EB-2019-0122

IN THE MATTER OF an application by Hydro One Networks Inc. on March 31, 2017 under section 78 of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, (Schedule B) for an order or orders approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2018 and for each following year effective January 1 through December 31, 2022;

AND IN THE MATTER OF the Decision and Order dated March 7, 2019 in EB-2017-0049; and

AND IN THE MATTER OF sections 40 and 42 of the Ontario Energy Board's *Rules of Practice and Procedure*.

SUBMISSIONS OF

CANADIAN MANUFACTURERS & EXPORTERS ("CME")

June 26, 2019

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1. INTRODUCTION

1. On March 31, 2017, Hydro One Networks Inc. ("**Hydro One**") filed a custom incentive rate application pursuant to section 78 of the *Ontario Energy Board Act, 1998, S.O.* 1998, c. 15 Schedule B, seeking orders approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2018 to December 31, 2022.

2. The application included an oral hearing, which was held over eleven days between June 11, 2018 and June 28, 2018. Hydro One's Argument in Chief was submitted on July 20, 2018.[1] Intervenor submissions were submitted on August 10, 2018.[2] Hydro One's Reply Argument was submitted on August 31, 2018.[3]

3. The Board issued its Decision and Order with respect to Hydro One's application on March 7, 2019 (the "**Decision**"). In the Decision, the Board determined that it would deny Hydro One's request for recovery of pension amounts outlined in the application. The disallowance in 2018 was $37 million in total, split between $17 million in OM&A spending, and $20 million in capital spending (the "**Pension Amounts**").

4. On January 26, 2019, Hydro One filed its motion for an Order to review and vary the Decision in relation to the Board's determination to disallow Hydro One's recovery of the Pension Amounts (the "**Motion**").

5. Hydro One essentially argues two things in the Motion:

   (a) That changes made to pension contribution and holiday rules, and changes and the interpretation of those rules by the Financial Services Commission of Ontario ("**FSCO**") constitute a "change in circumstances" as envisioned by the Board's *Rules of Practice and Procedure*.

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1 EB-2017-0049, Final Argument of Hydro One Networks Inc., July 20, 2018.
2 EB-2017-0049, Submissions of Canadian Manufacturers and Exporters, August 10, 2018.
3 EB-2017-0049, Reply Argument of Hydro One Networks Inc., August 31, 2018.

(b) That the Decision contains an error because the Board found that Hydro One's pension was in a surplus position, and was therefore allowed to take a pension contribution holiday throughout the plan period.

6. CME disagrees with both of these contentions, and submits that Hydro One's motion should be dismissed, as it does not meet the Board's threshold test for a motion to review and vary, and the Decision is reasonable on its merits.

2. THRESHOLD TEST

7. The threshold requirements for a motion to review and vary is set out in the Board's *Rules of Practice and Procedure*. Rule 40.01 states that any person may bring an order requesting that the Board review all or a part of a final order or decision, and can vary, suspend or cancel the order.[4]

8. Rule 42.01 sets out the threshold test by stating that every notice of motion under Rule 40.01 must:

> ***[S]et out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:***
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> ***(i) error in fact;***
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> ***(ii) change in circumstances;***
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> ***(iii) new facts that have arisen;***
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> ***(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time…***[5]

9. In addition to those requirements, the Board has determined that the error or change in circumstance must be material such that, if corrected, a reviewing panel would vary the decision.[6]

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4 Ontario Energy Board, *Rules of Practice and Procedure*, last updated October 28, 2016, p. 29.
5 Ontario Energy Board, *Rules of Practice and Procedure*, last updated October 28, 2016, p. 31.
6 EB-2006-0322/EB-2006-0338/EB-2006-0340, Motions to Review The Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, p. 18.

2.2 Error In Fact

10. In support of the Motion, Hydro One argues that the Board's decision contained an error. Specifically, Hydro One states that the Board found that Hydro One's pension plan had a surplus, and the Decision assumed that Hydro One was legally entitled to take a contribution holiday.[7]

11. According to Hydro One, this is an error because there have been changes made to the regulations under the *Pension Benefit Act,* and FSCO's interpretation of those new regulations. Hydro One argues that these changes meant that Hydro One did in fact need to make a pension contribution in 2018, and will be required to make pension contributions for much of the term covered by the Decision.[8]

12. In the motions to review the Natural Gas Electricity Interface Review Decision, the Board opined on what the moving party is required to demonstrate in order for there to be an "error in fact" in a Board's decision:

> ***"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."***[9]

13. CME believes that the Decision does not contain an error, and the Board appropriately addressed the evidence and argument that was submitted as part of EB-2017-0049.

14. Hydro One included, as part of its evidence in EB-2017-0049 an actuarial valuation completed by Willis Towers Watson (the "Willis Towers Watson Valuation").[10]

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7 EB-2019, 0122, Written Argument of the Moving Party, Hydro One Networks Inc. (motion for review and variance), June 5, 2019 at para 23.

8 EB-2019, 0122, Written Argument of the Moving Party, Hydro One Networks Inc. (motion for review and variance), June 5, 2019 at para 23

9 EB-2006-0322/EB-2006-0338/EB-2006-0340, Motions to Review The Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, p. 18.

10 EB-2017-0049, Exhibit C1, Tab 2, Schedule 2, Attachment 1, Willis Towers Watson, Hydro One Inc. Hydro One Pension Plan, Actuarial Valuation as at December 31, 2016, dated May 31, 2017.

The Willis Towers Watson Valuation found that the Hydro One's pension plan had an actuarial surplus as at December 31, 2016 of $433,678,307.00.[11] As a result of the significant surplus position, the Willis Towers Watson Valuation estimated that the minimum employer contributions for each of 2017, 2018 and 2019 would be $0.[12]

15. In addition to the Willis Towers Watson Valuation, Hydro One also produced Mr. Chhelavda as a witness in the proceeding to discuss Hydro One's pension position. During cross-examinations, Mr. Chhelavda testified regarding the possible impact of the new regulations:

> ***[S]o 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 for the full test period, and it may not even be applicable for 2018."[13]***

16. As demonstrated by the passage, Mr. Chhelavda was quite deliberate in stating that he was not sure when (if ever) the impacts would be felt.

17. Accordingly, the Board had two sets of evidence before it. The mathematically calculated and supported valuation completed by Willis Towers Watson, which outlined that Hydro One was not required to make pension contributions, and the evidence of Mr. Chhelavda, who expressed some reservations about whether, and when, the new pension rules would apply to Hydro One during the IR term. Accordingly, while there were some additional considerations added with regard to Hydro One's pension position, nothing in Mr. Chhelavda's testimony conflicted with the valuation report, as it was still entirely possible that Hydro One would not have to make pension contributions during the period, if they met the new, higher threshold.

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11 EB-2017-0049, Exhibit C1, Tab 2, Schedule 2, Attachment 1, Willis Towers Watson, Hydro One Inc. Hydro One Pension Plan, Actuarial Valuation as at December 31, 2016, dated May 31, 2017, p. 4.

12 EB-2017-0049, Exhibit C1, Tab 2, Schedule 2, Attachment 1, Willis Towers Watson, Hydro One Inc. Hydro One Pension Plan, Actuarial Valuation as at December 31, 2016, dated May 31, 2017, p. 11.

13 EB-2017-0049, Transcript Volume 4, p. 76.

18. However, even if the evidence could be said to conflict, it was open to the Board to consider both aspects of the evidence, weigh them, and to the extent that there was a conflict, prefer the Willis Towers Watson valuation. This does not mean that the Board made an error in fact when it found that Hydro One's pension plan was in a surplus position, as it accorded to the evidence put forward by Hydro One in EB-2017-0049.

19. The Decision also did not fail to address a material issue. In the Decision, the Board was alive to the fact that Hydro One had taken the position that the new pension rules could preclude Hydro One from taking a contribution holiday:

> ***"Hydro One further argued that new rules issued by the Financial Services Commission of Ontario (FSCO) in August 2018 make it extremely unlikely that it will be able to take a contribution holiday as its assets would have to outperform windup liabilities by more than $2.7 billion and then further exceed windup liabilities by 5%."***[14]

20. The Board however, determined that it was appropriate not to require ratepayers to bear the pension costs in the context of just and reasonable rates for Hydro One. Accordingly, the fact that the Board knew and understood about the change in the pension rules demonstrates that the Decision addressed the material issues regarding pensions during the IR term.

21. Finally, the Decision did not contain contradictory findings. In fact, the Board's determination regarding the pension contribution amounts are harmonious with, and should be viewed in the context of the Board's other findings regarding just and reasonable rates.

2.3 Change in Circumstances

22. Hydro One contends that there has been a change in circumstances such that the Decision is not correct. Their argument relates to the new regulations enacted pursuant to the *Pension Benefit Act* and FSCO's interpretation of the same. Specifically, Hydro

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14 EB-2017-0049, Decision and Order, March 7, 2019, p. 109.

One argues that there have been three changes to the pension contribution requirements that constitute a change in circumstances:

(a) The announcement of new regulations pursuant to the *Pension Benefits Act* on April 20, 2018, which were effective on May 1, 2018. These changes would require private employers to meet the more stringent wind-up test before taking contribution holidays;

(b) FSCO's guidance on interpretation of the new rules published on August 29, 2018. This guidance held that the new rules would apply starting January 1, 2019, and stated that entities could only take a holiday for 2018 if they had filed a cost certificate with FSCO by March 31, 2018 (which Hydro One did not do); and

(c) Further changes to the regulations pursuant to the *Pension Benefits Act*, promulgated in May of 2019, outlining that the new rules would take effect when a new valuation report becomes effective (altering the previous guidance that the effective date was January 1, 2019)

23. CME submits that the changes to the regulations, and the additional guidance that was given by FSCO has not materially changed Hydro One's circumstances regarding their pension since the hearing and argument in EB-2017-0049.

24. As stated above, the first of the new regulations under the *Act* were announced on April 20, 2018 and made effective on May 1, 2018, before the hearing in EB-2017-0049. By the time Hydro One was required to make its reply submission in EB-2017-0049 on August 31, 2018, it had been able to confirm that companies would only be allowed to take a contribution holiday if the assets exceeded windup liabilities by 5% or more. Accordingly, Hydro One made submissions to the Board outlining this development:

> ***"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%."***[15]

25. This argument was noted by the Board in its decision.[16]

26. Moreover, Hydro One's written argument in this proceeding confirms that FSCO's guidance regarding Hydro One's ability to take a contribution holiday in 2018 was published on August 29, 2018, prior to the submission of Hydro One's reply argument.[17]

27. Accordingly, given that those circumstances were present before EB-2017-0049 was considered by the Board, CME submits that their existence now does not constitute a "change in circumstances".

28. Regarding the regulations published on May 21, 2019, Hydro One's position relative to those rules have not changed since the hearing. During cross-examinations, Mr. Chhelavda indicated that Hydro One was unsure as to whether the new pension contribution rules from FSCO would have an impact throughout either 2018, or the years following.[18] As noted above, Hydro One's circumstances were such that, during their written submissions, Hydro One considered it "extremely unlikely" that they would be able to take a contribution holiday during the IR term.

29. Currently, as the result of the most recent FSCO update, Hydro One is still currently unsure as to whether or not they will be able to take a contribution holiday. As stated in Hydro One's written argument in this proceeding, the effective date for the new pension rules could be March 1, 2018, or as late as December 31, 2020.[19] As between

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15 EB-2017-0049, Reply Argument of Hydro One Networks Inc., August 31, 2018, p. 129.
16 EB-2017-0049, Decision and Order, March 7, 2019, p. 109.
17 EB-2019, 0122, Written Argument of the Moving Party, Hydro One Networks Inc. (motion for review and variance), June 5, 2019 at para 16.
18 EB-2017-0049, Transcript Volume 4, p. 76.
19 EB-2019, 0122, Written Argument of the Moving Party, Hydro One Networks Inc. (motion for review and variance), June 5, 2019 at para 19.

those two dates, Hydro One has no further insight or certainty regarding pension contribution payments than they did in August of 2018.

30. Furthermore, even if Hydro One were to be operating under the new pension rules, it is still possible that it still could take a contribution holiday. For instance, in 2020, Hydro One's pension plan's assets could exceed its windup liabilities by 5% or more. If that were the case, Hydro One would be able to take a pension contribution holiday, even despite the new tougher thresholds. While CME agrees with Hydro One that this is unlikely, or even "extremely unlikely", those are precisely the circumstances that were put before the Board in Hydro One's argument. Accordingly, there is no change of circumstances that would indicate that the Board's decision is incorrect.

3. THE MERITS OF THE DECISION

31. If the Board determines that the motion to review and vary passes the threshold test, then it must determine whether or not to grant the motion based on its merits. The first step in determining the merits of a motion is to determine the standard of review.

32. In *Toronto Hydro-Electric Systems Ltd. v. Ontario (Energy Board)*, the Ontario Court of Appeal noted that the OEB enjoys a "wide ambit of power in its rate setting function".[20] The Court went on to find that the *Ontario Energy Board Act, 1998*[21] reflected a clear intent by the legislators to use a subjective and open-ended grant of power to the OEB to fulfill its function to set rates.[22] Accordingly, the Court of Appeal found that the decisions of the OEB were entitled to substantial deference, and reviewed it on the "reasonableness" standard.[23]

33. In a decision on a motion to review and vary for Brant County Power Inc., the OEB found that:

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20 *Toronto Hydro-Electric Systems Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284 at paras 25-28.
21 S.O. 1998, c. 15, Sched. B.
22 *Toronto Hydro-Electric Systems Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284 at para 28.
23 *Toronto Hydro-Electric Systems Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284 at paras 39-40.

> ***"[T]he standards that the Court would use in reviewing a Board Decision are no different than those this panel should use in reviewing a prior Board Decision."***[24]

34. Accordingly, when reviewing a prior decision of the Board that deals with its rate-setting function, the appropriate standards of review is reasonableness.

3.2 The Reasonableness Standard

35. The Supreme Court of Canada held that the reasonableness standard is:

> ***[A] deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.***[25]

36. Reviews of decision which attract the reasonableness standard are concerned with whether the decision falls within the range of reasonable and acceptable outcomes which are defensible on the facts and law implicated in the matter.[26]

37. The law relating to the Board's power to set just and reasonable rates is open ended and permissive. Section 78(3) of the *Ontario Energy Board Act* states that the Board has the authority to make orders approving or fixing just and reasonable rates for electricity distributors.

38. Moreover, section 78(7) states:

> ***"Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable."***[27]

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24 EB-2009-0063, Decision and Order, August 10, 2010, para. 38. This finding was echoed in the Board's Decision and Order dated February 22, 2018 in EB-2016-0255 in the motion to review and vary a decision regarding Milton Hydro Distribution Inc. at page 10.

25 *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47.

26 *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47.

27 *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 78(7)

39. Accordingly, the Board's decision to deny Hydro One's request to include pension contribution amounts into rates is well within the legal framework at issue.

40. Similarly, the Decision is also defensible on the facts. In this regard:

(a) Hydro One's pension contained a surplus as defined by the Willis Towers Watson Valuation of approximately $434 million;[28]

(b) Hydro One's pension had been in a surplus position for some time prior to the EB-2017-0049 application;[29]

(c) Hydro One's pensions were a significant driver of their compensation costs, which have historically been significantly above market median, and have been commented on by the Board in numerous other proceedings;[30]

(d) With the new pension contribution rules, it was and is still possible for Hydro One to take contribution holidays in the event that it meets the stricter wind-up test.

41. Given the facts, the Board's decision to deny Hydro One's request to include the proposed $37 million in 2018 pension contribution amounts was defensible, and fell within the range of acceptable outcomes. While the Board could have made other reasonable determinations, that is not sufficient grounds for varying the decision.

4. CONCLUSION

42. For all of the foregoing reasons, CME submits that Hydro One's Motion to Vary should be denied.

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28 EB-2017-0049, Exhibit C1, Tab 2, Schedule 2, Attachment 1, Willis Towers Watson, Hydro One Inc. Hydro One Pension Plan, Actuarial Valuation as at December 31, 2016, dated May 31, 2017, p. 4.
29 EB-2017-0049, Decision and Order, March 7, 2019, p. 96.
30 EB-2017-0049, Decision and Order, March 7, 2019, pp. 105-110.

5. COSTS

43. We request that CME be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June, 2019.

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Scott Pollock

Counsel for CME

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