

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 specific charge for cable and telecom companies access to power poles charged by Hydro One (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 (now Rogers Communications Canada Inc.), 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 a motion by the Carriers to review and vary Decision EB-2013-0416/EB-2014-0247 as it relates to the Pole Access Charge (the “**Carriers’ Motion**”);

AND IN THE MATTER OF Procedural Order No. 7 of the OEB issued March 8, 2016 declining to issue the clarifying order sought by the Carriers in a letter to the OEB dated January 26, 2016 and ordering that this matter proceed by way of a written hearing.

NOTICE OF MOTION OF THE CARRIERS

THE CARRIERS will make a motion to the OEB on a date to be determined by the Board at the Board’s office located at 2300 Yonge Street, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The Carriers propose that this motion be heard orally.

THIS MOTION IS FOR:

1. An Order setting aside that portion of Procedural Order No. 7 of the OEB dated on March 8, 2016 (“**Procedural Order No. 7**”) ordering that this matter proceed by way of a written hearing, and substituting that portion of Procedural Order No. 7 with an order that:

(a) this matter will proceed by way of an oral hearing;

(b) an order that Hydro One produce its agreement or agreements with Bell Canada (“**Bell**”) in respect of joint use and pole attachments; and

(c) an order allowing for further interrogatories to Hydro One by the Carriers, in advance of the hearing.

GROUND FOR THIS MOTION:

2. In Procedural Order No. 4 dated October 26, 2015 (“**Procedural Order No. 4**”), the OEB directed that its review of the Pole Access Charge for Hydro One in this proceeding “will be within the context of the current approved OEB methodology as described in Decision and Order RP-2003-0249” (the “**2005 Methodology**”).

3. Following Procedural Order No. 4, the Carriers submitted evidence on November 20, 2015 demonstrating that, contrary to the 2005 Methodology, Hydro One had improperly included vegetation management costs as part of its indirect costs used in the calculation of the new Pole Access Charge of \$37.05.

4. By letter to the OEB dated January 26, 2016 the Carriers requested that the OEB hold an oral hearing on the following issues:

(a) whether Hydro One's inclusion of vegetation management costs as part of its indirect costs used in calculating the Pole Access Charge is inconsistent with the 2005 Methodology and therefore outside the scope of the Carriers' Motion; and

(b) if Hydro One's inclusion of vegetation management costs is not inconsistent with the 2005 Methodology (which the Carriers expressly deny), whether Hydro One has overstated or improperly allocated such costs.

The Intervenors raised additional issues in this proceeding

5. At the Technical Conference held on January 16, 2016, certain of the Intervenors¹ raised additional factors and issues (the "**Additional Issues**") that were not part of Hydro One's original application before the Board (the "**General Rate Application**"); nor were these Additional Issues raised by the Intervenors during the course of the General Rate Application. The Additional Issues are that:

(a) The Pole Access Charge should be calculated using 2015 forecast costs (instead of historical costs as prescribed in the 2005 Methodology and used by Hydro One in its General Rate Application).

¹ School Energy Coalition, Vulnerable Energy Consumers Coalition ("**VECC**"), Power Workers Union and Canadian Manufacturers & Exporters.

(b) The Pole Access Charge should be calculated using an average of 1.3 attachers per pole (instead of the 2.5 attachers prescribed in the 2005 Methodology and assumed by Hydro One in its General Rate Application).

6. In the Carriers' letter dated January 26, 2016, the Carriers submitted that any consideration by the OEB of the Additional Issues in the Carriers' Motion would be a violation of the principle of *res judicata*, as well as an abuse of process, and the Board should not permit the Intervenors to raise or argue the Additional Issues at the hearing.²

7. It is an uncontroverted principle of common law that, if a party "omits to raise any particular point... (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the same issue arises in the same or subsequent proceedings."³

8. The Intervenors were full participants during the proceedings in the General Rate Application for which the Board determined the just and reasonable Pole Access Change to be \$37.05. Yet the Intervenors did not raise the Additional Issues in those proceedings despite having ample opportunity to do so. The Carriers accordingly submitted that it would be unfair for the OEB to permit the Intervenors to have a second opportunity to raise these Additional Issues on the Carriers' Motion when the Carriers are receiving only one opportunity to raise their single issue of the inclusion of vegetation management costs.

² The Supreme Court of Canada has confirmed that *res judicata* and abuse of process govern the OEB's process in order to balance fairness to the parties with the protection of the integrity of the administrative decision-making process, which is undermined by permitting re-litigation of issues once decided (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 21).

³ *Fidelitas Shipping Co Ltd. v. V/O Exportchleb*, [1966] 1 QB 630.

9. In the General Rate Application, despite having ample opportunity to challenge the methodology used by Hydro One in determining the Pole Access Charge, the Intervenor chose not to do so. The Intervenor accepted without question the use of 2012 historical costs in determining the Pole Access Charge. They accepted without question the adoption of an average of 2.5 attachers per pole in determining the Pole Access Charge. They did not object to the final value of the Pole Access Charge of \$37.05 or suggest a different figure.

10. Accordingly, the Carriers submitted that if the Intervenor were given a second opportunity to make submissions on the Additional Issues on the Carriers' Motion, it would be a blatant abuse of process resulting in a: (1) duplication of OEB resources; (2) inconsistent outcomes; and (3) uncertainty regarding the finality of OEB decisions.

The OEB declined to exclude the Additional Issues and ordered a written hearing

11. In Procedural Order No. 7, contrary to the Carriers' request, the OEB declined to exclude the Additional Issues from the scope of the Carriers' Motion and ordered that the Carriers' Motion proceed by way of a written hearing. The OEB did not address the Carriers' *res judicata* and abuse of process submissions in its reasons.

12. The OEB also noted that "parties making submissions in this case should take note of the findings of the OEB in the Decision and Rate Order on Pole Access Charge in the Hydro Ottawa Limited proceeding EB-2015-0004, issued February 25, 2016" (the "**Hydro Ottawa Proceeding**").

13. Notably, in the Hydro Ottawa Proceeding, the OEB used the *actual* number of attachers per pole to determine a Pole Access Charge which was "just and reasonable". Accordingly, the Carriers anticipate that the OEB, in the Carriers' Motion, may set the

Pole Access Charge based on the *actual* number of attachers per pole, instead of the 2.5 attachers per pole prescribed in the 2005 Methodology and accepted by Hydro One and the Intervenor in the General Rate Application. Until the Technical Conference, the number of attachers was not raised as an issue by any parties.

The evidentiary record is insufficient to determine the actual number of attachers

14. Hydro One's evidence in response to inquiries by the VECC at the Technical Conference in this proceeding, held on January 12, 2016, is relevant to determining the actual number of attachers per pole.⁴ Specifically, at the Technical Conference, Hydro One gave evidence that attachments by Bell to Hydro One's poles have been excluded from the aggregate number of attachments calculated by Hydro One.⁵

15. Furthermore, following the Technical Conference, Hydro One stated in its answer to Undertaking JT3 that Bell and Hydro One "have a reciprocal use agreement (HONI 60% - Bell 40%)."⁶

16. Hydro One failed in both instances to explain the nature of its arrangement with Bell, preventing participants in this proceeding and the OEB from assessing its impact on amounts which are relevant to determining the Pole Access Charge, including the number of attachers per pole. In fact, as part of Undertaking JT3, Hydro One was asked by Mr. Harper of VECC to explain the impact of the fact that Bell does not pay a pole attachment fee. Hydro One has failed to respond substantively to Undertaking JT3.

17. Hydro One has failed to produce the agreement or agreements with Bell Canada in respect of joint use and pole attachments.

⁴ The number of attachers per pole is calculated by dividing the total number of poles with attachments by the aggregate number of attachments.

⁵ Technical Conference Transcript, page 34, lines 16-18.

⁶ Hydro One, Answers to Undertakings dated January 14, 2016, Response to Undertaking JT3.

18. As a result, Hydro One's evidence that 576,068 of its total of 1,525,344 poles are "joint use" poles is entirely unsubstantiated and accordingly, the reliability of that number for use in calculating the number of attachers per pole is unclear.

19. The Carriers have not had an opportunity to seek clarification from Hydro One on its stated number of joint use poles and have been denied natural justice in these circumstances.

20. Additional evidence which is required in order to substantiate Hydro One's evidence on the *actual* number of attachers per pole, including as follows:

(a) Hydro One's intended meaning of "joint use" is not in evidence.

Specifically, it is unknown whether Hydro One has defined "joint use pole" to include poles that have actual communications attachments on them or whether that definition also includes poles that have been designed and built as joint use poles, but may or may not have communications attachments on them.

(b) Hydro One's evidence does not disclose whether the 576,068 joint use poles, according to Hydro One, represents the entire pool of joint use poles or excludes those that are covered by Hydro One's agreement with Bell.

(c) In Hydro One's response to Carriers Interrogatory #1(a), Hydro One identified Bell as a Wireline Attacher with a reciprocal agreement with Hydro One that pays the Pole Access Charge. Hydro One has otherwise stated that Bell does not pay the Pole Access Charge. In order to

determine the potential impact of Hydro One's joint use agreement with Bell on the number of attachers per pole, this inconsistency in Hydro One's evidence must be reconciled.

21. Hydro One's evidence in respect of each of the above issues could materially impact the actual number of attachers per pole and accordingly, the Pole Access Charge. The General Rate Application remains unchanged at 2.5 attachers per pole and it has not sought an amendment in that regard.

22. The Carriers reasonably anticipated that in respect of these necessary clarifications, either:

(a) answers would not be required by the Carriers as a result of Procedural Order No. 4 that the Pole Access Change would be set within the 2005 Methodology, meaning that evidence regarding the Additional Issues, including the number of attachers per pole, would not be necessary; or

(b) if the OEB ordered that the Additional Issues should be considered as part of the Carriers' Motion, that an opportunity for the Carriers to obtain such further answers would arise at an oral hearing of the Carriers' Motion.

23. As a result of Procedural Order No. 7, declining to exclude the Additional Issues from the Carriers' Motion, an oral hearing is necessary to provide all parties to this proceeding with an opportunity seek clarification of the noted inconsistencies and deficiencies in the evidence from Hydro One.

24. Ultimately, the Carriers' objective is to ensure that the record contains sufficient evidence for the OEB to answer the following questions regarding the number of

attachers per pole if the issue of attachers per pole is allowed to be in issue in the hearing:

- (a) whether all of the poles that are part of a pool of joint use poles which Hydro One shares with Bell should be included in the number of joint use poles used to determine the number of attachers per pole (and regardless of whether Bell actually has an attachment on a pole);
- (b) whether all of the poles that attachers such as the Carriers which pay the Pole Access Charge do not use should be removed from the number of joint use poles; and/or
- (c) whether any capital contribution by Bell to the joint-use poles must be deducted from the cost base of those poles, reducing the costs that must be allocated from the remaining attachers, including Hydro One and the Carriers.

25. The Carriers submit that the procedure set by the OEB for the hearing of this matter denies participants to this proceeding, including the Carriers and Intervenors, of an opportunity to seek the necessary clarification and certain further evidence from Hydro One, which is required for the OEB to set a Pole Access Charge which is “just and reasonable”. Accordingly, the Carriers seek the relief set out in paragraph 1.

The hearing procedure denies the parties of fundamental procedural fairness

26. The process for determining the Pole Access Charge in this proceeding, which has been established by the OEB, denies the Carriers of essential features of natural justice and procedural fairness, as follows:

- (a) the OEB did not address the Carriers' *res judicata* and abuse of process submissions regarding the Additional Issues raised by the Intervenors in Procedural Order No. 7 or otherwise; and
- (b) the procedure ordered by the OEB, including that this matter proceed by way of a written hearing, denies the participants to this proceeding of any opportunity to seek clarification from Hydro One on evidence which is significant to determining the actual number of attachers per pole and accordingly, a fair and reasonable Pole Access Charge.

MATERIALS TO BE RELIED UPON:

27. The Carriers will rely on the following materials at the hearing of this motion:

- (a) The evidentiary record to date in the proceeding EB 2105-0141;
- (b) The Interrogatories, Answers to Interrogatories, Written Evidence, Oral Evidence and Submissions of the Parties to the Motion;
- (c) The *Ontario Energy Board Rules of Practice and Procedure*; and
- (d) Such other materials may be advised and the Board may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 18, 2016

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