

EB-2015-0141

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Decision EB-2013-0416/EB-2014-0247 of the Ontario Energy Board (the “**OEB**” or the “**Board**”) issued March 12, 2015 approving distribution rates and charges for Hydro One Networks Inc. (“**Hydro One**”) for 2015 through 2017, including an increase to the specific charge which Hydro One charges (the “**Pole Access Charge**”) for cable and telecom companies (“**Wireline Attachers**”) to access power poles (“**Wireline Attachments**”) from \$22.35 to \$37.05;

AND IN THE MATTER OF the Decision of the OEB issued April 17, 2015 setting the Pole Access Charge as interim rather than final;

AND IN THE MATTER OF a motion by Allstream Inc., Shaw Communications Inc., Cogeco Cable Inc., on behalf of itself and its affiliate, Cogeco Cable Canada LP, Quebecor Media, Bragg Communications, Packet-tel Corp., Niagara Regional Broadband Network, Tbaytel, Independent Telecommunications Providers Association and Canadian Cable Systems Alliance Inc. (collectively, the “**Carriers**”) to review and vary Decision EB-2013-0416/EB-2014-0247 as it relates to the Pole Access Charge (the “**Carriers’ R&V Motion**”).

SUBMISSIONS OF THE CARRIERS

June 10, 2016

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INTRODUCTION AND OVERVIEW

1. This is a motion by the Carriers to review and vary one aspect of Decision EB-2013-0416/EB-2014-0247, which approved distribution rates and charges for Hydro One for the years 2015 through 2017 (the “**General Rate Application**”), being the Pole Access Charge, which was approved at \$37.05 (the “**Approved Rate**”), an increase from the existing rate of \$22.35.
2. Leave to bring this motion was granted by the OEB in Decision and Order EB-2015-0141, dated June 30, 2015.
3. Later, in Procedural Order No. 4, dated October 26, 2015, the OEB clarified that the “motion will be a hearing on Hydro One’s proposed increase to the Pole Access Charge and whether that increase is just and reasonable” [emphasis added]. The increase referred to is that sought in the General Rate Application from \$22.35 to \$37.05. The Board further stated that the review “will be in the context of the current approved OEB methodology as described in Decision and Order RP-2003-0259, dated March 7, 2005” (the “**2005 Decision**”). The OEB also informed the parties that it plans to undertake a general policy review of miscellaneous rates and charges (the “**Policy Review**”) which will include the methodology used to set the Pole Access Charge.
4. In their evidence in support of the Carriers’ R&V Motion, the Carriers raised a single ground to challenge to the reasonableness of the Pole Access Charge – that being the incorrect inclusion of vegetation management costs in the calculation of the Pole Access Charge, which was contrary to the Board’s current approved methodology set out in the 2005 Decision (the “**Approved Methodology**”).
5. Hydro One filed no evidence in response to the Carriers’ evidence, and neither did any of the Interveners, all of whom were participating parties in the General Rate Application in which the Pole Access Charge was approved. At no point

have Hydro One or the Intervenors sought leave to file their own review and vary motions.

6. Despite this, and the singular basis for the Carriers' R&V Motion, the Intervenors and Hydro One have raised new issues respecting components of the Pole Access Charge – issues that have already been adjudicated as part of the General Rate Application and that are not the subject matter of the Carriers' R&V Motion. These new issues and new supporting evidence emerged prior to and at the Technical Conference on January 12, 2016.
7. The Carriers have always asserted that these new issues were not properly before the OEB and that the new evidence was not relevant, and sought rulings on two separate occasions that they be excluded from the proceeding. The OEB refused, ruling that the evidence “may” be relevant to the determination of a just and reasonable Pole Access Charge.
8. The Carriers maintain and reiterate their position that the only issue properly before the Board in the Carriers' R&V Motion is whether the increase in the Pole Access Charge from \$22.35 to \$37.05 is just and reasonable when it includes, inappropriately and contrary to the Approved Methodology, vegetation management costs.
9. Now, in its closing argument, Hydro One does not seek to affirm its original request for a Pole Access Charge of \$37.05. Rather, it is now seeking approval for a Pole Access Charge of \$70.04. In support of this astonishing increase, it cites the following factors:
 - a. it corrected various material errors in calculations it made in the General Rate Application and which were incorporated into the Approved Rate;
 - b. it decided to use 2014 historical costs to replace the 2012 historical costs it had used in the General Rate Application and which were incorporated into the Approved Rate ; and

- c. it decreased the average number of Wireline Attachers from 2.5 used in the General Rate Application to 1.3.
10. This new proposed Pole Access Charge represents a 313% increase over the current Pole Access Charge of \$22.35 and an 89% increase over the Approved Rate of \$37.05 originally sought by Hydro One in the General Rate Application!
11. In these submissions, the Carriers will challenge the Final Rate of \$37.05, the new proposed Pole Access Charge of \$70.04, the methodologies used to obtain these rates, and certain of the steps followed in this proceeding, being the Carriers' R&V Motion.
12. The Carriers submissions are summarized as follows:
 - a. It is not open to Hydro One to seek a new Pole Access Charge greater than the Approved Rate under the General Rate Application without having sought leave to bring a review and vary motion. The new Pole Access Charge sought by Hydro One would be in breach of the fundamental principles of finality and fairness. The Board should reject it out of hand.
 - b. It would be a violation of the principle of *res judicata* and an abuse of process for the OEB to consider and rule upon brand new issues and evidence that were raised by the Intervenors and Hydro One during the course of Carriers' R&V Motion.
 - c. The Board is incorrectly fettering its discretion by directing the parties to take note of the Board's findings in its decision regarding the Pole Access Charge for Hydro Ottawa.
 - d. The only adjustments that should be made to the Final Rate of \$37.05 are (1) the removal of vegetation management costs and (2) corrections to material errors made by Hydro One in its General Rate Application. These adjustments would result in a Pole Access Charge of **\$24.64**.

13. Notwithstanding the positions taken by the Carriers above, if the Board deems it appropriate to (i) allow Hydro One to abandon the Approved Rate and apply for a new Pole Access Charge and (ii) accept the new issues and evidence raised by the Intervenors and Hydro One, the Carriers submissions are as follows:
- a. The OEB should reject the inclusion of vegetation management as part of the Pole Access Charge. Its inclusion is inconsistent with the Approved Methodology and Hydro One willingly accepted that the Pole Access Charge does not include these costs.
 - b. The costs used to determine the Pole Access Charge should be based on 2012 actuals as used in the General Rate Application and not 2014 actuals as now proposed by Hydro One.
 - c. It is appropriate to use an average of 2.5 Wireline Attachers per pole. The assumption is an integral part of the Approved Methodology. It was also used by Hydro One in the General Rate Application and incorporated into the Approved Rate. A consideration of any value other than this number is outside the scope of the Carriers' R&V Motion.
 - d. If, on the other hand, the OEB determines that, rather than the assumed number of 2.5, it should consider a number based on the "actual" number of Wireline Attachers on Hydro One's poles, then the resultant Pole Access Charge must take into account Hydro One's pole and cost-sharing arrangement with Bell Canada. Put simply, Bell contributes to 40% of the costs of Hydro One's poles. It does not pay the Pole Access Charge or any other occupancy fee. Therefore, Hydro One can use only the remaining 60% of its costs as the basis for the Pole Access Charge and allocation among the Wireline Attachers who pay it.
 - e. If Bell does not pay the Pole Access Charge, then it should not be included in the average number of Wireline Attachers. That means the average number of Wireline Attachers must be at least 1.0. (If it is less

than 1.0, then the Attachers would be paying for poles that they are not on.) Given that there are more than one Wireline Attachers operating within Hydro One's territory, it is not unreasonable to assume an average of 1.1 Wireline Attachers per pole.

- f. All applicable costs must be adjusted in order to remove power-specific assets – this has been assumed to equal 15% of the total cost, which is consistent with the Approved Methodology and is supported by Hydro One.
- g. If the above submissions are applied, the resulting Pole Access Charge would be **\$28.51**. In the Carriers view, this is just and reasonable.

PART I: CARRIERS' REVIEW AND VARY MOTION AND 2005 METHODOLOGY

A. The increase in the Approved Rate is a result of the inclusion of vegetation management costs

14. The inputs used by Hydro One in the calculation of its Pole Access Charge in the General Rate Application are shown in the following table in relation the same inputs used in the 2005 Decision:

Inputs	OEB 2005	Approved Rate
DIRECT COSTS		
Admin Costs	\$0.69	\$0.85
Loss in productivity	\$1.23	\$1.51
Total Direct Costs	\$1.92	\$2.36
INDIRECT COSTS		
Net Embedded Cost (NEC)	\$478	\$746
Depreciation cost	\$31.11	\$12.68
Pole maintenance costs	\$7.61	\$82.41
Capital carrying cost	\$54.49	\$63.32
Total Indirect Costs	\$93.21	\$158.41
ALLOCATION		
# of non-power attachers	2.5	2.5
Allocation Factor	21.9%	21.9%
Indirect allocated	\$20.43	\$34.69
Pole Rate	\$22.35	\$37.05

15. As can be seen, there is a dramatic increase in pole maintenance costs. This increase is admitted to be as a consequence of the inclusion of “vegetation management costs” (i.e., “brush control” and “line clearing”) in that cost category, which are set out below based on 2012 figures:¹

D- “Maintenance Lines and Forestry” =>

Per Pole sum of Maintenance per year = \$ 82.41

Lines = Lines 2012 \$M, Line Patrols (\$8.65M) + Defect Correction (\$5.04M)
Total = \$13.69M divided by # of poles (1.73M) or \$7.91/pole for 2012

Forestry = Forestry 2012 \$M, Brush Control (\$34.7M) + Line Clearing (\$87.1M)
+ Customer Notification (\$7.1M) =Total \$128.9M=> divided by # of poles
(1.73M) or \$74.50/pole for 2012

B. The Approved Methodology to be applied excludes vegetation management costs

16. The Carriers’ R&V Motion was brought to provide an opportunity for the Carriers, who were not given notice of the General Rate Application, an opportunity to make submissions on the Pole Access Charge. Consistent with that purpose and in Procedural Order No. 4 dated October 26, 2015 (“**PO 4**”), the OEB directed that its review of the Pole Access Charge would be conducted within the context of the Approved Methodology:

“As described in Procedural Order #3, the motion will be a hearing on Hydro One’s proposed increase to the Pole Access Charge and whether that increase is just and reasonable. The OEB’s review of the Pole Access Charge in this proceeding will be within the context of the current approved OEB methodology as described in Decision and Order RP-2003-0249, issued March 7, 2005. However, as mentioned in a recent OEB decision, the OEB plans to undertake a policy review of miscellaneous rates and charges commencing this year which will include a review of Pole Access Charge methodology” [emphasis added.]

¹ *Response to Interrogatories of Hydro One Networks Inc.*, September 8, 2015 [“**HONI IRRs**”], Exhibit 1, Tab 1, Schedule 1, page 2 of 2.

17. The Policy Review referred to above was formally announced by the Board in its memorandum dated November 5, 2015. The memorandum makes it clear that the methodology of determining rates for pole attachments will be part of this review:

“As a first component of this phase, the OEB plans to prioritize the review of wireline pole attachments. The OEB will establish a Pole Attachments Working Group (PAWG) to provide advice on the technical aspects and related details to be addressed in the respect of pole attachments. The subsequent review of pole attachments will consider the methodology used for determining charges, including the appropriate treatment of any revenues that carriers may receive from third parties” [emphasis added.]²

18. The Approved Methodology requires that the Pole Access Charge be calculated as follows, as summarized in Appendix 2 of the 2005 Decision:

	Price Component - Per Pole	Explanation
	DIRECT COST	
A	Administration Costs	Historical per Wireline Attacher administration cost. In the 2005 Decision, the Board used a cost of \$0.69, based on the CRTC’s determination of a Wireline Attacher administration cost in 1999 of \$0.62, inflated to the date of the application (2003) ³
B	Loss in Productivity	Historical per Wireline Attacher incremental loss in productivity costs due to the requirement to work around wireline telecommunications facilities. In the 2005 Decision, the Board used a cost of \$3.08 for 1991 inflated to the date of the application (2003) and divided by 2.5 Wireline Attachers.
C	Total Direct Costs	B + C
	INDIRECT COST	
D	Net Embedded Cost per Pole	Historical net embedded cost of a bare pole. In the 2005 Decision, the Board used Milton Hydro’s 1995 cost of a bare pole of \$478.00. This cost had been adopted by the CRTC in Decision 99-13, as being representative of the cost for “poles alone”, consistent with Municipal Electric Association’s (“MEA”) agreement that “items such as cross-arms should be excluded from the capital costs of power utility poles”. ⁴

2 Ontario Energy Board Notice re: Review of Miscellaneous Rates and Charges in EB-2015-0304, November 5, 2015, pages 1-2.

3 Telecom Decision CRTC 1999-13, *Part VII Application - Access to Supporting Structures of Municipal Power Utilities - CCTA vs. MEA et al - Final Decision* (28 September 1999) (“**CRTC Decision**”).

4 CRTC Decision, paras. 199 and 206.

	Price Component - Per Pole	Explanation
E	Depreciation Expense	Historical depreciation cost of a bare pole. The Board used Milton Hydro's 1995 depreciation expense for a bare pole of 31.11 in the 2005 Decision. This cost had also been adopted by the CRTC in Decision 99-13 for the reasons discussed above.
F	Pole Maintenance Expense	Historical pole maintenance expense. In the 2005 Decision, the Board used Milton Hydro's 1995 costs of pole testing and pole straightening, inflated to the date of the application (2003). ⁵
G	Capital Carrying Cost	Pre-tax weighted average cost of capital for the year of the application (2003) x D.
H	Total Indirect Costs per Pole	E + F + G
I	Allocation Factor	21.9% based on an assumed number of non-power Wireline Attachers of 2.5 and 1 power attacher and assumed typical pole space allocations and utilization
J	Indirect Costs Allocated	H x I
K	Annual Pole Rental Charge	C + J

19. Based on a review of the 2005 Decision, it is clear that the Approved Methodology did not include vegetation management or tree-trimming costs. Rather, the Board simply adopted the pole maintenance costs that had been proposed by the CCTA in that proceeding. These costs were based on a 1995 Milton Hydro cost study (adjusted for inflation) that had been previously approved and adopted by the CRTC in its own 1999 decision dealing with pole attachment rates (the “**CRTC Decision**”).
20. The CRTC explicitly excluded tree trimming costs from the pole maintenance costs component of the Pole Access Charge, stating as follows:

“The Commission considers that maintenance costs should exclude tree trimming. Rather, the power utilities should be permitted to levy a separate charge on cable companies to reflect tree trimming

5 CRTC Decision, para. 212.

activities. The Commission considers that this matter is best left to be resolved by the parties in the first instance.”⁶

21. Hydro One acknowledged at the Technical Conference in this proceeding that, at the time of the 2005 Decision, it was aware of the CRTC’s use of the cost amounts from the Milton Hydro study⁷ and agreed that the CRTC Decision formed the basis for the methodology adopted by the OEB in the 2005 Decision,⁸ which excluded tree trimming or vegetation management costs.⁹ Following the 2005 Decision, Hydro One made an advertent choice, for reasons of administrative convenience, not to charge actual vegetation management costs to the Carriers and other attachers. It also accepted a rate that excluded vegetation management costs as being sufficient for its purposes.¹⁰
22. The Canadian Oxford Dictionary defines “methodology” as “a body of methods used in a particular branch of activity”. “Method”, in turn, is defined as “a mode of procedure; a defined or systematic way of doing a thing”. Combining the two, a methodology is “a group of procedures or ways of doing a thing used in a particular activity.”
23. From this, there can be no question that the exclusion of vegetation management costs from pole maintenance costs in favour of charging directly for such costs was part of a methodology. In other words, it was part of the definition of how pole maintenance costs are to be calculated, *i.e.*, “the way of doing a thing” in the larger activity of determining the Pole Access Charge.

6 CRTC Decision, para. 212.

7 Technical Conference Transcript dated April 8, 2015 (“**Technical Conference Transcript**”), EB-2015-0141, page 8.

8 Technical Conference Transcript, page 8.

9 Technical Conference Transcript, page 9.

10 Technical Conference Transcript, page 9.

24. Therefore, in accordance with the Approved Methodology, Hydro One cannot include its vegetation management costs as part of its pole maintenance costs.¹¹

C. Calculation of Pole Access Charge

25. When the vegetation management costs are correctly excluded from pole maintenance costs, and all other inputs accepted, the resultant Pole Access Charge is **\$20.75** as shown below.

Inputs	Approved Rate	Carriers
DIRECT COSTS		
Admin Costs	\$0.85	\$0.85
Loss in productivity	\$1.51	\$1.51
Total Direct Costs	\$2.36	\$2.36
INDIRECT COSTS		
Net Embedded Cost (NEC)	\$746	\$746
Depreciation cost	\$12.68	\$12.68
Pole maintenance costs	\$82.41	\$7.91
Capital carrying cost	\$63.32	\$63.32
Total Indirect Costs	\$158.41	\$83.92
ALLOCATION		
# of non-power attachers	2.5	2.5
Allocation Factor	21.9%	21.9%
Indirect allocated	\$34.69	\$18.39
Pole Rate	\$37.05	\$20.75

26. As the Board is aware, prior to the Technical Conference, Hydro One disclosed to the Carriers that it had mistakenly overstated the total number of poles used to calculate the per-pole inputs in its General Rate Application, and that there were fewer poles in its inventory than previously assumed in the calculation. Further, Hydro One advised that it had committed a material error in the way it calculated the pole depreciation expense.¹² While it would be open to the Carriers to oppose the these purported corrections to the pole count and depreciation for the

¹¹ The Carriers note that 2005 Methodology does not incorporate an annual inflation, as is further discussed below.

¹² Hydro One Supplementary Evidence dated December 22, 2015, EB-2015-0141.

reasons set out in Part II, the Carriers have chosen not to, albeit without prejudice to their opposition to the entirely new evidence and issues that have been raised in this proceeding, as well as the fundamental changes the Carriers believe have been made to the Approved Methodology, all of which are discussed in Parts II and III of this Submission.

27. As a result of these two significant alleged errors, the Approved Rate would increase by 16% to \$43.04, all other components unchanged, as shown below. Similarly, the Pole Access Charge put forth by the Carriers would increase from \$20.75 to \$24.64. The Carriers submit that this \$24.64 is the just and reasonable rate.

Inputs	Approved Rate	Approved Rate Corrected	Carriers Corrected
DIRECT COSTS			
Admin Costs	\$0.85	\$0.85	\$0.85
Loss in productivity	\$1.51	\$1.51	\$1.51
Total Direct Costs	\$2.36	\$2.36	\$2.36
INDIRECT COSTS			
Net Embedded Cost (NEC)	\$746	\$840.57	\$840.57
Depreciation cost	\$12.68	\$21.51	\$21.51
Pole maintenance costs	\$82.41	\$92.88	\$8.91
Capital carrying cost	\$63.32	\$71.36	\$71.36
Total Indirect Costs	\$158.41	185.75	\$101.78
ALLOCATION			
# of non-power attachers	2.5	2.5	2.5
Allocation Factor	21.9%	21.9%	21.9%
Indirect allocated	\$34.69	\$40.68	\$22.28
Pole Rate	\$37.05	\$43.04	\$24.64

PART II: IT IS NOT APPROPRIATE FOR THE OEB TO CONSIDER THE NEW ISSUES

A. It is not open to Hydro One to seek a rate in excess of the Pole Access Rate determined in the General Rate Application

28. It is submitted that the OEB does not have the jurisdiction to consider or act upon Hydro One's request to increase the Pole Access Charge to \$70.04, well beyond the Approved Rate of \$37.05.
29. The OEB *Rules of Practice and Procedure* (the "**OEB Rules**") set out the circumstances in which a person may seek to have all or part of a final order or decision reviewed and varied. Those rules require that:¹³
- a. the person seeking the review and variation bring a motion;
 - b. if the person was not a party to the proceeding, leave to bring the motion must be sought; and
 - c. the notice of motion must set out the grounds for the motion that raise a question as to the correctness of the order or decision.
30. Hydro One has failed to comply with the requirements in (a) and (c) above, which are mandatory. No motion has been brought and no grounds have been advanced that raise a question as to the correctness of the Board's order or decision on the General Rate Application.
31. Rather, Hydro One has attempted to indirectly refile its rate application for the Pole Access Charge on the basis of new evidence, culminating in a request (that was advanced for the first time in its closing submissions) for a new Pole Access Charge that substantially exceeds the Approved Rate, initially requested and approved as part of the General Rate Application.

¹³ *OEB Rules of Practice and Procedure*, Rules 40 and 41.

32. Hydro One is attempting to reargue its case on the basis of new or revised evidence. The OEB has consistently required that “there must be an identifiable error in the decision as a review is not an opportunity for a party to reargue the case.”¹⁴ Hydro One has made no attempt to identify an error on the part of the OEB. If anything, it is relying on its own errors to reargue the case.
33. There is nothing in the OEB Rules that would permit this approach, and it is contrary to the OEB Rules governing motions to review. Further, it is unfair and violates the principle of finality, which has been accepted by the OEB in more than one decision.¹⁵

B. New Issues raised by Hydro One and the Intervenors, as well as issues arising from the Hydro Ottawa Decision

34. At the Technical Conference, certain of the Intervenors¹⁶ raised additional factors and issues that were not part of the General Rate Application and were not raised by the Intervenors or Hydro One during the course of the General Rate Application (the “**New Issues**”). These new issues are:
- a. The Pole Access Charge should be calculated using 2014 or 2015 costs (instead of 2012 historical costs for the year used by Hydro One in its General Rate Application).
 - b. The Pole Access Charge should be calculated using an average of 1.3 Wireline Attachers per pole (instead of 2.5 as prescribed in the Approved Methodology and adopted by Hydro One in its General Rate Application).
35. Notwithstanding the Carriers’ objection to the introduction of the New Issues, in Procedural Order No. 7 dated March 8, 2016 (“**PO 7**”) the OEB declined to exclude the New Issues from the scope of the Carriers’ R&V Motion. Instead, the

14 *Ontario Power Generation Payments Review Decision*, May 11, 2009, EB-2009-0038, page 9-10.

15 *Natural Gas Electricity Interface Review Decision*, May 22, 2007, EB-2006-0322/0338/0340, page 15.

16 School Energy Coalition, Vulnerable Energy Consumers Coalition, Power Workers Union and Canadian Manufacturers & Exporters.

OEB exacerbated this apparent expansion in the scope of the Carriers' R&V Motion by directing that, when making their submissions, the parties in the proceeding take note of the Board's findings in the Hydro Ottawa Decision.¹⁷

36. The OEB confirmed its intention to rely on its findings in the Hydro Ottawa Decision in Procedural Order No. 8 dated March 21, 2016 ("**PO 8**"), despite its contrary directions in PO 4. Specifically, the OEB stated 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).”
37. The Carriers submit that it is inappropriate for the OEB to consider and rule upon the New Issues in the context of the Carriers' R&V Motion. To do so would be a violation of the principle of *res judicata*, not to mention an abuse of process.¹⁸ Furthermore, consideration by the Board of the Hydro Ottawa Decision further exacerbates the procedural irregularities in this proceeding, which has caused the Carriers' R&V Motion to be conducted in an unfair manner.
38. It is an uncontroverted principle of common law that, if a party “omits to raise any particular point... (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the same issue arises in the same or subsequent proceedings.”¹⁹
39. Hydro One and the Intervenors were full participants during the proceedings in the General Rate Application following which the Board determined the just and reasonable Pole Access Charge to be \$37.05. Yet they did not raise any of the

17 *Hydro Ottawa Limited Decision and Rate Order on Pole Attachment Charge*, February 25, 2016 ("**Hydro Ottawa Decision**"), EB-2015-0004.

18 The Supreme Court of Canada has confirmed that *res judicata* and abuse of process govern the OEB's process in order to balance fairness to the parties with the protection of the integrity of the administrative decision-making process, which is undermined by permitting re-litigation of issues once decided (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*], para. 21).

19 *Fidelitas Shipping Co Ltd. v. V/O Exportchleb*, [1966] 1 QB 630.

New Issues at that proceeding despite having ample opportunity to do so. It is unfair to permit the Intervenors to have a second opportunity to raise and argue the New Issues when the Carriers were provided with only one opportunity to raise issues they deemed relevant to the calculation of the Pole Access Charge. The only purpose of the Carriers' R&V Motion was to provide the Carriers with the opportunity to question the correctness of the Approved Rate established under the General Rate Application. The Carriers have done exactly this, as already described, on the basis of a single issue.

C. Consideration of the Intervenors' New Issues would violate *res judicata*

40. Under the overarching principle of *res judicata*, the mechanism of issue estoppel must act to prevent the Intervenors from raising or arguing new issues in this proceeding. To successfully establish issue estoppel, it must be shown that: (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel was final; and (3) the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.²⁰
41. In the Carriers' view, all three of the above conditions have been satisfied. Hydro One and the Intervenors are seeking to revisit the consideration of the Pole Access Charge and whether it is just and reasonable – something that has already been decided by the Board without any challenge from either Hydro One or the Intervenors. Accordingly, Hydro One and the Intervenors are estopped from raising the new issues in this proceeding, having already had an opportunity to do so.

D. Consideration of the New Issues would be an abuse of process

42. Abuse of process applies where “allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.”²¹

²⁰ *Danyluk*, para. 58.

²¹ *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [*Toronto (City)*], para. 37.

43. In the General Rate Application, despite having ample opportunity to challenge the methodology used by Hydro One in determining the Pole Access Charge, the Intervenor chose not to do so. The Intervenor accepted without question the use of 2012 historical costs. They accepted without question the adoption of an average of 2.5 Wireline Attachments per pole. They did not object to the final value of the Pole Access Charge of \$37.05 or propose a different figure.
44. Hydro One and the Intervenor now seek to use the Carriers' R&V Motion as an opportunity to revisit the Pole Access Charge afresh. Yet it is the Carriers, and not the Intervenor, who were denied the opportunity to challenge the Pole Access Charge during the proceedings for the General Rate Application. In response, the Board saw fit to grant the Carriers leave to bring this R&V Motion. Hydro One and the Intervenor, on the other hand, had full opportunity to review and challenge (in the Intervenor's case) the Pole Access Charge, and participated fully in the proceeding for the General Rate Application. They cannot now use the Carriers' R&V Motion and the passage of time as an opportunity to revisit the Pole Access Charge and introduce new issues that could have, and should have, been raised in the original General Rate Application.
45. In the Carriers' respectful submission, if the OEB determines that the New Issues are within the scope of this proceeding and thereby allow Hydro One and the Intervenor a second opportunity to make submissions on the New Issues, it would be a blatant abuse of process resulting in: (1) a duplication of OEB resources; (2) inconsistent outcomes; and (3) uncertainty regarding the finality of OEB decisions. In such cases, courts, including the Supreme Court of Canada,²² have dismissed or rejected the attempt at re-litigation.²³ Accordingly, it is the respectful view of the Carriers that the OEB has no choice but to refrain from considering the New Issues within the context of the Carriers' R&V Motion.

22 *Toronto (City)*, para. 58.

23 See for instance, the recent decision of the Ontario Court of Appeal in *College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association*, 2015 ONCA 851.

E. By signalling an intention to rely on the Hydro Ottawa Decision, the OEB may fetter its discretion

46. The Carriers submit that the OEB's earlier direction that the parties take note of its findings in the Hydro Ottawa Decision first articulated in PO 7 is fundamentally inconsistent with PO 4, which mandated that the Carriers' R&V Motion shall be determined "within the context of the current approved OEB methodology" (*i.e.*, the Approved Methodology) from the 2005 Decision. Accordingly, the Carriers submit that the Board's procedural orders have inappropriately and unfairly altered the scope of the Carriers' R&V Motion in a manner that is beyond the proper scope of a review and vary motion, and, in any event, has failed to afford the Carriers a fair and adequate opportunity to respond to the shifting sands of this proceeding.
47. The Board has a discretion to determine the methodology it uses to set a just and reasonable rate, and, in exercising that discretion, may have regard to its precedents. However, it is trite that the Board cannot fetter its discretion by treating a prior decision in another matter as binding on its determination in a proceeding.
48. Such a fettering of discretion is unreasonable and an error of law and jurisdiction. As the Ontario Court of Appeal stated in the seminal *Hopedale* decision:
- The right of an administrative tribunal to formulate general principles by which it is to be guided is undoubted and has been considered upon many occasions in the Courts. ... The tribunal, however, where it has announced considerations by which it is to be guided, and where it has original jurisdiction, must not fetter its hands and fail, because a guide has been declared, to give the fullest hearing and consideration to the whole of the problem before it.²⁴ [Emphasis added]
49. Unlike the 2005 Decision, which established the Approved Methodology for use throughout Ontario, the Hydro Ottawa case dealt only with that utility and was

24 *Re Hopedale Developments Ltd. and Town of Oakville*, [1965] 1 OR 259 (ONCA); see also *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2; *Stemijon Investments v. Canada (Attorney General)*, 2011 FCA 299, para. 22.

fact-specific to its situation. The Hydro Ottawa Decision cannot be used as binding or even persuasive precedent. Accordingly, the issues that are to be determined in this hearing must be considered without the Hydro Ottawa Decision used as binding or controlling precedent. That case had its own factual record, different parties and different issues to be decided.

PART III: SUBMISSIONS WITH RESPECT TO NEW ISSUES AND VEGETATION MANAGEMENT

A. The Carriers' proposed calculation of the Pole Access Charge

50. Notwithstanding the positions taken by the Carriers above and without prejudice to the Carriers' opposition to the Board's consideration of issues which are outside the proper scope of the Carriers' R&V Motion, if the Board deems it appropriate to (i) allow Hydro One to abandon the Approved Rate and apply for a new Pole Access Charge and (ii) accept the new issues and evidence raised by the Intervenor and Hydro One, the Carriers submissions are as follows:
- a. The OEB should reject the inclusion of vegetation management as part of the Pole Access Charge. Its inclusion is inconsistent with the Approved Methodology and Hydro One willingly accepted that the Pole Access Charge does not include these costs.
 - b. The costs used to determine the Pole Access Charge should be based on 2012 actuals as used in the General Rate Application and not 2014 actuals as now proposed by Hydro One.
 - c. It is appropriate to use an average of 2.5 Wireline Attachments per pole. The assumption is an integral part of the Approved Methodology. It was also used by Hydro One in the General Rate Application and incorporated into the Approved Rate. A consideration of any value other than this number is outside the scope of the Carriers' R&V Motion.
 - d. If, on the other hand, the OEB determines that, rather than the assumed number of 2.5, it should consider a number based on the "actual" number

of Wireline Attachers on Hydro One's poles, then the resultant Pole Access Charge must take into account Hydro One's pole and cost-sharing arrangement with Bell Canada. Put simply, Bell contributes to 40% of the costs of Hydro One's poles. It does not pay the Pole Access Charge or any other occupancy fee. Therefore, Hydro One can use only the remaining 60% of its costs as the basis for the Pole Access Charge and allocation among the Wireline Attachers who pay it.

- e. If Bell does not pay the Pole Access Charge, then it should not be included in the average number of Wireline Attachers. That means the average number of Wireline Attachers must be at least 1.0. (If it is less than 1.0, then the Attachers would be paying for poles that they are not on.) Given that there are more than one Wireline Attachers operating within Hydro One's territory, it is not unreasonable to assume an average of 1.1 Wireline Attachers per pole.
 - f. All applicable costs must be adjusted in order to remove power-specific assets – this has been assumed to equal 15% of the total cost, which is consistent with the Approved Methodology and is supported by Hydro One.
51. If the above submissions are applied, the resulting Pole Access Charge would be **\$28.51**. In the Carriers view, this is just and reasonable. The particulars of the calculation of the proposed rate (compared to the Approved Rate of \$37.05 and the rate sought by Hydro One of \$70.04) are contained in the following table.

Price Component – per Pole	Approved Rate	Rate sought by Hydro One	Rate sought by Carriers
# attachers	2.5	1.3	1.1
	– Used number from 2005 Decision	– Used “actual” no. of attachers	– Removed Bell as an attacher
# of poles	1,730,300	1,575,195	1,535,344
	– Used 2012 value – Error – now 1,535,344	– Used 2014 value	– Used “corrected” 2012 value.
Direct Costs			
Admin Costs	\$0.85	\$0.90	\$0.85
	– Used 2005 Decision value plus 7 years inflation	– Used 2005 Decision value plus 9 years inflation	– Used 2005 Decision value plus 7 years inflation
Loss in productivity	\$1.51	\$3.09	\$2.06
	– Used 2005 Decision value plus 7 years inflation	– Used 2005 Decision value plus 9 years inflation – Adjusted for 1.3 attachers	– Used 2005 Decision value plus 7 years inflation – Adjusted for 1.1 attachers
Total Direct	\$2.36	\$3.99	\$2.91
Indirect Costs			
Net Embedded Cost	\$745.86	\$944.49	\$504.34
	– Used 2012 year end value less 15% for power assets – Error – now \$840.57	– Used 2014 year end value less 15% for power assets	– Used 2012 corrected value (\$840.57), adjusted for Bell
Depreciation	\$12.68	\$23.83	\$12.91
	– Error – now \$21.51	– 1.7% x 2014 Net Acquisition Value	– Used 2012 corrected value (\$21.51), , adjusted for Bell
Pole Maintenance	\$82.41	\$88.56	\$8.92
	– Used 2012 costs – Included forestry	– Used 2014 costs – Included forestry	– Used 2012 costs – Excluded forestry
Capital Carrying Cost	\$63.32	\$80.19	\$42.82
	– 8.49% x 2012 NEC – Error – now \$71.36	– 8.49% x 2014 NEC	– Used 2012 corrected value (\$71.36), adjusted for Bell
Total Indirect	\$158.41	\$192.58	\$64.64
Allocation			
Allocation Factor	21.9%	34.3%	39.6%
	– Based on 2.5 attachers	– Based on 1.3 attachers	– Based on 1.1 attachers
Indirect Costs	\$34.69	\$66.05	\$25.60
RATE	\$37.05	\$70.04	\$28.51
Increase over current rate	66%	313%	28%

B. 2012 historical costs must be used to calculate the Pole Access Charge

52. The suggested use of 2014 or 2015 actual or forecast cost inputs by Hydro One for the purpose of calculating the Pole Access Charge is entirely inappropriate in the context of the Carriers' R&V Motion. There are a number of reasons for this.
53. The General Rate Application proceeded on the basis of Hydro One's 2012 historical costs for all aspects of that rate application, including the Pole Access Charge. It is a fundamental principle of ratemaking that consistency is required in the approach to costs and their application in the formulation of rates. It would be inconsistent to now use 2014 or 2015 costs in a review and vary motion with respect to a rate that has already been calculated on the basis of 2012 costs.
54. Further, the use of 2014 or 2015 actual or forecast cost inputs in the calculation of the Pole Access Charge is outside the scope of the Carriers' R&V Motion or any motion which may be brought by another party. A proper review and vary motion is restricted to the identification of an error in the decision or order of the OEB. The arbitrary substitution of 2012 costs with 2014 or 2015 costs has nothing to do with the identification of an error on a motion to review and vary, and is not within the purview of the OEB to consider.
55. Finally, in the Hydro Ottawa Decision, which the OEB has indicated it intends to rely on, the OEB approved "the use of Hydro Ottawa's 2013 historical costs as the basis for determining the pole attachment charge for 2016 to 2020 with no inflation adjustment."²⁵ Therefore, to be consistent with the Hydro Ottawa Decision, the Carriers submit that the OEB must use 2012 historical costs for determining the Pole Access Charge for 2015 to 2017 with no inflation adjustment.

25 Hydro Ottawa Decision, page 9.

C. It is not appropriate to review or reconsider the average number of attachers per pole in this proceeding

56. As stated in Part I above, the Carriers submit that the assumed number of Wireline Attachers of 2.5 is an aspect of the Approved Methodology that is to be used in this proceeding. Accordingly, arguments or evidence to alter this number are outside the scope of the Carriers' R&V Motion. Further, Hydro One adopted and relied upon the assumed 2.5 number of Wireline Attachers in its submissions for the General Rate Application. Therefore, for the reasons set out in Part II, it is not open for Hydro One to resile from that position.
57. Another reason why the Board should decline to consider recalculating the number of Wireline Attachers per pole is due to concerns the Board should have about the nature and credibility of Hydro One's evidence in this regard. The first arises out of the serious errors made by Hydro One in its pole count and calculation of depreciation. While an explanation was provided to the Board and parties, it does not inspire confidence that Hydro One's record-keeping is sufficiently accurate to be relied upon in making a significant change to the Approved Methodology.
58. The second arises out of what appears to be a clear and unexplained anomaly in Hydro One's count of the number of poles with attachers and the number of attachments in total. As explained below, the nature of the business of Wireline Attachers as described in the evidence is such that one would expect them to be active in the same areas and on most of the same poles as Bell. Unfortunately, the numbers presented by Hydro One in its final answers inexplicably contradict this fact.
59. Given how this issue was raised, not through evidence or interrogatories, but via an Intervenor's question at the Technical Conference,²⁶ and given that it has not been subject to the full evidentiary process of the hearing, the Board should not,

²⁶ Technical Conference Transcript, pages 37-39.

at this time, reconsider the number of Wireline Attachers per pole. This is a matter appropriately dealt with in the pending Policy Review.

D. In any event, any determination of the average number of attachers must properly address the joint use pole-sharing arrangement between Hydro One and Bell Canada.

60. Should the OEB determine that the issue of the number of Wireline Attachers is within the scope of the Carriers' R&V Motion (which the Carriers dispute), the Carriers submit that the calculation of the actual number of Wireline Attachers must take into account the joint use pole-sharing arrangement between Bell Canada and Hydro One in order to determine a just and reasonable Pole Access Charge.
61. Moreover, as discussed in detail below, the pole costs that Hydro One seeks to recover through the Pole Access Charge must also take into account the pole-sharing arrangement between Bell and Hydro One.
62. In the 2005 Decision, the OEB held that, as power poles are essential facilities for wireline communications companies, it should exercise its authority under section 74(1) of the Act to set a rate for access to the communications space on poles. The Board emphasized that the rate must not simply be just and reasonable. There must also be no preference granted to the owner of pole:

The Board agrees that power poles are essential facilities. It is a well established principle of regulatory law that where a party controls essential facilities, it is important that non-discriminatory access be granted to other parties. Not only must rates be just and reasonable, there must be no preference in favour of the holder of the essential facilities. Duplication of poles is neither viable nor in the public interest.²⁷

63. The Carriers submit that a proper review of Hydro One's pole costs and, accordingly, the OEB's determination of a just and reasonable Pole Access Charge, cannot be conducted without a full understanding and appreciation of the joint use pole-sharing arrangement that exists between Hydro One and Bell

²⁷ 2005 Decision, page 3.

Canada. To ignore or misunderstand this relationship could result in the OEB setting an unreasonable Pole Access Charge and Hydro One over-recovering its costs by a significant margin.

64. The Carriers note that, while *Hydro Ottawa* had a similar pole-sharing relationship with Bell, it was not addressed in the Hydro Ottawa Decision. because the Carriers were precluded from raising it. There was no evidence on the record that would have allowed the Carriers to argue this issue, let alone permit the Board to make a determination on the matter. In fact, the Carriers repeatedly sought details of Hydro Ottawa's relationship with Bell but were denied by both Hydro Ottawa and the Board.
65. The Carriers submit that, with the limited information that has been provided by Hydro One in this proceeding regarding its economic and operational relationship with Bell, there are two approaches to how that relationship could be factored into the allocation of costs and consideration of Wireline Attachers. First, the Bell-Hydro One relationship could be viewed as a partnership in which the parties share both poles and costs. Second, one could take notice of the relative occurrences of the Wireline Attachments of Bell and the other Carriers. Both approaches lead to consistent cost allocation and rate results.
- i. *Bell is a pole-sharing partner and contributes to the cost of Hydro One's poles*
66. As the Carriers understand the pole-sharing arrangement, Hydro One and Bell have entered into a historical agreement (referred to as a "contract of convenience") under which they have provided access to one another's poles at no cost.²⁸
67. As Hydro One has explained, there exists, across the entire Province of Ontario, a pool of joint use poles (*i.e.*, poles with both Hydro One and Bell as Wireline Attachers), of which Hydro One owns and is responsible for approximately 60%,

28 Carriers' Motion for an order compelling Hydro One to provide supplementary answers to interrogatories, Transcript dated May 19, 2016 (the "**Motion Transcript**"), EB-2015-0141, page 29.

and Bell owns and is responsible for 40%.²⁹ (Actual ownership is determined by pre-assigned geographic areas.³⁰) This pole-sharing arrangement makes sense as it allows Hydro One and Bell to share the costs of building their networks and avoid duplication of infrastructure.

68. The 60/40 split between Hydro One and Bell was based on the relative space each party took up on a standard 40 foot joint use pole; the idea being that, if Hydro One needed 60% of the pole to place its facilities, it should then pay for 60% of all the joint use poles.³¹ The split did not take into account any third party Wireline Attachers.
69. Under this arrangement, Bell and Hydro One have access to all of each other's joint use poles.³² The Bell-owned poles represent 40% of the total number of joint use poles available to Hydro One, and are being provided to Hydro One at no cost.
70. As explained by Hydro One, neither party pays any kind of occupancy fee to use the other's poles. Therefore, instead of paying a fee to attach to Hydro One's poles, Bell has made a contribution "in kind" by building and making available 40% of the joint use poles Hydro One uses.³³
71. Hydro One asserts that it took into account Bell's contribution by including the number of Bell attachments in the calculation of the average number of Wireline Attachers per pole. However, this line of reasoning is problematic; particularly in the context of a cost allocation methodology that requires all occupants of a pole to share costs associated with the common space on the pole equally.

29 Motion Transcript, page 29.

30 Motion Transcript, page 30.

31 On a 40 foot pole, Hydro One took up 24 feet – 10 feet of dedicated power space and half of the 28 feet of shared space. Bell took up 16 feet – 2 feet of dedicated communications space and half of the 28 feet of shared space.

32 Motion Transcript, page 41.

33 As admitted by Hydro One, Bell's contribution to the joint use pool is intended to act as a proxy for the pole attachment fee Bell would otherwise pay to Hydro One as a Wireline Attacher in the communications space.

72. First, the 60/40 split is based on the premise that there are only two Wireline Attachers – Hydro One and Bell – with Hydro One and Bell having the rights to use and benefit from all of the power and telecom space on the pole respectively.
73. Second, if it is accepted that Bell's contribution to the inventory of joint use poles is in lieu of, or a proxy for, the Pole Access Charge it would otherwise have to pay, it must be assumed that Bell's capital contribution, applied across the entire pole population, is always equal to the Pole Access Charge. But that cannot be. As a result of the General Rate Application, the OEB approved a Pole Access Charge (which was initially \$22.35) of \$37.05. Hydro One now proposes a Pole Access Charge of \$70.04 (and throughout this proceeding has provided calculations for a number of other Pole Access Charge scenarios). It is implausible that Bell's contribution is equivalent to each one of the Pole Access Charge scenarios (including each of \$22.35, \$37.05 and \$70.04).
74. In fact, Hydro One has provided no evidence that demonstrates a correlation between Bell's contribution "in kind" and the Pole Access Charge Bell would otherwise pay if it was a third party Wireline Attacher.
75. In the Carriers' submission, Bell is not, and cannot be treated like, a third party *rate-paying* Wireline Attacher. Rather, Bell is a "partner" with Hydro One that has agreed with Hydro One to share in the costs of building support structures (*i.e.*, poles) to carry each of Bell and Hydro One's respective electricity and communications lines.
76. As partners and co-owners of the joint use poles, Hydro One and Bell have control over the costs of each pole, the pole location, the timing of pole replacement or removal, and the allocation and use of space on the pole. Hydro One and Bell also have the ability to generate revenues from the provision of space on their poles. On the other hand, as mere tenants on the poles, rate-paying Wireline Attachers enjoy none of these rights or privileges.

77. The Carriers submit that the simplest and most effective way to properly take into account Bell's contribution to ensure that third party Wireline Attachers are paying a just and reasonable Pole Access Charge would be to deduct 40% from the average embedded cost per pole. This proposal is based on the straightforward logic that Bell has effectively contributed to 40% of the costs of all Hydro One poles in its joint use pool with Bell.
78. By way of example, if it is assumed that there are 100,000 joint use poles shared between Hydro One and Bell, presumably 60,000 of those joint use poles were built and owned by Hydro One and 40,000 were built and owned by Bell. Furthermore, if each joint use pole has an installed cost of \$1,000, Hydro One would have spent \$60 million to install its poles (and Bell would have spent \$40 million to install its poles). Under the pole-sharing arrangement however, Hydro One has access to a total of 100,000 poles. Therefore, its average cost per pole is \$600 (\$60 million divided by 100,000).
79. When the above principle is applied to the facts of this proceeding, the (2012 corrected) net embedded cost per pole of \$840.57 must be reduced by 40%, resulting in a figure of \$504.34.
80. A further adjustment that must be made to account for the Bell contribution. Because Bell's 40% contribution to the costs of the poles has been deducted from the pole costs, and because Bell is not being treated as a *rate-paying* Wireline Attacher, Bell's attachments (as well as the corresponding number of poles) must be removed from the average number of Wireline Attachers per pole. Unfortunately, these Bell attachment numbers cannot be determined with any degree of accuracy because Hydro One does not distinguish between those poles that have both Bell and other Wireline Attachers from those poles that have only Bell attachments. (It would be erroneous to deduct poles with both Bell and rate-paying Wireline Attachers.)
81. In the Carriers' view, however, this is not an issue. It is not necessary to know the number of poles with or without Bell attachments. If Bell is removed from the

picture, the average number of rate-paying Wireline Attachers per pole must be at least 1.0. If that number is less than 1.0, then it would include poles with no rate-paying Wireline Attachers. That would lead to the unintended result of rate-paying Wireline Attachers paying for poles they do not use – an outcome that would not be just and reasonable.

82. At a minimum, there is 1.0 Wireline Attacher per pole (likely Rogers). Given all of the other Carriers with networks deployed across the Province of Ontario, however, it can be reasonably assumed that the number of Wireline Attachers per pole is slightly greater than 1.0. Rogers is not the only telecom Wireline Attacher operating in Hydro One's territory and it is reasonable to apply an average of 1.1 Wireline Attachers per pole.
83. In other words, Hydro One is compensated in-kind for 40% of the costs of its poles from Bell. Regardless, based on Hydro One's proposed calculation of the Pole Access Charge, it is seeking to allocate 100% (not 60%) of its pole costs among the pole users, using a pole rate methodology which allocates or apportions such costs equally among pole users. (Hydro One's most recent request for a rate of \$70.04 based on 1.3 Wireline Attachers will allow it to recover 45% of its common costs from the rate-paying Wireline Attachers). This is in addition to the 40% contribution towards its cost from Bell. (Hydro One may also receive revenues from other third party Wireline Attachers installing power equipment and streetlamps on its poles.)
84. Hydro One has argued that there is no double recovery or shifting of cost due to its pole-sharing arrangement with Bell.³⁴ It claims that, as a result of its "contract of convenience" with Bell, it does charge Bell the regulated Pole Access Charge and Bell does not charge it what would be an unregulated and negotiated Pole Access Charge. Furthermore, Hydro One asserts that because Bell would be able to charge Hydro One more than it charges Bell, there is a tangible benefit, if

34 Motion Transcript, at page 22.

not savings, to Hydro One from the parties not charging one another. John Boldt, Hydro One's witness in this proceeding, stated:

In our contract of convenience we agreed to not charge each other. We save in administration costs and billing back and forth, and the offset of them being able to bill us more, not this regulated rate, actually makes our revenue requirement stay whole, where the fear is that it could increase.³⁵

85. This line of reasoning, however, is problematic if not misdirected, for the reasons set out below.
- a. As indicated above, it is implausible that Hydro One and Bell could have structured their agreement to equate to the huge variance of rates that are in play and absent any apparent consideration of Hydro One's revenues from third party telecom or other Wireline Attachers.
 - b. The proposition that, if Hydro One started to charge Bell the Pole Access Charge, Bell might charge Hydro One more for access to its poles, is purely speculative. Hydro One tendered no evidence in either the General Rate Application or on the Carriers' R&V Motion suggesting that Bell would charge Hydro One more for access to Bell poles than Hydro One would charge for Bell for access to Hydro One poles, let alone the quantum of such charge and the effect on Hydro One's operational expenses.
 - c. Whether or what Bell charges Hydro One for access to Bell poles is irrelevant to the purpose of setting a just and reasonable Pole Access Charge. As stated above, rate-setting methodology for an essential service mandates that the service provider be permitted to recover a reasonable portion of its costs to provide that service from those receiving the service. What that service provider pays (or doesn't pay) to others for goods and services is a matter of operating expense and not costs. The

³⁵ Motion Transcript, page 42.

fact that Bell has decided not to charge for access to its poles does not in any way affect the costs that Hydro One must recover from those using those poles.

Payments made by Hydro to obtain services from others in order to provide its electricity services are irrelevant to the methodology that this Board has determined should be applied in this proceeding. Only Hydro One's costs that have not otherwise been recovered from other Wireline Attachers are relevant at this juncture. As discussed above, those costs are 60% of Hydro One's reported costs (after netting out the in-kind payment that Hydro One has received from Bell).

86. Finally, the Carriers are of the view that the direct costs referred to as loss in productivity must be reduced by 40%.

ii. Review of the attachments of Bell and other Wireline Attachers

87. In its second answers to interrogatories, Hydro One disclosed that the total number of attachments on its owned poles was 746,434, of which 331,238 are Bell Canada attachments, and 415,196 are from all other Wireline Attachers. Strangely, Hydro One asserts that 576,068 of its poles "contains joint use".³⁶

88. This latter number is suspect, for the simple reason that it implies that there are 244,830 joint use poles which do not contain Bell, but have another Wireline Attacher. This contradicts the fact that, in almost every instance, the Carriers serve the same areas as Bell, and in most if not all cases, if they are on a pole, Bell is also going to be there. The instances where a Carrier will be on a pole without Bell also on the pole will be rare. Other local telephone providers only account for attachments to approximately 26,000 poles, so their existence cannot explain what appears to be a significant overstatement of the number of Hydro One poles that contain joint use.

³⁶ Hydro One Answers to Supplementary Interrogatories dated April 15, 2016, EB-2015-0141, Exhibit I, Tab 1, Schedule 2.2, page 1 of 1 and Exhibit I, Tab 1, Schedule 2.10, pages 1 of 2 and 2 of 2.

89. Given this factor, the Carriers submit that, in the alternative to the approach advocated in (i), above, the OEB should simply conclude that 2 attachers per pole is a reasonable number to assume, given the inconsistencies in the Hydro One evidence.
90. The table below sets out the rates that are derived using each of the above approaches to adjust for the Bell-Hydro One joint use arrangements.

Adjustments for Bell Joint Use Arrangement

Component	Deduct 40% from costs Remove Bell from # of attachers	Adjust # of attachers to reflect that there are generally 2.0 telecom attachers
# attachers	1.1	2.0
# of poles	1,535,344	1,535,344
Direct Costs		
Admin Costs	\$0.85	\$0.85
Loss in productivity	\$2.06	\$1.89
Total Direct	\$2.91	\$2.74
Indirect Costs		
Net Embedded Cost	\$504.34	\$714.48
Depreciation	\$12.91	\$21.51
Pole Maintenance	\$8.92	\$8.92
Capital Carrying Cost	\$42.82	\$71.36
Total Indirect	\$64.64	\$101.79
Allocation		
Factor	39.6%	25.9%
Indirect Costs	\$25.60	\$26.36
RATE	\$28.51	\$29.10

- E. **Power-specific assets equal to 15% must be excluded to derive the commons costs of a bare pole**
91. Both the Approved Methodology and the Hydro Ottawa Decision adopt a cost allocation methodology that looks at the common costs of a bare pole (*i.e.*, where that the costs of power-specific fixtures on the pole are excluded). The intent

behind this deduction is that Wireline Attachers should not have to contribute to costs that are specific and unique to the pole owner.

92. In the 2005 Decision, the Board used 15% as an appropriate deduction to exclude the costs of power-specific assets. Notably, in its General Rate Application and throughout the Carriers' R&V Motion, including its Argument in Chief, Hydro One has also put forth 15% as the appropriate adjustment.
93. In the Hydro Ottawa Decision, the Board decided to use 5% instead of 15%. However, in that case, the Board believed that there was sufficient (or more compelling) evidence to support a finding of 5%. However, within the proceeding for the R&V Motion, there has been no evidence put forth to support a finding of 5% as an appropriate deduction to exclude the costs of power-specific assets (even though Board staff asked Hydro One to restate its numbers with a 5% allocation).

F. No evidentiary basis for inclusion of vegetation management costs

94. Even if the OEB were to determine that vegetation management costs should be included in the pole maintenance costs for the purpose of this proceeding (which the Carriers expressly deny), the amounts claimed by Hydro One are far in excess of what is reasonable and necessary for it to recover its costs and no evidentiary basis exists to determine an appropriate amount to be included.
95. The standard form of *Agreement for Licensed Occupancy of Power Utility Distribution Poles (for Telecommunications Attachments)* between Hydro One and each of the Carriers (the "**Pole Attachment Agreements**") states that the Wireline Attacher's financial contribution to "line clearing" costs (including vegetation management costs) has been incorporated into the Pole Access Charge.³⁷ This is an incorrect statement, however, because the Pole Access

37 Evidence of Michael Piaskoski dated November 20, 2015 ("**Carriers' Evidence**"), EB-2015-0141, para. 20.

Charge of \$22.35 that was set by the Board in the 2005 Decision does not include vegetation management costs.³⁸

96. Despite Hydro One being aware that the Pole Access Charge did not include vegetation management costs, it prepared and entered into these Pole Attachment Agreements with the Carriers³⁹ that all explicitly stated that the Carriers' contribution to vegetation management is incorporated in the Pole Access Charge. Accordingly, since the 2005 Decision, Hydro One has consciously and deliberately disregarded the possibility of charging the Carriers for the vegetation management costs outside of the Pole Access Charge. This is presumably because the Pole Attachment Rate of \$22.35 set in the 2005 Decision was sufficient for it to recover its vegetation management costs which benefit the Carriers.⁴⁰
97. Hydro One has filed no evidence in this proceeding that justifies vegetation management costs being included in pole maintenance costs (and which supports the proposed increase in vegetation management costs to \$82.41 per pole from \$7.61 per pole), in order to recover its costs. Hydro One's inclusion of vegetation management costs in calculating the Approved Rate is entirely unsupported, particularly given that it considered the prior rate of \$22.35 (based on pole maintenance costs of \$7.61 per pole) to be sufficient.
98. Although Hydro One included its aggregate vegetation management costs in calculating the Approved Rate, a significant number of Hydro One poles requiring vegetation management activities do not even have Wireline Attachments. Only 15% of Hydro One's 1,730,000 poles have Wireline Attachments.⁴¹ It is unreasonable for Wireline Attachers to be responsible for vegetation management costs for poles without Wireline Attachments, for which they receive

38 Carriers' Evidence, para. 20.

39 Technical Conference Transcript, page 9.

40 Technical Conference Transcript, page 9.

41 Carriers' Evidence, para. 32.

no benefit. It is just and reasonable that Wireline Attachers contribute only to the vegetation management costs for those poles that are shared by Hydro One and those Wireline Attachers.

99. Furthermore, a greater proportion of poles with Wireline Attachments (relative to poles without Wireline Attachments) exist in urban areas, where a significant proportion of the Carriers' operate, and where dramatically different types and costs of vegetation management activities are required, relative to remote and wilderness areas where the Carriers do not operate and fewer poles with Wireline Attachments exist.⁴²
100. Evidence submitted by Hydro One respecting vegetation management costs in another proceeding⁴³ shows that those costs vary dramatically from region to region in the province. Hydro One produced no evidence regarding the actual costs associated with vegetation management on poles typically occupied by Wireline Attachers. The available information would support the conclusions that more remote and rural areas have greater per-pole vegetation management costs. Accordingly, charging Wireline Attachers on a gross averaging basis would cause them to unfairly subsidize the vegetation management of poles that they are not attached to, which is not just and reasonable.⁴⁴
101. No evidentiary basis exists for the OEB to determine an appropriate amount of vegetation management to be included in the calculation of a fair and reasonable Pole Access Charge in this proceeding. The OEB therefore should decline to do so. Further, any review of an appropriate proportion of vegetation management costs to be incurred by the Carriers ought to be determined within the scope of the Policy Review.
102. If Hydro One believes that the amount included in the Pole Access Charge is insufficient compensation for its vegetation management costs incurred to the

42 Carriers' Evidence, paras. 32-33.

43 Carriers' Evidence, paras. 27-30.

44 Carriers' Evidence, para. 33.

Carriers' benefit, Hydro One could charge each of the Carriers based on *actual* vegetation management costs incurred. Accordingly, a decision by the Board that vegetation management costs are appropriately excluded from calculating the Pole Access Charge does not prejudice Hydro One's ability to recover vegetation costs that may be appropriately incurred on behalf of the Carriers. If it chooses not to do so for administrative convenience, as it has done to date, that is for its account and not the account of the Carriers.

PART IV: THE POLE ACCESS CHARGE SHOULD BE INTERIM AND NOT FINAL

103. The Carriers do not believe the Board can establish a just and reasonable rate, in accordance with its statutory duty, by limiting the scope of this proceeding to the methodologies set out in the 2005 Decision and the Hydro Ottawa Decision.
104. Given that the Board is now conducting the Policy Review, the Carriers submit that the only appropriate course of action is to declare the Pole Access Charge interim pending the conclusion of the Policy Review. It would be a fundamental error at law for the OEB to set a Pole Access Charge based on a methodology that it has conceded requires reconsideration and which it has ordered be subject to the Policy Review.
105. Three of the Carriers, Rogers Communications Partnership, Quebecor Media Inc. and Allstream Inc., as well as Telus Communications Company (collectively, the "**Appellants**"), have appealed the Hydro Ottawa Decision (the "**Appeal**") 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.
106. 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:

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 Access Charge.
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 Access Charge.
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 and that the Policy Review will include the methodology used to set a Pole Access Charge. The OEB erred at law by setting a Pole Access Charge 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.

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.

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.
107. The Carriers respectfully submit that the Divisional Court's findings on these issues will have a material impact on the methodology that should be applied by the OEB, including the relevant factors and evidence that should be considered.
108. Accordingly, the Carriers request that the OEB declare Hydro One's current Pole Access Charge interim pending the hearing of the Appeal and the release of reasons by the Divisional Court. The determination of a final Pole Access Charge will benefit from the Divisional Court's decision and reasons (in addition to the outcome of the Policy Review). In any event, the Divisional Court's decision will be binding the OEB in respect of the mutual issues on the Appeal and the Carriers' motion.
109. Furthermore, the public interest requires that the Pole Access Charge set for Hydro One ought to be consistent with the outcome of the Policy Review and the Appeal.

CONCLUSION

110. The increase to the Pole Access Charge from \$22.35 to \$37.05, which was approved by the Board as part of the General Rate Application, is not just and reasonable, and it is not consistent with the current Approved Methodology prescribed by the Board for this proceeding.
111. Contrary to the Approved Methodology, Hydro One included vegetation management costs in its calculations for the Pole Access Charge. If vegetation management costs are correctly excluded from pole maintenance costs (and all

other cost inputs, including the corrections to its errors), the resultant Pole Access Charge is \$24.64, which the Carriers submit is just and reasonable.

112. The Board does not have the jurisdiction to consider or act upon the New Issues raised by Hydro One and the Intervenors, nor may it entertain Hydro One's request to disregard the Approved Rate and now approve a new Pole Access Charge to \$70.04. To do so would be a violation of the principles of *res judicata* and abuse of process.
113. Furthermore, any consideration by the OEB of the Hydro Ottawa Decision would exacerbate the procedural irregularities in this proceeding.
114. Although the Carriers are opposed to the consideration by the Board of the New Issues which are outside the proper scope of the Carriers' R&V Motion, without prejudice to that position the Carriers submit that:
 - a. The OEB should reject the inclusion of vegetation management as part of the Pole Access Charge. Its inclusion is inconsistent with the Approved Methodology and Hydro One willingly accepted that the Pole Access Charge does not include these costs.
 - b. The costs used to determine the Pole Access Charge should be based on 2012 actuals as used in the General Rate Application and not 2014 actuals as now proposed by Hydro One.
 - c. It is appropriate to use an average of 2.5 Wireline Attachers per pole. The assumption is an integral part of the Approved Methodology. It was also used by Hydro One in the General Rate Application and incorporated into the Approved Rate. A consideration of any value other than this number is outside the scope of the Carriers' R&V Motion.
 - d. If, on the other hand, the OEB determines that, rather than the assumed number of 2.5, it should consider a number based on the "actual" number of Wireline Attachers on Hydro One's poles, then the resultant Pole

Access Charge must take into account Hydro One's pole and cost-sharing arrangement with Bell Canada. Put simply, Bell contributes to 40% of the costs of Hydro One's poles. It does not pay the Pole Access Charge or any other occupancy fee. Therefore, Hydro One can use only the remaining 60% of its costs as the basis for the Pole Access Charge and allocation among the Wireline Attachers who pay it.

- e. If Bell does not pay the Pole Access Charge, then it should not be included in the average number of Wireline Attachers. That means the average number of Wireline Attachers must be at least 1.0. (If it is less than 1.0, then the Attachers would be paying for poles that they are not on.) Given that there are more than one Wireline Attachers operating within Hydro One's territory, it is not unreasonable to assume an average of 1.1 Wireline Attachers per pole.
 - f. All applicable costs must be adjusted in order to remove power-specific assets – this has been assumed to equal 15% of the total cost, which is consistent with the Approved Methodology and is supported by Hydro One.
115. If the above submissions are applied, the resulting Pole Access Charge would be **\$28.51**. In the Carriers view, this is just and reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 10, 2016

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TO: **SERVICE LIST**