



Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2015-0141

ROGERS COMMUNICATIONS PARTNERSHIP ET AL.

**Motion for Leave to Bring a Motion to Review and Vary
Decision EB-2013-0416/EB-2014-0247**

BEFORE : **Ken Quesnelle**

Presiding Member

Emad Elsayed

Member

June 30, 2015

1 INTRODUCTION AND SUMMARY

This is a motion by several cable and telecommunications companies (the Carriers) under Rule 40.02 of the OEB's Rules of Practice and Procedure for leave to bring a motion to review and vary the OEB's March 12, 2015 decision approving distribution rates and charges for Hydro One Networks Inc. (Hydro One) for 2015 through 2017. The Carriers say they did not have adequate notice that Hydro One proposed to increase the charge they are required to pay for using Hydro One's power poles (the Pole Access Charge).¹

For the reasons that follow, the OEB grants the Carriers leave to bring a motion to review the decision. As requested, the Carriers will have 20 days from the date of this decision to file a Notice of Motion. The rate order issued following the EB-2013-0416/EB-2013-0247 stated that the Pole Access Charge would remain as an interim rather than a final charge. The OEB will fix the final charge through the hearing of this motion.

¹ The Carriers are:

- Rogers Communications Partnership
- Allstream Inc.
- Shaw Communications Inc. (on behalf of itself and Shaw Cablesystems Limited)
- Cogeco Cable Inc. (on behalf of itself and its affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc.)
- Quebecor Media, on behalf of Videotron G.P.
- Bragg Communications Inc. operating as Eastlink
- Packet-tel Corp. operating as Packetworks
- Niagara Regional Broadband Network
- Tbaytel
- Independent Telecommunications Providers Association
- Canadian Cable Systems Alliance Inc.

2 BACKGROUND

On March 12, 2015, the OEB issued Decision EB-2013-0416/EB-2014-0247 in which it approved distribution rates and charges for Hydro One for 2015 through 2017 (not through 2019 as Hydro One had requested). Included in Hydro One's application was an increase in the Pole Access Charge from its current level of \$22.35 per pole per year, where it has been since 2005, to \$37.05 in 2015, \$37.42 in 2016, \$37.80 in 2017, \$38.18 in 2018, and \$38.56 in 2019.

Following the release of the decision, but before the OEB issued a final rate order, several of the Carriers wrote to the OEB seeking leave under Rule 40.02 to bring a motion under Rule 40.01 to review and vary the decision. The other Carriers joined the motion following the issuance of Procedural Order No. 1.

Leave is required under Rule 40.02 because the Carriers were not parties to the hearing on the Hydro One rate application. The Carriers say they did not participate in the hearing because they were not given adequate notice that Hydro One had applied to increase the Pole Access Charge.

On April 17, 2015, the OEB issued a decision in respect of Hydro One's draft rate order, in which the OEB determined that the Pole Access Charge will remain as an interim rather than a final charge until the Carriers' challenge to the March 12, 2015 decision is resolved. The OEB reiterated this in its final rate order decision on April 23, 2015. As a result, despite the March 12, 2015 decision, the Pole Access Charge remains at \$22.35 on an interim basis.

OEB staff filed a submission in support of the Carriers' motion for leave. Canadian Manufacturers & Exporters also expressed their support. The Power Workers' Union opposed the motion.

3 ANALYSIS

3.1 The adequacy of notice

The OEB accepts the Carriers' arguments that they did not participate in this proceeding because they did not realize that the application included a significant increase in the Pole Access Charge. The Notice of Hearing and Application, which was issued by Hydro One in accordance with the OEB's directions, did not refer to the Pole Access Charge and there is no evidence that Hydro One provided any specific information related to the Pole Access Charge directly to the Carriers. The OEB has no reason to question the validity of the Carriers' claim that they were simply not aware of the potential impact on them of an element of Hydro One's application.

In a similar case, the OEB determined that there was insufficient notice of a proposal by Toronto Hydro-Electric System Limited (Toronto Hydro) to increase the Pole Access Charge.² Hydro One argued that the case is distinguishable because its proposed increase is modest in comparison to the increase sought by Toronto Hydro. Hydro One also submitted that consideration must be given to the fact that the Pole Access Charge has not been adjusted for approximately 10 years.

The OEB agrees with the Carriers that neither the amount of the increase nor the length of time the present charge has been in force is determinative of the question of whether adequate notice was provided. While the proposed increase in this case is less than the increase proposed in the Toronto Hydro case, such an increase should have been brought to the attention of the affected customers. The quantum of the Pole Access Charge increase may or may not be appropriate but that question can only be answered with the affected parties present.

² Decision and Procedural Order No. 7, February 23, 2015 (EB-2014-0116).

3.2 The Carriers' jurisdiction argument

The Carriers argued that the OEB has no jurisdiction to approve an increase to the Pole Access Charge in Hydro One's rate application, which was made under section 78 of the *Ontario Energy Board Act, 1998*. According to the Carriers, the Pole Access Charge can only be increased through a section 74 application to amend a licence. The OEB notes the commonalities between the Pole Access Charge issues in this case and in the recent Toronto Hydro rate application.³ As explained in that case, pole attachment rates are incidental to the distribution of electricity, as the poles are an essential facility properly considered under section 78 of the Act. The OEB finds that it can set the Pole Access Charge under the jurisdiction granted by that section.

3.3 The Carriers' request for a stay

The OEB declared Hydro One's current Pole Access Charge interim as per the effective date of Hydro One's approved 2015 rate order in recognition of this matter having surfaced prior to rates being declared final. Therefore, the requested stay of the March 12, 2015 decision is not necessary.

3.4 Next steps

The OEB commends the Carriers for co-ordinating their submissions in this motion for leave and encourages them to do the same in the motion on the merits.

The OEB requires that the Carriers indicate in their Notice of Motion whether they intend to file any evidence, and whether they need further information from Hydro One in order to prepare that evidence.

³ Decision and Procedural Order No. 10, April 29, 2015 (EB-2014-0116).

4 ORDER

THE BOARD ORDERS THAT:

The Carriers' motion for leave is granted. The Carriers must file a Notice of Motion to review and vary within 20 days of this order.

DATED at Toronto, June 30, 2015

ONTARIO ENERGY BOARD

Original Signed by

Kirsten Walli
Board Secretary