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Hydro One Networks Inc. (HONI)
EB-2019-0122
Motion to Review and Vary Decision EB-2017-0049

Submission
of the
Vulnerable Energy Consumers Coalition
(VECC)

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1.0 Submissions

1.1 On March 26, 2019 Hydro One Networks Inc. (HONI) filed a notice of motion to review and vary the Decision and Order of the Ontario Energy Board EB-2017-0049. That Decision established electricity distribution rates for HONI for the period January 1, 2018 to December 31, 2022.

1.2 HONI seeks to have reconsidered the Board's denial of the recovery in rates of $37 million in expenses that are related to pension cost. These costs are categorized as $17 million in operating and administrative costs and $20 million in capitalized costs.

1.3 The Board's Rules of Practice and Procedure require the grounds for a motion be provided which:

> *(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;*

1.4 The Applicant submits that there have been changes in circumstances that support its motion. Specifically, new contribution holiday rules were enacted effective May 1, 2018 and the subsequent clarifications of the application of those rules by the Pension Regulator FSCO arrived at or after the proceeding closed. HONI argues that the Board made an error in the decision, in that it conflated the issue of solvency and surplus of the pension plan with the issue of the required pension contributions – specifically the ability to take a contribution holiday when the plan is in a surplus position.

1.5 The remedy or relief sought by HONI is to allow it to recover the disputed pension contributions in rates for the period 2018-2022 and to record any differences between those amounts and the amounts finally determined to be paid in the Pension Cost Differential Account (Account 1508 or the "PCDA"). HONI would then seek to clear these amounts annually as part of its annual rate adjustments.

1.6 In our submission it is not clear that HONI is correct in stating an error occurred. It may however, be correct that clarifications by FSCO (and HONI's interpretation and application of those clarifications) are of sufficient materiality to warrant a change to the original decision based on these new facts. Of course many things change subsequent to a Board decision. What differentiates this motion is both the materiality of that change and its anticipation by the Applicant as expressed to the Board at the time of the later portions of the original proceeding.

1.7 In our submission the change in circumstances and the materiality of that change are sufficient to cause the Board to reconsider its decision.

1.8 This does not mean we submit that the Applicant should prevail in the entirety of the relief sought. As is noted in the submissions of HONI, the Board was clearly aware of the possibility of change in regards to pension contributions. Yet it did not make provisions for potential future changes. For example, it did not establish deferral or variance accounts in anticipation of changes to pension provisions. It did, however, make two important findings which we submit should now be considered in light of this motion[1]:

- *For future rate applications, provide justification for the inclusion of any additional pension contributions in rates given the current surplus.*
- *The OEB does not consider Hydro One's proposed effective date of January 1, 2018 to be reasonable. Hydro One's last Custom IR application took just over 10 months from the filing of the application to the filing of its reply submission. With a 3 month allowance for the OEB to make its determinations and issue a decision it is reasonable for Hydro One to have expected that this application to take at least a year to complete…..While the OEB is setting May 1, 2018 as the effective date for new rates for Hydro One, rates will not be implemented until July 1, 2019.*

1.9 It is necessary to assess how these parts of the original decision are reflected in the relief provided. HONI seeks to recover the prorated portion of these costs for the 2018 rate year. In our submission, this would require a retroactive adjustment to the rates for that year – even if the Board were to allow the amounts to be recovered on a going forward basis since the amounts in question are from a prior rate period. Since the change in facts and the application of that change by Hydro One did not occur until subsequent to the close of the original proceeding, the Utility is not in our submission entitled to recover any amounts with respect to the 2018 rate year. It should be allowed, we submit, only to track amounts for potential recovery beginning January 1, 2019.

2.0 New Facts

2.1 HONI has filed new evidence concerning the FSCO policies and position. The new evidence was obtained or clarified by HONI at the time of its final argument as explained below: [2]

> *The transition from Pre-May 1, 2018 Rules to Post-May 1, 2018 Rules required clarification from FSCO. As a result, at the time the Regulations changed, Hydro One was unsure whether it would be permitted to take a contribution holiday for the period covered by its December 31, 2017 valuation report (2018, 2019, and 2020). That was the basis on which the hearing was conducted in June 2018. The focus of the hearing, and the Pension Findings, was largely on the possibility of taking a contribution holiday in 2018, and Hydro One's evidence was that it was uncertain whether it would be able to take a holiday in 2018, and whether it would take a holiday if it was able.*
>
> *After the hearing, the parties exchanged written submissions. Hydro One's reply submissions were filed on August 31, 2018 (the final opportunity for submissions in the proceeding), and by that time,*

[1] Decision and Order, EB-2017-0049
[2] Notice of Motion, March 26, 2019

Hydro One had confirmed that it was "extremely unlikely" that it would be in a position to take a contribution holiday, though it was not certain.

2.2 In its Reply Argument EB-2017-0049 the Utility further stated in part[3]:

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, <u>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%</u>

2.3 The revised provisions for Contributions as provided by HONI are set out below:[4]

Contribution Holidays

Under the proposed new funding framework, surplus would be available for a "contribution holiday", in which surplus is used to lower the contribution requirements of an employer or members for the normal cost and the PfAD in respect of the normal cost, if:

- *The plan's PfAD is fully funded on a going concern basis (e.g., if the plan's PfAD is 15%, then the value of the plan's assets determined on the basis of a going concern valuation, including accrued and receivable income but excluding the amount of any letter of credit held in trust for the pension plan, must be at least 115% of the plan's going concern liabilities);*
- *After reducing the solvency assets by the amount of surplus used to lower contribution requirements, the plan's transfer ratio is at least 1.05;*
- *A cost certificate is filed each year a contribution holiday is taken; and*
- *Notice is provided to plan participants, any unions representing members, and the plan's advisory committee (if there is one).*

In addition, the value of assets that could be used to take a contribution holiday for a year would be limited to 20% of the plan's available actuarial surplus, as identified in the plan's last filed valuation report. The available actuarial surplus in a particular fiscal year covered by the report would be 20% of the lesser of:

- *the amount by which the value of the plan's assets determined on the basis of a going concern valuation, including accrued and receivable income but excluding the amount of any letter of credit held in trust for the pension plan, exceeds the sum of going concern liabilities, the provision for adverse deviations in respect of going concern liabilities, and the prior year credit balance, and*
- *the amount, if any, by which the solvency assets could be reduced such that the transfer ratio would equal 1.05.*

With the exception of designated plans or individual pension plans, a contribution holiday could be taken only if an actuarial cost certificate is filed with the Superintendent within the first 90 days of the plan's fiscal year. The actuarial cost certificate would set out the estimated available actuarial surplus based on estimated going concern liabilities, estimated solvency liabilities, and estimated liabilities for excluded benefits (other than those payable under qualifying annuity contracts). The amount of available actuarial surplus that can be used to reduce contributions for normal cost and PfAD on the normal cost for a particular fiscal year would be the lesser of:

[3] Submission EB-2019-0122, June 5, 2019
[4] Motion Record and Book of Authorities Hydro One, June 5, 2019

- *the amount of available actuarial surplus for the particular fiscal year, as set out in the last filed report; and*
- *the amount of estimated available actuarial surplus as set in the actuarial cost certificate for the particular fiscal year.*

However, the rules regarding the cost certificate would be slightly modified in the fiscal year a valuation report is filed. An actuarial cost certificate would still be filed with the Superintendent. However, once the new report has been filed, the amount of available actuarial surplus to reduce contributions for normal costs in the fiscal year could be based on the new report and any restriction imposed by the actuarial cost certificate would be lifted. A catch-up contribution, calculated using existing rules (see s. 12 of the Regulation), may be required if the contributions based on the cost certificate are less than what the filed report indicated.

The proposed new requirements for contribution holidays would commence on the valuation date of the first report filed under the new framework.

2.4 It can, we submit, be reasonably concluded from these facts that irrespective of the applicability of new FSCO rules HONI would not have been able to take a pension holiday in 2018 because it did not file the requisite certificate[5].

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.17 Therefore, Hydro One was not permitted to take a contribution holiday in 2018.

As such it is difficult to determine in hindsight and without further discover on this issue if HONI did its due diligence in that filing a cost certificate may have been the most prudent course of action. In our view this is another reason that amounts for any part of the year 2018 should be excluded from potential recovery in rates.

3.0 Summary of Submissions

3.1 While VECC is sympathetic to position of HONI our view is that it is ineligible to recover any portion of the pension costs variance for the 2018 rate year. It is not certain that the adjustments would have been made to include the disputed pension costs for 2018 costs even if the Board had understood the rule changes to be certain. We arrive at this conclusion in part because the EB-2017-0049 decision clearly articulates the Board's concern with the inclusion of costs for pension liabilities it believed to be more than fully covered and because it believed that the Utility should recover only a portion of <u>any</u> of the incremental costs related to the 2018 rate year. Furthermore in our view and without further discovery it is not possible to ascertain whether HONI acted reasonably and prudently in failing to file the requisite certificates to FSCO in 2018.

[5] Hydro One Argument, June 5, 2019, pg 6.

3.2 In summary our submissions are:

a) The motion should be granted in part.

b) HONI should be granted the accounting orders necessary to record differences between the actual pension amounts paid and that amount calculated to be recovered in distribution rates for the 2019 to 2022 period.

c) Recovery of any amounts should be subject to review and consideration in a public proceeding of the Applicant.

3.3 VECC respectfully submits that it has acted responsibly and efficiently during the course of this proceeding and requests that it be allowed to recover 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED