EB-2005-0523

ONTARIO ENERGY BOARD

IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to make certain determinations respecting conservation and demand management ("CDM") activities as described in the Electric Distribution Rates ("EDR") Handbook and Total Resource Cost ("TRC") Guide pursuant to sections 19(4) and 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B ("OEB Act").

WRITTEN SUBMISSION
on behalf of the
COALITION OF LARGE DISTRIBUTORS

Introduction

1. The Board initiated this proceeding of its own motion to consider and decide certain issues in connection with the CDM activities of local distribution companies ("LDC"). In its November 11, 2005 Notice of Proceeding and Hearing ("Notice"), the Ontario Energy Board ("Board") set out the following three issues:

   - Issue 1 - should the Board order an LDC to spend money on CDM programs in an amount that is different from the amount proposed by the LDC in a test year and, if so, under what circumstances?

   - Issue 2 - should the Board require LDCs to demonstrate free ridership levels for all CDM programs on a program-by-program basis?

   - Issue 3 - should the Board order that an LDC be entitled to claim only incremental benefits associated with its participation in a CDM program with a non-rate regulated party?

2. The following six distributors are coordinating their participation in this proceeding as the Coalition of Large Distributors ("CLD"):

- Enersource Hydro Mississauga Inc.
- Horizon Utilities Corporation
- Hydro Ottawa Limited
- PowerStream Inc.
- Toronto Hydro-Electric System Limited
- Veridian Connections Inc.

3. The CLD members distribute electricity, as a group, to over 1.5 million customers or 40% of Ontario's total. The CLD members led the LDC response to the Minister of Energy's decision to permit electricity distributors to recover the third tranche of their market adjusted revenue requirement or "MARR" in return for investing one year's worth in CDM initiatives. The Board approved the individual CDM Plans of the CLD members in an oral decision with reasons on December 10, 2004 (RP-2004-0203).

4. The CDM Plans of the CLD members represent a significant commitment to the Government of Ontario's energy conservation goals. Collectively, the CLD members are committed to make capital and operations expenditures of more than $72 million over three years in discrete programs that fall into three categories – CDM for <50kW and >50kW customers, distribution loss reduction, and distributed energy.

5. The CDM Plans of the CLD members are "first-generation" plans that include pilot programs that are being implemented in a limited fashion in order to test their efficacy and efficiency in the Ontario market. The CLD members are evaluating and assessing the results of the first-generation CDM and are starting to plan for and, in the case of Enersource Hydro Mississauga Inc., implement second-generation CDM programs.

6. In its RP-2004-0188 Report issued on May 11, 2005, the Board decided that mandated CDM spending targets for 2006 (Issue 1) were not appropriate.[1] It did so despite the submissions of parties such as the Green Energy Coalition ("GEC") who favour such targets. The fact that its decision in this regard was included in a "Report" of the Board as opposed to a "Decision" of the Board is no less dispositive of the issue.

7. In the *Total Resource Cost Guide (*"TRC Guide") issued on September 8, 2005, the Board decided to adopt a set of generic values for certain TRC inputs, including rates for "free riders" and "attribution of benefits" (Issues 2 and 3, respectively). It did so despite the submissions of Pollution Probe that inputs should be decided on a case-by-case, program-by-program basis.

8. In light of these circumstances, the CLD members do not understand the need to revisit the three issues, mere months after each was considered and decided by the Board. This is of particular concern because the Board and the LDCs that it regulates are already under enormous pressure to complete the 2006 EDR process to ensure that new rates are in place by May 1, 2006.

9. All of the arguments on the issues in this proceeding have already been thoroughly debated. There is no legal or policy reason that requires the Board to revisit these issues at this time. Having decided to do so, however, and in the absence of any evidence whatsoever of changed circumstances that would warrant new decisions on these issues, it is incumbent on the Board to affirm its earlier decisions in respect of Issues 1, 2 and 3 and make it clear (to the extent that there is any doubt) that these decisions pertain to applications by all LDCs, for approval of their respective 2006 rates. The requirements for regulatory certainty, consistency and fairness require no less a course of action.

Issue 1: Mandated CDM Spending

Scope

10. Four parties filed affidavit evidence in connection with Issue 1: GEC; the Low Income Energy Network ("LIEN"); Hydro One Networks Inc. ("HONI"); and Newmarket Hydro

[1] RP-2004-0188, Report of the Board (2005 May 11), pp. 103-5.

Ltd. ("NHL"). Certain of the evidence – notably that of GEC – goes beyond what the CLD members understand to be the scope of this proceeding.

11. It is one thing to answer the question of whether and when the Board should mandate CDM spending for 2006 rates. It's quite another to offer a prescription for CDM on a province-wide basis. This is an important and complex issue that should be debated and decided in the proper forum, at the proper time, and with input from all stakeholders including the Ontario Power Authority ("OPA"). It is inappropriate to attempt to wedge this important topic into a proceeding that has been convened for a limited purpose.

12. In the result, the CLD members request that the Board disregard the evidence of GEC where it has strayed beyond the proper scope of this proceeding.

Jurisdiction

13. The Board considered its authority with respect to CDM activities of distributors in its EB-2005-0315 Decision and Order. It noted that:

(i) its authority respecting conservation activities "is with respect to rates;"

(ii) its rate-making authority addresses the prudence of expenditures and "does not extend to ordering LDCs to engage in specific demand management activities;"

(iii) there is no provision in the OEB Act conferring the Board the authority to direct an LDC to engage in CDM activities; rather, this matter is left to the discretion of the LDC;

(iv) no prior approval from the Board is required before an LDC enters into a CDM activity;

(v) the Board may review CDM expenditures for prudence and cost effectiveness as part of its rate-making authority;

(vi) as part of such a review, the Board may consider whether alternative CDM programs should be considered – whether they involve higher or lower expenditures than those proposed by the LDC; and

(vii) requiring LDCs to spend specified amounts of money on CDM programs is different from requiring LDCs to engage in specific CDM activities.

14. Although the jurisdictional aspect of the Board's EB-2005-0315 Decision and Order is not without ambiguity, it seems reasonably clear that the Board believes that its CDM jurisdiction is limited to deciding on the appropriate quantum of spending in connection with an application for approval of rates and does not extend to prescribing specific CDM programs or activities.

15. The CLD members agree with the Board in this regard. It would be helpful, however, if, in its decision in this proceeding, the Board resolved the apparent conflict between its statement that its rate-setting authority "does not extend to ordering LDCs to engage in specific demand management activities"[2] and its statement that it "clearly has the legal authority to consider whether alternative programs should be considered."[3]

Should Spending Levels be Mandated?

16. The CLD members submit that the Board should refrain from requiring incremental CDM expenditures in 2006. To do so at this time, would be premature and, indeed, imprudent for the reasons set out below:

(i) CDM Plans have already been approved

17. The first-generation commitments of the CLD members are entirely consistent with the Minister of Energy's decision of 19 December 2005 to require LDCs to reinvest one years worth of their third tranche of MARR in CDM spending, spread over a three-year period. These commitments were approved by the Board in EB-2004-0523 proceeding as a prudent way to ramp up CDM spending from pre-2004 levels (i.e., minimal levels) to levels that reflect Ontario's commitment to a culture of conservation.

2 EB-2005-0315 Decision and Order, p. 10, 1st full para.
3 *Ibid.*, p. 11, 1st para.

(ii) first generation CDM is still in progress

18. The CDM Plans of each CLD member are "first-generation" CDM Plans, "ring-fenced" in terms of total dollars to be spent and in terms of the period over which this spending is to occur. Plan spending is limited to one year's worth of each CLD member's MARR. The CDM Plans comprise "pilot" programs in the sense that most of them are new to the CLD members and some are being implemented in a limited fashion in order to test their efficacy and efficiency in the Ontario market. For many of these programs, the process of gathering and evaluating performance data has yet to be completed.

19. In the EB-2004-0203 proceeding, the CLD members sought and received Board approval for flexibility in how they managed their individual CDM Plans. The CLD members also sought and received Board approval to discontinue programs, add programs from the overall menu of programs, or reallocate dollars among programs, up to a cumulative limit of 20% of each member's spending obligation, without the requirement of Board approval, beyond the Board's final approval of the CDM Plans. During the currency of first-generation CDM, the CLD members continue to evaluate and adjust the programs in their respective CDM Plans to respond to customer demand, industry and regulatory changes, and the emergence of new CDM opportunities and technologies.

20. The CLD members are using the results of their individual first-generation CDM Plans to shape and inform the design of their individual second-generation CDM Plans. This process will be further informed by the results of the Board's annual review of CDM Plans in the second quarter of 2006. In these circumstances, it would be premature to require incremental CDM spending for 2006.

(iii) regulatory certainty is required

21. LDCs should not be required to spend incremental monies on undefined CDM programs, particularly when such spending could, at a later stage, be determined to be imprudent. In this regard, CLD members require an understanding of how the Board intends to judge the prudence of their CDM spending in future rate proceedings. CLD members also require regulatory certainty with respect to the TRC imputs that should be used when

carrying out cost benefit analysis on proposed CDM programs. The Board's decision to reopen the free rider and benefits attribution issues in this proceeding is evidence of the uncertain state of affairs in the regulatory arena.

Issue 2: Free Ridership Level - Program by Program

22. Six parties filed affidavit evidence in connection with Issue 2: Enbridge Gas Distribution Inc. ("EGD"); GEC; HONI; LIEN; NHL; and Pollution Probe. Only GEC and Pollution Probe would have the Board require LDCs to demonstrate free ridership levels on a program-by-program basis.

23. The other four parties oppose such a requirement, as do the CLD members, and EGD's affidavit evidence in particular provides a cogent and compelling rationale for such opposition. The CLD members subscribe to this rationale. Their first-generation CDM Plans, moreover, do not provide the detailed information that would be necessary to make such a precise determination of free-ridership levels. It would accordingly be unfair for the Board to impose such a requirement on their first-generation CDM Plans. The time for such a requirement, if ever, is when the CLD members and the other LDCs begin designing their second-generation CDM Plans.

Issue 3: Attribution of Benefits

24. The same six parties filed affidavit evidence in connection with Issue 3. Again only GEC and Pollution Probe would have the Board limit on LDC's claim to only the incremental benefits associated with its participation in a CDM program with a non-rate regulated party.

25. The other four parties again oppose such a change in the attribution rates, as do the CLD members, and again EGD's affidavit provides a cogent and compelling rationale for such opposition. Such a change would not only remove the incentive to pursue partnership opportunities with non-rate regulated parties, but also add a layer of complexity such as the means of valuing non-financial contributions.

26. The CLD members subscribe to this rationale. They are also concerned about the retroactive or retrospective nature of such a change in the attribution rules. As with Issue 2, now is not the time for such a change.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on behalf of the Coalition of Large Distributors, by its counsel, this 20th day of December, 2005.

(signed) H.T. Newland
Helen T. Newland