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Ontario

BY EMAIL

June 26, 2019

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Hydro One Networks Inc.
Motion to Review and Vary the Ontario Energy Board's EB-2017-0049 Decision and Order, issued March 7, 2019, regarding 2018 - 2022 Distribution Rates
OEB Staff Submission
OEB File No. EB-2019-0122

In accordance with Procedural Order No. 1, please find attached the OEB Staff Submission for the above proceeding. This document has been sent to Hydro One Networks Inc. and to all other registered parties to this proceeding.

Hydro One Networks Inc. is reminded that its Reply Submission is due by July 10, 2019, should it choose to file one.

Yours truly,

Original Signed By

Martin Davies
Project Advisor, Major Applications

Encl.

Motion to Review and Vary the Ontario Energy Board's EB-2017-0049 Decision and Order, issued March 7, 2019, regarding 2018 - 2022 Distribution Rates

Hydro One Networks Inc.

EB-2019-0122

OEB Staff Submission

June 26, 2019

1 INTRODUCTION AND SUMMARY

On March 7, 2019, the Ontario Energy Board (OEB) released its decision and order in the Hydro One Networks Inc. (Hydro One) Custom Incentive Rate-setting (IR) distribution rates application[1] for the period 2018-2022. In that decision the OEB disallowed the recovery of Hydro One's pension contributions for 2018 and throughout the term of the Custom IR framework based on the magnitude of the current surplus in the pension plan. The amount of the disallowance in the 2018 test period was $37 million ($17 million in Operating, Maintenance & Administration (OM&A) and $20 million in capital) (the pension finding).[2]

On March 26, 2019, Hydro One filed its Motion to Review and Vary (the Motion) the OEB's March 7, 2019 decision and order related to the pension finding. In particular, Hydro One argues that the OEB should review the pension finding based on Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* (Rules)[3] because:

- there have been changes in circumstances since the hearing
- the pension findings contain an error
- the change in circumstance and error are material and relevant to the outcome of the OEB's March 7, 2019 decision and order such that if the new information is taken into account, and the error is corrected, the reviewing panel would change the outcome of that decision[4]

Pursuant to the OEB's Procedural Order No. 1, on June 5, 2019 Hydro One filed with the OEB its motion argument and record/book of authorities.

In its argument, Hydro One indicates that there have been a number of changes to regulations and interpretation of regulations made under the Pension Benefits Act (PBA) that included material changes to the test which must be applied in order for a company to take a contribution holiday. Hydro One indicates that it is not known when the new test will apply to Hydro One as it is currently not possible to know when Hydro One's current pension valuation will cease to be operative. Given this uncertainty, Hydro One argues that this change constitutes a change in circumstances for the purposes of Rule 42.01(1)(a) of the Rules.[5]

Hydro One further submits that the OEB's finding related to the recovery of its pension contributions was in error as it assumed that the presence of a "surplus" in the

[1] EB-2017-0049
[2] EB-2017-0049, Decision and Order, p. 96
[3] Revised October 28, 2016
[4] EB-2019-0122, March 26, 2019 Notice of Motion, p. 2
[5] EB-2018-0122, June 5, 2019, Motion to Review and Vary – Hydro One Argument, p. 1

December 31, 2016 valuation resulted in Hydro One not having to make pension contributions. With respect to 2018 pension costs in particular, Hydro One claims that it was required to, and did, make a pension contribution for 2018. Moreover, it further claims that for much if not all of the period to which the OEB's decision and order relates, pension contributions are expected to be required.[6]

2 MOTIONS TO REVIEW

Rule 42.01 of the OEB's Rules sets out the information that must be contained in a motion to review:

> Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
> (ii) change in circumstances
> (iii) new facts that have arisen
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time...

Rule 43.01 provides that the OEB may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

In the Natural Gas Electricity Interface Review Decision (NGEIR Review Decision),[7] the OEB found as follows:

> In determining the appropriate threshold test pursuant to Rule 45.01 [now Rule 43.01], it is useful to look at the wording of Rule 44 [now Rule 42.01]…
>
> Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

[6] EB-2018-0122, June 5, 2019, Motion to Review and Vary – Hydro One Argument, p. 2
[7] Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006-0322/0338/0340, May 22, 2007, p. 18

> With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.
>
> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.
>
> The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.
>
> In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.
>
> In the OEB's decision on the Hydro One Motion to Review the OEB's Decision on Connection Procedures[8], the OEB made it clear that, in considering the threshold question, it will wish to be satisfied that a motion to review raises a question as to the correctness of the underlying decision, and is not being used as an opportunity to reargue the case. The OEB further stated that the error or new facts (as applicable) must be material and relevant to the outcome.

The purpose of a motion to review, therefore, is not simply to re-hear the original issue before the OEB. Most issues before the OEB require a significant exercise of judgment on behalf of the OEB panel. The purpose of a motion to review is not for a party to simply re-argue the same case in front of a different panel in the hope of achieving a different outcome.

Similarly, the task of a reviewing panel is not to consider the matter afresh – a motion to review is not a hearing *de novo*. The role of the reviewing panel is not to consider the evidence and decide what outcome it would have arrived at. A reviewing panel should instead look at the matter and determine if the original panel made an identifiable and material error of law or fact. If the answer to that question is "no", then the motion must fail. It does not matter if the reviewing panel might have come to a different conclusion on the evidence – if the original panel did not make an identifiable error then the reviewing panel should not consider the matter further.

[8] Motion to Review the EB-2006-0189 Decision, EB-2007-0797, November 26, 2007

In addition to being in keeping with the legislation, rules and OEB precedent, there are solid policy reasons behind this approach. A party should not be permitted two opportunities to argue the same case. Absent an identifiable error, parties should have confidence that an OEB decision is final. A motion to review also consumes significant OEB and party resources, and regulatory efficiency demands that these motions only be permitted where a clear error has been made. If parties could simply re-argue any issue that they "lost" in the original proceeding before the OEB, there would be little incentive for them to not file a motion to review.

OEB Staff Submission

Hydro One submits that the Motion should be granted on the basis that there has been a change in circumstance and that there are errors in the OEB's decision.

OEB staff will address Hydro One's motion argument by dealing with the substance of those arguments in addressing both the threshold and the merits of the motion. OEB staff respectfully submits that Hydro One's Motion simply re-argues matters that were already addressed, considered, and are on the record of the EB-2017-0049 proceeding. There has been no change in circumstances that would make pension contributions payable by Hydro One at this time, nor has Hydro One established an error on the part of the OEB in denying the recovery of its pension contributions. Consequently, Hydro One has not met the threshold test. Hydro One's Motion to review should be dismissed at the threshold stage. Should the OEB decide that the threshold test has been met, OEB staff submits that the Motion should still be denied on its merits as will be further explained below.

OEB staff addresses Hydro One's arguments in more detail within the following sections of its submission.

3 THE CHANGE IN CIRCUMSTANCE

Hydro One argues that the changes under the PBA and Regulations constitute a change in circumstance and raise important questions as to the correctness of the pension finding. In particular, the change to the PBA that Hydro One references relates to a new threshold test that determines if an entity is eligible to take a pension contribution holiday. The new test is effective May 1, 2018 and now requires a pension plan to be at least 105% funded as calculated on a wind-up basis (new funding rules). Hydro One described the matter as follows:

> These changes, which culminated in amendments to the Regulations on May 21, 2019, included material changes to the test under the PBA which must be applied in order for a company to take a contribution holiday. In Hydro One's

> case, it is not known when the new test will apply because as detailed herein, it is not currently possible to know when Hydro One's current valuation will cease to be operative. The new test may apply as early as March 1, 2018 and as late as December 31, 2020. Given the uncertainty caused by the changes to the Regulation, Hydro One submits that this change constitutes a change in circumstance under Rule 42.01(a) of the Board's Rules of Professional Practice and Procedure.[9]

The uncertainty that Hydro One references in the excerpt above stems from the fact that its current December 31, 2017 valuation[10], which governs its pension contribution requirements for the period 2018-2020, has been grandfathered under the pre-May 1, 2018 funding rules (old funding rules)[11] because it was completed and filed with the Financial Services Commission of Ontario (FSCO) prior to the effective date of the new rules. Therefore the new funding rules do not, and will not, apply to Hydro One until its existing December 31, 2017 valuation expires at the end of 2020, or when it is replaced by a new valuation (whichever occurs first). Therefore there is no exact date as to when the rules will become applicable to Hydro One. To complicate matters even further, Hydro One plans to insource call-centre functions previously carried-out by Inergi LP and Vertex Customer Management Ltd, which would require the transfer of pension assets and liabilities from the pension plans of those entities back into the Hydro One pension plan. Depending on the effective date of that transfer, it could potentially make the new funding rules applicable to Hydro One as early as March 1, 2018.

OEB staff does not agree with Hydro One's argument that the new funding rules and the related uncertainties represent a change in circumstance. The circumstances that Hydro One raises in its argument above were already brought forward and considered during the EB-2017-0049 proceeding. During that proceeding, the panel was advised that there were new funding rules coming into effect during the term of the application, that there was uncertainty as to when these new rules would be applicable to Hydro One, and uncertainty over how those new rules would impact Hydro One's contribution requirements over the Custom IR term.

For example, this was addressed in cross examination during the oral hearing:

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[9] EB-2019-0122, June 5, 2019 Motion to Review and Vary – Hydro One Argument, p. 1-2

[10] OEB staff notes that the December 31, 2016 pension valuation report is the report that is on the record of the EB-2017-0049 proceeding. As noted in the June 5 argument, Hydro One subsequently updated their pension valuation and filed the December 31, 2017 valuation report with FSCO on April 30, 2018. This valuation is not on the record of EB-2017-0049. It continues to present the plan in a surplus position under the old funding rules.

[11] The pre-May 1, 2018 rules (old rules) permits a contribution holiday if the pension plan is in a surplus position as calculated on a going-concern and solvency basis, pending the filing of an annual cost certificate.

> MR. CHHELAVDA: So this valuation is done on a going concern basis and the pension plan is in a surplus position, so it has -- at the point in time it has, based on the valuation methodology, it has …more assets than the liabilities, so you would have -- that's why it would estimate the minimum contribution as being zero.
>
> That being said, there are some challenges with this, so there are new pension rules that have come out in 2018, I believe, in the month of May -- April, May, which changes the funding ratio, so this may be true for, we think, for '18, but we're not sure if it holds beyond that, and the new rules, what they do is, the pension plan has to be in a stronger financial position to be able to take a contribution holiday, so this may not be applicable or the full test period, and it may not even be applicable for 2018.[12]

This was further addressed in Hydro One's reply submission:

> Importantly, however, in regards to what is permitted by the applicable legislation, pension regulator FSCO recently communicated its position with respect to the application of new funding rules which limit the use of a contribution holiday beyond 2018. Even though the December 31, 2017 actuarial valuation indicates that the minimum employer contribution requirement for 2018-2020 is zero, the actuarial valuation also states that the Application of Surplus amounts shown reflect the funding rules in force at the time the current valuation was filed. The actuarial valuation also states that this is subject to the preparation of a cost certificate at the beginning of each year confirming the level of available surplus that may be applied for 2019 and 2020. In August 2018, FSCO issued their position which states that for a contribution holiday to be taken in 2019 and beyond a cost certificate will need to be filed certifying that, at the beginning of the year, the assets of the plan exceed the windup liabilities by 5%. Based on this, it is extremely unlikely that Hydro One will be able to take a contribution holiday in the near future, as assets would have to outperform windup liabilities by more than $2.7 billion to first cover the windup deficit and then further exceed windup liabilities by 5%.[13]

Hydro One further supports its assertion that there has been a change in circumstance in paragraphs 11-19 of its motion argument. These paragraphs seem to provide details on the specific rule changes and various uncertainties with respect to the application of these new rules in the context of Hydro One's Custom IR application, but does not

[12] EB-2017-0049 Tx Volume 4, p 76
[13] EB-2017-0049, Hydro One Reply Submissions filed August 31, 2019, p 129

present anything that was not already considered as part of the EB-2017-0049 proceeding. Hydro One is simply reiterating that the uncertainties that were present in the original proceeding persist.

OEB staff submits that there has been no change in circumstance that would warrant a variance of the pension finding from the EB-2017-0049 proceeding. More particularly:

- The new rule changes were already explored throughout the EB-2017-0049 proceeding, including the uncertainty over when those new rules would become applicable to Hydro One and how they would impact its pension contribution requirements during the 2018-22 Custom IR term (as supported by the excerpts above).
- The new amendments to the PBA that were made official after the decision and order was issued are consistent with what was discussed and on the record of the EB-2017-0049 proceeding (i.e. the new threshold test is the same as that on the record).
- Hydro One continues to be bound by the same funding rules that underpinned the pension valuation that the OEB relied on to make its pension finding.
- Hydro One would have been legally permitted to take a contribution holiday in 2018 had it chose to file a cost certificate as required by the PBA (refer to further discussion on this under the "Correctness of the Decision" section below).
- Hydro One continues to remain eligible to take a contribution holiday in both 2019 and 2020 based on its most recent December 31, 2017 pension valuation (refer to further discussion on this under the "Correctness of the Decision" section below).

Correctness of the Decision

Hydro One's Motion argument sets out several arguments under the sub-heading "The Decision is Not Correct"[14], OEB staff will address each of those arguments below.

The Surplus Position relied upon by the Board is insufficient to permit Hydro One to legally take a contribution holiday under the PBA and the Regulations.

In this section, Hydro One argues that the pension finding was not correct because:

> Furthermore, the going concern and solvency surplus status of the Hydro One Pension Plan cannot be relied upon as a basis for Hydro One to take a contribution holiday under the Hydro One Pension Plan for the 2018-2022

[14] EB-2019-0122, Motion to Review and Vary – Hydro One Argument, starting on p. 10-14

> rate period given the PBA requirements for contribution holidays under the Post-May 1, 2018 Rules.[15]

OEB staff disagrees with Hydro One's argument. As noted in the "Change in Circumstance" section above, Hydro One's current December 31, 2017 actuarial valuation was grandfathered under the old funding rules because it was completed and filed before the effective date of the new funding rules[16]. Therefore, contrary to Hydro One's argument above, the going concern and solvency surplus status of the Hydro One pension plan does in fact continue to be relied upon as the basis for Hydro One to take a contribution holiday. These old funding rules will continue to apply to Hydro One until its current December 31, 2017 valuation is updated or until it expires on December 31, 2020, whichever occurs first.

Hydro One's current December 31, 2017 valuation indicates that its pension plan is in a surplus position as calculated from both a going-concern and solvency perspective.[17] Based on this, Hydro One was eligible to take a contribution holiday in the 2018 test year (Hydro One's eligibility to take a contribution holiday in 2018 is analyzed in more detail below). In addition, Hydro One remains eligible to take contribution holidays for 2019 and 2020. This is confirmed in the December 31, 2017 valuation by the actuary.

With respect to the 2018 year, Hydro One also argues that:

> Hydro One is not legally permitted to take a contribution holiday under the PBA and the Regulations in 2018 and for much of the period covered by the Decision; as a result, the Decision erroneously denied Hydro One costs that are and will be prudently incurred.[18]

OEB staff disagrees with Hydro One's assertion that it was not legally permitted to take a contribution holiday for 2018 and for much of the period covered by its Custom IR term. As noted above, Hydro One's pension valuation report confirms that it was eligible to take a contribution holiday in 2018, and it remains eligible to take a contribution holiday in 2019 and 2020.[19]

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[15] EB-2019-0122, Motion to Review and Vary – Hydro One Argument, Filed June 5, 2019, p. 11
[16] Reg.105/19, Sections 6.3, 7 (3.1.1), 7(4) to 7(6), 7.0.3 (1), 7.1(3)
[17] EB-2019-0082, Exhibit F-5-1, Attachment 1
[18] EB-2019-0122, Motion to Review and Vary – Hydro One Argument, Filed June 5, 2019, p. 11
[19] Section 3: Contributions, of the December 31, 2017 pension valuation report indicates that plan surpluses may be used to offset employer contributions and that based on the current surpluses in that valuation, there is enough to offset the employer contribution in 2018, 2019, and 2020.

The PBA rules stipulate that in addition to meeting the contribution holiday threshold tests set-out in the PBA, an annual cost certificate must be filed with FSCO within the first 90-days of the fiscal year in order to certify that the threshold tests continue to be met.[20] For example, in order to take a contribution holiday in 2018, Hydro One would have to have filed a cost certificate with FSCO by March 31, 2018.

Hydro One was entitled to take a contribution holiday in 2018 if they chose to do so; this was clear from its pension valuation on the record of EB-2017-0049 and continues to be the case in its updated December 31, 2017 pension valuation. With respect to its pension contributions, Hydro One argued during EB-2017-0049 that it intended, at its own discretion, to continue to make pension contributions to its pension plan notwithstanding that it was legally eligible to take a contribution holiday in order to insulate itself against any potential adverse future events. This was debated and discussed extensively throughout that proceeding.[21] Hydro One only became legally obligated to make those contributions once it chose not to file a cost certificate with FSCO within the first 90-days of 2018.

The fact that Hydro One did not file a cost certificate for 2018 was not on the record of the EB-2017-0049 proceeding, nor were the related implications of such a decision. The deadline for Hydro One to file its cost certificate for 2018 (i.e. March 31, 2018) came and passed during the EB-2017-0049 proceeding. OEB staff cross examined Hydro One's legal requirement to make pension contributions during the oral hearing.[22] The oral hearing in the proceeding did not begin until June 11, 2018, almost 2½ months after the deadline for filing the cost certificate. During the technical conference at the beginning of March, 2018, OEB staff asked Hydro One witnesses a series of questions regarding Hydro One's intention to continue making pension contributions notwithstanding Hydro One's surplus position.[23] The questions related to interrogatories filed in January of 2018.[24] The overall focus of the proceeding from a pension perspective was clearly around Hydro One's ability to take a contribution holiday in 2018. It is not clear why Hydro One would have remained silent about not filing its 2018 cost certificate when that information was clearly relevant. OEB staff submits that Hydro One had ample opportunity to mention this, and the implications of that decision, long before the oral hearing. Hydro One chose not to file the certificate but did not disclose that decision.

[20] The requirement to file an annual cost certificate with FSCO is consistent under both the old funding rules and new funding rules.
[21] EB-2017-0049 Tx Volume 4, p. 72-85
[22] *ibid*
[23] Technical Conference Thursday March 1, 2018, Transcripts p. 128-130
[24] OEB Staff IR # 213

Hydro One appears to be suggesting that it was uncertain about the application of the PBA rules, and that it may have prevented them from acting in accordance with those rules for the filing of a cost certificate:

> As stated above, guidance from FSCO published on its website on August 29, 2018 indicated that the contribution holiday restrictions in the Post-May 1, 2018 Rules (notably the 105% wind up test) would apply starting January 1, 2019. Moreover, the FSCO guidance clarified that companies may only take a contribution holiday for 2018 if they had filed a cost certificate with FSCO by March 31, 2018. As a result, FSCO's guidance made clear that Hydro One could not use its new December 31, 2017 valuation report to satisfy the cost certificate filing requirement.[25]

It is not clear to OEB staff why Hydro One considers the above statement from FSCO regarding the filing of a cost certificate as a clarification. OEB staff submits that the requirement to file a cost certificate within the first 90 days of a fiscal year has been part of the PBA since 2009 and therefore should require no clarification. In fact, this requirement forms part of both the old funding rules and the new funding rules; nothing has changed in that regard as a result of amendments to the PBA. Therefore, there is no reason why this long-standing rule should not have been known and understood by Hydro One for 2018 and during the EB-2017-0049 proceeding. Moreover, Hydro One has not provided any support for its assertion that its December 31, 2017 valuation report could not have been used to satisfy its cost certificate filing requirement.

Notwithstanding the reasons given by Hydro One, OEB staff submits that a legal obligation alone does not bind an OEB panel to permit recovery of a cost if that legal obligation was crystallized by specific actions taken by the applicant. The OEB must assess whether those actions were prudently made and the underlying cost was prudently incurred. The OEB panel rejected Hydro One's pension costs given the magnitude of the surplus in its pension plan. OEB staff submits that Hydro One created this legal obligation by its decision to not file a cost certificate by the PBA deadline. Put another way, Hydro One chose to make payments that could have been avoided, and sought to pass them on to the rate payer. This is a risk that Hydro One chose to take and that is subject to the OEB's approval as are other actions that have cost consequences and are included in the rate application, such as decisions on salary and wage levels. OEB staff further assesses whether the pension contributions represent a prudently incurred cost in the following section of its submission.

[25] EB-2019-0122, Motion to Review and Vary – Hydro One Argument, Filed June 5, 2019, p. 6

In regards to the remaining years of the application term beyond the test year, Hydro One claims that it is not legally permitted to take a contribution holiday under the PBA and the Regulations in 2018 and for much of the period covered by the decision.[26] OEB staff does not agree with Hydro One's claim that it is not legally permitted to take a contribution holiday for much of the period covered by the decision. OEB staff submits that based on its current December 31, 2017 pension valuation report, Hydro One remains eligible to take a contribution holiday in 2019 and 2020 pending the filing of the annual cost certificate with FSCO (provided that nothing changes with respect to its December 31, 2017 valuation). The PBA has included a transition measure for 2019 that permits a cost certificate to be filed with FSCO by June 30, 2019[27] rather than the usual 90-day deadline. Similar to its 2018 pension contributions, Hydro One will become legally obligated to make its pension contributions in 2019 and 2020 if it chooses not to file a cost certificate for each year with FSCO. For years 2021 and 2022, it is uncertain whether Hydro One will be eligible to take a contribution holiday as the current December 31, 2017 valuation report does not cover this period.[28] However that was also the case in the EB-2017-0049 proceeding and therefore nothing has changed in this regard.

The Pension Contributions are and will be Prudently Incurred

Under this section, Hydro One seems to be arguing that since it is now legally obligated to make pension contributions, by doing so, it is acting in accordance with the law, and therefore such costs meet the prudent investment test and should not have been disallowed.

Hydro One references *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, where the Ontario Court of Appeal endorsed the OEB's specific formulation of the prudent investment test which included the following component:

> 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

Hydro One in fact became legally obligated to make pension contributions for the test year 2018. However, as noted in the previous section of OEB staff's submission, a legal obligation alone does not bind an OEB panel to permit recovery of a cost, especially where the obligation only arose on account of actions taken (or not taken) by the applicant. The OEB must assess whether the underlying cost was prudently incurred.

[26] EB-2019-0122, Motion to Review and Vary – Hydro One Argument, Filed June 5, 2019, p. 11
[27] Reg 909 under the Pension Benefits Act, section 7(4).
[28] 2021 and 2022 will be governed under the new funding rules

In particular, Hydro One was eligible to take a pension contribution holiday for 2018 as outlined in its December 31, 2016 pension valuation on the record of the EB-2017-0049 proceeding (and in its current December 31, 2017 pension valuation). However, Hydro One, at its own discretion, elected not to take a contribution holiday by not filing its cost certificate for 2018 with FSCO within the first 90 days of the fiscal year. It became legally obligated to make pension contributions in 2018 once it chose not to file a cost certificate. Hydro One was well aware of the rules under the PBA and specifically, the need to file a cost certificate. This rule is not new. It has been part of the PBA since 2009, and has not changed as a result of the recent PBA amendments.

Therefore, it is clear that Hydro One had discretion to avoid paying its pension contributions for 2018, but chose to make them anyway. Not allowing such costs to be borne by rate payers during the rate-setting term that is the subject of the original application, when they could have reasonably been avoided was a reasonable decision.

Similarly, based on the most current December 31, 2017 valuation, Hydro One is also still eligible to take a pension contribution holiday in both 2019 and 2020, pending the filing of a cost certificate for each year. Unless something changes with respect to its current valuation (i.e. it ceases to be operative), there is no reason why a contribution holiday cannot taken in both years. As of today, these pension contributions can be reasonably avoided and therefore would not meet the prudent investment test.

The denial of costs required by law was not considered in EB-2017-0049

In this section, Hydro One argues that

> …no party, including Hydro One, was afforded the opportunity to make submissions as to whether Hydro One's pension costs should be denied if they were legally required….Hydro One submits that the Board's imposition of the Pension Findings is a denial of the right to be heard in respect of the Pension Findings…. The denial of the right to a fair hearing in respect of the Pension Findings is an error of law which renders the Pension Findings incorrect.[29]

OEB staff does not agree with Hydro One's argument in this regard. The matter of Hydro One's obligations to make pension contributions was a subject of pre-filed evidence; interrogatories[30]; questions during the technical conference[31]; cross-

[29] EB-2019-0122, Motion to Review and Vary – Hydro One Argument, Filed June 5, 2019, p.13-14
[30] OEB Staff IR #213
[31] Technical Conference Thursday March 1, 2018, Transcripts p. 128-130

examination[32]; and submissions.[33] Hydro One's argument suggests that, notwithstanding the ample material on the record with respect to pension contributions, Hydro One has been denied a fair hearing because no-one suggested to it that the OEB could deny Hydro One's request to recover the revenue requirement related to pension contributions. OEB staff submits that the denial of the recovery, particularly where it was shown that a cost could have been avoided, is entirely within the range of possible outcomes.

OEB staff notes that even now, when Hydro One is in effect rearguing the original case, it is still not able to show an obligation to make the contributions, with the possible exception of the 2018 contribution, although, as discussed previously, that obligation was created by Hydro One's own decision not to file either a cost certificate or a valuation report by the applicable deadline. OEB staff submits that the burden of proof is on the applicant; in OEB staff's view it is not an error in fact or law for a regulator to engage in analysis of what evidence is in fact on the record and come to its own conclusions as to what is an appropriate cost to be borne by ratepayers for a particular period. The OEB made the best determination it could, based on the evidence that was on the record. There was nothing unreasonable about the OEB's decision.

4 CONCLUSION

In conclusion, OEB staff submits that Hydro One's Motion to Review and Vary the OEB's March 7, 2019 decision and order related to the pension finding does not meet the required threshold test as stated in the Rules as it is not a change in circumstances and Hydro One should not be allowed to re-argue its case. Should the OEB decide that the threshold test has been met, OEB staff submits that the motion should still be denied on its merits because as noted there is no change in circumstances and Hydro One has failed to demonstrate that the decision is not correct, as outlined in the submissions above.

All of which is respectfully submitted.

[32] EB-2017-0049 Oral Hearing Tx Volume 4, p. 72-85
[33] Submissions were made in EB-2017-0049 by OEB staff, SEC, and others