests with a desire for administrative simplicity. That framework can be applied in 2008 and beyond.

### **III Issue Two**

40. The Board is seeking input from parties on the issue of whether it should require LDCs to demonstrate free-ridership levels for all CDM programs on a program by program basis. The Total Resource Cost Guide (“the Guide”) was developed by the Board through a consultation process in which parties had an opportunity to comment on the principles established by the Guide and the assumptions set out in the Guide. The Board considered the comments and finalized the Guide on September 8, 2005.

41. The evaluation of CDM programs is a difficult exercise. The measurement of results depends largely on program assumptions. Experience with natural gas DSM has demonstrated that

determining assumptions such as free-ridership rates can be very contentious. In the most recent Enbridge Gas Distribution Inc. (“EGD”) rate proceeding lengthy cross-examination was undertaken with respect to EGD’s proposed free-ridership rates. Experience with natural gas DSM has also demonstrated that establishing free-ridership rates can be a costly exercise, often requiring surveys of participants. In addition, free-ridership rates can vary year to year depending upon the environment in which the programs are undertaken. Although the Council does not necessarily support the free-ridership rate levels and other assumptions set out in the Guide, we submit that for 2006 the free-ridership rates established by the Board should stand. To require the LDCs at this stage to demonstrate free-ridership rates for all their programs would be costly, onerous and unnecessary.

42. Having said that the Council is concerned about the extent to which inappropriate free-ridership rates may be used to calculate shared savings mechanism (“SSM”) pay-outs. A free-ridership rate that is too low will inappropriately reward the shareholders for savings that were not actually achieved. The Board should ensure that the free ridership rates are reviewed prior to the next test year to ensure that they are appropriate.

43. Those LDCs that are applying for an SSM in 2007, and which will be paid a shareholder incentive based upon achieved results, it must be able to demonstrate “actual” results achieved. The Board should hold these LDCs to a higher standard in terms of monitoring and evaluation. If the LDC is seeking to recover a SSM reward from ratepayers, it must clearly demonstrate that the savings they achieved are real. In those cases, the Board should require the LDCs to justify their free-ridership rates on a program-by-program basis.

#### **IV Issue Three**

44. The last issue that the Board is seeking input on is the issue of attribution and the extent to which a LDC should only be able to claim incremental benefits associated with its participation in a CDM program with a non-rate regulated third party. This is particularly significant if a LDC is applying for an SSM reward based on TRC results achieved.

45. The Council reiterates its view that in assessing CDM results the goal is to determine “actual” results achieved to the extent possible. A LDC should only be credited with savings that are

attributable to its efforts. To do otherwise may overstate the savings levels achieved by the LDC and distort the results. If the results are used to calculate SSM pay-outs overstating the benefits attributable to a LDC will inappropriately reward the shareholders for efforts undertaken by others. This would be unfair to ratepayers, those that fund the reward. To in effect “pretend” that all of the savings were generated by one party when they were not is a very dangerous precedent. The credibility of CDM efforts could be jeopardized if such a policy were perpetuated by the Board.

46. The Council supports partnering in the design and delivery of CDM in Ontario. However, simply because an entity like Natural Resources Canada is not rate-regulated does not mean its program partners should be entitled to claim benefits it generated. The LDCs should only be rewarded for their efforts.

47. For 2006 it is unlikely that there are many cases where a LDC is partnering with a non-rate regulated entity. Therefore, unlike the free-ridership issue it should not be difficult to evaluate such partnerships on a case-by-case basis to determine the level of benefits that should be attributed to a LDC. The Council does not believe LDCs should be entitled to 100% of the benefits generated from these types of programs. It should be incumbent on the LDC to justify the attribution of savings for these programs on a case by case basis.

48. The Board needs to develop an attribution policy that is clear and fair to both ratepayers and shareholders.

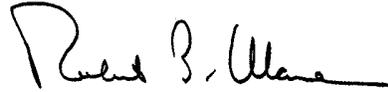
## **V Conclusion**

49. The Council remains concerned about the extent to which the CDM issues have dominated the regulatory processes currently before the Board. We are also concerned about the extent to which CDM issues continue to be revisited. The issues in this proceeding have already been considered by the Board in earlier processes.

50. Cost-effective CDM measures are in the best interests of residential consumers, and for that reason the Council supports them. The legislature clearly intended the OPA, with any direction from the Minister, to have primary responsibility for CDM measures in the province. The OPA must carry out that responsibility by, among other things, providing direction on what CDM measures the LDCs should undertake and, if necessary, what level of spending is required to

undertake those measures effectively. Until the OPA does so, the Board should carefully limit its role with respect to CDM measures to avoid the risk of creating a patchwork of different, and perhaps conflicting, CDM activities among LDCs.

**All Of Which Is Respectfully Submitted**



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