



**Canadian
Manufacturers &
Exporters**

Ontario Division

**Electricity
Conservation and Demand Management
(CDM)**

EB-2005-0523

**Canadian Manufacturers & Exporters
(CME)**

Reply Submission

January 11, 2006

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1.0 Introduction

- 1.1 CME's reply submission deals with issues arising from the submissions of Board Staff, Pollution Probe (PP), Green Energy Coalition (GEC), the Coalition of Large Distributors (CLD)¹, Newmarket Hydro Ltd. (NHL), Enbridge Gas Distribution Inc. (EGD), Energy Probe (EP), School Energy Coalition (SEC), Consumers Coalition of Canada (CCC), Low Income Energy Network (LIEN), the Vulnerable Energy Consumers Coalition (VECC), and the Ontario Power Authority (OPA).

Background

- 1.2 The Board's November 11, 2005 Notice of Proceeding and Hearing referenced the Board's Report on the 2006 EDR Handbook (RP-2004-0188) in which the Board stated:
- 1.2.1 It would not mandate a minimum expenditure target for LDC spending on CDM programs, and that LDCs may apply for CDM spending as part of its 2006 distribution rates application, but such spending must meet the TRC test established in the TRC Guidelines.
- 1.2.2 The issues in this proceeding are whether;
- 1.2.2.1 The Board should order an LDC to spend money on CDM programs in an amount that is different from the amount proposed by an LDC in a test year and, if so, under what circumstances?
- 1.2.2.2 With respect to section 2.1 of the TRC Guideline, the Board should require LDCs to demonstrate freeridership levels for all CDM programs on a program by program basis; and,
- 1.2.2.3 With respect to section 2.2 of the TRC Guideline, the Board should order that an LDC should only be entitled to claim incremental benefits associated with its participation in a CDM program with a non-rate regulated third party.
- 1.3 At the December 22, 2005 hearing, however, the Panel Chairman described the issues somewhat differently. The words in italics identify the additional objectives, as articulated by the Panel Chairman:
- 1.3.1 The issue in this proceeding is whether the Board *can and* should order an LDC to spend money on CDM in an amount that is different than the amount proposed by the LDC in its application, and, if so, under what circumstances?

¹ CLD = Toronto Hydro-Electric System Limited, Hydro Ottawa Limited, Horizon Utilities Corporation, Enersource Hydro Mississauga, PowerStream and Veridan Connections Limited

- 1.3.2 One purpose of this proceeding is to create a *binding ruling*. *The Handbook is a guideline*.
- 1.3.3 *The second purpose is to create a generic ruling; that is to say the order that would emanate from this proceeding would apply to all LDCs.*
- 1.3.4 The second issue relates to the TRC Guideline. In section 2.1 of that, the Board established a standard free ridership rate to be included in LDCs' calculation of costs and benefits. Section 2.2, the Board went on to say that an LDC may claim 100 percent of the benefits associated with a CDM program which they jointly market with other non rate-regulated parties.²
- 1.4 The Chairman's remarks added jurisdictional, application (timing) and scope dimensions to the proceeding.

Issues

- 1.5 CME's reply submission focuses five areas, as follows:

Application of Decision

- 1.5.1 To which year or years should the Board's decision(s) apply?

Jurisdiction

- 1.5.2 Does the OEB have jurisdiction to mandate CDM spending and, if so, should it exercise that mandate?

Six Tests

- 1.5.3 Regardless whether or not the OEB has jurisdiction, which test should be employed to determine the level of LDC CDM spending in each year?

Central Planning Bias

- 1.5.4 Is the Board panel biased towards CDM central planning at the expense of a market economy?
- 1.5.5 Can or should the OPA make recommendations to the OEB with respect to the OEB setting CDM targets for the LDCs outside of a process that does not permit cross-examination?
- 1.5.6 Indeed, has the Board, as regulator, placed an unreasonable burden (obligation) on the OPA as a result of its request that the OPA consider making CDM target recommendations to the OEB, given the Board's regulatory review of the OPA's fiscal 2006 expenditure and revenue requirement (EB-2005-0489)?

TRC Guide

- 1.5.7 Can and should the Board mandate free rider rates and other assumptions by means of the TRC Guide?
- 1.5.8 Should TRC assumptions be applied prospectively or retrospectively?

² Transcript, December 22, 2005, pages 1 and 2

- 1.5.9 Did Enbridge Gas Distribution correctly describe the level of agreement involved in the 2003 ADR Settlement Agreement?

2.0 Application of the Board's Decision

Issues

- 2.1 The Board has indicated that its' ruling with respect to mandating CDM expenditures, free rider rates and attribution would be definitive and apply to all LDCs.³
- 2.2 However, it is unclear whether:
- 2.2.1 To which year or years its decision would apply, that is to 2006 alone, to 2006 and each subsequent year thereafter, or to 2007 and each year thereafter, or some other combination.
- 2.2.2 The Board's decision would apply only to LDC CDM spending arising from so-called third tranche funding regardless of the year in which it is spent, or to LDC CDM program proposals beyond third tranche funding?

Background

- 2.3 With respect to CLD and HONI, the Board has already decided the level of 2006 LDC CDM expenditure related to third tranche funding. Indeed, both CLD and HONI will within a few days be entering into 2006 rate hearings on other issues.⁴
- 2.4 Board Staff evidently believes the Board's decisions in this proceeding would relate only to 2006 when it stated: "Our submission is that the current guidelines should be made binding directions from the Board, or a binding order from the Board to apply to '06 rates."⁵
- 2.5 Indeed, the Board Staff's submission states: "this proceeding can therefore provide a decision on these issues for 2006 that is both binding (it will result in an order) and generic (it will apply to all LDC distribution rates)."⁶
- 2.6 Both CLD and HONI are concerned that the Board would change the rules of the game after its 2006 CDM program has been established.
- 2.7 On the other hand, PP believes that the Board's decisions will apply beyond 2006 and have application in future years.⁷

³ Ibid.

⁴ Ibid, page 26, lines 23 to 28, and page 47, lines 16 and 20

⁵ Ibid, page 24, lines 27 to 28, and page 25, line 1.

⁶ Board Staff Submission, December 20, 2005, page 3, paragraph 9

⁷ "Today the Board is considering certain binding rules that would give guidance to managers in the future." Transcript, page 74, lines 12 to 13.

CME Position on the Issues

- 2.8 CME submits the Board's decision in this hearing should be restricted to third tranche CDM funding only whether it is spent in 2006 or 2007. Its ruling or rulings should not apply to future years.
- 2.9 In CME's view, it would be inappropriate for the Board to now require LDCs to review their third tranche 2006 CDM spending plans, using formulas such as those proposed by Board staff or by GEC.
- 2.10 Indeed, if the Board restricts its decision to 2006, CME would be content if the Board allowed LDCs to use the free rider rates in the TRC Guide, provided LDCs are not allowed to claim an incentive based on a TRC calculation involving *a priori* free rider rates and claim 100% attribution.
- 2.11 In the alternative, should the Board decide that its decision(s) should apply beyond 2006, CME urges the Board to ensure that the TRC Guide assumptions are regularly reviewed and that the Board to be guided by CME's recommendations with respect to the OEB jurisdiction, to test for determining the level of CDM spending, free rider rates and attribution, as set out in this reply submission.

3.0 Jurisdiction

Issue

- 3.1 Does the OEB have jurisdiction to mandate CDM spending and, if so, should it exercise that mandate?

Background

- 3.2 Intervenors are split on the issue of whether the Board has jurisdiction, and fall into four camps, namely those intervenors who:
- 3.2.1 Took no position at the December 22nd hearing (or had not looked at the jurisdictional issue prior to the hearing). These intervenor include: CLD, HONI, NHL, VECC, OPA, EGD, and EP.
- 3.2.2 Declined to express a view on the Board's jurisdiction to mandate CDM spending, rather proposed a different route. These intervenor include: Board Staff and SEC.
- 3.2.3 Believe the Board has jurisdiction. These intervenor include: Pollution Probe, GEC and LIEN.
- 3.2.4 Believe the Board does not have jurisdiction to mandate CDM spending. These intervenors include: CCC and CME.

Mandate Issue Avoided**Board Staff**

3.3 Board Staff demurred on whether the Board has jurisdiction to mandate LDC CDM spending. Specifically, Board Counsel stated:

“I wouldn't say that the Board lacks jurisdiction to say that a LDC should spend 1 percent of its revenues on CDM or something. ... I'm saying the Board ought not to do that, because the Board's rate-making power, I think, is quite broad, and I'm not making a jurisdictional argument here. The question as framed is: What should the Board do?”⁸

3.4 At the same time, Board Counsel referenced the fact that the Board does “not have the authority under section 29.1 of the Electricity Act⁹ to order utilities to carry out CDM initiatives.”¹⁰

3.5 As an alternative to jurisdiction Board Staff recommended the Board stick to black letter ratemaking – the ability of the Board to require LDCs to make expenditures based on what is cost effective.¹¹

3.6 In essence, it is a determination by the Board that an LDC's proposal “to spend ... rate payer money on distribution assets or services ... could have been spent more effectively on CDM initiatives.”¹²

3.7 In Board Staff's view, “The Board's authority in respect of LDC expenditures is in the rate setting context. The Board's key power in this regard is to determine whether or not LDC expenditures should be recovered from rate payers, on the one hand, or borne by LDC shareholders, on the other.”¹³

SEC

3.8 SEC, on the other hand, said:

3.8.1 It was “not going to talk about the legal issue ... the practical reality is if the Board decides it wants to exercise jurisdiction in this area, it has ample tools within its arsenal to decide to do that.”¹⁴

⁸ Transcript, page 19, lines 8 to 15.

⁹ **29.1 (1)** Subject to section 71 of the *Ontario Energy Board Act, 1998* and such limits and criteria as may be prescribed by the regulations, a transmitter, distributor or the OPA may provide services that would assist the Government of Ontario in achieving its goals in electricity conservation, including services related to,

(a) the promotion of electricity conservation and the efficient use of electricity;

(b) electricity load management; or

(c) the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources. 2004, c. 23, Sched. A, s. 40.

¹⁰ Transcript, page 12, lines 4 to 6

¹¹ Ibid, page 14, line 26 and Board Staff Submission, December 20, 2005, paragraph 16.

¹² Board Staff Submission, page 9, paragraph 22.

¹³ Ibid, page 7, paragraph 15.

¹⁴ Ibid, page 136, lines 8 to 12

3.8.2 “We're not proposing that the Board set specific dollar figures. We're not proposing that you order specific programs. What we are proposing is that you consider CDM the same way as you consider every other judgement call the utility makes.”¹⁵

3.9 NHL also chose not to address the jurisdictional issue but stated:

3.9.1 “The best approach to jurisdiction is the one that's been commended to you by ... Board Staff ... in the context of your rate-setting jurisdiction and ... the prudence standard.”

3.9.2 “Even if the Board has jurisdiction, it should not exercise any power to order increased CDM spending at this time. I emphasize ‘at this time’.”

3.9.3 “We're also in a process of transition with the arrival in this area of the OPA ... and my submission very strongly is this is not the time for the Board to be kind of proactively exercising jurisdiction that imposes new obligations on LDCs.”¹⁶

3.9.4 “There are really two options before you. We can view LDCs as initiators or as facilitators. ... Newmarket Hydro sees the facilitation role as an appropriate one.”¹⁷

OEB has Jurisdiction

3.10 Pollution Probe, LIEN and GEC argue that the Board has jurisdiction and should exercise that jurisdiction to compel LDCs to spend significant amounts on CDM subject to those initiatives meeting the TRC test.

LIEN

3.11 LIEN goes further and says: “the government has clearly stated that the LDC has a primary role in providing conservation and demand management.”¹⁸ It also asserts that: “I think everyone has said that if the Board wants jurisdiction, you can take it”.¹⁹

3.12 LIEN suggests the Board has authority “in section 1 of the Act, and they include not only prices, but adequacy, reliability, quality of electricity services, as well as the economic efficiency and cost effectiveness of demand management.”²⁰

Pollution Probe

3.13 While PP said it would not get into a legal jurisdictional argument²¹, it nonetheless referenced “amendments to the Energy Board ... (and) to the Electricity Act ...

¹⁵ Ibid, page 139, lines 1 to 5

¹⁶ Ibid, page 51

¹⁷ Ibid pages 52 and 53

¹⁸ Ibid, page 156, lines 12 to 14

¹⁹ Ibid, page 154, lines 1 to 2

²⁰ Ibid, page 154, lines 21 to 24.

(that) changed what used to be ...the question about jurisdiction²² ... and, specifically, Section 83.1 of the OEB Act (which) says: ‘The Board may establish standards, targets, and criteria for evaluation of performance by generators to whom section 78.1 applies, transmitters, distributors and retailers’.”²³

- 3.14 According to PP, these amendments “relate to the jurisdictional issue, and ... make ... clear that the Board can set targets and criteria ... (and... guide ... how the mandated extra spending would operate, ... that is, ... the Board can set targets and criteria for that extra spending. By setting targets, the Board can set a goal; can establish the objectives and the desired public interest result. And it can say: ‘You are mandated or directed to spend 1 percent, or 2 percent or 3 percent of your total revenue, on top of your third tranche spending, for additional CDM’.”²⁴
- 3.15 PP acknowledges that: “a target is not necessarily an order to spend the money regardless of other factors. (But) ... the Board can say, above the third tranche spending, the LDCs are directed to spend up to a target level, subject to the criterion of the TRC test.”²⁵
- 3.16 PP believes the Board is more than a reviewer or a quality control and that the word "promote" (in section 1(2) of the OEB Act) not only has an active connotation, it is connected "to promote economic efficiency and cost effectiveness"²⁶ ... moreover, to promote, through targets and other things, demand management.”²⁷

GEC

- 3.17 GEC is asking the Board to “charge utilities with an obligation to pursue all that is cost effective, ... reasonable and practicable. ... It would be unreasonable to say (to LDCs) ... go out and get it all (i.e., the Mandatory Option proposed by Board Staff). ... The Board should take this opportunity to give generic direction.”²⁸
- 3.18 Should the Board agree with the generic approach, “the burden shifts to the utilities to ... rejig their plans and come back ... and, through ... a variance account, the rate-setting process can proceed”. The objective is to give LDCs direction to go out and ramp up moving towards practical, achievable and reasonable CDM.
- 3.19 GEC also says “if the LDCs don't deliver CDM, and nobody else does, they will need to deliver more expensive power and transmission and distribution upgrades. And this Board must surely have jurisdiction to at least penalize utilities that fail to

²¹ Ibid, page 77, lines 12

²² Ibid, page 77, lines 12 to 18.

²³ Ibid, page 77, lines 24 to 28 and page 78, lines 1 to 2.

²⁴ Ibid, page 78, lines 4 to 16.

²⁵ Ibid, page 78, lines 17 to 28

²⁶ Ibid, page 89 lines 10 to 13.

²⁷ Ibid, page 89, lines 6 to 8.

²⁸ Ibid, page 108, lines 13 to 19 and page 109, lines 3 to 5.

deliver the least cost option. So I think right there you have jurisdiction. ... The debate here isn't about jurisdiction, it is about what the Board should do”²⁹

- 3.20 GEC goes further and says:³⁰
- 3.20.1 The OEB has the authority to promote through targets and other things, demand management. Specifically, section 1(2) OEB Act) says: "to promote economic efficiency and cost effectiveness."³¹ This section gives the Board a positive objective of promoting cost-effectiveness and rational economic outcomes.
 - 3.20.2 Section 1 requires supply expansion to be cost-effective, and that can only be true if CDM, that is cheaper than supply investment, has first occurred.
 - 3.20.3 Section 83 is an empowering section which lets the Board give positive guidance and criteria, and it is that section the Board could rely on to provide general direction to utilities.
 - 3.20.4 The Board can point to spending levels, a crude barometer of DSM or CDM attainment, as an indication of what it views as ... a reasonably aggressive ramp-up.
 - 3.20.5 Government has given direction, including, speeches from the Premier, and the Minister directing the Board to oversee the utilities spending \$163 million on CDM to start, and the Legislature expressing its will in section 1 of the Act. But we don't have nice language tied up with a bow, just some pretty strong indications of government and legislative intent.
 - 3.20.6 GEC believes that “given a statutory mandate in section 1, it's not appropriate for the Board to be merely permissive of LDC spending. You should move towards a heightened expectation; call it mandating ... a form of mandating.”
 - 3.20.7 The prudence test ... could be the hammer the Board holds and hopes not to have to use.
- 3.21 GEC believes section 29.1 enables LDCs to spend money on conservation, but it is permissive not mandatory.³²

CME Position - OEB has no Jurisdiction to Mandate CDM Spending

- 3.22 CME agrees with the CCC's analysis that the Board has two primary powers under the OEB Act in relation to LDCs – the power to licence (section 70) and the power

²⁹ Ibid, page 105, lines 21 to 28

³⁰ Ibid, pages 105 to 121

³¹ Ibid, page 89, lines 9 to 13.

³² Ibid, page 105, lines 12 to 14.

to approve rates (section 78), and, that the OEB Act confers no CDM powers on the Board.³³

- 3.23 CME submits that neither under the Board’s power to approve rates, nor its power to licence, does the Board have the power to mandate an LDC CDM to spending.
- 3.24 Indeed, Board Staff is of the view that the Board has a “statutory mandate of efficiency and cost effectiveness in CDM (that) requires it to review the entire statutory scheme to identify where the primary responsibility should be for funding CDM initiatives leading to broad societal benefit. ... The scheme assigns this responsibility to the OPA not LDCs.”³⁴
- 3.25 Energy Probe also recommends caution with respect to how it deals with CDM issues, especially given the role of the OPA.³⁵

Rate making Power

- 3.26 Section 1(1)(2) of the OEB Act states that an objective of the Board is to promote economic efficiency and cost effectiveness of demand management of electricity, but CME submits that neither this section, nor any other section, requires the Board to mandate that CDM programs exist.³⁶
- 3.27 Section 71(2) of the OEB Act³⁷ permits LDCs to engage in CDM activities and references section 29 of the Electricity Act; section 29 is also permissive, not mandatory.³⁸
- 3.28 Unlike the energy conservation powers the Legislature has given the Board in the natural gas sector³⁹, there is no such power in the electricity sector. Indeed, the

³³ CCC December 20, 2005, Submission, page 5

³⁴ Board Staff Submission, page 11, paragraph 29.

³⁵ Transcript, page 127, lines 25 to 28, and page 128, lines 1 to 3.

³⁶ 1(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. 2004, c. 23, Sched. B, s. 1.

³⁷ 71(2) Subject to section 80 and such rules as may be prescribed by the regulations, a transmitter or distributor may provide services in accordance with section 29.1 of the *Electricity Act, 1998* that would assist the Government of Ontario in achieving its goals in electricity conservation, including services related to,

(a) the promotion of electricity conservation and the efficient use of electricity;

³⁸ 1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. 2004, c. 23, Sched. B, s. 1.

³⁹ 2 (5) of the OEB Act, 1998 sets out an objective of the Board for the natural gas sector: “To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.”

Board’s objectives in the OEB Act for the electricity and natural gas sectors are, for the most part, quite different.

- 3.29 Moreover, contrary to LIEN’s assertion, the government has not given LDCs a primary CDM role. At best, LDCs have a voluntary role under section 29.1 of the Electricity Act and section 71(2) of the OEB Act.
- 3.30 CME strongly disagrees with LIEN’s assertion that jurisdiction is there for the Board’s taking. SEC is the only other intervenor that proposes that line of argument.
- 3.31 SEC’s position is pragmatic, if unrealistic. In essence, SEC advocates forget about the law and jurisdiction – exercise jurisdiction whether you have it or not. Clearly, to SEC “the end justifies the means”.
- 3.32 SEC, LIEN and VECC advocate a process that would pervert the Board’s traditional rate making responsibilities into a political log rolling exercise with SEC, LIEN, VECC and others lobbying to steering more money to their particular interest groups than they have paid in rates.⁴⁰
- 3.33 CME submits the Board must not be allow its regulatory role to be transformed into a political log rolling venue.

Licencing Power

- 3.34 Section 70 gives the OEB the power to issue a licence and to determine its conditions,⁴¹ while section 83 empowers the OEB to establish standards, targets and criteria for evaluation of performance, including the conditions of a licence.⁴²
- 3.35 CME submits that the Board does not have the power under section 83 to mandate LDC CDM spending.
- 3.36 As well, Board Counsel evidently also does not believe the OEB can require LDCs to spend more on CDM or, at least the Panel Chairman seems to be of that view when he asked GEC: “So even if those targets were put in as a condition of licence,

⁴⁰ See CME Submission, Electricity CDM Activities –EB-2005-0523, December 20, 2005, page 14 for the economic and political science definition of free rider.

⁴¹ 70(1) A licence under this Part may prescribe the conditions under which a person may engage in an activity set out in section 57 and a licence may also contain such other conditions as are appropriate having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*. 1998, c. 15, Sched. B, s. 70 (1).

⁴² 83. (1) The Board may establish standards, targets and criteria for evaluation of performance by generators to whom section 78.1 applies, transmitters, distributors and retailers. 1998, c. 15, Sched. B, s. 83 (1); 2004, c. 23, Sched. B, s. 27 (1).
 (2) The Board may have regard to the standards, targets and criteria referred to in subsection (1) in exercising its powers and performing its duties under this or any other Act in relation to generators to whom section 78.1 applies, transmitters, distributors and retailers, including establishing the conditions of a licence. 1998, c. 15, Sched. B, s. 83 (2); 2004, c. 23, Sched. B, s. 27 (2).

as is contemplated in 83.2, that would be in conflict with Mr. Vegh's point that we can't order them (LDCs) to spend a specific amount.”⁴³

- 3.37 Indeed, even GEC believes the Board does not have mandatory powers under section 83, since conservation targets “are a shade lighter than mandatory requirements. ... Targets are presumptive ... (and) rebuttable.”⁴⁴
- 3.38 Moreover, CME submits that if the Board set CDM targets as a condition of an LDCs licence, and the TRC test is used, this would, according to GEC, result in these programs failing to meet the rate impact test (RIM)⁴⁵, and rates would increase.
- 3.39 In light of such rate impact, CME submits the Board should use caution, given its legislative mandate, in section 78(3), to approve rates that are “just and reasonable”.⁴⁶

4.0 Six Tests – Three Criteria

Issue

- 4.1 Regardless whether or not the OEB has jurisdiction to mandate LDC CDM spending, which test should be employed to determine the level of spending in each year?

Six Tests / Three Criteria

- 4.2 Six tests have been proposed, three of which are a different measure of a “prudence”.
- 4.3 Within each of these test, CME submits there are also three criteria:
- 4.3.1 Who should decide on the level of CDM spending?
- 4.3.2 What level of spending is appropriate?
- 4.3.3 How should the level of spending decision be made, i.e., using the TRC methodology or some other methodology?
- 4.4 Board Staff identified three “prudence” tests:
- 4.4.1 An LDC test – In this test, each LDC makes the decision on the appropriate level of CDM spending, using the TRC methodology

⁴³ Transcript, page 107, lines 22 to 26

⁴⁴ Ibid, page 107, lines 8 to 10.

⁴⁵ The RIM Test measures the impact of an energy conservation program on an LDC's rates.

⁴⁶ 78(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 1998, c. 15, Sched. B, s. 78 (3).

- 4.4.2 A Mandatory TRC test – In this test, the TRC methodology determines the level of LDC CDM spending.
- 4.4.3 A Cost Effective Alternative test – In this test, the Board ultimately determines the level of CDM spending, based on a comparison of LDC investment alternatives, using the TRC methodology.
- 4.5 Three other tests were proposed, namely:
- 4.5.1 A Spending Goal / TRC test – In this test, the Board would order LDCs “to spend a significant amount of ratepayers’ money” on programs that have met the TRC test.”⁴⁷ Not all CDM programs that meet the test would need to be implemented immediately.
- 4.5.2 The Judgement test – In this test, the Board exercises its judgement as to the level of LDC CDM spending that is sufficient.
- 4.5.3 The Low Income Consumer test – In this test, the Board would require LDCs to have low income programs, unless the LDCs can justify why they are not appropriate. The level of spending each LDC would be required to spend on low-income CDM programs is not clear.

Cost Effective Alternative Option

- 4.6 Board Staff proposes that: “LDC expenditures should be presumed prudent unless they are demonstrated to be unreasonable” and “that the test of prudence relates to a comparison between alternative LDC expenditures”.⁴⁸
- 4.7 According to Board Staff:
- 4.7.1 LDCs can make trade-offs between distribution and CDM expenditures.⁴⁹
- 4.7.2 An LDC’s expenditure is imprudent only if it can be demonstrated that CDM expenditures are more cost effective than an alternative LDC investment in distribution assets⁵⁰ and that failure to invest in the CDM initiative resulted in higher distribution rates than the rates would have been if the CDM investment has been made.⁵¹
- 4.8 Board Staff’s proposal is based on black letter ratemaking – the ability of the Board to require LDCs to make expenditures based on what is cost effective.⁵² In essence a

⁴⁷ Ibid, page 67, lines 18 to 21.

⁴⁸ Board Staff Submission, page 4, paragraph 11

⁴⁹ Ibid, page 11, paragraph 31

⁵⁰ Note the limitation here to distribution assets, not all LDC expenditures.

⁵¹ Op. cit. page 6, paragraph 14.

⁵² Transcript, December 22, 2005, page 14, line 26 and Board Staff Submission, December 20, 2005, paragraph 16.

determination that an LDC's proposal to spend (or expenditure of) rate payer money on distribution assets or services ... could have been spent more effectively on CDM initiatives."⁵³

- 4.9 Board Staff's proposal is also based on the notion that:
- 4.9.1 "To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made ... (And that) prudence must be determined in a retrospective factual inquiry"⁵⁴
- 4.9.2 "The Board should not go the next step (and tell an LDC) you must make (a CDM) expenditure whenever it meets societal benefit. ... From a prudence perspective ... it's unfair to impose (the TRC test) burden on the LDCs or on their customers, to say that they must always make any investment possible that's going to reduce those societal costs."⁵⁵
- 4.9.3 "LDCs ... aren't in a position to make ... (societal benefit) tradeoffs. They can't decide whether we should get new generation, or transmission, or demand. They only have control over their narrow part of the world, the distribution system."⁵⁶
- 4.10 Board Staff confirmed that "for expenditures that the LDC puts forward themselves the test ... is the TRC test. The other prudence test would only be applied to expenditures that would be requested or proposed by others. ... (And that expenditures) proposed by the LDC ... would still only meet the TRC test and would not have that higher burden. It would be only those proposed by others in addition to the LDC programs that would have that higher burden"⁵⁷
- 4.11 On the other hand, Board Staff also says that the TRC methodology would not be appropriate for determining prudence because the TRC is a wide measure of societal benefits and includes costs over which the LDCs have no control; costs of generation, costs of electricity, costs of transmission. It is unfair to impose this burden on the LDCs or on their customers, to say that they must always make any investment possible that's going to reduce those societal costs.⁵⁸
- 4.12 Board Staff rejected the "LDC Choice" and the "Mandatory TRC" Options.⁵⁹
- 4.13 GEC, on the other hand, believes the Board Staff's Cost Effective test "is paramount to the RIM test, which will invariably fail".⁶⁰

⁵³ Board Staff Submission, page 9, paragraph 22.

⁵⁴ Ibid. pages 7 and 8, paragraph 16.

⁵⁵ Transcript, page 18, lines 18 to 20, and page 20, lines 27 to 28, and page 21, lines 1 to 3.

⁵⁶ Ibid, page 23, lines 19 to 23

⁵⁷ Transcript, page 84, lines 17 to 21 and page 86, lines 15 to 20 and 27

⁵⁸ Ibid, pages 20 and 21

⁵⁹ Board Staff Submission, page 10, paragraphs 25, 27, and 28.

LDC Option

- 4.14 This option was presented by Board Staff as part of its prudence test. In essence, it assumes that “an LDC’s failure to invest in CDM is never imprudent.”⁶¹
- 4.15 Board Staff rejected the LDC option because it “leaves too little room for the Board to exercise its judgment in any given case”.⁶²
- 4.16 LDC intervenors prefer this option, with the possible exception of NHL.

Mandatory TRC Option

- 4.17 Board Staff also presented a Mandatory TRC option, which assumes that “an LDC’s failure to invest in any CDM initiatives that would otherwise meet the TRC Test is imprudent.”⁶³
- 4.18 Board Staff rejected the Mandatory TRC Test option because it “leaves too little room for the Board to exercise its judgment in any given case”⁶⁴, and because:
- 4.18.1 It is too categorical (GEC agrees with Board Staff that there is need for a reasonableness, practical, test in the application of the TRC test).
- 4.18.2 It raises concerns about aligning costs and benefits of CDM between different groups different LDCs customers and Ontario customers as a whole (GEC disagrees and believes Board Staff is wrong on the facts).
- 4.18.3 It raises concerns about usurping OPA's role (GEC does not see this as a problem, as it believes there is room for everyone).

Set a Specific Level of CDM Spending / Must meet the TRC Test

- 4.19 Pollution Probe and GEC strongly support the Board mandating “large degrees of (CDM) spending, subject to (meeting the) TRC test.”⁶⁵ Both PP and GEC reject the mandatory TRC test.
- 4.20 PP views that “TRC test ... (as) ... the bedrock. ... It is a test that measures ... whether a conservation measure is sensible from the financial point of view of the customers, and conserves energy and saves money.⁶⁶ ... (It is) a financial test that asks whether the customers in Ontario save money by saving energy.”⁶⁷

⁶⁰ Transcript, page 126, lines 15 to 17.

⁶¹ Board Staff Submission, page 8, paragraph 21

⁶² Ibid, page 10, paragraph 27.

⁶³ Ibid, page 9, paragraph 21

⁶⁴ Ibid, page 10, paragraph 27.

⁶⁵ Transcript, page 67, lines 21 to 22.

⁶⁶ Ibid, page 66, lines 2 to 11.

⁶⁷ Ibid, page 69, lines 20 to 21

4.21 As well, Pollution Probe believes:

4.21.1 “The TRC test ... does differ from a pure focus on rates. ... The Board Staff submission ... focuses on rates. ... Rates, in this context, are distinguished from bills, it is not wise ... to look at just rates.”⁶⁸

4.21.2 Believes that, while the general idea of prudence is worthwhile,⁶⁹ the prudence test is “somewhat mistaken ... going too far ... it is unnecessary ... somewhat inappropriate because ... the Board (is) not reviewing a particular test year to see whether it should disallow some expenditures⁷⁰, ... and you don't need to ... deal with some sort of detailed legalistic test of prudence taken from another context in order to affirm that principle.”⁷¹

4.21.3 LDCs have a CDM leadership role, quite apart from that of the OPA.⁷²

4.22 GEC also sees difficulties in the Board Staff's approach:

4.22.1 First, the test is based on a relative rate impact rather than a bill impact. Most efficiency programs raise rates. CDM programs fail the RIM test. So if you use the RIM test as the requirement on LDCs, you would not be promoting economic efficiency and cost effectiveness in keeping with the Board's statutory objectives. Hence, GEC's support for the TRC analysis, since rate impact does not equate to cost effectiveness.

4.22.2 Second, the Board's test is applied by considering competing investment opportunities available to the LDC at the time it makes its investment decisions. GEC says this would be a very difficult test to apply. It also compares apples and oranges.

4.22.2.1 Some LDC expenditures raise rates and bills but are surely prudent if they keep, for example, linesmen from being electrocuted. There may be a more cost-effective thing you can do with your money, but it doesn't mean you shouldn't be doing this one too. And that's the same with CDM.

4.22.2.2 Most CDM expenditures are not direct substitutes for a particular isolated supply-side investment.

4.22.3 Third, the Board's test limits consideration of cost-effectiveness to the impact on the distribution portion of rates or the bill. Again, GEC says this flies in the face of the Board's statutory mandate.

⁶⁸ Ibid, page 81, lines 4 to 8 and lines 12 to 13.

⁶⁹ Ibid, page 74, line 10

⁷⁰ Ibid, page 73, lines 26 to 28 and page 74, lines 1 to 9.

⁷¹ Ibid, page 75, lines 1 to 5

⁷² Ibid, page 75, lines 6 to 15

Judgement Option

4.23 SEC dismisses both the Board Staff's prudence test and the TRC test and states "the Board should do ... what it does with other judgement calls by utility executives, and that is, balance the various factors."⁷³

4.24 Specifically, SEC believes the Board Staff's cost effective test and the TRC test are not appropriate because:

"The Board Staff's test ... and the pure TRC test ... go off the rails. In both cases they try to be too mechanistic. They give up flexibility for certainty. ... The right way (is) for the Board ... to consider all of the relevant factors: What are the existing rate levels? What is the utility's resource availability? ... What are the short-and long-term rate and bill impacts of a particular CDM plan or proposal? What are the other priorities of that particular LDC? If that particular LDC has a problem that it should be focussing on more than C and DM, you can't ignore that. You have to take that into account. What are the CDM opportunities in that particular LDC's area?"⁷⁴

4.25 By implication, SEC dismisses the LDC Option. Apparently, SEC believes the Board's judgment is more relevant.

Low Income Program Option

4.26 LIEN and VECC advocate programs directed specifically at low-income consumers. To these intervenors, an LDC should have low-income CDM programs, unless there are compelling reasons for not having them. The onus for explaining why it does not have low-income programs should be on the LDC.

4.27 LIEN goes further and advocates a social welfare obligation be placed on LDCs:

4.27.1 "I also appreciate the Board's concern that there may be cross-subsidization, that ... this is a social policy rather than an economic-regulated policy, but this is clearly what the government has mandated, and therefore we think that the Board should specifically encourage that the LDCs conduct conservation energy for low-income consumers."⁷⁵

4.27.2 "If a LDC proposes no or inadequate CDM programs directed at low-income consumers and doesn't provide an explanation satisfactory to the Board of why there is no need for such programs, then the Board should order the utility to spend money on low-income CDM programs in an

⁷³ Transcript, page 140, lines 11 to 13.

⁷⁴ Ibid, page 139, lines 19 to 28 and page 140, line 1.

⁷⁵ Transcript, page 159, lines 6 to 13

amount that is different from the amount proposed by the LDC in the test year.”⁷⁶

4.27.3 The goal is to reduce electricity bill for low-income consumers, not rates.⁷⁷

4.28 As well, LIEN references Ministerial directives to the OPA and to Ministerial letters: “the Minister has said not only in its directive to the OPA but also in its letters to the LDCs that ... there must be provision made for low-income consumers.”⁷⁸

4.29 VECC has a similar view: “CDM programs generally have a real danger of regressive cross-subsidy and that low-income customers pay for CDM programs in their rates, like all other ratepayers, but are not able to participate in them due to financial, social or language or other barriers.”⁷⁹

4.30 VECC argues that: “It is not a matter of redistributing wealth. It is to correct the redistribution that already exists in general CDM programs. ... The overall level of CDM spending we believe is sufficient ... however, ... the proportion of CDM spending on targeted low-income programs is extremely low.”⁸⁰

4.31 VECC also reference a letter from the former Minister of Energy in the context of third tranche CDM funding. The letter stated among other things his recognition that LDCs “require some assurance with respect to conservation proposals that would be considered for purposes of cost recovery. ... (And that) “Programs and initiatives targeted to low income and other hard to reach consumers should be supported by the Board.”⁸¹

CME Position on the Six Tests

4.32 CME supports the LDC option and rejects the Cost Effectiveness test, as proposed by Board Staff; the Mandatory TRC option; the TRC option, as proposed by GEC and Pollution Probe; the Judgement Test, as proposed by SEC; and the Low-Income option, as proposed by LIEN and VECC.

4.33 If there is to be CDM spending by LDCs, the amount of spending should be determined by the LDC concerned. Each LDC is acutely aware of the views and needs of its customers with respect to the trade-off between conservation and higher rates.

⁷⁶ Ibid, page 160, lines 7 to 13.

⁷⁷ Ibid, page 153, lines 23 to 26

⁷⁸ Ibid, page 158, lines 23 to 26

⁷⁹ Transcript, page 165, lines 9 to 14.

⁸⁰ Ibid, page 165, lines 16 to 19 and 24 to 28 and page 166, lines 1 to 2.

⁸¹ Letter from Dwight Duncan, Minister of Energy, to Enersource Hydro Mississauga Inc., May 31, 2004.

- 4.34 CME supports the TRC methodology for determining which CDM programs should be undertaken. However, CME does not support the use of TRCs to determine the level of any incentive available to LDCs to undertake CDM activities.

Board Staff

- 4.35 CME agrees with Board Staff that the Legislature has given the OPA and not the OEB the responsibility to “provide leadership in planning and coordination of measures for electricity conservation and load management in Ontario.”⁸²
- 4.36 CME disagrees with Board Staff that the Board should, and can, use its rate making power to increase the level of LDC CDM spending. CME believes this would be a perverse use of the Board’s rate making powers.
- 4.37 CME submits that the Board may disallow an expenditure because it is not cost effective, but it cannot turn around and say that an LDC has to make a particular kind of cost effective expenditure. The Board does not have that power.⁸³
- 4.38 Moreover, even if the Board compared, or required LDCs to compare, CDM expenditures with non-CDM expenditures using some cost effectiveness methodology, the result would be one or more of the following:
- 4.38.1 A zero sum game, with no net increase in total LDC spending, just a redistribution of expenditures from non-CDM to CDM. A non-CDM expenditure shown to be imprudent from a cost effectiveness standpoint would be disallowed, with the equivalent amount being spent on a CDM initiative.
- 4.38.2 A non zero sum game, with non-CDM expenditures being disallowed but no equivalent CDM expenditure being made. In the absence of jurisdiction, the Board cannot force an LDC to spend money on CDM even if it were shown to be “cost effective”.
- 4.38.3 As Ms. Newland stated, the Board Staff’s cost effective option has “the potential for turning every rate application into a debate about CDM and whether the utility is doing enough in this area.”⁸⁴
- 4.39 Board Staff incorrectly applies the concept of cost effectiveness to its cost effective alternative. Cost effectiveness analysis requires the examination of alternatives to achieve the same, not dissimilar objectives.⁸⁵

⁸² Electricity Act, s. 25.11(1)

⁸³ See Appendices 1 and 2 for the relevant sections of the OEB Act, 1998 and the Electricity Act, 1998.

⁸⁴ Transcript, page 36, lines 21 to 26

⁸⁵ Cost-effectiveness analysis: A technique in which the cost and effects of an intervention and an alternative are presented in a ratio of incremental cost to incremental effect.

<http://www.hsph.harvard.edu/cearegistry/glossary.html>

- 4.40 A comparison of non-CDM and CDM expenditures is a comparison of “apples” and “oranges”.
- 4.41 NHL takes a different view to arrive at essentially the same position, at least in the short term, when it states that “the reality in Newmarket is that CDM is not an alternative to new facilities. ... For sometime to come, (we) are going to need both. So the idea of trading one for the other is not as problematic, at least in the short term, in Newmarket's area.”⁸⁶
- 4.42 There is no way to reasonably compare the relative merits of investments that have totally different objectives. For example, how would one compare the cost and effect of CDM expenditures with the costs and effects of salaries and other OM&A expenditures or, for that matter, with investments in distribution assets made for safety and reliability reasons?
- 4.43 The Board Staff cost effective option proposal is a non-starter and should be rejected by the Board. In the final analysis, the Board has no jurisdiction to mandate any increase in LDC CDM spending.

[LIEN / VECC](#)

- 4.44 CME submits that, quite apart from the Board’s lack of jurisdiction to mandate LDC CDM spending, the Board has no jurisdiction to engage in social welfare programs in the guise of CDM programs for low-income consumers.
- 4.45 If the Government intends that there should be assistance to certain electricity customers, then the only agency with that power is the OPA under section 25. 2(h) of the Electricity Act. The assistance in that section, however, relates to rates, not electricity bills.
- 4.46 VECC may be correct when it states that low-income programs are needed to correct redistribution that has already taken place.
- 4.47 But such redistribution is the consequence of central planning, where individuals are taxed to achieve a bureaucrat’s, or politician’s notion of a better society. Central planning and redistribution of income creates an incentive for individuals and groups to lobby for more benefits, and/or less costs, at the expense of others in society. In other words, the economic and political science definition of a free rider.⁸⁷
- 4.48 CME submits there is no basis for low-income consumers to receive higher incentives to conserve than are available to every other consumer.
- 4.49 If low-income consumers are excluded from CDM programs because of income, CME submits any deficit should be redressed by the Legislature and / or Parliament, not by using electricity rates as a social welfare program.

⁸⁶ Transcript, page 50, line 28 and page 51, lines 1 to 5.

⁸⁷ CME Submission, Electricity CDM Activities –EB-2005-0523, December 20, 2005, page 14.

- 4.50 Contrary to LIEN’s reference to Ministerial directives, there are no such directives to the OEB with respect to CDM programs for low-income consumers and those sent to the OPA are not directed to or reviewed by the OEB.⁸⁸
- 4.51 The Minister’s letter to Enersource Mississauga referencing support the Board might give to low-income programs was in connection only with third tranche funding and was designed to give LDCs assurance only in connection with that funding, not with future programs. As such, the Board should not give any weight to this letter in connection with CDM programs beyond 2006.

SEC

- 4.52 As discussed under the jurisdictional issue, SEC’s proposed judgement option would, in CME’s view, pervert the Board’s traditional rate making responsibilities into a political log rolling exercise with SEC and others lobbying to steering more money to their particular interest groups than they have paid in rates.

GEC / Pollution Probe

- 4.53 Both GEC and PP stress that mandating higher levels of CDM spending, using the TRC methodology, is desirable because it will lower ratepayer bills and that the Board should be concerned with bill levels rather than rates. LIEN also takes this view.
- 4.54 However, the OEB’s rate making power, derived from section 78(3),⁸⁹ is clear and relates to “just and reasonable rates” not bills. GEC, PP, and LIEN may wish it were otherwise, and believe it should be, but the the focus of the legislation is on rates, not bills.
- 4.55 The GEC / PP argument contains the implicit premise that consumers should be able to maintain the same level of electricity consumption but at a lower cost as a result of CDM spending. According to the OPA, the amount of CDM spending over the next 20 years is significant - between \$5 and \$11 billion - all of it presumably paid for by consumers through one mechanism or another.⁹⁰
- 4.56 This GEC / PP premise suggests that they do not believe in individual responsibility to conserve electricity, rather they believe in a “silver bullet” in the form of enforced taxation to finance CDM programs that can relieve the individual of reducing his / her level of consumption. CME submits this line of thinking is a variant of the social welfare view of life.

⁸⁸ The OEB Act, section 27.1) The Minister may issue, and the Board shall implement, policy directives that have been approved by the Lieutenant Governor in Council concerning general policy and the objectives to be pursued by the Board. 1998, c. 15, Sched. B, s. 27 (1).

⁸⁹ 78(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor’s obligations under section 29 of the *Electricity Act, 1998*. 1998, c. 15, Sched. B, s. 78 (3).

⁹⁰ Transcript, Exhibit #1, Ontario Power Authority, Supply Mix Advice Report, Volume 1, December 2005, page 50

- 4.57 If GEC / PP truly believe the issue is lower bills, then each individual who wants a lower bill has the solution in his/her own hands; he/she can consume less electricity.
- 4.58 Accordingly, CME submits the Board should give no weight to the arguments of Pollution Probe and GEC.
- 4.59 The OEB Act speaks in terms of economic efficiency and cost effectiveness, but when Board Staff, GEC, PP, and others refer to those terms they do so primarily with equipment and technology in mind, not human behaviour. But lower electricity consumption is the most cost effective energy conservation technique around.
- 4.60 CME submits human behaviour is the most cost effective way to reduce electricity consumption and changing human behaviour is best be achieved through a market economy, not through central planning.

5.0 Central Planning Bias

Issues

- 5.1 There are two related issues:
- 5.1.1 Whether the Board panel is biased towards CDM central planning at the expense of a market economy approach.
- 5.1.2 Whether the OPA can or should make recommendations to the OEB with respect to the OEB setting CDM targets for the LDCs outside of a process that does not permit cross-examination.

Indeed, has the Board, as regulator, placed an unreasonable burden (obligation) on the OPA as a result of its request that the OPA consider making CDM target recommendations to the OEB, given that the Board's review of the OPA's fiscal 2006 expenditure and revenue requirement (EB-2005-0489)?

Intervenor Positions

- 5.2 Board Staff cautioned the Board against mandating CDM spending given "the different agencies out there and given the different instruments given to the Board. ... It's a question of, What is the most cost effective way to do it."⁹¹
- 5.3 Indeed, there are a profusion of agencies involved in various aspects of energy conservation, with no clear separation of their roles and responsibilities and with a tendency "to take in each other's washing", as witness "the Board approves the system plan and the Board approves the OPA's fees".⁹²
- 5.4 During an exchange between the Panel Chairman and the OPA, the Chairman stated:

⁹¹ Transcript, page 14, lines 4 to 6

⁹² Ibid, page 14, lines 1 to 2

“(CDM) is a very live issue in this community and most people seem to agree that more CDM, rather than less, would be useful; that it's been a bad summer. The IESO has issued a report that all of us have read carefully and give some considerable weight. So it would be helpful if you can consult with Mr. Lyle and Dr. Carr in your reply submissions, if you feel able, and possibly give this some further thought.”⁹³

- 5.5 Notwithstanding its responsibility for energy conservation, the OPA has set no long-term conservation targets, the Chairman of the Panel, in this exchange, seemed to be seeking recommendations from the OPA for the Board to set targets.⁹⁴
- 5.6 Even though the OPA spokesman demurred, the Chairman requested the OPA give further thought to the matter.⁹⁵
- 5.7 The OPA’s Supply Mix Advice Report suggests that between \$5 and \$11 billion will be need to be invested in CDM capital costs over the next 20 years to achieve between 1,810 to 4,300 MW of equivalent installed capacity. See Figures 2 and 3 below⁹⁶.

Figure 2

Table 1.2.10: A Robust Portfolio for Meeting a Range of Scenarios

Resource	Installed Capacity (MW)	Capital Costs (as spent \$Billions)
Conservation	1,800 to 4,300	5 – 11
Renewables	13,900 to 16,100	14 – 22
Natural gas-fired generation	10,200 to 12,500	7 – 10
Nuclear power	12,900 to 15,900	30 – 40

Source: OPA

Figure 3

Table 1.2.9: In Summary, Installed Capacity (MW)

	Existing Facilities Remaining in Service by 2025	Procurement Initiatives	Recommendation Beyond Procurement	Total Additions to 2025	Recommendation (Total, Existing and Additions)
CDM	0	460	1,350 – 3,850	1,810 – 4,300	1,810 – 4,300
Renewables	7,810	1,570	6,720	Up to 8,300	Up to 16,100
Nuclear	515	3,000	9,400 - 12,400	12,400 - 15,400	12,900 – 15,900
Natural Gas	5,000	6,000	750 – 1,500	Up to - 7,500	Up to 12,500
Gasification	0	0	250	250	250

Source: OPA

Over the period to 2025, OPA CDM procurement initiatives will result in the equivalent of about 460 MW, or 11% and 25% per cent of the total. It is assumed

⁹³ Ibid, page 178, lines 10 to 12.

⁹⁴ Ibid, page 176, lines 26 to 28.

⁹⁵ Ibid, page 177, lines 15 to 17

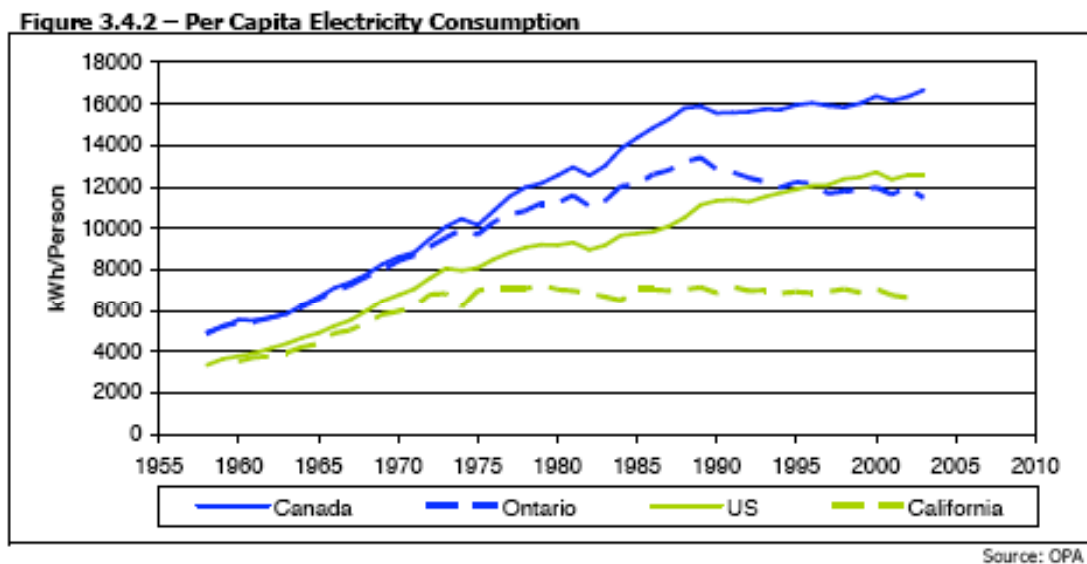
⁹⁶ Ibid, Exhibit #1, Ontario Power Authority, Supply Mix Advice Report, Volume 1, December 2005, page 50

the OPA will raise the money from electricity consumers for those procurement contracts. It is unclear who will be responsible for the remaining investment.⁹⁷

CME Position

- 5.8 CME agrees with Board Staff's caution that the Board should not mandate LDC CDM spending but should seek the most cost effective way to encourage conservation.
- 5.9 In lieu of "letting the market work", the OPA estimates it will cost electricity consumers between \$5 and \$11 billion in mandated conservation spending to achieve the level of conservation the OPA deems necessary. This is, perhaps, a measure of whether the central planning approach is cost effectiveness, or a measure of its inefficiency.
- 5.10 The OPA says that Ontario has lower per capita energy consumption compared to any other North American jurisdiction, significantly lower than the Canadian average and lower than United States, except California. See Figure 4.⁹⁸

Figure 4



- 5.11 What the OPA does not say is that California rates are more than 100% higher than those in Ontario, demonstrating that the market does work to reduce electricity consumption.⁹⁹

⁹⁷ Indeed, the OPA acknowledged that it had made no assumptions about how much of the \$5 to \$11 billion would come from LDCs. Transcript, page 174, lines 18 and 19.

⁹⁸ OPA, Supply Mix Advice Report, Volume 3, pages 56 and 57.

⁹⁹ Residential consumers in California pay between 11.31 cents and 11.45 cents, per kWh as compared with 5 cents per kWh per month for the first 1,000 kWh and 5.8 cents about 1,000 kWh, over 100% more. <http://www.bizjournals.com/sanjose/stories/2005/05/16/daily28.html> and http://www.oeb.gov.on.ca/html/en/industryrelations/ongoingprojects_regulatedpriceplan.htm#updates

- 5.12 So long as Ontario continues to shield consumers from the true cost of electricity and to propagate a high cost electricity supply policy, there will continue to be concerns about the future supply and cost of electricity. It is a self-fulfilling prophecy.
- 5.13 CME disagrees with the narrow range of cost effective alternatives implicit in Board Staff's approach, which excludes the "market economy" approach and letting individuals choose for themselves the level of conservation investment appropriate for them, based on their reaction to energy prices.
- 5.14 The Board's electricity regulated price plan masks the true cost of energy and mutes the incentive to conserve energy, which, in turn, sets up conditions for central planning and the taxing of consumers in the name of energy conservation.¹⁰⁰
- 5.15 The Board seems determined to play an intrusive and activist role in LDC CDM activities, as witness to the Chairman's comments to the OPA with respect to targets. Clearly, the Board gives no weight to the role of the market economy to induce ratepayer CDM investment and to avoid costly LDC and OPA financed programs.¹⁰¹
- 5.16 For two reasons, CME submits it is inappropriate for the Board to ask the OPA if they would recommend that the OEB set CDM targets. First, it is inappropriate for one government agency (the OEB) to request another government agency (the OPA) to make recommendations that would expand the OEB's scope. Second, this is especially inappropriate when OEB regulates the OPA.
- 5.17 The Board, in its role as regulator, is holding hearings to determine the OPA's 2006 fees. That hearing involves an examination of the OPA's energy conservation activities and plans.
- 5.18 Just because the OPA has the responsibility for conservation does not mean it can delegate that responsibility to the OEB in any way, including making recommendations about LDC CDM targets.
- 5.19 If the Board has concerns about the level of CDM spending on Ontario, it should make those concerns known to the OPA during the Board's review of the OPA's 2006 expenditure and revenue requirement hearing, as per the CDM issues list related to that hearing.¹⁰²

¹⁰⁰ "The majority of Ontario electricity consumers fall under the regulated rate plan ... more than 50,000 customers representing over 55 per cent of the electricity load are exposed to the market price." Independent Electricity System Operator, 2006-2008 Business Plan, page 10.

¹⁰¹ Transcript, page 176, lines 16 to 19, and page 177, lines 6 to 8.

¹⁰² OPA's 2006 Conservation Operating Budget issues list includes the following CDM issues:

- 1.1. Conservation strategy and program coordination
 - 1.1.1. Specific goals for CDM initiatives
 - 1.1.2. Coordination of OPA targeted sector activities with similar LDC Initiatives
 - 1.1.3. Assessment and establishment of overall OPA/LDC programs and funding levels
 - 1.1.4. Organization of overall CDM program direction and review of OPA/LDC responsibilities and funding breakdowns
 - 1.1.4.1 Recommended LDC spending levels for CDM activities
- 1.2. Provincial CDM potential and methodologies for extending the "reach" of CDM programs
- 1.3. Pilot program cost/benefit and effectiveness determination
- 1.4. Quantified 2006 Performance targets

- 5.20 Indeed, unlike the Board’s natural gas objectives where the OEB is required “to promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario”, there is no similar requirement for the Board to promote energy conservation in the electricity sector in a manner consistent with the policies of the Government of Ontario in the electricity sector.¹⁰³
- 5.21 As a result, even if the OPA recommends that the Board set CDM targets for LDCs, CME submits there is no legislative basis for the OEB to act on such recommendations.
- 5.22 Finally, CME agrees with Energy Probe’s scepticism “about the efficacy of subsidized utility programs” ... (and) it is timely, and ... an opportunity to increase clarity through this process, given the rest of what's going on in the Board's mandate with the Ontario Power Authority talking about conservation programs where they're bandying around numbers of 5 to 11 billion dollars. We think this is time for a cautious, methodical approach on behalf of the Board.”¹⁰⁴

6.0 TRC Guide

Issues

- 6.1 Can and should the Board mandate free rider rates and other assumptions by means of the TRC Guide?
- 6.2 Should TRC assumptions be applied prospectively or retrospectively?
- 6.3 Did Enbridge Gas Distribution correctly describe the level of agreement involved in the 2003 ADR Settlement Agreement?

Intervenor Positions

Pollution Probe

- 6.4 Pollution Probe argues that free rider rates should be evidence-based, not on *apriori* assumptions and that evidence-based free rider rates:
- 6.4.1 Provides a financial incentive to an LDC to do better. This is an aid to conservation.
- 6.4.2 Determine, as best as possible, actual savings and avoid phantom savings.
- 6.4.3 Are cost effective. It focuses on the wise use of money, and avoids spending money on programs that aren't financially sensible.
- 6.4.4 Promotes best practices. It allows the Board and the LDCs to distinguish good programs from mediocre ones from bad ones. It allows good programs to hop from and spread from LDC to LDC, and it allows bad programs,

¹⁰³ OEB Act, 1998, sections 1 and 2 (5)

¹⁰⁴ Transcript, page 127, lines 16 to 17 and 25 to 28, and page 128, lines 1 to 3.

which may have been initiated in good faith, to be pruned before others make that mistake.

6.4.5 Avoids excessive profit bonuses, and allows valid profit bonuses.¹⁰⁵

6.5 In response to a Panel question about the practicality of going to evidence-based free rider rates for 2006 rates, PP responded that the Board can make a judgement on how well the utility did, given what the utility had available to it, and that, for each program the utility brings forward evidence to support a particular free rider rate for that program. The evidence may vary from program to program, however.¹⁰⁶

6.6 PP argues that if an LDC does not provide evidence because “We don't have the time, we don't have the staff, and we're not going to try and defend the free rider rates we've got. ... We have no evidence. ... The only result may be they may not get a profit bonus this year.”¹⁰⁷

GEC

6.7 GEC say it is:

6.7.1 Not advocating retroactive free rider adjustments but should use the best information available at the time.

6.7.2 As a practical matter, the best information available in 2006 may well be the Board Staff's list in many cases, but in other cases the utilities will have better information and they should be obliged to design their programs in light of that and be obliged to bring it forward.

6.7.3 It is important to get the rule right now, so we don't have the same problem in 2007.

6.7.4 The Board should make clear now that it expects, certainly by 2007, that free rider rate is evidence-based so that the utilities while they're collecting their 2006 statistics, while they're designing the evolution of their portfolio, will have regard to what the real free rider rate is.

6.7.5 This is not just about unfair SSM awards but also good program design and bad portfolio makeup; that is the real cost here.

6.7.6 Similarly, with attribution, there are likely to be very few partnerships between the utilities and non rate-regulated entities in 2006. So there is no great concern about imposing that change right away.

¹⁰⁵ Transcript, pages 90 to 93.

¹⁰⁶ Ibid, page 93, lines 15 to 20.

¹⁰⁷ Ibid, page 94, lines 21 to 25.

- 6.7.7 100% attribution rule as it stands is very dangerous, as it would result in utilities receiving richly and undeserved rewards and a positive incentive to chase free loading opportunities to get an SSM. The Board should make clear that that needs to change, if not immediately, certainly in time for the 2007 period, although we agree with CCC there would be really no great hardship in making it in the immediate either.

SEC

- 6.8 SEC believes it is a matter of practicality. Be pragmatic. The TRC Guide should be left as a guide, as a default. If utilities want to come in or if intervenors want to come in with evidence to show that some other number is appropriate for free rider rates, the Board can look at it at the time. Otherwise, the guide is the default. It's a practical way of dealing with it right now.¹⁰⁸
- 6.9 With respect to whether the free rider rates should be locked-in., SEC believes incentives should not be paid for benefits that didn't happen. If they happened, incent them.¹⁰⁹
- 6.10 Finally, attribution is really just a variation on free rider. It is just a different view of the same concept.
- 6.11 The principle should be that the value-added delivered by the utility should be what they get credit for. Base attribution on financial contribution, because it is something easy.¹¹⁰

CME Position

- 6.12 CME agrees with the position set out by SEC with respect to the TRC Guide and free rider rates.
- 6.13 Further, CME submits that for third tranche 2006 CDM programs, the Board can mandate free rider rates and other assumptions by means of the TRC Guide but recommends that the Board not do so.
- 6.14 With respect to whether TRC assumptions be applied prospectively or retrospectively, CME submits that TRC assumptions should be based on the latest information, even if that involves a retrospective adjustment. This is important not only for purposes of good program design, but also to ensure that neither ratepayers nor LDCs benefit inappropriately from paying too much or too little for CDM incentives.
- 6.15 CME strongly recommends that the Board not allow LDCs to claim 100% attribution of programs jointly undertaken with non-regulated entities.

Enbridge Gas Distribution

- 6.16 At the December 22nd hearing, EGD's Counsel stated that: This ... is what led to the ultimate settlement of the issue in respect of the 2003 rules which were adopted,

¹⁰⁸ Transcript, page 141, lines 23 to 28.

¹⁰⁹ Ibid, page 142

¹¹⁰ Transcript, page 143, lines 6 to 7

which were on the consent of all the parties that participated in that proceeding, (emphasis added) which fixed prospectively key assumptions, including free rider rates”¹¹¹.

- 6.17 EGD is incorrect when it said all parties agreed to the so-called 2003 rules. In fact. The following parties did not agree: CME, CAC (now CCC), VECC and IGUA.¹¹²
- 6.18 CME supports SEC in its concern that locking-in assumptions and not using the most up to date information can result in ratepayers being charged million of dollars for incentive based for phantom benefits.

7.0 Summary Conclusions

- 7.1 CME supports a conservation culture but opposes achieving that through central planning. CME favours a market economy approach.
- 7.2 If central planning is to be the norm for Ontario, however, it is essential that the OEB not intervene in areas in which it has no jurisdiction.

Application

- 7.3 The Board’s decision in this hearing should be restricted to third tranche CDM funding only, whether it is spent in 2006 or 2007. Its ruling or rulings should not apply to future years.
- 7.4 It would be inappropriate for the Board to require LDCs to review their third tranche 2006 CDM spending plans, using formulas such as those proposed by Board staff or by GEC.
- 7.5 Indeed, if the Board restricts its decision to 2006, CME would be content if the Board allowed LDCs to use the free rider rates in the TRC Guide, provided LDCs are not allowed to claim an incentive based on a TRC calculation involving *a priori* free rider rates and claim 100% attribution.

Jurisdiction

- 7.6 The Board does not have the power to mandate an LDC CDM to spending, either under its power to approve rates or its power to licence.

Tests

- 7.7 CME supports the LDC option and rejects the Cost Effectiveness test, as proposed by Board Staff; the Mandatory TRC option; the TRC option, as proposed by GEC and Pollution Probe; the Judgement Test, as proposed by SEC; and the Low-Income option, as proposed by LIEN and VECC.
- 7.8 If there is to be CDM spending by LDCs, the amount of spending should be determined by the LDC concerned. Each LDC is acutely aware of the views and

¹¹¹ Transcript, page 59, lines 5 to 10.

¹¹² RP-2002-0133, Partial Decision with Reasons, August 19, 2003, Exhibit N1, Tab 1, Schedule 1, pages 69 to 71,

needs of its customers with respect to the trade-off between conservation and higher rates.

- 7.9 The Board should be mindful that its legislation requires it to focus on rates, not bills. Given this the Board should give due weight to the rate impact (RIM) test.

Submitted this 11th day of January, 2006

By

Canadian Manufacturers & Exporters