

**ONTARIO ENERGY BOARD**

**OEB PROCEEDING EB-2017-0049**

**APPLICATION FOR ELECTRICITY DISTRIBUTION RATES  
BEGINNING JANUARY 1, 2018 UNTIL DECEMBER 31, 2022**

**NOTICE OF MOTION**

Hydro One Networks Inc. ("**Hydro One**") will make a motion to the Ontario Energy Board (the "**Board**") at its offices at 2300 Yonge Street, Toronto on a date and time to be fixed by the Board.

**PROPOSED METHOD OF HEARING:** The motion is proposed to be heard orally.

**THE MOTION IS FOR:**

1. An order that the Board review and vary the Board's decision and order of March 7, 2019 in EB-2017-0049 (the "**Decision**") in respect of the following determination:
  - a) The denial of Hydro One's request to recover \$37 million (\$17 million in OM&A and \$20 million in capital) (Issue 38, page 96, "Pension Costs") (the "**Pension Findings**").

**The Threshold Test is Met**

2. The Pension Findings should be reviewed, and meet the threshold for a review of the Decision as specified in Rule 43 of the Board's *Rules of Practice and Procedure* and Board decisions applying same.<sup>1</sup> Namely,

- a) 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;
- b) 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 deficit position 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
- c) the change in circumstance and error identified above are material and relevant to the outcome of the 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 Decision.

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<sup>1</sup> See, in particular, EB-2006-0322/0338/0340 p. 18.

**THE GROUNDS FOR THE MOTION ARE:**

**Background**

3. EB-2017-0049 was a Custom Incentive Rate application by Hydro One seeking approval of distribution rates for the period January 1, 2018 to December 31, 2022 (the “**Application**”). As part of Hydro One’s application it sought recovery of \$37M in current service cost pension contributions in 2018, which reflected the share of Hydro One’s pension contributions attributable to distribution service, and which was comprised of \$17M in OM&A and \$20M in Capital. Hydro One also sought to recover corresponding amounts for pension current service pension contributions from 2019 to 2022.

4. At the time the Application was filed in 2017, and at all relevant times from the filing of the Application to the current time, the Hydro One Pension Plan was in a surplus position on a going concern and solvency basis. Subject to meeting certain filing requirements, pursuant to the *Pension Benefits Act* (“**PBA**”) and Regulation 909 (the “**Regulations**”) 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 of the Hydro One Pension Plan. A contribution holiday means an employer can apply surplus to offset its current service pension contributions for a period if certain conditions are met.

5. After Hydro One filed the Application, on December 14<sup>th</sup>, 2017, the Ontario government announced amendments to the Regulations to support a new funding framework for pension plans. The announcement contemplated that the circumstances under which an employer, such as Hydro One, could take a contribution holiday would change. At the time, it

was expected that the anticipated funding regulations would only apply to actuarial funding reports filed after the new rules took effect.

6. On March 28, 2018, the Ontario Budget 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. After this announcement, but before the new funding Regulations came into effect, on April 30, 2018, Hydro One filed a valuation report as at December 31, 2017 under the Pre-May 1, 2018 Rules. This valuation report was disclosed as part of the Application process.

7. 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 the Regulations (the **"Post-May 1, 2018 Rules"**). 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. Different, less restrictive, rules apply to public sector pension plans, but all private sector pension plans, including the Hydro One Pension Plan, must follow the more restrictive rules.

8. Based on 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).

9. 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.

10. 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, 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.

#### **The Change in Circumstance**

11. On August 29, 2018, 2 days before Hydro One's reply submissions were filed, FSCO posted on its website a guidance document titled "2018 Funding Reform – Ability to Take Contribution Holidays and Pay PBGF Assessment", which provided FSCO's position on the treatment of valuation reports filed under the Pre-May 1, 2018 Rules. Because of the complexity, the document included a chart to illustrate the application of the contribution holiday rules under different scenarios. According to the chart, employers in the position of Hydro One would not be permitted to take a contribution holiday under the Pre-May 1, 2018 Rules after 2018 in any circumstance. This document was not part of the evidentiary record on the Application.

12. For 2018, the FSCO guidance 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 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 did not qualify for a contribution holiday in 2018.

13. The above guidance from FSCO was, potentially, subject to change based on feedback received by FSCO from industry groups and others. However, it has not in fact changed and remains FSCO policy at this time.

**The Decision is not correct**

14. In the Decision, the OEB disallowed all of Hydro One's requested \$37M in 2018 pension contributions (\$17M in OM&A and \$20M in capital). As a result, the OM&A component of pension contributions is disallowed for the entire 5 year rate period.<sup>2</sup> The OEB stated that it disallowed the recovery of pension contributions because of the "magnitude of the current surplus" of Hydro One's pension plan. The surplus position referenced in the decision is that the Hydro One Pension Plan is in a surplus position on a going concern and solvency basis.

15. 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. 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.

16. Furthermore, the result of the new interpretation by FSCO is that Hydro One cannot legally take a contribution holiday during 2019 or any future year covered by the rate application as 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

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<sup>2</sup> Decision, page 96.

covered by the Application due to the significant deficit position. For 2018, Hydro One could not legally take a contribution holiday because it had not filed a cost certificate by March 31, 2018.

17. Due to the error and the change in circumstances, the Pension Findings should be amended to allow Hydro One to recover the current service cost pension contributions that it is legally required to make during the years covered by the Application as those contributions were prudently incurred, and relate to rate-regulated service that Hydro One provides to its customers. Alternatively, Hydro One should be permitted to track legally required pension contributions in a deferral account and recover those amounts in its next distribution rate application.

**Rules and Other Grounds**

18. Rules 8, 40, 42, and 43 of the Board's *Rules of Practice and Procedure*.

19. Such further grounds and material as counsel may advise and the Board may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. The Board's Decision with Reasons dated March 7, 2019;
2. Materials from the record of this proceeding;
3. New evidence concerning FSCO position on grandfathering applications;
4. Hydro One's submissions on this Motion, which will be delivered in accordance with the Board's procedural order(s) in regards to this Motion; and

5. Such further and other documentary evidence as counsel may advise and the Board may permit.

Date: March 26, 2019

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AND TO: Intervenors of Record