CASSELS BROCK
LAWYERS

April 19, 2016

By Email, RESS, and Same Day Courier

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Dear Sir/Madam:

Re: **EB-2015-0141** – Motion by the Carriers for Review and Variance of Decision EB-2013-0416/EB-2014-0247 as it relates to the specific charge for Cable and Telecom Companies' Access to power poles (the "**Pole Access Charge**") by Hydro One Networks Inc. ("**Hydro One**").

In Procedural Order No. 8, dated March 31, 2016, ("**Order No. 8**"), the OEB ordered that the Carriers may file written submissions on why there is good reason for not proceeding with a written hearing. In that regard, the Carriers make the following submissions.

(a) In the interests of efficiency and fairness, this proceeding should be adjourned until the appeal pending in the Hydro Ottawa EB-2015-0004 decision issued February 25, 2016 (the "**Hydro Ottawa Decision**") is heard and decided.

(b) In the interim the Carriers will also bring a motion, by no later than Friday, April 23, 2016, seeking an order for direction from the OEB under rule 27.03 in respect of deficiencies in the answers of Hydro One to the Supplementary Interrogatory Questions filed by the Carriers pursuant to Procedural Order No. 8. The Carriers ask that the OEB rule on that motion before making any decision on the request for adjournment of this hearing.

(c) In the alternative, should the OEB refuse to adjourn this proceeding, the Carriers submit that an oral hearing should be held in this matter.

(d) Further and in any event, the Carriers repeat their objections to the fundamental unfairness of the manner in which this matter has proceeded.

An Adjournment of the Hearing Pending the Appeal of the Ottawa Hydro Decision is Appropriate

Three of the Carriers, Rogers Communications Partnership, Quebecor Media Inc. and Allstream Inc., as well as Telus Communications Company (collectively, the "**Appellants**"), have appealled the Hydro Ottawa Decision (the "**Appeal**") as of right, to the Superior Court of Justice (Divisional Court). The Appellants have sought an order quashing the Hydro Ottawa Decision or, in the alternative, sending the matter back to the OEB for a rehearing with respect to a just and reasonable Pole Access Charge.

The Appellants' grounds of appeal, as set out in the Notice of Appeal attached, include the following issues on which the Divisional Court's findings will be relevant to the OEB's decision in this proceeding:

A. Grounds of appeal regarding the identification and application of a methodology to determine the Pole Access Charge

1. The OEB breached the rules of procedural fairness by failing to give adequate reasons for its decision, including its decision not to consider methodology in setting a just and reasonable pole attachment rate.
2. The OEB fettered its discretion and erred in law and / or jurisdiction in finding that the issue of methodology was "out of scope" despite the fact that "rate design" had been identified as an issue by the Board.
3. The OEB fettered its discretion and erred in law and / or jurisdiction by treating the methodology employed by the Board in a prior case in 2005 as binding on its determination of a final Pole Access Charge in the Hydro Ottawa Decision.
4. The OEB erred at law by failing to consider methodology which is a relevant and essential input into a determination of a just and reasonable pole attachment rate.
5. During the oral hearing in the Hydro Ottawa proceeding, the OEB informed the parties that it plans to undertake a general policy review of electricity distributors' miscellaneous rates and charges (the "**Policy Review**") and that the Policy Review will include the methodology used to set a pole attachment rate. The OEB erred at law by setting a pole attachment rate based on a methodology that it has conceded requires re-consideration and which it has ordered be subject to the Policy Review.
6. The OEB erred at law in setting the Pole Access Charge on a final basis despite the fact that the Board has ordered that the issue of methodology be subject to the Policy Review.
7. The OEB erred in law by failing to consider adequately or at all whether the methodology proposed by Ottawa Hydro was "just and reasonable" under section 36 of the OEB Act.

B. Grounds of appeal regarding the identification and application of the burden of proof of a "just and reasonable" rate

8. The Board erred at law in shifting the burden of proof to the Carriers to establish that the rate requested by Hydro Ottawa was not just and reasonable, when the burden should have been on Hydro Ottawa to prove that its proposed rate was just and reasonable.

C. Grounds of appeal regarding the production of reciprocal pole access agreements with Bell Canada

9. The OEB erred at law in failing to order production of documents relevant to the determination of a just and reasonable rate, namely, the Bell Canada/Hydro Ottawa and Hydro One/Hydro Ottawa reciprocal pole access agreements.

10. The OEB also breached the rules of procedural fairness in failing to provide adequate reasons for its decision to deny production of these documents.

The Carriers respectfully submit that the Divisional Court's findings on these issues will have a material impact on the conduct of the hearing in this proceeding, including the scope of the evidence and arguments presented and the OEB's ultimate decsion.

Accordingly, the Carriers request that the OEB adjourn this proceeding pending the hearing of the Appeal and the release of reasons by the Divisional Court. If this proceeding is so adjourned, the parties' submissions on issues of methodology, burden of proof and production of the reciprocal pole access agreement between Hydro One and Bell Canada, and the OEB's consideration of those issues, will benefit from the Divisional Court's decision and reasons. In any event, the Divisional Court's decision will be binding the OEB in respect of the mutual issues on the Appeal and in this proceeding.

An adjournment of this proceeding, pending the release of the Divisional Court's reasons, will also maximize efficiency and economy in the use of the OEB's resources by ensuring its ultimate findings on those issues in this proceeding which overlap with the issues in the Appeal are consistent with the reasons and decision of the Divisional Court. If the OEB were to continue with this proceeding prior to the conclusion of the Appeal, the likelihood of an appeal of its ultimate decision in this proceeding would be significant, particularly if that decision is inconsistent with the Divisional Court's decision and reasons. An adjournment of this proceeding at this time reduces the risk of a repetitive and duplicative appeal of the OEB's decision in this proceeding.

Furthermore, the public interest requires that the OEB's decision in this proceeding be made consistent with the outcome of the Appeal.

The Carriers further submit that no prejudice to Hydro One or any of the other participants in this proceeding will arise as a result of the delay caused by the requested adjournment. The pole rate that Hydro One sought and received originally (without notice to the Carriers) will remain in

place as an interim rate, and will be subject to retroactive adjustment when the rate is ultimately determined.

The Carriers will bring a motion seeking direction from the OEB in respect of Hydro One's deficient answers to interrogatories

As stated above, the Carriers intend to bring a motion seeking direction from the OEB in respect of Hydro One's answers to interrogatories dated April 15, 2016 (the "**Answers to Interrogatories**") pursuant to Rule 27.03 of the OEB's *Rules of Practice and Procedure*, which will be filed by Friday, April 22, 2016. (An example of the scope of the motion is summarized in the following paragraph; the Carriers reserve the right to raise other deficiencies in the Answers to Interrogatories in the motion when it it is filed.)

In the Answers to Interrogatories, Hydro One declined to respond to, and/or provided insufficient responses to, the Carriers' Interrogatories #2.1 and #2.8. In particular, Hydro One declined to respond to those proper questions, on the basis that the OEB had "denied the Carriers' request for the production of any agreements with Bell in respect of join use and pole attachments" in Procedural Order #8. In Interrogatories #2.1 and #2.8, the Carriers did not request the production of any agreements with Bell. Instead, the Carriers posed questions to which the answers relate specifically to the question which the OEB stated to be relevant: "Are any of the costs that are being claimed... in this proceeding being recovered elsewhere such as through reciprocal arrangments with other parties?" As a result, it is the Carriers' view that Interrogatories #2.1 and #2.8 must be answered by Hydro One in advance of a hearing in this proceeding.

An Oral Hearing on the Motion is Required

In the event that the OEB declines the request that the hearing be adjourned pending the appeal of the Hydro Ottawa Decision, and, irrespective of the outcome of the Carriers' motion respecting the Hydro One responses to the Supplementary Interrogatory questions, the Carriers request that an oral hearing be held in this proceeding.

In Procedural Order No. 7, the OEB declined to exclude certain new issues that were raised by other intervenors in the proceeding that had not been raised in Hydro One's original application before the OEB (see below for more detailed discussion of this matter). Therefore, it is the Carriers' view that an oral hearing is necessary to provide all parties to this proceeding with an opportunity to seek clarification, by way of cross examinations, of the noted inconsistencies and deficiencies in Hydro One's evidence and to explore Hydro One's answers to interrogatories filed on September 8, 2015 and April 15, 2016.

Furthermore, the parties require an opportunity to make submissions to the OEB on the features of the 2005 Methodology, as well as the appropriate treatment of the evidence on the Additional Issues in regards to the 2005 Methodology. This is necessary as a result of the OEB's decision in Procedural Order No. 7 declining to address the issue of methodology.

In addition, in their supplemental interrogatories to Hydro One, OEB staff have asked Hydro One to provide the costing inputs and the resulting Pole Access Charges if Hydro One were to

use 2014 and 2015 actuals instead of the 2012 actuals used in Hydro One's original application to the OEB. This new costing information has not been tested or reviewed in any capacity and the Carriers seek the opportunity to do so in an oral hearing.

Ultimately, the Carriers' objective is to ensure that the record contains sufficient evidence for the OEB to determine a just and reasonable Pole Access Charge, based on the 2005 Methodology, and that the parties have an opportunity to proceed with their submissions on evidence, based on a mutual understanding of the features of the 2005 Methodology. The fulfilment of this objective requires a component of an oral hearing to address the methodology issue.

Finally, the public interest requires that the request for an increase to the Pole Attachment Charge be subject to proper scrutiny by those who pay those rates, not to mention the OEB. Accordingly, an oral hearing is the only means for the Carriers to test the reliabity of Hydro One's evidence before the OEB. The public interest requires an oral hearing to be held in these circumstances so that the OEB can make a considered decision on the Pole Access Charge increase sought by Hydro One, on a proper record.

The Carriers repeat their Objections to the manner in which this Motion has proceeded

In Procedural Order No. 4 dated October 26, 2015 (the "**Procedural Order**"), the OEB ordered that its review of the Pole Access Charge in this Motion "will be within the context of the current approved OEB methodology as described in Decision and Order RP-2003-0249," issued March 7, 2015 (the "**2005 Methodology**").

Following Procedural Order No. 4, 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 proposed new Pole Access Charge of $37.05.

By letter to the OEB dated January 26, 2016, the Carriers requested that the OEB hold an oral hearing on the following issues:

(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 this proceeding; 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.

At the Technical Conference held on January 16, 2016, certain of the Intervenors[1] raised additional factors and issues (the "**Additional Issues**") that were not part of Hydro One's original application before the OEB (the "**General Rate Application**"); nor were these Additional

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[1] School Energy Coalition, Vulnerable Energy Consumers Coalition ("**VECC**"), Power Workers Union and Canadian Manufacturers & Exporters.

Issues raised by the Intervenors during the course of the General Rate Application. The Additional Issues are that:

(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); and

(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 assumed by Hydro One in its General Rate Application).

In Procedural Order No. 7, contrary to the Carriers' request, the OEB declined to exclude the Additional Issues from the scope of this proceeding and ordered that it proceed by way of a written hearing.

The OEB later noted that parties making submissions in this case should take note of its findings in the Hydro Ottawa Decision.

Notably, in the Hydro Ottawa Decision, the OEB used the actual number of attachers per pole to determine a Pole Access Charge which was "just and reasonable". Accordingly, the Carriers anticipate that, in this proceeding, the OEB will set the Pole Access Charge based on the actual number of attachers per pole, instead of the 2.5 attachers per pole prescribed in the 2005 Methodology, accepted by Hydro One and the Intervenors in the General Rate Application and ultimately approved by the OEB. Until the Technical Conference in this proceeding, the number of attachers was not raised as an issue in this proceeding by any of the parties, as well as the OEB.

Now, in Order No. 8, the OEB states that it:

> "...would like to ensure that the record is sufficient to enable the calculation of the Hydro One Pole Access Charge in accordance with the applicable findings in the Hydro Ottawa decision (e.g., that the charge should be based on historical rather than forecast costs, and on the actual number of attachers per pole rather than the presumed 2.5 attachers per pole)."

The Carriers submit that this position, first articulated in Order No. 8, is fundamentally inconsistent with Procedural Order No 4, which mandated that this proceeding shall be determined "within the context of the current approved OEB methodology" (being the 2005 Methodology). The Carriers submit that the orders of the OEB have inappropriately and unfairly caused changes in the scope of this hearing in a manner which is beyond the proper scope of a review and vary motion, and which, in any event has failed to afford the Carriers a fair and adequate opportunity to respond to the shifting sands of this proceedings.

CASSELS BROCK
LAWYERS

The Carriers appreciate the OEB's consideration of its requests.

Yours very truly,

Timothy Pinos
TP/gmc

Court File No. _____

(Ontario Energy Board)
File No. EB-2015-0004

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF a Decision and Order of the Ontario Energy Board dated February 25, 2016 on an Application by Hydro Ottawa Limited for an Order approving electricity distribution rates for the period from January 1, 2016 to December 31, 2020.

BETWEEN:

ROGERS COMMUNICATIONS PARTNERSHIP, TELUS COMMUNICATIONS COMPANY, QUEBECOR MEDIA INC. and ALLSTREAM INC.

Appellants

- and -

THE ONTARIO ENERGY BOARD and HYDRO OTTAWA LIMITED

Respondents

NOTICE OF APPEAL

Rogers Communications Partnership, TELUS Communications Company, Quebecor Media Inc. and Allstream Inc. **(the "Carriers")** appeal to the Divisional Court from the Decision and Order **(the "Order")** of the Ontario Energy Board **(the "Board")** dated February 25, 2016 approving a final pole attachment charge for Hydro Ottawa Limited **("Hydro Ottawa")** in the amount of $53 per pole, per year, effective January 1, 2016 and to remain in effect on a final basis subject to direction from the Board (the **"New Pole Rate"**).

THE APPELLANTS ASK that the Order of the Board be set aside and that an Order be granted as follows:

1. Quashing the Order;

2. Suspending the application of any pole attachment rate adjustment by Hydro Ottawa until the conclusion of the Policy Review (defined hereafter) which the Board has initiated concerning the methodology used to establish pole attachment rates;

3. In the alternative, sending the matter back to the Board for a rehearing with respect to a just and reasonable pole attachment rate for Hydro Ottawa in accordance with the directions of this Court;

4. Their costs of this appeal; and

5. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS OF APPEAL are as follows:

Breach of Procedural Fairness - Right to be Heard

6. The Board breached the duty of procedural fairness in failing to provide the Carriers with the right to be heard on the issue of methodology, despite the fact that:

(a) "rate design" was identified as an issue by the Board;

(b) the Board had previously ruled that issues of methodology were relevant to the proceeding; and

(c) methodology is an integral component of setting a just and reasonable rate under section 36 of the *Ontario Energy Board Act, 1998*, S.O. 1998 c. 15, Sched. B. ("**OEB Act**").

7. The Board breached its duty of procedural fairness by failing to allow the Carriers to conduct their case in the manner they saw fit, including the tendering of evidence with respect to methodology.

8. The Board breached the rules of procedural fairness by striking the Carriers' (as then defined) reply submissions and denying the Carriers the right to be heard in response to the submissions of the intervenors who were adverse in interest to the Carriers.

9. The Board breached the rules of procedural fairness in failing to consider the Carriers' arguments relating to the wireless attachment deferral account, which was agreed to in a settlement made by other parties. The Carriers were not included in these settlement discussions or consulted on the establishment of a wireless attachment deferral account, notwithstanding its relevance to the methodology and inputs used to establish a just and reasonable pole attachment rate.

Breach of Procedural Fairness - Failure to Give Adequate Reasons

10. The Board breached the rules of procedural fairness by failing to give adequate reasons for its decision, including its decision not to consider methodology in setting a just and reasonable pole attachment rate.

Board Errors of Law and / or Jurisdiction

11. The Board fettered its discretion and erred in law and / or jurisdiction in finding that the issue of methodology was "out of scope" despite the fact that "rate design" had been identified as an issue by the Board in its Issues List.

12. The Board fettered its discretion and erred in law and / or jurisdiction by treating the methodology employed by the Board in a prior case in 2005 as binding on its determination of a final pole attachment rate in this case.

13. The Board erred at law by failing to consider methodology which is a relevant and essential input into a determination of a just and reasonable pole attachment rate.

14. During the oral hearing, the Board informed the parties that it plans to undertake a general policy review of electricity distributors' miscellaneous rates and charges (the **"Policy Review"**) and that the Policy Review will include the methodology used to set a pole attachment rate. The Board erred at law by setting a pole attachment rate based on a methodology that it has conceded requires re-consideration and which it has ordered be subject to the Policy Review.

15. The Board erred at law in setting the New Pole Rate on a final basis despite the fact that the Board has ordered that the issue of methodology be subject to the Policy Review.

16. The Board erred at law in shifting the burden of proof to the Carriers to establish that the rate requested by Hydro Ottawa was not just and reasonable, when the burden should have been on Hydro Ottawa to prove that its proposed rate was just and reasonable.

Rate set for Power-Specific Assets was Arbitrary

17. The Board's decision to establish a 5% deduction to account for power-specific asset costs included in the pole costs claimed by Hydro Ottawa was arbitrary.

18. The Board's decision to set a 5% deduction to account for power specific asset costs was not reasonable as there was no evidence, or insufficient evidence, on the record to support a deduction of 5% for power specific asset costs.

19. The Board erred at law by shifting the burden to the Carriers to establish an appropriate deduction for costs of power-specific assets included in Hydro Ottawa's pole costs used to set the pole attachment rate, when the burden should have been on Hydro Ottawa to prove that its proposed pole attachment rate was just and reasonable.

Failure to Order Disclosure of Relevant Documents

20. The Board erred at law in failing to order production of documents relevant to the determination of a just and reasonable rate, namely, the Bell Canada/Hydro Ottawa and Hydro One/Hydro Ottawa reciprocal pole access agreements.

21. The Board also breached the rules of procedural fairness in failing to provide adequate reasons for its decision to deny production of these documents.

Failure to set a Just and Reasonable Rate

22. The Board erred in law by failing to consider adequately or at all whether the methodology proposed by Ottawa Hydro was "just and reasonable" under section 36 of the OEB Act.

23. The Board erred in law by failing to fix a rate that was "just and reasonable" under section 36 of the OEB Act.

No Jurisdiction under section 78 of OEB Act

24. The Board has no jurisdiction to amend the pole attachment rate established by condition of licence in an application under section 78 of the OEB Act, which authorizes the Board to approve rates for transmitting or distributing electricity or such activities as may be prescribed. Pole attachments are not a prescribed activity.

25. The Carriers rely on the OEB Act, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss 10.1, 15(1), and the *Courts of Justice Act*, R.S.O. 1990 c. C.43.

26. Such further and other grounds as counsel may advise and this Honourable court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

27. An appeal lies to the Divisional Court from the Order of the Board pursuant to section 33(1)(a) of the OEB Act.

28. Leave to appeal is not required.

29. Such further and other grounds as counsel may advise and this Honourable Court may permit.

The Appellants request that this appeal be heard at Toronto.

March 24, 2016

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IN THE MATTER OF *the Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF a Decision and Order of the Ontario Energy Board dated February 25, 2016 on an Application by Hydro Ottawa Limited for an Order approving electricity distribution rates for the period from January 1, 2016 to December 31, 2020.

Court File No. _____

(Ontario Energy Board)
File No. EB-2015-0004

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

NOTICE OF APPEAL

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