



January 26, 2016

By Email, RESS, and Same Day Courier

Ontario Energy Board
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Attention: Kirsten Walli, Board Secretary
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Dear Sir/Madam:

Re: OEB File: EB-2015-0141 – Motion by the Carriers for Review and Variance of Decision EB-2013-0416/EB-2014-0247 (the “Motion”)

Proposed Hearing and Issues before the OEB

In Procedural Order No. 4 dated October 26, 2015, the Ontario Energy Board (the “**OEB**” or the “**Board**”) directed that its review of the Pole Access Charge for Hydro One Networks Inc. (“**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**”).

In light of this order, 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 Pole Access Charge of \$37.05.

Accordingly, the Carriers submit that the only issues for the hearing of the Motion are:

- (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 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 Carriers respectfully request that the OEB hold an oral hearing on these issues.

The Intervenors have inappropriately raised additional issues in this proceeding

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 described below:

- (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).
- (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 adopted by Hydro One in its General Rate Application).

In the Carriers’ respectful submission, any consideration by the Board of the Additional Issues 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

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

The Intervenors were full participants during the proceedings in the General Rate Application for which the Board determined the just and reasonable Pole Access Charge to be \$37.05. Yet they did not raise the Additional Issues in these proceedings despite having ample opportunity to do so. It is unfair to permit the Intervenors to have a second opportunity to raise these Additional Issues when the Carriers are receiving only one opportunity to raise their single issue.

¹ School Energy Coalition, Vulnerable Energy Consumers Coalition, Power Workers Union and Canadian Manufacturers & Exporters.

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.

A hearing on the Additional Issues would violate *res judicata*

Under the principle of *res judicata*, the mechanism of issue estoppel acts to prevent the Intervenor from raising or arguing the Additional Issues in this proceeding. To successfully establish issue estoppel, it must be shown that: (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel was final; and (3) the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.⁴

In the Carriers' view, all three of the above conditions have been satisfied. The Intervenor is seeking to revisit the Pole Access Charge and whether it is just and reasonable – something that has already been decided by the Board. Second, the OEB set the final Pole Access Charge at \$37.05. Third, the Intervenor was a party to the General Rate Application. Accordingly, the Intervenor is estopped from raising the Additional Issues in this proceeding, having already had an opportunity to do so.

A hearing on the Additional Issues would be an abuse of process

Abuse of process applies where “allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.”⁵

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 attachments 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.

The Intervenor now seeks to use this Motion as an opportunity to revisit the Pole Access Charge afresh. Yet it is the Carriers, and not the Intervenor, who were denied the opportunity to review and challenge the Pole Access Charge during the proceedings for the General Rate Application. In response, the Board has seen fit to grant the Carriers leave to bring this Motion to review and vary the Board's decision. The Intervenor, on the other hand, had full opportunity to review and challenge the Pole Access Charge and participated fully in the proceeding for the General Rate Application. They cannot now use the Carriers' review and

⁴ *Danyluk*, *supra* note 2, at para. 58.

⁵ *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at para. 37.

vary motion as an opportunity to revisit the Pole Access Charge and introduce new issues that could have, and should have, been raised in the original General Rate Application.

In the Carriers' respectful submission, if the Intervenor were now given a second opportunity to make submissions on the Additional Issues, 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. In such cases, courts, including the Supreme Court of Canada,⁶ have dismissed or rejected the attempt at re-litigation.⁷ Accordingly, the Board has no choice but to deny the Intervenor the opportunity to present the Additional Issues.

Relief sought by the Carriers

For the reasons discussed above, the Carriers respectfully request that the Board issue a clarifying order, prior to the commencement of the hearing, directing that any cross-examination, argument or discussion relating to the Additional Issues is outside the scope of the Motion for the reasons above.

The Carriers appreciate the OEB's consideration of this request.

Yours very truly,



Timothy Pinos
TP/gmc

⁶ *Ibid*, at para. 58.

⁷ See for instance, the recent decision of the Ontario Court of Appeal in *College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association*, 2015 ONCA 851.