

March 30, 2015

**EMAIL, COURIER & RESS**

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

Dear Ms. Walli:

**Re: Toronto Hydro-Electric System Limited CIR Application 2015-2019  
(EB-2014-0116)**

We are counsel to Toronto Hydro-Electric System Limited (“**Toronto Hydro**”) in the above-noted matter. Further to Procedural Order No. 9, please find enclosed Toronto Hydro’s submissions in response to the March 6, 2015 motion from the Carriers.

Yours truly,



Crawford Smith

cc. Charles Keizer, Torys LLP  
Daliana Coban, Toronto Hydro  
Intervenors

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

**AND IN THE MATTER OF** an application by Toronto Hydro-Electric System Limited for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2015 and for each following year effective January 1 through to December 31, 2019.

## **TORONTO HYDRO RESPONSE TO CARRIERS' MOTION**

**March 30, 2015**

1. These are the submissions of Toronto Hydro-Electric System Limited (“Toronto Hydro”) in response to the motion by Rogers Communications Partnership; Cogeco Cable Inc. on behalf of itself and its affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc.; Allstream Inc.; and TELUS Communications Company and its affiliates (together, the “Carriers”).

2. In their motion, the Carriers ask that the Board strike out Toronto Hydro’s request, in its Application, to increase its wireline pole attachment rate (the “Rate”) on the basis that the Board lacks jurisdiction under section 78 of the *Ontario Energy Board Act, 1998* (the “Act”) to hear Toronto Hydro’s request. In the alternative, the Carriers ask that the existing hearing schedule be revised and the hearing date adjourned. For the reasons set out below, Toronto Hydro submits that the Board should deny the Carriers’ motion.

### **Background**

3. The Carriers first asked the Board to strike Toronto Hydro’s request for an increase to the Rate by correspondence dated February 9. While Toronto Hydro denied the merit of any of the Carriers’ claims, it did not oppose the Carriers’ participation in the proceeding to test the relevant evidence. The Board heard argument on February 17, 2015. At that time, the Carriers repeated

the arguments set out in their earlier letter and advanced a new argument – that the Board lacked the jurisdiction to consider the Rate under section 78 of the Act.<sup>1</sup>

4. In its February 23, 2015 Decision and Procedural Order No. 7, the Board determined that it would not grant the relief requested in the Carriers' letter. Rather, the Board ordered that additional procedural steps would be established to permit the Carriers a full opportunity to participate in the hearing. These steps included interrogatories, the right to file evidence and a one-day oral hearing. The Board also decided to grant late intervenor status to Rogers. In doing so, the Board noted that it

will not delay its Decision on Toronto Hydro's rates nor will it parse out this issue and make it the subject of a separate proceeding. Therefore, the OEB requires, as a condition of granting late intervenor status to Rogers and the other carriers that they adhere to the schedule outlined in this Decision and Procedural Order.<sup>2</sup>

The Board applied this same condition in granting late intervenor status to Cogeco, TELUS and Allstream in Procedural Order No. 8 on March 5, 2015.

5. Notwithstanding the Board's Decision and Procedural Order No. 7, on March 6 the Carriers filed this motion again asking that the Board strike from the Application Toronto Hydro's request for an increase in the Rate or, in the alternative, to revise the schedule for hearing this aspect of the Application. In support of their request, the Carriers again argue (as they did at the oral hearing in February) that the Board lacks jurisdiction under section 78 of the Act to hear Toronto Hydro's request. In support of their alternative request, the Carriers argue that the schedule set out in Procedural Order No. 7 unreasonably prejudices the Carriers' ability to address the proposed Rate increase, particularly because several of the Carriers' representatives were scheduled to be on vacation.

6. In Procedural Order No. 9 issued March 11, 2015, the Board established a written process to consider the motion. This process provided an opportunity for the Carriers to file any

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<sup>1</sup> Ontario Energy Board, Hearing Transcript Vol. 1, EB-2014-0116, February 17, 2015, p. 5.

<sup>2</sup> Ontario Energy Board, Decision and Procedural Order No. 7 (EB-2014-0116), February 23, 2015, p. 4.

additional motion materials by March 25, 2015 and reiterated that the dates previously established for hearing the issue of the proposed Rate increase in the main Application remain in effect. On March 25, 2015 the Carriers filed additional motion materials consisting of a letter seeking to expand on two aspects of the motion, neither of which relate directly to the primary argument in the motion concerning the Board's lack of jurisdiction.

**The Board has Jurisdiction to Set Wireline Pole Attachment Rates in this Proceeding**

7. The Carriers argue that the Board should strike Toronto Hydro's request for an increase in its Rate on the basis that the Board lacks jurisdiction under section 78 of the Act to hear this aspect of Toronto Hydro's request. The Board already heard this argument at the oral hearing on February 17. After considering all parties' arguments, the Board issued its Decision and Procedural Order No. 7 and properly rejected the Carriers' request. The Board should refuse the Carrier's attempt to re-argue the matter.

8. In any event, even if it were appropriate to re-argue the issue, the Carriers' position lacks merit. The Rate is an offset to Toronto Hydro's revenue requirement and has a direct impact on the distribution rates being established under section 78 in this proceeding. The amount of the proposed increase represents the amount by which distribution ratepayers would, in the absence of the proposed increase, effectively be subsidizing the telecommunications companies which have wireline attachments on Toronto Hydro's poles.

9. Further, contrary to the Carriers' submission, Toronto Hydro's distribution license does not need to be amended to give effect to the proposed Rate increase. Pursuant to its license, Toronto Hydro is required to charge the rate established in its tariff, which the Board approves from time to time. This arrangement was established as a result of the Board's Decision and Order dated March 7, 2005 in RP-2003-0249 (the "CCTA Decision"). In the CCTA Decision, the Board amended all electricity distributor licenses so as to require distributors, including Toronto Hydro, to provide access to their distribution poles at such rate as was approved by the Board in that proceeding. However, the Board also indicated at p. 8 of the CCTA Decision that "any LDC that believes that the province-wide rate is not appropriate can bring an application to have the rates modified based on its own costing." That is what Toronto Hydro has done.

10. The CCTA Decision does not require that an application to modify the CCTA rate be brought under section 74 through a licence amendment proceeding. In fact, there is nothing in Toronto Hydro's distribution licence that would need to be amended to give effect to the request for a modified Rate. Section 22.1 of Toronto Hydro's licence (ED-2002-0497) does not reference any particular wireline pole attachment rate nor any particular Board proceeding where such a rate has been established. Rather, it states that Toronto Hydro "shall charge the rate approved by the Board and included in the Licensee's tariff." It is through a rate proceeding under section 78 that the Board establishes Toronto Hydro's tariff, not through a licence amendment proceeding under section 74.

11. Accordingly, it is within the Board's jurisdiction to establish the Rate through a proceeding under section 78. Doing so is also consistent with the Board's prior practice. For example, each time the Board has established a new Toronto Hydro tariff so as to include the existing wireline attachment rate since the CCTA Decision, the Board has exercised jurisdiction under section 78 of the Act in respect of wireline pole attachment rates. Moreover, in a distribution rate proceeding for Hydro One Networks Inc. (EB-2010-0228), the Board decided that, consistent with the CCTA Decision, it would regulate charges for generators requesting joint use of Hydro One's distribution poles. In addition to noting that generators should be treated like all other parties requesting joint use of Hydro One's distribution poles, such as telecommunications carriers, the Board established a generator joint use charge based on a particular methodology, all within the context of a section 78 rate proceeding.

12. Also notable is that, pursuant to s. 19(4) of the Act, the Board of its own motion may determine any matter that under the Act it may determine on an application. In so doing, the Board has the same powers as upon an application. As such, even if the Carriers were correct that Rate must be modified by means of an application under section 74 of the Act (which they are not), it would be within the Board's discretion to consider and determine such Rate on its own motion within the context of a section 78 proceeding.

#### **The Board Should Not Revise the Schedule Established in Procedural Order No. 7**

13. The Carriers' alternative request for a revised schedule to consider the proposed Rate change should also be rejected by the Board. Again, the Carriers' simply seek to re-argue a

matter already decided by the Board. At p. 3 of its Decision and Procedural Order No. 7 the Board held:

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.

14. Further, at p. 4 of the Decision and Procedural Order No. 7, the Board stated that the Carriers would be granted late intervenor status in this proceeding on the condition that they adhere to the schedule outlined in the Decision and Procedural Order No. 7. Having been granted late intervenor status on this basis, the Carriers' standing in the proceeding is premised on the condition that they adhere to the established schedule. The Board should not now grant, in response to the motion, the Carriers' request for a delay in the proceeding.

15. In their additional motion materials of March 25, 2015, the Carriers make a generalized complaint that inconsistencies and gaps in Toronto Hydro's evidence with respect to the cost inputs for the Rate have been identified. The connection, if any, between this argument and the motion is unclear. The Carriers' have met the Board ordered schedule, filing dozens of interrogatories, together with well over 100 pages of evidence. In any event, Toronto Hydro rejects the complaint. Toronto Hydro filed extensive responses to the Carriers' interrogatories on March 12, 2015. Since then, it has received no communication from the Carriers as to the adequacy of the responses provided. The Carriers' complaint is broad and ambiguous.

### **Consequences of Delaying Consideration of the Proposed Wireline Pole Attachment Rate**

16. In the event the Board determines that the schedule for considering the proposed Rate should be changed, Toronto Hydro asks that the current Rate be declared interim with Toronto Hydro being permitted to recover from attachers the difference, if any, between the current Rate and the approved Rate for the duration of the interim period. The incremental revenue would be recorded in a variance account and refunded to Toronto Hydro's distribution customers by way of a negative rate rider at a later date. In this way, impacts to the overall schedule of the proceeding could be avoided.

17. Finally, Toronto Hydro notes that the Carriers have suggested a schedule that includes a number of additional procedural steps. Toronto Hydro's application did not forecast the costs associated with what amounts, in effect, to a separate proceeding. As Toronto Hydro advised in its March 11, 2015 letter to the Board, if the Board is inclined to establish such a schedule, Toronto Hydro also intends to request a variance account in which to record the difference between its forecasted regulatory costs for this application and proceeding, and the regulatory costs that it actually incurs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

A handwritten signature in black ink, appearing to read 'C/S' followed by a stylized flourish.

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Crawford Smith  
Torys LLP  
Lawyers for Toronto Hydro