



Ontario
Energy
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de l'énergie
de l'Ontario

DECISION AND ORDER

EB-2019-0234

HYDRO ONE NETWORKS INC.

Motion to review and vary the Decision dated March 12, 2015 regarding Hydro One Networks Inc.'s electricity distribution rates and other charges beginning January 1, 2015 (EB-2013-0416/EB-2014-0247)

BEFORE: Cathy Spoel
Presiding Member

March 12, 2020

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1 INTRODUCTION AND SUMMARY

This is a decision on a motion (the Motion) regarding the Decision¹ (2015 Decision) in the Ontario Energy Board (OEB) proceeding that considered the Hydro One application for electricity distribution rates and other charges to be effective January 1, 2015, and each year thereafter until December 31, 2019 (Original Proceeding). More particularly, this decision is on whether the Motion meets the OEB's threshold test.

One of the findings in the 2015 Decision was that the Hydro One seasonal rate class was to be eliminated and existing seasonal class customers should be moved to one of three Hydro One residential rate classes according to their density (Seasonal Rates Elimination Determination). The OEB initiated a proceeding in 2016 to implement the Seasonal Rates Elimination Determination (the Seasonal Class Elimination Proceeding).²

Further to the 2015 Decision, Hydro One prepared a "Report on Elimination of the Seasonal Class" (2015 Seasonal Report). The 2015 Seasonal Report was updated in 2016 and 2019 (the 2019 Seasonal Report, filed on July 19, 2019), as part of the Seasonal Class Elimination Proceeding. The OEB determined that it would treat Section 5 of the 2019 Seasonal Report – a section entitled "Alternative Approach to Elimination of the Seasonal Class" – as a motion to review the Seasonal Rates Elimination Determination under Part VII of the OEB's *Rules of Practice and Procedure* (Rules).

The OEB established a separate panel for the purpose of determining the threshold question of whether the Seasonal Rates Elimination Determination should be reviewed before conducting any review on the merits. The OEB assigned OEB file number EB-2019-0234 to this matter.

Hydro One was allowed to file such additional material as it considered desirable for the purposes of the Motion and to make submissions on the threshold question.

On October 1, 2019, Hydro One filed additional material and submissions on the threshold question. Hydro One noted that the Motion is the subject of Rule 42.01 of 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:

¹ EB-2013-0416/EB-2014-0247 – Decision March 12, 2015

² EB-2016-0315

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- 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, all four grounds had been met.

The OEB agrees with Hydro One that the threshold test has been met on two of the grounds cited by Hydro One in the “change of circumstances” category, with respect to both the OEB’s decision to move to all-fixed residential distribution rates, and the introduction of Distribution Rate Protection (DRP), and that these grounds raise a question as to the correctness of the 2015 Decision. The OEB does not agree that the threshold test has been met in respect of the other grounds cited by Hydro One. Further direction with respect to the next steps to hear the merits of the Motion will be given in due course.

2 THE PROCESS

The OEB determined in the 2015 Decision that Hydro One's seasonal rate class should be eliminated and existing seasonal class customers should be moved to one of three Hydro One residential rate classes according to their density. The OEB directed Hydro One to prepare a plan by August 4, 2015 for the elimination of the seasonal rate class commencing January 1, 2016.

Hydro One filed its initial 2015 Seasonal Report on August 4, 2015. The OEB initiated a new proceeding³ to consider the remaining steps for the elimination of the seasonal class in November 2016. The OEB ordered Hydro One to update its 2015 Seasonal Report, and Hydro One filed an updated report on December 1, 2016 (2016 Seasonal Report).

In March of 2017, Hydro One filed an application for approval of its proposed 2018-2022 distribution rates.⁴ By letter dated September 20, 2018, the OEB informed parties that it intended to resume the Seasonal Class Elimination Proceeding at the conclusion of its review of Hydro One's proposed 2018-2022 distribution rates. The OEB indicated that an update to the 2016 Seasonal Report was expected after the 2018-2022 distribution rates proceeding concluded and that Hydro One could, if it wished, propose a revised approach to the elimination of the seasonal class. The OEB issued its Decision and Order on Hydro One's 2018-2022 distribution rate application on March 7, 2019.

The OEB resumed the Seasonal Class Elimination Proceeding on April 17, 2019, by issuing Procedural Order No. 2 which directed Hydro One to file an updated report on the elimination of the seasonal class and reiterated that the OEB's decision to eliminate the seasonal class had been made in a prior proceeding. The OEB noted that "The objective of the current proceeding is to review the updated report, determine if rate mitigation over time is required and select the preferred approach to achieve such mitigation."

Hydro One filed its 2019 Seasonal Report on July 19, 2019. The 2019 Seasonal Report includes a proposed alternative that would maintain the seasonal class. This is set out in Section 5 of the 2019 Seasonal Report entitled "Alternate Approach to Elimination of the Seasonal Class."

³ EB-2016-0315

⁴ EB-2017-0049

On September 17, 2019, the OEB issued Procedural Order No. 3 in the Seasonal Class Elimination Proceeding which noted that requests to reconsider an earlier OEB decision are made to the OEB by means of a motion to review under Part VII of the OEB's Rules. In a motion to review, the OEB considers whether there is a question as to the correctness of the decision being reviewed.

The OEB further stated that it had determined that it would treat Section 5 of Hydro One's 2019 Seasonal Report as a motion to review the Seasonal Rates Elimination Determination.

The OEB noted that under Rule 43.01 of the Rules the OEB may, with or without a hearing, decide a threshold question of whether the matter should be reviewed before conducting any review on the merits. The OEB stated that it intended to proceed on this basis and would establish a separate panel for the purposes of deciding the threshold question.

As a first step in this proceeding, the OEB determined that it would allow Hydro One an opportunity to file such additional material as it considered desirable for the purposes of the Motion, and to make submissions on the threshold question. The OEB stated that Hydro One should include, at a minimum, the information set out in Rule 42.01 indicating why, in its view, there is a question as to the correctness of the March 2015 Decision. The OEB stated that any further procedural steps would be determined after receipt of Hydro One's material and submissions.

Hydro One filed this material on October 1, 2019.

On November 28, 2019, the OEB issued Procedural Order No. 1, which provided that OEB staff and intervenors were to file any submissions on the threshold test by December 19, 2019. OEB staff, the Vulnerable Energy Consumers Coalition (VECC), the Consumers Council of Canada (CCC), the Federation of Ontario Cottagers' Association (FOCA) and the Balsam Lake Coalition (BLC) filed submissions. Hydro One filed a reply submission on January 9, 2020.

3 DECISION

Rule 42.01 of the Rules 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, all four grounds had been met.

Hydro One argued that two errors of fact had been made in the 2015 Decision, which were: (i) error of understanding that the seasonal class was not a density-based rate class; and (ii) error of not concluding that the load characteristics of seasonal customers are sufficiently different from their neighbours to justify a separate rate class.

Hydro One further argued that there had been five subsequent developments that fell under the other three grounds. Those developments were: (i) the OEB's subsequent decision to move to all-fixed residential distribution rates; (ii) new fact showing how the move to all-fixed residential distribution rates addressed the OEB's previous concern; (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; (iv) the subsequent introduction of DRP; and (v) the subsequent comment letters from seasonal customers.

OEB staff agreed with Hydro One that the OEB's subsequent decision to move to all-fixed residential distribution rates is a new fact that was not previously in evidence in the Original 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 all-fixed residential distribution rates on the record leading to the 2015 Decision, nor could there have been. Accordingly, OEB staff submitted that the Motion passed the threshold test.

OEB staff argued that the other criteria cited by Hydro One failed to meet the threshold test. OEB staff submitted that the two 'errors' cited by Hydro One were actually cases of evidence being interpreted differently by the OEB panel from the way Hydro One believed the evidence should be interpreted. OEB staff noted in this context the very

broad definition of 'errors in fact' on which Hydro One had based its argument and submitted that Hydro One's interpretation of this ground was more one of 'errors in interpreting facts', rather than errors in fact which is the relevant ground in the OEB's Rules.

OEB staff disagreed with Hydro One that the subsequent developments which it had cited, other than the OEB's decision to move to all-fixed residential distribution rates, met the threshold test.

OEB staff argued that while the subsequent introduction of the DRP may have increased the magnitude of the issue of the continuing need to be able to identify seasonal customers for billing purposes, because Rural or Remote Electricity Rate Protection (RRRP) existed at the time of the March 2015 Decision, this issue was known to the OEB when it made the Seasonal Rate Elimination Determination and as such is not a new fact.

OEB staff further argued that the subsequent comment letters from seasonal customers were also not a new fact that met the threshold test. OEB staff submitted that this was because seasonal customers were well represented in the Original Proceeding as not only did the BLC represent seasonal customers, but FOCA was also an intervenor in the proceeding.

VECC noted that in terms of change in circumstance, new facts that have arisen and facts not previously in evidence, Hydro One had cited the OEB's subsequent decision to move to all-fixed distribution rates for residential and seasonal customers and the government's introduction of the DRP. VECC agreed with Hydro One that these facts represented a change in circumstances from those that existed at the time of the 2015 Decision and that they fundamentally impacted the facts that the OEB relied on in coming to its decision to eliminate seasonal rates. VECC argued that these factors alone are sufficient to meet the threshold issue and warrant the OEB proceeding with a full review of the merits of Hydro One's motion. CCC expressed similar views.

BLC stated its general agreement that changing circumstances since the time of the 2015 Decision warrant a review and possible variance of the OEB's Seasonal Rate Elimination Determination. However, BLC also stated that it did not agree with Hydro One's characterization and reliance on certain grounds as set out in its motion.

BLC agreed with Hydro One that the introduction of the DRP warranted a review of the 2015 Decision. BLC noted that at the time of the 2015 Decision there was no DRP in place or contemplated. As such, the effect of the OEB's decision to eliminate the

seasonal rate class without DRP was that Year-Round Urban Density (UR) and Year-Round Medium Density (R1) seasonal customers would experience the same rates as their non-seasonal counterparts and there would have been no situation where customers in those rate classes would experience significantly different distribution rates. BLC also noted that it was known at the time of the 2015 Decision that there was going to be a remaining difference between rates paid by Year-Round Low Density (R2) customers and R2 seasonal customers, despite their coexistence in the same rate class, as a result of RRRP.

BLC argued that with the introduction of the DRP it is essentially impossible for the vast majority of seasonal customers to share the rates paid by neighbouring non-seasonal customers. BLC stated that this had resulted in a shift in the effectiveness of the elimination of the seasonal rate class to provide for rate equity between customers with identical location-based characteristics. As such, BLC submitted that it is appropriate to revisit the 2015 Decision to determine whether a different approach may be warranted.

BLC argued that other grounds cited by Hydro One did not justify revisiting the 2015 Decision. BLC submitted that the OEB's subsequent decision to move to all-fixed residential distribution rates was known at the time of the 2015 Decision and, as such, it would be inappropriate to view the 2015 Decision as having been made without knowledge of the impending OEB policy. BLC rejected the other grounds cited by Hydro One such as the subsequent comment letters from seasonal customers, and alleged errors made by the OEB in the 2015 Decision. BLC also made various recommendations as to how the 2015 Decision should be varied.

FOCA stated that it had reviewed Hydro One's submission in this matter and was in general agreement with it. FOCA submitted that when the OEB had issued its announcement regarding the implementation of all-fixed residential distribution rates, this had created a completely different context and implications for the 2015 Decision and justified a review of it.

Hydro One responded⁵ by noting that all intervenors that made a submission agreed that there had been a change in circumstances since the OEB had made the 2015 Decision and that the change in circumstances fundamentally impacts the facts that the OEB relied on at the time of the Seasonal Rate Elimination Determination. Hydro One

⁵ Reply Argument, p.4.

therefore submitted that it had clearly met the threshold regarding a review and variance of the 2015 Decision.

Hydro One noted that OEB staff, VECC, CCC and FOCA had all agreed that the OEB's subsequent decision to move to all-fixed residential distribution rates is a new fact that was not previously in evidence in the Original Proceeding. Hydro One stated that, as such, there was no consideration of this move on the record in the Original Proceeding leading to the 2015 Decision.

Hydro One further noted that BLC's submission had included several transcript references from the Original Proceeding in support of its view that the parties were aware of the proposal to move to all-fixed residential distribution rates and that it would be inappropriate to view the 2015 Decision as having been made without knowledge of the impending OEB policy.

Hydro One disagreed and responded that the possible move to all-fixed residential distribution rates was only a proposal at the time of the Original Proceeding and that there was no pending OEB policy. Hydro One also stated that:⁶

Furthermore, and more importantly, the impact of moving to fully-fixed distribution rates upon eliminating the Seasonal Rate Class was never quantified during the Original Proceeding. Hydro One therefore submits that it is impossible to draw the conclusion that the Board made its Decision in light of the subsequent policy change.

Hydro One further submitted that the matter now being considered by the OEB is only to review the 2015 Decision with respect to the Seasonal Rate Elimination Determination as proposed in the Original Proceeding and not to consider new proposals for which evidence has not been submitted. Hydro One argued that if the OEB believes that there is merit to the proposals for changes to the seasonal rate class raised by BLC in its submission, then the best course of action would be for Hydro One to consider those proposals as part of its next cost-of-service application for 2023 distribution rates, given the impact on Hydro One's overall rate structure and the potential impact on rates for all Hydro One customer classes.

⁶ Reply Argument, p.3.

Findings

As noted previously, Hydro One argued that two errors of fact had been made in the 2015 Decision; and that the following five subsequent developments fell under the other three grounds contemplated by Rule 42.01: (i) the OEB's subsequent decision to move to all-fixed residential distribution rates; (ii) new fact showing how the move to all-fixed residential distribution rates addressed the OEB's previous concern; (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; (iv) the subsequent introduction of DRP; and (v) the subsequent comment letters from seasonal customers.

The OEB finds that the threshold test has been met on two of the grounds cited by Hydro One in the "change in circumstances" category, with respect to both the OEB's decision to move to all-fixed residential distribution rates and the introduction of the DRP.

First, the OEB finds that the threshold test has been met with respect to the OEB's decision to move to all-fixed residential distribution rates. The OEB considers this to have been a change in circumstances that raises a question as to the correctness of the 2015 Decision. The all-fixed rate policy may have been proposed by the OEB prior to the issuance of the 2015 Decision, but it was not finalized by the OEB until after the issuance of the 2015 Decision and, as noted by Hydro One, "the impact of moving to fully-fixed distribution rates upon eliminating the Seasonal Rate Class was never quantified during the Original Proceeding."

As the OEB has determined that the threshold test has been met with respect to the decision to move to all-fixed residential distribution rates, the OEB does not consider it necessary to make any further findings with respect to the two related new facts also cited by Hydro One, specifically the "new fact showing how the move to all-fixed residential distribution rates addressed the OEB's previous concern" and "new fact showing how the move to all-fixed residential distribution rates changed the customer bill impacts on which the OEB based its Decision." These may be consequences of the implementation of the change in policy, rather than new facts.

The OEB agrees with parties that argued that the introduction of the DRP is also a change in circumstances that raises a question as to the correctness of the 2015 Decision. The OEB notes that OEB staff did not support this ground for the Motion, but the OEB agrees with Hydro One that while OEB staff's submission is correct with regard to the impact on seasonal customers moving to the R2 residential class, it is not correct

for the large number of seasonal customers moving to the R1 class for the reasons cited by Hydro One in its reply submission.⁷ Specifically, as Hydro One stated (in part):

The RRRP subsidy did not apply, and continues not to apply, to the R1 residential class; and therefore, as also noted by BLC in its submission, at the time of the [2015 Decision] the expectation was that seasonal customers moving to the R1 residential class would experience the same rates as their non-seasonal counterparts. Hydro One submits that the introduction of the DRP represents a change in circumstances for the impact on seasonal customers moving to the R1 residential class, which the Board would not have been aware of at the time of its Decision.

Put another way, RRRP applies to the R2 class but not to the R1 class. The DRP applies to both the R2 and R1 classes. Seasonal customers are not, and would not be eligible for RRRP or the DRP, regardless of the residential class into which they would be placed. The R2 residential class received the RRRP benefit at the time of the 2015 Decision. As seasonal customers are not eligible for RRRP, it would therefore have been known that there would be a discrepancy between the bills of seasonal and non-seasonal customers in the R2 class. The introduction of the DRP would increase that discrepancy. R1 residential customers are not eligible for RRRP, so there would have been no discrepancy between their bills and the bills of the seasonal customers moving into that class. The introduction of the DRP created the potential for a new discrepancy if seasonal customers are moved into that class. These impacts were unknown at the time of the Decision.

The OEB finds that the threshold test has not been met in respect of the other grounds proposed by Hydro One.

The OEB agrees with OEB staff that the two ‘errors’ cited by Hydro One were instances of evidence being interpreted differently by the OEB panel from the way Hydro One believed the evidence should be interpreted.

The OEB also agrees with OEB staff that the subsequent comment letters from seasonal customers did not constitute a new fact, for the reasons cited by OEB staff.

With respect to proposals for changes to the seasonal rate class such as those contained in BLC’s submission, the OEB notes that the only matter being considered in this particular decision is whether any of the grounds cited by Hydro One meet the

⁷ Reply Argument, p.3.

OEB's threshold test, and not to consider new proposals for changes to the seasonal rate class such as those contained in BLC's submission. The OEB finds that such proposals are out of scope of the matter before the OEB at this time.

Having determined that the threshold test has been met, further direction with respect to the next steps to hear the merits of the Motion will be given in due course.

Cost Awards

On December 10, 2019, the OEB issued a letter which confirmed that cost eligible intervenors in both the proceeding on Hydro One's application for approval of distribution rates for 2015 to 2019⁸ and the proceeding on Hydro One's application for electricity distribution rates and other charges beginning January 1, 2016,⁹ participating in this Motion proceeding, would be eligible for cost awards. VECC, CCC, FOCA and BLC were previously determined to be cost eligible, and may recover their reasonable costs of participation in the Motion. The OEB considers it appropriate to address cost awards for participation in respect of the threshold question at this time.

⁸ EB-2013-0416/EB-2014-0247

⁹ EB-2013-0416/EB-2015-0079

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. VECC, CCC, FOCA and BLC shall submit their cost claims for their participation in the Motion proceeding no later than 7 days from the date of issuance of this Decision and Order.
2. Hydro One shall file with the OEB and forward to VECC, CCC, FOCA and BLC any objections to the claimed costs within 14 days from the date of issuance of this Decision and Order.
3. VECC, CCC, FOCA and BLC shall file with the OEB and forward to Hydro One any reply to any objections to the cost claims within 21 days from the date of issuance of this Decision and Order.
4. Hydro One shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

DATED at Toronto March 12, 2020

ONTARIO ENERGY BOARD

Original signed by

Christine E. Long
Registrar and Board Secretary