Ontario Energy Board | Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2019-0122

HYDRO ONE NETWORKS INC.

Notice of Motion to Review and Vary EB-2017-0049 Decision and Order dated March 26, 2019

BEFORE: Michael Janigan
Presiding Member

Lynne Anderson
Member

Robert Dodds
Vice Chair and Member

December 19, 2019

TABLE OF CONTENTS

1 INTRODUCTION AND SUMMARY

The Ontario Energy Board (OEB) determined in its March 7, 2019 Decision and Order[1] (the Original Decision) that Hydro One Networks Inc.'s (Hydro One) request to recover the revenue related to $37M ($17M in OM&A and $20M in capital) in forecasted pension contributions was denied ("the Pension Findings"). As part of its finding that Hydro One's 2018 OM&A budget was not fully justified, the OEB found that Hydro One had a significant surplus in its pension plan and there is no justification for continued inclusion of additional pension contributions in rates. The OEB directed Hydro One in future rebasing applications to provide justification for the inclusion of any additional pension contributions in rates given the current surplus.

On March 26, 2019, Hydro One filed with the OEB a Notice of Motion to Review and Vary this portion of the Original Decision (the Motion) in accordance with Rules 8, 40, 42 and 43 of the OEB's *Rules of Practice and Procedure* (Rules).

The OEB dismisses the Motion of Hydro One. The OEB finds that there has been no change of circumstance or new facts that have arisen that compel a conclusion that the Pension Findings are in error; and the OEB finds that the decision reached in those findings is reasonable based upon a review of the relevant evidence.

[1] EB-2017-0049, p. 96

2 THE PROCESS

On May 17, 2019, the OEB issued Notice of Motion Hearing and Procedural Order No. 1 (PO#1) in this proceeding.

In PO#1, the OEB deemed the parties granted intervenor status in the EB-2017-0049 proceeding as intervenors in this proceeding. In addition, those parties that were granted cost eligibility status in the EB-2017-0049 proceeding were also determined to be eligible for cost awards in this proceeding.

The OEB determined, in PO#1, that it would receive written submissions as to (1) whether the Motion meets the threshold test as specified in the Rules; and (2) if the threshold test is met, whether the grounds cited of change in circumstances and an error in the Original Decision are justified. The OEB also established a schedule for the filing of written submissions on this matter.

Hydro One filed its submission on June 5, 2019. OEB staff and the following intervenors filed submissions on June 26, 2019: Canadian Manufacturers & Exporters (CME); Power Workers' Union (PWU); School Energy Coalition (SEC); Society of United Professionals (SUP, formerly the Society of Energy Professionals); and Vulnerable Energy Consumers Coalition (VECC). Hydro One filed its reply submission on July 10, 2019.

3 DECISION

Background

Hydro One asserted in its Motion that the Pension Findings should be reviewed, and that the request met the threshold for a review of the Original Decision as specified in Rule 43 of the OEB's Rules and relevant OEB decisions.

Hydro One's reasons for its request were that:

> I) There have been changes in circumstances since the hearing including a new interpretation issued by the Financial Services Commission of Ontario ("FSCO"), and as a result, the Pension Findings are not correct;
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> II) The Pension Findings contain an error as they hold that Hydro One should not be permitted to recover pension contributions due to the surplus position of the Hydro One Pension Plan on a going concern and solvency basis. However, the surplus position on a going concern and solvency basis does not allow Hydro One to take a contribution holiday as the Hydro One Pension Plan is in a significant shortfall position based on the funding sufficiency required of the Plan on a wind up basis: $2,731,310,047 as of December 31, 2017. Therefore, Hydro One must make the pension contributions that it sought to recover; and
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> III) The change in circumstances and the error identified above are material and relevant to the outcome of the Original Decision such that if the new information is taken into account, and the error is corrected, the reviewing panel would change the outcome of the Original Decision.

I) Change in Circumstances

Hydro One stated that at the time its distribution rates application was filed in 2017, and at all relevant times from the filing of this application to the current time, the Hydro One Pension Plan had been in a surplus position on a going concern and solvency basis.

Hydro One further stated, in its motion application, that subject to meeting certain filing requirements, pursuant to the *Pension Benefits Act* (PBA) and the Regulations thereunder (referred to collectively as the Regulations), and more particularly O.Reg. 909, as they were in force at the time the application was filed (the Pre-May 1, 2018 Rules), it would have been possible for Hydro One to take a contribution holiday based on the funded position (a surplus of over $434 million) of the Hydro One Pension Plan.

However, Hydro One noted that on December 14, 2017, after it had filed the application, the Ontario government had announced amendments to the Regulations to support a new funding framework for pension plans. This announcement contemplated that the circumstances under which an employer, such as Hydro One, could take a contribution holiday would change. At the time, Hydro One expected that the anticipated funding regulations would only apply to actuarial funding reports filed after the new rules took effect.

Hydro One further explained that on March 28, 2018, the Ontario Budget had announced that there was continuing work on new funding rules, and on April 20, 2018, the new Regulations were announced with an effective date of May 1, 2018. Hydro One stated that after this announcement, but before the new funding rules came into effect, it had filed on April 30, 2018 a valuation report as at December 31, 2017 under the Pre-May 1, 2018 Rules.

Hydro One stated that the new contribution holiday rules were enacted effective May 1, 2018 pursuant to section 55.1 of the PBA and pursuant to O.Reg. 250/18, which amended O.Reg. 909 (the “Post-May 1, 2018 Rules”). Hydro One further stated that under the Post-May 1, 2018 Rules, a private employer, such as Hydro One, can only take a contribution holiday in a year if an actuary certifies the plan has a funded ratio of at least 105% calculated on a wind-up basis. While different – and less restrictive – rules apply to public sector pension plans, all private sector pension plans, including the Hydro One Pension Plan, must follow the more restrictive rules.

According to Hydro One, based upon the PBA and Regulations alone, it was unclear whether contribution holidays would be permitted based on the Pre-May 1, 2018 Rules (in place at the time the Hydro One valuation report was filed) on a grandfathered basis, and, if so, for how many years the grandfathering would apply. 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 it reported had been filed with the FSCO.

Hydro One stated that this was its position at the time the oral hearing of its distribution rates application was conducted in June 2018. According to Hydro One, 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 were able.

Hydro One further noted that, after the oral hearing, it filed final reply submissions on August 31, 2018. In those submissions, Hydro One drew to the attention of the OEB the

guidance that had been communicated by a posting on the website of the Financial Services Corporation of Ontario (FSCO) on August 28, 2018. This guidance set out the position of the FSCO with respect to the Post 2018 Funding Rules[2]. The FSCO's position established that for a contribution holiday to be taken in 2019 and beyond, a cost certificate had to be filed certifying that at the beginning of the year the assets of the plan exceed the windup liabilities by 5%. In the result, assets would have had to outperform windup liabilities by more than $2.7 B to meet that metric making it "extremely unlikely" that Hydro One would be able to take a contribution holiday in the near future.[3] The FSCO's guidance also provided that a cost certificate had to have been filed with the FSCO prior to March 31, 2018 for a contribution holiday to be available in 2018 under the Pre-May 1, 2018 Rules.

The FSCO's guidance document "Ability to Take Contribution Holidays and Pay PBGF Assessments" posted on its website on August 29, 2018, and referenced in Hydro One's reply submissions of August 31, 2018, confirmed that Hydro One would not be permitted to take a contribution holiday under the pre-May 1, 2018 Rules for 2019 and beyond. For 2018, the FSCO guidance also confirmed that a contribution holiday would only be available under the Pre-May 1, 2018 Rules if the employer had filed a cost certificate with the FSCO before March 31, 2018. Since Hydro One filed a valuation report by April 30, 2018, but had not filed a cost certificate by March 31, 2018, it would not qualify for a contribution holiday in 2018.

Hydro One noted that this guidance document was not part of the evidentiary record for the Application. Hydro One also submitted that the above guidance from the FSCO was, potentially, subject to change based on feedback received by the FSCO from industry groups and others. However, Hydro One stated that at the time of the filing of this motion, the guidance had not changed and remained FSCO policy.

Hydro One cited O.Reg. 105/19 issued May 21, 2019 (2019 Regulation) as providing another changed circumstance that requires a review of the Original Decision. The 2019 Regulation provided that the Post-May 1, 2018 Rules now take effect when a new valuation report becomes effective (and not on January 1, 2019 as had been indicated by the FSCO guidance document issued August 28, 2018).

Hydro One set out the effect of an approval of the transfer of pension assets and liabilities arising as a result of the Hydro One initiative to in-source call centre functions

[2] 2018 Funding Reform for Defined Benefit Pension Plans, Financial Services Commission of Ontario http://www.fsco.gov.on.ca/en/pensions/actuarial/Pages/2018-funding-reform.aspx
[3] Hydro One's Reply of July 10, 2019 in this proceeding notes that its Pension Plan would have to earn a 56% return in 2019-2020 period which was "almost certainly impossible".

carried out by Inergi LP (Inergi) and Vertex Customer Management Ltd. Hydro One stated that the FSCO's (now the Financial Services Regulatory Agency of Ontario - FSRA) approval of the transfer is pending. Hydro One received confirmation by letter dated July 17, 2019, from the FSRA that the Post-May 1, 2018 Rules apply to Hydro One as of March 1, 2018 in the event that the Inergi Transfer is approved by the FSRA.

Hydro One submitted that there was no basis for the OEB's Pension Findings other than the existence of the ability to take a contribution holiday. Hydro One argued that the 2019 Regulation prevented a contribution holiday even if a timely cost certificate had been submitted by Hydro One in the event that the Inergi transfer is approved by the FSRA.

II) Error in the Pension Findings

Hydro One stated that the Pension Findings are in error as they focus on the going concern and solvency surplus status of the Hydro One Pension Plan, rather than the new legal requirements for contribution holidays. Hydro One argued that the surplus position relied on by the OEB is insufficient to permit Hydro One to take a contribution holiday under the PBA and the Regulations.

Hydro One further stated that the result of the interpretation by the FSCO is that Hydro One cannot legally take a contribution holiday during 2019 or any future year covered by the rate application. This is because the Hydro One Pension Plan is not more than 105% funded on a wind-up basis as required under the Post-May 1, 2018 Rules, nor is it expected to be during any year covered by the Application. Hydro One added that for 2018, it could not legally take a contribution holiday because it had not filed a cost certificate by March 31, 2018.

Hydro One submitted that due to the OEB's error, the Pension Findings should be amended to allow it to recover in rates the current service cost pension contributions that it is legally required to make during the years covered by the Application. Hydro One stated that those contributions will be prudently incurred, and relate to rate-regulated service that Hydro One provides to its customers. Alternatively, Hydro One submitted that it should be permitted to track legally required pension contributions in a deferral account and recover those amounts in its next distribution rate application.

III) The Changes in Circumstances are Material and Relevant

Hydro One submitted that the availability of a contribution holiday is required to support the reductions made by the OEB in the Pension Findings. Since the "windup test" in the Post-May 1, 2018 Rules, as well as the earlier application of those Rules by virtue of

O.Reg. 105/19, removes the possibility of a contribution holiday, the OEB is required to review and vary the Original Decision.

Hydro One further argued that given: (1) the complexity of the issue, and (2) that the changes introduced to pension legislation were both in the period during the distribution rates proceeding and after, meant that these were matters that could not be given full consideration at the time of the original hearing. Hydro One submitted that additional evidence is warranted from subject-matter experts in order for a fully reasoned determination to be made on this motion. Hydro One argued that with further evidence, the OEB would have the benefit of specific pension investment, pension law and actuarial expert evidence in the resolution of this motion.[4]

On July 22, 2019, Hydro One filed an additional letter stating that further to its reply submissions, FSRA had confirmed in writing that the Post-May 1, 2018 Rules (as defined in the Reply Submission) apply to Hydro One effective March 1, 2018, assuming that the Inergi Transfer (as defined in the Reply Submission) is approved.

The letter further stated that as a result and as explained in detail in the Reply Submission, the Hydro One Pension Plan does not meet the required test to take a contribution holiday under the PBA effective March 1, 2018.

OEB staff and Intervenor Submissions

Hydro One's position was supported by both PWU and SUP.

VECC submitted that the motion should be granted in part arguing that the change in circumstances and the materiality of that change are sufficient grounds to cause the OEB to reconsider its findings.

VECC argued that 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, Hydro One is not entitled to recover any amounts with respect to the 2018 rate year and should only be allowed to track amounts for potential recovery beginning January 1, 2019.

VECC further submitted that Hydro One 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.

[4] Hydro One Reply Submission, at p.2

VECC submitted that without further discovery it is not possible to ascertain whether Hydro One acted reasonably and prudently in failing to file the requisite cost certificate with the FSCO in 2018.

OEB staff submitted that Hydro One had not met the threshold test and that its motion to review should be dismissed at the threshold stage. It further submitted that if the OEB was to decide that the threshold test had been met, the Motion should still be denied on its merits.

OEB staff argued that the change in circumstances that Hydro One raised in its motion argument had already been brought forward and considered during the distribution rates proceeding. OEB staff stated that, in particular, the panel had already been advised: (1) that there were new funding rules coming into effect during the term of the application, (2) that there was uncertainty as to when these new rules would be applicable to Hydro One, and (3) that there was also uncertainty over how those new rules would impact Hydro One's contribution requirements over the Custom IR term.

OEB staff argued that Hydro One's current December 31, 2017 valuation has been grandfathered under the old pension funding rules (the Pre-May 1, 2018 rules) and that this would continue to be the case until its December 31, 2017 pension report ceases to be operative. On that basis, OEB staff submitted that Hydro One's December 31, 2017 pension report indicated that Hydro One is legally eligible to take a contribution holiday in 2018, 2019, and 2020, which is unchanged from the situation existing during the distribution rates proceeding.

OEB staff further submitted that Hydro One only became legally required to make contributions in 2018 because it failed to file a cost certificate by March 31, 2018, which is a stipulation in the PBA. OEB staff disputed Hydro One's reasons for failing to file its certificate noting that the related PBA rule for filing this certificate had been in place since 2009. Therefore, OEB staff argued there was no reason why Hydro One should not have been aware of it, and had Hydro One met this deadline, it would have been permitted to take a contribution holiday in 2018.

OEB staff also submitted that Hydro One had had ample opportunity to disclose its failure to file its cost certificate for 2018 during the distribution rates proceeding because the deadline had occurred well before the oral hearing. OEB staff noted that while the focus of the proceeding and hearing with respect to the pension matter had been on whether or not Hydro One could take a contribution holiday, Hydro One had inexplicably not disclosed its failure to file its 2018 cost certificate and the related implications.

OEB staff also argued that a legal obligation alone does not bind an OEB panel to permit recovery of a cost if that legal obligation was incurred by specific actions taken by an applicant. OEB staff submitted that the OEB must assess whether or not those actions were prudently made and the underlying cost was prudently incurred.

OEB staff further argued that a cost that could have been avoided does not represent a prudently incurred cost for regulatory purposes.

OEB staff disputed Hydro One's claim that the denial of costs required by law was not considered in the distribution rates proceeding. OEB staff noted that the matter of Hydro One's obligations to make pension contributions was the subject of pre-filed evidence, interrogatories, questions during the technical conference, cross- examination, and submissions. Therefore, OEB staff concluded that Hydro One's argument was baseless as it suggests that, notwithstanding the ample material on the record with respect to pension contributions, Hydro One had been denied a fair hearing because no one had suggested to it that the OEB could deny Hydro One's request to recover the revenue requirement related to pension contributions.

CME took a similar position to that of OEB staff, submitting that Hydro One's motion should be dismissed, as it did not meet the OEB's threshold test for a motion to review and vary, and the Original Decision is reasonable on its merits. CME argued that the Original Decision was correct based on the information and testimony on the record and further submitted that the changes to the regulations, and the additional guidance that was given by FSCO, has not materially changed Hydro One's circumstances regarding its pension funding since the hearing and argument in the distribution rates proceeding.

CME argued that as the result of the most recent FSCO update, Hydro One is still unsure as to whether or not it will be able to take a contribution holiday just like it was during the distribution rate proceeding.

CME further argued that the OEB's decision to deny Hydro One's request to include pension contribution amounts in rates is well within the legal framework at issue and the Original Decision falls within the range of reasonable outcomes.

CME submitted that the Original Decision is supportable based on such factors as: (1) the surplus in the pension plan, (2) pensions being a significant driver of Hydro One's compensation costs which have historically been above market median and (3) with the new pension contribution rules, it was and is still possible for Hydro One to take a contribution holiday.

SEC argued that the reduction in pension recovery was determined by the OEB in the context of an analysis of reductions required due to compensation levels that are higher

than the OEB believes are appropriate. SEC further argued that at no time did the OEB state, directly or indirectly, that the pension costs should be removed from the revenue requirement because of a possible contribution holiday. SEC instead submitted that what the OEB had said is that Hydro One's compensation levels are too high and it is no longer reasonable for customers to pay those high compensation levels in rates.

SEC asserted that the possibility of a contribution holiday is irrelevant to the current motion, because the Original Decision did not deny the recovery of pension costs on the basis that Hydro One was not going to make cash payments to the pension plan. SEC instead asserted that the OEB knew that Hydro One was going to make at least some payments to the plan, but determined that no payments would be recoverable in rates because compensation costs were too high.

SEC submitted that Hydro One has not, in this Motion, challenged the conclusion of the OEB in the Original Decision that its compensation costs are too high, and only a lesser amount should be included in just and reasonable rates.

SEC therefore submitted that the threshold test has not been met because:

> (1) Hydro One has failed to show that the potential availability of a contribution holiday was a fact relied on by the OEB in the Pension Findings,
>
> (2) Even if the availability of a contribution holiday was the underlying basis of the OEB's Pension Findings, the situation today is no different from the situation then in terms of uncertainty over the application of the new rules, and
>
> (3) No error in fact occurred as consistent with the clear legal framework, the OEB found that Hydro One's compensation costs are too high, and reduced the amount recoverable in rates to a more reasonable amount.

SEC further submitted that if the OEB decides that the threshold test is passed, the Motion must fail on the merits, for at least three reasons:

> (1) Hydro One has not provided evidence sufficient for the OEB to conclude that it is required by law to make contributions to the pension plan, but has only provided evidence that its contribution obligations are still uncertain;
>
> (2) The OEB in its Original Decision determined that OM&A compensation levels should be reduced by $32.3 million because they were too high. If the $17 million in OM&A pension costs were to be reinstated, then the Review Panel would be required to embark on a review of the reasonableness of the new compensation level, starting from the premise that the $17 million would have to be found

somewhere else to get down to reasonable levels. Since Hydro One has not argued that the OEB's determination that compensation levels are too high is an error, this Review Panel should not order total compensation levels to be recovered in rates at a higher level than those determined in the Original Decision; and

(3) The OEB decided that, despite the requirement in the collective agreement to make payments to the pension plan of $47.4 million in 2018, and despite the uncertainty of the contribution holiday under FSCO rules, it was not reasonable to recover pension contributions in rates when the Applicant's pension plan had a substantial surplus that had continued for some years. In order to overturn this determination, this Review Panel would have to determine that that conclusion was not within the range of reasonable outcomes based on the facts in evidence in this proceeding. SEC submitted that it is not possible to argue that is not within that range of reasonable outcomes.

Hydro One asserted that parties opposing its motion claimed that the disallowance of pension costs required by law was considered in the distribution rates proceeding, and submitted that there was no discussion at the hearing on whether or not the OEB should disallow pension costs if Hydro One was not legally permitted to take a contribution holiday.

Hydro One disputed SEC's assertion that the Pension Findings were based on a finding relating to the reasonableness of Hydro One's compensation costs and claimed that this was an attempt by SEC to re-write the Original Decision. Hydro One stated that no other reasons aside from the presence of a "surplus" are provided or implied in the OEB's decision in support of its Pension Findings.

Hydro One disputed OEB staff's submission that Hydro One should have filed a cost certificate in March 2018 instead of planning to rely on the December 31, 2017 full valuation report, which Hydro One filed as its actuarial basis for taking a contribution holiday in 2018. Hydro One stated that it had provided Appendix D that it argued supported the understanding of its actuaries that a cost certificate was not required in a year when a full valuation was prepared in order to establish the right to a contribution holiday.

Hydro One submitted that the OEB must make decisions that are accurately informed by the law. In this case, the OEB had regard to the law as it assumed that the disallowance of pension contributions could be based on the "surplus" in the Pension Plan. Hydro One argued that the assumption that the law permitted a contribution holiday was incorrect.

Findings

Hydro One's motion to review and vary the Original Decision in the EB-2017-0049 proceeding is based on two interrelated assertions that:

(a) a change in circumstances has arisen that discloses a material error in the Original Decision

(b) the findings in the Original Decision were based on the availability of a contribution holiday and thus are in error.

The alleged change in circumstances primarily consists of a new interpretation issued on August 28, 2018 by the FSCO. This interpretation provided in an on-line guidance document clarified that the Post-May 1, 2018 Rules based on Ontario Regulation 250/18 negated any ability of Hydro One to take a "contribution holiday" from making pension contributions, despite the presence of a surplus of over $434 million in its pension plan . It also required a cost certificate to be issued by March 31, 2018 to claim a contribution holiday for 2018 under the Pre-May 1, 2018 Rules. Ontario Regulation 105/19 further limited the ability of Hydro One to take a contribution holiday for 2018 by providing for the application of the Post-May 1, 2018 Rules at a date that may be as early as March 1, 2018 in the event of FSRA approval of the Inergi transfer.

Hydro One submits that this disallowance in the Pension Findings was in error as it was based on an assumption that the existing pension surplus would allow Hydro One to refrain from making pension contributions, and so be able to take a "contribution holiday" from pension plan contributions. Hydro One states that as it cannot do so, the OEB's Pension Findings are in error, and recovery of these amounts in its revenue requirement must be allowed.

The first task of the OEB in deciding Hydro One's motion is to determine the threshold issue of whether there has been a change in circumstances, as submitted by the applicant, and if so whether this change in circumstances raises a question as to the correctness of the order or decision pursuant to sec. 42.01 of the OEB Rules.

The relevant passages in the Original Decision with respect to the disallowance of recovery of pension contributions are set out below:

> The OEB finds that Hydro One's proposed 2018 OM&A budget of $576.7 million has not been fully justified and shall be reduced by $32.3 million (to $544.4 million). This reduction (representing 5.6%) includes $10 million based on Hydro One's past cost performance, $4.8 million related to above market median compensation, $17 million related to pension, and

$0.5 million associated with the Hydro One Accountability Act (section 78(5.0.2) of the OEB Act).

The main reasons for this reduction are as follows:

- Hydro One has been under-spending its OM&A compared to approved levels and is forecasting to spend more in 2018 than it did in either 2016 or 2017. There is no compelling evidence to support this.
- Hydro One's compensation levels continue to be higher than benchmarks in spite of repeated concerns expressed by the OEB in previous proceedings.
- Hydro One's has a significant surplus in its pension plan and there is no justification for continued inclusion of additional pension contributions in rates.
- The introduction of the Hydro One Accountability Act regarding executive compensation (section 78(5.0.2) of the OEB Act). [5]

Pension Costs

Although Hydro One's pension plan has been in a significant surplus position for some time (current surplus is more than $434 million), Hydro One is seeking to recover $37 million from ratepayers in 2018 ($17 million in OM&A and $20 million in capital). Further details are provided under Issue 40.

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 contributions in rates given the current surplus. [6]

There is no mention in the above passages of a "contribution holiday" as the reason for the disallowance of pension costs. There is a summary of the positions of OEB staff and intervenors associated with the employer contribution toward pension costs in the discussion on human resources costs in Issue 40 of the Original Decision.[7] However,

[5] EB-2017-0049, p.94
[6] *Ibid*. p.96
[7] *Ibid*. pp.108, 109 Issue 40: Are the proposed 2018 human resources costs appropriate (excluding executive compensation)?

the OEB's findings on pension costs are under Issue 38 on operating, maintenance and administration (OM&A) costs.[8] The reduction in OM&A related to pension costs formed part of the OEB's overall reduction in Hydro One's proposed OM&A costs.

The OEB is left with the determination of the reason why the "magnitude of the surplus" in the pension plan was provided in the Original Decision's rationale for the disallowance of recovery of the pension contributions in Hydro One's revenue requirement. As noted in the arguments of OEB staff and a number of intervenors, the fact that Hydro One may be legally obligated to make pension contributions does not bind an OEB panel to mandate recovery of the cost in revenue requirement.

In this case, there are two possible rationales supporting the Pension Findings decision to disallow recovery of pension costs because of the surplus:

(i) The original panel was of the view that Hydro One could take a "contribution holiday" and there was no need to support the required contribution in rates as current pension service contributions by Hydro One could be made from the surplus;

(ii) The original panel determined that as a result of the magnitude of the surplus, ratepayers should not fund contributions even if they were required to be made and could not be made from the surplus

Hydro One's contentions are that the OEB's reduction in the Pension Findings was based on an error of interpretation of the relevant pension regulations and/or has been made inoperative by subsequent regulation. Hydro One's contentions, if proven, raise a question concerning the correctness of the Original Decision. On this basis, the OEB finds that the motion meets the threshold test pursuant to Rule 42.01 of the OEB's Rules. However, the OEB must then consider whether the error alleged that gave rise to the question of correctness has been proven. The fact that a motion applicant has met the threshold test does not mean in itself that the impugned decision must be varied. It merely signifies that the grounds for review, if proven, would raise a question as to the correctness of the decision.

First, in order to show any error, Hydro One must establish that the OEB made the reduction in the Pension Findings because of the OEB's belief that Hydro One could take a "contribution holiday" and that the required pension contributions could be made from the existing surplus.

[8] *Ibid*. at p. 96 Issue 38: Are the proposed OM&A spending levels appropriate?

In this motion proceeding, Hydro One now maintains that changes in circumstances have arisen that either provide new information as to the effect of the May 1, 2018 changes made under the Pension Benefits Act by way of O.Reg. 250/18, or the issuance of O.Reg. 105/19 that potentially extends the reach of the Post-May 1, 2018 Rules. According to Hydro One, these changes remove any uncertainty concerning Hydro One's ability to take a contribution holiday.

This new information with respect to the effect of O.Reg. 250/18 was, in fact, communicated to the OEB in Hydro One's Reply Argument for the EB-2017-0049 proceeding, filed on August 31, 2018. The following passage in Hydro One's reply submission sets out this communication:

> 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%.[9]

There does not appear to be a difference between the unavailability of a contribution holiday in 2019 and beyond, expressed in the above-referenced passage in Hydro One's reply submission of August 31, 2018, and that described in Hydro One's motion. It remains "extremely unlikely" that Hydro One would be able to meet the financial metrics associated with the test for a contribution holiday as required by the FSCO (now the FSRA). The inability to meet the surplus sufficiency standard continues to be the reason that a contribution holiday cannot occur during those years. And while O.Reg.

[9] Reply Submission of Hydro One, August 31, 2018, p.129

105/19 did potentially expand the reach of the Post-May 1, 2018 Rules created by O.Reg. 205/18 into as early a date as March 1 2018, the issue is moot because Hydro One did not meet the date required for cost certificate submission for the 2018 year, a requirement confirmed in the FSCO guidance document of August 28, 2018. The OEB also notes that the Pension Findings did not identify the availability of a contribution holiday in 2018 as a source for the disallowance in rate recovery.

While it appears that Hydro One correctly advised the original OEB panel as to the necessity of it making pension contributions in accordance with O.Reg. 250/18, the OEB must still determine whether (a) the Pension Findings were based on an incorrect interpretation of that advice, or (b) the denial of recovery of pension contributions, based on the magnitude of the surplus, was reasonable without the availability of a contribution holiday.

The OEB has noted that the Original Decision was silent concerning the possible availability of a contribution holiday in 2018 and/or in subsequent years of the Custom IR period. The issue had been canvassed and rather thoroughly argued by Hydro One and interested parties to the proceeding. It seems doubtful that the OEB's decision to reduce OM&A based on the pension surplus would not have specifically made a determination on the contribution holiday issue in the Decision if it had actually been the cause of the reduction in the Pension Findings. The OEB finds that a conclusion that Hydro One would be able to take a contribution holiday was not the only possible basis for the reduction associated with Hydro One's pension contributions.

The task of the OEB in reviewing a decision that has met the threshold test for a motion to review and vary is to determine whether the decision was reasonable. In affirming that reasonableness is the accepted standard for review of decisions by specialized administrative tribunals such as the OEB, the Divisional Court of Ontario in *Tribute Resources Inc. v. Ontario Energy Board* [10] described the meaning of the reasonableness standard. In citing *Gale v. College of Physicians and Surgeons of Ontario*[11], the judgement noted:

> "Reasonableness is a deferential standard, animated by the principle that certain questions that come before tribunals do not lend themselves to one particular result. It is concerned with whether the outcome falls within a range of possible acceptable outcomes."

[10] 2018 ONSC 265
[11] 2915 ONSC 1981

The OEB has also found that reasonableness is the appropriate standard for the review of its own prior decisions. For example, in a 2010 decision on a motion to review and vary the implementation of an interim order,[12] the OEB made the following findings (in part):

> 36 The standard of review with respect to Decisions of the Ontario Energy Board was most recently canvassed by the Ontario Court of Appeal in the *Toronto Hydro Dividend* case. There, the Court of Appeal upheld the Board's Decision that required any future dividends to be approved by the majority of the independent directors. The Court noted, "in judicial review reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. But it also concerned with whether the Decision falls within a range of possible acceptable outcomes which are defensible in respect of facts and law".
>
> 37 In finding that the Decision was justified, the Court referred to the often cited passage from *Law Society of New Brunswick vs. Ryan* where Iacobucci, J. articulated the relationship between the reasons of the tribunal and the reasonableness of its Decision.
>
> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable, in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.* [The Court's emphasis, footnotes omitted]
>
> 38 We believe that the standards that a court would use in reviewing a Board Decision are no different than those this panel should use in reviewing a prior Board Decision.

[12] Brantford Power Inc. (Re), 2010 LNONOEB 269 (EB-2009-0063). See also, for example, the OEB's decision on a motion by Ontario Power Generation (OPG) to review and vary the Decision and Order on OPG's 2017-2021 payment amounts (EB-2018-0085).

Subsection 1(1) of the *Ontario Energy Board Act, 1998* (OEB Act) sets out a number of objectives by which the OEB shall be guided in carrying out its responsibilities under that or any other Act in relation to electricity. Those objectives include (among others):

> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

A distributor requires an order of the OEB to charge for the distribution of electricity. Subsection 78(3) of the OEB Act provides, among other things, that the OEB may make orders approving or fixing just and reasonable rates for the distributing of electricity.

The reduction to Hydro One's OM&A in issue here formed part of an overall reduction of $32.3 million, or 5.6%, that was made to that category of expenditures because the OEB found that Hydro One's OM&A budget was not fully justified. This left Hydro One with an OEB-approved OM&A envelope of $544.4 million. The magnitude of the pension surplus animated the specific reductions of $17 million in OM&A and $20 million in capital. The individual reductions at page 94 of the Original Decision were cited as the "main reasons" for the overall OM&A reductions.

The OEB also notes that, among other matters, the Original Decision expressed concern about compensation costs being higher than comparable companies, and specifically rejected the Hydro One argument that compensation comparisons to those comparable companies should exclude pension costs. As a result, the amount of the total compensation, that included pension costs, formed the basis of the OEB's conclusion that the compensation level proposed by Hydro One was an unreasonable burden on ratepayers. The OEB finds that this provides additional context for the reduction provided in the Pension Findings.

The OEB finds that it was reasonable to remove pension contributions from Hydro One's revenue requirement based on the size of the pension surplus. This surplus of $434 million had been accumulating because of the continued contributions of customers to Hydro One's employee pensions as well as the investment return on those contributions. The surplus could continue to accumulate while ratepayers were required to fund pension contributions. Although a pension contribution holiday was not the basis for the Pension Findings, the Original Decision addressed the issue of the fairness of this continued burden on ratepayers. This surplus, considered in the context of the

Original Decision's finding of Hydro One's proposed excessive level of compensation, provides a reasonable basis for the disallowance set out in the Pension Findings.

The OEB concludes that the disallowance was not dependent on the availability of a contribution holiday for Hydro One, but rather reflects a result that falls within a reasonable range of outcomes based on a balancing of interests between Hydro One and its ratepayers. The assignment of responsibility for pension contributions to Hydro One outside of rates thus addressed the issue of fairness inherent in the ratemaking process based on the OEB's assessment of the amount of revenue that would be sufficient to efficiently operate the utility. While Hydro One's motion has passed the threshold test, the Applicant has been unsuccessful in showing the existence of any error that would compel the OEB to review and vary the Original Decision.

The OEB dismisses Hydro One's motion to review and vary the OEB's Decision and Order in the EB-2017-0049 proceeding.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Hydro One's motion to review and vary the OEB's Decision and Order in the EB-2017-0049 proceeding is dismissed.

2. CME, SEC and VECC shall submit their cost claims no later than January 9, 2020.

3. Hydro One shall file with the OEB and forward to CME, SEC and VECC any objections to the claimed costs no later than January 16, 2020.

4. CME, SEC and VECC shall file with the OEB and forward to Hydro One any reply to any objections to the cost claims no later than January 23, 2020.

5. Hydro One shall pay the OEB's cost incidental to this proceeding upon receipt of the OEB's invoice.

All materials filed with the OEB must quote the file number, **EB-2019-0122**, be made in a searchable/unrestricted PDF format and sent electronically through the OEB's web portal at https://pes.ontarioenergyboard.ca/eservice. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and email address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at https://www.oeb.ca/industry. If the web portal is not available parties may email their documents to the address below. Those who do not have computer access are required to file seven paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Martin Davies at Martin.Davies@oeb.ca OEB Counsel, James Sidlofsky at James.Sidlofsky@oeb.ca.

DATED at Toronto December 19, 2019

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar and Board Secretary