



EB-2014-0116

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.

DECISION and PROCEDURAL ORDER NO. 10

April 29, 2015

Toronto Hydro-Electric System Limited (Toronto Hydro) filed a Custom Incentive Rate (“CIR”) application (the “Application”) with the Ontario Energy Board (the OEB) on July 31, 2014 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998 seeking approval for changes to the rates that Toronto Hydro charges for electricity distribution, to be effective May 1, 2015 and each year until December 31, 2019. Commencing in 2016, rates will be effective January 1.

Notice of Motion

On March 5, 2015, a Notice of Motion (the motion) was filed with the OEB by 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. and TELUS Communications Company and its affiliates (collectively the Carriers).

The motion requests that the OEB issue an order striking out the request by Toronto Hydro in the Application for an increase in its annual wireline pole attachment rate, on the basis that the OEB lacks jurisdiction under section 78 of the *Ontario Energy Board Act, 1998* to hear Toronto Hydro's request.

In the alternative, the Carriers ask that a procedural order establishing a revised schedule for the hearing of Toronto Hydro's requested wireline pole attachment rate increase be established to replace the one set out in Decision and Procedural Order No. 7. The Carriers claim that the schedule is highly prejudicial to them.

Decision on the Motion

This Decision addresses the following issues raised in the motion:

1. Jurisdiction of the Board to Set the Wireline Pole Attachment Rate in this Proceeding
 - a. Does the OEB have jurisdiction under section 78 of the Act to determine wireline pole attachment rates?
 - b. 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

2. Revised Schedule

Should the OEB revise the current schedule for this proceeding?

1. **Jurisdiction of the Board to Set the Wireline Pole Attachment Rate in this Proceeding**
 - a. ***Does the OEB have jurisdiction under section 78 of the Act to determine wireline pole attachment rates?***

Subsection 78(3) of the Act grants the OEB the authority "to make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed".

The Carriers allege that the OEB does not have jurisdiction, pursuant to its rate-setting authority to set wireline attachment rates. Their view is that while 78(3) refers to setting just and reasonable rates for transmission and distribution of electricity, and “such other activity as may be prescribed”, pole attachments are not a prescribed activity.

The Carriers submit that the OEB’s jurisdiction to regulate wireline 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.

The Carriers argue that a new application is required if the rate is to be changed by way of a license amendment. Toronto Hydro, SEC and OEB staff disagree and submit that the Board, in this same proceeding, on the same evidence, can adjust Toronto Hydro’s rates pursuant to section 74(1)(b).

Toronto Hydro submits that a pole attachment 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.

Toronto Hydro, SEC and OEB staff submit that the OEB has explicitly prescribed the activity of setting wireline attachment rates in Toronto Hydro’s license:

22.1 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 Board and included in the Licensee’s tariff.

The OEB has explicitly prescribed the activity of setting wireline attachment rates in Toronto Hydro's license. The OEB agrees with OEB staff that pole attachment rates are incidental to the distribution of electricity as the poles are an essential facility properly considered in under section 78 of the Act. The scope of the OEB's jurisdiction is always subject to its own assessment in light of specific challenges. The OEB finds that the setting of wireline of pole attachment rates clearly falls under section 78 of the Act.

b. 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

The Carriers argue that a new application is required if the rate is to be changed by way of a license amendment. Toronto Hydro, SEC and OEB staff disagree and submit that the Board, in this same proceeding, on the same evidence, can adjust Toronto Hydro's rates pursuant to section 74(1)(b).

The OEB finds that while the legal tests are different under sections 74 and 78, namely "just and reasonable" versus "in the public interest", when regard is given to the objectives of the OEB and the purposes of the *Electricity Act, 1998*, for the purpose of ratesetting they are essentially equivalent. It would not be in the public's interest to set a rate that is not just and reasonable, so any differences are a matter of form rather than substance. In the alternative, if the wireline attachment rate properly falls under section 74 of the Act, the OEB finds that no new notice would need to be issued. All of the parties wishing to participate in the proceeding have been notified in the current proceeding and as such the requirements of procedural fairness have been met.

2. Revised Schedule

a. Should the OEB revise the current schedule for this proceeding?

The Carriers argue that they will suffer prejudice by the schedule established by the OEB in Procedural Order No. 7 as 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.

The OEB notes that since the time that the motion was filed the OEB has issued Procedural Order No. 9 which adjourned the previously set date for the oral hearing. The OEB therefore finds that the request for a revised schedule is now moot.

The OEB notes that there is one additional matter to consider and that is the request made by Toronto Hydro that the current wireline pole attachment rate be declared interim with Toronto Hydro being permitted to recover from the attachers the difference, if any, between the current rate and the approved rate for the duration of the interim period.

On April 28, 2015, the OEB declared Toronto Hydro's rates interim as of May 1, 2015 including the charge for wireline pole attachments. Toronto Hydro is directed to track the incremental revenue it would have received through the proposed increase to the wireline pole attachment rate, in order to allow the OEB to make a determination on the treatment of any incremental revenue that may exist following the OEB's determination on the appropriate level of the charge.

The OEB ORDERS THAT:

1. A transcribed technical conference will be held on May 6 and 7, 2015 at the OEB offices at 2300 Yonge Street, Toronto, 25th floor at 9:30 am.
2. Responses to undertakings given at the Technical Conference shall be filed with the OEB and delivered to all parties on or before May 18, 2015.
3. An Oral Hearing on this matter will be held on June 9 and June 11, 2015 in the OEB's hearing room at 2300 Yonge Street, 25th Floor, Toronto.

All filings to the OEB must quote the file number, EB-2014-0116, and be made electronically through the OEB's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, in searchable / unrestricted PDF format. 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 proceeding, parties must include the Case Manager, Martin Davies at Martin.Davies@ontarioenergyboard.ca and Board Counsel, Maureen Helt at Maureen.Helt@ontarioenergyboard.ca.

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DATED at Toronto, April 29, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary