

ONTARIO ENERGY BOARD

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 Hydro Ottawa Limited for an Order approving electricity distribution rates for the period from January 1, 2016 to December 31, 2020.

**HYDRO OTTAWA LIMITED
SUBMISSIONS ON MOTIONS**

A. Background

1. On August 24, 2015, Rogers Communication Partnership ("Rogers"), TELUS Communications Company and Quebecor Media (collectively, the "Carriers") filed a Notice of Motion for an order requiring Hydro Ottawa Limited ("Hydro Ottawa") to produce agreements with Bell Canada and Hydro One Networks Inc. ("Hydro One"), or alternatively, to provide a detailed description of the rights and obligations of each of the parties under these agreements.
2. On August 26, 2015, Hydro Ottawa filed a Notice of Motion for an order requiring the Carriers to answer questions that they refused to answer at the Technical Conference in this proceeding on August 25, 2015.
3. On August 28, 2015, the Board issued Procedural Order No. 6 in this proceeding, which states that any party wishing to file additional material in relation to the motions should do so by September 3, 2015. On September 3, 2015, the Board issued Procedural Order No. 7, which added to Procedural Order No. 6 by requiring that the moving parties (Hydro Ottawa and the Carriers) file any additional material or additional submissions in relation to the motions by September 3, 2015, while providing Board staff and intervenors until September 10, 2015 to file any submissions.
4. These are the submissions of Hydro Ottawa in response to the motion by the Carriers and in support of Hydro Ottawa's motion.

5. Both of the motions now before the Board relate to Issue 4.11 in the Approved Issues List that is attached as Schedule A to the Board's Issues List Decision dated August 21, 2015. Issue 4.11 is as follows:

4.11 Are the costs underpinning the proposed new charges for the specific charge for Access to Power Poles appropriate and is the rate design appropriate?

6. As far as Issue 4.11 is concerned, it is important to note that the issue does not make any reference to methodology and does not include any reconsideration of the methodology for calculating pole access charges that was set out in the Board's RP-2003-0249 Decision and Order.¹ Indeed, it is very clear from the words "costs underpinning" in Issue 4.11 that it is the costs used by Hydro Ottawa in the application of the methodology, rather than the methodology itself, that is at issue in this proceeding.

7. Hydro Ottawa's submissions, first, in response to the motion by the Carriers and, second, in support of its own motion, are set out under the headings that following.

B. Carriers Motion

(i) Agreements Are Not Relevant

8. The evidence in this proceeding confirms that Bell Canada pays the current Board-approved pole attachment rate for all of its wireline attachments on Hydro Ottawa poles² and the evidence provides the pole attachment rate paid by Hydro One for power attachments on Hydro Ottawa poles.³ Going beyond such evidence, the Carriers seek production of agreements with Hydro One and Bell Canada on the ground that the "rights and obligations" of the parties to those agreements are relevant in this proceeding.⁴

9. As set out above, the issue in this proceeding is whether Hydro Ottawa's costs underpinning the charge for Access to Power Poles are appropriate and whether the rate design

¹ RP-2003-0249 Decision and Order dated March 7, 2005.

² Response to Carriers Interrogatory #1, part c, IR:H-7-1(Carriers #1).

³ Response to Technical Conference Undertaking JTC1.6.

⁴ Transcript of Technical Conference on August 13, 2015 ("August 13th Transcript"), page 30.

is appropriate. The rights and obligations of the parties under agreements with Bell Canada and Hydro One do not shed any light on whether Hydro Ottawa's costs "underpinning" the proposed pole access charges are appropriate and thus the agreements are not relevant in this proceeding.

(ii) No Issue About Methodology

10. The evidence filed on behalf of the Carriers in this proceeding is not consistent with the methodology for calculating pole access charges set out in the Board's RP-2003-0249 Decision and Order.⁵ However, the Approved Issues List for this proceeding does not include any issue about re-opening the methodology set out in the RP-2003-0249 Decision and Order, nor any issue at all about the methodology for calculating pole access charges. The issue in this proceeding (Issue 4.11) is whether Hydro Ottawa's costs used in the application of the methodology are appropriate and whether the rate design is appropriate.

11. In the RP-2003-0249 proceeding, the electricity distributors ("LDCs") relied on reciprocal agreements with telephone companies on an issue of methodology, namely, the allocation of common or indirect costs. The cable companies disputed whether the reciprocal agreements could be looked to for guidance on this issue of methodology.⁶ The Board accepted the position of the LDCs with regard to the reciprocal agreements.

12. In this proceeding, there is no issue of methodology because, under the Approved Issues List, the only issue is whether Hydro Ottawa's costs used in the application of the methodology, and the rate design, are appropriate. The reciprocal agreements with telephone companies, which the cable companies did not consider to be relevant in relation to the methodology considered in RP-2003-0249, are most certainly not relevant to Hydro Ottawa's costs used in the application of the methodology. Similarly, the agreement with Hydro One is not relevant to Hydro Ottawa's costs used in the application of the methodology.

⁵ Transcript of Technical Conference on August 25, 2015 ("August 25th Transcript"), page 8.

⁶ RP-2003-0249 Decision and Order, pages 6-7.

(iii) Fishing Expedition

13. At the Technical Conference held on August 13, 2015, Hydro Ottawa gave 18 undertakings to provide information requested by the Carriers.⁷ The Carriers wrote to the Board about these undertakings on August 14, 2015. Among other things, the Carriers August 14th letter contained the following statements about the responses to the undertakings:

... Given that many of Hydro Ottawa's undertakings will not be answered by Monday, August 17th, the Carriers respectfully request that their deadline to file evidence be extended to two days following receipt of all answers to undertakings by Hydro Ottawa.

This extension is necessary as the expert retained by the Carriers requires the answers to undertakings to complete his analysis and finalise his report. In addition to the expert evidence, the Carriers anticipate that they will be serving and filing the evidence of one fact witness. This fact witness also requires Hydro Ottawa's answers to undertakings to finalise his evidence. ...

14. Hydro Ottawa went to considerable effort to answer as many of the undertakings as possible by end of day on Friday, August 14th and to provide the remaining undertaking responses during the next week. At the Technical Conference held on August 25, 2015, a panel of witnesses was called to answer questions on intervenor evidence and the witness panel at large was asked to indicate how the responses to undertakings were used in their evidence.⁸ The witnesses were unable to provide any indication of how the undertaking responses were used in their evidence.⁹

15. Hydro Ottawa submits that the Board should not allow this proceeding to be used as a "fishing expedition" through the files and records of Hydro Ottawa. Clearly the Carriers were able to prepare their evidence without access to the agreements with Bell Canada and Hydro One that they now seek to have produced. Hydro Ottawa was very cooperative in giving undertakings to provide information requested by the Carriers at the Technical Conference, but it respectfully submits that any further attempts to "fish" through its files and records should not be allowed.

⁷ Undertakings JTC1.1 to JTC1.18.

⁸ August 25th Transcript, page 4.

⁹ August 25th Transcript, pages 4-5.

C. Hydro Ottawa Motion

16. During the Technical Conference held on August 25, 2015, the Carriers refused to answer a number of questions posed by Hydro Ottawa. Hydro Ottawa will group the unanswered questions in two different categories, for the purposes of its submissions in respect of the refusal of the Carriers to answer the questions.

(i) Challenge to Board Methodology

17. David McKeown filed evidence on behalf of the Carriers and, at the August 25th Technical Conference, he confirmed that his evidence is not consistent with the methodology set out by the Board in the EB-2003-0249 Decision and Order.¹⁰ He testified that he is aware of the EB-2003-0249 decision and he was asked for his view about what the Board should do in this case on the issues in his evidence that were already addressed in EB-2003-0249 (transcript, page 7, line 24 to page 8, line 17). He was also asked for his view about whether any of the other points decided in EB-2003-0249 should be open for reconsideration (transcript page 8, line 22 to page 9, line 9).

18. The Carriers refused to answer these questions on the grounds that Mr. McKeown cannot be required to address matters of legal argument or strategy and that he is not a lawyer and not able to testify about precedent. However, the questions did not seek a legal response from Mr. McKeown, they did not seek any answers about legal arguments or strategy and they did not ask Mr. McKeown to comment on the value of precedent.

19. Mr. McKeown has been put forward as an expert witness on behalf of the Carriers and he was simply asked for his view about what the Board should do in this case on the issues raised in his evidence that have already been addressed by the Board. Even if he has no view about what the Board should do in this case, it would be meaningful to know that he gave evidence that is inconsistent with the approved methodology while not even considering what the Board should or would do with such evidence in this proceeding. Further, given that Mr. McKeown's evidence is not consistent with the approved methodology, it surely must be a relevant question to ask him for his view about whether any other aspects of the methodology should be open for reconsideration in this case.

¹⁰ August 25th Transcript, page 8.

20. On another issue about the approved methodology, Mr. McKeown was asked to indicate whether there is anything from the Board specifically supporting his approach (transcript, page 16, line 23 to page 17, line 21). The Carriers refused to answer this question on the ground that “anybody is welcome” to refer to a Board decision in argument. However, a central issue rising from the evidence filed by the Carriers is whether that evidence raises points of methodology that are not within the Approved Issues List for this proceeding and thus it is important to distinguish in Mr. McKeown’s evidence between the areas where he is departing from the methodology and the areas where he is not questioning the methodology. In fact, other questions about whether points in Mr. McKeown’s evidence are part of the approved methodology were answered during the Technical Conference.¹¹

(ii) Costs Recovered from Third Parties by Rogers

21. The following exchange took place with the representative of Rogers at the August 25th Technical Conference:

MR. CASS: ... Now, in respect of the attachments that Rogers pays Hydro Ottawa for the ability to access on Hydro Ottawa’s poles, does Rogers then, in turn, charge other companies for the opportunity to take advantage of that by overlash?

MR. RICHARD: I believe there is costs that are passed on for a third party to Rogers strand.¹²

22. The Carriers then refused to answer a question about what Rogers charges to others for the opportunity to “overlash”. The Carriers also refused to answer a series of related questions, including whether Rogers recovers these costs from multiple parties such that Rogers may be profiting from the access that it gains on Hydro Ottawa poles.¹³

23. In relation to Issue 4.11, namely, whether the costs underpinning the charge for Access to Power Poles are “appropriate”, it surely must be relevant to know what “costs” are “passed on” by Rogers (or any of the Carriers) to other parties. If Rogers passes on

¹¹ August 25th Transcript, pages 17-18.

¹² August 25th Transcript, page 26.

¹³ August 25th Transcript, page 26, line 24 to page 27, line 7; page 27, lines 8 to 14; page 27, lines 15 to 19; page 27, lines 20 to 25; page 27, line 26 to page 28, line 2; page 28, lines 3 to 5, and page 28, lines 6 to 9.


to third parties more than the amount that it is charged by Hydro Ottawa, or if Rogers passes on to third parties a meaningful proportion of the amount charged by Hydro Ottawa, there can be no doubt that this information is relevant to the "appropriate" amount charged by Hydro Ottawa.

D. Order Requested

24. For the reasons set out above, Hydro Ottawa submits that the Board should dismiss the motion by the Carriers and, further, that the Board should allow the Hydro Ottawa motion and require the Carriers to answer the questions that they refused to answer during the Technical Conference on August 25, 2015.

All of which is respectfully submitted.

September 3, 2015.

for: 

Fred D. Cass
Counsel for Hydro Ottawa Limited