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**BY E-MAIL**

March 30, 2015

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Toronto Hydro-Electric System Limited  
Application for Rates  
Board File Number EB-2014-0116**

In accordance with Procedural Order No. 9, please find attached OEB staff's submission on the Carriers' motion.

*Original Signed By*

Martin Davies  
Project Advisor, Electricity Rates & Accounting

**2015 ELECTRICITY DISTRIBUTION RATES**  
**Toronto Hydro-Electric System Limited**

**EB-2014-0116**

**STAFF SUBMISSION ON MOTION**

**March 30, 2015**

## Background

### INTRODUCTION

Toronto Hydro-Electric System Limited (Toronto Hydro) is a licensed electricity distributor serving the City of Toronto, which has approximately 730,000 customer accounts. Toronto Hydro filed its complete custom incentive rate application (the application) for the May 2015 to December 31, 2019 period on July 31, 2014. Toronto Hydro requested approval of its proposed electricity distribution rates and other charges effective May 1, 2015 and custom Price Cap Index (Custom PCI) framework to set distribution rates effective for the period January 1, 2016 to December 31, 2019, and the rates and charges resulting from it.

The OEB initially received ten intervention requests for this application, all of which were approved.

On February 9, 2015, the Rogers Communications Partnership (Rogers) on its own behalf as well as on behalf of Allstream Inc. and Cogeco Cable Inc. on behalf of itself and its affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc. filed a letter with the OEB stating that Rogers and the other carriers have wireline communications attachments on poles of Toronto Hydro for which the annual rate for these attachments is currently \$22.35 per pole. Rogers stated that it and the other carriers had recently become aware that the application contained a proposed increase in this rate to \$92.53 per pole.

In Procedural Order No. 7, the OEB established a schedule for certain steps which included the filing of interrogatories on Toronto Hydro's evidence related to the wireline attachment rate, as well as allowing the late intervenors an opportunity to file evidence on this matter, if they wish to do so, and interrogatories on any such evidence filed. A one-day oral hearing on this matter is scheduled for April 16, 2015.

The OEB received two requests for late intervention status. On February 26, 2015, Cogeco Cable Inc. on behalf of itself and its affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc. (Cogeco) and TELUS Communications Company and its affiliates (TELUS) requested late intervention status in this proceeding. On the same date, Allstream Inc. (Allstream) also requested late intervenor status. The OEB accepted that Cogeco, TELUS and Allstream are wireline carriers that are required to pay any wireline attachment rate for Toronto Hydro that

may be approved by the OEB. The OEB accepted the late intervention requests of Cogeco, TELUS and Allstream

On March 6, 2015 Rogers, Cogeco, TELUS and Allstream (the Carriers) filed a motion seeking the following relief:

1. An order striking out the request by Toronto Hydro for an increase in its annual wireline pole attachment rate, on the basis that the OEB lacks jurisdiction under section 78 of the Act to hear THESL's request.
2. In the alternative, a procedural order establishing a revised schedule for the hearing of THESL's requested wireline pole attachment rate increase.

In its motion the Carriers submit that the OEB has no jurisdiction under section 78 to hear pole attachment rate increase requests. Rather, the Carriers argue that the Board's jurisdiction to regulate pole attachment rates is provided by section 74 of the Act which gives the OEB a broad power to amend licences in the public interest.

### **Issues**

OEB staff submits the following issues need to be determined by the OEB in this motion:

1. Does the OEB have jurisdiction under section 78 of the Act to determine wireline pole attachment rates?
2. If the OEB does not have jurisdiction under section 78, does the OEB have to issue new notice if it proceeds under section 74 of the Act?
3. Does the schedule established by the OEB as set out in Procedural Order number 7 result in prejudice to the Carriers?

### **Submission**

OEB staff's address each of the three issues set out above.

## **Does the OEB have jurisdiction under section 78 of the Act to determine wireline pole attachment rates?**

### **Background**

In 2005, an application was made to the OEB by the Canadian Cable Television Association (CCTA) which sought access to the power poles of the regulated electricity distribution utilities in Ontario for the purpose of supporting cable television transmission lines<sup>1</sup>. Specifically, the CCTA was seeking an Order under section 74(1) of the Act to amend the licences of these utilities in a fashion that would specify the uniform terms of access including a province-wide uniform rate or pole charge for such access.

The CCTA Application was opposed by the Electricity Distribution Association (EDA) and the Canadian Electricity Association (CEA). The EDA represents almost all licensed electricity distributors in the province while the CEA is a national association representing electricity distributors, generators and transmitters.

The position of the EDA *et al* was that regulatory intervention by the OEB is not necessary. The EDA argued that the CCTA had not demonstrated that there was systematic abuse of monopoly power and absent that showing, the OEB should allow the parties to continue to negotiate. In its decision the OEB stated at paragraph 11 of the Decision that

The OEB agrees that power poles are essential facilities. It is a well-established principle of regulatory law that where a party controls essential facilities, it is important that non-discriminatory access be granted to other parties. Not only must rates be just and reasonable, there must be no preference in favour of the holder of the essential facilities. Duplication of poles is neither viable nor in the public interest.

The OEB concluded that it should set access charges.

### **Discussion and Submission**

The Carriers argue that Section 78 of the Act concerns rate-setting for the distribution of electricity. It does not address rate-setting for other discrete issues.

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<sup>1</sup> *Canadian Cable Television Assn. (re) 2005 LNONOEB 23*

Accordingly, the OEB has no jurisdiction under section 78 to hear pole attachment rate increase requests. The Carriers further submit that the OEB's jurisdiction to regulate pole attachment rates is provided by section 74 of the Act, which gives the OEB a broad power to amend licences in the public interest. OEB staff submits that section 74 of the Act deals with licence amendments:

Amendment of licence

74. (1) The OEB may, on the application of any person, amend a licence if it considers the amendment to be,  
(a) necessary to implement a directive issued under this Act; or  
(b) in the public interest, having regard to the objectives of the OEB and the purposes of the *Electricity Act*, 1998.

Section 74 is a licensing power and while the OEB makes conditions of a licence under section 74 the amount charged is a rate. This is clear from Toronto Hydro's Electricity Distribution Licence (ED-2002-0497) which, at section 22 deals with pole attachments:

22 Pole Attachments

The Licensee shall provide access to its distribution poles to all Canadian carriers, as defined by the Telecommunications Act, and to all cable companies that operate in the Province of Ontario. For each attachment, with the exception of wireless attachments, the Licensee shall charge the rate approved by the OEB and included in the Licensee's tariff.<sup>2</sup>

In its motion the Carriers rely on the following determination by the OEB in support of its position that the wireline attachment rate is not a rate under section 78:

The OEB has determined (in RP-2003-0249) that power poles are essential facilities. It concluded that "[d]uplication of poles is neither viable nor in the public interest". The determination of an appropriate access rate is crucial to the safeguarding of the public interest. It is not, therefore, a rate for "transmitting or distributing of electricity", but a rate designed to accomplish broader public interest goals.

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<sup>22</sup> Toronto Hydro-Electric System Limited Electricity Distribution Licence ED-2002-0497, section 22

OEB staff disagrees with the Carrier's argument that the above determination somehow supports the Carriers submission that wireline attachment rates are not properly determined under section 78 of the Act for two reasons. First, the RP-2003-0249 proceeding was a case brought under section 74(1) of the Act as it was a request by the applicant to **amend the licences** of a number of distribution utilities in Ontario in a manner that would specify the uniform terms of access to poles including a providing for a uniform rate or pole charge for such access. The CCTA's proposed amendment was to require a standard pole attachment agreement, including a standard pole rental charge as part of the standard terms and conditions. The CCTA Decision and Order was issued on March 7, 2005, granting access to local distribution company poles at a rate of \$22.35 per pole per year.

In a subsequent proceeding, EB-2011-0120<sup>3</sup>, the Canadian Distributed Antenna Systems Coalition (CANDAS) filed an application under section 74 (1) requesting an order, among other things to amend the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to power poles. Much of the proceeding concerned the interpretation of the CCTA Decision and Order and whether it applied to all attachments to poles for cable and telecommunications or whether it applied only to wireline attachments, to the exclusion of wireless attachments. OEB staff submits that although the proceeding dealt with wireless and wireline attachments the application was brought under section 74 for a licence amendment.

The second reason OEB staff submits that wireline pole attachments rates are properly considered in under section 78 of the Act is that while the rate may not be a charge for the distribution of electricity, it is a charge related to the system for the distribution of electricity and the scope of the OEB's jurisdiction is always subject to its own assessment in light of specific challenges.<sup>4</sup>

OEB staff submits that the wireline rates are incidental to the distribution of electricity because the poles are an essential facility. Poles are a rate base asset on which electricity rates are based and therefore attachment to those poles are something for

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<sup>3</sup> *Canadian Distributed Antenna Systems Coalition (re)2012-LNONOEB 364 (EB-2011-0120)*

<sup>4</sup> *Hydro One Networks Inc. (Re)*, 2007 LNONOEB 29 (EB-2006-0501) at paragraph34

which the OEB can set a rate under section 78. In further support of this position OEB staff notes that the revenue generated from the attachments are used to reduce distribution rates in the same way as other miscellaneous charges such as change of occupancy.

The OEB's jurisdiction with respect to ratemaking is derived from the following sections of the Act:

- 19(1) The OEB has in all matters within its jurisdiction authority to hear and determine all questions of law and fact.
- 19(6) The OEB has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.
- 78(3) The OEB may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed.
- 78 (7) Upon an application for an order approving or fixing rates, the OEB may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable.

In the EB-2006-0501 case, a number of intervenors argued, and OEB staff observed, that the OEB's method of determining just and reasonable rates does not include prohibiting the subject utility from making expenditures or incurring costs at rigidly prescribed levels. Rather, the OEB approves a revenue requirement that is consistent with its findings on various cost categories, including operating costs.<sup>5</sup>

The OEB determined that its obligation to arrive at just and reasonable rates, and to protect the interests of consumers, requires it to assess the reasonableness of all cost categories for which recovery is sought. The OEB has a wide discretion to allow, disallow or adjust the components of both rate base and expense.<sup>6</sup>

For the above reasons, OEB staff submits that the determination of wireline pole attachment rates is properly made under section 78 of the Act.

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<sup>5</sup> *Ibid*, at para 39

<sup>6</sup> *Ibid*, at para 40

## **Notice**

Regardless of the determination that the OEB may make on the first issue, OEB staff submits that no new notice is required and the OEB can proceed to determine the matter under section 74 of the Act.

The Carriers submit that Toronto Hydro has failed to provide adequate notice of the proposed increase to its wireline attachment customers. Accordingly the Carriers requested that the OEB strike out Toronto Hydro's request in the Application for an increase in its wireline attachment rate, as well as all of its supporting evidence, and refuse to hear this matter in the course of the proceeding. In the alternative the Carriers ask the OEB to deny Toronto Hydro's request for an increase in its wireline attachment rate.

On February 26, 2015 the OEB issued its decision on the Carriers request. The OEB accepted the argument by Rogers that it will experience a "significant impact as a result of the proposed increase in the wireline attachment rate by Toronto Hydro" however it did not accept that it will take the Carriers months to participate in the proceeding. The Panel stated that "should Rogers and the other carriers choose to ask interrogatories or file evidence, they should be able to do so within the time allotted in the schedule that has been established by the OEB".

With respect to the issue of notice the OEB ordered that other carriers wishing to make requests for late intervenor status related to the wireline attachment could do so and the OEB directed Toronto Hydro to serve a copy of its February 23rd decision on the parties to the previous wireless proceeding. No other parties, other than the Carriers as defined above, requested intervenor status.

OEB staff submits that all the parties wishing to be heard on this matter are currently before the OEB and no further notice is required.

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## **Issue of Prejudice**

The Carriers argue that they are prejudiced by the schedule established by the OEB and that it does not provide them with sufficient time to gather the evidence necessary to properly test Toronto Hydro's request for an increase in the wireline pole attachment rate.

OEB staff notes that the Panel has already determined, in Procedural Order no. 7 which was reiterated in Procedural Order no. 9:

The panel does not accept that it will take Rogers and the other carriers months to prepare to participate in the proceeding. The issue of costs related to wireline attachments is not new. Therefore, should Rogers and the other carriers choose to ask interrogatories or file evidence, they should be able to do so within the time allotted in the schedule that has been established by the OEB.

OEB staff further notes that the Carriers filed over 24 pages interrogatories on March 5 which Toronto Hydro has answered. In OEB staff's submission the level of detail requested by the Carriers in their interrogatories is exceptional and disproportionate to the level of detail requested by parties on the other aspects of Toronto Hydro's application. Despite this, on March 26 the Carriers filed affidavits from its experts setting out alleged deficiencies in Toronto Hydro's evidence. The Carriers therefore argue that there is a need to amend the current procedural schedule set out by the OEB to allow, in the Carriers submission, the time needed for the OEB to consider the Carriers case for the alleged deficiencies in Toronto Hydro's interrogatories and to determine what evidence it needs to file in order to make its case.

In addition the Carriers also argue that a revised schedule providing for additional time for the determination of the wireline issue would not cause any prejudice to Toronto Hydro.

OEB staff submits that the OEB must determine whether a revision to the current schedule is necessary to secure a fair and just determination of the pole attachment rate on its merits. In making this determination OEB staff submits that the OEB should consider the Carriers argument but should do so in the context of the level of information that the OEB needs in order to determine the matter of the appropriate pole attachment rate and balance that with the level of information that the Carriers are requesting.

Further OEB staff submits that the fairness of the OEB's decision in granting or refusing the Carriers request is contingent on the OEB properly weighing and assessing all of the applicable factors related to the request which include the impact on the efficiency and effectiveness of the OEB's processes and the desirability of having the matter

decided in a timely manner on the one hand and the potential prejudice to the Carriers on the other. In weighing these factors, the timeliness of the request, the Carriers reasons for being unable to proceed on the scheduled date and the length of time requested by the Carriers should also be considered.

- *All of which is respectfully submitted-*