

July 21, 2010

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Kirsten Walli,
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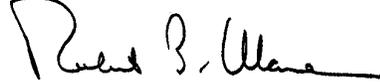
Dear Ms Walli:

**Re: Board File Number: EB-2010-0215/
Creation of the Conservation and Demand Management Code for Electricity
Distributors/Comments of the Consumers Council of Canada ("CCC")**

We are counsel to the CCC. In accordance with the Board's Notice dated June 22, 2010, we are filing herewith our client's Comments. In developing these Comments, our client has collaborated with the London Property Management Association, the School Energy Coalition and the Canadian Manufacturers & Exporters.

Yours very truly,

WeirFoulds LLP



Robert B. Warren

RBW/dh

cc: Consumers Council of Canada, Attn: Joan Huzar
cc: J. Girvan

ONTARIO ENERGY BOARD

COMMENTS OF THE CONSUMERS COUNCIL OF CANADA

**RE: CREATION OF THE CONSERVATION AND DEMAND
MANAGEMENT CODE FOR ELECTRICITY DISTRIBUTORS**

INTRODUCTION

1. On June 22, 2010, the Ontario Energy Board ("Board") gave notice that it intended to create a proposed Conservation and Demand Management Code for Electricity Distributors ("CDM Code"). The Board invited interested parties to comment on the proposed CDM Code. These are the comments of the Consumers Council of Canada ("Council") on the proposed CDM Code.

2. Section 27.2 of the *Ontario Energy Board Act* ("OEB Act") provides that a directive to the Board may require the Board to specify, as a condition of licence, CDM targets for electricity distributors. A Directive was issued by the Minister of Energy and Infrastructure on March 31, 2010, requiring the Board to add as a condition of licence a requirement that Ontario local distribution companies ("LDCs"), achieve reductions in electricity consumption and peak provincial electricity demand ("the Directive"). The Board is, through another process, setting targets for each LDC.

3. The Directive also requires that the Board establish the CDM Code which includes rules relating to the reporting requirements and performance incentives associated with the CDM programs. The rules also relate to the planning, design, approval, and implementation of the programs. In addition, the Code sets out rules for the evaluation, measurement and verification of Board approved programs. The Code as it is currently drafted does not consider low-income programs and the rules that will guide the design and delivery of those programs.

GENERAL COMMENTS

4. The Council has consistently supported the delivery of cost-effective CDM programs. The Minister's Directive effectively requires the Board to establish an extensive and

comprehensive framework for LDC delivery of CDM programs. The Council believes that it is critical the Board establish a framework that facilitates the delivery of cost-effective CDM in the Province in a way that is in the best interests of ratepayers. The Council is concerned that, until this time, ratepayer input has been excluded from the Board's target setting and Code development process. We have a number of concerns about the Code and urge the Board to ensure all interests are carefully considered before finalizing the ultimate framework established through the Code. The Council sees value in adding a stakeholder consultation session to the Code development process. In our view this would allow parties to seek clarity around the proposals and the positions of all parties. It would allow for informed discussion of the issues and help to sort out what we see as deficiencies in the framework. We also propose that parties be given a further chance to comment following that process.

5. The Council sets out below its detailed comments on each of the elements of the Code below. We also have the following general overview comments and concerns:

- The CDM targets have been developed through a process that excluded ratepayer groups. Ratepayers will be potential participants in the CDM programs and are the ones that ultimately fund the programs. Ratepayers, at this point in the process, have no idea to what extent the targets are appropriate and whether reaching these targets will represent a just and reasonable use of ratepayer funds. Whether funded through the Global Adjustment Mechanism ("GAM") or through distribution rates, ratepayers are the ones who ultimately pay. The Board should ensure, going forward, that ratepayer groups are consulted and given the opportunity to provide input on the targets and how they are to be achieved;
- Funding the programs through the GAM will present a new level of cross-subsidization within the electricity sector. There will be no match between which customer groups benefit from programs and the extent to which those customers pay for those programs;
- It is unclear as to what the total CDM budget will be for all LDCs. The Board has determined that LDCs will have access to incentives totalling \$72

million. Has the Board determined what an overall cost of the program will be over 4 years? How does this relate to the \$72 million?;

- There is a requirement in the Directive that the Board shall, in approving Board-approved CDM programs, continue to have regard to its statutory objective, including protecting the interests of consumers with respect to prices. There is no mechanism by which the Board can do that under the CDM model set out in the Code.
- There is reference throughout the CDM Code to OPA-Contracted Province-wide CDM programs that a distributor may undertake through a contract with the OPA. Given the fact the LDCs will be meeting some or all of their requirements to achieve CDM targets through OPA-contracted programs these contracts should be publicly available. It is not clear from the Code whether the details of the contracts will be filed with the Board and be subject to public review. In the absence of those details the Council submits that the Board cannot assess the reasonableness of the LDC's CDM activities.
- The framework that is being established by the Code is administratively complex and almost certainly onerous for Ontario LDCs. Many LDCs, particularly the smaller ones, have no experience delivering CDM programs and in undertaking the required accounting, evaluation, monitoring and verification processes that are required. The Council submits that the Board should consider exempting the smaller LDCs from this process. Customers within the service areas of the smaller LDCs could be directed to the OPA if they have expressed interest in program participation.

CDM STRATEGY AND ANNUAL REPORTS (Section 2)

6. The Code stipulates that a LDC must provide a high level description of how it intends to achieve its target, and do so by November 1, 2010. For many LDCs, particularly those that have no experience delivering CDM programs, this will be a difficult task. They are being given a mandatory CDM target by the Board to achieve over four years. The Council questions

how each LDC will determine what it will take to reach that target - what programs should be pursued, what the cost of those programs would be and what other costs will be incurred. In addition, it is not clear how the Board will assess the reasonableness of the "strategies".

7. The concept of "Board approved programs" is confusing. If the Board is going to consider the reasonableness of the programs, and a LDC's strategy, all programs will effectively be approved by the Board. If a LDC chooses to meet its requirements by delivering OPA programs only, that decision will have to be "approved" by the Board. We suggest that the programs outside of those developed by the OPA be referred to as "LDC-designed programs".

8. There is a requirement that LDCs offer programs for all customer types. Does this mean there is a requirement to offer CDM programs to all customers? If not, only some customers will have access to programs but all customers will pay for those programs through the GAM. This is an example of the cross-subsidization problem noted above. In addition, if there is a requirement to offer programs to all customer types, what is the required split? How much should each LDC spend on each sector?

9. With respect to projected budgets how will a LDC assess how much to spend on its CDM Strategy? How does the Board intend to assess the reasonableness of the budgets?

10. The Code requires LDCs to develop a CDM Strategy and file that strategy with the Board by November 1, 2010. Once a CDM Strategy is deemed "complete", a distributor shall make it available for public review at its offices and if available its website. How will stakeholders know that a CDM Strategy has been filed? What process does the Board envisage for stakeholder review? In the absence of a process for stakeholder review, what is the purpose of the public review?

11. With respect to the Annual Reports, there is a requirement to make them available for public review. Again, what process does the Board envisage for stakeholder review of the Annual Reports? The Council sees value in the Board posting both CDM strategies and the Annual Reports on its website to allow for greater access.

12. In the section regarding the OPA, the Council it is not clear what process will be followed in order to ensure that a "Board-approved" program is not duplicative of an established OPA program. The Board, in collaboration with the OPA, should make that determination.

BOARD-APPROVED CDM PROGRAMS (Section 3)

13. As noted above, the terminology "Board-approved programs" is confusing. In effect, the Board will be approving how a distributor intends to achieve its target - either through OPA programs, programs designed by a LDC or some combination of both. The Council suggests these non-OPA programs be called "LDC-designed programs".

14. As a part of the filing requirements for Board approved programs, LDCs are required to file "a complete projected annual budget for each of the distributor's CDM programs". It is unclear how the Board will assess the reasonableness of those budgets. In addition, given LDCs will be striving to meet their targets with OPA programs, Board approved programs or a combination of both, will the Board be considering overall budgets, or just the budgets associated with non-OPA programs? The Board needs to consider the total amount of money spent by a LDC regardless of whether the money is spent on an OPA program or a non-OPA program. In considering its statutory objective to protect the interests of consumers with respect to prices, the Board will need to see what each LDC is spending overall.

15. The Code does not specify when a distributor is required to apply for Board approved programs. It would be useful for the Board to set out its expectations in this regard. In addition, it would be useful for the Board to set out the timing of its approval process. If LDCs want to move ahead with program delivery there should be some expectation as to how long the approval process will take, assuming they are not permitted to go ahead without Board approval.

16. The Code requires that the OPA's Measures and Assumptions List be used in the evaluation of programs. For some LDC designed programs there may not be OPA developed input assumptions. The Council suggests that the Code set out the process to get such assumptions approved. The Board is aware of the fact that developing input assumptions can be highly contentious. The process for approval of new assumptions that are not part of the OPA's list should be clearly set out in the Code, as well as a timeline for that approval process.

17. With respect to low-income customers, the Council notes that, in a letter dated July 5, 2010, the Minister of Energy and Infrastructure asked the Board to proceed with further work on low income conservation. The Council expects that this work will proceed on another track, but that the outcome of that process be incorporated into the CDM Code.

COST EFFECTIVENESS (Section 4)

18. The CDM code refers to cost effectiveness in the context of the cost-effectiveness tests used by the OPA. The Council agrees that programs should continue to be screened and evaluated using the traditional cost-effectiveness tests. Specifically , the Council endorses the use of the total resource cost test ("TRC Test"). Although the Directive requires the use of the OPA cost-effectiveness tests, the Council submits that Code should be explicit about the use of the TRC. The Council is concerned that the screening could be unilaterally changed without an opportunity for stakeholders to have input.

19. The Code allows for LDCs to pursue pilot programs in order to test or evaluate new technologies. The Council submits that it would be more cost-effective to have the OPA pursue pilot programs. The OPA has been for many years now designing and delivering programs, including pilots. The OPA has the expertise to explore the value of new technologies and their potential impact on the Ontario market. The Council views pilots as analogous to research. LDCs should not be in the business of research, using ratepayer funds to effectively "test out" new technologies. This is well outside their mandate to provide safe and reliable delivery services to their customers.

20. If the Board believes that LDCs should pursue pilot programs, the Council raises the following questions:

- How will the Board assess whether a pilot program has merit? What criteria will it use?
- If the LDC has applied to fund a pilot program with the OPA and not had that program approved, why does that make it eligible for OEB approval?

- How will the Board assess whether a LDC has demonstrated "how the pilot program will increase the collective understanding of the methodology and/or technology and its benefits as a CDM activity?" What criteria will it use?
- How much can a LDC spend on a pilot program? What proportion of its overall budget can be spent on pilot programs?
- If the Board gets multiple applications for pilot programs that intend to test the same technologies how will the Board decide which LDC gets approval for the program(s)?

21. As noted above , the Council believes that the OPA should be responsible for the design and delivery of pilot programs in Ontario. Accordingly the CDM Code should be amended to provide that LDCs are not permitted to pursue pilots.

22. With respect to educational programs, the Council sees value in LDCs undertaking some consumer education regarding CDM. Typically this forms part of the programs and, accordingly, those costs should be considered program costs. In terms of general information programs, we again ask what criteria will the Board use to evaluate the reasonableness of the budgets spent on education? The Board, the Ministry of Energy and Infrastructure and the OPA should be coordinating a comprehensive educational campaign around conservation and time of use pricing. As energy bills continue to rise this educational work will be more and more critical.

23. Although we see value in LDCs educating their customers about CDM, we see the requirements in the Code as too subjective. How will the Board assess how much and LDCs is permitted to spend on education? How will the Board ensure that these efforts are cost effective? The Council submits that the Board should more precisely define the requirements for educational programs.

ACCOUNTING TREATMENT (Section 5)

24. Section 5.2 requires a LDC to use a fully allocated costing methodology for all CDM programs. To the extent a LDC applies a fully allocated costing approach, it is not clear

how the corresponding reduction to its revenue requirement will be captured. If this is done in a year when a LDC is rebasing the issue may not be significant. However, if fully allocated costing is applied in an year in which a LDC is basing its rates on an incentive regulation mechanism ("IRM") there will be no opportunity to capture the reduction in the rate regulated revenue requirement.

25. The Council submits that there should be a deferral account mechanism put in place that will allow for the results of any fully allocated costing approach to flow through to distribution rates. Although the Council supports a fully allocated accounting approach, it is only meaningful if there are regulatory mechanisms such as deferral accounts in place to ensure the costs are properly allocated and recovered in the appropriate fashion.

26. Section 5.3 refers to "a distributor's earned revenues and incurred expenses from all Board-Approved CDM Programs" and requires that these are to be kept separate from a distributor's earned revenues and incurred expenses from all OPA- Contracted Province-Wide CDM Programs. The Council submits it is not clear as to what "earned revenues" refers to. Are these the funds that LDCs will obtain from a GAM fund? If not, what revenues are being referred to? The Code needs to be clarified in this regard.

27. In addition, the Council has the following comments on the accounting treatment of the CDM programs:

- Will LDCs be required to make publicly available all of the costs and revenues of both Board-Approved CDM Programs and OPA Programs? This should be a requirement. As noted above, there should be full disclosure of all contracts the LDCs have with the OPA to undertake programs. The Board is, in effect, approving a portfolio approach to CDM with some programs being undertaken under contract with the OPA and other programs subject to a yet undefined Board approval process. The overall costs and "revenues" associated with that portfolio should be on the public record as these LDCs are regulated entities and the funds ultimately come from Ontario ratepayers;

- How will LDCs obtain funds to deliver their programs? If they choose to undertake OPA programs, how are the funds dispersed? What if they spend more than what they have been given by the OPA to undertake the programs? What if they spend less? Will there be variance account treatment for those funds? Will there be a true up to actual costs? Will the amount available for spending be capped?
- Section 5.5 requires that a LDC track spending for its Board-Approved CDM programs in a Board-approved CDM variance account. The disposition of the balance in the account shall be made at the time specified by the Board and in the manner specified by the Board. Are LDCs going to be given an initial amount by the IESO or OPA around which actual spending is tracked? What is also not clear is the process the Board intends to undertake to dispose of the balances in these accounts. Will this be a public process?

PROGRAM EVALUATION, MONITORING AND EVALUATION (Section 6)

28. The Council supports third-party evaluation of a LDC's CDM results. The Council submits that the Board should develop a template for third-party evaluations to avoid having these consultants effectively re-invent the wheel. The Council suggests that the Board and the OPA collaborate on the development of the templates.

PERFORMANCE INCENTIVE (Section 7)

29. The Board has indicated that it will make available \$72 million to the LDCs in the form of a performance incentive. The Council questions the extent to which a performance incentive is required, the level of the incentive proposed, and the appropriateness of the process for awarding incentives. The Council acknowledges that the Directive states:

"A tiered performance incentive mechanism shall be available to distributors for verified electricity savings with incentives beginning to accrue once a distributor meets 80% of its CDM Target; performance incentives shall not be offered for electricity savings achieved beyond 150% of each CDM Target." 6(d)

30. The Ontario electric LDCs are publicly owned entities. They are being directed by the Government, as a condition of their licences, to achieve CDM targets. It is unclear to the Council why, in addition to getting their costs fully recovered, the LDCs should have access to an incentive for the shareholders. The Board is also in the midst of a process that is considering revenue decoupling, which would address any revenue erosion from CDM programs keeping the LDCs whole.

31. Having said that the Council recognizes the Board has an obligation to follow the Minister's Directive. The Council questions why the Board has determined that an incentive (\$72 million) which is equal to 5% of the total net income for distributors is appropriate. Where is the evidence that this incentive is required by LDCs or represents a level that will incent them effectively?

32. In addition, the Council acknowledges that the targets that are proposed in draft form have no correlation to what the potential savings are in each service territory. Two similar sized LDCs may have the same target, but the potential to achieve results in their service territory may be very different. Some LDCs in areas with extensive growth will have an easier time relative to a LDC that operates in an economically distressed area. The LDC that will have an easier time potentially, will have access to a larger incentive. That does not seem fair. LDCs are tied to targets that may not be appropriate for them.

33. The Council notes in the Directive that the Board shall ensure that the total of the CDM targets established for all distributors is equal to 1330 MW of provincial peak demand persisting at the end of the four-year period and 6000 gigawatt hours of reduced electricity consumption accumulated over the four-year period. The Council questions how the Board will assess whether the savings achieved will be persisting at the end of the four-year period. From a ratepayer perspective it would be unfair to reward LDCs for peak reductions that did not persist at the end of the period. The Code should specify what is meant by persistence and how it will be evaluated.

34. What is missing from the Code are provisions regarding scenarios where LDCs do not effectively pursue CDM or do not achieve their allocated targets. Does the Board intend to

impose penalties on the those LDCs? If so, how would that penalty scheme work? The Council submits that the Board should be very clear as to what the consequences of non-compliance are.

35. We have suggested that the Board hold a stakeholder consultation session following the filing of comments on the Code. We think this would be an appropriate forum to consider different incentive models. The Council is aware that groups such as the School Energy Coalition and London Property Management Association have proposed different incentive structures. A stakeholder session will facilitate a better understanding of those models and any others that are being proposed. Parties will then be in a better position to put forward their preferred alternative.

CONCLUSIONS

36. The Minister's Directive and the Board's CDM Code propose the establishment of a framework that represents a significant change in which CDM is designed and delivered in the Province. Under that framework LDCs, many of which have never undertaken CDM programs before, are being directed to achieve results. It is critical that the Board develop a framework that is workable and fair to both LDCs and their customers. The rules need to be clear. The Code, as it is now drafted does not present a clear roadmap for the LDCs to follow. In the absence of a clear roadmap, money will be wasted and results will not be achieved. As set out in our comments, and those of other stakeholders, many of the details have yet to be worked out. We urge the Board to take the time to get this right. Continued discussion with stakeholders and further opportunity to comment is required in order to get this right.

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