



NOTICE OF ISSUANCE OF A NEW CODE

ISSUANCE OF THE CONSERVATION AND DEMAND MANAGEMENT CODE FOR ELECTRICITY DISTRIBUTORS

BOARD FILE NO.: EB-2010-0215

**To: All Licensed Electricity Distributors
All Other Interested Parties**

Date: September 16, 2010

The Ontario Energy Board (the "Board") is giving notice (the "Notice") under section 70.2 of the *Ontario Energy Board Act, 1998* (the "Act") of the issuance of the Conservation and Demand Management Code for Electricity Distributors (the "CDM Code"). The Board has developed the new CDM Code in accordance with the Minister of Energy and Infrastructure's directive, dated March 31, 2010, that was issued to the Board under sections 27.1 and 27.2 of the Ontario Energy Board Act, 1998 (the "Directive").

The CDM Code is an important component of the Board's efforts to promote CDM consistent with the Government of Ontario's policies. The CDM Code is designed to ensure distributors meet their CDM targets in a way which is cost effective and provides value to ratepayers. Rigorous reporting requirements and a performance incentive scheme are key components of this approach.

I. BACKGROUND

On June 22, 2010 the Board issued a Notice of Proposal to Issue a New Code in which it proposed the creation of a new CDM Code.

The Board received 26 written submissions in total, from a variety of stakeholders. After reviewing the written submissions, the Board has concluded that no material changes are required. Minor changes have been made to improve clarity and understanding. A summary of the written submissions and the Board conclusions are set out below. The submissions are posted on the Board's website at www.oeb.gov.on.ca.

The complete text of the CDM Code is set out in Attachment A to this Notice. Attachment B sets out, for informational purposes, a comparison of the CDM Code relative to the Proposed CDM Code issued on June 22, 2010.

The Board's Jurisdiction

In its submission, the Consumers Council of Canada ("CCC") raised certain issues with regard to the Board's jurisdiction to adopt the CDM Code as drafted. Specifically, CCC submitted that the Board does not have the jurisdiction to authorize the recovery of the costs associated with CDM Programs through the Global Adjustment Mechanism ("GAM"), nor to do so without a hearing.

GAM Funding

CCC argued that neither the *Ontario Energy Board Act, 1998* (the "Act") nor the Minister of Energy and Infrastructure's Directive dated March 31, 2010 (the "Directive") give the Board the authority to order or direct the recovery of the costs of CDM Programs from the GAM. The Board disagrees with this assertion. There are two statutory provisions that together address this issue, the first in relation to payments to be made by the IESO to distributors in relation to Board-Approved CDM Program costs (section 78.5 of the Act) and the second in relation to the manner in which the IESO recovers amounts that have been so paid (section 25.33 of the *Electricity Act, 1988*).

Specifically, the relevant portions of each of these sections read as follows:

78.5 (1) The IESO shall make payments to a distributor or to the OPA on behalf of other persons prescribed by the regulations with respect to amounts approved by the Board for conservation and demand management programs approved by the Board pursuant to a directive issued under section 27.2.

(2) The amount and timing of each payment referred to in subsection (1) shall be determined by the Board in accordance with such rules, methods and criteria as may be prescribed by the regulations or mandated by a code issued by the Board or an order of the Board.

25.33 (1) The IESO shall, through its billing and settlement systems, make adjustments in accordance with the regulations that ensure that, over time, payments by classes of market participants in Ontario that are prescribed by regulation reflect amounts paid, in accordance with the regulations, to generators, distributors, the Ontario Power Authority ("OPA") and the Financial Corporation, whether the amounts are determined under the market rules or under sections 78.1 to 78.5 of the *Ontario Energy Board Act, 1998*.

Ontario Regulation 429/04 (Adjustments under Section 25.33 of the Act) made under and for the purposes of section 25.33 of the *Electricity Act, 1998* prescribes how the GAM is to be calculated by the IESO and recovered from market participants and others. The Board acknowledges that, in order to complete the legislative framework for the recovery of CDM Program costs through the GAM, Ontario Regulation 429/04 will need to be updated to include, as one of the components of the GAM, any amounts paid by the IESO under section 78.5 of the Act. The Board anticipates that such an update will be provided in the near future.

For greater clarity, however, the Board has revised the draft Code to remove references to the GAM in the three places that they appear, in favour of references to the applicable statutory provision. Specifically, the Board has: (i) deleted the definition of “GAM”; (ii) replaced the reference to “GAM” in the definitions of “Board-Approved CDM Programs” with a reference to section 78.5 of the Act; and (iii) deleted the direct reference to the GAM in the definition of CDM Programs. The Board has also added sections 3.4.1 and 7.3.1. These sections confirm that Board-Approved CDM Programs (section 3.4.1) and performance incentives (section 7.3.1) will be paid by the IESO under section 78.5 of the Act, on a schedule specified by the Board.

Authorization of recovery of funds without a hearing

CCC has also argued that the Board is not empowered to authorize the recovery of costs for CDM Programs without a hearing. CCC argues that neither the Act nor the Directive specifically authorize the Board to approve recovery for CDM Programs without a hearing. CCC references section 78 of the Act, which provides that no transmitter or distributor of electricity shall charge for the transmission or distribution of electricity except with an order of the Board. Subsection 21(2) of the Act further provides that the Board shall not make an order until it has held a hearing. CCC concludes that in proposing to approve the costs for CDM Programs, and doing so (possibly) without a hearing, the Board is acting without authority and in excess of its statutory jurisdiction.

As noted above, the Board expects that any payments for CDM Programs that are authorized by the Board pursuant to the Directive will be recovered under section 78.5 of the Act, and not through distribution rates under section 78 of the Act.

CCC observes that the Directive does not specifically authorize the Board to approve funding for CDM Programs without a hearing. This is correct; however the Directive does require the Board to issue a Code. The statutory provisions governing the creation of codes are at section 70.1 through 70.3 of the Act. Subsection 70.1(3) provides: “a code issued under this section may provide that an approval, consent or determination of the Board is required, with or without a hearing, for any of the matters provided for in the code”, and this is specifically reiterated in section 1.6 of the draft Code. The authority to grant approvals through codes without a hearing, therefore, is found in the Act itself.

The Board notes that the draft Code does not in fact state that the Board will grant approvals without holding a hearing. Section 1.6.1 of the draft Code states that the Board *may* issue an approval without a hearing, or may do so through an oral, written, or electronic hearing. The Board will consider applications for Board-Approved CDM Programs as they are filed, and may in many cases hold hearings.

Performance Incentives

The Board recognizes that s. 78.5 arguably does not permit the Board to authorize performance incentive payments from the IESO for energy or demand savings that are associated with OPA-Contracted Province-Wide CDM Programs. To the extent that this remains an issue at the time distributors apply for performance incentives, the Board will only authorize performance incentive payments as permitted by the Act; that is, only those portions of the performance incentive that are associated with Board-Approved CDM Programs. The balance of the performance incentive would be the responsibility of the OPA.

II. SUMMARY OF COMMENTS AND REVISIONS

Comments on the CDM Code

1. General Provisions

Additional definitions were proposed by a variety of stakeholders. Specifically, there were requests to add a definition for “customer type(s)” and to include the word “persistence” in the peak demand savings definition. In order to add clarity, the Board has added a definition of “customer type(s)”. The Board has also revised the definition for “peak demand savings (kW)” by adding the phrase “...persisting at the end of the four-year period...” to remove any confusion regarding persistence.

Several stakeholders requested more information regarding the establishment of the OPA-Contracted Province-Wide CDM Programs, stating that without this information, the filing of the CDM Strategy would be delayed. The Board does not know the specific release date for the OPA-Contracted Province-Wide CDM Programs, but is aware that distributors have been involved in the program development process and is confident that they will have the information needed to complete the CDM Strategy by November 1, 2010.

A number of stakeholder submissions requested further clarification regarding which of the OPA’s cost effectiveness tests distributors are required to use in their evaluation of potential Board-Approved CDM Programs. The Board understands that the OPA will have a clearly defined set of cost effectiveness tests on its website shortly. The set of cost effectiveness tests on the OPA’s website will be limited to only those tests the distributor is required to use when evaluating the cost effectiveness of potential Board-Approved CDM Programs.

The Board also received several requests from stakeholders for further clarification regarding the timeline for energy and peak demand savings. The Minister's Directive is clear that only electricity (kWh) and peak demand (kW) savings that are realized between January 1, 2011 and December 31, 2014 will be counted towards a distributor's targets.

The Board has moved the definitions for "Allocable Costs" and "Marginal Costs" from Appendix A to the Definitions Section 1.2 of the CDM Code to offer more clarity at the request of a stakeholder. The Board has also moved the definition for "Non Rate-Regulated Activities" from Appendix A to Section 1.2 to provide further clarity.

The Board has added language to the end of the "Board-Approved CDM Programs" definition, and removed the reference to the GAM, for consistency purposes and to provide more information about how funds will be received by distributors. This change responds to requests from a number of stakeholders.

2. CDM Strategy & Annual Reports

Written comments were received from many stakeholders urging the Board to revise section 2.3.3. Section 2.3.3 describes the criteria to be used when determining whether or not a prospective Board-Approved CDM Program is duplicative of an existing OPA-Contracted Province-Wide CDM Program. The Directive is clear that Board-Approved CDM Programs shall not duplicate OPA-Contracted Province-Wide CDM Programs. In order to meet this requirement, a Board-Approved program must be substantively different from an OPA program. If the programs are not substantively different, then the overall efficiency of conservation program delivery in the province will be reduced and additional costs will be borne by ratepayers unnecessarily. In section 2.3.3 the Board has identified some of the situations in which a program would not meet the criteria of being substantively different. In other words, a difference in one of the listed attributes (incentive level, qualification requirements, technology specifications, marketing approaches, and budgets) would not be sufficient to create a substantively different program. The Board believes this approach will allow for innovation through Board-Approved CDM Programs.

Stakeholders suggested that the CDM Strategy include an analysis of the distributor's unique service territory. The Board concludes that this aspect may well be addressed by a distributor in its CDM Strategy, in the context of the strategy statement, the program description or the program mix, but the Board is of the view that it is unnecessary to make this a specific requirement.

Written submissions were also made recommending the addition of a comment period and/or approval process for the CDM Strategy document. The Board will not be implementing a comment period and/or approval process for the CDM Strategy. The CDM Strategy is intended to act as a monitoring tool for the Board and planning tool for distributors. Distributors remain responsible for achieving their CDM targets and the

Board's approval process will be limited to considering applications for specific programs.

One stakeholder suggested that the Board include additional language to section 2.1.1 to allow for other organizations, beyond those currently listed, to partner with distributors to pursue administrative efficiencies in meeting the CDM Targets. The Board agrees that there is merit to this request and that distributors should be able to partner with organizations that will help them achieve their CDM Targets. The Board has added the phrase "...and any other organizations" to the end of Section 2.1.1(d) in order to provide even more flexibility for distributors in delivering CDM Programs to its customers.

Submissions were received from various stakeholders requesting that distributors be required to offer programs targeted to low-income customers. The Directive states that the Board shall "permit" distributors to meet a portion of their targets through low-income CDM programs. Given this permissive language, the Board cannot require that each distributor undertake low-income CDM programs. However, the Board has amended the CDM Code to include a requirement that distributors, as part of their CDM Strategy, provide a statement as to whether the distributor will offer CDM programs to low-income customers, and the rationale for that decision.

One stakeholder suggested that the Board require distributors to share the information they gain from conducting pilot programs. The Board sees merit in this request and believes that the conservation efforts across the province can benefit from the sharing of pilot program information and data, and has amended the filing requirements for the Annual Reports to include the production of this information.

Many of the submissions enquired whether the Annual Reports and CDM Strategy documents would be posted on the Board's website. The Board will post all relevant CDM documents, including Annual Reports, CDM Strategies, applications for Board-Approved CDM Programs and subsequent decisions.

3. Board-Approved CDM Programs

There was a request by some stakeholders to have a clear timeframe and approval process for Board-Approved CDM Programs included in the Code. The Board does not consider it appropriate to include this sort of information in the CDM Code, as the CDM Code is a set of requirements for distributors. Section 1.6.1 of the CDM Code describes the possible approval mechanisms, and the Board will determine which approach to use on a case-by-case basis.

A number of stakeholders requested that the Board keep an inventory of pilot programs for distributors (and others) to reference quickly and easily. The Board will post pilot program documentation on its website in a similar fashion to other CDM documents.

Several stakeholders urged the Board to consider allowing investment in new infrastructure to qualify as a CDM initiative. The Board has considered this issue in the past and continues to be of the view that prudent investments in new infrastructure are standard utility business practice by distributors and should not be classified as CDM.

In section 3.1.4(f)(ii) and throughout the CDM Code, “direct” and “indirect costs” has been changed to “Marginal Costs” and “Allocable Costs”, respectively. This change, made at the recommendation of a stakeholder, will ensure that the language in the body of the CDM Code is consistent with what appears in Appendix A.

A stakeholder requested that the Board require distributors to provide the technical assumptions and substantiating data to support any departure from the OPA’s Measures and Assumptions List. The Board agrees with this request and has revised section 3.1.4(g) accordingly. The Board has also divided the sub-section of 3.1.4(g) into three parts for further clarity.

The Board has added section 3.4.1 to clarify the IESO’s role in paying for Board-Approved CDM Programs.

4. Cost Effectiveness

A group of stakeholders recommended that the Pilot CDM Programs requirements be altered slightly. The recommendation was that 4.2.1(a) be changed to include the word “generally” rather than “already” in referring to the technologies to be tested or evaluated by distributors within the pilot program. The Board agrees that offering greater flexibility has the potential to spur innovation, and has amended the CDM Code accordingly.

A group of stakeholders submitted that the requirements for Educational CDM Programs in section 4.3 are too restrictive and recommended that the word “or” be added so that a distributor would not need to demonstrate both electricity consumption and peak demand reductions. The Board sees merit in this recommendation insofar as these types of programs may not offer both electricity and peak demand savings, but may still have value to a distributor’s customers. The Board has revised sections 4.1.4 and 4.3.1 and afforded distributors greater flexibility when providing evidence that a pilot or educational program will likely result in peak demand savings (kW) and/or electricity savings (kWh).

5. Accounting Treatment

Many stakeholders requested clarification in the method the Board would employ in disposing of a distributor’s Board-Approved CDM variance account. The Board will make a determination on the disposition of the variance accounts when a distributor files for rebasing after the end of the four-year CDM term, consistent with the method currently followed for the disposition of CDM variance accounts.

There were submissions from many stakeholders regarding the treatment and ownership of Environmental Attributes. Some stakeholders suggested that the Board should allow the flexibility to offer the ownership of Environmental Attributes to customers as an added incentive, while other stakeholders simply sought further guidance for the treatment of Environmental Attributes.

The Board has determined that distributors shall hold any environmental attributes arising in relation to electricity savings from Board-Approved CDM Programs. Disposition of the benefits of the environmental attributes arising in relation to electricity savings from Board-Approved CDM Programs shall be determined by the Board at a later date.

Two stakeholders requested clarification of the terms “earned revenues” and “incurred expenses.” The Board sees value in providing further clarity in this area and has revised sections 5.3 and 5.4 to replace “earned revenues” and “incurred expenses” with “program funding” and “program expenditures”, respectively.

The Board was also asked by the majority of stakeholders to detail the manner in which GAM funding would be provided to distributors. The Board has added sections 3.4.1 and 7.3.1 to clarify the process through which a distributor will receive approval and subsequent funding for either a Board-Approved CDM Program or a Performance Incentive.

6. Program Evaluation, Measurement & Verification

A number of stakeholders submitted that the Board should provide templates for third party evaluations and annual reports. The CDM Code requires distributors to follow the OPA’s EM&V Protocols and the Board concludes that this provides sufficient guidance to distributors. Likewise, Appendix C sets out the components of the Annual Report and therefore provides detailed guidance as to the content of these reports. The Board concludes that it is not appropriate at this time to develop a standardized form for reporting purposes.

7. Performance Incentive

There were many written submissions regarding the performance incentive. Some stakeholders urged the Board to increase the amounts available at the lower end of the performance ranges to allow for greater earning potential as distributors work towards their CDM Targets. There was also the suggestion that the bonus ranges be reduced from six to three.

The Board believes that the distributors who achieve the highest savings results should have the possibility to earn the highest incentive returns. The Board is satisfied that the current structure provides an appropriate balance by rewarding strong performance, without undue complexity.

A stakeholder suggested that a distributor, after meeting 80% of both its CDM Targets, should not be required to meet the threshold requirements to advance to the next bonus range as set out in Appendix D. The recommendation was that a distributor be awarded a performance incentive reflective of the verified savings it has achieved relative to both electricity and peak demand independently. The Board sees merit in rewarding a distributor, after it has met the required 80% of both its CDM Targets, for its achievement in each savings category independently. The Board has revised the eligibility requirements set out in Appendix D to the CDM Code. The Board has concluded that this change is not of sufficient magnitude to require a further round of comment.

Many stakeholders who submitted written comments recommended that the centrality principles set out in section 7.1.2 be removed from the CDM Code. Stakeholders suggested that this set of criteria will limit collaboration and act as a disincentive to distributors when attempting to meet their CDM Targets. It is the Board's view that a set of criteria surrounding the attribution of benefits is an essential piece of the performance incentive framework to ensure that verified savings are divided appropriately when distributors engage with third parties, outside of the OPA, to deliver CDM Programs. The Board expects that distributors would be able to claim 100% of the savings it achieves from contracting into OPA-Contracted Province-Wide Programs. The Board also notes that where a distributor does not meet the test for centrality, it is able to submit its proposal for an attribution of benefits for the Board to approve in accordance with section 7.1.3.

Some stakeholders requested clarification on whether the performance incentive was a before or after-tax amount. The performance incentive is a before-tax amount.

The Board received two specific proposals for a cost-efficiency incentive from two separate stakeholders. The Board appreciates the efforts of these parties and although the cost-efficiency incentive proposals were completed in the requested manner, the Board has decided that the potential benefits are not of sufficient magnitude to warrant the additional complexity.

A number of stakeholders requested information as to the specific disciplinary actions that would be taken by the Board in the event a distributor did not meet its CDM Targets. The CDM Targets form part of a distributor's licence and issues related to compliance with this enforceable provision are governed by the Board's compliance processes and the relevant provisions of the Act. The Board is not in a position at this time to specify what action would be taken in the event of non-compliance. The appropriate sanction would depend upon the specific fact situation and be determined in accordance with the Board's compliance processes.

The Board has added section 7.3.1 to provide further clarity on the means through which a distributor will receive its performance incentive payment.

8. Lost Revenues

Only a few stakeholders commented on lost revenues and requested that the Board include a Lost Revenue Adjustment Mechanism structure in the CDM Code. As the Directive states lost revenues that result from CDM Programs will not act as a disincentive to distributors. The precise mechanism to handle lost revenues incurred by CDM Programs will be developed and communicated to distributors in the future. In the meantime, the Board suggests that distributors track distribution losses as currently outlined in the Board's CDM Guidelines.

Appendix A – Fully Allocated Costing Methodology for Non Rate-Regulated Activities

The Board has removed the definitions of “Allocable Costs”, “Marginal Costs” and “Non-Rate Regulated Activities” from this section and moved them to the Definitions section at section 1.2.

Appendix B – CDM Strategy Template

The Board has removed the reference to the examples of customer types throughout the CDM Code

Appendix C – Annual Report Template

The Board has removed the words “or groups” from section 1.2.1 and 2.2.1.

Appendix D – Performance Incentive

The Board has revised the criteria for advancement to the next bonus range within the performance incentive. The Board has removed the requirement that a distributor needs to have met the minimum level of savings for both CDM Targets at each range in order to advance and earn the amounts available in that range. The Board believes the revised performance incentive structure will allow distributors to earn an incentive that is reflective of the verified results it has achieved.

Issuance of a New CDM Code by the Board

The Board has determined that the revised CDM Code is complete and satisfies the requirement imposed by the Minister's Directive to develop a CDM Code for Electricity Distributors without a hearing.

The Board is therefore issuing the new CDM Code as presented in this Notice.

Coming into Force

The new CDM Code will come into force on the date on which it is published on the Board's website.

This Notice, including the attached new CDM Code, is available for public viewing on the Board's website at www.oeb.gov.on.ca and at the office of the Board during normal business hours.

Cost Awards

A Notice of Hearing on Cost Awards for this process will be issued shortly.

CDM Targets (EB-2010-0216)

The Board will be issuing further correspondence regarding the proposed CDM Targets in the near future.

If you have any questions regarding the new CDM Code, please contact the Board's Market Operations hotline at 416-440-7604. The Board's toll free number is 1-888-632-6273.

DATED at Toronto, September 16, 2010.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Attachment A: Conservation and Demand Management Code for Electricity Distributors

Attachment B: Comparison version of the CDM Code relative to the Proposed CDM Code issued on June 22, 2010.

Attachment A

Conservation and Demand Management Code for Electricity Distributors

(see attached document)

Attachment B

**Comparison version of the CDM Code relative to the Proposed CDM Code issued
on June 22, 2010.**

(see attached document)