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BY EMAIL and RESS

March 30, 2015
Our File No. 20140116

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2014-0116 – Toronto Hydro 2015-2019 Rates – Carriers' Motion

We are counsel for the School Energy Coalition ("SEC"). The Carriers[1] have brought a motion for an order i) striking out the request by Toronto Hydro Electric System Limited ("Toronto Hydro") to change its wireline pole attachment rates on the basis that the Board does not have jurisdiction pursuant to section 78 of the *Ontario Energy Board Act, 1998* ("*OEB Act*"), and ii) in the alternative, revising the proceeding schedule. Pursuant to Procedural Order No. 9, these are SEC's submissions in respect to the motion brought by the Carriers.

Jurisdiction Issue

The Board has the authority, pursuant to section 78(3) of the *OEB Act,* to set wireline attachment rates. Alternatively, even if it does not, the Board can set the rate by way of a section 74(1)(b) license amendment, without the need to strike this aspect of the Application or delay the proceeding.

In the Wireless Attachment Consultation (EB-2014-0365), SEC made comments regarding the inconsistency between the ability of Toronto Hydro to have its wireline attachment rates set by way of a section 78 order, and other utilities that must do so only by way of a license amendment. SEC has appended the relevant excerpt of those comments to these submissions.[2] SEC notes that its submissions are specific to the situation of Toronto Hydro, and should not be construed as having

[1] Rogers Communication Partnership; Cogoeco Cable Inc . on behalf of itself and is affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc; Allstream Inc; and Telus Communications Company and its Affiliates.
[2] SEC Submissions in EB-2014-0365, dated January 16, 2015 (see Appendix)

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application to other distributors, whose licences do not have similar wording to that in Toronto Hydro's licence.

Section 78

The Carriers allege that the Board does not have jurisdiction, pursuant to its rate-setting authority under section 78 of the *OEB Act*, 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.

SEC disagrees. The Board has explicitly prescribed the activity 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. [emphasis added] [3]

Toronto Hydro's Tariff of Rates and Charges is determined by a section 78 order.

Unlike other sections of the *OEB Act* that include the term "may be prescribed", in section 78(3), it is not followed by the words "by regulation"[4]. The the Board has the authority to prescribe "such other activities" for the purpose of electricity related rate-setting. This interpretation is consistent with the principle of presumption of consistent expression, which states that while the same words (or phrases) in a statute should be given the same meanings, the converse is also true.[5] Different words (or phrases) in a statute should be given different meanings.

The Carriers claim that under that logic the Board could set the rate for any activity a utility undertakes. This fails to take account of the overall scope of the Board's mandate. The Board will always be constrained by its general statutory authority, its objectives, and the overarching purpose of the *OEB Act*, which is to constrain utility monopoly power.[6] The reason the Board initially regulated pole attachments were for that reason.[7] Further, it should be noted that at the time of the CCTA decision (RP-2003-0249), the Board did not even have the option to set wireline rates by section 78 order. It was not until 2009 that "such other activity as may be prescribed" was added to section 78(3) the *OEB Act*. [8]

This is also not the first time the Board has regulated pole attachments by way of a 78 order. In EB-2010-0228 Hydro One sought, and the Board approved, rates for joint pole use between itself and generators.[9] While the situation of generators is arguably different from that of the Carriers, since generators are still transmitting electricity using the poles, it is instructive to note that the Board expressly relied on its reasoning in the CCTA decision as the basis for regulating joint use by Hydro One and generators under section 78.[10]

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[3] License ED-2002-0497, section 22.1
[4] See for example "may be prescribed by regulation" in sections 51(2), 88.1(1)(a), 112.8(4). Also, "prescribed by regulation" in sections 78(3.0.2), 78(5.1), 88.1(5), 112.10(d)
[5] Ruth Sullivan, *Sullivan on Construction of Statutes, 5th ed.* (Markham, LexisNexis, 2008), at pp.216, 218-19
[6] This is confirmed by the wording of section 29(1) of the *OEB Act.*
[7] See *Decision and Order* (RP-2003-0249), dated March 7 2005, p.3
[8] See *Green Energy and Green Economy Act, 2009*, Schedule D, section 12(1) which amended section 78(3) of the *OEB Act*
[9] *Decision and Order* (EB-2010-0228), dated March 17, 2010, p.5
[10] *Ibid*

Section 74

Even if the Board decides it does not have authority pursuant to section 78 of the *OEB Act,* it does have a similar authority by way of section 74(1)(b) license amendment. The question, then, would be whether the evidence in this proceeding, and the notice given, is sufficient for the Board to make a decision on a license amendment.

The Carriers have taken the position that a new application is required if the rate is to be changed by way of a license amendment. SEC disagrees and submits that the Board, in this same proceeding, on the same evidence, can adjust Toronto Hydro's rates pursuant to section 74(1)(b). While the legal tests are different, "just and reasonable" versus "in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act*, *1998*", for the purposes of rate-setting, they are essentially equivalent. It would not be in the public's interest to set a rate that is not just and reasonable.[11]

Toronto Hydro is applying to change the wireline attachment rate using the same methodology as was originally approved in the CCTA decision, which was approved by way of license amendment. It is simply seeking to adjust the input costs to that methodology, to account for their changes in the intervening decade. Moreover, if the Carrier group wants to adduce some further evidence that is specific to the section 74(1)(b) test, then it has the ability to do so at the oral hearing. Thus, this proceeding has, or will have, a full evidentiary foundation on which the Board can determine wireline attachment rates.

There is also no issue of inadequate notice. The Carriers are clearly aware of the substance of Toronto Hydro's request. They are now intervenors in this proceeding. The actual subsection of the *OEB Act* that implements the proposed new rate is not relevant to the question of adequacy of notice, as long as the substance of the proposal is clearly set out in the application, and there is sufficient notice of the application itself.

Request For A Delay of the Proceedings

SEC takes no position on the claim by the Carriers of prejudice, but does submit that a delay is inconsistent with the Board's previous ruling on this matter. In the alternative, if a delay is granted, Toronto Hydro's proposed wireline rate, not the current rate, should be set on interim basis.

A delay in the proceeding, thus rendering the decision on the pole attachment rate separate from the rest of the Application, will not allow the Board to adjudicate the justness and reasonableness of distribution rates in a proper manner. The Board highlighted this in its *Decision and Procedural Order No. 7,* released on February 23, 2015:

> THESL's rate application is based on the fact that wireline attachment revenue, estimated to be $6.7 million, will be a revenue offset and as such will impact the rates proposed in the application. Accordingly, the OEB 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.[12]

[11] The opposite may not be true. SEC noted in our submission in EB-2014-0365 that the tests under section 74(1)(b) ("public interest…") and section 78(3) ("just and reasonable") are different. While the test under section 78(3) includes, by necessary implication, consideration of the public interest test, it is not obvious that the public interest test in section 74(1)(b) would always have to consider the just and reasonableness. In this case since the issue is rate-setting, it would be essentially an equivalent standard. In general, the section 78 test is the broader and more inclusive test.

[12] *Decision and Procedural Order No.7*, p.4

The Board was correct that it would not be proper to make the pole attachment rate subject to another proceeding. The amount collected is a revenue offset, and is integral to determining whether distribution rates are just and reasonable. The amount at issue is material. The referenced $6.7M is for 2015 alone. Toronto Hydro's proposal is to set rates for 5 years. The total revenue requirement and rate impacts, not just the reasonableness of specific components, are fundamental to determining if rates are just and reasonable.

In their Letter of March 25th, the Carriers make a comparison between their proposal and Toronto Hydro's amended proposal to have a variance account established to capture the difference between what is approved in the ICM true-up proceeding and the approved opening rate base in this proceeding. That variance could also be material, will impact rates applicable to the 2015 year, and will be decided in another proceeding. They therefore propose that their request is directly analogous.

SEC does not agree with Toronto Hydro's decision to separate the ICM true-up from this rebasing application. Given where we are now, it is very much appropriate for Toronto Hydro to amend its proposal regarding the ICM true-up in the way that it has, but in SEC's view the separating of the two processes itself should never have happened in the first place. The Board was clear about this in the Phase 1 ICM decision, where it said that it expected the true-up process to take place in the context of a rebasing proceeding.[13]

On the ICM process, the process has unfolded as it has, and that cannot be fixed. Use of a variance account is the best the Board can do. The wireline attachment situation is different. That can be considered by the Board in a timely manner. SEC submits the problem of the Board not setting all aspects of rates in a single proceeding should be minimized, not exacerbated.

In the alternative, if the Board does agree with the Carriers that the decision on wireline attachments should be delayed, SEC submits that the Board should establish as the interim rate, the proposed pole attachment rate, not the current rate. First, that would be consistent with Toronto Hydro's proposal regarding the ICM true-up. Second, considering the significant rate increase Toronto Hydro is seeking, ratepayers should not have to subsidize telecommunication and cable companies for a moment longer than is required to complete this process.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (email)
Interested Parties (email)

[13] *Partial Decision and Order* (EB-2012-0064), dated April 2, 2013 , p.75:

> The Board, at the time of rebasing, whether this is through a cost of service review as part of 4th Generation IR, or through a Custom IR application, will determine whether any overspending should be allowed in rate base, or whether any underspending should be returned to ratepayers. [emphasis added]

Appendix

Evidence in that proceeding demonstrated that Toronto Hydro's actual cost for the attachment of wireless devices was significantly more than the $22.35 per pole per year approved by the Board in the CCTA proceeding (EB-2003-0049), which was leading to a cross-subsidization between ratepayers and wireless attachers.

It may be helpful for the Board to clarify what occurs in a situation where a distributor and potential wireless attacher cannot agree what the market price (or terms) would be, likely because there may not be a wireless attachment market, at least for a given type of wireless attachment, in a given distributors service territory (or more likely, a specific area(s) of its service territory). This is likely to occur for distributors whose service territory includes small urban areas where there are few, if any, tall buildings. The Board may wish to provide for a more streamlined process for resolving such a dispute rather than the requirement to bring a formal section 74 application.

Other Issues – Wireline Attachments

While this consultation is about *wireless* attachments only, the Board does mention in its letter that the option remains open to distributors to seek a change to the $22.35 rate for *wireline* attachments in a cost of service Custom IR application. SEC wishes to flag the following issue for the Board's consideration, either now or in its proposed upcoming Specific Service Charge review.

One issue that arose during the Toronto Hydro proceeding (EB-2013-0234) is that the CCTA order[2] was never formally incorporated into the text licenses of distributors, as other province-wide licenses amendments have been.[3] The Board, subsequent to its Decision and Order approving the settlement agreement, issued an amended license for Toronto Hydro that incorporated any language regarding pole attachments for the first time.[4] In addition to the terms of the settlement, the Board included the following:

> 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.[5] [emphasis added]

This should be contrasted with the language in the CCTA order which would seem to indicate that the rate for pole attachments is set in the license itself, not the tariff.

> The license conditions of the electricity distributors licensed by this Board shall as of the date of this Order be mandated to provide that all Canadian carriers as defined in the Telecommunication Act and all cable companies that operate in the Province of Ontario shall have access to the power poles of the electricity distributors at the rate of 22.35 per pole per year. [emphasis added]

It appears to SEC that the amended Toronto Hydro license is different from the deemed provisions in the CCTA order, which would apply to all other distributors in the province. Toronto

[2] Decision and Order (RP-2003-0497), dated March 7, 2005 at p.11

[3] As an example, on December 18th 2014, the Board issued a Decision and Order (EB-2014-0324) amending licenses of all electricity distributors to implement a Ministerial Directive regarding Conservation and Demand Management. On the same day it issued amended licenses for each distributor incorporating the terms of that order.

[4] License ED-2002-0497, date of Amendment: June 5, 2014

[5] *Ibid.* section 22

Hydro has the ability to apply to change the rate for wireline attachments by way of a section 78 order, as it is proposing to do in its current Custom IR application (EB-2014-0116). In contrast, all other distributors could only do so by way of a section 74 order. The importance of this is that the statutory test for setting rates is different than a license amendment ("just and reasonable"[6] versus "in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act*, *1998*"[7]).

To be clear, SEC agrees with the approach the Board undertook in its issuance of the amended Toronto Hydro license, allowing the specific rate to be charged to be included in distributors Tariff of Rates and Charges. This approach consistent with the Board's statement in its letter about the application of Section 2.11.7 of the *Filing Requirements* as it relates to the pole attachment rate. There is no reason that the rate for wireline pole attachments should be treated any differently than any other distribution rate, or specific service charge.

All of which is respectfully submitted.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)

[6] *Ontario Energy Board Act, 1998*, section 78(3)
[7] *Ibid.*, section 74(1)(2)