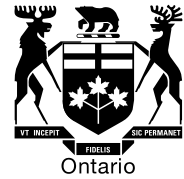


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**BY E-MAIL**

December 19, 2019

Attention: Ms. Christine Long, Registrar and Board Secretary

Dear Ms. Long:

**Re: Hydro One Networks Inc.  
Motion on Seasonal Rates Elimination  
OEB File Number EB-2019-0234**

Please find attached OEB staff's submission on the motion filed by Hydro One Networks Inc.

*Original Signed By*

Martin Davies  
Project Advisor, Rates  
Electricity Distribution: Major Rate Applications & Consolidations

**Hydro One Networks Inc.**

**EB-2019-0234**

**ONTARIO ENERGY BOARD**

**STAFF SUBMISSION ON MOTION TO REVIEW  
SEASONAL RATES DECISION**

**December 19, 2019**

## INTRODUCTION

On September 17, 2019, the Ontario Energy Board (OEB) issued Procedural Order No. 3 (PO #3) in the proceeding to implement the OEB's Decision to eliminate Hydro One Networks Inc.'s (Hydro One) distribution seasonal rate class (the seasonal rates proceeding).<sup>1</sup> The OEB stated that the purpose of PO #3 was to address how the OEB intended to treat a portion of the July 19, 2019 filing (2019 Seasonal Report)<sup>2</sup> made by Hydro One in that proceeding. This was Section 5 of the filing entitled "Alternate Approach to Elimination of the Seasonal Class." The OEB determined that Section 5 would be treated by the OEB as a motion by Hydro One to review part of the OEB's decision of March 12, 2015 on Hydro One's distribution rate application (March 2015 Decision)<sup>3</sup> and established this proceeding to review that motion; specifically whether or not the motion passed the OEB's threshold test.

The OEB invited Hydro One, as an initial step, to file additional material and submissions on the threshold question of whether the March 2015 Decision should be reviewed.

On October 1, 2019, Hydro One filed the requested additional material and submissions on the threshold question, noting that this is the subject of Rule 42.01 of the OEB's *Rules of Practice and Procedure* (the Rules), which states that the requesting party shall set out the grounds for the motion that raise a question as to the correctness of the decision, which grounds may include:

- a) error in fact;
- b) change in circumstances;
- c) new facts that have arisen; and
- d) facts that were not previously in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Hydro One submitted that although it needed to show only one of these grounds in order to meet the threshold, the fact is that all four grounds are met.

As explained below, OEB staff submits that Hydro One has demonstrated that the motion does meet the threshold test based on one of the four grounds –

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<sup>1</sup> EB-2016-0315

<sup>2</sup> Hydro One Networks Inc. EB-2016-0315 "Implementation of the Ontario Energy Board Decision to Eliminate the Seasonal Rate Seasonal Class – Updated Seasonal Report," July 19, 2019.

<sup>3</sup> EB-2013-0416/EB-2014-0247

specifically, on the basis of facts that were not previously in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

## **OEB Staff Submission**

### *The Purpose of a Motion to Review*

As noted by Hydro One, Rule 42.01 of the OEB's Rules<sup>4</sup> provides the grounds upon which a motion may be raised with the OEB:

Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

- (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;...

The OEB first examined the purpose of a motion to review in detail in the Natural Gas Electricity Interface Review Decision (NGEIR Review Decision)<sup>5</sup> and found:

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

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

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<sup>4</sup> Revised October 28, 2016

<sup>5</sup> Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006-0322/0338/0340, May 22, 2007, p. 18

inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

In the OEB's Decision on the Hydro One Motion to Review the OEB's Decision on Connection Procedures,<sup>6</sup> the OEB further commented:

...in the case of an applicant-driven motion to review, it is not sufficient to simply reargue the case, or to argue that a different outcome might have been preferred. The moving party must show that the decision at issue is incorrect in an identifiable, relevant and material way.<sup>7</sup>

In a 2005 Natural Resource Gas Limited decision, the OEB stated:

This [i.e. the motion to review] is not a hearing of the application *de novo*. In considering a motion to vary, the Board considers whether new evidence has been presented by the Applicant, or whether the original panel made an error in law or principle so as to justify the reversal of the original Decision.<sup>8</sup>

The purpose of a motion to review, therefore, is not simply to re-hear the original issue before the OEB. Most issues before the OEB require a significant exercise of judgment on behalf of the OEB panel, and lend themselves to a number of possible outcomes. The purpose of a motion to review is not for a party to simply re-argue the same case in front of a different panel in the hope of achieving a different outcome.

Similarly, the task of a reviewing panel is not to consider the matter afresh – a motion to review is not a hearing *de novo*. The role of the reviewing panel is not to consider the evidence and decide what outcome it would have arrived at. A reviewing panel should instead look at the matter and determine if the original panel made an identifiable and material error of law or fact. If the answer to that

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<sup>6</sup> Motion to Review the EB-2006-0189 Decision, EB-2007-0797, November 26, 2007

<sup>7</sup> Decision and Order, Hydro One and Great Lakes Power, EB-2007-0797, p. 8

<sup>8</sup> Decision with Reasons, Natural Resource Gas Limited, RP-2004-0167/EB-2005-0188

question is “no”, then the motion must fail. It does not matter if the reviewing panel might have come to a different conclusion on the evidence – if the original panel did not make an identifiable error then the reviewing panel should not consider the matter further.

In addition to being in keeping with the legislation, rules and OEB precedent, there are solid policy reasons behind this approach. Most issues before the OEB could result in a range of decisions – all of which would meet the broad test of being just and reasonable. A party should not be permitted two opportunities to argue the same case. Absent an identifiable error, parties should have confidence that an OEB decision is final. A motion to review also consumes significant OEB and party resources, and regulatory efficiency demands that these motions only be permitted where a clear error has been made. If parties could simply re-argue any issue that they “lost” in the original proceeding before the OEB, there would be little incentive for them to not file a motion to review.

OEB staff notes that, as stated above, Hydro One submitted that although it needed to show only one of the four grounds established in the OEB Rules for motions to review had been met in order to meet the threshold, Hydro One had argued that all four grounds had been met.

The comments that follow include OEB staff’s review of Hydro One’s arguments on each of these four grounds and its submissions on whether, in staff’s view, each particular test has been met.

### *Error in Fact*

- i. Error of Understanding that the Seasonal Class Was not a Density-Based Rate Class

### **Background**

Hydro One noted that in the March 2015 Decision,<sup>9</sup> the OEB had stated that:

The OEB finds the arguments of BLC [Balsam Lake Coalition] to be persuasive. Hydro One has developed the technical capability to implement and maintain density-based rates for its non seasonal residential classes ...The OEB agrees with BLC that the existence of density-based rate classes erodes justification for the retention of the

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<sup>9</sup> p.48

seasonal class ...Existing seasonal class customers shall be placed in a residential class according to their density.

Hydro One submitted that this quote indicated that the OEB understood that the existing Seasonal Class was not a “density-based” rate class and also shows that the OEB had erred in not relying on the actual evidence on the record in the original proceeding. Hydro One argued that the evidence clearly established that the costs paid by seasonal customers do take density into account and that Hydro One applies a density adjustment in establishing cost causality and rates for the Seasonal Class.

As such, according to Hydro One, the OEB had erred by accepting and relying on BLC’s submission, contrary to the actual evidence, that it was necessary to move seasonal customers into another class in order to have such customers pay density-based rates. Hydro One concluded that, both at the time of the original proceeding and today, density is a specific consideration in establishing the costs and rates to be paid by the Seasonal Class.

Hydro One stated that in its evidence in the Original Proceeding,<sup>10</sup> density factors had been shown as used in Hydro One’s cost allocation model to establish the cost to serve customers in the Seasonal Class. The density factor applied to the Seasonal Class was a value of 3.6, which is a weighted average value that captures the fact that about 78,000 low density seasonal customers have a density factor of 4.8 (the same as the low density year-round residential customers) and about 70,000 medium density seasonal customers have a density factor of 1.9 (the same as the medium density residential customers).

Hydro One stated that the result of applying a 3.6 density factor to the Seasonal Class is that seasonal customers, as a group, are allocated costs that accurately reflect their density-based characteristics, without having to abandon the other defining characteristic in determining the cost of serving the Seasonal Class, which is its unique load characteristics.

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<sup>10</sup> Exhibit G1, Tab 3, Schedule 1 pages 9 to 12

- ii. Error of Not Concluding That the Load Characteristics of Seasonal Customers are Sufficiently Different from their Neighbours to Justify a Separate Rate Class.

## **Background**

Hydro One noted that in the March 2015 Decision, the OEB had stated that it “is not convinced that the load characteristics of seasonal customers are sufficiently different from their neighbours in the residential classes to justify the continuation of the seasonal class.”<sup>11</sup>

Hydro One submitted that the OEB had erred in making this finding as it had first ignored evidence provided in the original proceeding that had clearly showed that the load characteristics are significantly different between year-round residential and seasonal customers<sup>12</sup> and disregarded the testimony of Mr. Andre during the oral hearing which highlighted the distinct difference in the load characteristics of the seasonal and residential classes.<sup>13</sup>

Hydro One argued that as evidence of this second error by the OEB, the evidence in the original proceeding had included no analysis of how the demonstrated differences in seasonal customer load characteristics impact the allocated costs and rates for the Seasonal Class on which to make a determination that the characteristics are “sufficiently different” to warrant a separate rate class.

## **Submission**

OEB staff submits that neither of the two instances cited above by Hydro One is an error in fact that would imply that the motion had met the threshold test. OEB staff notes that in the earlier discussion of relevant OEB decisions on motions, the NGEIR Review Decision made clear the criteria that the OEB was using to determine whether an error had been appropriately demonstrated by an applicant:

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<sup>11</sup> p. 48

<sup>12</sup> Exh I, Sch 7.01, Sch 8-FOCA3 and Exh I, Sch 7.02, Sch 6 – VECC93.

<sup>13</sup> Transcript, Vol. 7, pp. 47-48.



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.<sup>14</sup>

OEB staff submits that the two ‘errors’ cited by Hydro One above are in fact cases of evidence being interpreted differently by the OEB panel from the way Hydro One believed the evidence should be interpreted. OEB staff notes in this context the very broad definition of ‘errors in fact’ on which Hydro One is basing its argument. OEB staff submits that Hydro One’s interpretation of this ground is more one of ‘errors in interpreting facts’, rather than errors in fact which is the relevant ground in the OEB’s Rules.

OEB staff concludes that the acceptance of Hydro One’s interpretation of the meaning of errors of fact by the OEB would significantly broaden the grounds under which motions could pass the threshold test and subject a significantly increased number of OEB decisions to review through motions, which would increase regulatory uncertainty about the finality of the OEB’s decisions, as well as regulatory burden.

#### *Change in Circumstances*

#### *New Facts That Have Arisen*

#### *Facts That Were Not Previously In Evidence In The Proceeding and Could Not Have Been Discovered By Reasonable Diligence At The Time*

Hydro One, in its filed material, combined its discussion of the remaining three grounds for the motion into one section.

- i. The OEB’s Subsequent Decision to Move to All-Fixed Residential Rates

## **Background**

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<sup>14</sup> Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006-0322/0338/0340, May 22, 2007, p. 18

Hydro One noted that on April 2, 2015, several weeks after the March 2015 Decision, the OEB had issued its policy regarding a new distribution rate design for residential electricity consumers. This led to the OEB's subsequent order that the move to all-fixed rates would apply to customers in Hydro One's Seasonal Class.<sup>15</sup>

Hydro One argued that the OEB policy to move to all-fixed rates and the order that the policy would apply to the Seasonal Class, is not only a new fact on its own, but also a new fact that immediately signified a change in circumstances and the creation of new facts that could not have been previously discovered. Hydro One submitted that the OEB's order had a significant and dramatic impact on the evidence led in the original proceeding that had resulted in the March 2015 Decision and in the assessment of that evidence by Hydro One, intervenors and the OEB.

ii. New Fact Showing How the Move to All-Fixed Residential Distribution Rates Addressed the OEB's Previous Concern

### **Background**

Hydro One submitted that the changes to the Seasonal Class distribution rates resulting from the OEB order had largely addressed the concerns of BLC, the intervenor whose concerns were relied upon by the OEB in the March 2015 Decision. Hydro One noted that in the March 2015 Decision, the OEB had written that:<sup>16</sup>

The OEB is aware that the elimination of the seasonal class will cause rate impacts, particularly for lower volume seasonal customers. At the same time, the OEB is mindful of BLC's submission that this group of customers is not paying the full costs of the services they receive.

Hydro One asserted that, in making this statement, the OEB had been voicing its concern that low-volume seasonal customers were not paying the full costs of serving them, and had been relying on that fact as a ground to eliminate the Seasonal Class. Hydro One argued that, understandably, it was not in anyone's knowledge at that time that the soon-to-follow policy decision and the OEB's order would fully address that problem by requiring the move to all-fixed

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<sup>15</sup> EB-2013-0416/EB-2015-0257, *Order*, September 30, 2015

<sup>16</sup> p. 48

residential distribution rates, which when completed would result in low and high volume seasonal customers paying the same charge for distribution service.

Hydro One submitted that the significance of that decision was, and remains that both low and high volume seasonal customers would be paying the same charge for distribution service and that both low and high volume customers will be paying an equal and fair share of their costs, which was the major driver for the elimination of the Seasonal Class.

- iii. New Fact Showing How the Move to All-Fixed Residential Distribution Rates Changed the Customer Bill Impacts on Which the OEB Based its Decision

## **Background**

Hydro One stated that during the rates proceeding that resulted in the March 2015 Decision, neither Hydro One, intervenors, nor the OEB could have contemplated the customer impacts resulting from the combined effect of moving to all-fixed rates and eliminating the Seasonal Class.

Hydro One noted that while some customer bill impact information was provided in the original proceeding,<sup>17</sup> that information only demonstrated the impacts of moving seasonal customers to the year-round residential classes at the fixed and variable rates that existed at the time. Hydro One submitted that as it is now known, but could not have been known during the original proceeding, those bill impacts are not an accurate reflection of what will happen to seasonal customers as a result of eliminating the Seasonal Class.

Hydro One stated that with the new knowledge that the move to all-fixed rates applies to the Seasonal Class, it is now able to determine and evaluate the bill impact on seasonal customers resulting from both the move to all-fixed residential rates and the elimination of the Seasonal Class. In particular, Hydro One added it is now possible to demonstrate the incremental impact on seasonal customers as a result of eliminating the Seasonal Class and moving to the applicable all-fixed year-round residential class rates, as compared to the impact on seasonal customers as a result of moving to all fixed Seasonal Class rates.

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<sup>17</sup> Exhibit I, Tab 7.02, Schedule 1 Staff 94.

Hydro One argued that, as detailed in Schedule “A” to its submission, the move to all-fixed rates largely addresses the concern expressed by the OEB regarding the disparity in distribution charges between high and low volume seasonal customers and results in a significant bill reduction for all high volume seasonal customers. Furthermore, the incremental impact from eliminating the Seasonal Class is only a small bill reduction of about \$7 per month for the subset of seasonal customers moving to the R1 residential class, but a large incremental bill increase of about \$68 per month for those seasonal customers moving to the R2 residential class, including any high volume seasonal customers moving to the R2 residential class.

As such, Hydro One concluded that high volume seasonal customers moving to the R2 residential class would not benefit from the March 2015 Decision, contrary to the evidence available to the OEB at the time of that Decision and contrary to the objective stated in the March 2015 Decision that the elimination of the Seasonal Class would address the concern of high volume seasonal customers.

### **Submission**

OEB staff agrees with Hydro One that the OEB’s subsequent decision to move to all-fixed residential rates, announced three weeks after the March 2015 Decision, is a new fact that was not previously in evidence in the proceeding and could not have been discovered by reasonable diligence at the time. As such, there was no consideration or assessment of the impact of the move to fully fixed residential rates on the record leading to the March 2015 Decision, nor could there have been. Accordingly, it is the submission of OEB staff that the motion passes the OEB’s threshold test.

#### iv. The Subsequent Introduction of Distribution Rate Protection

### **Background**

Hydro One noted that the *Ontario Energy Board Act, 1998* was amended after the March 2015 Decision, to add a new section 79.3, which established the Distribution Rate Protection plan (the DRP). The DRP, as subsequently detailed in Regulation 198/17, applies to residential customers of certain specified electricity distributors, including Hydro One’s R1 and R2 residential customers.

Regulation 198/17 further specifies that the DRP applies only to a Hydro One R1 and R2 residential customer “if he or she resides continuously at the service

address to which the account relates for at least eight months of the year.” This is the same criterion used in the Rural and Remote Rate Protection (“RRRP”) Regulation 442/01, which the OEB has previously ruled makes seasonal customers ineligible to receive the RRRP subsidy and therefore means that seasonal customers are also not eligible for DRP.

Hydro One argued that this new fact means that even if the Seasonal Class is eliminated, customers in the same rate class will still be paying vastly different distribution charges because seasonal customers moving to the R1 and R2 residential classes will not get DRP, whereas existing R1 and R2 year-round residential customers will.

Hydro One submitted that although this disparity was understood in the context of the RRRP subsidy for seasonal customers moving into R2 residential class, introduction of the DRP subsidy has significantly exacerbated the problem in the R2 residential class, where existing year-round customers will get both the RRRP and DRP subsidies. Hydro One noted that the extent of the disparity was unknown at the time of the March 2015 Decision.

Hydro One argued that the issue of the disparity in distribution charges for customers in the R1 residential class is even more significant because the OEB and parties to the original proceeding would have believed that seasonal customers moving to the R1 class would pay the same rates as existing R1 year-round residential customers; but that anticipated result changed completely when the DRP subsidy came into effect and seasonal customers were not eligible to receive the subsidy.

Hydro One submitted that the key implication of the preceding discussion is that, while the Seasonal Class would be technically eliminated by the March 2015 Decision, in practice, seasonal customers moving to the R1 and R2 residential classes have to continue to be distinctly identified for billing purposes and will continue to pay distinctly different distribution charges from those paid by the R1 and R2 year-round residential customers in the same class. Hydro One submitted that this is contrary to the outcome anticipated by the OEB in the March 2015 Decision.

## **Submission**

OEB staff notes that the creation of the DRP may have increased the magnitude of the issue of the continuing need to be able to distinctly identify seasonal

customers for billing purposes. However, because the RRRP existed at the time of the March 2015 Decision, this issue was known to the OEB when it made the decision to eliminate the seasonal class and as such is not a new fact. As such, OEB staff is of the view that this ground for the motion does not meet the threshold test.

v. The Subsequent Comment Letters from Seasonal Customers

**Background**

Hydro One submitted that the large number of comment letters received to date by the OEB in response to the current seasonal rates proceeding,<sup>18</sup> even in advance of notice being issued in this proceeding, indicates that seasonal customers are very interested in the elimination of the Seasonal Class.

Hydro One argued that at the time of the original proceeding, seasonal customers would not have been aware of the possibility that the Seasonal Class could be eliminated as part of that proceeding given that this was never considered as an option during the stakeholdering that Hydro One carried out in exploring possible changes to the Seasonal Class in advance of the submission of Hydro One's 2015-2019 rates application.

Hydro One further stated that the possibility the Seasonal Class might be eliminated as part of the OEB's review of Hydro One's rate application was also not highlighted in the notice of the original proceeding. As such Hydro One argued, the OEB's decision to eliminate the Seasonal Class was based largely on the submission of the BLC, which represents a very limited number of seasonal customers, and was not informed by what is now known to be significant interest from seasonal customers in the elimination of the Seasonal Class.

**Submission**

OEB staff submits that this ground for the motion does not meet the threshold test. OEB staff submits that seasonal customers were well represented in the original proceeding. Not only did the BLC represent seasonal customers, but the

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<sup>18</sup> EB-2016-0315

Federation of Ontario Cottagers Associations was also an intervenor in the proceeding.

### **Conclusion**

OEB staff agrees with Hydro One that the OEB's subsequent decision to move to all-fixed residential rates is a new fact that was not previously in evidence in the proceeding and its impacts could not have been discovered or assessed by reasonable diligence at the time. Accordingly, it is the submission of OEB staff that the motion passes the OEB's threshold test.

- All of which is respectfully submitted-