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Our File: EB20150304

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2015-0304 – Wireline Pole Attachment Charges – Comments on Draft Report

We are counsel to the School Energy Coalition ("SEC"). These are SEC's comments on the *Draft Report of the Board: Framework for Determining Wireless Pole Attachment Charges* ("Draft Report"). SEC is very supportive of the Board's review of the wireline pole attachment rate, which has not been changed since 2005.[1] Distribution ratepayers have seen their bills increase significantly since that time, but wireline pole attachers have not borne their fair share of this increase as the provincial rate has not been adjusted.

Wireline pole attachers are no different from other customers of a distributor, in that the expectation is that there is a fair allocation of appropriate costs to them. A new updated rate that allocates the costs fairly between distribution ratepayers and third-party wireline attachers will ensure that there is no cross-subsidy between classes of users.

Regulators in Canada and the US, such as the Canadian Radio-television and Telecommunications Commission ("CRTC") or the Federal Communications Commission may have a mandates to encourage wireline attachments for the purpose of expanding broadband access or competition within the telecommunication sector. The Board's mandate is different. It has a statutory mandate to set just and reasonable rates that are consistent with its objectives for electricity to "protect the interests of consumers with respect to prices" under the *Ontario Energy Board Act* ("*OEB Act*").[2] While the outcome of the Board's Draft Report may ultimately lead to a rate for wireline pole attachers that is significantly higher than the current rate, and one that may be higher than other provinces, that is a function of the passage of time since the rate was set, a period during which distribution ratepayers have also seen significant increases in their bills. Their rates have increased

[1] *Decision and Order* (RP-2003-0249 - CCTA), March 7 2005 ["CCTA Decision"],

[2] See *Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B* ["*OEB Act*"], section 1(1)1

significantly more than the rate of inflation over the same period of time. The issue before the Board is one of "cost identification and cost allocation to different customer classes."[3]

SEC has limited its comments to only some of the major areas of concern regarding the proposed methodology. In some areas it is not in a position to comment, since even though the undersigned, on behalf of SEC, was a member of the Pole Attachment Working Group ("Working Group"), it was not provided the data submitted by the utilities to Nordicity in that process. Overall, SEC submits that the proposed methodology in the Draft Report understates the appropriate wireline pole attachment rate and so certain adjustments should be made.

One significant area of concern is how the Board may plan to implement the Draft Report. Usually, the Board's policy documents set out a framework for how individual panels should consider the cases before them, such as by setting out a methodology of guidelines. The Draft Report, though, sets out a specific rate which it says it will implement. It is not clear how the Board plans to do this consistent with its obligations under the *OEB Act.*

A. Draft Report Methodology

Allocation Methodologies

In SEC's view, the central principle behind the cost allocation methodology should be that common costs are divided amongst all users as they are equally required for each individual user (power user or third-party). If a sub-set of the users of the pole require a dedicated space, or incur an incremental cost because of their individual requirements, then those costs are directly assignable to that subset of users (i.e. power or third-party attacher). Equal sharing, which was adopted by the Board in the CCTA decision, is consistent with the principles.

While the Draft Report stated that it is adopting Nordicity's recommendation that allocation of common costs should be done based on a 'hybrid equal sharing' methodology, which is a change from the equal sharing methodology the Board approved in the CCTA decision, it is not clear that this was actually recommended. Regardless, SEC disagrees with this modification to the equal sharing methodology, as it does not lead to a just and reasonable allocation of common space costs.

It would appear to SEC that Nordicity recommends the equal sharing methodology, not the hybrid equal sharing approach. Its report says:

> Therefore, the equal sharing methodology is recommended to allocate indirect costs in the determination of the pole attachment rate. Consideration of any other methodology would require a detailed assessment of costs such as incremental costs (minimum threshold) and standalone costs (maximum threshold) in the Ontario Context. [emphasis added] [4]

Nordicity further states that "the analysis clearly demonstrates that equal sharing methodology is the most appropriate to allocate common costs between the two types of attachers on a joint use pole".[5]

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[3] *Decision and Procedural Order No.* 7 (EB-2016-0085 - InnPower -), November 10 2017, p.3

[4] Draft Report, p.60

[5] Draft Report, p.70

The hybrid equal sharing presented by Nordicity is simply a middle ground between the equal sharing and proportionate approaches.[6] It discussed the hybrid equal sharing methodology in its review of potential options. In doing so, Nordicity does not even attempt to ground the proposal in any economic theory or cost allocation principles. As it readily admits, it "is a novel approach… and has not been applied by any Canadian jurisdiction to the best of Nordicity's knowledge".[7]

The Board in the Draft Report attempts to justify the approach, but that justification is not based on anything presented in the Nordicity Report. The rationale the Board provides in preferring the hybrid equal sharing approach is that the more the number of third-party attachers on a pole, the less the power attacher is allocated of the common space costs, yet, an increase in third-party attachers does not increase the space the attachers use on the pole.[8]

The problem with that approach is that there is no principled reason to allocate the cost of the common space as if it was about dividing costs between two broad categories of customers (power and third-party). All those who attach to the pole, power or third-parties benefit equally from the common space. The most appropriate methodology divides the common space on the pole equally among all attachers (power or third-party) because absent the joint-use scenario, each attacher would have been required to build their own pole that would each have included common space. This is consistent with the comments the Board made in the CCTA decision, where it stated that "common costs should be shared equally among all attachers."[emphasis added][9] While it is correct the communication space does not increase/decrease with the number of third-party attachers, the value they receive from the common space is the same regardless of the number of total attachers. The greater the number of attachers, the less each user, regardless of type, is required to pay.

The equal sharing methodology is the fair approach.

Vegetation Management

The Board has proposed that a fair share of vegetation management costs be recovered through the pole attachment rate. SEC strongly supports this approach.

As the Board pointed out in the Draft Report, there is a major inconsistency between distributors as to how they recover vegetation management costs. As discussed at the Working Group, and demonstrated in two recent proceedings (Hydro One and InnPower), many distributors, while contractually allowed to recover vegetation management costs in their joint-use agreements, are not actually doing so. This has led to a significant cross-subsidy between distribution ratepayers and pole attachers.

Even if all distributors enforced the terms of the joint-use agreements and negotiated with their third-party attachers the payment of vegetation management costs, it would invariably be done on different bases in each case. Since the distributors are recovering the full vegetation management cost in distribution rates, they have a limited incentive to ensure that pole attachers are paying their

[6] Nordicity, p.39

[7] Nordicity, p.40

[8] Draft Report, p.30

[9] CCTA Decision, p,.10

fair share. Including vegetation management costs in the rate allows for Board oversight of how those costs are being appropriated, and ratepayer involvement in the decision-making process.

Use of Average Data

The net embedded cost per pole calculation is the most important cost input into the methodology. This is because it is reflected in both the carrying cost and depreciation indirect expense. Those two elements alone represent 67% of the total pole attachment rate.[10]

The Draft Report used an average of six years historical cost data (2010 to 2015) as the inputs to the proposed methodology, as opposed to the 10 years of data that was used by Nordicity in its report. SEC submits that using multi-year averages of costs is appropriate only if there is year-over-year variability in the cost information as opposed to a consistent trend. If not, then using multi-year averages will lead to a cross-subsidization between distribution ratepayers and wireline attachers.

The net embedded cost per pole input should not be based on a multi-year average calculation. Based on the data in the Nordicity Report, unlike the pole maintenance expense[11], it has a consistent year-over-year increasing trend. Regardless of which set of data in the Nordicity Report one reviews[12], the annual distributor average embedded cost (gross value) per pole, and the net embedded cost (net book value) per pole, have increased every year since 2005. By using a 6 year average as proposed by the Board, the cost allocated understates the actual cost that customers are paying for their share of these costs in distribution rates. The difference between the net embedded cost per pole and the 6 year average is approximately $238 per pole.[13] A similar calculation demonstrates that in the embedded cost per pole used for the depreciation cost calculation, the difference between the 6 year average and the 2015 amount is approximately $164 per pole.[14]

When these amounts are adjusted to remove power fixture costs, and with all other elements of the methodology being held constant, the impact is about $6.32 per attacher in 2015 and $7.00 when adjusted to 2018. This impact will get larger each year, as the trend appears to be sustained.

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[10] [(Carrying cost per pole - $75.57+ Depreciation expense per pole - $26.40) * (Allocation factor with 1.3 attachers - 32.45%) / (Annual Pole Rental Charge 2015 - 49.73)] = 66.5% (See Draft Pole Attachment WorkForm, Tab 'Appendix')

[11] Nordicity Report, p.53

[12] See Nordicity Report, p.47, Table 19, and p.49, Table 21

[13] SEC says approximately since it is unable to fully reproduce the calculations contained in the Draft Report using the data available in Nordicity Report. Specifically, the Appendix to the Draft Pole Attachment Workform, which provides the detailed calculations, provides a NBV per pole of $1077.93 per pole (see cell D20) based on the total NBV number (presumably the 6 year average) of each distributor. Those numbers were not provided in such a way in the Nordicity Report. The closest information is the average net embedded cost per pole (Nordicity Report, p.49, Table 21) which has a six year average of $1,076.17. The difference is $1.76.

[14] Similarly to the above footnote, SEC was unable to fully reproduce the calculations in the Draft Report for the calculation of the embedded cost per pole for the purposes of the depreciation calculation. The Appendix to the Draft Pole Attachment Workform, which provides the detailed calculations, provides a gross book value per pole of $1625.71 per pole (see cell D32). The closest information is the average embedded cost per pole (Nordicity Report, p.49, Table 21) which has a six year average of $1,624.17. The difference is $1.54.

Cost Per Pole				
Year	Net Embedded Avg	% Change	Embedded Avg	% Change
2005	$610.00		$1,151.00	
2006	$641.00	5.08%	$1,185.00	2.95%
2007	$687.00	7.18%	$1,246.00	5.15%
2008	$752.00	9.46%	$1,335.00	7.14%
2009	$802.00	6.65%	$1,398.00	4.72%
2010	$856.00	6.73%	$1,431.00	2.36%
2011	$935.00	9.23%	$1,517.00	6.01%
2012	$1,003.00	7.27%	$1,577.00	3.96%
2013	$1,112.00	10.87%	$1,694.00	7.42%
2014	$1,237.00	11.24%	$1,721.00	1.59%
2015	**$1,314.00**	**6.22%**	**$1,805.00**	**4.88%**
2010-2015 avg	**$1,076.17**	**8.59%**	**$1,624.17**	**4.37%**
Source: Nordicity Report, p.49, Table 21				

SEC submits that the Board should not use multi-year averages for the net embedded cost per pole calculation, but use the 2015 cost per pole. If not, the Board is understating the cost per attacher of approximately $7.00. In fact, if anything, this still understates the actual cost as the annual increases in the net embedded cost per pole are significantly higher than the inflation adjustment from 2015 to 2018 at a 6-year average of 4.37% a year.

Attachers or Attachments

As discussed in the Draft Report, currently the pole attachment rate is set on an attacher not attachment basis.[15] The Draft Report is not proposing to change that in the new rate. From discussions in the Working Group, most distributors do not currently even track the number of attachments per pole. While historically it may have made sense to consider attachments and attachers to be essentially synonymous, significant consolidation in the telecommunication industry since the CCTA decision has increasingly led to the same attacher having multiple attachments on a pole.[16]

SEC supports the Draft Report requirement that distributors on a going forward basis begin to collect and track attachment data so that in a future review the information will be available to the Board.

Number of Attachers

The Board has adopted Nordicity's recommendation of 1.3 third-party attachers per joint use pole.[17] This is based on the data provided to Nordicity from four distributors.[18]

SEC raises two issues with this that warrant further consideration. First, the 1.3 third-party attachers, as calculated by Nordicity, include non-communication attachers such as streetlights and generators which may not attach in the communication space. This has an effect on the allocation of indirect

[15] Draft Report, p.53

[16] See EB-2015-0004, Tr.2, p.146

[17] Draft Report, p.13

[18] Nordicity Report, p.44-45

costs, as the number of actual attachers per pole sharing the communication and separation space will be less than 1.3. The issue is material, as many utilities have significant numbers of streetlight attachments on their poles. For Hydro Ottawa, as of 2015, streetlights made up 22.4% of its third-party attachers.[19]

A second, related issue is that distributors are not charging all third-party attachers, specifically streetlight attachments. SEC understands that this is because in many cases those distributors have reciprocal arrangements with municipalities in which they have access at no cost to streetlight poles. If this is the case, and the arrangement is appropriate, streetlights should be removed from the attacher per pole calculation on the same basis that the Draft Report has excluded Bell attachments.[20]

Rounding of Proposed Rate

The Draft Report states that the wireline attachment rate will be $52 per year per attacher for 2018. Yet, the $52 rate is a rounded down $52.36 per attacher that results from the methodology and cost inputs.[21] The Board never rounds rates to the nearest dollar, and it not clear from the Draft Report why it has chosen to do so for wireline attachers.

SEC submits doing so is inappropriate and results in an unnecessary cross-subsidy from distribution ratepayers. While $0.36 may seem immaterial at first glance, aggregated over all attachers for every distributor, the amount is significant.

B. Implementation

Method of Implementation

The Draft Report states that the "OEB intends to have its new wireline pole attachment rate of $52 effective the 1st month following the issuance of this policy on a final basis (early 2018)."[22] The Board plans to apply it to all distributors that do not have an OEB-approved specific rate.[23]

SEC is unclear how the Board plans to implement the Draft Report, and specifically, what parts of the report does it expect will require, if at all, further refinement through a hearing process.

While the Draft Report sets out a specific pole attachment rate that the Board plans to implement province-wide, a Board policy cannot set a rate. The Board can only set a rate by way of an order pursuant to section 78(2) of the *Ontario Energy Board Act, 1998* (*"OEB Act"*) [24] after it is held a hearing pursuant to section 21(4).[25] This consultation process, while beneficial to all stakeholders who have participated, is not a hearing.

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[19] See EB-2015-0004, J2.3. Streetlights made up 13,516 of the total 60,463 attachers (22.4%).

[20] Draft Report, p.45

[21] Appendix to the Draft Pole Attachment Workform

[22] Draft Report, p.47

[23] Draft Report, p.47

[24] In the CCTA decision the Board set the rate by way of a license amendment under section 74(1). See CCTA Decision, p.1. Regardless if the Board sets the rate by license amendment or through its rate setting authority, the same requirements for a hearing exist.

[25] *OEB Act,* s.21(2)

Customer groups did not have the ability to request information from the distributors as they would in a hearing though interrogatories, nor did they have the ability to file expert evidence on the appropriate allocation methodologies. Further they were not provided an opportunity to test the Nordicity report, as no draft was provided to Working Group members to review.

The exception to the requirement to hold a hearing under the *OEB Act* when exercising its statutory authority to make an order, is if no party requests a hearing within a reasonable time set by the Board after providing notice, or the Board determines that no person is adversely affected in a material way by the outcome.[26] Neither applies in this case. Considering the history of the issue in numerous proceedings, SEC expects that at least those with wireline attachments would want a hearing if notice is provided. Further, it cannot be credibly said that those who have pole attachments will not be adversely affected in a material way by the proposed rate change in the Draft Report. For some customer groups, they could argue the same thing, i.e. that they would want a hearing, and that the proposed rate change affects them adversely, i.e. as being too low.

In certain situations, the Board has also set rates without a hearing utilizing its authority under section 6 of the *OEB Act* to delegate its authority to set that rate to an employee of the Board. In that situation, the delegate is not required to hold a hearing.[27] While some parties would certainly argue that section 6(4) is implicitly subject to section 21(4), because the power delegated to the employee is the Board's power, which is expressly circumscribed, this issue has not been raised in the past because the Board has been scrupulous to limit its use of section 6(4) to situations that were clearly and obviously mechanistic in nature. Thus, they were not contentious.

SEC is not aware of any other situation where rates have been set by way of delegated authority without a hearing, in a situation where the underlying issue is as contentious as that of the appropriate wireline attachment rate, nor where the percentage change in rates on one group of customers is as large as is proposed here.

SEC submits it is not good regulatory practice to use the section 6(4) authority for anything but routine mechanistic adjustments to rates, or changes to rates required by binding methodology set by regulation, as it does with the Rural or Remote Electricity Rate Protection[28] or Distribution Rate Protection.[29] On that basis, SEC does accept that the Draft Report's proposal for annual inflation adjustments to the pole attachment rate would be appropriately dealt with under the Board's delegated authority powers.

The recent history of pole attachment proceedings is that they have been highly contentious. Rogers, a third-party communications attacher, has even appealed two of the decisions to the

[26] *OEB Act,* s.21(4)

[27] The methodology for calculating the Rural or Remote Electricity Rate Protection charge is determined by Ontario Regulation 442/01 (See for example, Decision and Order (EB-2017-0234), June 22 2017)

[28] The methodology for calculating the Distribution Rate Protection determined by Ontario Regulation 197/17

[29] See for example the implementation of the Rural or Remote Electricity Rate Protection charge, the methodology is determined in Ontario Regulation 442/01 (Decision and Order (EB-2017-0234), June 22 2017)

Divisional Court.[30] Rogers has already been very vocal about its unhappiness about the consultation process[31], and it is predictable that implementation of the new policy, particularly without a hearing, may generate a further challenge. Frankly, it is possible that customer groups would also challenge the rate. Either way, seeking to implement the rate without a hearing is not likely to simplify the regulatory process, but is more likely to complicate it.

SEC recommends that the Board set out express guidance regarding how it proposes to implement the final version of the Draft Report in accordance with the *OEB Act*, so that parties understand how the proposed methodology that underlies the number is expected to be applied, and so that there is ultimately a sustainable result.

Speaking more generally, setting rates, directly or indirectly, by way of policy consultation is, in SEC's view, inappropriate. The final pole attachment rate should be adjudicated in a hearing like any other contentious rate issue. A generic hearing to do so is the perfect avenue for this. The Board's Draft Report is an appropriate starting point for that proceeding, but it cannot be the end point. The sooner a generic proceeding can occur, the better off all ratepayers (both distribution and third-party attachers) will be.

Therefore, SEC recommends that the final Report set out a generic hearing process to determine the provincial pole attachment rate.

Provincial vs distributor Specific Rate

The Draft Report provides that the Board intends to set a provincial wide rate in 2018, and adjust that rate using the Board's inflation number each year.[32] The Board also has provided that distributors can choose to select at their rebasing to apply for their own utility-specific pole attachment rate based on the approved methodology set out in the Board's final report.

SEC agrees that setting a provincial rate for 2018 makes sense, but believes the Board should require distributors to apply for a utility-specific rate at the time of their individual rebasing applications.

As seen in the data of just the 5 utilities that provided information during the Working Group that is the basis of the Nordicity Report, the cost information varies significantly between distributors.

A separate problem with allowing distributors the option to determine if it should seek a utility-specific rate is that there are inherent biases that may determine if they will or will not apply for one. To them, it is revenue neutral, while between distribution ratepayers and third-party attachers, it is not. From the distributors' perspective, since they will get recovery of their full costs either way, they do not see the value for them in seeking a utility-specific rate. For example in the recent InnPower rates proceeding (EB-2016-0085), after being told by the Board to provide notice to attachers

[30] *Rogers Communications Canada Inc. v The Ontario Energy Board*, 2017 ONSC 3959; *Rogers Communications Partnership v Ontario Energy Board*, 2016 ONSC 7810

[31] Letter: Re: *Review of Miscellaneous Rates and Charges (EB-2015-0304) Wireline Pole Attachment Charges*, From: Michael Piaskoski (Rogers Communications), Dated March 7 2017

[32] Draft Report, p.32

regarding the proposed rate change, it tried to withdraw its request for a utility-specific rate.[33] At the very least, the Board should require in all cost of service or Custom IR proceedings, notice to be provided to all third-party attachers that state that the wireline attachment rate *may* change. This would allow for a utility-specific rate be set by the Board even if it was not originally proposed by the applicant distributor.

It is also unlikely that a distributor will seek a utility-specific rate if their individual costs are lower than those that are the inputs to the provincial rate. This is unfair to third-party attachers. Distribution ratepayers normally cannot seek to raise the pole attachment rate during a rate hearing, absent a request from the distributor. This is because unless a distributor seeks to change the rate, third-party attachers are not provided notice, which is a legal requirement.[34]

If a distributor does seek a utility-specific attachment rate, the Draft Report should clarify three issues.

First, what does it mean by the "OEB's methodology"[35]? The Board should clarify which specific inputs are open to adjustment on a utility-specific basis, and which ones are not. For example, is the power deduction factor of 85% part of the approved methodology, or is it open for a distributor to propose another amount based on their evidence?

Second, the Draft Report discusses that the provincial rate will be adjusted annually using the Board's inflation number for the year[36], but is silent on what happens to a utility-specific rate. SEC submits that the same adjustment should be made to a utility-specific attachment rate during the distributors' respective IRM adjustment, unless the distributor files evidence demonstrating that a different escalation factor is appropriate in their case.

Third, while SEC understands why historic data is used for the provincial rate, it is not clear why a distributor seeking a utility-specific rate would not use the same forecast cost information as it is using for setting distribution rates. By using historic data, even if adjusted for inflation, it will lead to a mismatch in the allocation of approved costs that distribution ratepayers and third-party attachers will pay. If forecast cost data is appropriate for forward test year rate-setting for distribution ratepayers, it should be appropriate for third-party attachers. The Board should allow distributors to use test year cost information as part of setting any utility-specific rate.

All of which is respectfully submitted.

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[33] *Procedural Order No.6* (EB-2016-0085 - InnPower), October 10 2017

[34] *Decision and Order* (EB-2015-0141 - Rogers et al), June 3 2015, p.3; *Decision and Procedural Order No. 7* (EB-2014-0116 - Toronto Hydro) , February 23 2015

[35] Draft Report, p.32

[36] Draft Report, p.32-33

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Interested parties (by email)