ROGERS

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By Email (BoardSec@ontarioenergyboard.ca) and Courier

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: OEB File: EB-2013-0416/EB-2014-0247 - Application by Hydro One Networks Inc. for approval of distribution rates for 2015 to 2019

Introduction and Summary

1. This letter is submitted by Rogers Communications Partnership ("**Rogers**") on its own behalf, as well as on behalf of (1) Allstream Inc., (2) Cogeco Cable Inc. (on behalf of itself and its affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc.), (3) Videotron G.P. and (4) Bragg Communications Inc. operating as Eastlink, (collectively, the "**Carriers**"). Shaw Communications Inc. and Shaw Cablesystems Limited ("**Shaw**") submitted their own reply dated April 10, 2015.

2. This letter is in response to the letter dated April 7, 2015 from counsel to Hydro One Networks Inc. ("**Hydro One**") in which Hydro One opposes the individual requests of the Carriers and Shaw for leave to file a motion pursuant to section 40.02 of the *Rules of Practice and Procedure* asking the Ontario Energy Board (the "**Board**") to review and vary its March 12, 2015 decision approving Hydro One's electricity distribution rates for the years 2015 to 2019 (the "**Decision**").

3. In the Decision, the Board approved an increase to the annual rate Hydro One is permitted to charge communications companies such as the Carriers to access and occupy its poles (the "**Pole Attachment Rate**"). The Board approved an increase to the Pole Attachment Rate from $22.35 to, initially, $37.05.

4. In reply, the Carriers submit that Hydro One has failed to provide any grounds to resist the request for leave to file a review and vary motion. In particular:

    (a) Having regard to prior Board proceedings respecting the rates for pole attachments and the law regarding notice, the Carriers reasonably

expected clear and specific notice of any intention by Hydro One to seek a Pole Attachment Rate increase;

(b) Contrary to the false and misleading submissions of Hydro One, none of the pre-application consultations provided any such notice;

(c) The Notice of Application submitted by Hydro One provided no such notice;

(d) The Application and Evidence filed by Hydro One provided no such notice; and

(e) Hydro One's assertion that the materiality of the impact of the resulting decision is a factor in determining the adequacy of notice is simply wrong as a matter of law; in any event a proposed 66% rate increase is material and significant on any standard.

5. The Carriers also agree with and adopt the submissions of Shaw in its reply.

Context; Reasonable Expectations

6. In 2005 decision, following an application by 23 cable companies under section 74(1) of the *Ontario Energy Board Act* (the "**Act**"), the Board established, as a condition of licence, that all licensed electricity distributors shall provide access to their power poles to **all** Canadian carriers and cable companies operating in Ontario at a Pole Attachment Rate of $22.35 per pole (RP-2003-0249, the "**2005 Order**").

7. While the rate of $22.35 was established as a standard province-wide rate, the Board invited any electricity distributor that believed that the province-wide rate was not appropriate to its circumstances to bring an <u>application to have its rate modified</u> based on its own costing. Absent any such application, the province-wide rate was to apply as a condition of licence as of the date of the 2005 Order.

8. Therefore, it would have been expected that any electricity distributor seeking to modify its Pole Attachment Rate would bring an application to the Board, on specific notice to the parties to the 2005 Order and with reference to the 2005 Order, to amend its applicable condition of licence under section 74 of the Act. Hydro One has not done this. Instead, it brought its request to increase its Pole Attachment Rate as part of a distribution rate application under section 78. Neither Rogers nor any of the other Carriers expected, nor would reasonably have expected, this course of action.

9. To the knowledge of the Carriers, no electricity distributor has applied to the Board under section 74 of the Act seeking to amend its conditions of licence for a new Pole Attachment Rate. In fact, the Carriers believe that the inclusion of a new Pole Attachment Rate as part of a general rate application is the first time an electricity distributor has sought to increase its Pole Attachment Rate since the

2005 Order was made. To the Carriers' knowledge, until the applications of Hydro One, and more recently, Toronto Hydro, there have never been electricity distribution rate applications that included a request to modify the Pole Attachment Rate.

10. Accordingly, it was not a reasonable expectation that an electricity distributor such as Hydro One would bring a request to increase its Pole Attachment Rate as part of an omnibus electricity distribution rate application, particularly where such request is buried as a line item in thousands of pages of evidence.

Requirement of Reasonable Notice; Inadequacy of Notice of Application

11. It is a fundamental requirement of procedural fairness that any persons whose interests may be affected by an administrative proceeding have adequate notice of the fact that their existing rights may be affected by the hearing.[1] While the adequacy of a notice depends upon the circumstances of the case, it must at the very least put a reasonable reader on notice as to the issue which may affect the interests of that reader and some particulars of how they may be affected.

12. The Board has endorsed and adopted this requirement in its own public statements:

> "The purpose of the Notice is to inform the affected ratepayers and other stakeholders of the application, its nature and the impact on affected customers."[2]

13. The Notice of Application dated February 7, 2014 (the "**Notice**") fails abjectly to give adequate notice of an application to seek an increase in the Pole Attachment Rate.

14. First, on its face the Notice applies to rates for "electricity distribution", which, it goes without saying, has nothing to do with a Pole Attachment Rate (which relates only to the rental of space on a hydro pole and not to the distribution of power).

15. Second, the specifics of the Notice make it clear that it relates only to rates for the delivery of power by Hydro One to its residential consumers and other customers. This is confirmed later in the notice where it is stated "These proposed changes relate to Hydro One's distribution services."

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1 *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro et al* (1984) 46 O.R. (2d) 715, 1984 CanLII 19 (Div.Ct.)

2 See: http://www.ontarioenergyboard.ca/oeb/Industry/Regulatory%20Proceedings/Applications%20Before%20the%20Board/Electricity%20Distribution%20Rates/2015%20Electricity%20Distribution%20Rate%20Applications

16. There is no ambiguity as to what is meant by “electricity distribution” and “distribution services”. They refer to the charges for the delivery of electricity by Hydro One, acting as a local utility or distributor, to consumers, businesses and others end users.[3] Or, to quote Hydro One’s 2013 Annual Report, this is the “business of delivering and selling electricity to customers”.[4] This function in no way incorporates the activity of gaining rental revenue from pole attachments.

17. Accordingly, there is nothing in the Notice of Application that would alert a reasonable Carrier to the fact that the Pole Attachment Rate would be in issue at the hearing. Further there is no indication of how that rate might be affected by the hearing. Finally, there are express words in the Notice that a reasonable reader would take to limit the scope of the hearing to issues relating to the distribution of electricity and rates charged for that service.

18. Hydro One argues that, in order to succeed on this motion, there must be sufficient grounds to doubt the correctness of the Board’s decision in approving the new rate. This argument is incorrect as a matter of law.

19. Where no notice or inadequate notice has been given such that there has been a breach of natural justice, the proceeding based upon the defective notice must be set aside as a matter of justice. The law is clear that a failure to give adequate notice is a jurisdictional error, and does not involve any consideration of whether there are good grounds to set aside the decision on its merits.[5] Put another way, it is no answer to a failure to give adequate notice to say that the result would have been the same had proper notice been given, as neither the tribunal nor a court can speculate on what would have happened had proper notice been given.[6]

No Notice from Pre-Application Consultation or Post-Application Filings

20. Hydro One’s assertion that the consultation process it carried out in 2013 provided effective notice to Rogers is disingenuous in the extreme.

21. Hydro One held four consultation sessions in 2013 prior to filing its Application. Rogers’ representatives attended two of those sessions as a consequence of its

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[3] See the OEB’s written and graphic representation of what is involved in distribution at http://www.ontarioenergyboard.ca/oeb/_Documents/2015EDR/bckgrndr_2015_distribution_rates.pdf.

[4] Hydro One 2013 Annual Report, p.16.

[5] *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro et al* (1984) 46 O.R. (2d) 715; 1984 CanLII 19 (Div. Ct.). In any event the Board, in its decision failed to consider a clear jurisdictional issue on the face of the Notice of Application. This is discussed below.

[6] *Supermarches Jean Labreque Inc. v Flamand* [1987] 2 SCR 219 at 238: “the absence of any real and present prejudice... can in no way remedy [the failure to give the parties proper notice and an opportunity to be heard]”. See also *Edmonton Police Assn v Edmonton (City)* 2007 ABCA 187 (Alta. C.A.) and *1657575 Ontario Inc v Hamilton (City)* 2008 ONCA 570 (Ont.C.A.).

interest in the rate treatment of Unmetered Scattered Load (USL) customers. Rogers receives USL electricity for its cable signal amplification power supplies from electricity distributors throughout Ontario, including Hydro One. Rogers intervened in Hydro One's 2008 Distribution Rates Case (EB-2007-0681) in respect of this issue, as well as other Board rate and policy proceedings, in pursuit of proper cost allocation and rate design treatment for USL electricity distribution customers.

22. Hydro One described its responsibility in and the purpose of the 2013 consultations as including the following:

> "Inform and update key stakeholders about our Distribution and Transmission business, and the approaches and methodology used to determine revenue requirement and rate design"
>
> "Give stakeholders a range of opportunities to provide input and feedback on all aspects of the application"
>
> "Provide adequate background information to enable participation"

23. The proceedings at the four consultations were recorded in the form of an agenda, a PowerPoint presentation, and minutes for each. <u>None</u> of the proceedings for the four consultations contains <u>any</u> mention of the Pole Attachment Rate or the possibility that an increase may be sought.[7]

24. Further, Rogers has contacted the persons who represented it at two of the consultations, and both confirm that there was no mention or discussion of the Pole Attachment Rate or any possible change at either of the consultations attended. Should this matter proceed further, each person is prepared to testify as to this fact.

25. While Rogers may have been "consulted" based on its past participation and interest in USL rates, the other Carriers were not made privy to such consultations and, as admitted by Hydro One in its response, were not even invited to the stakeholder meetings. This confirms the fact that Rogers was invited because of its participation in a matter unrelated to the Pole Attachment Rate (*i.e.*, its involvement in USL rates in 2008, a matter in which the other Carriers were not involved).

26. From the foregoing, Rogers had a legitimate expectation that an issue which would be raised in the Application and which was relevant to a stakeholder's interest would be discussed during the consultation process. Hydro One's complete failure to do so in respect of the Pole Attachment Rate, contrary to its own representations, further compounds the fundamental unfairness arising from the lack of notice in the Notice.

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[7] These documents may be reviewed at: http://www.hydroone.com/RegulatoryAffairs/Pages/DxRates.aspx

27. Hydro One further points to its Application and Evidence filed January 31, 2014 in support of its argument that the Pole Attachment Rate issue was clearly identified (or identifiable) to all those who would be affected by a change. This argument is only slightly less fantastic than that relating to the consultations, and has no merit whatsoever.

28. First, given the context of the 2005 Order as arising out of a one-issue proceeding relating to pole attachments and licence conditions, the absence of any mention in the consultation process, the absence of any prior inclusion of Pole Attachment Rates in a distribution application, and the complete absence of any reference in the Notice, there would be no expectation that a Carrier should have to comb through an extensive application relating to electricity distribution on the off chance that pole attachments would be included.

29. In fact, had a Carrier digested Exhibit A of the Application, which includes the Exhibit List, Application, Summary of Application, Financial Summary and Summary of Distribution Business it would have found no reference to pole attachments or Pole Attachment Rates. In the Application, the Carrier would have noted, in paragraph 15, the statement by Hydro One that the persons affected by the Application are the "ratepayers of its Distribution business". Given that pole attachments are nowhere described in Exhibit A as part of Hydro One's distribution business, the Carrier would have no reason to suspect that they were part of the application.

30. The only evidence about the Pole Attachment Rate is found on a single page buried about 2,900 pages later in a Supporting Schedule called "Miscellaneous Charges", which is one of 12 supporting schedules to Exhibit G – Cost Allocation and Rate Design. Significantly, the written direct evidence for Cost Allocation and Rate Design, which is contained in 15 other schedules, contains no reference to the Pole Attachment Rate.

31. Accordingly, the assertions that the Carriers should have been aware of the Application as it related to Pole Attachment Rates or that they failed to exercise due diligence in respect of the Application and Pole Attachment Rates has no foundation or credibility whatsoever.

Size of Increase Not Relevant to Notice

32. Hydro One takes the position that, because Hydro One's proposed increase to its Pole Attachment Rate is "relatively small" when compared to the outrageous 300% increase sought by Toronto Hydro, notice is not required. This argument must fail on two grounds.

33. First, Hydro One's increase from $22.35 to $37.05 represents a 66% increase over the last ten years, well above the rate of inflation over the same time period. The fact that Toronto Hydro was seeking an incredible and unprecedented 300% increase does not somehow make Hydro One's increase insignificant. Moreover,

a review of the costing inputs used to calculate the new rate shows that, when compared to the inputs approved by the Board in the 2005 Order, the net embedded cost per pole has increased by 56%, and maintenance costs per pole have increased by almost 1000% (from $7.61 to $82.41). No one could objectively assert that a 66% increase over 10 years is not significant or material.

34. Indeed, had the Carriers participated in this proceeding, they would have properly investigated and challenged these costs. In their absence, these costs and resulting Pole Attachment Rate were approved by the Board without any objection or variation.

35. Secondly, the principle of proper notice to those parties who may be affected by a decision does not turn on the "materiality" of the decision made pursuant to the defective notice. Since notice and the underlying principle of natural justice are jurisdictional in nature, a failure of notice is not subject to a materiality analysis. The legal principle (discussed above) that where there has been inadequate notice, the proceeding should be set aside without consideration of the merits, is equally applicable here.

36. Hydro One states that joint use or pole attachment charges in this proceeding were not contentious. The inaccuracy of this bald assertion is evidenced by the motions brought by the Carriers, as well as Shaw. A 66% increase is contentious and is controverted by them.

The Board did not have jurisdiction to approve the Pole Attachment Rate

37. The entirety of Hydro One's Application, including its request for an increased Pole Attachment Rate, is made pursuant to subsection 78(3) of the Act. Section 78 of the Act concerns rate-setting for the distribution of electricity. It does not address rate-setting for other business. Accordingly, in the Carriers' submission, the Board did not have jurisdiction under section 78 to hear Hydro One's request for a Pole Attachment Rate increase.

38. The header for section 78 of the Act is "Orders by Board, electricity rates". Subsection 78(1) is the foundation of the Board's jurisdiction to set rates for the transmission of electricity. It refers only to electricity:

> 78. (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract.

39. Subsection 78(3) states:

> ***Rates***
>
> (3) The Board 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 and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. [On a day to be named

by proclamation of the Lieutenant Governor, subsection (3) is amended by striking out "electricity or such other activity" and substituting "electricity, unit sub-metering or unit smart metering or such other activity". See: 2010, c.8, ss.38 (14), 40.]

40. Subsection 78(3) refers only to electricity and to "such other activity as may be prescribed". Pole attachment is not a prescribed activity.

41. In the 2005 Order, the Board determined that power poles are essential facilities and 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.

42. The Carriers submit that the Board's jurisdiction to regulate Pole Attachment Rates is provided by section 74 of the Act, which gives the Board a broad power to amend the licences of electricity distributors in the public interest:

> ***Amendment of licence***
>
> 74. (1) The Board 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 Board and the purposes of the *Electricity Act, 1998*.

43. In its plain and ordinary meaning and taking into context the different wording of section 78, section 74 confers upon the Board the jurisdiction that it requires to regulate licensees in the public interest in respect of matters other than electricity rate changes. The Board may consider that amendments to Hydro One's Pole Attachment Rates would be in the public interest pursuant to subsection 74(1)(b) as opposed to being just and reasonable under section 78.

44. For these reasons, the Carriers submit that the Board did not have jurisdiction to consider Hydro One's request for an increase in its approved Pole Attachment Rate brought pursuant to section 78 of the Act, and this aspect of the Decision should be dismissed on this basis.

Conclusion

45. In summary, the Carriers submit that all of Hydro One's objections to the Carriers' application for leave to file a review and vary motion must fail for the following reasons:

    (a) the Carriers reasonably expected that Hydro One would provide a clear and specific notice of its intention to seek Board approval for an increase to its Pole Attachment Rate;

(b) it cannot be shown, based on any reasonable and objective criteria, that Hydro One provided sufficient notice of its proposed increase to the Pole Attachment Rate - Hydro One's 2013 consultations, to which only Rogers was invited, did not address the Pole Attachment Rate increase, neither Hydro One's Notice nor its Application and Evidence provided any effective notice of the Pole Attachment Rate increase;

(c) the requirement to provide notice is not dependent on the materiality of the decision affecting those parties requiring notice; and

(d) in any event, the Board lacked the jurisdiction to approve the Pole Attachment Rate as part of this proceeding.

46. The Carriers hereby confirm that they are requesting that the Board issue an Order:

(a) granting the Carriers status as parties to this proceeding and leave to file a motion requesting that the Board review and vary the Decision as it relates to the Pole Attachment Rate approved in the Decision;

(b) extending the deadline for the Carriers to file a motion to review and vary the Decision until 20 days after the date on which the Board grants the Carriers leave to file the review and vary motion; and

(c) staying that part of the Decision and any resulting Order that approves the Pole Attachment Rate.

We appreciate the Board's consideration of this motion.

Sincerely,

Pamela Dinsmore
Vice President, Regulatory – Corporate Affairs
Rogers Communications Partnership

cc: Cogeco Cable
Allstream
Eastlink
Videotron
Shaw
Parties and Interveners