

June 26, 2019

File 93901

VIA RESS FILING AND COURIER

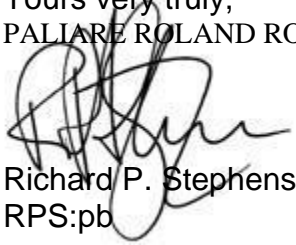
Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli,

**Re: Hydro One Networks Inc. Motion to Review and Vary
EB-2019-0122**

Attached please find the Power Workers' Union's Submissions with respect to the above-noted application.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP


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EB-2019-0122 Hydro One Networks Inc.
Motion to Review and Vary EB-2017-0049
Decision and Order dated March 26, 2019

Submissions of the Power Workers' Union ("PWU")

1. The PWU was an active intervenor in the EB-2017-0049 proceeding. As reflected in the Board's reasons, the PWU opposed the disallowance of the \$37 million of pension costs that is the subject of this motion.

2. The PWU supports Hydro One's motion. This is a proper case for the Board to exercise its review and variance power and the Board's decision below with respect to this issue was incorrect, either by virtue of a misapprehension of the evidence before it at the time of the decision, or by virtue of changed circumstances, or by both.

The Facts

3. The PWU agrees with and adopts the facts set out in paragraphs 7-19 of its submissions.

Submissions

a. The Test to be Applied

4. The PWU adopts Hydro One's submissions regarding the test to be applied on the motion.

b. The Board Misapprehended the Evidence of an Obligation on Hydro One to Make the Payments in Question

5. It is clear that the sole basis for the Board's disallowance of the pension costs in question was its view that Hydro One had an entitlement to take a contribution holiday by virtue of the surplus position reflected in the December 31, 2017 valuation report filed in evidence. This conclusion is reflected in several comments made by the Board in its reasons:

(a) "Hydro One has a significant surplus in its pension plan and *there is no justification for continued inclusion of additional pension contributions in rates*";¹ and

(b) "The OEB denies Hydro One's request to recover the \$37 million (\$17 million in OM&A and \$20 million in capital) *based on the magnitude of the current surplus*. For future rebasing applications, the OEB directs Hydro One to *provide justification for the inclusion of any additional pension contribution in rates given the current surplus*."²

6. Further, the Board recorded (uncritically) the following comments made by parties to the proceeding:

(a) "...the amount of pension costs being sought for the test period should be reduced to zero ... *because the actuarial valuation that underpins the test period pension costs indicates that the pension plan is in a surplus*

¹ Board's Reasons, p. 94 (emphasis added)

² Board's Reasons, p. 96 (emphasis added)

*position and therefore does not require any employer contributions to be made,”*³ and

- (b) “... the OEB should reduce to some extent the amount that Hydro One is seeking to recover for its pension cost *because its own valuation shows that employer contributions are unnecessary due to a significant surplus in the pension plan.*”⁴

7. The PWU submits that it is apparent that the Board’s conclusion that there is “no justification” for continued pension contributions could only be correct if Hydro One was under *no obligation to continue to make such contributions*. If Hydro One was under *some obligation*, the OEB might retain some authority to disallow such costs nonetheless⁵, however, it could not say that there was “no justification” for those costs. It would then be necessary for the Board to consider that justification and make a determination whether it was sufficient to warrant inclusion of those costs in the revenue requirement so as to generate “just and reasonable” rates.

8. As a consequence, it is apparent that the Board’s decision was premised upon its understanding that, by virtue of the valuation report, Hydro One did not have an obligation to make the pension contributions in question. As Hydro One has demonstrated, that understanding was not correct.

9. In fairness to the Board, there was a degree of uncertainty with respect to the legal requirements in effect as at the conclusion of the hearing. In fairness to Hydro

³ Board’s Reasons, p. 108 (emphasis added)

⁴ Board’s Reasons, p. 108 (emphasis added)

⁵ It is not necessary to definitively determine this issue in order to decide this motion.

One, however, the degree of regulatory uncertainty was very small. This fact was entirely, and erroneously, ignored by the Board.

10. Hydro One provided the Board with information regarding the status of the legal landscape, both through witness testimony and through updates in its submissions. As indicated in its submissions on this motion, Hydro One advised the Board in its final submissions filed on August 31, 2018 that, on the basis of FSCO guidance, it was “extremely unlikely” that it would be permitted to take a contribution holiday.⁶ In theory, it was possible for the Board to reject this evidence and information, and to make a specific finding that Hydro One was under no such obligation. In such a case, it would be incumbent upon the Board to provide an explanation for rejecting the entirely uncontradicted evidence of Hydro One. Such a finding would have been exceeding difficult to sustain in the absence of any evidence whatsoever to support it. Needless to say, the Board gave no such reasons, and made no such finding.

11. As a consequence, the PWU submits that, quite apart from the question of “changed circumstances”, it would be appropriate to grant this motion on the basis of the Board’s clear misapprehension regarding the existence of the “obligation” on the part of Hydro One to make the pension payments in question.

c. Change of Circumstances

12. As set out in its motion materials, any remaining uncertainty regarding the existence of Hydro One’s continued obligation to make the pension payments in

⁶ Hydro One Reply Submissions, p. 129

question has now been removed.⁷ Since this was the fundamental premise underlying the Board's decision, review and variance is appropriate. The review panel should ask itself the question: "if the original panel had been aware of and understood the legal effect of O. Reg. 105/19, would it have disallowed the costs in issue"? The PWU submits the answer is clear – the costs would not have been disallowed.

13. Moreover, failure to grant review and variance simply means that a legally required expense, necessarily arising from the operation of Hydro One's regulated business will be borne by the shareholder. Inevitably, Hydro One will be deprived of its opportunity to earn the "fair return" it is legally entitled to.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

⁷ See O. Reg. 105/19 and Hydro One's submissions regarding its effect. The only uncertainty now is the duration for which a pension contribution holiday will be precluded.