Shepherd Rubenstein

BY EMAIL and RESS

Mark Rubenstein
mark@shepherdrubenstein.com
Dir. 647-483-0113

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

March 14, 2018
Our File: EB20170045

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2017-0045 – Halton Hills Hydro Inc. 2018 IRM – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No.2, these are SEC's submissions on the request by Halton Hills Hydro Inc. ("HHHI"), as part of its 2018 IRM application, for a) approval of a deferral account and related approvals for clearance of the balance to capture certain depreciation expenses, and b) a z-factor for recovery of costs associated with a pay equity settlement. SEC submits the Board should deny both requests.

A. Depreciation Deferral and Variance Account

HHHI is seeking approval for the creation of a deferral and variance account to remedy what it says is an error in the calculation of the depreciation expense in its 2016 cost of service re-basing application (EB-2015-0074). HHHI's evidence is that its own model that it used in its 2016 cost of service application incorrectly calculated the depreciation expense by $330,259.[1] It is requesting the creation of a deferral and variance account to capture the $330,259 per year from 2016 to 2021 (or until it next rebases), and to clear those amounts annually.[2]

SEC submits the request should be denied. There is no regulatory basis for the request, and it is contrary to the approved EB-2015-0074 settlement agreement.

No Regulatory Basis. HHHI has not provided a regulatory basis for the relief it is seeking such as a Z-Factor or other permissible IRM adjustment. There is no plenary basis under the Handbook on Rate Applications, the RRFE, or any other policy documents issued by the Board that would permit the relief that HHHI is seeking. When asked directly in interrogatory SEC-1 on what regulatory basis it was seeking approval to establish this new deferral account and how it met those eligibility criteria, HHHI did not provide any, and simply cited the Board's authority to set just and reasonable rates and to the meet the fair return standard.[3] Neither of these provides a regulatory basis under the Board's rate-setting policies, which is premised on decoupling revenues from costs during the IRM period.

[1] Application for a Deferral and Variance Account, p.1-2
[2] *Ibid*
[3] Interrogatory Response SEC-1

Under the Board's rate-setting approaches, a distributor must choose which of three rate-setting options to apply under (Price Cap IR, Custom IR, and Annual IR).[4] Each of those options comes with different parameters and trade-offs. HHHI in 2016 chose the Price Cap IR under which methodology, "base rates are set through a cost of service process for the first year and the rates for the following four years are adjusted using a formula specific to each year."[5] No other adjustments are permitted besides to distribution rates unless they are for a z-factor[6], or incremental/advanced capital module.[7] An off-ramp to the entire plan may be triggered when the distributors' annual regulatory ROE is outside of the +/- 300 basis points ROE. [8] When that has occurred, a "regulatory review may be initiated", but it is not guaranteed.[9]

None of these adjustments or off-ramps are relevant to the present relief. While HHHI does make mention of the +/- 300 basis points off-ramp, it admits it has not triggered it.[10] Moreover, if at some point it does trigger it, all that means is that the Board *may* initiate a regulatory review. Even if a review does occur, it does not guarantee any particular outcome.

Motion to Review and EB-2015-0074 Settlement Proposal. In substance, what HHHI is in fact seeking is to review and vary the EB-2015-0074 decision. It is seeking to approximate the impact as if the approved revenue requirement that was part of the 2016 cost of service base rates included the corrected depreciation expense.

SEC submits that, even on this basis, the Board should deny the requested relief. It is simply not open to HHHI to seek to review and vary that decision.

First, Rule 40.01 requires that any motion to review to be brought within 20 days after the decision and order is issued. The decision which approved the settlement proposal in EB-2015-0074 was approved in an oral decision made on March 10, 2016.[11] The application for this requested relief was filed over 19 months later on October 23, 2017.

Moreover, it is not as if HHHI just discovered the error. Its evidence was that it discovered it when it was finalizing its 2016 year-end financials, which would have occurred at the latest, in early 2017. Even ignoring the specific requirements under the Board's Rules, the requested relief is contrary to statute.

The Board's authority to review and vary previous decisions is derived from the *Statutory Powers Procedures Act*. [12] Section 21(2) requires that the "review shall take place within a reasonable time after the decision or order is made." Nineteen months is not a reasonable time.

Second, under the Board's Rules, the request would not meet the threshold test for a review. Correction of an error such as this does not meet any of the enumerated grounds under Rule 42.01.

---

[4] Handbook for Utility Rate Applications, October 13 2016, p.6 ["*Rate Handbook*"]

[5] Rate Handbook, p.23

[6] Rate Handbook, p.27; Filing Requirements For Electricity Distribution Rate Applications - 2017 Edition for 2018 Rate Applications, Chapter 3 (July 20, 2017), p.17

[7] Rate Handbook, p.27; Filing Requirements For Electricity Distribution Rate Applications - 2017 Edition for 2018 Rate Applications, Chapter 3 (July 20, 2017), p.17

[8] Rate Handbook p.28, Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach (October 18, 2012), p.11

[9]Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach (October 18, 2012), p.11

[10] Application for a Deferral and Variance Account, p.2

[11] EB-2015-0075, Tr.1, p.27; *Decision and Rate Order* (EB-2015-0074 - Halton Hills), p.4

[12] *Statutory Powers Procedure Act*, R.S.O. 1990, s.21(1):

More importantly, the premise that underlies HHHI's request is incorrect. HHHI assumes that if the corrected depreciation calculation had been provided in its 2015-0074 application, the result would have been an approved revenue requirement that is $330,259 greater than that which was approved. This is unlikely to have been the case.

The Board's decision setting rates was by way of acceptance of a Settlement Proposal entered into between HHHI and intervenors (SEC, VECC and Energy Probe).[13] That Settlement Proposal was a full settlement of all the issues, and was reached by way of a non-severable package.[14] If the Board is to vary the EB-2015-0074 decision, then by the terms of the approved settlement proposal, the entire agreement falls.[15]

It is entirely unknowable at this point how the impact of an additional request of $330,259 by HHHI would have impacted any potential final settlement or if one would have been reached at all. It is very doubtful that parties would simply have reached the same terms on all other aspects of the settlement. At no point before filing this application, did HHHI seek to even notify the signatories of the settlement proposal that it had discovered an error.[16]

Further, the terms of the settlement itself state that the intervenors, in reaching the agreement, are "relying on the accuracy of the underlying evidence in entering into this Settlement Proposal."[17] In essence, HHHI made an accounting error. The Board has previously said that distributors "have ultimate control of their books and records and therefore bear the responsibility of ensuring that there are no mistakes in their filings with the Board."[18] Ratepayers should not be responsible for correcting HHHI's own errors.[19]

---

[13] Interrogatory Response SEC-3; EB-2015-0074, Halton Hills Hydro Inc. Settlement Proposal, filed February 29 2016; ["Approved 2015-0074 Settlement Proposal"], p.2

[14] Approved 2015-0074 Settlement Proposal, p.4-5

[15] Approved 2015-0074 Settlement Proposal, p.3:

> The Parties have settled the issues as a package, and none of the parts of this Settlement Proposal are severable. If the Board does not accept this Settlement Proposal in its entirety, then there is no settlement (unless the Parties agree in writing that any part(s) of this Settlement Proposal that the Board does accept may continue as a valid settlement without inclusion of any part(s) that the Board does not accept).
>
> In the event that the Board directs the Parties to make reasonable efforts to revise the Settlement Proposal, the Parties agree to use reasonable efforts to discuss any potential revisions, but no Party will be obligated to accept any proposed revision. The Parties agree that all of the Parties who took on a position on a particular issue must agree with any revised Settlement Proposal as it relates to that issue prior to its resubmission to the Board.

[16] Interrogatory Response OEB Staff-15(c). HHHI's lack of notice to the signatories to the settlement proposal is in contract to Welland Hydro's Motion to Review and Vary in EB-2016-0147. In that case, Welland Hydro sought to amend terms of the approved settlement in EB-2012-0173. Welland Hydro reached out to the intervenors who were signatories to that settlement proposal, and there was an agreement on consent to vary the approved proposal, and also waiving the time requirements set out in the Rules. In EB-2016-0152, the Board rejected the request by OPG during the Payment Amount Order phase to adjustment the time period of disposition of set out in a an approved settlement proposal on the basis that circumstances had changed by the time the final decision was released. The Board disallowed the change, stating "[t]he signatories to the settlement proposal have not agreed to an extension as proposed by OPG and there is no guarantee that they would." (See *Decision on Draft Payment Amounts Order and Procedural Order No. 10* (EB-2016-0152 - OPG) March 12 2018, p.8)

[17] Approved 2015-0074 Settlement Proposal, p.3

[18] *Partial Decision and Procedural Order No.3* (EB-2014-301/0072 -- Essex Powerlines), March 25 2015, p.7

[19] The nature of monopoly rate regulation is that distributors have a huge asymmetry of information about their operations and financial information as compared to ratepayers. Ratepayers have no visibility into errors that have

HHHI is not only seeking recovery of the impact of the error on a going-forward basis, but also a retroactive adjustment for the impact in 2016 and 2017. Even if the Board believes it should exercise a general discretion during IRM to adjust rates to include additional amounts for deprecation going forward, it does not have the authority to collect retroactively for amounts for 2016 and 2017 rate years. To do so would be impermissible retroactive ratemaking. The Board confirmed recently in its decision in EB-2017-0045 that this applies to the correction of errors embedded in final rates.[20] The rule against retroactive ratemaking is not a discretionary decision by the Board; if it is found to be applicable, it prevents the adjustment from being made unless there is a recognized exception[21] to the rule.[22] The generally accepted exceptions are a) rates are interim, or b) a deferral or variance account "encumbers" past amounts with the expectation of all parties that they will be adjusted in the future.[23] Neither of these exceptions is available.

HHHI's reference to the fair return standard in response to interrogatory SEC-1 is simply misplaced. What is required under the fair return standard is that the Board, in approving rates, should provide a regulated utility an *opportunity* over the *long-run* to recover its cost of capital.[24] The Board provided HHHI that ability. It has not denied HHHI the ability to earn a fair return on its requested amount; it is HHHI itself that, in its application, made an error in a previous request before the Board. HHHI freely entered into a settlement agreement on the terms the Board approved. It cannot now claim that in approving an agreement entered into freely by HHHI, the Board has denied it the opportunity to earn its cost of capital.

SEC submits the Board should deny the request for a deferral and variance account, and the associated disposition, related to its depreciation expense.

B. <u>Pay-Equity Z-Factor</u>

HHHI is seeking to recover the costs of a Pay Equity Settlement Agreement it reached with its union (the Power Workers Union) through a Z-factor. The total amount, which is based on actual costs incurred to date and forecast costs until 2021, is $261,251.

The members of SEC, Ontario's publically funded schools, have for decades been at the forefront of pay equity. The position of SEC and its members is uncompromising in this regard and we strongly support HHHI's implementation of pay equity. But the issue in this proceeding is not whether pay equity is appropriate, but if the costs incurred as part of a settlement, are recoverable from

---

been made in the distributor's favor, especially those outside of a rate application. Because of that, it is important that a distributor does not have an asymmetrical ability to recover errors made when it negatively impacts them, but seemingly have no affirmative obligation (which they appear as of now not to have) to bring forward errors that go the other way.

[20] *Decision and Order* (EB-2017-0045 - KWHI), March 1 2018, p13; The Board also confirmed that asymmetrical retroactive adjustments (to the benefit of customers) to correct errors can occur if there was wilful misconduct or the utility was enriched. Neither situation is applicable here.

[21] There is confusion in the language in many decisions on retroactive ratemaking. Some consider certain situations where the rule does not apply as exceptions, others treat them as simply contours that define its general scope. See for example, *Northland Utilities et al v. NWT Public Utilities Board,* 2010 NWTSC 92, para 5, regarding the exception for deferral accounts, compared to *Bell Canada v. Bell Aliant Regional Communications*, [2009] SCC 40 the leading authority on the issue, in which the Supreme Court makes no reference to it being an exception. Further, see the discussion in *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 beginning at para. 163.

[22] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 ["*ATCO SCC 2006*"], para 71; *Decision and Order* (EB-2005-0031 - Great Lakes Power), February 24 2006, p.8.

[23] *Bell Canada v. Canada (Canadian Radio Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764

[24] *Ontario Energy Board v. Ontario Power Generation Inc*., 2015 SCC 44, para. 16

ratepayers *during this IRM period* by way of a Z-Factor. SEC submits they are not as they do not meet the Board's requirements.

The Board's criteria for a Z-factor recovery are that of causation, prudence, and materiality.[25] A distributor must meet all three criteria.[26] SEC submits HHHI has not met the requirements of causation or materiality.

Causation: The requirement for causation is that the amounts must be "directly related to Z-Factor events."[27] The pay-equity settlement is not a Z-Factor event and so, does not meet the requirement of causation.

The Board has on multiple occasions commented that a Z-factor event is one "not within management's control".[28] They are "events genuinely external to the regulatory regime and beyond the control of management and the Board."[29] A Z-Factor is for "unforeseen events outside of [the distributors'] control".[30] It is limited to "extraordinary events".[31] None of the hallmarks of a Z-Factor event are present here.

While it is not exactly clear what 'external event' HHHI is relying on, in its pre-filed evidence it does appear that it takes the view that a new legislative or regulatory requirement has been mandated regarding pay equity:

> In October 2014 the Government of Ontario issued a mandate to Ontario employers requiring each employer to develop a strategy to further close the wage gap. Employers and Unions were responsible for identifying wage gap(s) and empowered to negotiate a reasonable settlement. The legislation was mandatory – although the PEA provided employers with little guidance as to process and timing.[32]

This reference is entirely misleading. The Government of Ontario in October 2014 did not mandate employers to do anything new. When asked in interrogatories SEC-5 and VECC-5 to provide the October 2014 "mandate to Ontario employers", HHHI produced a copy of the mandate letter from the Premier to the Minister of Labour. That letter, among many other mandates the Premier is instructing the Minister to undertake within his portfolio, includes the requirement to lead "the development of a wage gap strategy".[33] The mandate letter, which is issued to all ministers upon being sworn in, does not mandate Ontario employers to do anything new nor could it. It simply sets out the expectations of the Premier vis-a-vis the Minister of Labour.

A Z-Factor is not a catch all provision of a distributor's rate plan to capture any costs that it did not budget for, foreseen or otherwise. It is for costs that arise due to events that it could not budget for because they arise entirely beyond any meaningful sense of control. For example, Z-Factor events

[25] Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors, July 14 2008), ["IRM Report"], Appendix, p.iv

[26] *Ibid*, ,Appendix, p.iv

[27] *Ibid*, Appendix, p.v

[28] *Ibid*, Appendix, p.iv

[29] *Ibid*, p.35; *Decision* (EB-2009-0032- Horizon), March 24 2010, p.4

[30] *Decision and Order* (EB-2014-0162 - Milton Hydro), October 16 2014, p.2

[31] IRM Report, p.37

[32] Z-Factor Application, p.7

[33] Interrogatory Response VECC-5, Appendix IRR-G

include major storms like the winter 2013-14 ice storms[34], or the F3 tornado that destroyed much of the Town of Goderich[35].

Even regulatory changes will not always trigger a Z-factor event. The Board has rejected Z-Factor events relating to changes in pension regulations[36] and new TSSA directives[37], on the basis that the underlying nature of these events are of the type that the utility should either have taken risks to mitigate[38] or they involve challenges a distributor is expected to meet.[39] Distributors are required to meet obligations under various employment related legislation and regulations in addition to the Pay Equity Act.[40] Settlements between a distributor and its union occur in the normal course of business and in no way can be considered outside of the control of management.

The requirements under the Pay Equity Act are not new. The legislation has been in force since 1987, and has applied to all Ontario employers with 10 employees since then.[41] HHHI has had a pay equity committee since before 1990.[42] It is not a new regulatory requirement that would be outside of management's control, but an integral part of the operations of all businesses in Ontario. HHHI has had a pay equity plan since 1990, and that "[p]eriod testing for Pay Equity is part of an employer's ongoing maintenance obligations."[43] As HHHI's own evidence states, a pay equity adjustment such as its settlement with its union is not indicative of any non-compliance, but rather "indicative of a Pay equity maintenance process that is working and that employers must undertake periodically as job duties change and evolve and as organization itself evolves". [44] None of these meet the requirement for the event to be "genuine[ly] exogenous" to HHHI.[45]

Far from unforeseen or "genuinely incremental to the [distributor's] experience and reasonable expectation"[46], in its last cost of service application, HHHI provided evidence of an increase in costs related to advisor costs related to resolving pay equity issues.[47] It clearly contemplated that it would incur incremental costs.

HHHI has not met the requirement of causation.

Prudence. SEC agrees the expense was prudent.

---

[34] For example the 2014 ice-storm claims (*Decision and Order* (EB-2014-0162 - Milton Hydro), October 16 2014, Decision and Order (EB-2014-0272 - Veridian), February 19 2015

[35] *Decision with Reasons* (West Coast Huron - EB-2011-0335), January 31 2012, p.8

[36] *Decision and Order* (Enbridge - EB-2011-0277), May 10 2012, p.8-9

[37] *Ibid,* p.10-11

[38] *Ibid*, p.9

[39] *Ibid*, p.13

[40] For example, see the *Labour Relations Act, Employment Standards Act*, and the *Occupational Health and Safety Act*.

[41] Interrogatory Response OEB Staff-13

[42] Interrogatory Response OEB Staff-12

[43] Interrogatory Response VECC-3(b)

[44] Interrogatory Response VECC-3(b)

[45] *Decision and Order* (Enbridge - EB-2011-0277), May 10 2012, p.9;

[46] *Filing Requirements For Electricity Distribution Rate Applications - 2017 Edition for 2018 Rate Applications*, Chapter 3 (July 20, 2017), p.17

[47] See Interrogatory Response SEC-8 regarding references in the EB-2015-00764 application at Exhibit 4, Tab 2, Schedule 1, p.44

Materiality. The materiality threshold for a distributor like HHHI with a revenue requirement of less than $10M is $50,000.[48] The evidence is that pay equity settlement costs do not meet the materiality threshold. In none of the years does the amount reach $50,000.[49]

This is the same materiality threshold as would apply in its cost of service application under the Filing Requirements.[50] When asked in Interrogatory SEC-11, in which individual years specifically has HHHI incurred or forecast to incur these incremental costs above its materiality threshold of $50,000), it responded by saying that the application has been "submitted in totality under the principles indicated in the 2018 Filing Requirements".[51] There is no principle of totality regarding the materiality threshold. The threshold is specific and calculated on an annual basis.[52]

The rationale underlying this materiality requirement is that the costs must "have a significant influence on the operation of the distributor; otherwise they should be expensed in the normal course and addressed through organizational productivity improvements." [53] The $261,251 (including carrying costs) claim for costs attributable between 2012 and 2021, which based on its own evidence, in no single year the amount is above $50,000, are not costs that should cause any adverse effect on the operations of HHHI.[54]

SEC submits HHHI has not met the requirement of materiality.

C. <u>Summary</u>

SEC submits the Board should reject both the request for a deferral and variance account to correct an error made in HHHI's EB-2015-0074 application regarding its depreciation expense, and its request for a Z-Factor for its pay equity settlement.

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and interested parties (by email)

[48] IRM Report, p.36;

[49] Z-Factor Application, p.,9, Table PE1

[50] *Filing Requirements For Electricity Distribution Rate Applications - 2017 Edition for 2018 Rate Applications*, Chapter 2, (July 20, 2017), p.5

[51] Interrogatory Response SEC-11(d)

[52] The threshold is determined based on the distributor's revenue requirement which is also calculated on annual basis.

[53] IRM Report, Appendix, p.iv

[54] Z-Factor Application, p.9; Interrogatory Response SEC-1(b)