EB-2015-0141

Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF Decision EB-2013-0416/EB-2014-0247 of the Ontario Energy Board (the "**OEB**") issued March 12, 2015 approving distribution rates and charges for Hydro One Networks Inc. ("**Hydro One**") for 2015 through 2017, including an increase to the Pole Access Charge;

AND IN THE MATTER OF the Decision of the OEB issued April 17, 2015 setting the Pole Access Charge as interim rather than final;

AND IN THE MATTER OF the Decision and Order issued June 30, 2015 by the OEB granting party status to Rogers Communications Partnership, Allstream Inc., Shaw Communications Inc., Cogeco Cable Inc., on behalf of itself and its affiliate, Cogeco Cable Canada LP, Quebecor Media, Bragg Communications, Packet-tel Corp., Niagara Regional Broadband Network, Tbaytel, Independent Telecommunications Providers Association (ITPA) and Canadian Cable Systems Alliance Inc. (CCSA) (collectively, the "**Carriers**");

AND IN THE MATTER OF Procedural Order No. 4 of the OEB issued October 26, 2015 setting dates for, *inter alia*, evidence of the Carriers.

APPENDICES
to the
Evidence of
Michael Piaskoski
Rogers Communications Partnership

November 20, 2015

APPENDIX A
to the
Evidence of
Michael Piaskoski
Rogers Communications Partnership

November 20, 2015

Michael E. Piaskoski

SUMMARY OF QUALIFICATIONS

- Eight years in Rogers Regulatory proceeded by 12 years as a telecom lawyer specializing in regulatory, competition and commercial matters. Bright, professional and ambitious performer who continually exceeds expectations.
- Expertise in drafting cogent, concise and easy-to-understand regulatory and legal filings and litigation materials. Proven abilities in negotiating critical agreements and disputes on favourable terms and financial savings.
- Known in the industry for proactively assuming leadership roles in joint negotiations and joint regulatory proceedings.
- Develops excellent relationships and rapport with clients, industry peers, consultants and government officials and other stakeholders.
- Practical engineering background provides comprehensive understanding of industry-specific operational and technological issues.

PROFESSIONAL EXPERIENCE

Rogers Communications **2007-2015**
Director, Municipal & Industry Relations

- Negotiated numerous access agreements and licences allowing Wireline and Wireless Network groups to implement critical build plans on time and on favourable terms.
- Assumed role of prime on regulatory proceedings, including pole attachment rate hearings, tower-sharing regulation by the CRTC and Industry Canada.
- Proactively assumed leadership roles in industry negotiations and regulatory filings (CRTC CISC Working Group on Model MAA, Ontario pole rate hearings, municipal access agreements, joint build agreements).
- Successfully settled numerous contentious and long-standing access disputes, including railway right-of-way fees, municipal access issues and hydro poles.
- Met with and presented to various government officials and committees to protect and further Rogers' interests.

Sole practice **2006-2007**
Miller Thomson LLP **2004-2006**
Blake, Cassels & Graydon LLP **1995-2004**

- Advised and represented telecom and broadcasting clients in numerous applications and public hearings before the CRTC and Industry Canada, as well as litigation and other matters of regulatory compliance, including:
  - competitive disputes
  - occupancy of public rights-of-way

- broadcasting, telecom, spectrum and radio licence applications
- regulatory filings and reports
- commercial disputes and appeals of CRTC decisions
- certification of radio equipment and regulation of radio towers
- telemarketing activities
- application of the CRTC's "contribution" regime

EDUCATION

1993	**LL.B.**	**University of Toronto**
1979	**B.Sc. Engineering (with Distinction)**	**University of Calgary**

OTHER PROFESSIONAL EXPERIENCE

1984-1990	**Northern Telecom Canada Ltd.** (Calgary and Brampton)	Management positions in Production, Financial Planning and Marketing
1979-1983	**Genstar Structures Ltd.** (Calgary)	Project Engineer

SELECTED PUBLICATIONS

2004 "Do Efficiencies Receive 'Superior' Treatment in Canada? Some Practical and Legal Observations of Superior Propane", *World Competition - Law and Economics Journal*

2004 "Competition Law and High-Tech Industries: Market Definition and Other Economic Considerations", *Journal of Information, Law and Technology*

2003 "The Role of Efficiencies in Telecommunications Merger Review", *Federal Communications Law Journal*

2002-2004 Telecoms 2002, 2003 and 2004, *Global Competition Review Special Report* - Overview of Canadian telecommunications regulation

PRESENTATIONS AND PUBLIC SPEAKING

2012 "Canadian Regulatory Environment - 2012 and Beyond", SCTE Canadian Summit

2005 Appeared on "Squeeze Play", ROBTV to discuss the implications of the CRTC's pending decision on VoIP *(Toronto)*

2003 "The Role of Efficiencies in Telecommunications Merger Review", IBA - *Communications and Competition Law Conference (Budapest)*

APPENDIX B
to the
Evidence of
Michael Piaskoski
Rogers Communications Partnership

November 20, 2015

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2015-0141

Motion to review and vary Decision EB-2013-0416/EB-2014-0247 as it relates to the Specific Charge for Cable and Telecom Companies Access to the Power Poles charged by Hydro One Networks Inc.

PROCEDURAL ORDER NO. 4
October 26, 2015

Eleven cable and telecommunications companies and associations (the Carriers) have, with leave of the Ontario Energy Board (OEB), jointly filed a Notice of Motion to review and vary the OEB's March 12, 2015 decision approving distribution rates and charges for Hydro One Networks Inc. (Hydro One) for 2015 through 2017, as it relates to the charge they (or in the case of the associations, their members) are required to pay to use Hydro One's poles (the Pole Access Charge).

The purpose of this motion is to fix the final Pole Access Charge, which until the disposition of the motion remains at the interim level of $22.35 per pole per year.

On July 29, 2015, the OEB issued Procedural Order #3, setting out the parties to the motion, establishing an interrogatory process and making provision for parties to indicate if they intend to file evidence. Hydro One filed interrogatory responses on September 8, 2015 and on September 14, 2015 the Carriers advised that they intend to file evidence in this matter.

As described in Procedural Order #3, the motion will be a hearing on Hydro One's proposed increase to the Pole Access Charge and whether that increase is just and reasonable. The OEB's review of the Pole Access Charge in this proceeding will be within the context of the current approved OEB methodology as described in Decision and Order RP-2003-0249, issued March 7, 2005. However, as mentioned in a recent OEB decision[1], the OEB plans to undertake a policy review of miscellaneous rates and

[1] EB-2015-0004, Decision on Motion and Procedural Order #9, October 14, 2015

charges commencing this year which will include a review of pole attachment rate methodology.

At this point it is still premature for the OEB to determine whether the motion will proceed as an oral hearing or as a written hearing.

THE OEB ORDERS THAT:

1. The Carriers shall file their evidence on or before **November 20, 2015**.

2. OEB staff, intervenors, or Hydro One shall request any relevant information and documentation regarding evidence filed by the Carriers by written interrogatories filed with the OEB and served on all parties on or before **November 30, 2015**.

3. The Carriers shall file with the OEB complete written responses to all interrogatories and serve them on all parties on or before **December 11, 2015**.

4. A transcribed Technical Conference will be held **December 17, 2015** starting at 9:30 a.m. in the OEB's offices at 2300 Yonge Street, 25th floor, Toronto, to clarify any matters arising from the interrogatories, including the interrogatories answered by Hydro One. If required, the Technical Conference will continue on **December 18, 2015**. Parties intending to participate are to notify all parties of the topic areas for questioning by **December 15, 2015**.

5. A Settlement Conference will be convened on **January 12, 2016** starting at 9:30 a.m., at 2300 Yonge Street, 25th floor, Toronto. If necessary, the Settlement Conference will continue on **January 13, 2016**.

6. Any settlement proposal arising from the Settlement Conference shall be filed with the OEB on or before **January 28, 2016**. In addition to outlining the terms of any settlement, the settlement proposal should contain a list of any unsettled issues, indicating with reasons whether the parties believe those issues should be dealt with by way of oral or written hearing.

7. Any submission from OEB staff on a settlement proposal shall be filed with the OEB and served on all parties on or before **February 4, 2016**.

8. If there is no settlement proposal arising from the Settlement Conference, Hydro One shall file a statement to that effect with the OEB by **January 19, 2016**. In that event, parties shall file with the OEB and serve on the other parties by

January 26, 2016 any submissions on which issues should be heard in writing, and for which issues the OEB should hold an oral hearing.

All filings to the OEB must quote the file number, EB-2015-0141, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at https://www.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 e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 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 motion, parties must include the Case Manager, Harold Thiessen at harold.thiessen@ontarioenergyboard.ca and OEB Counsel, Ian Richler at ian.richler@ontarioenergyboard.ca.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, October 26, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX C
to the
Evidence of
Michael Piaskoski
Rogers Communications Partnership

November 20, 2015

Canadian Radio-television and Telecommunications Commission

ARCHIVED - Telecom Decision CRTC 99-13

Telecom Decision
Ottawa, 28 September 1999
Telecom Decision CRTC 99-13
PART VII APPLICATION -- ACCESS TO SUPPORTING STRUCTURES OF MUNICIPAL POWER UTILITIES -- CCTA vs MEA et al -- Final Decision
File No.: 8690-C13-01/97
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Summary

Cable companies and competitive telecommunications carriers often rent space on poles and underground conduit owned by telephone companies and power utilities to carry the transmission lines that they use to provide service to their customers. This allows them to provide service without installing their own poles and conduit, often called support structures.

In Telecom Decision **CRTC 95-13** Access to Telephone Company Support Structures, the Commission established a pole rental rate of $9.60 per year payable by cable companies and telecommunications carriers wishing to rent space on such poles. This rate applies to poles owned by several larger telephone companies, including most of those that were then part of the Stentor group.

In the application addressed in this decision, the Canadian Cable Television Association (CCTA)

requested that the Commission grant access to the poles owned by certain power utilities in Ontario at the same rate of $9.60 per year.

The Municipal Electric Association (MEA), an organization representing most Municipal Public Utility Commissions and the Hydro Electric Commission of Ontario, opposed the CCTA's application. It considered, among other things, that the Commission did not have jurisdiction to deal with the application.

The Commission, however, has concluded that, in the circumstances of this case, it has the constitutional and statutory jurisdiction to deal with this matter under the Telecommunications Act.

The Commission considers that cable companies should pay incremental costs and make a reasonable contribution to capital costs associated with attaching their cables to poles owned by power utilities. Based on this principle, the Commission is establishing an annual pole rental rate of $15.89 per pole for cable company access to hydro poles owned by the power utilities named in this decision, until and unless the parties agree otherwise.

Introduction

1.In 1996, the Municipal Electric Association (the MEA), a voluntary organization whose members comprise the municipal Public Utilities Commissions and Hydro Electric Commissions of Ontario (the municipal power utilities or PUCs), decided to overhaul the support structure arrangements between municipal power utilities and certain cable television companies in Ontario. On behalf of its members, the MEA proposed a revised support structure agreement to include an annual pole rental rate to cable companies of over $40 per pole. The cable companies considered the MEA's proposals unacceptable. Despite extended negotiations, the cable companies were unable to agree with the MEA on the terms of a revised support structure agreement, including the applicable pole rental rate.

2.The support structure agreements between the cable companies and the municipal power utilities expired on or before 31 December 1996 and provided for an annual pole rental rate of $10.42. Beginning in January of 1997, the municipal power utilities refused to grant the cable companies new permits for access to their support structures.

The Application

3.On 13 February 1997, the Canadian Cable Television Association (the CCTA) filed an application pursuant to Part VII of the CRTC Telecommunications Rules of Procedures (the Rules), on behalf of Cablenet (a division of Cogeco Cable Inc.); Mr. Pierre Juneau (as trustee for 3305911 Canada Inc. in respect of certain cable distribution undertakings that were then to be transferred by Rogers Cablesystems Ltd.)1; Rogers Cablesystems Limited and its subsidiaries; and Shaw Cablesystems Ltd. and its subsidiaries (the cable companies or the Applicants). That application was brought against a number of municipal power utilities in Ontario. The CCTA's application was brought under subsections 43(5) and 61(2) of the Telecommunications Act (the Act). It sought both final and interim relief in order to gain access to the support structures of

those municipal power utilities.

4.Subsection 43(5) of the Act provides as follows:

43. (5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

5.The municipal power utilities that are party to this proceeding are identified in Attachment A and are hereinafter collectively referred to as the Respondents. The MEA acted on behalf of most (but not all) the utilities named as Respondents. Prior to 1 January 1998, the MEA represented 28 of the Respondent utilities. In its final submission, the MEA indicated that it represented 25 of the Respondents2. The remaining Respondents not represented by the MEA are: Canadian Niagara Power (CNP); Chatham Hydro; the Hydro Electric Commission of the Town of Deep River (Deep River); L'Orignal Hydro Electric Commission (L'Orignal HEC); Pelham Hydro-Electric Commission (Pelham HEC); Plantagenet Hydro Electric Commission (Plantagenet HEC); Webbwood Hydro Electric Commission (Webbwood HEC); Toronto Hydro-Electric Commission; and the West Elgin Hydro-Electric Commission. Deep River and CNP each filed an answer on its own behalf.

6.The cable companies have obtained support structure services from the municipal power utilities for many years pursuant to successive support structure agreements. As noted above, the support structure agreements between the cable companies and the PUCs expired on or before 31 December 1996. In anticipation of the expiry of the agreements, negotiations were commenced in the spring of 1996 to conclude new agreements. While the cable companies had serious concerns about many aspects of the MEA's proposed new model agreement, the key point of disagreement between the parties was the support structure rate. The MEA took the position that the support structure rate should increase from $10.42 per pole per year to $40.92 per pole per year.

7.The cable companies objected to the MEA's proposed rate increase on the basis that this represented an increase of approximately 300% over the existing rate and contrasted sharply with the $9.60 rate established by the CRTC in Access to Telephone Company Support Structures, Telecom Decision **CRTC 95-13**, dated 22 June 1995 (Decision 95-13) for access to telephone company poles. The cable companies were unable to reach an agreement with the municipal power utilities regarding terms of access on either an interim or final basis. In addition, the cable companies found themselves in the position of being unable to obtain support structure permits from any of the municipal power utilities.

8.In its application for interim relief, the CCTA requested that the Commission grant the Applicants access to the support structures of the Respondents on an interim basis according to the terms that applied in 1996, subject to two exceptions. First, the pole rental rate of $10.42 per pole per year would apply on an interim basis. The CCTA submitted that the interim rates that it proposed would be subject to adjustment retrospectively when the Commission would set final rates. Second, the CCTA requested that the Respondents be required to process permit applications within 30 days of receipt, failing which a permit application would be deemed to be approved. The CCTA indicated that an application could be denied solely on the basis of safety

or technical concerns. It was submitted that this second adjustment was required in order to ensure that the Applicants were able to proceed with their plans in a timely manner.

9.In its Answer, the MEA objected to the CCTA's application, for both interim and final relief, on the basis that the Commission is without statutory and constitutional jurisdiction to grant the relief sought, as well as on the merits of the application. The MEA reserved the right to make additional submissions on the jurisdictional issues at a later date and expressly did not attorn or concede to the Commission's jurisdiction in this matter.

10.By letter dated 27 March 1997, the Commission indicated that it was not prepared to rule on the application for interim relief at that time and stated that it would be in the public interest if the parties attempted to resolve their dispute with the assistance of Commission staff. Consequently, the Commission suspended consideration of the CCTA's application, while the parties took part in an informal and non-binding dispute resolution process designed to facilitate and encourage the parties to arrive at their own mutually acceptable settlement with the assistance of Commission staff. Commission staff would issue a non-binding opinion on matters that were unresolved after the meeting with the parties. This non-binding opinion would provide the parties the opportunity to review the relative merits of their case and encourage more realistic settlement negotiations before resorting to a formal determination by the Commission. If a party considered that any matter still remained unresolved two weeks after the staff opinion had been provided to the parties, any party could file a request that the Commission re-initiate the process to determine, on an interim and final basis, any of the issues that were not satisfactorily resolved. The Commission also noted that the parties would be provided with an opportunity to comment on staff's opinion and make further submissions, including submissions regarding the issues of constitutional and statutory authority. It was also stated that the staff opinion, all material filed by the parties prior to the release of the opinion and any subsequent submissions filed would form part of the record of the proceeding upon which the Commission's decision would be based.

11.The parties met with Commission staff on 23 April 1997. At that meeting, it was apparent that the principal issue in dispute between the parties related to the appropriate costing methodology and associated pole rental rate. The methodology proposed by the Respondents resulted in a proposed pole rental rate of $40.92 per pole per annum. As noted above, the most recent agreements that expired on or before 31 December 1996, had provided for a pole rental rate of $10.42 per pole per annum. At the conclusion of the meeting, the parties acknowledged that there was little likelihood of resolving at the meeting, the principal dispute relating to the appropriate costing methodology and associated pole rental rate. As a result, the meeting was adjourned and discussion of the other issues raised by the parties was reserved pending release of a non-binding opinion by Commission staff solely on the issue of the appropriate methodology and pole rental rate.

12.On 13 May 1997, Commission staff issued a non-binding opinion suggesting that the parties adopt an annual support structure rate of $13.40 per pole. In an attempt to build on the discussion which took place during the Commission's dispute resolution process, the parties met throughout June and July, but were unable to resolve their disagreements. On 8 August 1997, the CCTA wrote to the Commission requesting that its application for interim and final relief be re-initiated.

13.By letter dated 8 September 1997, the Commission resumed the process. With respect to the

interim relief, the Applicants and Respondents were given the opportunity to file evidence and any additional submissions, including submissions regarding the non-binding staff opinion and the issues of constitutional and statutory authority. Other interested parties were also given the opportunity to file comments.

14.On 1 October 1997, the MEA served on the Attorneys-General of Canada and the provinces a Notice of Constitutional Question pursuant to the Federal Court Act. However, none of the Attorneys-General filed submissions.

15.In the course of this proceeding, the Commission received comments relating to the jurisdictional issues from the CCTA, the MEA and CNP as well as from Saskatchewan Power Corporation, TransAlta, UMG Cable Telecommunications Inc. (UMG), Ontario Hydro, Telus Corporation (Telus) and Stentor Resource Centre Inc. (Stentor) on behalf of BC TEL, Bell Canada and MTS NetCom Inc., as interested parties.

16.On 7 November 1997, following two rounds of submissions by the parties, the Commission denied the request for interim relief on the basis that the Applicants had not met one of the criteria for granting interim relief.3 Having come to the conclusion that interim relief should be denied, the Commission did not need to address, at that time, the other arguments raised by the parties, including the issue of its constitutional and statutory jurisdiction.

17.In accordance with the Commission's Revised Directions on Procedure issued 23 September 1997, the Commission received responses to interrogatories and final and reply comments on behalf of the parties in respect of the application for final relief. The record closed 17 February 1998.

18.It is to be noted that the Commission has had before it a second and similar application filed by UMG on 25 February 1997 pursuant to Part VII of the Rules. In its application, UMG sought interim relief pursuant to subsections 42(1), 43(5), 55 and 61 of the Act and named Ontario Hydro as Respondent. In a decision dated 27 March 1997, the Commission granted UMG interim relief and made preliminary findings on jurisdictional issues.

19.On 24 April 1997, Ontario Hydro filed with the Federal Court of Appeal a Motion for Leave to Appeal as well as an Originating Notice of Motion for judicial review of the Commission's decision. In both of these applications, Ontario Hydro submitted, amongst other issues, that the Commission had erred in finding that it had the statutory and constitutional jurisdiction to grant UMG interim relief. On 29 May 1998, the Federal Court of Appeal issued its decisions denying Ontario Hydro's application for leave to appeal and quashing the application for judicial review.

20.The Federal Court of Appeal's decisions denying leave to appeal and quashing the motion for judicial review of the Commission's decision in the UMG v. Ontario Hydro matter were issued after the close of the proceeding for final relief in the instant case.

21.In a letter dated 3 June 1998, the CCTA requested that the Commission render a decision in respect of its application for final relief given that it had become obvious that the parties were not able to settle this matter on their own and "given that any doubt regarding the CRTC's

jurisdiction over access disputes has been dispelled by the Federal Court of Appeal's recent decision". In particular, the CCTA maintained that the Federal Court of Appeal had "upheld the CRTC's jurisdiction under the Telecommunications Act to resolve disputes between cable companies and power utilities over access to power utility poles".

22.In a letter dated 4 June 1998, the MEA took exception to the CCTA's position on several grounds. In particular, the MEA noted that the Court dismissed Ontario Hydro's application for leave to appeal without providing any reasons for its decision. In addition, the MEA argued that the Court's decision does not form a binding precedent and is not a ruling on the validity of the constitutional and statutory arguments made to the Commission. The MEA noted that some of the submissions made by the MEA in the instant case differ significantly from those advanced to the Court by Ontario Hydro and the leave sought there was to appeal an interim order, not a final order.

23.The MEA also submitted that the CCTA's letter of 3 June 1998 presents further legal submissions after the close of the proceedings, is consequently a breach of procedural fairness, and should not be considered.

24.The Commission has determined that the aforementioned letters should be considered part of the record of the proceeding. The Court's decisions represent a change in circumstances which occurred after the close of the record of this proceeding and which the parties could not have addressed previously. The Commission considers that the allegation of procedural unfairness raised by the MEA is without merit since the MEA has had the opportunity to, and did, fully respond to the CCTA's position.

25.The Commission acknowledges that the Federal Court's decisions relating to the UMG v. Ontario Hydro interim decision do not represent a binding precedent on the jurisdictional issues raised in the present application. Accordingly, the Commission has made its final determination in the present case based on its own merits, giving due consideration to all arguments raised by the parties to this proceeding, including the jurisdictional arguments similar to those raised in the UMG v. Ontario Hydro matter.

Issues

26.In its application, the CCTA asked the Commission to grant the cable companies access, on a final basis, to the municipal power utilities' support structures on the same terms and conditions as applied in 1996, with the exception that the annual pole rental rate be set at $9.60 per pole per year.

27.The main issues raised in the submissions relating to the application for final relief are as follows:

(a) the Commission's constitutional and statutory jurisdiction under subsection 43(5) of the Act;

(b) an alleged breach of procedural fairness;

(c) the need for regulatory intervention;

(d) the appropriate pole costs and pole rental rate;

(e) the non-monetary terms of the support structure agreement;

(f) other causal costs due to cable company attachments on utility poles; and

(g) the pole rental rate for the PUCs not represented by the MEA.

A.The Commission's Constitutional and Statutory Jurisdiction under Subsection 43(5) of the Telecommunications Act

1.Jurisdictional Issues Raised by the Parties

28.The Commission notes that the MEA has, throughout this process, consistently maintained that the Commission is without statutory and constitutional jurisdiction to grant the relief requested. The CCTA has also maintained its position that the Commission has jurisdiction to grant the relief requested.

29.In its final submissions, the MEA reiterated its position, and repeated and relied on its submissions at the interim stage. In its reply submissions on final relief, the MEA raised further jurisdictional arguments including submissions with respect to the interpretation of the expression "other public place", in subsection 43(5) of the Act, and the related issue of support structures located on private land.

30.The MEA's submissions focused upon the following two jurisdictional issues:

(i)The Commission's statutory jurisdiction pursuant to subsection 43(5) of the Act to make the Orders requested by the CCTA; and

(ii)Parliament's constitutional jurisdiction to adopt and the Commission's constitutional jurisdiction to apply subsection 43(5) in the manner requested by the CCTA.

31.In addition, the MEA submitted that the Commission's decision in the UMG v. Ontario Hydro matter dated 27 March 1997, which involved similar questions as arise in the MEA's case, although the factual foundation is different, was incorrect. The MEA further noted that the Commission's decision in the UMG v. Ontario Hydro case was a "preliminary" decision and that

the Commission made clear that it was making that decision on the basis that it could, after a full argument by the parties, arrive at a different conclusion concerning jurisdiction. In the MEA's view, this was an appropriate qualification as extensive submissions and constitutional facts were not available to the Commission at that time.

32.In its final submissions, the CCTA relied on its interim submissions and on the reasons given in the Commission's decision in the UMG v. Ontario Hydro matter, and made additional arguments including submissions relating to the interpretation of "other public place".

33.Both CNP and Deep River objected to the Commission intervening in this matter. CNP argued that subsection 43(5) did not apply because the poles are not public assets, many of the poles are located on property owned by CNP and the allegation that the cable companies cannot obtain access to support structures on terms acceptable to them was wholly subjective and one-sided. Deep River submitted that the Commission should ensure that further negotiations continue, resorting to mediation if necessary.

2.Position of the CCTA and the MEA: Constitutional Jurisdiction

34.The MEA submitted that subsection 43(5) is outside the constitutional jurisdiction of the federal Parliament and is properly a matter for the provincial legislatures.

35.In this regard, the MEA raised the following arguments:

(a) municipal power utilities are creatures of provincial statute and are responsible to their local municipalities;

(b) the MEA's members are intensely and exhaustively regulated by Ontario Hydro;

(c) a complex legislative scheme applies to the activities of Ontario's municipal power utilities;

(d) many Canadian provinces have established regulatory schemes for the regulation of power utility pole attachments;

(e) numerous factors contribute to the decisions and standards applicable to power utility pole attachments;

(f) Electricity is dangerous and pole attachment activities must remain within the power of the MEA's members in order to ensure the safety of the workers and the public, and the technical reliability of the power distribution system; and

(g) The municipal power utilities and the cable television industry have a long-standing

relationship and a history of negotiated agreements.

36.In addition, the MEA argued that circumstances have changed since the Supreme Court decided in the late 1970s that because cable companies were single indivisible undertakings, all of the functions of the cable companies, including the system for the distribution of signals, fell under federal jurisdiction. The MEA submitted that the Supreme Court's original decision requires review.

37.The MEA noted that cable companies have been found by the Commission to have a dual nature, to be both broadcasting and telecommunications undertakings. Furthermore, the MEA noted that, while there was some sense in finding that the entire undertaking was connected and indivisible in the past, cable companies now no longer have to own their distribution facilities. In other words, while the reception of signals may still be essential to the cable company, a cable company may lease the entire distribution network such that the network may be entirely within a single province's boundaries. In this regard, the MEA noted that a similar division occurred in the case of Ontario Hydro where the Supreme Court of Canada found that Ontario Hydro's nuclear facilities fell within federal jurisdiction but the system for the distribution of power and conventional power generating facilities were provincial in nature.

38.The MEA further argued that subsection 43(5) does not have any connection to federal jurisdiction. There is no mention of any federal undertaking or any work or object of a federal nature, unlike the rest of sections 42 and 43 which mention "Canadian carriers" and "distribution undertakings". While the MEA submitted that a provision may be subsumed within federal jurisdiction when it is closely connected to a federal statutory scheme, it argued that this close connection is subject to attack.

39.The MEA submitted that the Supreme Court of Canada's test in General Motors v. City National Leasing4, stands for the principle that a very close connection must exist between the provision and the Act as a whole where provincial powers are heavily affected by federal legislation as in the case of subsection 43(5). In this regard, the MEA submitted that subsection 43(5) is easily severable from the rest of the scheme. There is no evidence that cable companies would not be able to operate without subsection 43(5). Moreover, subsection 43(5) can be read down so that it does not apply to provincial power utilities.

40.The MEA noted that an elaborate and complex series of provincial statutes and regulations govern all of the activities of the PUCs in Ontario and ties them to municipalities. While the PUCs are responsible for control and management of the utilities, the municipalities, pursuant to the Municipal Act, and Ontario Hydro play a role in the control of the property and finances of the PUCs. In the MEA's view, anything that affects PUCs affects this provincial legislative scheme. The access and conditions requested by the CCTA to the power utility poles would affect their core activities.

41.The MEA submitted that the distribution of power, due to the danger involved, does not leave a wide margin for error. The Commission's involvement in the power industry is not only about price but also about conditions of access. In the MEA's view, there is an elaborate provincial scheme to ensure that electricity flows to consumers safely, effectively and efficiently and this system must be preserved even if as a result some inconvenience is incurred by cable companies.

42.In response, the CCTA noted that while the Commission has found that cable companies may have a dual nature, as they may act as both broadcasting undertakings and telecommunications common carriers, cable companies are subject to federal jurisdiction under both aspects of their dual nature.

43.The CCTA argued that there is no doubt that Parliament has the constitutional authority to affect property rights in connection with the regulation of Canadian carriers and distribution undertakings. In this regard, the CCTA noted that section 43 establishes a complete legislative regime to enable Canadian carriers and distribution undertakings to construct, operate and maintain their transmission lines. Subsections 43(2) to 43(4) deal with situations where it is necessary to construct support structures for transmission lines while subsection 43(5) deals with support structures that already exist. All of these provisions are within the legislative competence of Parliament.

44.The CCTA argued that the analytical approach set out in the test advanced by the MEA as applied in General Motors v. City National Leasing has no application to telecommunications. The CCTA submitted that even if the test is relevant, subsection 43(5) is an integral element in the general legislative scheme under section 43 for the construction of transmission lines by Canadian carriers and distribution undertakings and ensures that support structures are shared whenever possible, thereby avoiding needless expense and public inconvenience. In the CCTA's view, it is not only reasonable for the Commission to have jurisdiction in the present situation, it is necessary.

3.Position of the CCTA and the MEA: Statutory Jurisdiction

45.The MEA submitted that subsection 43(5) displays multiple ambiguities and its ordinary meaning is unclear. In particular, the MEA submitted that words and phrases such as "person", "supporting structure of a transmission line", "other public place" and "conditions" are ambiguous. In the MEA's view, these ambiguities require going beyond their ordinary meaning.

46.The MEA submitted that, because subsection 43(5) is unclear, it is important to examine Parliament's intention when it drafted the provision. The MEA argued that, while the Commission chose the dictionary approach in the UMG v. Ontario Hydro decision, it should have examined the statutory context of the provision. In this regard, the MEA submitted that the two elements of statutory context are the immediate context of the word or phrase as well as the use elsewhere in the statute of the particular terms considered ambiguous.

47.The CCTA argued that the Commission did not err in relying on the ordinary meaning of subsection 43(5) in the UMG v. Ontario Hydro decision. The CCTA noted that the Commission also considered and adopted the statutory context, which supports the interpretation advocated by the CCTA in the present proceeding. In the CCTA's view, the purposive interpretation of subsection 43(5) would support an expansive interpretation in view of the obvious purpose of this section which is to promote the sharing and efficient use of support structures. The CCTA noted that in the UMG v. Ontario Hydro decision, the Commission describes the legislative history of subsection 43(5) and from this description, it is clear that subsection 43(5) represents an integral element in a coherent legislative scheme to address support structure issues and an attempt to accommodate provincial concerns regarding the possible proliferation of support structures.

48.The MEA argued that, based on section 4 of the Act, the "person" who provides a public service cannot be a distribution undertaking because subsection 43(5) does not explicitly include distribution undertakings. The MEA noted that Parliament referred to "Canadian carriers" and "distribution undertakings" in other related provisions of sections 42 and 43 but switched to dealing with "person" in subsection 43(5). Furthermore, the MEA submitted that the word "person" was ambiguous in view of the use of the word "fournisseur" in the French version, rather than a term equivalent to "person". The MEA argued that if one applies the purposive approach in interpreting the Act, subsection 43(5) should properly be interpreted to allow non-broadcasting entities to gain access to the poles that Canadian carriers and distribution undertakings were given the power to construct under sections 42 and 43. Subsection 43(5) was not meant to allow the Commission to make orders against organizations outside the federal sphere of influence.

49.The CCTA submitted that the MEA's interpretation of the word "person" lacks both merit and relevance. In the CCTA's view, there is no dissonance or incongruity between the French and English phrases. Both refer in general terms to a supplier of services to the public. It is clear that a cable company qualifies as a "person who provides services to the public" or as "le fournisseur de services au public".

50.The MEA argued that the UMG v. Ontario Hydro decision was incorrect in finding that the absence of qualification of the term "transmission line" in subsection 43(5) indicated Parliament's intent to include a more general type of transmission line. The MEA submitted that the terms "transmission line" and "supporting structures", when examined in the context of the statute itself, should be interpreted as telecommunications transmission lines and supporting structures. In the MEA's view, power utility poles themselves are outside the Commission's statutory jurisdiction.

51.The MEA submitted that because other subsections of the Act specifically refer to "transmission line" as being qualified in the context of telecommunications carriers or distribution undertakings, the use of the phrase "transmission line" in subsection 43(5) similarly must refer to a telephone line or a cable distribution wire rather than a power line. In the MEA's view, such an interpretation retains the consistent meaning of the phrase "transmission line" throughout the statute. Furthermore, the MEA submitted that the similarity between the terms "transmission facility" and "transmission line" would indicate that the transmissions with which the Act is concerned involve intelligence or data and not electrical power. In addition, the MEA submitted that the Commission's reliance, in the UMG v. Ontario Hydro decision, on Parliament's use of the term "telecommunications line" in the definition of "international submarine cable" as an indication of the scope of "transmission line" in subsection 43(5), was flawed. In the MEA's view, the use of "telecommunications line" was an attempt by Parliament to emphasize the transmission and receiving elements of such a line, as opposed to merely defining it as a transmission line. Thus, there was a reason why Parliament used the term "telecommunications line" in the submarine cable context and this reason has no bearing on subsection 43(5).

52.The MEA further submitted that the phrase "supporting structure of a transmission line" should be interpreted in the context in which it appears such that not only should "transmission line" be interpreted as a telecommunications transmission line, but "supporting structures" should be limited to telecommunications supporting structures. Thus, it is irrelevant whether cable distribution wires are already attached to some power utility poles; the power utility poles themselves are outside the Commission's jurisdiction because they are not telecommunications "supporting structures".

53.The MEA noted that subsection 43(5) was added after Second Reading of Bill C-62 without any real parliamentary discussion. Neither subsection 43(5) nor any provision similar to it appeared in the Railway Act, the predecessor to the Telecommunications Act, or in related telecommunications legislation. In the MEA's view, it is not clear on the record why the provision was added or what mischief it was meant to remedy. Whatever the purpose, Parliament could not have intended that "transmission line" include wire transmitting raw electrical power wholly within a province or that "supporting structure" include power utility poles.

54.The CCTA argued that the alleged ambiguities raised by the MEA are nothing more than attempts to obscure the plain meaning of a simply worded provision. In the CCTA's view, there is no ambiguity in the use of the term "transmission line" and the phrase "supporting structure", and both are sufficiently broad to include power utility lines and poles.

55.The CCTA argued that the use of the more general term "transmission line" in subsection 43(5), without the qualitative adjective "telecommunications" or qualifying terms such as "of a Canadian carrier" found elsewhere in the Act, indicates that Parliament wished the term to be given its ordinary, broad meaning. If Parliament had intended to refer to a line solely for the purpose of emitting, transmitting or receiving intelligence in subsection 43(5), Parliament would have used the term "telecommunications line", as it did in the definition of "international submarine cable".

56.The CCTA submitted that the MEA's argument to the effect that "supporting structures" must be read as "telecommunications supporting structures" because power utility poles are outside the Commission's jurisdiction is circular and has no merit. In the CCTA's view, the ordinary meaning of "supporting structure of a transmission line" includes a power utility pole.

57.The MEA submitted that the phrases "highway" and "other public place" provide each other with context. In the MEA's view, Parliament intended that the type of "public place" in question share the same type of public access as that of a "highway" and, therefore, a right-of-way would not be the type of "other public place" contemplated by Parliament.

58.The MEA further submitted that, in law, a right-of-way over private land held by a municipal power utility does not confer a public right of access and is not the type of "other public place" contemplated by Parliament. In the MEA's view, the phrase "other public place" cannot be reasonably interpreted to include private land.

59.The MEA noted that many power utility poles are located on private land. The proportion of power utility poles on private land is specific to each PUC and varies tremendously. A portion of these power utility poles are located on easements granted to a PUC while others are in place pursuant to an agreement between land owners and PUCs. In its view, the application of subsection 43(5) to private places would constitute a form of illegal expropriation.

60.The CCTA submitted that, contrary to the narrow interpretation advanced by the MEA, the term "other public place" must be read in the context of subsection 43(5) and not merely in relation to the term "highway". The purpose of subsection 43(5) is to promote the sharing and

efficient use of existing support structures. Given this purpose and given that Parliament is presumed to have been aware of the location of support structures on public utility rights-of-way, it would be entirely inappropriate to read "other public place" as being a location which must have the same type of public access as a "highway" as suggested by the MEA.

61.In the CCTA's view, subsection 43(5) must be given its plain meaning and interpreted as applying to support structures owned by power utilities. The CCTA submitted that if this interpretation were not adopted, there would be a significant and unjustifiable gap in the scheme established under section 43. In support of this argument, the CCTA noted, for example, that almost all poles (approximately 95%) in Alberta are owned by power utilities. In Newfoundland, power utility poles are interspersed with poles owned by the telephone company, NewTel Communications Inc., making it futile to grant access to the NewTel poles alone.

62.The CCTA submitted that, in the context of subsection 43(5), the phrase "other public place" must be taken to include public utility rights-of-way and easements. In the CCTA's view, Parliament must be presumed to know that a certain percentage of support structures owned by either power utilities or telephone companies are located on public utility rights-of-way in many provinces. The CCTA further submitted that it would make no sense for Parliament to establish a regulatory regime which would require a cable company to construct a new line of support structures on a highway when support structures with spare capacity already exist on a nearby public utility right-of-way. Under such a scenario, the Commission could grant relief in respect of the majority of the support structures but not with respect to the exceptional few. Parliament could not have intended such a haphazard access regime.

63.The CCTA further submitted that if poles on public rights-of way or easements were not included, then attachments to such poles could be subject to excessive rates and other unreasonable terms of access and could have the effect of counterbalancing the overall effect of reasonable rates and terms imposed by the Commission, contrary to Parliament's intention.

64.The CCTA also argued that a public utility right-of-way cannot be dedicated as private property in the usual sense. It is land dedicated to a public purpose; namely, the placement of public utility facilities to permit the delivery of utility services for the benefit of the public. The public purpose remains the same whether the right-of-way is statutory or consensual. Support structures located on a public utility right-of-way may be used for more than one public purpose and this does not alter the public nature of such a right-of-way. In the CCTA's view, the public purpose of a public utility right-of way renders it a "public place" for the purpose of subsection 43(5) and is consistent with the purposive interpretation of the phrase.

65.The CCTA submitted that according to the evidence of the MEA, 92% of the support structures which are subject to the agreements between the power utilities and the cable companies are located on the road allowance of highways and streets. The remaining 8% of the MEA's members' support structures are situated on property that is subject to a statutory or consensual public utility easement or right-of-way.

66.In its response to the CCTA's final submissions, the MEA focused upon the proposition that subsection 43(5) only applies to public places and not to private land. In this regard, the MEA confirmed that 92% of joint use power utility poles of 18 of the Respondents are located on the road allowances of public streets and highways.

67.The MEA submitted that the CCTA's assumption that the remaining power utility poles are set on property "which is subject to a statutory or consensual public utility right-of-way or easement is unjustifiable and without evidentiary foundation". In particular, the MEA indicated that "some power utility poles are located on public property, but in many cases, power utility poles are located on private land without the benefit of a right-of-way or easement. In some cases specific landowners have allowed power utility poles to be located on their land without granting a right-of-way". In the MEA's view, the CCTA has attempted to gloss over the property ownership issues implicit in its proposed interpretation of subsection 43(5) of the Act.

68.In the MEA's view, allowing a government agency to order the use of private land for a public purpose is a form of expropriation. The MEA submitted that such expropriation by the Commission is allowed, pursuant to section 42, in very limited circumstances and that, in order for subsection 43(5) to be applicable to private land, federal authorities must officially expropriate the land and make it a "public" place. This, in the MEA's view, would entail fair compensation. In addition, the MEA submitted that the entire scheme of section 43 only allows the Commission to make orders concerning public land and that Parliament has specifically avoided granting the Commission expropriation powers in situations to which section 43 applies.

69.The MEA argued that public places have been defined in other contexts as places the public may go or where an invitation has been tendered for the public to enter on the land. In the MEA's view, private land occupied by power utility poles does not imply that the public has been invited to enter the land. In addition, the MEA added that a municipality is a corporate entity that is not the public and therefore, land occupied in part by municipal electric power utilities that are owned by private land owners remains private because the right-of-way does not allow other people to enter the land.

70.In addition, the MEA argued that the appropriate extent to which the parties are required to negotiate in good faith before approaching the Commission for an order is unclear.

71.The CCTA submitted that the MEA's argument relating to the degree of negotiation between the parties before approaching the Commission is both irrelevant and without merit. In this regard, the CCTA stated that there is no doubt that there were extensive negotiations on the access issue.

72.The MEA stated that it is unclear to what extent the "conditions" that the Commission would impose can cover elements of an agreement that usually would be freely negotiated between the parties. In addition, the MEA submits that it is unclear whether these "conditions" can have an impact on industries, such as the electrical power industry, that fall outside the Commission's purview.

73.The CCTA submitted that the phrase "any conditions" is unambiguous and must of course relate to access to support structures. The CCTA indicated that this phrase clearly encompasses the terms of a support structure agreement which is within the Commission's expertise. The CCTA noted that it has not requested any conditions that could be construed otherwise.

74.The MEA further submitted that there is a presumption in law that Parliament's intention with regard to a particular provision is to avoid absurd results. It is absurd to suggest that Parliament

intended that the Commission "regulate" power utilities or have the power to write the entire contract for cable companies to make use of power utility poles. The MEA added that the Commission does not have the expertise to administer all of the safety and technical standards involved in the distribution of power. Moreover, if a broad interpretation is taken of subsection 43(5), the MEA submitted that the Commission could end up regulating the access of an advertiser ("person") stringing signs near roadways to poles that support pneumatic tubes between government offices ("support structures" of a "transmission line").

75.In the CCTA's view, there is nothing absurd about the Commission having jurisdiction over the terms of access to power utility poles. Such jurisdiction does not amount to administering all of the safety and technical standards involved in the distribution of power, as advanced by the MEA. The CCTA acknowledges that safety and technical standards already exist and would need to be taken into account.

76.Furthermore, the CCTA submitted that the present application is not one where the Commission is faced with a choice between public safety and cable television service. The CCTA noted that the Applicants have asked the Commission to grant them permission to have access to the support structures of the Respondents on terms based on the agreement that was in place for a number of years prior to 1997.

4.Position of Other Parties: Constitutional and Statutory Jurisdiction

77.As noted above, in addition to the comments and reply comments received from the CCTA and the MEA, the Commission has received comments relating to the jurisdictional questions from CNP, Saskatchewan Power Corporation, TransAlta, UMG, Ontario Hydro, Telus and Stentor on behalf of BC TEL, Bell Canada and MTS NetCom Inc., as interested parties.

78.Both Saskatchewan Power Corporation and TransAlta filed, at the interim stage, brief comments supporting the position of the MEA. Although their comments were filed late, the Commission determined that they should be accepted as part of the interim relief record. While both parties reserved the right to participate more extensively on final relief, there were no submissions received at the final stage.

79.UMG took the position that the Parliament of Canada enjoys the necessary jurisdiction to enact both subsections 42(1) and 43(5) of the Act and that on correct reading, both apply to allow the Commission to impose the relief sought. Ontario Hydro submitted that the relief should be denied because the Commission would be without statutory and constitutional jurisdiction. Ontario Hydro maintained that the intent of subsection 43(5) is, clearly, to provide a remedy for a person that provides a public service which cannot gain access to the distribution facilities of a telecommunication company within the jurisdiction of the Commission. Ontario Hydro submitted that even if the federal government did have jurisdiction to enact legislation relating to a provincial electrical distribution system, subsection 43(5) of the Act does not give the Commission such jurisdiction.

80.Stentor submitted that Parliament has the constitutional authority to legislate with respect to access by Canadian carriers and distribution undertakings to support structures owned or operated by provincially regulated utilities. Stentor submitted, as well, that subsection 43(5)

applies to situations in which a Canadian carrier or a distribution undertaking cannot gain access on terms acceptable to it, to support structures located on a highway or other public place owned or operated by provincially regulated public utilities.

81.Stentor suggested that the term "transmission line" in subsection 43(5) should be interpreted to mean a telecommunications transmission line. This interpretation would be internally consistent with the entirety of section 43. Canadian carriers and distribution undertakings construct telecommunications transmission lines, not electrical transmission lines. Accordingly, a fair interpretation of subsection 43(5) is that if a support structure of an electrical utility is constructed on a highway or other public place, a person who provides services to the public (i.e., a federally regulated Canadian carrier or distribution undertaking or other public utility) requiring access to such a structure to support a telecommunications transmission line may apply to the Commission for access if such a person cannot gain access on acceptable terms.

82.Stentor submitted that subsection 43(5) is, in pith and substance, legislation "in relation to" federal works and undertakings and telecommunications, and that it may validly affect issues of property and civil rights within a province. In this regard, Stentor noted that subsection 43(3) and its predecessors have long done so with respect to municipalities and submits that there is a clear and rational connection between a valid purpose of the Act and the need for access to support structures. Accordingly, Stentor submitted that subsection 43(5) of the Act is valid federal legislation, notwithstanding its incidental effect on property and civil rights within a province.

83.Stentor added that while it is clear that the Commission has jurisdiction to address disputes regarding access to support structures, it would be inappropriate to conclude that the Commission should regulate the provision of access to support structures owned or operated by the municipal utilities on an ongoing basis. In Stentor's view, subsection 43(5) was intended to provide the Commission the ability to resolve disputes on a case by case basis, as the National Transportation Agency and its predecessor agencies had done under provisions analogous to subsection 43(4) in the Railway Act and prior to the coming into force of section 104 of the Telecommunications Act.

84.Telus submitted that the term "transmission line" in subsection 43(5) was intended to mean a telecommunications transmission line. Hence, in its view, any supporting structure which carries a telecommunications transmission line falls within the Commission's jurisdiction under subsection 43(5). The broad language used in that subsection indicates that it is intended to deal with supporting structures upon which telecommunications lines are carried irrespective of the ownership of the supporting structures.

85.Telus also noted that the Commission is guided by the objectives enshrined in section 7 of the Act, including: to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions, to render reliable and affordable telecommunication services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; and, to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications. In Telus' view, the adoption of a restrictive interpretation of subsection 43(5) where only supporting structures owned by Canadian carriers would be subject to the Commission's jurisdiction would be contrary to the broad language of the provision and would deprive the Commission of the means to fulfil the very objectives of the Act.

86.Telus indicated that there are no cases5 applying the doctrine of interjurisdictional immunity to federal laws in order to protect provincially incorporated companies or provincially regulated undertakings from the extension of federal laws to the status or essential powers of these undertakings. Telus submitted, however, that it is difficult to see how subsection 43(5) of the Act would be regarded as affecting the status or essential powers of the provincially regulated power utilities. In Telus' view, the constitutional analysis ought to focus on whether the Act may have an incidental or ancillary effect on a provincial undertaking.

87.Telus submitted that the Act is clearly legislation in relation to a matter of federal competence and that, if subsection 43(5) is valid federal legislation that is in "pith and substance" a law that is in relation to a matter within the competence of Parliament, it may validly have an incidental effect upon property and civil rights within a province. On fair reading, subsection 43(5) would only affect provincial poles that have already been used to carry transmission lines. The right that is granted is merely access, not an easement, and presumably does not interfere with the operation of the power poles. This, in Telus' view, amounts to a very minor encroachment. Accordingly, the test for determining how necessary the impugned provision is to the otherwise valid legislative scheme involves determining whether there is a rational, functional connection between subsection 43(5) and the valid part of the Act, which is the regulation of telecommunications and the deployment of transmission lines.6 In this regard, Telus submitted that access to supporting structures already carrying transmission lines is rationally and functionally connected with the regulation of telecommunications and concluded that subsection 43(5) is valid federal legislation notwithstanding its incidental effect upon property and civil rights within a province.

5.Analysis and Conclusion on Jurisdiction

88.The Commission has carefully considered the submissions made by the parties with regard to its constitutional and statutory jurisdiction. Although the facts giving rise to this application differ from those in the UMG v. Ontario Hydro matter, many of the jurisdictional arguments raised in this proceeding are similar to those raised there. Upon further consideration of these arguments in this proceeding, the Commission has, to some extent, made a final determination that is identical to the preliminary findings outlined in the UMG v. Ontario Hydro interim decision. The Commission's determination on its statutory and constitutional jurisdiction is set out below.

5.1 Constitutional Jurisdiction

89.Pursuant to subsection 52(1) of the Act, the Commission may, in exercising its powers and performing its duties under the Act, determine any question of law. In light of the applicable case law, such an express power enables the Commission to examine and rule upon the constitutional validity of a statute that it is called upon to apply.7 If the Commission considers that a provision is constitutionally invalid, it can treat the statutory provision as having no force and effect.

90.In order to properly assess the validity of subsection 43(5), it is necessary to first proceed to the determination of the content or subject matter of the law in order to properly characterize the "pith and substance" of the provision and assess whether it is in relation to a matter within

federal jurisdiction. The characterization of the law involves not only considering the legal effect of the provision but also inquiring into the purpose the statute was enacted to achieve.8

91.Pursuant to section 47 of the Act, the Commission must exercise its powers and perform its duties under the Act and any special Act with a view to implementing the Canadian telecommunications policy objectives outlined in section 7 of the Act. The Commission considers that there is a direct relationship between the policy objectives and the underlying purpose subsection 43(5) is designed to achieve. In particular, the Commission notes that, pursuant to section 7, it is to exercise its powers under the Act with a view to implementing, amongst others, the following objectives: to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada; to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; to enhance efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and, to respond to the economic and social requirements of users of telecommunications services.

92.The Commission is of the view that subsection 43(5) of the Act is a validly enacted provision within the legislative authority of the Parliament of Canada. It provides a statutory remedy to distribution undertakings, Canadian carriers and other persons who provide services to the public. It applies in circumstances where those undertakings have been unable to negotiate terms and conditions, acceptable to them, which would allow them to gain access to supporting structures located on a highway or other public place in order to install or maintain new and existing plant. The Commission considers that subsection 43(5) of the Act is properly characterized as being designed to encourage joint use of existing supporting structures in order to facilitate the efficient deployment of the distribution plant of cable distribution undertakings, Canadian carriers and other persons who provide services to the public. The Commission considers that this provision applies when the applicant or, the respondent or both are federal undertakings contemplated by either the Telecommunications Act or the Broadcasting Act.

93.The Commission considers that section 43 provides a comprehensive legislative scheme in that it contemplates not only the construction of transmission lines but also access to existing supporting structures. It is of the view that the inability of Parliament to put into place a comprehensive legislative scheme in order to allow for the orderly deployment of distribution networks and the efficient joint use of existing support structures located on a public place, by either a cable distribution undertaking or a Canadian carrier, would affect a vital and essential part of the management, location, design and operation of those federal undertakings. Subsection 43(5) ensures that support structures are shared whenever possible, thereby avoiding unnecessary expense and public inconvenience.

94.The Commission has determined that subsection 43(5) of the Act is, in pith and substance, legislation in relation to a matter of federal competence, namely federal works and undertakings. Parliament's exclusive jurisdiction over broadcasting (including cable distribution) has been clearly established by the courts.9 Pursuant to those authorities, a cable distribution system is part of an indivisible communications undertaking within the legislative competence of Parliament. Similarly, the Courts have found that Parliament has exclusive jurisdiction over interprovincial and international telecommunications undertakings, including companies who operate in a single Province but whose undertakings extend beyond the limits of the Province through their interconnection with the public switched telephone network or otherwise.10 Because distribution undertakings provide both broadcasting and telecommunications services, these undertakings are subject to federal jurisdiction under both aspects of their dual nature.

95.The Commission considers that subsection 43(5) is integral to the federal legislative scheme relating to broadcasting distribution and telecommunications. The communications system of a distribution undertaking, including the coaxial or fibre optic cable and associated equipment, represents a fundamental element of the undertaking's operation in broadcasting and telecommunications. Without the communications system, a distribution undertaking cannot provide services to the public or meet its obligations under the Broadcasting Act. A distribution undertaking must have access to support structures in order to maintain and upgrade existing plant as well as extend its system to new customers and service areas. Such maintenance, upgrades and service extensions are required to meet the Applicants' existing regulatory obligations under the Broadcasting Act, as well as to permit the Applicants to compete effectively in the supply of broadcasting and telecommunications services. Contrary to the MEA's suggestion, the communications system forms an integral and indivisible part of the undertaking's operations whether in broadcasting or telecommunications. Furthermore, the denial of access to supporting structures may force the distribution undertaking to discontinue its service to the public which it is licensed to serve or result in the unnecessary duplication of supporting structures, the cost of which would ultimately be borne by subscribers.

96.In the Commission's view, the transmission lines of a distribution undertaking are a vital part of its operations just as they are a vital part of a telephone company.11 As noted by Martland J. in the Supreme Court of Canada's decision in Quebec (Commission du salaire minimum) v. Bell Telephone Co. of Canada12, an undertaking is not a physical thing, but is an arrangement under which physical things are used and, where matters are a vital part of the operation of an interprovincial undertaking as a going concern, such matters are subject to the exclusive legislative control of the federal Parliament.

97.As noted by Telus, under the pith and substance doctrine, a law that is classified as being "in relation to" a matter within the competence of the enacting body may have an incidental or ancillary effect on matters outside the competence of the enacting body. With respect to these incidental or ancillary effects, legislative power is concurrent rather than exclusive, but the presence of valid federal legislation will in any event force out provincial legislation through principles of paramountcy. Under this analysis, if subsection 43(5) of the Act is, in pith and substance, legislation "in relation to" a matter of federal jurisdiction, it may validly affect issues of property and civil rights within a province.13 The Commission notes, for instance, that although the Respondents are regulated under provincial legislation, certain aspects of their activities may be subject to the jurisdiction of Parliament on the basis that the matter is integral to federal jurisdiction.14 The existence of valid provincial jurisdiction over intraprovincial power utilities does not render them immune from valid federal legislation in the present circumstances.

98.The powers conferred on the Parliament of Canada under subsections 91(29) and 92(10) of the Constitution Act, 1867 have been widely construed in relation to the purpose and the interests which the federal legislation is formulated to achieve. For example, Parliament's jurisdiction over federal undertakings has been consistently found by courts to include the jurisdiction to confer upon them the right to enter upon the streets and highways of municipalities, without their consent, in order to construct conduits, lay cables or erect poles.15 The jurisprudence relating to similar subsections in predecessor legislation is particularly relevant and is clearly applicable to the present legislative scheme found under section 43.

99.The Commission considers that the impugned subsection is not in relation to the

intraprovincial generation or distribution of electricity, which is a matter within provincial jurisdiction as a "local works and undertakings" within subsection 92(10) of the Constitution Act, 1867.16 Legislation which seeks to foster and promote the efficient joint use of poles by federal undertakings is not a colourable attempt to regulate the municipal power utilities' core activities.

100.The Commission is also of the view that the provincial legislative scheme pertaining to municipal power utilities does not displace, but in fact can stand side by side with, the authority conferred upon the Commission by Parliament in section 43 of the Act. Even if there was an inconsistency between the two statutes, subsection 43(5) would be paramount. The Commission, however, considers that no such inconsistency exists in the present case since providing access to the support structures of municipal power utilities represents an ancillary function of these entities. The application of subsection 43(5) does not involve encroaching upon their core activities. Electrical distribution systems have operationally been able to coexist for many decades on the same poles that support distribution and telephone plants.

101.The Commission acknowledges that subsection 43(5) could result in some degree of interference with the contractual or proprietary rights of the public utilities. As submitted by Telus and the MEA, the appropriate test to be applied in determining whether a federal law may validly affect a provincial matter will depend on the degree of encroachment upon the provincial matter. In this regard, the MEA noted that this involves adducing considerable evidence of the degree to which a provision in question affects provincial powers. While the MEA has asserted that the application of subsection 43(5) would result in a significant encroachment into provincial matters, it has not provided the evidence to establish the degree of encroachment which it alleges, despite the opportunity given it to do so in this proceeding.

102.The Commission notes that the "interference" or "encroachment" upon public utilities is limited on the face of the present legislation. In particular, subsection 43(5) only applies where the parties are unable to agree on the terms of a joint use arrangement, only with respect to a right of access to the supporting structures of a transmission line constructed on a highway or other public place, and only for the purpose of providing services to the public. As submitted by Telus, the right that is granted is merely one of access to supporting structures, not an easement, and presumably does not interfere with the operation of the electrical poles. If the Commission must intervene and set terms of access to power utilities' supporting structures, it would necessarily do so in a manner that would not prevent the transmission of electricity in a safe and technically acceptable manner.

103.The Commission agrees with Stentor that it would be inappropriate to conclude that Parliament intended to authorize the Commission to regulate the provision of access to support structures owned or operated by municipal power utilities on an ongoing basis. On plain reading of subsection 43(5) and on the basis of the context in which subsection 43(5) is found, subsection 43(5) is intended to provide the Commission the ability to resolve disputes on a case by case basis.

104.Given the above, the Commission is of the view that any encroachment is of a minor nature. As noted by Telus, the test to be applied to determine how necessary the impugned provision is to the otherwise valid legislative scheme will depend on the degree of encroachment on provincial powers. For minor encroachments, the rational functional test is appropriate; for major encroachments, a stricter test as to whether the provision is truly necessary or essential will apply.

105.The Commission considers that there is a rational and functional connection between a valid purpose of the Act and the need for access to supporting structures. Furthermore, because subsection 43(5) provides a less intrusive alternative to the construction rights contained in the legislative scheme under section 43, the Commission considers that subsection 43(5) is truly necessary or essential to facilitate the efficient and orderly development of a telecommunications system in accordance with the Telecommunications Act and the Canadian telecommunications policy objectives.

106.In light of the above, the Commission has concluded that subsection 43(5) of the Act should not be adjudged to be invalid, inapplicable or inoperable.

5.2 Statutory Jurisdiction

a.Approach to Statutory Interpretation

107.The Commission considers that the terms and phrases in subsection 43(5) must be interpreted based on their ordinary meaning as well as the context of the Act as a whole. It is a well-known principle of statutory interpretation that the words of a statute are to be given their ordinary meaning unless the context requires otherwise.17 Furthermore, the generally accepted approach to statutory interpretation requires that a statutory provision be read in the context of the whole Act, bearing in mind the purpose and the scheme of the Act. This purposive approach has been described as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Act.18

108.This rule has evolved into what is now known as the "modern rule" whereby one must determine the meaning of the legislation in its total context having regard to the purpose of the legislation, the consequences of the proposed interpretations, the presumptions and special rules of interpretation and admissible external aids.19 An appropriate interpretation is said to be one that can be justified in terms of its compliance with the legislative text or its plausibility, its promotion of the legislative purpose or its efficacy and its acceptability in leading to an outcome that is just and reasonable.20

109.Furthermore, the Commission notes that section 12 of the Interpretation Act provides that "every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

110.The Commission has examined the various submissions relating to the interpretation of the words and phrases contained in subsection 43(5) bearing these various principles in mind.

b.Legislative History

111.Sections 42 and 43 are two of a number of provisions included in a part of the Act entitled "Construction and Expropriation Powers" (sections 42 through 46). Section 54 of the National Telecommunications Powers and Procedures Act was the immediate predecessor to section 42, although a similar provision has been in existence in one form or another in the Railway Act since 1888. Predecessor provisions to subsections 43(1) to (4) of the Act were contained in the Railway Act and courts have interpreted those provisions broadly.21 There are no predecessors to subsection 43(5) in the previous legislation. In order to construe this provision in its proper context, in light of the mischief the subsection was intended to address, a review of the submissions, reports and debates leading to the adoption of section 43 of the Telecommunications Act in 1993 [formerly Bill C-62, An Act Respecting Telecommunications (Bill C-62)], while not determinative, is helpful.

112.The questions relating to the joint use of support structures and access to rights-of-way were addressed as early as 1991 by the Local Networks Convergence Committee appointed under the authority of the Minister of Communications. The Committee developed recommendations for changes in government policy and regulation to govern the future evolution of the local telecommunications network infrastructure, and the increasing convergence of the services and markets of telephone companies and cable operators.

113.The Committee's report stated that Government policy, regulation and industry practice have long recognized that there are good economic, environmental and aesthetic reasons for sharing support structures between the telephone and cable industries, as well as others, notably electrical power utilities.22 The report noted that regulatory intervention was required in the early days of the cable industry to order telephone companies to make their support structures available to cable operators on reasonable terms.23 It also indicated that telephone companies have entered into agreements with electrical utility companies to ensure that support structures are efficiently shared in the provision of electrical power and telephone services. In the Committee's view, the duplication of aerial support structures was not economically efficient and could have adverse environmental and aesthetic impacts. The report noted the fact that most electrical and telephone support structures were in place before the emergence of the cable industry and further noted the increased importance of ensuring that measures would be taken to make support structures available to the cable industry. It noted that, while the cooperative arrangements relating to the joint use of support structures had been of value in permitting the sharing of support structures, there was room for improvement. It stated that joint-use arrangements between power utilities, telephone companies and cable operators had successfully precluded the construction of duplicate infrastructures in many areas.

114.The report included a number of recommendations relating to the sharing of support structures:

7. Canadian policy and regulation should continue to promote the sharing of support structures by telephone companies, cable operators and other support structure providers. In this regard, the concept of support structures should be defined more broadly in the future, taking into account new technologies such as fibre optic cables, for which sharing arrangements can improve the efficiency of the local network infrastructure.

8. Government policy and regulation should not prevent the development of joint ventures between telephone companies and cable operators that are aimed at achieving more effective and efficient sharing of support structures.

9. Telephone companies and cable operators should, in conjunction with electrical power utilities, and other providers of support structures, establish better cooperative mechanisms to plan the shared construction and use of support structures. Where necessary, regulators should intervene to ensure that such cooperative mechanisms are developed and implemented and that they function effectively.24 (emphasis added)

115.The report also addressed issues relating to ensuring that cable operators are granted a legal right of access to rights-of-way for the purposes of installing their transmission lines and associated support structures. Representatives of the cable industry had advocated the importance of such rights in situations where access to support structures of telecommunications common carriers, electric power utilities and other providers of support structures was unavailable. Telephone company representatives had expressed concerns that such a right of access to rights-of-way would lead to duplication of support structures. The cable industry had agreed that a right of access on its part to public rights-of-way should only arise if suitable support structures were not available on reasonable terms. The report underlined the importance of joint use of structures as the primary course of action as follows:

In order to prevent unnecessary duplication of support structures, as well as potential environmental disruption and aesthetic problems, government policy and regulation should continue to require cable operators to negotiate with other potential suppliers of support structures to obtain suitable facilities. However, where these negotiations are unsuccessful, it would be reasonable to grant cable operators similar rights of access to public rights of way as telephone companies. At the federal level, these rights, which are currently set out in the Railway Act, are proposed to be simplified and updated by means of clauses 48 and 49 of Bill C-62.25

116.The Committee concluded its remarks with the following recommendation:

10. Cable operators should have the same rights of access to public rights of way as federally regulated telephone companies in circumstances where suitable support structures are not available to them on reasonable terms and conditions from telephone companies, electric power utilities or other providers of support structures.26

117.Prior to tabling Bill C-62 before the House of Commons, the Senate Committee on Transport and Communications undertook to pre-study its subject matter. The submissions made on behalf of the cable companies raised the question of providing them with the same rights of access as telephone companies. With respect to these concerns, the Senate Committee recommended:

> We further recommend that the cable industry should be entitled to the construction powers to be granted all federally-regulated telecommunications carriers, by way of a consequential amendment to the Broadcasting Act.27

118.Following the Senate Committee's report, there were no provisions relating to construction and access by distribution undertakings in Bill C-62. At First Reading in the House of Commons, the provisions relating to construction powers applied only to "Canadian carriers" and not to

distribution undertakings. There was no reference to access to supporting structures.

119.Following Second Reading, submissions were made before the House of Commons Sub-Committee on Bill C-62 of the Standing Committee on Communications and Culture. Several submissions before this Sub-Committee addressed the need to grant the same rights of access to rights-of-way to cable operators as those provided for telephone companies. These emphasized the need to clearly define cable's access to public rights-of-way to include the same recognized legislative power to access public roadways and places as is currently enjoyed by telephone companies in view of the new competitive environment. The submissions specifically referred to access being frustrated or instances where the support structures are unavailable and no other alternative is available to resolve the problem. While such a right of access was said to be implicit under the Broadcasting Act in view of the legal duty to make service available to each household or premise within its licensed service area, the cable operators underlined the importance of having an express right, in view of the increasing convergence and competition in the market. The provinces, on the other hand, raised concerns about a proliferation of undertakings trying to "dig up highways".

120.The Minister of Industry proposed to the Commons Sub-Committee to amend the provisions in the following manner:

> If the subcommittee agrees, clauses 48 and 49 [now sections 43 and 44 of the Act], will be amended so that they apply equally to broadcasting distribution undertakings as defined under the Broadcasting Act. In addition, we will propose an amendment to clause 48 of the bill that will provide for efficient use, by those serving the public, of support structures constructed on public rights of way and require the CRTC to take account of all uses of the right-of-way or other public place prior to issuing any orders under this clause.

121.Accordingly, the section was amended to include reference to distribution undertakings in subsections 43(1)28 to (4), and subsection 43(5) was added in its entirety. The amendments were adopted on Third Reading without any further discussion.

122.Based on the concerns expressed and the comments and recommendations made prior to the addition of subsection 43(5), the Commission is of the view that the underlying intent in adding that provision was to ensure that the granting of construction rights to Canadian carriers and distribution undertakings to build their own infrastructure did not represent the only alternative available to these undertakings where a more efficient use of existing support structures could be made available.

123.The Commission also considers that such an intent can be reasonably inferred from the fact that the exercise of construction rights by Canadian carriers and distribution undertakings is not an unfettered power. Such powers are subject to not "unduly" interfering with "the public use and enjoyment of the highway or other public place" and must be exercised upon obtaining consent from the municipality or other public authority having jurisdiction. Furthermore, where consent is not available and the Commission intervenes, the Commission must have due regard to the use and enjoyment of the highway or other public place by others. In the Commission's view, the pre-existence of supporting structures would be a consideration relevant to the granting of a permission to construct a separate infrastructure. In this respect, it may be said that subsection 43(5) provides a natural complement to subsections 43(2) to 43(4) of the Act.

124.The Commission is of the view that it is reasonable to conclude that the legislative history leading to subsection 43(5) lends support to the proposition that subsection 43(5) was added to address concerns relating to the granting of construction powers which could lead to unnecessary construction on highways and other public places. The legislative history lends support to the proposition explored below, that it is appropriate to construe this subsection broadly to include the supporting structures of all utilities, including electrical power companies. By allowing access to existing supporting structures irrespective of the type of utility owning or controlling such a structure, the adverse environmental, economic and aesthetic impact associated with unnecessary duplication of aerial supporting structures is avoided.

c.Canadian Telecommunications Policy and Other Public Interest Concerns

125.As noted previously, the Commission must, pursuant to paragraph 47(a) of the Act, exercise its powers and perform its duties under the Act with a view to implementing the Canadian telecommunications policy objectives outlined in section 7. Therefore, in interpreting the scope of subsection 43(5), the Commission must have regard to implementing these policy objectives.

126.The Commission notes that there are a number of considerations relating to supporting structures which should be evaluated in light of section 7 of the Act:

(1) The failure to facilitate the orderly development of Canada's telecommunications system would appear to be contrary to the objectives of paragraph 7(a) (strengthening the economic fabric of Canada and its regions);

(2) If duplicate infrastructures are financed and constructed despite the added costs, unnecessary capital and operational costs would ultimately have to be borne by subscribers. Such a result would appear to be contrary to the objectives of paragraph 7(b) (affordable telecommunications services);

(3) The capital costs inherent in the construction of duplicate infrastructures may operate as a barrier to entry and a disincentive for the deployment of networks which are essential to an information-based society and economy. Such a result would appear to be contrary to the objectives of paragraphs 7(a), 7(c) (to enhance the efficiency and competitiveness of Canadian telecommunications) and 7(f) (to foster increased reliance on market forces for the provision of telecommunications services);

(4) The development of duplicate infrastructures also raises the prospect of considerable inconvenience to the public as crews from various service providers go about deploying, maintaining, and altering their separate networks near or under Canadian streets, highways and other public places according to their own schedules. These consequences would appear to be contrary to the objectives of paragraphs 7(c) and 7(f).

127.Historically, the support structures of Canadian electrical power utilities have constituted an important element of Canada's telecommunications system and an important component required

for the delivery of broadcasting services to the Canadian public. Interpreting subsection 43(5) as extending to the supporting structures of electrical power utilities would be consistent with the attainment of the objectives of Canadian telecommunications policy, including facilitating the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions.

128.The Commission has recognized the public interest in the sharing of support structures at least since 1977.29

129.Furthermore, as a result of the telecommunications policy objectives, and particularly paragraph 7(f), the Commission has undertaken a course of regulatory action in order to implement a regulatory framework which places greater emphasis on market forces and competition.30 Similarly, under its jurisdiction pursuant to the Broadcasting Act, the Commission has implemented a framework to encourage competition in the distribution of broadcasting services.31 As a result of competition and the emergence of additional industry players, there will be growing pressures with respect to the construction of new communications support structures and use of existing structures.

130.In Decision 95-13, the Commission clearly stated its policy with respect to joint use of support structures as follows:

The Commission is of the view that it is in the public interest to minimize the number of support structures (poles and conduit) through joint use of those structures, regardless of their ownership. Moreover, the Commission expects that maximizing the use of support structures (in terms of the number of companies using each structure) will help facilitate interconnection and interoperability between Canadian carriers and cable television undertakings. [...]

With respect to the issue of joint ownership of support structures, the Commission notes that, historically, many telephone companies and power companies in Canada have participated in arrangements where each partner contributed to the capital investment. Thus, in some arrangements, the partners have joint ownership of the structure. In such situations, each participant has had a measure of control and influence over the provisioning of the structures. The Commission is of the view that these arrangements appear to have functioned adequately, and sees merit in parties, including cable television undertakings, seeking access to a large number of structures entering into arrangements where they would share in the capital investment and maintenance costs.

131.The construction of distribution infrastructures is required in order to provide telecommunications and broadcasting services to the public. In the Commission's view, an approach that forces each operator to construct its own duplicate infrastructure is not in the public interest. The Commission believes that the development of a proper distribution infrastructure will be as important to the Canadian economy in the 21st century as was the construction of a railway infrastructure in the 19th century.

132.In addition to the policy objectives of the Act, the Commission notes that Parliament has declared at subparagraph 3(1)(t)(ii) of the Broadcasting Act that distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective

technologies available at reasonable costs. The Commission notes that there may also be detrimental environmental and aesthetic consequences linked to the construction of avoidable duplicate infrastructures, particularly with respect to aerial transmission lines. Therefore, apart from the objectives declared by Parliament in the Canadian telecommunications policy, efficient use of existing supporting structures appears to be consistent with the broader public interest.

d.Interpretation of "person who provides services to the public"

133.The MEA argues that subsection 43(5) does not apply to distribution undertakings. The MEA notes that Parliament used the expression "person who provides services to the public" in subsection 43(5) rather than "Canadian carriers" and "distribution undertakings" which are used in the related provisions of sections 42 and 43, and suggests that there is an inconsistency between the word "person" in the English version and the use of "fournisseur" in the French version. The MEA concludes that subsection 43(5) was enacted in order to allow non-broadcasting entities to gain access to the poles Canadian carriers and distribution undertakings were given the power to construct under sections 42 and 43.

134.The Commission considers that the MEA's argument cannot be sustained. Clearly, distribution undertakings provide services to the public. The use of the term "fournisseur" clearly denotes a service provider when read in the context of subsection 43(5). Given the legislative history, the policy objectives of the Act, the plain wording of the subsection and the rest of section 43, the Commission considers that subsection 43(5) provides a statutory remedy to cable distribution undertakings as well as to Canadian carriers and other persons who provide services to the public as part of a comprehensive legislative scheme designed to allow for the orderly deployment of the distribution plant of these entities and the efficient joint use of existing support structures located on a public place. It is the Commission's view that any interpretation of the expression "person who provides services to the public" that excludes distribution undertakings would negatively affect these federal undertakings and would be contrary to Parliament's intent.

e.Need for Prior Negotiation

135.With respect to the appropriate degree to which the parties have to attempt to negotiate before bringing a dispute to the Commission, the Commission is of the view that there is no explicit or implicit statutory requirement to that effect.32 The Commission considers that subsection 43(5) of the Act applies in circumstances where a cable operator is unable, on acceptable terms, to gain access to supporting structures pursuant to an initial support structure agreement. The subsection would also be applicable where, despite the existence of an agreement, the person seeking access is in fact unable to gain access on acceptable terms or is otherwise unable to restore a previous contractual relation.

136.The Commission considers that it is generally sound policy to require the parties to proceed to good faith negotiations prior to seeking a Commission determination. In particular, the Commission's decision of 27 March 1997, which instituted a non-binding dispute resolution process, illustrates the Commission's desire to see prior negotiations occurring. In the Commission's view, it is clear, in this case, that there have been extensive negotiations, that further negotiations will not be fruitful and that the Applicants are unable to gain access on terms acceptable to them.

f.Interpretation of "any conditions that the Commission determines"

137.With respect to the MEA's suggestion that the Commission's jurisdiction to set conditions of access is unclear and perhaps limited, the Commission is of the view that the phrase "any conditions that the Commission determines" is unambiguous and sufficiently broad in scope to allow the Commission to set rates, terms and conditions of access to supporting structures.

138.The Commission acknowledges that Parliament did not intend the Commission's jurisdiction to include the ongoing regulation of the rates, terms and conditions applicable to the use of support structures owned by municipal power utilities but rather, provided the Commission the ability to resolve disputes on a case by case basis.33 Furthermore, it is the Commission's view that the terms of access imposed by the Commission in the resolution of such disputes should continue to apply until the parties can agree otherwise.

139.As noted previously, the Commission considers that the conditions attached to a permission granted under subsection 43(5) must, by necessity, be drafted so as to not prevent the power utility's poles from being used in a safe and technically acceptable manner. This is consistent with the approach taken by the Commission previously in relation to the terms of access to telephone company support structures as stated in Decision 95-13:

The Commission is of the view that the owners of support structures have the right to set and enforce construction standards, provided that those standards are based on safety and technical requirements and do not unreasonably impede access by other telecommunications carriers and cable television undertakings.

g.Interpretation of "transmission line"

140.With respect to the MEA's submission that the use of the phrase "transmission line" refers to a transmission line of a telecommunications common carrier or a distribution undertaking rather than the power line of a public utility, the Commission is of the view that the use of the phrase is sufficiently broad to include electrical transmission lines. The Commission has based its determination upon the ordinary meaning of the phrase as well as upon reading the words in the context of section 43 and the Act as a whole, bearing in mind the purpose and the scheme of the Act.

141.The Commission notes that the Act does not provide a definition of "transmission line". The Commission notes the following dictionary definitions of "transmission line" or "ligne (de transmission)":

> transmission line, a conductor or set of conductors designed to carry electricity (esp. on a large scale) or electromagnetic waves with minimum loss and distortion; [The Oxford English Dictionary, Second Edition]

> transmission line: a metallic circuit of three or more conductors used to send

energy usu. at high voltage over a considerable distance; specif. : a usu. metallic line used for the transmission of signals or for the adjustment of circuit performance and often consisting of a pair of wires suitably separated, a coaxial cable, or a wave guide. [Webster's Third New International Dictionary, 1981]

ligne: III [...] 3º Système de fils ou de câbles conduisant et transportant l'énérgie électrique. Ligne à haute tension. - Spécialt. Ligne électrique assurant les communications par télégraphe ou téléphone. [Le Petit Robert, 1988]

142.Based on these definitions, it may be reasonably concluded that the ordinary meaning of "transmission line" or "ligne de transmission" includes, in addition to the transmission lines of telecommunications common carriers and of cable distribution undertakings, the transmission lines used to distribute electrical power.

143.In addition, the Commission is of the view that such an interpretation is consistent with the fact that elsewhere in the Act the expression "transmission line(s)" is narrowed by being qualified as the transmission line of a Canadian carrier or a distribution undertaking.34 This is particularly relevant in section 43, where subsections 43(2) to (4) contain such a qualification while subsection 43(5) does not.

144.The Commission also notes that Parliament has used the apparently narrower expression "telecommunications line" when it defined, at subsection 2(1) of the Act, the term "international submarine cable".

145.Consistent with the Commission's finding that the words "transmission line" include electrical transmission lines, the Commission is of the view that the expression "supporting structure of a transmission line" in subsection 43(5) is intended to deal with supporting structures carrying transmission lines including the supporting structures owned or controlled by electrical power utilities.

146.The CCTA submitted in its intervention that Parliament must be taken to have been aware of certain facts relating to the ownership of support structures in Canada when the Act was enacted. The Commission notes that cable distribution undertakings have made use of support structures of power utilities since the 1950s. In addition, the poles of power utilities currently constitute a significant component of the distribution networks of both cable and telephone companies across the country. For instance, the CCTA indicated that in Alberta almost all the supporting structures are owned by the power utilities. The CCTA also indicated that in Newfoundland there is a high level of mixed ownership of the poles used to support transmission lines, such that in any stretch of poles some may be owned by NewTel Communications Inc. (formerly Newfoundland Telephone Company Limited) (NewTel), and others by Newfoundland Power. The CCTA argued that it would make it futile to grant access only to the poles owned by telephone companies. In the Commission's view, Parliament could not have intended such a haphazard access regime.

147.Telus' interpretation of subsection 43(5) to the effect that it is intended to deal with situations where telecommunications transmission lines are already occupying support structures is overly restrictive, contrary to the Canadian telecommunications policy objectives and inconsistent with the ordinary meaning ascribed to subsection 43(5). Such a restrictive

interpretation would create a barrier to entry for new competitors in both cable distribution and local telephony, thereby favouring incumbent service providers such as Telus. New entrants would be forced to exercise their construction rights under subsections 43(2) to (4) of the Act in order to build a duplicate network. Therefore, the Commission rejects the narrow alternative interpretation that would require the "telecommunications" transmission lines to be present on the support structures before an application for a right of access can be made pursuant to subsection 43(5).

148.In the Commission's view, the language found in subsection 43(5) is sufficiently broad to mean any existing support structure carrying any type of transmission line. Furthermore, such an interpretation is entirely consistent with section 43 and the Act as a whole. Section 43 of the Act establishes a complete legislative scheme to enable Canadian carriers and distribution undertakings to construct, operate and maintain their transmission lines. Subsections 43(2) through 43(4) deal with situations where it is necessary to construct support structures. Subsection 43(5) addresses the situation where support structures carrying transmission lines already exist. In the Commission's view, to suggest that access under subsection 43(5) is limited to support structures carrying only certain types of transmission lines or support structures owned or operated by certain entities would not only be contrary to the words read in their ordinary sense but would also create an unjustifiable gap in the legislative scheme found in section 43. In view of the object of section 43 and the policy objectives in section 7, the Commission concludes that the phrase "supporting structure of a transmission line" must be interpreted to mean any supporting structure that serves to carry a transmission line and that already exists. The Commission considers that this interpretation is consistent with the public interest and the objectives of the Canadian telecommunications policy.

h.Interpretation of "highway or other public place"

149.The Commission does not accept the MEA's argument that the expression "other public place" must be interpreted narrowly because it follows the word "highway". The MEA's interpretation would mean that "other public place" would have to be in the nature of a highway or something similar and would exclude poles located on a public utility right-of-way. Contrary to the narrower contextual approach suggested by the MEA, the Commission is of the view that, in accordance with generally accepted principles of statutory interpretation, the contextual approach would require the term "other public place" to be read in the context of the whole of the subsection, the section and the Act and not merely in relation to the term "highway". Given the purpose of subsection 43(5), the section and the Act as a whole and given that Parliament must be presumed to have been aware of the location of support structures, it is entirely inappropriate to read "other public place" as being limited to a location having the same type of public access as a "highway".

150.The Commission considers that the phrase "other public place", in light of the purpose and the context of subsection 43(5) and the Act as a whole cannot be limited to land that is necessarily open to the general public. The meaning of "public place" will depend on the specific purpose and legislative context in which it is used. Private ownership is not necessarily incompatible with the conclusion that a place is public. For instance, courts have held that a privately owned property can be a public place if the public or a portion of the public can generally have access to it. For example, the Broadcasting Act excludes from the definition of "broadcasting" a transmission of programs that is made solely for performance or display in a "public place". In that context, sports arenas have generally been considered public places even if privately owned and even though payment may be required for entry. In the case of the Telecommunications Act, there is no clearly applicable precedent.

151.The restrictive interpretation suggested by the MEA would mean that access to a string of poles would be impeded if some poles that are located on a public utility right-of-way or easement were interspersed amongst others located on a "highway". As submitted by the CCTA, this interpretation would result in a form of "jurisdictional hopscotch" in that subsection 43(5) would apply to the majority of support structures, but not to the exceptional few. This would have the effect of entirely frustrating the purpose of subsection 43(5) which is to facilitate and promote the efficient use and sharing of support structures. As noted previously, Parliament must be presumed to have been aware of the location of support structures on public utility rights-of-way or easements. The Commission considers that "highway or other public place" is broader than what the MEA would have the Commission find.

152.The Commission notes that subsection 43(5) deals with access to existing supporting structures. It is not a means to create an easement and cannot serve to create rights of entry upon property where such rights do not already exist or are expressly limited. However, for the purpose of identifying the support structures falling within the scope of subsection 43(5), and in light of the purpose and context of subsection 43(5), the expression "highway or other public place" should be read to include any public utility easement or right-of-way dedicated to the placement of public utility facilities for the benefit of the public.

153.The Commission considers that a supporting structure located on a public utility easement or right-of-way cannot be characterized as being located on purely private property. The right of a public utility in a public utility easement is a conditional right and not an exclusive private right, at the expense and detriment of the public and of other public utilities also charged with the duty of providing a service. The public interest forms an integral part of public utilities. Where one devotes its property to a use in which the public has an interest, one in effect grants to the public an interest in that use, must submit to be controlled by the public for the common good and such property ceases to be juris privati.35

154.The Commission notes that the Ontario Court of Appeal has recognized that the principle establishing an agency relationship between a public utilities commission and a municipality has existed at common law for more than a century.36 It also notes that a statutory agency relationship may also be established under the constituting legislation creating a specific PUC. In the Commission's view, where a PUC acquires an easement, it acquires the easement as an agent for the city. It is a benefit for the distribution system, not only for the actual customers but also for the city at large.37 Accordingly, in view of the fact that public utility easements are acquired to serve a public purpose for the benefit of the general public and not merely for the private use and purpose of individuals, the Commission finds that it is reasonable to include support structures located on public utility easements within the scope of the expression "constructed on a highway or other public place". The fact that a public utility right-of-way is one for the benefit of the municipality at large would lend support to the use of such access rights by cable companies for the benefit of the public at large.

155.The MEA has indicated in its final submissions that some power utility poles are situated on private land without the benefit of a right-of-way or easement. In this regard, the Commission notes that the MEA acknowledges that 92% of the support structures owned by 18 of the municipal power utilities it represents are located on the road allowances of highways or streets.

156.While the CCTA has stated that the remaining 8% are situated on property which is subject

to statutory or consensual public utility easements or rights-of-way, the MEA has indicated, in reply, that "some" of these poles are located on public property, "many" are on private land without the benefit of a right-of-way or easement and, in "some cases", specific landowners have allowed power utility poles to be located on their land without granting a right-of-way.

157.The Commission is of the view that, despite the fact that the MEA is in the best position to provide factual support for their submission, it has failed to provide appropriate evidence to substantiate it, choosing instead to rely on ambiguous words such as "some" and "many" to denote a subset of the remaining 8%. In addition, the Commission notes that, because this was raised at the reply stage, there was no opportunity for the CCTA to comment on the undefined proportion of the remaining 8% of the poles or the extent of this situation.

158.The Commission finds it difficult to surmise that there is no right-of-way with respect to poles, in view of the safety and maintenance requirements of such structures. In the Commission's view, the presence of support structures on private land would by necessity require the owner of the support structure to retain a means to ensure public safety and system security.

159.The Commission notes that PUCs may acquire easements in a number of ways, including transfers of easement from Ontario Hydro, purchases of easement from private land owners, easements received from owners of registered plans of subdivision, easements on lands conveyed as a condition for granting of a consent for severance or as a result of a condition imposed in a site plan control agreement between a private land owner and the Regional Municipality and by way of statutory rights of access. In the Commission's view, it would be reasonable and appropriate for the Commission to apply an evidentiary presumption that de facto public utility easements exist.

160.The Commission considers that the acquisition of limited rights and interests by the public utility to gain access to its support structure through easements, leases, licenses of occupation or permits is not expropriation in the sense that there is no change in ownership of the land. However, the Commission acknowledges that the acquisition of such rights may, in certain circumstances, entail compensation to the land owner, depending on inconvenience, land value, impact on property, loss of production of farm land, etc. and may be restricted to specific uses or users.

161.The Commission recognizes that, when determining the permissible uses of an easement on private land, consideration must be given to a number of circumstances in existence at the time of its creation. Such an assessment would include consideration of the reasonable expectations of the parties, taking into account the nature of the easement, its purpose, the extent of the burden on the land and their expectations as to the normal development of the user and the projected use of the easement. In the absence of evidence to the contrary (such as specific restrictive terms), it may be found that the parties anticipated changes in the future which could affect the use of the easement consonant with changed realities, such as those affecting land use patterns, or technological development.

162.It is the Commission's view that, absent specific restrictions in the terms creating the easement, the cable company's use of a public utility's right-of-way to gain access to power utility poles, being consistent with the underlying purpose of the public utility right-of-way, would not generally constitute an unauthorized enlargement and alteration in the character,

nature and extent of the easements relating to the public utility's supporting structures, especially where the change in the nature or intensity of the use does not cast an unreasonable burden on the land affected. In this regard, the rights attached to each public utility easement will be dependent upon the specific terms under which they were acquired. The terms of the easements must be construed in light of the purposes for which they were intended to be used.

163.The Commission considers that terms of access to the public utility easements are beyond the scope of subsection 43(5), which relates to access to the support structures. Cable distribution undertakings may be required to negotiate with the land owner their own right of access, including compensation, where the terms of access to the public utility easement are specifically restricted in relation to the permitted use or user.

164.The Commission is of the view that it has jurisdiction to grant a remedy pursuant to subsection 43(5) of the Act, subject to any conditions that it determines are reasonable in the circumstances. In particular, the Commission notes that the Applicants are distribution undertakings within the meaning of subsection 2(1) of the Broadcasting Act and are persons who provide services to the public who cannot, on terms acceptable to them, gain access to the supporting structures of transmission lines constructed on a highway or other public place, as contemplated under subsection 43(5) of the Act.

B.Procedural Fairness

165.The Commission is of the view that the MEA's submissions regarding the alleged unfairness of the proceeding resulting from the staff opinion are unfounded.

166.In its final and reply comments, the MEA submitted that the staff opinion has tainted this entire proceeding with unfairness and that the CCTA relied, in large part, on the staff opinion to justify a low pole rental rate. The MEA stated that parties were directed by the Commission to participate in a dispute resolution process in an attempt to settle the dispute without a ruling from the Commission. The MEA added that parties were informed that submissions, as well as the eventual staff opinion would form part of the record placed before the Commission. The MEA further stated that the resulting staff opinion, did not take into account or even refer to the extensive oral submissions made by the MEA in an attempt to resolve the dispute. It noted that the recommended pole rental rate in the staff opinion was the same rate charged by Ontario Hydro, despite the fact that no evidence concerning pole attachment on Ontario Hydro's poles was before the Commission or staff. The MEA submitted that, as a result, the Commission should exclude from consideration the staff opinion, and the portions of the CCTA's submissions relying on the staff opinion.

167.With respect to the MEA's complaint that the staff opinion did not take into account or refer to the extensive oral submissions made by the MEA, the Commission notes that, as confirmed by the courts, it is neither practical nor necessary for Commission decisions to repeat each and every party's arguments leading to a decision. This should be all the more so for a non-binding staff opinion arising from a less formal process. However, the Commission notes that the staff opinion was nonetheless based on all of the submissions leading to and including the dispute resolution process. Moreover, the staff opinion was not written with a view to reiterating the parties' positions which were at an impasse, but rather was designed to facilitate the reaching of an agreement between the parties with the assistance of staff's preliminary opinion on the rate issue.

168.As stated in the Commission's letter decision of 27 March 1997 which outlined the dispute resolution process, the staff opinion was meant to provide a concise report outlining staff's views on some or all of the issues that remained to be resolved. Parties were expected "to attempt, with the benefit of the staff opinion, to resolve outstanding issues". The parties could obtain clarification with regard to any matter contained in that opinion. In essence, it was to be used, calling upon staff's broad knowledge and expertise in these matters, as a tool to facilitate an agreement between the parties in an informal fashion.

169.With regard to the complaint that the staff opinion recommended the same rate as that charged by Ontario Hydro, despite the fact that no evidence concerning pole attachment on Ontario Hydro's poles was before the Commission or staff, the Commission notes that staff indicated in its opinion that, in the absence of better evidence and persuasive arguments to the contrary, it considered the Phase II causal costing approach to costing telephone company services an appropriate starting point to determine the applicable rate. Staff recognized that there may be differences in the costs incurred by power utilities with respect to support structures and, in the absence of better evidence, found the rate proposed by Ontario Hydro in its most recent model support structure license agreement to be appropriate in the context of power utility poles.

170.The Commission notes that the record of the proceeding now provides the necessary evidence for the Commission's determination of the appropriate methodology and rate without reference to Ontario Hydro's agreed rate.

171.It is to be noted that all parties were informed, in the Commission's 27 March 1997 decision suspending the application for interim relief pending the dispute resolution process, that the staff opinion was non-binding and that they would be given a full opportunity to comment on its merits as well as make further submissions, including submissions regarding the issues of constitutional and statutory authority, if the proceeding for interim and final relief was resumed.

172.The Commission further notes that, while the parties have provided comments on the staff opinion, the essence of their submissions relates to providing the groundwork and the evidence to support their own rate setting methodology. Accordingly, the Commission has focused its analysis on these substantive arguments in reaching its final recommendations.

173.For the reasons outlined above, the Commission denies the MEA's request that it exclude from consideration the staff opinion, and the portions of the CCTA's submissions relying on the staff opinion.

C.The Need for Regulatory Intervention

174.In its final comments, the MEA argued that, even if the Commission has jurisdiction under subsection 43(5), it should refrain from exercising its jurisdiction in the present case. The MEA submitted that there is competition between broadcasting distribution undertakings and telecommunications carriers and therefore, the Commission should forbear from exercising its jurisdiction under subsection 43(5). The MEA stated that, while the forbearance power provided

by section 34 does not apply to section 43, subsection 34(2) of the Act provides for forbearance from regulation when sufficient competition exists to protect the public. The MEA added that if the Commission in this proceeding mandates access to power utility poles at a rate below the fair market value of the communication space, cable companies will gain a competitive advantage over their rivals.

175.The CCTA, in reply, submitted that, as acknowledged by the MEA, section 34 of the Act does not apply to section 43. Moreover, the CCTA added, the MEA's argument about forbearance conveniently neglects the public policy concerns which underlie section 43, and subsection 43(5) in particular. The CCTA added that the environmental, safety and public convenience issues associated with support structures highlight the need for regulatory oversight and the inapplicability of section 34. The CCTA further added that even if section 34 were relevant, the conditions necessary for forbearance under section 34 do not exist.

176.The MEA also submitted that the Commission should refrain from exercising its jurisdiction in the present case because there is no question of access being denied to the cable companies. The MEA added that the cable companies have merely chosen not to pay the requested price and instead asked the Commission to regulate pole attachment, despite the existence of alternatives to pole attachment available, for example by placing cables underground or distributing services by way of other technologies such as direct-to-home (DTH) satellite or "wireless cable". In reply, the CCTA stated that the dispute is about access: the MEA is demanding that the cable companies pay an annual rate of $40.53 for access to the power utility poles.

177.The CCTA submitted that the MEA's suggestion that the cable companies could place their cables underground or construct their own pole lines ignores the strong public policy in favour of sharing existing support structures. The CCTA also submitted that the respondent power utilities have an effective monopoly in the situations under dispute and, consequently, no form of market negotiation can take place. The CCTA added that regulatory oversight of the cost of monopoly inputs to competitive services is neither unusual nor inappropriate. The CCTA further added that there is nothing on the record of the proceeding to suggest that the MEA would change its position on the appropriate level of the pole rental rate if the Commission were to decline to exercise its jurisdiction under subsection 43(5).

178.The Commission notes that, as submitted by the CCTA and as acknowledged by the MEA, section 34 of the Act may only be applied in respect of those sections of the Act that are specified in section 34. Section 34 cannot apply with respect to the exercise of the Commission's powers under section 43.

179.The focus of subsection 43(5) is access to support structures. The issue is not only whether access has been denied but rather, whether access may be obtained on terms acceptable to the person who provides services to the public. The Commission is of the view that an important consideration in a decision not to grant relief under subsection 43(5) would be whether there are, in fact, alternative support structure suppliers to serve the distribution needs of the applicant seeking relief. The Commission notes that there is not sufficient competition between support structure suppliers and, further, considers that the alternatives to pole attachment suggested by the MEA are neither practical nor reasonable alternatives in the present case. The business of the applicants is to distribute television signals through cable, not through alternative distribution technologies. Indeed, the Commission has licensed them for that purpose. Further, subsection 43(5) applies in situations where access cannot be obtained on

terms acceptable to the applicant and is not limited to situations where access is necessarily denied. Under the circumstances of this case, subsection 43(5) is appropriate for consideration.

180.The Commission considers that the public policy concerns which underlie section 43 and the public interest support the need for regulatory oversight. The construction of new support structures as well as access to existing support structures are matters of public concern and it is not sufficient to look at these issues as involving simply the private interests of contracting parties. The Commission also considers that all reasonable avenues to resolve this dispute through negotiation, whether with or without Commission staff participation, have been fully explored and further efforts of a similar nature are unlikely to result in a break in the impasse. Despite the time that has elapsed since the dispute arose, the parties have been unable or unwilling to reach a consensual arrangement. In light of the above, the Commission considers it appropriate to make a final determination on the final relief requested.

D.Pole Costs and Rental Rate

1.Introduction

181.In its application, the CCTA requested that the Commission grant access to support structures of the power utilities at the pole rental rate established in Decision 95-13 for the Stentor operating companies (as they then were), namely a pole rate of $9.60 per year.

182.The MEA submitted that, in the event the Commission decides to regulate access to power utility poles and set a pole rental rate, the price of access should approximate fair value as closely as possible. The MEA noted that pole rental fees affect electricity rate payers and submitted that these rate payers should not be penalized by bearing the cost of a subsidy to the cable television industry.

183.The MEA submitted that the Commission should focus its pole costing approach on the net embedded cost of poles. The MEA proposed rating models that would establish rates that would recover both the incremental costs associated with the cable companies' use of power utility poles and make a contribution to the capital costs of these support structures.

184.The CCTA agreed in principle that the cable companies should pay incremental costs and make a reasonable contribution to capital costs. However, the CCTA disagreed with the MEA's approach to the actual calculation of incremental and capital costs and, consequently, the pole rental rate.

185.In Decision 95-13, the Commission approved rates that covered incremental costs and provided a contribution to recognize fixed common costs. In the current proceeding, the Commission notes the CCTA's agreement that users of MEA members' support structures should also pay rates that recover incremental costs and provide a contribution. The Commission is also of the view, however, that determining the level of contribution requires, in this case, an examination of the MEA's evidence regarding its fixed costs.

186.The Commission notes that in the record of this proceeding, the parties focused their cost evidence on a typical 40 foot power utility pole. The Commission, therefore, bases its determinations on the 40 foot Pole Space Model submitted by the MEA. Although the Respondents' poles vary in size, the Commission's cost estimates and the resulting annual pole rental rate applies to all poles in the Respondents' territories.

2.Incremental Costs

187.The CCTA submitted that, typically, under support structure agreements, a significant portion of any incremental costs is paid by way of non-recurring charges which are specific to particular activities. The CCTA added that this has been the case for the support structure agreements between the cable companies and power utilities in the past and would continue to be so under either of the contending support structure agreements advocated by the CCTA and the MEA.

188.The CCTA considered that, in addition to these non-recurring costs, certain incremental costs can be viewed as being incurred on an ongoing basis, namely: administration costs related to the placement of the cable companies' facilities on the power utility poles and loss in productivity costs resulting from the power utility crews having to work around the cable companies' facilities. The CCTA noted that these incremental costs are typically recovered as part of the monthly pole rate. The CCTA submitted that, based on evidence filed by the telephone companies in previous Commission proceedings, administration costs for the power utilities should be in the range of $1.80 to $2.40 per year. Based on this same evidence, the CCTA added that the costs associated with loss in productivity should be in the range of $0.25 to $0.75, and total ongoing incremental costs should therefore be in the range of $2.05 to $3.15 per year.

189.The MEA provided an annual estimate of $3.15 per pole for loss of productivity in utility line work due to the presence of cable attachments on utility poles.

190.The CCTA submitted that, to the extent that the MEA's loss of productivity cost of $3.15 is intended to recover all ongoing incremental costs (i.e., both the administration and loss in productivity as those terms are used by the Commission), it considered the estimate high but reasonable.

191.The Commission notes that the CCTA and the MEA agree that loss in productivity resulting from the power utility crews having to work around the cable companies' facilities properly constitutes ongoing incremental costs that are typically recovered as part of the pole rate.

192.The Commission notes that the CCTA seeks to draw support for its proposed loss of productivity from several past analyses involving loss of productivity to telephone companies caused by the presence of cable attachments on telephone company-owned poles. The Commission considers, however, that use of and costs for telephone company support structures are not necessarily an appropriate basis for deriving costs for use by a cable or telecommunications company of electrical utility poles. Further, the CCTA has not provided any information regarding loss of productivity pertaining to municipal utility operations. The

Commission considers that the MEA's loss of productivity cost of $3.15 is a reasonable estimate.

193.The Commission notes that the CCTA stated that administration costs specifically applicable to the placement of facilities on the MEA members' poles should also be seen as incremental costs appropriately recoverable through monthly pole rates.

194.However, the Commission notes that the MEA did not identify such pole-related administration costs. The MEA has taken a different approach to estimating the administration costs and has not included an incremental cost specific to pole-only related administration costs. Absent any specific evidence as to what would constitute a reasonable incremental cost for pole-related administration costs, the Commission has derived a $0.62 figure based on the MEA's submission, as discussed further in the following section.

195.Based on the foregoing, the Commission considers a figure of $3.77 per pole per year (that is, $3.15 in loss of productivity and $0.62 in incremental administration costs) to be a reasonable estimate to recover ongoing incremental costs.

3. Capital Costs

196.Based on an estimate of embedded costs obtained by deflating a $1,270 replacement pole cost using the Consumer Price Index (CPI) over a 25-year period, and assuming an even distribution of poles, the MEA derives an average embedded cost of $820, a net embedded cost of $520 and an annual depreciation expense of $32.80.

197.The CCTA submitted that the MEA's embedded and net embedded cost estimates are too high. The CCTA added that, as acknowledged by the MEA, these figures are not based on historical data but are estimates derived from an initial cost which is itself an estimate. The CCTA considered that no attempt had been made by the MEA to exclude the pole cost elements which are purely for the benefit of the power utilities (e.g. the cost of cross arms) or to accommodate the fact that power utility poles are more expensive to purchase and install than poles which would be installed purely for communications purposes. The CCTA also considered that, in the present circumstances, the simplest way to achieve an estimate would be to adopt the costs of the telephone companies.

198.In reply, the MEA submitted that the accounting practices of the Respondents are not set up in such a manner that all utilities can supply exact pole costing figures. However, the MEA stated that its estimates are based on real data supplied by utilities in question and are not based on five-year-old information obtained from a completely different industry, as is the case with the CCTA's data. The MEA submitted, moreover, that the reasonableness of its data is confirmed by the actual data of Milton Hydro. The MEA also submitted that the Milton Hydro analyses are within 5% to 8% of the estimates developed by the MEA and validate the reasonableness of the MEA's estimates.

199.The MEA noted that it agreed with the CCTA claims that items such as cross arms should be excluded from the capital costs of power utility poles and added that it had removed such costs from the figures it proposed. The MEA further added that any cost-based model should be

grounded on the costs inherent in the poles in question, i.e., power utility poles.

200.In its evidence, the MEA included a 10% Return on Asset Base which is applied against the net embedded cost of a pole. The CCTA submitted that the inclusion of a 7% rate would be a more appropriate estimate of the actual annual carrying charge because the power utilities are municipally controlled entities which can finance debt at less than a 10% rate. In reply, the MEA submitted that the 10% figure represents the return required by its members for their assets and does not reflect debt, carrying costs or financing charges.

201.The MEA also included a 10% administration mark-up on the Depreciation expense and Return on Asset base. In interrogatory MEA(CCTA) 24Oct97-9, the MEA indicated that this Administration mark-up is intended to recover additional power utility costs such as a Commissioner's expense, a general administration expense and office maintenance which are not reflected in the capital cost of the pole.

202.In this regard, the CCTA submitted that these types of costs should not be included when determining the contribution to capital costs payable by the cable companies. The CCTA submitted that the pole rate should recover the ongoing incremental costs associated with cable company use of a power utility pole, as well as make a reasonable contribution to the 217.capital cost of the pole, but is not intended to make a contribution to the general operating costs of a power utility.

203.In its evidence, the MEA also included a $20 annual pole maintenance cost in its calculation of annual capital carrying costs. According to the MEA, this maintenance cost includes $15 for tree trimming, $3.50 for pole testing and maintenance and $1.50 for pole straightening.

204.The CCTA noted that, in interrogatory MEA (CCTA)24Oct 97-6(b), the MEA indicated that the $15 tree trimming cost includes the cost of trimming at the communications space level where this task is performed by the power utility on joint use poles. The CCTA added that at the same time, under past MEA support structure agreements, as well as under the MEA's proposed new model agreement, the cable companies would be required to pay a separate charge for all tree trimming at the communications space level, independent of the monthly pole rate. The CCTA stated that the MEA's maintenance cost should be adjusted downward to bring it into line with the maintenance costs of the telephone companies which, according to the CCTA, range between $5.75 to $15.00.

205.The Commission agrees with the MEA that any cost based model should be established based on the costs of power utility poles rather than poles designed merely for communications purposes, and that the cable companies should pay for the use of the poles available to them.

206.The Commission notes that the MEA members are not subject to any regulatory accounting requirements to maintain separate sub-accounts for support structures and, as a consequence, the accounting costs for poles alone are not available. However, the Commission also notes that the MEA, to support its estimates of embedded and net embedded costs of a pole, submitted an analysis of Milton Hydro poles which was appended to the MEA's 17 October 1997 evidence.

207.Using an embedded cost of service approach based on utility financial records, Milton Hydro developed a methodology for determining the full costs associated with utility overhead lines and the pole component for those lines. From Appendix A of the Milton Hydro analysis the following figures for poles are available: the net embedded cost of a pole is $478 and the annual depreciation expense is $31.11.

208.The Commission notes that, unlike the estimates submitted by the MEA, the evidence from Milton Hydro is based on financial records to determine pole costs. In the absence of actual data for the MEA-wide pole population in question, the Commission is of the view that the Milton Hydro data could serve as a reasonable proxy. Therefore, the Commission determines that the estimated net embedded cost of $478 and depreciation expense of $31.11 are to be used in the calculation of the pole rental rate.

209.The Commission considers that the pole rate is not intended to make a contribution to the general operating costs of a power utility. In the absence of identification by the MEA of any pole-specific administration-related incremental costs directly related to the use of power utility poles by the cable companies, the Commission considers that one half of the MEA's total administration mark-up, amounting to $0.62 annually, will serve as a reasonable estimate for ongoing incremental pole-related administration costs such as the costs of issuing permits, administering contracts and, billing and collections.

210.With regard to the MEA's proposed return on investment rate of 10%, the Commission notes that in the MEA's 14 April 1997 evidence in support of its rental rate, it described its proposed 8% Annual Carrying Charge as the annual lost investment opportunity represented by the installed cost of a 40 foot wood pole. The MEA also stated that its proposed 8% return on investment is consistent with financial planning practices at investment, insurance and pension organizations. In the same submission, the MEA also added that the rate of return presently allowed municipal utilities by Ontario Hydro is 8.5%.

211.The Commission agrees with the MEA that the owners of power utility pole assets should be allowed to recover a return on their investment. However, the Commission considers that the proposed 10% return is not supported by the MEA's evidence in this matter. In light of the above, the Commission determines that 8.5% is appropriate as a return on investment rate.

212.The Commission considers that maintenance costs should exclude tree trimming. Rather, the power utilities should be permitted to levy a separate charge on cable companies to reflect tree trimming activities. The Commission considers that this matter is best left to be resolved by the parties in the first instance. Furthermore, the Commission notes that in the Milton Hydro study, pole maintenance costs, excluding tree trimming, are $6.47 ($5.00 for pole testing and $1.47 for straightening). Consistent with the Commission's determination that the Milton Hydro data should be used in the rate calculation, maintenance costs of $6.47 will be included in the monthly pole rental rate.

4.Space Allocation Factor

213.The CCTA submitted that a factor based on the percentage of usable space consumed remains the most appropriate means of allocating capital costs. The CCTA also submitted that

under this approach, an allocation factor of 7.4% would be appropriate since the cable companies use 1 foot out of a total 13.5 feet of usable space on a typical 40 foot pole. The MEA has proposed two different allocation factors - (i) the Pole Space Model factor and (ii) the MEA's Glaeser Model factor.

(i) Pole Space Model

214.A basic 40 foot joint use pole is described in the MEA's evidence as follows:

Power space 11.50 ft
Separation space 3.25 ft
Communication space 2.00 ft
Clearance 17.25 ft
Buried 6.00 ft

215.The MEA Pole Space Model allocation factor is 33% and is obtained by averaging the allocation factors of 26% and 40% which, in turn, are based on allocations between three users (cable company, telephone company and power company) and two users (cable company and power company), respectively. The MEA proposed to allocate the total length of a 40 foot pole such that the user or users of the communications space are responsible for 100% of the communications space, 100% of the separation space, and a proportionate share (i.e., 50% or 33% depending on the number of users, as the case may be) of the clearance and buried portion of the pole.

216.The CCTA submitted that the allocation of the separation space to a cable company is not justifiable. The CCTA added that the need for a separation space is caused by the obligation of the power utilities to comply with Canadian Standards Association (CSA) standards, which in turn, are intended to address the dangerous nature of the power utilities facilities. The CCTA does not agree that the cost of clearance space and buried pole should be shared equally among all support structure users. The CCTA also submitted that the allocation factor should reflect the benefits and superior rights associated with pole ownership such that the owner should bear a correspondingly higher share of the capital costs. In the CCTA's view, the communications space is spare capacity to the power utilities, and they would be fully compensated for the use of this space if they recovered any incremental costs which they may incur.

217.In reply, the MEA submitted that the separation space is necessary only because of the placement of cable company plant on power utility poles. The MEA added that without communications attachments a power utility could, in many circumstances, install shorter poles or use the entire communications and separation space itself. The MEA suggested that the separation space only exists to protect the communications plant and workers and the electric power utilities derive no benefit.

(ii) Glaeser Model

218.Under the Glaeser Model approach, capital costs are allocated on the basis of the benefits, measured by the avoided costs to each party realized through joint use poles, i.e., the capital

cost of a pole is allocated according to the relative cost a cable company would otherwise have to incur. Depending on the number of users, the Glaeser Model uses the formula C/(C+U) or C/(C+C+U) to determine the allocation factor for a cable company. In these formulas, C is the cost of a communications pole and U is the cost of a power utility pole. By averaging the allocation factors which result from these two formulas, the MEA arrives at a Glaeser Model allocation factor of 35%.

219.In its final comments, the CCTA submitted that the Glaeser Model fails to adequately take into account the fact that the power utilities use a higher cost pole. The CCTA added that the Glaeser Model has never been used to set support structure rates and in its view, it would be inappropriate for the Commission to use this methodology now. The CCTA added that this model purports to allocate costs according to relative benefit, however, it fails to take into account the benefits of ownership.

220.In reply, the MEA submitted that the Commission should not be dissuaded from adopting a methodology only because it has never used the model on prior occasions.

221.The costing approach used by the MEA in developing its proposed $40.53 annual rate is based on a fully distributed costing methodology which requires the communications companies to bear the full costs of the communications space, a share of clearance and buried pole and all of the separation space costs.

222.The Commission is of the view that in determining the appropriate costs to be recovered from the cable companies, it is important to consider that they do not have the rights of ownership of the pole. Accordingly, the Commission considers that the fully distributed costing approach proposed by the MEA is not appropriate and that an allocation factor based on the percentage of usable space consumed is more reflective of a user's actual use and therefore is a more appropriate means of allocating costs. Furthermore, in light of increasing competition in broadcasting distribution and telecommunications and the potential for future growth in the number of communications space users, the Commission is of the view that the expectation that all power utility poles will accommodate two communications users is reasonable.

223.The Commission considers that the usable space on a 40 foot power utility pole, after allowance for clearance and buried pole, is 16.75 feet. Moreover, the Commission is of the view that the power utilities derive no benefits from the separation space, and that the separation space is necessary only to protect the employees and attachments of the communications companies. The Commission agrees with the MEA's comments that, without communications attachments, the power utilities could use the entire separation and communications space itself. Therefore, the Commission considers that the separation space is causal to communications users. Accordingly, the separation space, as well as the communications space, will be allocated equally between two communications users.

224.Based on the above, the Commission considers that the cable companies occupy one foot of the communications space and 1.6 feet of the separation space for a total of 2.6 feet of the 16.75 feet of usable space. Therefore, the Commission determines that the resulting space allocation to cable companies is 15.5%.

225.Based on the findings in this decision, the Commission calculates the pole rental rate as

follows:

Net embedded cost/pole: $ 478.00
Depreciation: 31.11
Interest: 40.63
(8.5% of Net embedded cost/pole)
Maintenance: 6.47
Administration mark-up: N/A
Total capital related costs: 78.21
(Depreciation + Interest + Maintenance)
Cable distribution allocation: 15.5%
(Space Allocation Factor)
Contribution: 12.12
(Total capital related costs x Cable distribution allocation)
Loss in productivity: 3.15
Administration costs: 0.62
Total annual cost/pole: $ 15.89
(Contribution + Loss in productivity + Administrations Costs)

226.The Commission hereby sets the annual pole rental rate at $15.89 per pole unless and until parties agree otherwise.

E.Non-Monetary Terms of the Support Structure Agreement

227.The CCTA submitted that the cable companies have been unable to reach an agreement with the power utilities on terms for renewal of the support structure agreements which expired on or before 31 December 1996. The CCTA added that the appropriate remedy at this time would be for the Commission to set the pole rate and give the cable companies permission to access the power utilities' support structures on the same non-monetary terms as applied in 1996.

228.The MEA submitted in reply that, if the rate issue is resolved, only five issues of any significance need to be resolved. In the MEA's view, these can be resolved through negotiation by the parties and do not require Commission intervention. According to the MEA, the five issues to be resolved are: fees; signature of plans by a professional engineer; liability, damages and insurance; vested rights; and assignment.

229.The MEA added that, contrary to the CCTA's submissions, the expired pole attachment agreement is no longer viable. The MEA stated that the power utilities had a number of concerns with the expired 1992 Model Agreement related to issues and problems that were not addressed or were completely lacking in the expired agreement. The MEA listed a number of elements of the expired pole attachment agreement which would be problematic if the Commission attempted to impose the expired contract for future pole attachments. The MEA stated that these concerns relate directly to the safe, efficient and cost effective operation of the utility distribution system.

230.In reply, the CCTA stated that negotiations were promising, at least in respect of non-monetary terms. However, the CCTA added that they also believe that the completion of such

negotiations would likely take several months while they require access to the poles of the Respondents' power utilities as soon as possible.

231.While the Commission is of the view that it has the jurisdiction to set the non-monetary terms and conditions of access to support structures, it considers that these matters are best left to negotiations between the parties. Given the MEA's suggestion that there are only a few issues outstanding, the Commission considers that a new negotiated pole attachment agreement is likely achievable. However, until such time as a new agreement is reached, the cable companies need access to the support structures of the power utilities. Therefore, the Commission directs that the cable companies be granted access on the same non-monetary terms as set out in the expired support structure agreement unless and until the parties agree otherwise.

F. Other Causal Costs Due to Cable Company Attachments on Power Utility Poles

232.In its evidence, the MEA submitted that, in addition to loss of productivity in carrying out utility line work around cable company attachments, there are a number of other causal costs incurred by the utility due to the presence of cable company attachments on utility poles. The MEA submitted that non-recurring direct charges to be recovered should be separate from the pole attachment cost.

233.The MEA submitted that these causal costs vary among utilities and cable companies according to factors such as local conditions, amount of ongoing work, and cable company performance. Examples of causal costs subject to direct charges include: extra engineering time required due to the presence of cable attachments on poles, review of permit applications, cost to make bonding connections to utility neutral conductor, and the cost of an initial field inspection to determine feasibility of proposed joint use.

234.In reply comments, the CCTA submitted that the cable companies have not experienced significant problems with the respondent power utilities in the past in respect of such non-recurring charges. The CCTA stated that, while it has not been a central concern in the present application, the cable companies believe that it is important to emphasize that the Commission would have jurisdiction under subsection 43(5) of the Act should an access dispute ever relate to such charges.

235.The Commission considers that it has the jurisdiction to intervene in any dispute relating to access to support structures including those relating to the recovery of non-recurring charges. The Commission considers that the recovery of other causal costs is best left to be negotiated between individual cable companies and power utilities in the first instance.

G.Pole Rental Rate of the PUCs not Represented by the MEA

236.The PUCs not represented by the MEA within the scope of this proceeding are: Toronto Hydro-Electric Commission, West Elgin Hydro-Electric Commission; CNP; Chatham Hydro; Deep River; L'Orignal HEC; Pelham HEC; Plantagenet HEC; and Webbwood HEC. Deep River and CNP each filed an answer on its own behalf.

237.The submissions of Deep River and CNP largely objected to the Commission intervening in this matter while offering little evidence to substantiate pole costs and the pole rental rate.

238.However, in its 7 March 1997 submission, CNP stated: "as Rogers believes that it can seek resolution by the CRTC on contractual matters, we feel justified in requesting that the CRTC impose a decision on Rogers to accept our last offer of a one year contract and a very reasonable pole rate of $20.75." However, no specific evidence on incremental or capital cost elements included in the pole rental rate was submitted by the power utility. Also, by letter dated 2 April 1997, CNP stated that it was prepared to await the outcome of the Commission process to determine a rate for the MEA. CNP also added that it would be further prepared to harmonize its pole rate with the MEA's mediated rate, provided it deemed it to be fair and equitable.

239.By letter dated 21 February 1997, Pelham HEC confirmed that it would renew its expired contract effective 1 January 1997. Pelham HEC also stated that "the pricing will be as agreed after negotiations with the MEA or a final ruling from the CRTC".

240.The Commission notes that none of the other respondent PUCs not represented by the MEA submitted pole costs or rate evidence in this proceeding on their own behalf. The Commission also notes that the PUCs were aware of the CCTA's application against them and had an opportunity to participate in the proceeding. Therefore, the Commission determines that the annual pole rental rate of $15.89 applies to all the Respondents in this application unless and until the parties agree otherwise.

Conclusion

241.The Commission determines that, unless and until the parties agree otherwise, the cable companies will be granted access on the same terms and conditions as set out in the individual expired support structure agreements, adjusted so that the annual pole rental rate, as of the date of this decision, is fixed at $15.89 per pole per year.

242.With respect to the Toronto Hydro-Electric Commission, the terms and conditions of past agreements that applied to the Hydro Electric Commission of the City of North York and the Public Utilities Commission of the City of Scarborough, with the exception of the pole rate which is fixed at $15.89 per pole per year would, unless and until the parties agree otherwise, continue to apply in their respective former territories. Similarly, with respect to the West Elgin Hydro Electric Commission, unless and until the parties agree otherwise, the cable companies will be granted access on the same terms and conditions as set out in the expired support structure agreement of the West Lorne Public Utilities Commission, adjusted so that the pole rate as of the date of this decision, is fixed at $15.89 per pole per year.

Secretary General

following Internet site:

www.crtc.gc.ca

1.Transactions were authorized in Decision 97-157, 24 April 1997.

2.As of 1 January 1998, three of the utilities represented by the MEA were dissolved and reconstituted under provincial legislation. Pursuant to subsection 28(3) of the City of Toronto Act, 1997, S.O. 1997, c. 2, the Hydro Electric Commission of the City of North York and the Public Utilities Commission of the City of Scarborough were dissolved. A new hydroelectric power utility named the Toronto Hydro-Electric Commission was established pursuant to the above-noted Act. Similarly, the West Lorne Public Utilities Commission was dissolved by municipal by-law and ministerial order. A new utility was established under the name of West Elgin Hydro-Electric Commission. These reconstituted entities are not represented by the MEA.

3.Criteria for interim relief as set out in Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, as supplemented by RJR MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311.

4.[1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.

5.Hogg, Constitutional Law of Canada, p. 15-33.

6.Telus provides an overview of the jurisprudence relating to the two approaches applied by the courts in determining whether a federal law may validly affect a provincial matter. According to Telus, the two approaches that have been applied in the jurisprudence are: 1) the rational, functional connection test enunciated in Papp v. Papp (1970), 1 O.R. 331 (Ont. C.A.) and applied in R. v. Zelensky, [1978] 2 S.C.R. 940 and in Multiple Access v. McCutcheon, [1982] 2 S.C.R. 161, and 2) the test as to whether the impugned provision is truly "necessary" or essential to the operation of the legislative scheme as enunciated as a dictum in R. v. Thomas Fuller Construction, [1980] 1 S.C.R. 695 and cited with approval in Regional Municipality of Peel v. MacKenzie, [1982] 2 S.C.R. 9. Telus notes that Professor Hogg observes that the stipulation that the impugned provision be "essential" to the legislative scheme is more strict than the rational connection test and notes that in General Motors v. City National Leasing, [1989] 1 S.C.R. 641, Dickson J. attempted to reconcile these approaches such that "As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained" at p. 671. Telus submits that under this theory, a court must measure the degree of encroachment of a legislative scheme on the other government's sphere of power and then determine how necessary the impugned provision is to the otherwise valid legislative scheme. For minor encroachment, the rational functional test is appropriate. For major encroachment, a stricter test, such as the "truly necessary" or "essential" tests apply.

7.Bell v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854.

8.As noted by Hogg in Constitutional Law of Canada, at pages 15-12 to 15-16 (1998, loose-leaf

edition), the characterization of a law for constitutional purposes involves the identification of the "matter" of the law; the matter is often described as the "pith and substance" of the law, but is perhaps best described as the dominant or most important characteristic of the law. The process of characterization is not a technical, formalistic exercise, confined to the strict legal operation of the impugned law. For example, the fact that a provincial law levies a tax is not decisive of its classification as a taxing measure. The Court will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve. In determining the purpose of a statute, Hogg states that there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law which the statute purports to correct.

9.Radio Reference, [1932] A.C. 304; Re CFRB (1973), 3 O.R. 819 (Ont. C.A.); Capital Cities Communications v. CRTC, [1978] 2 S.C.R. 141; Public Service Board v. Dionne, [1978] 2 S.C.R. 191; Attorney General (Quebec) v. Kellogg's Co., [1978] 2 S.C.R. 211; Irwin Toy v. Attorney General (Quebec), [1989] 1 S.C.R. 927; and Re Canadian Motion Pictures Distributors Association et al. and Partners of Viewer's Choice Canada (1996), 68 C.P.R. (3d) 450 (F.C.A.).

10.Subsections 91(29) and 92(10)(a) of the Constitution Act, 1867; Toronto v. Bell Telephone Co., [1905] A.C. 52; Alberta Government Telephones v. CRTC, [1989] 2 S.C.R. 225; Téléphone Guèvremont Inc. v. Quebec (Régie des Télécommunications), [1994] 1 S.C.R. 878.

11.Re Oshawa Cable TV Ltd and Town of Whitby (1969), 4 D.L.R. (4th) 224 (Ont H.C.J.) regarding the constitutional incompetence of a province to regulate the construction and operation of a cable company's distribution network.

12.Quebec (Commission du salaire minimum) v. Bell Telephone Co., [1966] S.C.R. 767.

13.Munro v. National Capital Commission, [1966] S.C.R. 663; Dyke and Cochin Pipe Lines (1978), 85 D.L.R. (3d) 607 (Sask. C.A.); Re Canadian Motion Pictures Distributors Association et al. and Partners of Viewer's Choice Canada (1996), 68 C.P.R. (3d) 450 (F.C.A.); Canadian National Railway Co. v. National Transportation Agency, [1996] 1 F.C. 355 (F.C.A.).

14.Re Ontario Hydro et al., [1993] 3 S.C.R. 327.

15.Toronto v. Bell Telephone Co., [1905] A.C. 52; Toronto v. Canadian Pacific Railway Co., [1908] A.C. 540; Canadian Pacific Railway Co. v. Toronto Transportation Commission, [1930] A.C. 696, [1930] 4 D.L.R. 849 (P.C.); Bell Telephone Company of Canada v. Canadian National Railway Co., [1933] A.C. 563; Toronto Railway Company v. Toronto, [1920] A.C. 426.

16.Fulton v. Energy Resources Conservation Board, [1981] 1 S.C.R. 153; section 92A of the Constitution Act, 1867.

17.Côté, P.-A., The Interpretation of Legislation in Canada, 2d ed., at pages 219-224.

18.Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536.

19.Dreidger on the Construction of Statutes, 3rd ed., at page 131.

20.Dreidger, supra, at page 427.

21.Canadian Pacific Railway Co. v. Toronto Transportation Commission, [1930] A.C. 696, [1930] 4 D.L.R. 849 (P.C.); Bell Telephone Co. v. Canadian National Railway, [1933] A.C. 563; Canadian Electrical Association v. Canadian National Railway, [1934] C.R.C. 162 (P.C.); Canadian National Railway Co. v. Bell Telephone Co., [1939] S.C.R. 308; Canadian Pacific Railway Co. v. Attorney-General (Quebec), [1965] S.C.R. 602; Toronto Railway Company v. Toronto, [1920] A.C. 426.

22.Convergence - Competition and Cooperation - Policy and Regulation Affecting Local Telephone and Cable Networks, Report of the Co-Chairs of the Local Networks Convergence Committee, at page 63.

23.See, for instance, Transvision (Magog) Inc. v. Bell Canada, [1975] C.T.C. 463.

24.Supra, note 22, at page 65.

25.Supra, note 22, at page 66.

26.Supra, note 22, at page 67.

27.Proceedings before the Standing Senate Committee on Transport and Communications, Senate of Canada, Issue No. 27 (June 22, 1992), at 27:36.

28.Subsection 43(1) provides that in sections 43 and 44, "distribution undertaking" has the same meaning as in subsection 2(1) of the Broadcasting Act.

29.Bell Canada, Tariff for the Use of Support Structures by Cable Television Licensees, Telecom Decision CRTC 77-6, dated 27 May 1977.

30.See, for example, Review of Regulatory Framework, Telecom Decision **CRTC 94-19**, dated 16 September 1994; Competition and Culture on Canada's Information Highway: Managing the Realities of Transition, 19 May 1995; Implementation of Regulatory Framework - Co-location, Telecom Public Notice **CRTC 95-13**, dated 20 March 1995; Implementation of Regulatory Framework - Local Interconnection and Network Component Unbundling, Telecom Public Notice **CRTC 95-36**, dated 11 July 1995; Implementation of Regulatory Framework - Local Number

Portability and Related Issues, Telecom Public Notice **CRTC 95-48**, dated 10 November 1995; Local Competition, Telecom Decision **CRTC 97-8**, dated 1 May 1997; Forbearance - Regulation of Toll Services Provided by Incumbent Telephone Companies, Telecom Decision **CRTC 97-19**, dated 18 December 1997; Stentor Resource Centre Inc. - Forbearance from Regulation of Interexchange Private Line Services, Telecom Decision **CRTC 97-20**, 18 December 1997; Implementation of Price Cap Regulation and Related Issues, Telecom Decision **CRTC 98-2**, dated 5 March 1998; Local Pay Telephone Competition, Telecom Decision **CRTC 98-8**, dated 30 June 1998; Regulation under the Telecommunications Act of Certain Telecommunications Services Offered by Broadcast Carriers, Telecom Decision **CRTC 98-9**, dated 9 July 1998; Review of Contribution Regime of Independent Telephone Companies in Ontario and Quebec, Telecom Decision **CRTC 99-5**, dated 21 April 1999.

31.New Regulatory Framework for Broadcasting Distribution Undertakings, Public Notice **CRTC 1997-25**, dated 11 March 1997; Broadcasting Distribution Regulations, Public Notice CRTC 1997-150, 22 December 1997.

32.British Columbia Telephone Company v. CRTC, 28 June 1991, File No. 91-A-1800 and 91-A-1920 (F.C.A.), leave to appeal denied on interlocutory ruling of 16 May 1992, CRTC Exhibit No. 6, in the proceeding leading to Decision 92-12; cf. Section 336 of the former Railway Act.

33.The Commission notes that its jurisdiction to resolve access disputes under subsection 43(5) is to be contrasted with the Commission's ongoing regulation of access to supporting structures of telephone companies which has not been based on subsection 43(5) of the Act. In the proceeding leading up to Telecom Decision 95-13, it was argued that the Commission should not render a general decision with regard to access to telephone company support structures and that access to such structures should only be governed by the specific regime provided at subsection 43(5) of the Act. The Commission concluded that access to telephone company support structures is a "telecommunications service" within the meaning of the Act. Accordingly, the Commission rejected the argument that its jurisdiction with respect to such access is governed only by subsection 43(5). Rather, in prescribing the rates, terms and conditions set out in Decision 95-13, the Commission relied on the provisions of the Act generally applicable to telecommunications services, including sections 24, 25 and 27. This is the approach adopted by the Commission previously under the Railway Act, and which was approved by the Supreme Court of Canada in British Columbia Telephone Company v. Shaw Cable Systems (B.C.) Ltd., [1995] 2 S.C.R. 739, at pages 760-766.

34.See s. 43(2), 43(3), 43(4), 44, 67(1)(a), and 76(2) of the Act.

35.In this regard, the Commission notes that in Transvision (Magog) Inc. v. Bell Canada, supra, the Canadian Transport Commission (CTC) concluded that telephone company poles ceased to be pure private property. The CTC stated that the use and enjoyment Bell had of its property was subject to certain limitations imposed by law in the public interest. It also stated that when one devotes one's property to a use in which the public has an interest, one, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest one has thus created.

36.Fenn v. Peterborough (City) (1979), 25 O.R. (2d) 399 (Ont. C.A.); affirmed by the Supreme Court of Canada in Consumers Gas Co. et al v. Fenn et al, [1981] 2 S.C.R. 613.

37.In the Matter of an Application under Rule 14.05(3) by Sudbury Hydro-Electric Commission for an Interpretation of Subsection 50(3) and Subsection 50(5) of the Planning Act, R.S.O. 1990, c. P.13 (1996), 29 O.R. (3d) 23 (Gen. Div.)

ATTACHMENT A

LIST OF RESPONDENTS

1.Barrie Public Utilities Commission
2.Canadian Niagara Power
3.Chatham Hydro
4.Clarington Hydro Electric Commission
5.The Hydro Electric Commission of the Town of Deep River
6.The Police Village of Embrun Hydro System
7.Essex Public Utilities Commission
8.Guelph Hydro
9.Hydro-Electric Commission of Cambridge and North Dumfries
10.Innisfil Hydro
11.Hydro Electric Commission of Kitchener-Wilmot
12.L'Orignal Hydro Electric Commission
13.Leamington Public Utilities Commission
14.Markham Hydro Electric Commission
15.Mississauga Hydro Electric Commission
16.Niagara-on-the-Lake Hydro Electric Commission
17.The Hydro Electric Commission of North Bay
18.Oakville Hydro
19.Orillia Water, Light and Power
20.Pelham Hydro-Electric Commission
21.Perth Public Utilities Commission
22.Pickering Hydro
23.Plantagenet Hydro Electric Commission
24.Public Utilities Commission of the Village of Port Stanley
25.Public Utilities Commission of the Town of Paris
26.Richmond Hill Hydro Electric Commission
27.Shelburne Hydro
28.Stoney Creek Hydro-Electric Commission
29.Stratford Public Utility Commission
30.Toronto Hydro-Electric Commission (formerly Hydro Electric Commission of the City of North York and the Public Utilities Commission of the City of Scarborough)
31.Hydro Electric Commission of Waterloo, Wellesley, and Woolwich
32.Webbwood Hydro Electric Commission
33.West Elgin Hydro-Electric Commission (formerly West Lorne Public Utilities Commission)
34.The Public Utilities Commission of the Township of Zorra

Date modified: ????-??-??

APPENDIX D
to the
Evidence of
Michael Piaskoski
Rogers Communications Partnership

November 20, 2015

40745

AGREEMENT FOR

LICENSED OCCUPANCY OF POWER UTILITY DISTRIBUTION POLES

(for Telecommunications Attachments)

TABLE OF CONTENTS

a

THIS AGREEMENT FOR LICENSED OCCUPANCY OF POWER UTILITY DISTRIBUTION POLES made in duplicate this 1st day of January, 2014 (the "**Effective Date**").

BETWEEN:

HYDRO ONE NETWORKS INC.
a corporation incorporated pursuant to the laws of the Province of Ontario (hereinafter referred to as "Networks")

OF THE FIRST PART,

-AND-

ROGERS COMMUNICATIONS PARTNERSHIP, a general partnership created and organized under the laws of the Province of Ontario, by its partners ~~Rogers Communications Inc.~~ and Fido Solutions Inc., having a registered office at 333 Bloor Street East, 9th Floor Toronto, Ontario M4W 1G9
(hereinafter referred to as the "Licensee")

Mountain Cablevision Limited PJ

OF THE SECOND PART.

WHEREAS the Licensee wishes to place, affix or attach or continue to place, affix or attach, as the case may be, attachments to poles owned by Networks and Networks is willing to grant permission to the Licensee to so place, affix or attach the Licensee's attachments subject to the terms and conditions herein;

AND WHEREAS the parties acknowledge that the Joint Use of Networks' poles shall be of mutual advantage and shall provide an environment that maximizes the efficiencies and effectiveness of Joint Use to better serve the parties' respective customers;

AND WHEREAS the parties agree to deal with each other with due consideration for the safety of their respective employees, agents, servants and contractors and the preservation of each other's property and assets and the interests of their respective customers;

AND WHEREAS both parties acknowledge and agree that while the environment in which they work and provide service has both mechanical and construction safety issues, electrical safety shall be of paramount importance in the joint planning, design, placement, maintenance and removal of Attachments on or along the Joint Use Poles.

NOW THEREFORE in consideration of the mutual covenants and the terms and conditions contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby irrevocably acknowledged, the parties hereto agree as follows:

1.0 DEFINITIONS:

As used in this Agreement, unless the subject-matter or context is inconsistent therewith, the following terms shall have the following meanings:

"**Agreement**" means this Agreement for Licensed Occupancy of Power Utility Distribution Poles between the Licensee and Networks and shall include Schedules "A" and "B" attached hereto and any amendments to the body of this Agreement and to the Schedules.

"**Application**" means the form attached hereto as Schedule "B", the format of which may be revised from time to time by Networks, to be completed and submitted to Networks by the Licensee when the Licensee wishes to place its attachments on Networks' poles in accordance with the terms and conditions of this Agreement.

"**Attachment(s)**" means any material, apparatus, equipment or facility owned, in full or in part by the Licensee for the purpose of providing Telecommunications Services and attached to, either by being carried on or supported by, the Joint Use Pole(s) as approved by Networks, including, but without limiting the generality of the foregoing:

- Licensee owned cable not directly attached to the pole but overlashed to a cable or messenger owned by a third party;
- Service Drops affixed directly to Joint Use Pole(s);
- Service Drops attached In-Span to a strand or messenger supported by Joint Use Pole(s);
- Service Drops owned by the Licensee that emanate from a telecommunication cable owned by the Licensee and attaching to a Joint Use Pole.

"**Contract Administration Guide**" or "**CAG**" means the administrative and operating practices and processes outlined in Schedule "A" attached hereto.

"**Emergency**" means a situation in which there is a risk of bodily injury or death or an imminent or existing interruption of power or service to customers.

"**Good Utility Practice**" means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry in North America during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgement in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in North America.

"**Hazardous Condition**" means a structural/mechanical or electrical hazard that has the potential to cause harm or injury to persons or property which requires specific work conditions until the hazard is removed. Reference: Section 4.0 of the CAG.

"**Interspaced Pole**" means a tangent Joint Use Pole(s) that has been added between existing Joint Use Pole(s).

"**In-Span**" means a position between poles owned by Networks.

"**Joint Use**" means the use of a pole owned by Networks to support attachments of any person who has an Agreement for Licensed Occupancy of Power Utility Distribution Poles with Networks.

"**Joint Use Pole(s)**" means a pole(s) owned by Networks which supports attachments including Service Drop(s) not owned by Networks.

"**Joint Use Pole Line**" means a line of Joint Use Poles.

"**Limits of Approach**" means the distance that must be maintained between personnel and/or equipment and exposed live electrical apparatus in order to work safely as provided in the *Occupational Health and Safety Act*, R.S.O. 1990 c. 0.1, as amended and/or Part II of the *Canada Labour Code*, R.S.C. 1985, c.L.2, as amended, and all applicable regulations thereto.

"**Line Clearing**" means the provision of adequate neutral conductor clearance from tree interference for all attachments carried on, to, or supported by Joint Use Poles, and includes underbrushing, tree removal, cabling or guying of trees, pruning or trimming, treatment of cuts, application of herbicidal sprays and disposal of debris.

"**Make-ready Work**" means that work which is necessary and required solely for the purpose of directly accommodating the attachment(s) which the Licensee wishes to attach to Networks pole(s) and includes, but is not limited to, initial Line Clearing, any changes or additions to or Rearrangement of Networks' poles or Networks' attachments. Without restricting the generality of the foregoing, Make-ready Work does not include the costs of replacing defective poles, or previously scheduled betterment programs initiated by Networks.

"**Permit**" means the approved Application evidenced by the signature of a duly authorized Networks employee in accordance with the terms and conditions of this Agreement.

"**Pole Rental Rate**" means the annual fee payable by the Licensee to Networks pursuant to the terms of this Agreement, which fee is more particularly described in Section 10.0 below.

"**Rearrange**" or "**Rearrangement**" means the removal of attachments or Attachments from one position on a Joint Use Pole and placing the same attachments or Attachments and such incidental material as may be required in another position on the same Joint Use Pole.

"**Redundant Attachment**" means an Attachment owned by the Licensee, which is not being used to provide Telecommunications Services.

"**Service Drop(s)**" means telecommunication facilities that are self-supporting and are used to supply Telecommunications Services to one or more customers of the Licensee, but does not include NEZ wire.

"**Standard**" means the Canadian Standard Association Standard C22.3 No. 1-M87 "Overhead Lines", as same may be amended or updated from time to time hereafter.

"**Telecommunications Service**" is as defined in the *Telecommunications Act* (federal).

"**Transfer**" means the removal of attachments or Attachments from one Joint Use Pole and placing the same attachments or Attachments and such incidental materials as may be required on another Joint Use Pole.

2.0 TERM:

2.1 Subject to Section 17.0 herein and the termination rights in this clause 2.1, this Agreement shall be of full force and effect commencing on the Effective Date and ending on December 31, 2014 (hereinafter referred to as the "Initial Term") and shall thereafter be automatically renewed for successive periods of one (1) year upon the same terms and conditions herein (hereinafter the Initial Term and renewal periods collectively referred to as the "Term"); provided that either party may terminate this Agreement effective at any time after the expiry of the Initial Term by providing at least thirty (30) days' prior written notice of termination to the other party.

2.3 The Licensee represents and warrants that on the Effective Date the Attachments which form the subject of Existing Permits (as defined in clause 2.2 above) comply with the Standard and all other applicable laws, statutes, regulations, by-laws, standards, and codes and that the Attachments which form the subject of Permits that are not Existing Permits shall, at the time the Joint Use is established for said Attachments, comply with the then current Standard or Networks' then current Distribution Standards, whichever is more stringent, as well as all

other applicable laws, statutes, regulations, by-laws, standards and codes. Subject to the foregoing, the Licensee represents and warrants and covenants that at the Licensee's sole risk and expense, during the Term of this Agreement, the Attachments which form the subject of Permits and Existing Permits (as defined in clause 2.2 above) shall comply with the current Standard or Networks' then current Distribution Standards, whichever is more stringent, and all other applicable laws, statutes, regulations, by-laws, standards and codes, as they may be amended from time to time.

3.0 CONTRACT ADMINISTRATION GUIDE: ("CAG")

3.1 Both parties agree to be bound by and comply with the terms and conditions of the CAG.

4.0 APPLICATION FOR JOINT USE AND GRANT OF PERMISSION:

4.1 Whenever the Licensee wishes to place its attachments, or alter the number, size or nature of its Attachments, on Networks' poles and/or Joint Use Poles, as the case may be, it shall complete and submit an Application to Networks and Networks shall reply to such Application, in the manner specified in the CAG.

4.2 For each Permit issued by Networks pursuant to Section 1.0 of the CAG, Networks hereby grants to the Licensee, and the Licensee hereby accepts from Networks, the permission to place, affix or attach and to maintain such of the Licensee's attachments on poles owned by Networks, both of which attachments and poles and locations of the poles are designated in the said Permit, in accordance with the terms and conditions of this Agreement.

4.3 The Licensee shall pay Networks for the costs of the Make-ready Work performed by Networks by no later than 30 days after the date of the invoice rendered by Networks therefor; such costs shall be payable by the Licensee even in circumstances when the Licensee decides to no longer place, affix or attach its attachments unto the relevant pole after it has approved the costs for the Make-ready Work.

4.4 The Licensee shall provide Networks with two days' advance notice of when it will initially place, affix or attach its Attachments on Networks' poles as approved by Networks. Upon completion of the said work to place, affix or attach the said Attachments, the Licensee shall notify Networks of the said completion after which Networks may conduct an inspection of such work. The placing, affixing or attaching of the Licensee's Attachments on Networks' poles as authorized by a Permit shall be at the sole expense and risk of the Licensee.

4.5 Whenever the Licensee desires to modify, Rearrange, Transfer, add to or remove Attachments (with the exception of Service Drop(s)and strand-mounted or cable-mounted equipment), the parties shall proceed in the manner set out in Decision Tables 1, 2 and 3 of the CAG.

4.6 In the event that a third party has approached the Licensee or the Licensee has approached a third party with regard to placing or attaching an attachment(s) of the third party onto a Networks' pole, whether by overlashing on any of the Licensee's existing Attachments or otherwise, the Licensee shall cause the third party to contact Networks in writing in regard to executing a Joint Use Agreement for purposes of placing, affixing or attaching the third party's attachments unto Networks' poles and the Licensee shall cause the third party to copy the Licensee on the said written notice to Networks. For greater certainty, the Licensee is not entitled to grant any permission to any third party for the placing, affixing or attaching of the third party's attachments onto Networks' poles, whether by overlashing on any of the Licensee's existing Attachments or otherwise.

5.0 INSTALLATION, MAINTENANCE AND OPERATION OF JOINT USE POLES:

5.1 In the event that Networks determines that there is a Hazardous Condition, which includes, but is not limited to, deteriorated or defective Networks attachments and/or Joint Use Poles, Networks shall mark or band the Joint Use Pole(s) where the electrical or mechanical hazard exists in accordance with the CAG and shall use its best efforts to correct the Hazardous Condition depending on its severity within 24 hours after discovering the Hazardous Condition, but in any event no later than 30 days after discovering the Hazardous Condition.

5.2 (a) Where a potential or actual Hazardous Condition is determined by Networks to be widespread, Networks shall notify the Licensee in writing of the potential safety risk and the nature of the hazard, as soon as reasonably possible, quantify, mark or band the poles where the Hazardous Condition exists and correct the Hazardous Condition within a reasonable timeframe. Until such time that Networks has remedied the Hazardous Condition, Networks shall offer protection to the Licensee and its employees and contractors at no cost until such time as the Hazardous Condition is corrected.

(b) Both parties acknowledge and agree that if the Licensee proceeds to work on its Attachments located on the applicable Joint Use Pole(s) after receiving the notification referred to in subparagraph (a) above from Networks and prior to Networks having remedied the Hazardous Condition, the Licensee shall do so at its own risk and shall assume all risk of damage, loss or injury to its Attachments or to attachments of third parties and to its employees, servants, agents, representatives, contractors and other persons acting on its behalf in performing the work and third parties.

5.3 In the event that the Licensee determines that there is a Hazardous Condition posed by its Attachments on the Joint Use Poles, the Licensee shall (i) notify Networks of the potential safety risk and the nature of the Hazardous Condition as soon as reasonably possible, (ii) identify the Joint Use Poles where the Hazardous Condition exists, and (iii) correct the Hazardous Condition in accordance with Section 4.0 of the CAG. If the Hazardous Condition is not so corrected by the Licensee, Networks may remove the Licensee's Attachments at the Licensee's sole expense and risk of damage to the Licensee's Attachments and Networks shall be reimbursed by the Licensee for the said costs of removal within thirty (30) days of issuance of an invoice by Networks. Until such time that the Licensee has remedied the Hazardous Condition, the Licensee shall offer protection to Networks, its employees and contractors and its equipment at no cost.

5.4 In the event that Networks suspects a problem with any of its Joint Use Poles or its attachments thereon which Networks is of the opinion does not constitute a potential or actual Hazardous Condition, it shall notify the Licensee of said problem and provide the Licensee with any additional information relating to the problem as Networks deems appropriate. In addition, Networks may require the Licensee to carry out certain activities or to take certain precautions in light of the said problem and the Licensee shall comply with any such requirements. Any remedial work associated with the said suspected problems, such as but not limited to any training associated with the said suspected problems, that the Licensee wishes Networks to provide to the Licensee for purposes of the Licensee working on its Attachments on any said Joint Use Pole shall be at the sole cost and risk of the Licensee except as otherwise specified in any applicable law.

5.5 Subject to the foregoing provisions of this Section 5.0, Networks shall at all times and at its sole expense maintain its Joint Use Poles and all of its own supporting attachments in a safe and serviceable condition and in accordance with its standards and shall repair or replace such of said attachments and/or Joint Use Poles as they become defective, deteriorated or unsafe in accordance with the terms and conditions herein.

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6.0 INSTALLATION, MAINTENANCE AND OPERATION OF ATTACHMENTS:

6.1 During the Term of this Agreement, the Licensee covenants and agrees that it will:

(a) only attach Attachments (other than Service Drop(s)) to Joint Use Poles in locations identified in a Permit approved by Networks for those particular Attachments;
(b) attach Attachments in such a way so as not to interfere with the lines, works or equipment of Networks or of other permitted users of the Joint Use Poles;
(c) attach Attachments in accordance with the terms and conditions herein;
(d) not attach any attachments (other than Service Drop(s)) until Networks has approved the Application for the particular attachments;
(e) work in conjunction with Networks to develop a mutually satisfactory standard for labeling Attachments that would include a method of identifying the type and owner of the Attachment, placement of the identification tag and develop an implementation plan with a view to have the standard implemented on or before the end of the Initial Term; and
(f) not attach any new distribution or trunk cable Attachments to any Joint Use Pole(s) without having removed all Redundant Attachments from said Joint Use Pole(s).

6.2 The Licensee shall at all times and at its sole expense, and in accordance with the terms and conditions of this Agreement:

(a) maintain and operate its Attachments in a safe and serviceable condition in accordance with the placement and safety practices and specifications set out in the CAG, all applicable laws, statutes, regulations, by-laws, guidelines and codes of every governmental authority including, without limitation, Good Utility Practice.
(b) replace Attachments as they deteriorate, become defective or unsafe; and
(c) remove Attachments, including, but not limited to Redundant Attachments, that are no longer required for providing or being used to provide Telecommunications Services.

6.3 The Licensee shall, at its sole cost, Rearrange or temporarily remove any of its Attachments, at Networks' request, where this is required for purposes of the placement, Rearrangement, maintenance or removal of any of Networks' attachments. The Licensee will perform such work within ninety (90) days after being notified in writing by Networks to do so, or within a shorter period of time in case of an Emergency, as may be determined by Networks using Good Utility Practice and which shall be relayed to the Licensee with reasons therefor. If the Licensee is unable to comply with any such notice, or in the event of an Emergency requiring immediate action, Networks may perform the said work, or cause the said work to be performed by others at the risk of damage to the Licensee's Attachments and the Licensee shall pay the costs of said work.

7.0 PERFORMANCE GUARANTEE:

7.1 If the Licensee has not had a previous satisfactory financial relationship with Ontario Hydro or Networks, Networks may require that the Licensee deposit with Networks, security in favour of Networks, in an amount and in a form satisfactory to Networks, securing the due performance of the obligations of the Licensee as provided for in this Agreement. The security will be maintained in good standing by the Licensee for a period of three years from the date that it is first placed with Networks or the balance of the remaining Term if less than three years remains of the Term.

8.0 RIGHT OF WAY:

8.1 The Licensee shall be responsible for obtaining any and all easements, rights of way, licenses, privileges, authorizations, permissions or other land rights from others including authorization or permission to locate on municipal or provincial road allowances or any other applicable authorization or permission required from any municipal, provincial or federal government or any agency, body or board thereof having jurisdiction, as may be necessary for the placement, operation, Line Clearing and maintenance of its Attachments upon and along, and removal of its Attachments from, the Joint Use Poles provided for in a Permit and if the Licensee fails to comply with the provisions of this clause, it shall indemnify Networks from and against any and all claims or demands or other liability resulting from such failure.

8.2 Networks gives no warranty of permission from property owners, such as municipalities, for the use of its poles by the Licensee, and if objection is made thereto and the Licensee is unable to remedy the matter satisfactorily within thirty (30) days after the objection is first raised (unless the parties agree in writing to another time period), Networks may then, by notice in writing at any time, require the Licensee to remove its Attachments from the Joint Use Poles involved, and the Licensee shall, at its own expense, remove its Attachments from such Joint Use Poles within ninety days (90) days after receipt of said notice unless the Licensee is legally required to remove its Attachments by a shorter time period in which case the Licensee shall remove its Attachments from such Joint Use Poles during such shorter period of time. Nothing in this Section 8.0 shall be deemed to confer on the Licensee any authority to maintain its Attachments on Networks' poles for the said period of ninety (90) days, or any portion thereof, or otherwise to infringe upon any legal rights of such property owners.

8.3 If both parties agree, one party may obtain any required Right of Way for both parties. Each party shall share equally the cost of obtaining the Right of Way, including the compensation paid to the property owner.

9.0 SAFETY AND COMPLIANCE WITH APPLICABLE LAWS:

9.1 The Licensee shall ensure that its employees, agents, representatives, contractors and subcontractors in the performance of the Licensee's obligations and the exercise of the Licensee's rights under this Agreement shall at all times:

(a) comply with the more stringent of the Standard and Networks' Distribution Standards, the CAG, and all applicable laws, rules, orders, ordinances, regulations and other rules of all lawful authorities acting within their powers;
(b) comply with Networks' safety practices;
(c) carry out work according to the Limits of Approach; and
(d) are competent and qualified to deal with electrical hazards in accordance with the requirements of the *Occupational Health & Safety Act*, (Ontario) as amended and all applicable regulations thereto including, Construction Projects – O. Reg. 213/91 or Part 11 of the Canada Labour Code, R.S.C. 1985, c. L.2, as amended and all applicable regulations thereto, whichever is more stringent.

10.0 POLE RENTAL RATES:

10.1 The Licensee shall, during the Term of this Agreement, pay to Networks an annual Pole Rental Rate consisting of the total of the following amounts:

(a) $22.35 per Joint Use Pole that supports an Attachment of the Licensee; except where the Joint Use Pole supports only Service Drops of the Licensee and the Joint Use Pole is used by the Licensee solely for the purpose of achieving vertical clearance for the Service Drops supported thereon (hereinafter referred to as "**Clearance Poles**"); and
(b) $16.76 per Clearance Pole.

10.2 For purposes of calculating the amount payable by the Licensee pursuant to clause 10.1(b) above, the parties acknowledge and agree that the number of Clearance Poles shall be deemed to be equal to seven and a half percent (7.5%) of the total number of Joint Use Poles that support a Licensee Attachment and this number shall be multiplied by a rate equal to 75% of the rate charged for Joint Use Poles that are not Clearance Poles in accordance with clause 10.1(a) above, which equals $16.76.

10.3 Notwithstanding clause 10.2 above, in order to determine the actual number of Clearance Poles for purposes of calculating the amount owing under clause 10.1(b) above, the Licensee may undertake an audit of all or a representative sample of the Joint Use Poles (provided such representative sample is agreed upon between the parties). In the event that such an audit is completed, the actual number of Clearance Poles shall be used for purposes of calculating the amount payable pursuant to clause 10.1(b) term of the Agreement. The parties acknowledge and agree that no adjustments shall be made in respect of any invoices issued prior to any audit conducted pursuant to this clause 10.3 and which audit results in a new number of Clearance Poles.

10.4 The Licensee shall pay and indemnify and save harmless Networks, its successors and assigns and its shareholder, directors, officers, employees and agents against all taxes, rates, assessments, or fees of every nature and kind which are levied directly upon Attachments designated on a Permit or any other taxes, rents, assessments or fees levied directly by reason of the rights granted to the Licensee by this Agreement.

10.5 In January of each year during the Term of this Agreement, Networks shall issue an invoice for the Pole Rental Rate payable by the Licensee for the said year and, subject to the next sentence, the Licensee shall pay said invoice by no later than sixty (60) days after the invoice date. Provided the Licensee first obtains Networks' prior written approval, the Licensee may pay the invoice in two installments to be paid on or before the first days of March and July in each year.

10.6 If at any time after an invoice has been issued by Networks pursuant to clause 10.5 above, the Licensee has placed, affixed or attached an Attachment to a Networks-owned pole for which Networks has issued a Permit in accordance with Section 4.0 above, and the said pole does not already support a Licensee Attachment, then the License shall be charged the full Pole Rental Rate for the said pole. In any given year, where there are Attachments placed on a Networks pole as approved by Networks after the issuance of an invoice referred to in clause 10.5 above for the said year and the placement occurs between January and June, Networks shall issue an invoice to the Licensee for the Pole Rental Rate for the said pole in July of the given year, and where there are Attachments placed on a Networks pole (as approved by Networks) after the issuance of an invoice referred to in clause 10.5 above for the said year and the placement occurs between July and December, Networks shall issue an invoice to the Licensee for the Pole Rental Rate for the said pole in January of the following year. The Licensee shall pay any invoice issued pursuant to this clause 10.6 by no later than sixty (60) days after the invoice date.

10.7 Throughout this Agreement, any reference to Networks' costs means Networks' charges for labour, equipment and materials at Networks' standard rates plus Networks' standard overheads.

10.8 If the Licensee has capacity available on its fibre optic cables in areas where Networks requires such capacity for the purpose of enhancing or improving the reliability and security of Networks' transmission and/or distribution system, the Licensee shall, upon Networks' request, enter into good faith negotiations with Networks for the purpose of reaching an agreement to address the terms and conditions (including Networks' operating and maintenance requirements), that will govern the grant of a right to said capacity from the Licensee to Networks.

11.0 DIVISION OF COSTS:

11.1 Except where expressly provided herein, both parties acknowledge and agree that the costs involved in erecting, placing, maintaining and otherwise dealing with the Joint Use Poles and Attachments in specified circumstances shall be borne by or divided between each party or the parties respectively as outlined in Section 13.0 and Decision Table 14 of the CAG.

12.0 UNAUTHORIZED ATTACHMENTS AND REDUNDANT ATTACHMENT:

12.1 If at any time during the Term of this Agreement an attachment(s) of the Licensee or a third party acting through or under the Licensee is attached to a Networks' pole without an Application being approved by or on behalf of Networks for such attachment(s), where Networks determines, in its sole and absolute discretion, to be feasible to do so, the Licensee may submit a revised or new Application to reflect the attachment(s) and where the revised or new Application is approved by Networks, the said attachment(s) becomes authorized and can remain on the pole subject to the terms and conditions of this Agreement. If Networks determines that it is not feasible, the Licensee shall remove the said unauthorized attachment(s) by no later than 30 days after requested to do so by Networks, failing which Networks shall have the right to forthwith remove any and all unauthorized attachment(s) and to charge the Licensee for all costs incurred by Networks as a result of the removal of such unauthorized attachment(s).

12.2 In addition to the Pole Rental Rate payable for authorized Attachment(s) and the costs identified in clause 12.1 above, the Licensee agrees to pay to Networks the total Pole Rental Rates described in clause 10.1 above for unauthorized attachment(s) for each year during which the unauthorized attachment(s) are placed on the poles or Joint Use Poles or for a period of five years whichever is greater, the total Pole Rental Rate being calculated by using the rate payable per Joint Use Pole and the rate payable per Clearance Pole for the current year. The parties agree that the amounts payable pursuant to this clause shall be deemed to be fair and just in the circumstances and shall be treated as liquidated damages and not as a penalty. Should the number of unauthorized attachment(s) exceed 2% of the number of Joint Use Poles for which Permits have been granted, the Licensee will also pay to Networks its labour costs associated with the audit wherein Networks discovered the unauthorized attachment(s). Notwithstanding the foregoing, the parties agree that Service Drop(s) will not be treated as unauthorized attachments for the purposes of this clause 12.2.

12.3 The Licensee shall notify Networks in writing of any Redundant Attachment. If the Licensee fails to remove any Redundant Attachment within 90 days of being notified by Networks to do so or within 90 days of an Attachment becoming a Redundant Attachment, whichever occurs first, Networks is entitled to liquidated damages in the amount of $100.00 per Joint Use Pole to which a Redundant Attachment is attached.

13.0 EXISTING RIGHTS OF OTHERS:

13.1 If Networks has granted rights or privileges to a third party to use poles not covered by this Agreement, then nothing herein contained shall be construed as affecting such rights or privileges, if and when this Agreement is made applicable to such poles. Networks shall have the right to continue and extend such existing rights or privileges, it being expressly understood, however, that for the purpose of this Agreement, the attachments of any such third party shall be treated as Networks' attachments.

13.2 Nothing in this Agreement shall prevent or limit Networks from permitting the affixing of third party attachments to any of its poles or Joint Use Poles.

13.3 Where the Licensee acquires ownership of Joint Use Poles, it shall also assume Networks' existing obligations to third parties in respect of these Joint Use Poles.

14.0 LIABILITY, DAMAGE AND INDEMNIFICATION:

14.1 The Licensee hereby assumes all risk of damage to or loss of its Attachments howsoever caused, and does for itself and its successors and assigns hereby release and forever discharge Networks, its successors and assigns, its directors, officers, employees and agents from all claims and demands with respect thereto, except to the extent that such loss and damage are caused by Networks' negligence. The Licensee hereby agrees to fully release, indemnify and save harmless Networks, its successors and assigns, its shareholder, directors, officers, employees and agents, of, from and against all damage, loss or injury to persons or property which may be suffered or which may hereafter be sustained or incurred by reason of, or in any way relating to, arising from, or based upon the exercise by the Licensee of the rights and other permissions herein granted and/or the performance of or purported performance of or non-performance of the Licensee of any of its obligations or covenants in this Agreement, and all manner of claims, charges, expenses, liabilities, obligations and demands in connection therewith, including, but not limited to, claims from the Licensee or from third parties, arising out of power outages or fluctuations that would not have occurred but for the presence of the Licensee's Attachments on the Joint Use Poles, except to the extent that any of the foregoing are caused by Networks' negligence.

14.2 Notwithstanding anything else in this Agreement, Networks shall not be liable for any economic loss, loss of goodwill, loss of profit or for any special, indirect or consequential damages, where the said losses or damages are incurred by the Licensee whose Attachments are placed on Networks' Joint Use Poles or by any third party claiming through or under the Licensee.

14.3 The Parties acknowledge and agree that this Section 14.0 shall survive termination or expiry of this Agreement.

15.0 DISPUTE RESOLUTION:

15.1 Networks and the Licensee shall seek to resolve problems or concerns related to this Agreement at the operational level. Except in circumstances where an Emergency exists as may be determined by Networks using Good Utility Practice, in which case this clause does not apply, if such disputes or any other disputes related to this Agreement are not resolved within thirty (30) days after the dispute arises, either party may, by notice to the other, refer the dispute to a committee to be formed and to be comprised of two (2) representatives, one appointed by each party. If the two representatives cannot resolve the dispute within ten (10) days after reference to them, either party may seek such further recourse as it deems appropriate including bringing an application to the Ontario Energy Board for dispute resolution. Nothing in this clause serves as a waiver of any other rights or remedies that either party may have pursuant to this Agreement, at law or equity.

16.0 INSURANCE

16.1 The Licensee shall, during the Term of this Agreement, procure and maintain in full force and effect with financially responsible insurance carriers, insurance policies in which Networks is named as an additional insured, in the amount of Five Million Dollars ($5,000,000.00) against liability due to damage to Networks' property or property of any other person or persons and against liability due to injury to or death of any person or persons in any one instance. Such policies of insurance shall:

a) contain a severability of interest clause and cross liability clause between the Licensee and Networks;
b) be non-contributing with, and shall apply only as primary and not excess to any other insurance available to Networks;
c) provide that it shall not be cancelled or amended so as to reduce or restrict coverage except upon thirty (30) days' prior written notice (by registered mail) to Networks.

16.2 The Licensee shall, upon Networks' request, provide Networks with a certificate of insurance completed

by a duly authorized representative of the Licensee's insurer certifying that coverages required pursuant to clause 16.1 above are in effect.

16.3 The Licensee agrees that the insurance described in clause 16.1 above herein does not in any way limit the Licensee's liability pursuant to the indemnity provisions of this Agreement.

17.0 TERMINATION:

17.1 If the Licensee defaults at any time in the payment of the Pole Rental Rate or any other amount payable by the Licensee or if the Licensee fails to or neglects at any time to fully perform, observe and comply with any of the other terms, conditions and covenants herein, then Networks may, as soon as practicable after becoming aware of the default, notify the Licensee in writing of such default and the Licensee shall correct such default to the satisfaction of Networks within thirty (30) days of the issuance of such notice or sooner in the case of an Emergency, as may be determined by Networks or within a longer time period if agreeable to Networks, failing which Networks may forthwith terminate this Agreement and the privileges herein granted in respect of the Permits affected by the default or to which the default relates.

17.2 Networks shall be entitled, at its option, to terminate this Agreement immediately upon written notice to the Licensee upon the Licensee becoming bankrupt or insolvent, upon the expiry, cessation or revocation of the Licensee's license from the Canadian Radio-television and Telecommunications Commission or upon the Licensee ceasing to provide Telecommunications Services.

17.3 The termination of a Permit approved pursuant to this Agreement shall not be deemed to be termination of this Agreement unless such Permit is the last remaining or only Permit approved pursuant to this Agreement in which case the termination of the Permit shall be deemed to be termination of this Agreement.

17.4 For the termination or cancellation of any Permits, a new Permit number is not required. The word "Cancellation" or "Termination" will be typed in the space normally used for the Permit number and the Permit number to be "Cancelled" shall be shown in the "Location" block noting the reason for cancellation.

18.0 WAIVER AND LATE PAYMENTS:

18.1 The failure of either Party hereto to enforce at any time any of the provisions of this Agreement or to exercise any right, power or option which is herein provided shall in no way be construed to be a waiver of such provision or any other provision nor in any way affect the validity of this Agreement or any part hereof or the right of either party to enforce thereafter each and every provision and to exercise any right or option. The waiver of any breach of this Agreement shall not be held to be a waiver of any other or subsequent breach. Nothing shall be construed as or have the effect of a waiver except an instrument in writing signed by a duly authorized officer of the party which expressly waives a right, power or option under this Agreement

18.2 In the event that the Licensee fails to pay any amount payable hereunder when due, such unpaid amount shall bear interest from the payment due date until the date Networks receives such payment at a rate of 1.5% per month compounded monthly (19.56 per cent per year).

19.0 FORCE MAJEURE:

19.1 Save and except for the payment of any monies required hereunder, neither party shall be deemed to be in default of this Agreement where the failure to perform or the delay in performing any obligation is due

wholly or in part to a cause beyond its reasonable control, including but not limited to an act of God, an act of any federal, provincial, municipal or government authority, civil commotion, strikes, lockouts and other labour disputes, fires, floods, sabotage, earthquakes, storms, epidemics, and an inability due to causes beyond the reasonable control of the party. The party subject to such an event of force majeure shall promptly notify the other party of its inability to perform or of any delay in performing due to an event of force majeure and shall provide an estimate, as soon as practicable, as to when the obligation will be performed. The time for performing the obligation shall be extended for a period equal to the time during which the party was subject to the event of force majeure. Both parties shall explore all reasonable avenues available to avoid or resolve events of force majeure in the shortest time possible.

19.2 Notwithstanding clause 19.1 above, the settlement of any strike, lockout, restrictive work practice or other labour disturbance constituting a force majeure event shall be within the sole discretion of the party involved in such strike, lockout, restrictive work practice or other labour disturbance and nothing in clause 19.1 above shall require the said party to mitigate or alleviate the effects of such strike, lockout, restrictive work practice or other labour disturbance.

20.0 RELATIONSHIP OF PARTIES:

20.1 Nothing in this Agreement creates the relationship of principal and agent, employer and employee, partnership or joint venture between the parties. The parties agree that they are and will at all times remain independent and are not and shall not represent themselves to be the agent, employee, partner or joint venturer of the other. No representations will be made or acts taken by either party which could establish any apparent relationship of agency, employment, joint venture or partnership and no party shall be bound in any manner whatsoever by any agreements, warranties or representations made by the other party to any other person nor with respect to any other action of the other party.

20.2 The parties will endeavor to have communications and/or district meetings between their respective operational staff as the parties deem appropriate to discuss upcoming work plans for the following year that may impact Joint Use.

21.0 NOTICE:

21.1 Any notice or other writing required or permitted to be given under this Agreement or for the purposes of it, to any party, shall be valid only if delivered in writing in accordance with this clause. Notices can be provided to **ROGERS COMMUNICATION PARTNERSHIP, 333 Bloor Street East, 9th Floor, Toronto, Ontario M4W 1G9 Attention: Senior Vice-President, Regulatory, Fax number (416) 935-4655 with a copy to: Rogers Communications Partnership, 333 Bloor Street East, 9th Floor, Toronto, Ontario M4W 1G9 Attention: Senior Vice-President & General Counsel**, Fax Number (416) 935-3548 in respect of the Licensee and to the Manager responsible for Joint Use Agreements, 185 Clegg Road, Markham Ontario. L6G 1B7 in respect of Networks. The parties may change their respective addresses and addressees for delivery by delivering notices of such changes as provided herein. Notice sent accordingly shall be deemed to have been delivered and received:

(a) If delivered by hand, upon receipt;
(b) If delivered by fax, 48 hours after the time of transmission, excluding from the calculation weekends and public holidays;
(c) If delivered by overnight courier, four (4) days after the couriering thereof;
(d) If delivered by registered mail, six (6) days after the mailing thereof, provided that if there is a postal strike such notice shall be delivered by hand or courier.

22.0 ASSIGNMENT:

22.1 Neither this Agreement nor any rights, remedies, liabilities or obligations arising under it or by reason of it nor Permit(s) granted hereunder shall be assignable by the Licensee without Networks' prior written consent, which consent shall not be unreasonably withheld; provided that the Licensee may assign this Agreement or any rights, remedies or liabilities to a financial institution as security for financing purposes, in which case the Licensee shall provide Networks with advance notification of assignment by giving Networks written notice at least 30 days prior to the effective date of the assignment. The Licensee further covenants and agrees to cause the assignee to execute an assumption agreement with the Licensee and Networks thereby agreeing to be bound by the terms and conditions of this Agreement. Subject thereto, this Agreement shall extend to, be binding upon and enure to the benefit of the parties hereto and there respective successors and permitted assigns.

23.0 ENTIRE AGREEMENT:

23.1 This Agreement, together with all Schedules attached hereto, constitutes the entire agreement between Networks and the Licensee with respect to the subject matter herein and supersedes all prior oral or written representations and agreements concerning the subject matter of this Agreement.

24.0 AMENDMENTS:

24.1 This Agreement may be amended only by mutual written agreement of the Parties.

25.0 SEVERABILITY:

25.1 If any provision of this Agreement is declared invalid or unenforceable by any competent authority such provision shall be deemed severed and shall not affect the validity or enforceability of the remaining provisions of this Agreement, unless such invalidity or unenforceability renders the operation of this Agreement impossible.

26.0 OTHER INFORMATION:

26.1 Each party shall at the other party's request and expense execute and do all such further acts and things as may be necessary to carry out the full intent and meaning of this Agreement and the transactions contemplated thereby.

27.0 COUNTERPARTS:

27.1 This Agreement may be executed in counterparts and the counterparts together shall constitute an original.

28.0 REASONABLENESS:

28.1 Each party agrees that it shall at all times act reasonably in the performance of its obligations and the exercise of its rights under this Agreement.

29.0 SCHEDULES

29.1 Schedules "A" and "B" attached hereto are to be read with and form part of this Agreement.

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30.0 APPLICABLE LAW:

30.1 This Agreement shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the laws of the Province of Ontario and the federal laws of Canada applicable therein, and the parties hereto irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario in the event of a dispute hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by the signatures of their respective representatives duly authorized in that behalf.

HYDRO ONE NETWORKS INC.

Name: John Boldt
Title: Manager - Program Integration
I have the authority to bind the corporation.

ROGERS COMMUNICATIONS PARTNERSHIP
Acting by its partners ~~Rogers Communications Inc. and~~ Mountain Cablevision Limited PJD and
Fido Solutions Inc.

Mountain Cablevision Limited
~~Rogers Communications Inc.~~

Name: PAM DINSMORE
Title: VP REGULATORY

And

Name:
Title:

We have the authority bind the Corporation.
The Corporation has the authority to bind the Partnership.

Fido Solutions Inc.

Name: PAM DINSMORE
Title: VP REGULATORY

And

Name:
Title:

We have the authority bind the Corporation.
The Corporation has the authority to bind the Partnership.

SCHEDULE "A"

Contract Administration Guide ("CAG")

1.0 APPLICATION FOR JOINT USE:

1.1 Whenever the Licensee desires to place its attachments on Network's poles, it shall initially contact and submit to Networks a Preliminary Notice of Application (Decision Table 1) to the appropriate zone office as shown in Appendix "1" of Schedule "B" attached to the Agreement to express its interest and, in accordance with the steps outlined in Decision Table 1, the Licensee shall also submit to Networks a written Application in duplicate therefor, signed by its duly authorized officer (see sample attached hereto as Appendix "1" to this Schedule "A" attached to the Agreement and shall specify in the space provided on the said form, the location of the poles in question and the number and kind of attachments (with the exception of Service Drop(s) and strand-mounted or cable-mounted equipment) which it is desired to place thereon. In addition, as part of its Application, the Licensee shall submit such other information or material required by Networks for purposes of Networks assessing the feasibility of the Licensee placing, affixing or attaching its attachments onto Networks' poles, including the ability of Networks to comply with all applicable laws, statutes, regulations, by-laws, standards, and codes in respect of its poles.

1.2 Location of Attachments on Joint Use Poles will be determined by Networks at a joint field visit before Joint Use is established unless otherwise expressly agreed by both parties. The usual position for Attachments will be on the roadside of Joint Use Poles. All of the Attachments will normally be on the same side of the Joint Use Pole to minimize climbing hazards and to facilitate pole replacement.

1.3 The placement of the Licensee's Attachments on the field side of Joint Use Poles shall not, however, preclude placing fibre optic cables on the roadside of such Joint Use Poles. However, additional costs may be incurred by the Licensee upon replacement of Joint Use Poles where cables have been placed on both sides and such costs shall be borne by the Licensee.

1.4 If Networks is satisfied with a Licensee's Application and the other information or material required to be submitted by the Licensee pursuant to clause 1.1 above, Networks shall signify its acceptance of the Application by affixing the signature of its duly authorized officer, upon the duplicate copy of the Application and shall return it to the Licensee and such accepted Application shall thereupon be and shall constitute a Permit hereunder.

1.5 Notwithstanding anything contained herein, it is understood and agreed by both parties that Networks may reject any Application it receives pursuant to Section 1.1; and when Networks rejects an Application, it shall return the duplicate thereof to the Licensee indicating thereon its rejection and the reason(s) therefor. However, when the reason for rejection may be satisfied by the Licensee, the Licensee may re-submit the Application to Networks for reconsideration by Networks and if accepted by Networks, such accepted Application shall thereupon be and shall constitute a Permit hereunder. Networks shall return the Application to the Licensee either accepted or rejected within 20 days after its receipt for up to 49 proposed attachments and 60 days after its receipt for Applications involving 49 or more proposed attachments unless extenuating circumstances prevent Networks from doing so within the applicable timeframe.

1.6 Both parties acknowledge and agree that each Permit approved by or on behalf of Networks shall be deemed to have been issued pursuant to the Agreement and shall be read and construed in accordance with the Agreement.

1.7 Networks may at its discretion require the Licensee to pay the costs of having Networks' employee(s) attend at the location of its poles to be designated on the Application to determine what, if any, Make-ready Work may be required to accommodate the Licensee's Attachment(s), the cost of preparing an estimate of such Make-ready Work costs and the cost of preparing an Application if requested to do so by the Licensee in writing.

1.8 Both parties acknowledge and agree that the permission to attach Attachments to the Joint Use Poles shall be deemed to be effective as of the date of the approval of each Permit approved by or on behalf of Networks.

1.9 Networks agrees to provide the Licensee with the opportunity to reserve extra space for its Attachments on the Joint Use Poles during the design phase of placing, replacing or upgrading the Joint Use Poles, provided that prior to commencement of construction, the Licensee confirms its agreement to pay Networks for the costs associated with the said extra space thirty days after issuance of an invoice therefor by Networks. The said invoice shall be issued by Networks after completion of construction.

1.10 Upon the request by and at the sole expense of the Licensee, Networks may, in its sole discretion, agree to rebuild, alter, add to or change the existing Joint Use Poles to accommodate the Attachments and maintain the Limits of Approach.

1.11 Networks will make a reasonable attempt to notify the Licensee of any pending changes to Networks' rules and safety regulations regarding the placement, maintenance or removal of Attachments on and from its Joint Use Poles.

1.12 Both parties acknowledge and agree that the application process shall consider existing safety hazards, route design as well as imminent and future loading on the specified poles.

SEE DECISION TABLES 1, 2 and 3 (Pages 4, 5 and 6)

PRELIMINARY NOTICE OF APPLICATION - (DECISION TABLE 1)

To: Hydro One Networks _____ _____ _____ _____ _____	From: Licensee: _____ Address: _____ City: _____ Postal Code: _____
Fax No.: _____ Phone No.: _____ Field Representative: _____	Contact: _____ Telephone _____ Fax Com: _____ Date: _____

NOTICE OF APPLICATION

WE ARE INTERESTED IN PLACING ATTACHMENTS (AS SPECIFIED) AT THE FOLLOWING LOCATION(S)

LOCATION (PROXIMITY):

Application For: New attachment _____ Revise Existing _____

Existing Hydro One Networks Inc. Permit #: _____

Licensee Reference #: _____

Licensee Construction Contact: _____

(Phone): _____ (Cell): _____ (Pager): _____

Date: _____

Signature: _____

Licensee's Construction Representative: _____

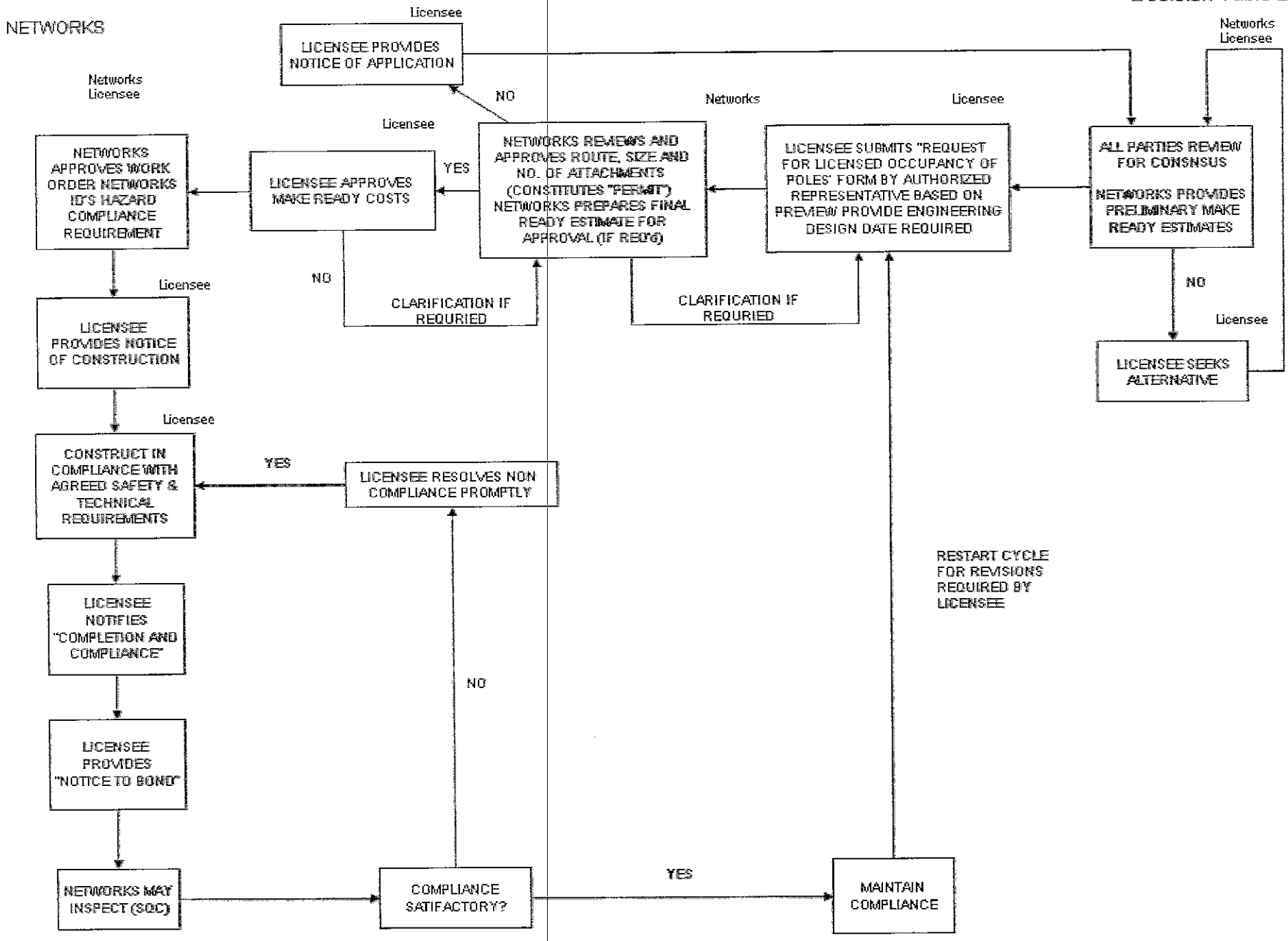
Print Name: _____

Date: : _____

Contact #: _____

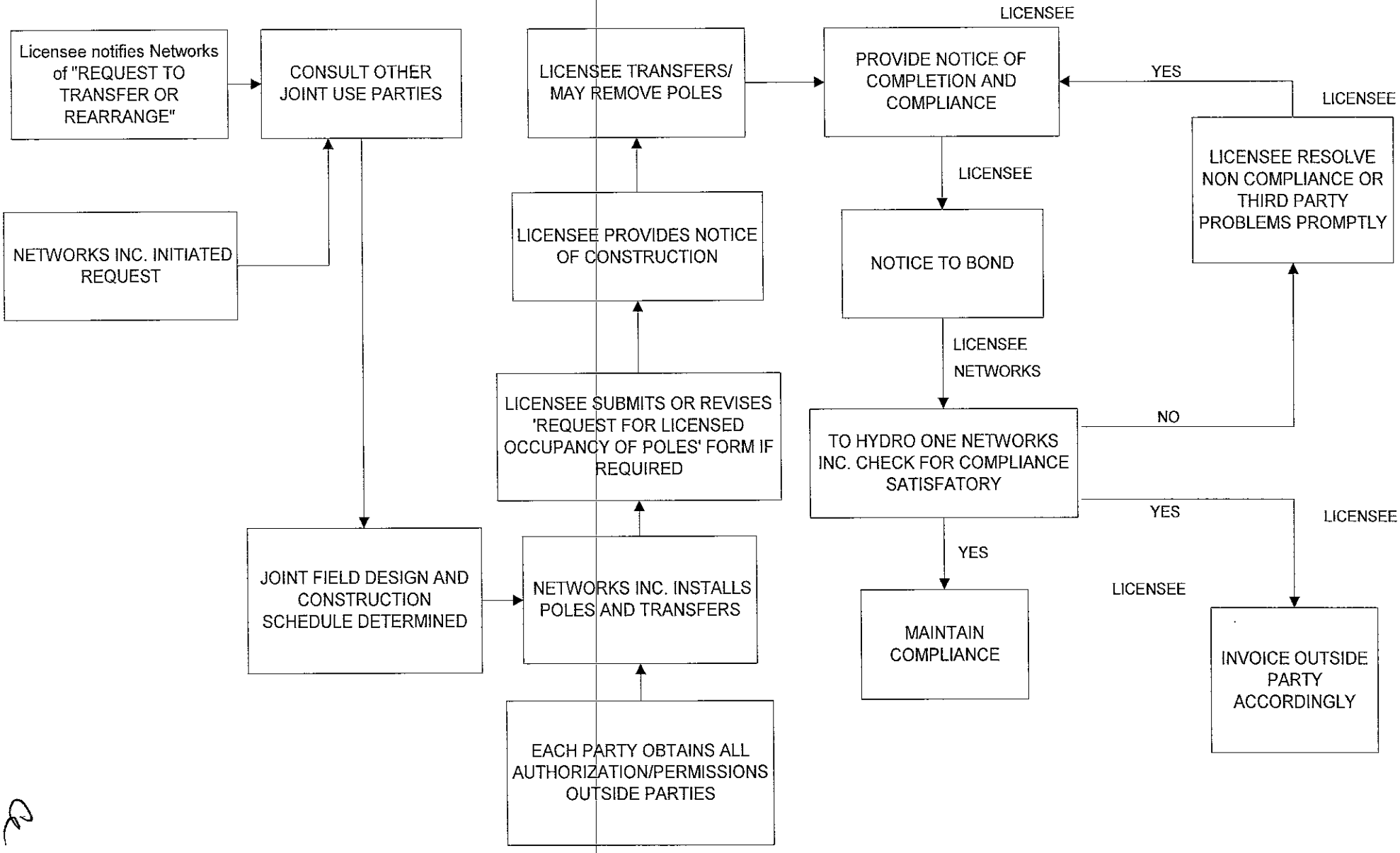
APPLICATION FOR NEW ATTACHMENT AND REVISIONS

Decision Table 2



HYDRO ONE NETWORKS OR LICENSEE REQUESTS FOR TRANSFER OR RE-ARRANGEMENT (OF LICENSEE'S ATTACHMENTS)

Decision Table 3



2.0 CONTRACTORS AND USE OF CONTRACTORS:

2.1 Contractors may be used by Networks or the Licensee to do any work in connection with Networks' attachments on Joint Use Poles and the Licensee's Attachments respectively. Each party is responsible for retaining its own contractors and for ensuring compliance with the terms and conditions set out in the CAG and the Agreement.

2.2 As an alternative, either party may contract with the other party to perform any work, including construction, in lieu of contracting with an independent party. The work will proceed on terms and conditions to be agreed upon by both parties. Joint cooperation is encouraged.

2.3 As a condition of approval, Networks may require the Licensee to, and the Licensee shall, use the workforce of Networks as a sole source in placing attachments of the Licensee onto Networks' poles if there is an overriding explicit safety issue or potentially Hazardous Conditions, that both parties, acting reasonably, agree, mandates this requirement. The rates and charges applied must be agreed to before any work commences and the Licensee should be provided with a written explanation of the estimate of cost and the requirement for changes.

2.4 The party engaging a contractor is entirely responsible to ensure, and if necessary provide to the contractor, electrical hazards awareness training necessary to demonstrate the appropriate level of skill and competence to work in proximity to an electrical environment.

2.5 A party shall not direct or supervise employees, agents, representatives, subcontractors and contractors of the other party. Notice of violation or non-compliance given to any said persons shall also be provided at the same time or as soon as possible thereafter to an authorized representative of the party responsible for the said persons.

2.6 To be considered duly qualified to work for the Licensee in proximity to an electrical environment, the Licensee must ensure that the person it hires demonstrates an acceptable level of competence in the following:

- Electrical Hazards Awareness
- Identification of failure potential in:
  - insulators
  - poles
  - depth of setting
  - inspection methods
- Identification of line voltage and placement of attachments on structure
- Clearance specifications:
  - clearances to ground, driveways and roadways
  - separation between Networks attachments and the Licensee's Attachments
- Testing and use of rubber gloves of applicable class during the placing of Attachments parallel to energized conductors

- Requirements for hold-offs, protection or isolation at certain stages of construction
- Good working knowledge and understanding of:
- Applicable governing regulations
- Electrical theory
- Energy flows and barriers
- Electrical induction
- Electricity and the body
- Limits of approach
- Hazard identification
- Insulating gloves and testers

3.0 OWNERSHIP IDENTIFICATION OF POLES AND ATTACHMENTS:

3.1 Signs and markings on all Joint Use Poles are placed by Networks to clearly indicate ownership, placement year, and pole test and treatment date of the Joint Use Pole as shown in Figure 4-1 and Figure 4-2 below. Networks may also mark the Joint Use Poles with a pole tag insignia to denote pole number, switch number, transformer location. Such markings should not present a hazard to persons climbing the Joint Use Pole. Any additional Joint Use Pole markings must be agreed to by Networks.

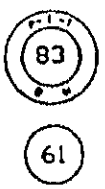
3.2 In accordance with the Standard, the Licensee's Attachments must be tagged by the Licensee to identify its ownership.

Networks Owned Pole Marking

Note: Dating nails are installed at or near the brand height. For poles 55 feet (16.8 metres) or less, the brand is 10 feet (3 metres) from the butt. For poles over 55 feet, the brand is 15 feet (4.5 metres) from the butt.

(a) Standard for installing dating nails; prior to June 4, 2003:

For Joint Use Poles 55 ft (16.8M) or less, the brands are 10ft (3.0M) from the butt. For Joint Use Poles over 55 ft, the brand is 14 ft (4.3 M) from the butt.



Note: Top diagram depicts nail with treatment year. Bottom diagram depicts nail with installation year.

Figure 4-1

(b) New standard for installing dating nails; after June 4, 2003:

For Joint Use Poles 70 ft (21.3 M) or less, the brands are 10ft (3.0 M) from the butt. For Joint Use Poles over 70 ft, the brand is 15 ft (4.6 M) from the butt.

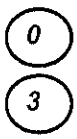
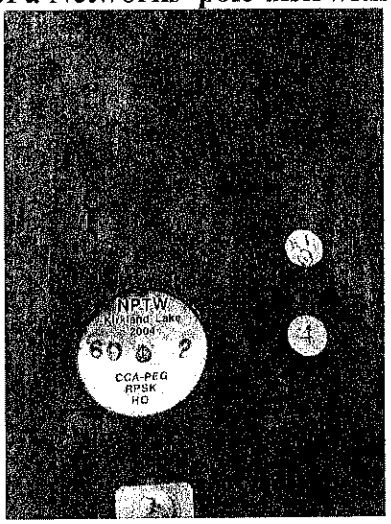


Figure 4-2

It should be noted the dating nails are installed at or near the brand height.

Placement Year
In accordance with the Standard, the Licensee's Attachments must be tagged by the Licensee to identify ownership.
An example of a Networks pole disk with dating nails is below:



4.0 MARKING HAZARDOUS CONDITIONS:

4.1 Subject to clause 4.2, Hazardous Conditions on the Joint Use Poles and the Licensee Attachments shall be corrected by Networks and the Licensee respectively, but the cost of so correcting shall be at the expense of the party creating the Hazardous Condition. In the case where the Hazardous Condition is created by a third party, as between the parties hereto the cost of correcting the Hazardous Condition shall be borne by the Licensee, where the Hazardous Condition is on the Licensee's Attachment(s) and Networks, where the Hazardous Condition is on Networks' Joint Use Pole(s).

4.2 If the Hazardous Condition is created by the Licensee and the Licensee does not agree to pay for the costs to correct the Hazardous Condition(s), Networks may correct the problem or, where required, remove the Licensee's Attachments at the sole risk of damage to the Licensee's Attachments and at the Licensee's expense. Networks shall be reimbursed by the Licensee for the said costs of removal within thirty (30) days of issuance of an invoice therefor by Networks.

4.3 Mechanical or structural Hazardous Conditions such as broken guy wires or cable and strand with inadequate clearances over roadways, will be brought to the attention of the Licensee by Networks when Networks becomes aware of same by written or faxed notice. The Licensee shall correct the Hazardous Condition at its expense from within 24 hours to 30 days after it receives written notification thereof from Networks depending on the level of actual or potential danger of the potential Hazardous Condition to the public or the Joint Use Pole(s) or Networks' attachments, as determined by Networks acting reasonably. Networks may correct the Hazardous Condition at the Licensee's expense if the level of actual or potential danger and/or any other circumstance prevents the Licensee from correcting the Hazardous Condition in the required timeframe as determined by Networks acting reasonably.

Defective or deteriorated poles and electrical Hazardous Conditions will be marked by Networks as follows:

Electrical: *Red belted tag holder with tag (*Note: Networks uses a red belted tag holder for work protection and under no circumstances shall the Licensee or any of its contractors work above the red band.

For more information on Hazardous Conditions, the Licensee may contact the appropriate Zone office as shown in Appendix "1" of Schedule "B" to the Agreement.

5.0 CLEARANCES:

5.1 The minimum clearances of both parties' attachments from each other and from the ground are provided in Table 6-1 below. The phase and neutral clearances are stipulated at the structure, based on the required in-span requirements at maximum sag. The ground clearance is based on in-span requirements with the conductor or cable at normal sag.

Table 6-1

Minimum Hydro One Standards for Communication Cable Clearances

MINIMUM JOINT USE LINE SEPARATIONS

(For 75 m Spans using 3/0 AACSR tensioned neutral Conductor)

	Phase to Licensee Cable	Tensioned 3/0AACSR Neutral to Licensee	Licensee Cable to Ground at Vehicle

		Cable	Access measured at mid span
New Joint Use Lines	2.7m (9'-0")	1.0m (40")	4.7m (15'-6")
Existing Joint Use Lines Maintenance or Major Construction Activity	2.7m (9'-0")	1.0m (40")	4.4m (14'-6")

* This clearance is based on Networks conductor sizing of a 3/0 AACSR neutral and average 75 metres (250 foot.) span length. The clearance requirement will be greater where the length of the span is greater than 75 metres or the size of the conductor is greater than 3/0 AACSR. Precise information may be required for clearance concerns at problem locations. Note that clearances to primary voltages must be maintained BEFORE clearances to secondary or neutral.

NOTES:

i) Major construction activity means work involving addition or replacement of poles, conductors or cables. The cable to ground clearance of 4.4 metres is a desired target and pole replacements should not be considered for minor deviations.

ii) Clearances for any new poles installed or new Joint Use established, shall be considered as new.

iii) Vehicle access means roads, driveways, farm lanes and field entrances and any other location where large trucks and/or farm machinery including Forestry equipment could be expected to cross under a Joint Use Pole Line.

iv) Existing low ground clearances on Joint Use Pole Lines in locations not accessible to large vehicles may be left until major construction activity or pole changes occur. Problem locations must be resolved at the Licensee's sole expense and as determined to be required by Networks.

v) Normal clearances for Licensee cable at normal sag is not less than 4.7m metres over travelled roads and highways. Licensee's normal attachment point on the pole, will be 5.5m above the ground.

vi) A pole top extension may be used, for tangent framing only, to achieve the required vertical separation if the conditions outlined in the chart on page 14 are met and the pole has an expected additional life span of at least 10 years.

The above table is for clearances in regards to when Networks is using a 3/0 AACSR neutral. If the neutral conductor is a size other than 3/0AACSR, then it is the responsibility of Networks' Area Distribution Engineering Technician and the Licensee to work together using design standards to calculate the proper pole height taking sags into consideration.

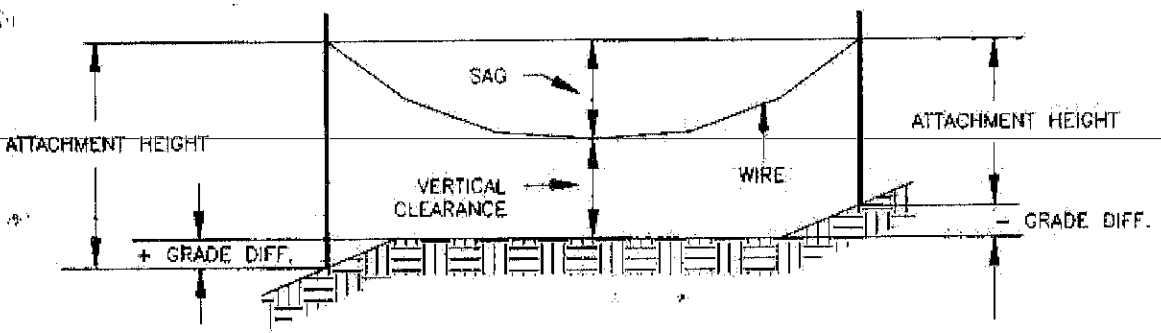
SEE ACCOMPANYING "CLEARANCE/SEPARATION SKETCHES ON PAGES 13 AND 14

MINIMUM VERTICAL CLEARANCES OF WIRES, CABLES AND CONDUCTORS ABOVE GROUND OR RAILS

DL6-101

LOCATION OF WIRES, CABLES OR CONDUCTORS	SYSTEM VOLTAGE			
	SPAN GUYS, AND COMMUNI-CATIONS WIRES	UP TO 600V AND NEUTRAL	2.4/4.16 TO 16/27.6kV	44kV
	MIN. VERTICAL CLEARANCES			
• OVER OR ALONGSIDE ROADS OR LANDS ACCESSIBLE TO VEHICLES	4.4m	4.4m	4.8m	5.2m
• OVER GROUND ACESSIBLE TO PEDESTRIANS ONLY	2.5m	3.1m	3.4m	3.7m
• ABOVE TOP OF RAIL AT RAILWAY CROSSINGS	7.3m	7.3m	7.6m	8.1m

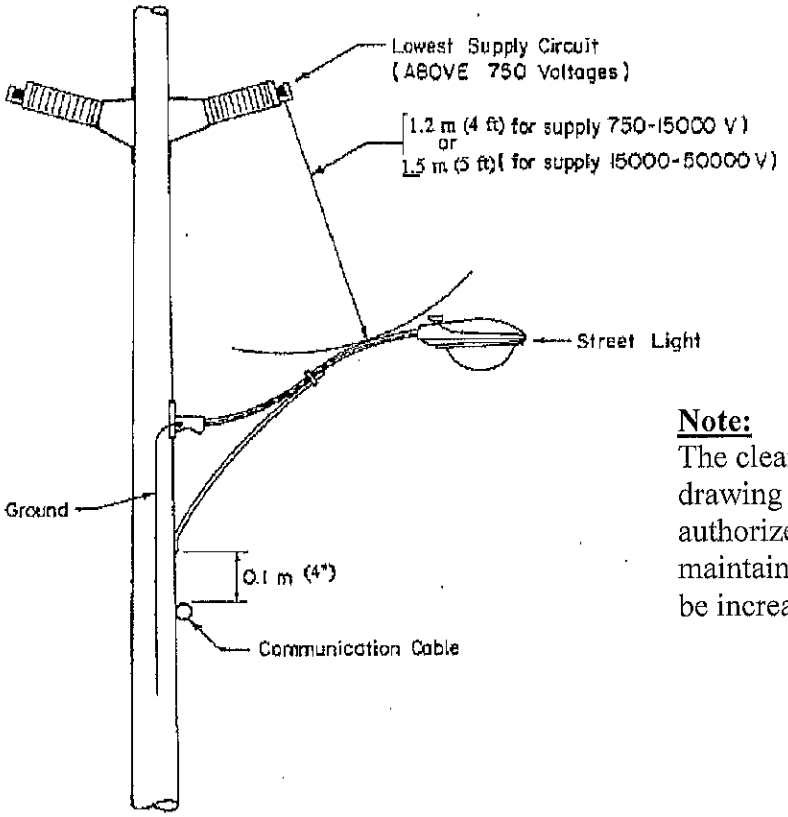
NOTE: THE VERTICAL CLEARANCES IN THE ABOVE TABLE ARE UNDER MAXIMUM SAG CONDITIONS.



MIN. ATTACHMENT HEIGHT = MAX. SAG, (FROM SECTION 7)
+ MIN. VERTICAL CLEARANCE (FROM TABLE)
± GRADE DIFF.
+ 0.3m (VEHICLE OR RAILWAY LOCATION)
+ SNOW COVER (PEDESTRIAN LOCATION)

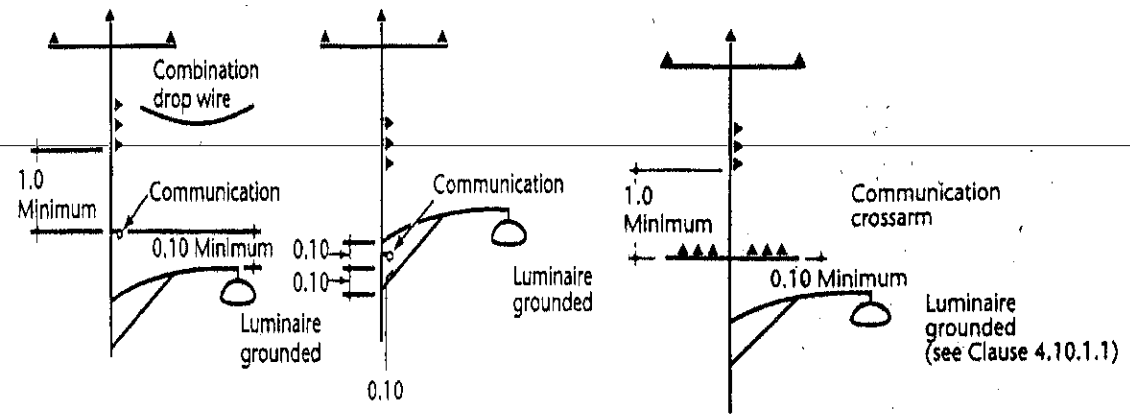
CONVERSION TABLE	
METRIC	IMPERIAL (APPROX)
2.5m	8'-0"
3.1m	10'-0"
3.4m	11'-0"
3.7m	12'-0"
4.4m	14'-5"
4.8m	15'-6"
5.2m	17'-0"
7.3m	24'-0"
7.6m	25'-0"
8.1m	26'-6"

Minimum Streetlight Clearances



Note:
The clearances to primary conductor shown in the drawing are based on accepted Limits of Approach for authorized workers. If unauthorized workers will be maintaining the streetlights, then this clearance must be increased to 3m minimum.

Communications



NOTES

1. Dimensions in meters unless otherwise noted.
2. Streetlight can be located above or below neutral/secondaries. (Below the neutral is preferred.)
3. Communications cables must be 1.0m minimum below all neutral/secondaries.
4. Communications cables must separated from streetlight by 0.1m minimum.
5. Clause 4.10.1.1 referred to above originates from the Standard.

6.0 SAFE CLIMBING CONDITIONS:

6.1 The Licensee shall comply with the following requirements which are concerned primarily with the provision for safe climbing conditions:

(a) Clearance from Base of Poles

Unless dictated otherwise by road authorities and/or unless otherwise permitted by Networks, no Licensee pedestal or other above ground fixture shall be installed above grade within 3 metres (10 feet) of the base of a Networks' Joint Use Pole. New Joint Use Poles should be located 3 metres away from above ground objects such as hydrants or fence posts where possible.

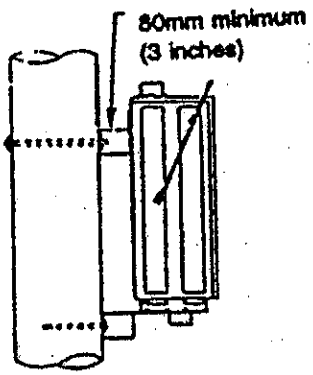
(b) Pole Mounted Attachments on a Pole

The Licensee's attachments such as power supplies, battery cabinets or other pole mounted attachments must be identified on the Application form for approval by Networks and must not be placed on frequently climbed poles such as recloser, switch or transformer poles. Subsidiary apparatus poles or pad mounted installations are the preferred alternatives.

(c) Size of Attachments

The maximum size of any Attachment in or below communication space shall be 1 metre (3 feet) high by 0.3 metres (1 foot) wide and a depth of 0.3 metres (1 foot) for equipment not including standoff brackets which allow a minimum of 80 millimetres (3 inches) space between the Joint Use Pole and the Attachment. The maximum size for a bracket mounted Attachment shall not exceed 1 metre (3 feet) high by 1 metre (3 feet) wide and a depth of 0.7 metres (30 inches). Any variation in size other than what is stated in this clause must be approved by Networks

Figure 6. 1 (c)
Attachments with Stand-off Brackets (where permissible)



NOTE: Where permitted by Networks, the size of Licensee's Attachment shall not exceed 1 metre (3 feet.) x 1 metre (3 feet.) x 0.7metres (30 inches) when mounted on standoff brackets as shown.

(d) *Location of Attachments on Pole*

Attachments must be mounted on the strand side of the Joint Use Pole to maximize safe climbing space.

The Licensee must place its Attachments, which require access from a Joint Use Pole, on the same side of the Joint Use Pole to maximize safe climbing space. Vertical Attachments such as conductors, cables and conduit shall be grouped together such that a minimum continuous surface of 60% of the Joint Use Pole circumference shall remain clear for climbing.

(e) *Special Poles*

Poles referred to in this subparagraph (e) are steel, concrete or wood poles and may involve special treatment such as stained poles, which prohibit normal construction and operational methods. If normally accepted climbing practices cannot be employed, then the parties shall agree to an alternate method required to install and maintain the Licensee's Attachments.

(f) *Subsidiary Apparatus Pole*

Where required, the Licensee's apparatus pole shall be placed "in line" and at least 3 meters (10 feet) from a Joint Use Pole. The top of the apparatus pole should not extend more than 0.3 metres (1 foot) above the Licensee's Attachment.

(g) *Separation of Aerial and Underground Facilities*

Unless otherwise directed by road authorities, separation of at least one meter from below ground facilities shall be maintained between centerlines of overhead and underground facilities to enable safe operating space for power augers during the replacement or addition of Networks' Joint Use Poles. The Licensee acknowledges that any encroachments of the one meter separation may cause a potential risk of future interruptions, cable damage and expense to repair for the Licensee.

7.0 GUYING AND ANCHORING:

7.1 Each party shall provide guys and anchors with sufficient capacity to support its own attachments/Attachments and shall ensure that any such guys (except those used to support Attachments for which Permits authorizing Joint Use were in force prior to the Effective Date) are a minimum 3/8 of an inch thick.

7.2 Suitable anchoring and guying that is required to accommodate unbalanced or additional loads due to the Licensee's Attachments, shall be installed by the Licensee at the Licensee's expense.

7.3 Should the Licensee be unable to supply and install a suitable anchor, Networks may, at the Licensee's request and expense, act as contractor for the Licensee to install an anchor.

7.4 The Licensee's anchors must be placed with a minimum separation of 1.5 metres (5 feet) from Networks' anchor.

7.5 Where separate anchoring is undesirable, the parties may cooperate to jointly study the feasibility of and, if agreeable to Networks, implement joint anchoring. If Networks agrees to such joint anchoring, Networks will install such joint anchoring at the Licensee's expense.

7.6 When adding or changing guys and anchors, the installing party shall not affect the existing tension on the other party's guys or disturb existing anchors.

7.7 Crossing guy wires is undesirable, however, where it is unavoidable, the minimum clearance between crossing guys (the point at which two guys cross) shall be 80 millimetres (3 inches).

8.0 STRAIN INSULATORS:

8.1 Strain insulators of the appropriate mechanical strength and voltage rating shall be installed on all down guys. Strain insulators on the Licensee's guys must be installed between 2.5m and 3.5 metres (8 to 12 feet) above ground by the Licensee. The Licensee's insulators must be maintained in safe working condition at all times by the Licensee.

Notes:

Primary Phase conductor is defined in the Standard as a circuit having phase to phase voltage above 750 Volts.

The insulator shall be located below all primary and neutral conductors under broken guy conditions and should be a minimum of 2.0 meters (6 feet), where possible from the point of attachment at Networks' Joint Use Pole.

One insulator may be used to meet both requirements, provided it is located below all primary and neutral conductors and it insulates or isolates the section of guy that is within 1.0 metre of the Licensee's Attachment from the top portion of the guy.

9.0 POLE TOP EXTENSIONS:

9.1 *(a) Description*

Pole top extensions are made of solid epoxy resin fiberglass rod and may, at Networks' discretion, be installed by Networks at the pole top to raise the primary conductor in order to obtain either the "primary to neutral" or "primary to cable" separation required at the higher voltage. An explanation will be provided in the case of denial.

(b) Restriction

The pole top extension(s) are to be used by Networks only for tangent applications where a Joint Use Pole replacement would otherwise be necessary (ie, they should not be used on new construction).

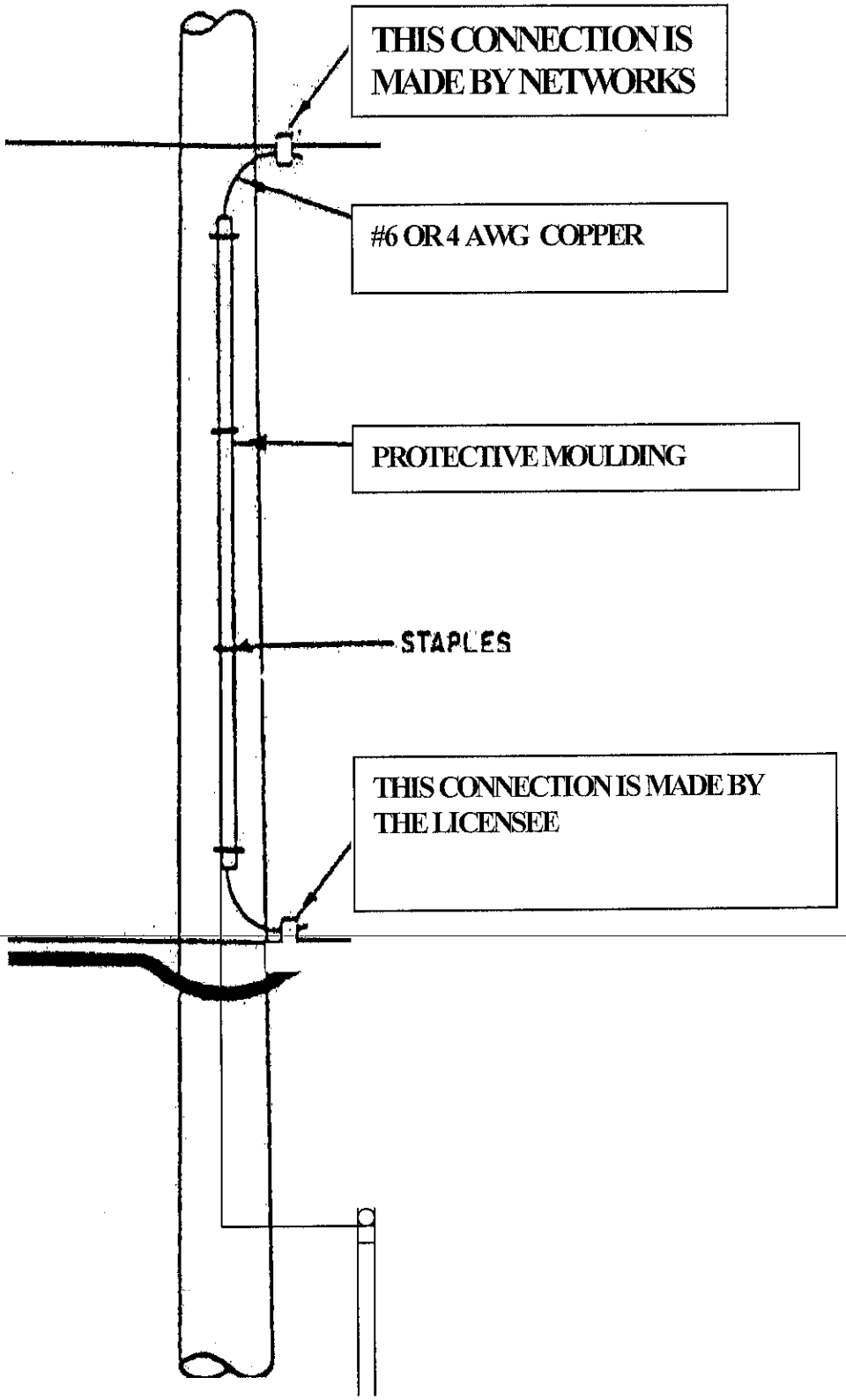
10.0 BONDING:

10.1 Bonding of the metallic sheath of communication cables or supporting strands to Networks power system multi-grounded neutral (MGN) is required in all cases of Joint Use when line voltage is 2,400 volts phase to ground or greater. Bonding shall be provided by the Licensee at lower voltages if requested by Networks to correct interference problems. Bonds shall be installed by the Licensee at the beginning and end of the Joint Use Pole Line, and to every Networks downground (vertical ground) and at intervals consistent with coordination protection and/or noise mitigation requirements and must not to exceed 300 m (1000 ft.) between bonds. The Licensee may make grounding connections to Networks downgrounds. All connections to Networks system neutral must be made by Networks.

SEE ALSO FORM "NOTICE TO BOND" (Page 20) – this form must be completed and submitted to Networks by the Licensee prior to bonding.

Figure 11.1

Bonding Communication Cable to Power System Neutral


THIS CONNECTION IS MADE BY NETWORKS
#6 OR 4 AWG COPPER
PROTECTIVE MOULDING
STAPLES
THIS CONNECTION IS MADE BY THE LICENSEE

NOTICE TO BOND

To: Hydro One Networks
_____
_____
_____
_____
_____

Fax No.: _____
Phone No.: _____
Field Representative:
_____

From:
Licensee: _____
Address: _____
City: _____
Postal Code: _____

Contact: _____
Telephone _____
Fax Com: _____

Date: _____

THIS SECTION TO BE COMPLETED BY LICENSEE TO INITIATE BONDING

Hydro One Networks Inc. Permit #: _____
Licensee Reference #: _____
Licensee Construction Contact: _____
(Phone): _____ (Cell): _____ (Pager): _____
Location (Proximity): _____
Bonding Ready for Connection by:
Locations Identified on Permit: Yes _____ No _____
Separate Plan Provided: Yes _____ No _____
Signature: _____ Date: _____
Contact Number: _____

THIS SECTION TO BE COMPLETED BY NETWORKS

Hydro One Networks Inc. Estimate for Bond Connection:
Signature: _____ Date: _____
Date: _____ Licensee's Construction Representative: _____

THIS SECTION TO BE COMPLETED BY LICENSEE

THIS IS TO NOTIFY YOU THAT OUR WORK IS COMPLETE. PLEASE PROCEED TO BOND CONNECTION ON THE BASIS AS AGREED.

Signature: _____ Date: _____
Date: _____ Licensee's Construction Representative: _____

11.0 ELECTRICAL INTERFERENCE:

11.1 Proposed major changes to Networks' conductors or faulty insulators which may introduce electrical interference or noise induction problems will be assessed by the parties at joint planning meetings. The parties shall cooperate to mutually resolve such problems.

12.0 JOINT PLANNING:

12.1 Every reasonable attempt must be made by the parties to hold regular Joint Use meetings at least annually (and more frequently if required bearing in mind workload activity or problems) to plan for new construction, reconstruction, major changes and planned workload, including Line Clearing programs. Job progress and any problems that have developed since the previous meeting shall be discussed at each meeting.

13.0 DIVISION OF COSTS: (see also Table 14)

13.1 Joint Use Poles:

(a) Unless otherwise specifically provided herein, Joint Use Poles are installed by, and at the expense of, Networks.

(b) Where a Joint Use Pole is erected by Networks to replace another Joint Use Pole solely because the existing Joint Use Pole is insufficient in height, class or strength to accommodate the Licensee's requirements, the Licensee will pay Networks' costs of installation of the new Joint Use Pole and the costs to Transfer Networks' attachments as well as the Licensee's own Attachments.

(c) Where a Joint Use Pole must be added to an existing line of Joint Use Poles to provide crossing or guying facilities solely for the Licensee, the Licensee is responsible for the installation costs of the Joint Use Pole and Networks' costs to attach to the new Joint Use Pole.

13.2 Ceasing Joint Use:

(a) Subject to clause 13.2(b) below, the cost of removing Joint Use Pole(s) is borne by Networks, who retains ownership of the Joint Use Pole(s) unless otherwise agreed to by the parties.

(b) If Networks has removed its attachments from a Joint Use Pole and has cut off the top of the Joint Use Pole above the Licensee's Attachments, the Licensee shall either (i) acquire the Joint Use Pole at a mutually agreeable price or (ii) remove its Attachments from the said Joint Use Pole at its own risk and expense by no later than 60 days after the date of notification of their required removal by Networks.

(c) Where the Licensee desires or is required to discontinue the use of Joint Use Poles or where the use of such Joint Use Poles has been terminated by cancellation of the Permit, the Licensee shall remove its Attachments, including bond wires, from the Joint Use Poles within 90 days after receipt of notification to remove, failing which Networks shall remove the Licensee's Attachments at the Licensee's expense and at the Licensee's risk of damage to the Licensee's Attachments.

(d) If the Licensee wishes to modify, Rearrange, add to or remove its Attachments from Joint Use Poles, it shall notify Networks and submit a revised Application or cancel its existing applicable Permit accordingly. In. the case of the Licensee's request for additional Attachments (other than Service Attachments as described in clause 10.1(b) and strand-mounted or cable-mounted equipment), Networks will inspect the Joint Use Poles at the Licensee's expense and review the revised Application in accordance with Section 1.0 above.

13.3 Existing Joint Use - Cost re: Attaching, Transferring, Rearranging Attachments:

(a) Licensee's Request

Where Networks is required to attach, Transfer or Rearrange its attachments solely for the purpose of establishing new Joint Use or adding to existing Joint Use, the Licensee shall pay the costs to attach, Transfer or Rearrange Networks' attachments.

(b) Third Party Requests to Remove, Replace or Relocate Poles

Where a third party, such as but not limited to, a road authority requests the Licensee to Transfer or Rearrange its Attachments, the Licensee shall resolve any issues with respect to costs with the third party.

(c) Third Party Requests for Attachment

Where either party is required to Transfer or Rearrange its own attachments/Attachments to accommodate the third party, the costs associated therewith shall be the responsibility of that third party.

(d) Networks' Requirement

Where a Transfer of both parties' attachment(s)/Attachment(s) is involved in the replacement of Joint Use Poles due solely to the requirements of Networks, each party shall bear the cost for the Transfer of its own attachment(s)/Attachments respectively.

13.4 **Extra Space - Replacement of Joint Use Poles**

(a) ***Networks' Requirement***

Where extra space is required solely for Networks' purposes, or as a result of requirements of a governing body with respect to Networks' attachments only, the existing Joint Use Pole shall be replaced at the sole expense of Networks. However, where the space occupied by the Attachments of the Licensee causes Networks to replace a Joint Use Pole with a higher Joint Use Pole to accommodate additional attachments of Networks, then the Licensee shall pay an amount equal to the value of the existing Joint Use Pole as determined by Networks having regard to the Joint Use Pole's residual value, together with the cost of Transferring Networks' existing attachments to the new Joint Use Pole as well as the Licensee's own Attachments. Examples include equipment poles, regulator or recloser installations and switch poles.

(b) ***Licensee's Requirement***

Where extra space is required solely for the purposes, or as a result of the requirements of, a governing body with respect to the Licensee's Attachments only, the Licensee shall pay to Networks the cost of supplying and installing the new Joint Use Pole as well as Networks' costs to Transfer its attachments.

(c) ***Both Parties***

Where extra space is required by both parties, the Licensee shall pay to Networks a sum equal to one half of the costs of installing a new Joint Use Pole. Each party shall be responsible for the Transfer of its own attachments/Attachments and the costs associated therewith.

(d) ***Considerations***

In order to facilitate Joint Use Pole replacements, the following options will be considered:

- Networks transfers the Licensee's Attachments at a fixed rate
- Networks makes a temporary Attachment for Licensee (ie, rope sling)
- Licensee attends during pole replacement to make Transfer at the same time

13.5 **Common Crossing Pole Replacement**

Where an existing Joint Use Pole requires replacement to provide means for a common crossing pole or guying facility of the Licensee, such Joint Use Pole shall be replaced by Networks, and the Licensee shall pay to Networks the costs to supply and install the new common crossing pole as well as the costs to Transfer Networks' and the Licensee's Attachments.

13.6 **Interspaced Poles**

Where a Joint Use Pole is added (interspaced) to an existing line of Joint Use Poles for the sole requirements of the Licensee, the cost of such new Joint Use Pole as well as Networks' attachment costs shall be paid by the Licensee. This new Joint Use Pole shall be the property of Networks. The applicable Pole Rental Rate shall also be paid by the Licensee and the existing Permit shall be modified by the Licensee in both cases no later than 30 days from after the Joint Use Pole is added. If the Interspaced Pole is required by both parties, it shall be installed by Networks, material and installation charges will be shared equally by both parties and each party will bear its own attachment costs.

13.7 **Written Cost Estimates and Invoicing**

Unless otherwise specifically provided herein, when Networks performs work which expense is to be borne in whole or in part by the Licensee, prior to performing the work, Networks will prepare and provide the Licensee with an itemized written cost estimate for labour, materials and miscellaneous expenses. When the written cost estimate is signed and returned to Networks, such estimate is considered a valid purchase order and shall form the basis for invoicing. Upon completion of the work, an invoice is rendered and becomes due and payable within sixty (30) days of issuance of the invoice. All outstanding invoices shall bear interest from the payment due date until the date Networks receives such payment at a rate of 1.5% per month compounded monthly (19.56 percent per year).

13.8 **Networks' Requirements**:

(a) In the event that Networks needs to perform work on or replace an existing Joint Use Pole Line or any part thereof for purposes of placing any additional attachments required by Networks, Networks shall carry out any such work or replacement in a manner such that the Licensee's Attachments on the said Joint Use Pole Line or part thereof shall, except for the cost of the Licensee to Transfer its own Attachments, be accommodated at no additional cost to the Licensee. The Licensee shall, at its sole risk and expense, Transfer its Attachments onto the new Joint Use Poles or to the revised location on the existing Joint Use Poles, as the case may be, as a result of Networks' work carried out pursuant to this subparagraph (a).

(b) When Networks wishes or needs to build a pole line adjacent to an existing pole line owned by the Licensee, Networks shall build the pole line in such manner so as to accommodate the Licensee's attachments that are on the Licensee's existing pole line. Upon completion of the construction of Networks' new pole line, the Licensee shall transfer its attachments from its existing pole line unto Networks' new pole line and the parties shall document said transfer by means of Permits by no later than 30 days after the said transfer. Networks shall pay the Licensee for the costs incurred by the Licensee for so transferring its attachments and for the residual value of the Licensee's poles on its existing pole line that have been replaced with the poles on Networks' new pole line within 30 days after Networks' receipt of an invoice therefor from the Licensee.

DECISION TABLE 14

Division of Costs - Summary Table 14

Type Of Work	Reason For Work	Party Paying
supply and install pole	provide pole for Networks requirements	Networks
joint planning re: new lines or re-located lines	joint coordination and previews	Each party pays for own Engineering services
Application preview by Networks	Caused by Notice of Application	Licensee
design time	if requested by Licensee	Licensee
Estimates by Networks	for Licensee's Make-ready Work	Licensee
Price estimate by Networks	caused by Licensee's Application	Licensee
Application – review and approval by Networks	caused by Licensee's new or revised Request for Licenced Occupancy form	Licensee
Rearrange each party's attachments/Attachments	caused by Licensee	Licensee
Rearrange each party's attachments/Attachments	caused by Networks	each party pays for its own costs to Rearrange
Pole top extension	required for Licensee	Licensee
Crossarm	required for Licensee	Licensee
Replace existing Joint Use Pole	Licensee's requirement	Licensee
Interspaced Joint Use Pole	Licensee's requirement	Licensee
Interspaced Joint Use Pole	Networks requirement, third party requirement	each party bears own costs
Pole removal	ceasing Joint Use by Networks	Networks
remove Licensee's Attachments	Joint Use Pole removal	Licensee
Replacement of Joint Use Pole with existing Attachments	Vehicle/storm damage, deterioration	each party bears own costs of Transfers
Replacement of Joint Use Pole with existing Attachments	Networks requirement, 3rd party requirement	each party bears own costs
single Joint Use Pole replaced or added in non-Joint Use Pole Line	common crossing for Licensee	Licensee
Attaching, Transfer or Rearrange Networks attachments	Accommodation of Licensee's Attachments	Licensee
attach, Transfer/Rearrange Networks attachments	Networks request	each party pays own costs to Transfer its attachments/Attachments

Rectify/remove Hazardous Condition	safety requirement	party creating Hazardous Condition
Make-ready Line Clearing	for Licensee's Attachments	Licensee
Maintenance Line Clearing	routine Line Clearing	Licensee contributes in Pole Rental Rate
bonding connection	Licensee's requirement	Licensee

Jan 06

14.0 LINE CLEARING:

14.1 Networks shall carry out Line Clearing determined to be necessary for maintenance purposes on existing Joint Use Poles. Permission for maintenance Line Clearing will be obtained from property owners by Networks for both parties prior to the performance of the work. Where permission to clear around the Licensee's Attachments cannot be obtained, the matter shall be left to the Licensee to resolve prior to the scheduled Line Clearing and if such matter cannot be resolved, Networks shall not be obligated to perform the maintenance Line Clearing for the said Attachments.

14.2 The Licensee's monetary contribution towards maintenance Line Clearing of Joint Use Poles which is incorporated in the Pole Rental Rate is based upon and recognizes the following:

- Networks' incremental costs to maneuver in and around Licensee's Attachments as part of maintenance Line Clearing around Joint Use Poles.
- Networks' removal and clean-up of storm damaged trees along a Joint Use Pole Line.
- Maintenance Line Clearing reduces costs for new or added Attachments.
- Licensee's input and influence in the local Line Clearing program to meet joint requirements when feasible.
- Joint interest in maintaining the integrity of Networks' neutral along a Joint Use Pole Line from tree-related damage.

14.3 Maintenance Line Clearing requirements will form part of the regular joint planning meetings. Discussion will also include all Line Clearing required:

- for construction of new Joint Use Poles
- for replacement of existing Joint Use Poles
- for routine maintenance purposes
- to permit Joint Use to be established on existing poles

Networks will consider the Licensee's input in the local maintenance Line Clearing program to meet joint requirements where feasible.

14.4 The costs involved in Make-ready Line Clearing determined by Networks as necessary to be carried out on Joint Use Poles shall be shared as follows:

(i) Where Joint Use is to be established on existing Networks poles or existing Joint Use Poles must be replaced for said purpose, all Make-ready Line Clearing costs shall be borne by the Licensee; tenders may be called by the Licensee and contracts may be awarded to Networks or to qualified forestry contractors for any Make-ready Line Clearing required by the Licensee provided the work is done in compliance with Networks' Line Clearing specifications; if Networks performs the Make-ready Line

Clearing, the costs for the Make-ready Line Clearing shall be paid by the Licensee within 30 days of the date of the invoice issued by Networks.

(ii) Where new Joint Use is to be created or an existing line of Joint Use Poles is relocated, Make-ready Line Clearing shall be performed by Networks; notice shall be provided to the Licensee along with the estimate of the costs of the Make-ready Line Clearing work to be performed and the cost of such Line Clearing for the new Joint Use Poles shall be shared 75% by Networks and 25% by the Licensee as will be provided for in an invoice to be issued by Networks. The Licensee shall pay the said costs to Networks within 30 days of the date of the invoice issued by Networks.

15.0 LINE CLEARING SPECIFICATIONS:

15.1 The following specifications are a standard for Line Clearing that shall be applied to all Joint Use Poles. Approved arboricultural practices shall be followed while still assuring plant safety and reliability.

- Trees are to be pruned sufficiently to provide clearances with adequate provision to reach the next maintenance Line Clearing cycle, giving due consideration to tree species, growth, planned clearing cycles and location.
- All pruner and saw cuts are to be made using the natural target pruning technique. All cuts will be made by drop crotch pruning to a lateral or parent limb which should be at least one-third the diameter of the limb being removed.
- Pruner and saw cuts need not be painted with tree wound dressing unless otherwise specified by Networks' Forestry representative.
- All brush is to be either burned, chipped or piled neatly off the right of way to a height not exceeding 0.5 meters (18 inches).

16.0 PERMIT AND SAFETY AUDITS:

16.1 At such time as deemed necessary by Networks, Joint Use Poles will be audited by Networks unless the parties agree to do so together, in order:

(i) to detect and subsequently correct all deficiencies within ninety (90) days except Hazardous Conditions which, except as otherwise specified in the Agreement or CAG or except in the case of an emergency, require correction within thirty (30) days;
(ii) to confirm that Joint Use is properly authorized by Permit; and
(iii) to confirm the accuracy of Pole Rental Rates being charged.

16.2 Subject to the immediately following sentence, where an audit is carried out by both parties simultaneously, each party shall bear its own respective costs associated with the audit. Should an audit reveal that the number of

unauthorized attachments exceeds 2% of the number of Joint Use Poles for which Permits have been granted, then the Licensee will pay Networks' labour costs associated with the audit as well as Pole Rental Rates for unauthorized Attachments pursuant to clause 12.2 of the Agreement.

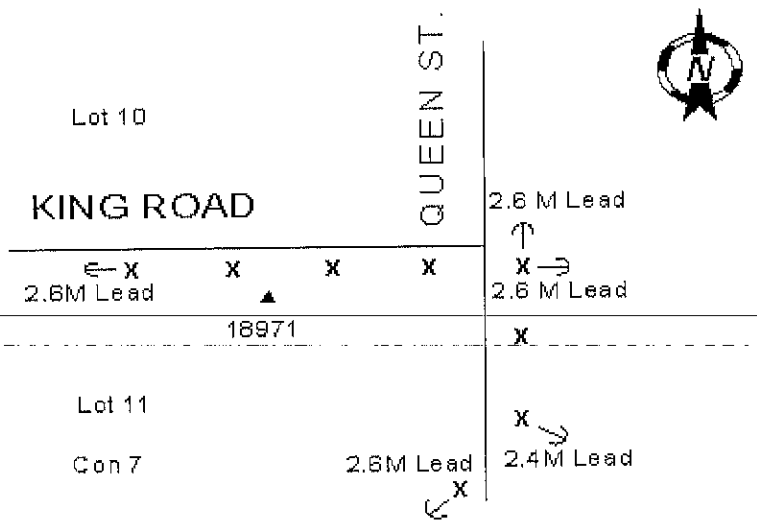
APPENDIX "1"

hydro one

APPLICATION FOR LICENSED OCCUPANCY OF POLES

*Please complete all boxes above the dotted line.

to be attached to and form part of the agreement effective: **Audit Date August, 2001**			Licensee's project name/refer # supercedes Permit No. or "New" **1971-02**
permission is requested by **name of Cable/Telecom company**	signed: **(by authorized Cable Co. rep)**		title: **(of authorized Cable Co. Rep)**
to place attachments as follows: (note specific quantity, size and nature of proposed attachment(s)) **1-075 inch dia. Coaxial cable & 1-0.5 inch Fibre Cable on 1-6M Strand, Line Tension- 21 kN, 9mm Guy Steel, Anchor leads in meters**			
Desired Construction Target			
lot nos. (in or between) Lots 10 - 11	conc./street or road names Con. 7	township/village or town of East Gwillimbury	county/municipality York Region



* Please orient sketch to the north, show occasional OHNC transformer numbers and adjacent Permit numbers

For Internal Use Only

Approved (Hydro One)	legend O = Anchors X = **Rental Pole**	No. of full rental poles **8**
Operations manager or designate: **Operations/ Front Line Manager**		
Operations Centre Newmarket	Permit no. **2005-999**	
Construction Verification	☑ yes ☐ no	
Date	Other internal project	

AC

SCHEDULE "B"

hydro one

APPLICATION FOR LICENSED OCCUPANCY OF POLES

*Please complete all boxes above the dotted line.

To be attached to and form part of the agreement effective:		Licensee's project name/refer #	
		Supercedes Permit No., "New" or "Cancel"	
Permission is requested by	Signature:	Name and Title: (please print)	
To place attachments as follows: (note specific quantity, size and nature of proposed attachment(s)			
Company Division		External Permit Number	
Lot no. (in or between)	Conc./Street or Road names	Township/Village or town of	County/Municipality

* Please orient sketch to the north, show occasional Networks transformer numbers and adjacent Permit numbers

For Internal Use Only

Approved (Networks) Signature	Legend	No. of full rental poles
Name and Title (please print)		
Operations manager or designate		
Operations Centre	Permit no.	
Construction Verification	☐ Yes ☐ No	

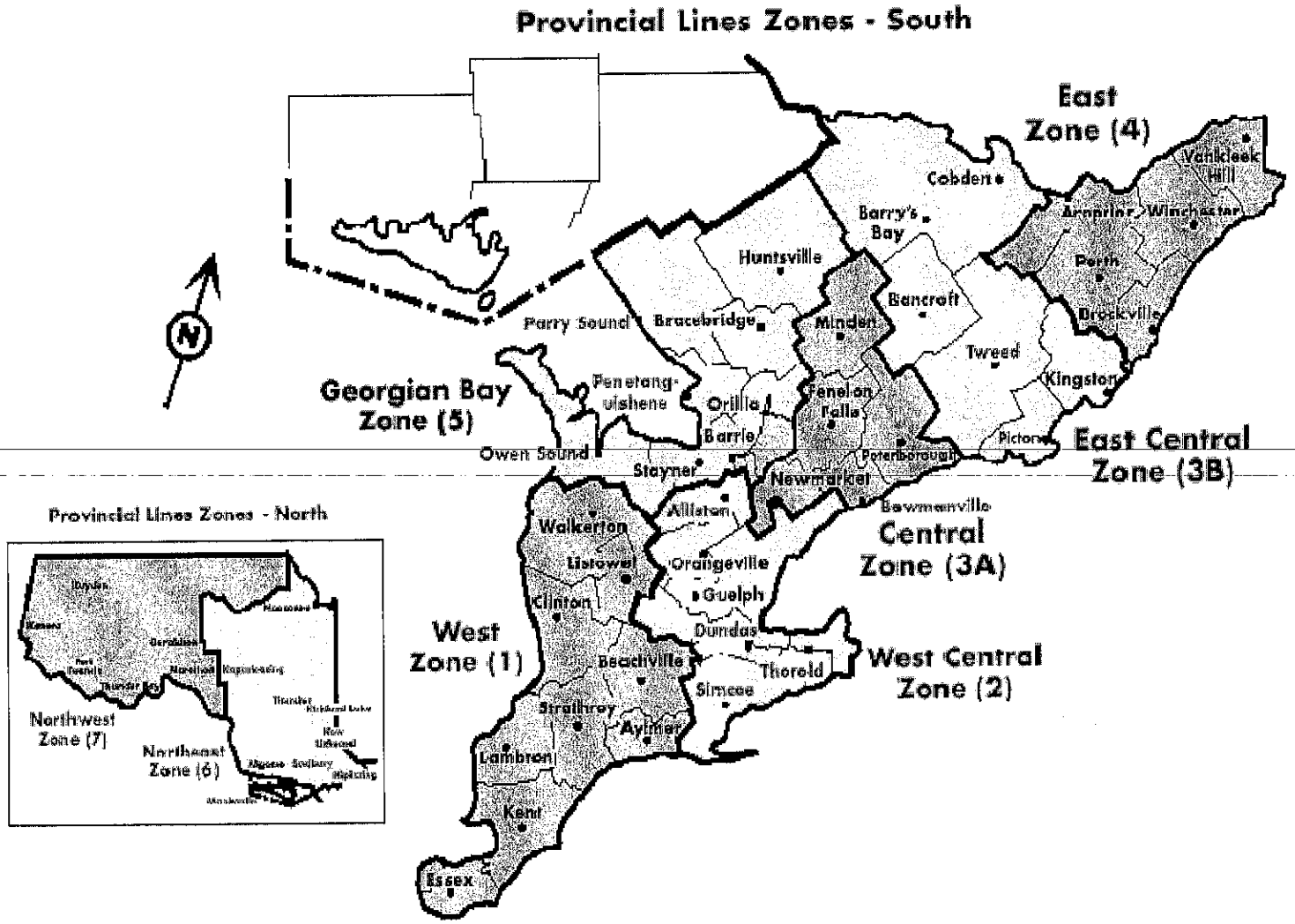
Date	Other internal project

hydroOne

Appendix "1"

Zone Contact List

Zone #	Zone Name	Telephone #	Fax #	E-mail address
1	West	1-800-957-7756 x 3252	519-423-6971	Zone1scheduling@HydroOne.com
2	West Central	905-627-6050	905-627-6046	Westcentralzonescheduling@HydroOne.com
3A	Central	1-888-871-3514 x 3341	705-743-9890	Zone3ascheduling@HydroOne.com
3B	East Central	1-866-646-4619	613-967-3582	Eastcentralzonescheduling@HydroOne.com
4	East	1-866-288-8874 or 613-267-2154	613-267-7248	Eastzonescheduling@HydroOne.com
5	Georgian Bay	1-888-238-2398 and press 2	705-727-4803	Zone5scheduling@HydroOne.com
6	Northeast	1-888-835-9444 x 309	705-566-8093	Zone6scheduling@HydroOne.com
7	Northwest	1-800-208-9412 or 807-346-3840	1-800-932-6171	Northwestzonescheduling@HydroOne.com


Provincial Lines Zones - South
East
Zone (4)
Cobden
Barry's
Bay
Arnprior
Winchester
Perth
Brockville
Huntsville
Bancroft
Parry Sound
Bracebridge
Minden
Tweed
Kingston
Georgian Bay
Zone (5)
Penetang-
uishene
Orillia
Barrie
Fenelon
Falls
Owen Sound
Stayner
Peterborough
Picton
East Central
Zone (3B)
Newmarket
Bowmanville
Alliston
Central
Zone (3A)
Walkerton
Listowel
Orangeville
Guelph
Clinton
Dundas
West
Zone (1)
Beachville
Thorold
West Central
Zone (2)
Simcoe
Strathroy
Ayimer
Lambton
Kent
Essex
Provincial Lines Zones - North
Northwest
Zone (7)
Northeast
Zone (6)

APPENDIX E
to the
Evidence of
Michael Piaskoski
Rogers Communications Partnership

November 20, 2015

Carrier	Zone(s) Serviced	Places of Operation in Ontario
Niagara Regional Broadband Network	Southern	Port Colborne, Grimsby, Lincoln, Niagara-on-the-Lake, St. Catharines, Wainfleet, Fort Erie, West Lincoln, Niagara Falls, Pelham, Thorold, Welland
Bragg Communications	Southern, Eastern, Northern	Aberarder, Alexandria, Alfred, Algoma Mills, Allenford, Alvinston, Arkona, Arthur, Astorville, Athens, Aylmer, Ayton, Azilda, Bailey's Bay, Resort, Bayfield, Berwick, Birch Point, Blackstock, Blezard Valley, Blind River, Bonfield, Bothwell, Bourget, Bradley Harbour, Britt, Brownsville, Brucefield, Burk Falls, Cache Bay, Caesarea, Calstock, Calton, Cambray, Camden East, Camlachie, Campbellford, Cannington, Capreol, Cardinal, Casselman, Centralia, Chaput Hughes, Charlore Park, Chelmsford, Chesley, Chesterville, Clarence Creek, Clinton, Cobalt, Coboconk, Cochrane, Coldwater, Coniston, Copenhagen, Copper Cliff, Corbeil, Courtland, Cowans Bay, Crediton, Curve Lake Reserve, Dashwood, Dowling, Drayton, Dunrobin, Durham, Dyers Bay, Earlton, Elk Lake, Elliot Lake, Elmwood, Embro, Emily Township, Emsdale, Englehart, Ennismore, Espanola, Exeter, Falconbridge, Fauquier, Finch, Fitzroy Harbour, Forest, Garson, Glencoe, Goderich, Gore Bay, Green Valley, Haileybury, Haliburton, Hallebourg, Hanmer, Hanover, Harriston, Harrowsmith, Hartington, Harty,Hastings, Havelock, Hearst, Hepworth, Highview Acres, Holtyre, Huron Park, Iron Bridge, Iroquois, Iroquois Falls, Janetville, Jocko Point, Kapuskasing, Katrine, Kearney, Kenedon Park, Kettle Point, Killarney, King Kirkland, Kirkland Lake, Kukagami, Lancaster Trailer Park, Langton, Latchford, Lee Valley, Levack, Limoges, Lion's Head, Listowel, Little Britain, Little Current, Lively, Luton, Magnetawan, Mallard's Bay, Manitowaning, Mar, Markstay, Marmora, Massey, Matheson, Mattawa, Mattice, Maxville, M'chigeeng, Mckerrow, Merrickville, Mildmay, Millbank, Miller Lake, Milverton, Mindemoya, Minden, Mississauga Reserve, Moonbeam, Morrisburg, Mount Brydges, Mount Forest, Mount Salem, Naim Centre, Naughton, Neustadt, New Liskeard, Newburgh, Newbury, Noelville, Norland, North Bay, North Cobalt, Northbrook, Norwood, Novar, Oakwood, Oliphant, Omemee, Onaping, Opasatika, Orwell, Paisley, Palmerston, Picton, Plantagenet, Porcupine, Porquois Junction, Port Bruce, Port Burwell, Port Elgin, Port Perry, Port Rowan, Powassan, Railton, Sauble Beach, Schumacher, Seagrave, Serpent River, Shallow Lake, Simcoe, Smith Township, Smooth Rock Falls, South Porcupine, South River, Southampton, Spanish, Spanish Trailer Park, Springfield, St. Isidore, St. Williams, Stokes Bay, Straffordville, Sturgeon Falls, Sturgeon Falls Ext, Sucker Creek, Sudbury, Sunderland, Sundridge, Swastika, Sydenham, Tara, Tehkummah, The Glen, Thessalon, Thornloe, Timmins, Tobermory, Trent River, Trout Creek, Tweed, Val Caron, Val Rita, Val Therese, Vama, Verner, Verona, Vienna, Wahnapitae, Walkerton, Wardsville, Warren, Webbwood, Whitefish, Whitefish Falls, White's Point, Wiarton, Wikwemikong, Williamsburg, Winchester, Wingham, Woodlawn, Woodville, Worthington

Carrier	Zone(s) Serviced	Places of Operation in Ontario
Allstream	Southern, Eastern	Wireline Attachments primarily in urban areas, including surrounding Orleans, Ottawa, Barrie, and Brampton.
Shaw Communications	Northern	Red Lake, Fort Frances, Dryden, Thunder Bay, Schreiber, Sault Ste. Marie, Red Rock, Ear Falls, Kenora, Vermilion Bay, Pickle Lake, Ignace, Emo, Manaki, Clearwater Bay, Manotouwadge, Marathon, White River, Terrance Bay
Cogeco Cable	Southern, Eastern, Northern	Arnprior, Bracebridge, Brockville, Clinton, Cobden, Dundas, Essex, Fenelon Falls, Guelph, Huntsville, Kent, Kingston, Lambton, Lincoln, Nipissing, Parry Sound, Perth, Peterborough, Picton, Simcoe, Strathroy, Trenton, Tweed, Vankleek Hill, Winchester
Quebecor Media	Eastern	Clarence, Wendover, Rockland
Packet-tel	Southern	Courtland, Tillsonburg
Tbaytel	Northern	Wireline Attachments in townships surrounding and outside Thunder Bay.