EB-2015-0304

Draft Report of the Board

Framework for Determining Wireline Pole Attachment Charges

Submission of
Rogers Communications Canada Inc.

Submitted on behalf of

Bragg Communications Inc., Canadian Cable Systems Alliance, Cogeco Connexion Inc., Independent Telecommunications Providers Association, Zayo Canada Inc. (formely Allstream Inc.), Niagara Regional Broadband Network, Packet-tel Corp. (o/a Packetworks), Québecor Média Inc., Rogers Communications Canada Inc. Shaw Communications Inc., Tbaytel, TELUS Communications Inc. and BH Telecom

EXECUTIVE SUMMARY

1. In this submission, Rogers Communications provides its comments on the OEB's *Draft Report of the Board - Framework for Determining Wireline Pole Attachment Charges* (the "**Draft Report**"), as well as the supporting report prepared by the OEB's economic expert, Nordicity (the "**Nordicity Report**").

2. Rogers had an active role in the industry Pole Attachment Working Group ("**PAWG**"), which was established to undertake a policy consultation process that to examine telecom wireline attachments to LDC poles. The PAWG's meetings, discussions and input were used by OEB staff to prepare the Draft Report. Having participated in the PAWG and now reviewed the Nordicity Report and Draft Report, Rogers is extremely disappointed in the haphazard manner in which the PAWG process was managed, which has now metastasized into two defective and error-riddled reports that call for a new province-wide pole attachment rate.

3. In our view, the entire PAWG process was deficient and deeply-flawed. The following discussion provides a high level summary of many of the deficiencies we have identified, and why we believe the Board has no choice but to "shelve" the Draft Report and reject all of its recommendations.

Material issues with the PAWG process, Nordicity Report and Draft Report

- The PAWG process failed its original and principal purpose – to come up with a proper rate-setting methodology for telecom attachments on hydro or LDC poles. The PAWG had no mandate to set a province-wide rate, which became the focus of all its efforts and the primary matter discussed in the two reports.

- The PAWG process provided no meaningful discussions on methodology and how pole costs should be allocated to telecom attachers.

- There was no opportunity for parties to submit or test real evidence on all the issues in dispute. Most of the Board's conclusions are all based on anecdotal evidence put forth by the LDC participants.

- The costing data that was collected from the LDCs and curated by Nordicity and the Board to form the new pole attachment rates was completely unreliable. It was inconsistent, incomplete, untested and full of mistakes, and there were no opportunities for participants to test it. It would be patently unreasonable for the Board to continue to use this data.

- The PAWG process was not compliant with the OEB's own policies and procedures regarding rate-setting procedures and policy consultations.

- From a legal perspective, the PAWG process is an illegitimate attempt to set a new province-wide pole attachment rate. In other words, the Board is not legally permitted to set rates through policy statements. It can only do so through an open and transparent public hearing. In addition, the PAWG process was a breach of procedural fairness

- The Draft Report made numerous recommendations on "key policy issues" that are based on faulty assumptions and incorrect facts, making them ultimately misinformed and misguided. They have a significant impact on the pole attachment rate and are unsustainable on any reasonable basis.

- In the Draft Report, the OEB makes conclusions and adopts recommendations that are completely at odds with the recommendations of the PAWG industry participants and Nordicity, the Board's own expert. In many cases, the Draft Report completely misapprehends the issues at hand (e.g., adjustments for inflation, the treatment of tree-trimming (vegetation management), the revenues the telecoms receive from other telecoms attaching to their wires (overlashing), and the effect of the pole-sharing agreements that LDCs have with Bell Canada.

- The new pole rate of $52 proposed in the Draft Report, as well as its supporting costing methodologies, are full of mistakes, whether caused by faulty data, inappropriate calculations or faulty assumptions. In fact, every single category of costing input for the pole rate has issues that raise considerable doubt on its integrity and veracity.

- The Board's proposal to explore a "value-based" pole rates for what has been declared an "essential service" is unprecedented and completely inappropriate.

4. We cannot support the recommendations of the Draft Report in any capacity and we urge the Board to scrap or shelve the Draft Report and reconsider how to address this issue using a proper administrative proceeding.

INTRODUCTION

1. Rogers Communications Canada Inc. ("**Rogers**") is pleased to provide its comments on EB-2015-0304, *Draft Report of the Board - Framework for Determining Wireline Pole Attachment Charges* dated December 18, 2017 (the "**Draft Report**") prepared by the Ontario Energy Board (the "**OEB**" or the "**Board**"), as well as the supporting report prepared by Nordicity, *OEB Wireline Pole Attachment Rates and Policy Framework* dated December 14, 2017 (the "**Nordicity Report**").

2. This submission is provided on behalf of Rogers and 12 other telecommunications companies[1] (collectively, the "**Carriers**").

3. The Nordicity Report and the Draft Report represent the conclusions and recommendations of Board staff following a lengthy consultation process involving an industry working group referred to as the Pole Attachment Working Group (the "**PAWG**" or the "**Group**"). The PAWG was made up of representatives from the electricity distribution industry (referred to as local distribution companies or "**LDCs**"), the telecom industry (*i.e.*, the Carriers) and ratepayers groups. The Carriers' representatives included Rogers, Cogeco, TBTel and BH Telecom. OEB staff and their economic expert, NGL Nordicity ("**Nordicity**") made up the balance of the PAWG.

4. The PAWG was created following two very contentious pole attachment rate hearings in which the Board decided it would not establish a methodology for setting pole attachment rates. (These were proceedings for Hydro Ottawa[2] and Hydro One[3].) Instead, the Board issued decisions based on the methodology that had been established back in 2005.[4]

5. The PAWG met four times throughout 2016 and the beginning of 2017. As expected, it was very difficult for participants with completely different interests to reach a consensus on most items. It was also not surprising that many of the issues that were hotly disputed (but not ruled upon) in the Hydro Ottawa and Hydro One proceedings the Board came up in the PAWG proceeding.

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1 Bragg Communications Inc., Canadian Cable Systems Alliance, Cogeco Connexion Inc., Independent Telecommunications Providers Association, Zayo Canada Inc. (formely Allstream Inc.), Niagara Regional Broadband Network, Packet-tel Corp. (o/a Packetworks), Québecor Média Inc., Shaw Communications Inc., Tbaytel, TELUS Communications Inc. and BH Telecom

2 EB-2014-004, Decision and Order, February 25, 2016

3 EB-2015-0141, Decision and Order, August 4, 2016

4 RP-2003-0249, Decision and Order, March 7, 2005

6. What was not expected was how deficient and defective the whole PAWG process ended up being, and how Board staff and Nordicity were unable to manage the issues before them in order to fulfill their principal objective of coming up with a rate-setting methodology for telecoms to install their wireline equipment on LDC poles (referred to as "telecom attachers" and "telecom attachments").

7. Throughout the PAWG proceeding, the Carrier representatives voiced their objections to the manner in which the meetings were being held, leading to the Carriers expressing their concerns in a letter to the Board on March 7, 2017. A copy of that letter can be found at **Appendix A** to this submission.

8. Instead, we have a Draft Report that ignores the recommendations of the Board's own expert and calls for a $52.00 province-rate based on a wealth of dubious data and incorrect calculations, a suggestion of a methodology that will not stand up to any scrutiny, and a call for "market rates" in the future.

9. In our submission, the PAWG process, the Nordicity Report and the Draft Report contain an overwhelming number of material errors, dealing with procedural fairness, data integrity, assumptions used and theories and calculations applied. These errors contribute towards a pole attachment rate and policy that are punitive towards the telecoms, and cannot be viewed as "just and reasonable".

10. These matters are of such significance, that the Carriers have retained an economic expert, a regulatory expert and legal counsel to provide their opinions on the PAWG proceeding and the resultant reports. These matters can no longer be decided by a group of people in a room arguing and "speculating" about LDC cost accounts and economic theories.

11. The OEB has demonstrated that it is completely out of sync with all the utility regulators in North America as it continues to set and propose rates that are at least twice that of rates elsewhere.

12. This submission is divided into the following six parts:

    (a) **Part A** describes all of the procedural deficiencies contained in the PAWG proceeding.

    (b) **Part B** demonstrates how the PAWG process fails to conform to the Board's previously stated policies and usual practice for setting rates. It was prepared with the assistance of Paula Zarnett of BDR NorthAmerica

Inc. Her complete and compelling report ("**BDR Report**") can be found at **Appendix B** to this submission.

(c) **Part C** demonstrates, from a legal perspective, how the PAWG process cannot be used to form the basis of a province-wide rate. It was prepared by the law firm of Fasken Martineau in Ottawa.

(d) **Part D** comprises a critique of the recommendations from the Nordicity Report and the Draft Report relating to the "key policy issues" identified by Board staff during the PAWG process. It was prepared with the assistance of Andrew Briggs, AGBriggs Consulting Inc. His comprehensive report ("**Briggs Report**") can be found at **Appendix C**.

(e) **Part E** does a deep-dive of the Nordicity Report and the Draft Report to expose numerous errors and inconsistencies in the data, costing methodologies and calculations used to establish the new provincial pole attachment rate. This was also completed with the assistance, who raises no less than 29 significant "issues" relating to the analyses in the two reports. This section examines each of the costing inputs to the pole attachment rate.

(f) **Part F** raises our argument on why it is entirely inappropriate for the Board to pursue value-based rates in its proposed second phase of this proceeding.

(g) Finally, **Part G** contains a short conclusion and recommendation.

A. The PAWG process itself was deficient and failed its purpose

1. PAWG failed to meet its original mandate

1. In its letter dated 5 November 2015, the Board sets out its intention to establish the PAWG, stating as follows:

> The OEB will establish a Pole Attachments Working Group (PAWG) *to provide advice on the technical aspects and related details* to be addressed in 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. Later, in its letter dated February 9, 2016, the Board established the composition of the PAWG and provided more information regarding the consultation process.

> The main objectives of the wireline pole attachments review includes an *assessment of a number of technical issues and details related to pole attachments, and the review of the cost allocation methodology for setting wireline charges for pole attachments*, including the appropriate treatment of any revenues that carriers may receive from third parties*. [emphasis added]*

3. Based on the above, it is clear that a core task of the PAWG was to review the rate-making methodology. However, in reality, very little time was spent on this principal issue. Instead, the majority of the time in the meetings was spent discussing the collection of costing data from the LDCs (which, in of itself, turned out to be an exercise of largely questionable value), reviewing various aggregations and permutations of that data, and considering an alternative "economic return" costing model introduced by Nordicity that was eventually scrapped.

4. In fact, at the third PAWG meeting, Board staff changed the focus of the PAWG from a review of methodology to a consideration of a province-wide "default" rate based on all of the untested costing data Nordicity collected from the LDCs.[5] To the extent methodological issues were discussed, PAWG participants simply tabled their positions on a summary and anecdotal basis. There was no requirement to provide supporting evidence that could be tested and challenged by other parties.

5. For example, there was no discussion or analysis on the types of work activities that comprise *administrative* and *loss in productivity* costs or on how to record

5 Minutes of PAWG Meeting #3, p.15.

and calculate them. Instead, Nordicity and the Board applied simple percentages to certain of the LDCs' accounting codes to derive default values. Save for an untested and self-serving analysis put forth by Hydro One, there was no discussion or analysis on how "power-only" assets should be excluded from the pole costs. Again, a simple percentage was applied to an LDC account code. There was also no discussion or analysis on the technical aspects of tree-trimming and vegetation management around poles. Instead, the Draft Report has once again simply adopted an unchallenged and unverified percentage of an account code (Account 5135) put forth by Hydro One.

6. In summary, the PAWG failed to properly explore the matters that are at the core of determining a just and reasonable pole attachment rate, as was mandated by the Board. Instead, as the Draft Report demonstrates, this task was replaced by a quest for efficiency that led to the importation of unreliable and questionable data into even more questionable calculations to come up with a one-size-fits-all pole attachment rate.

2. Process did not allow parties to submit or test relevant evidence on issues

7. The PAWG process provided no opportunity for participants to present or test expert or lay evidence on numerous critical issues, including:

   (a) on how to allocate the common costs of a pole;

   (b) the relative weight and stress placed on a pole by different types of attachers; the disparities between the rights and obligations of telecom attachers as opposed to pole owners;

   (c) the methodology for excluding power-specific assets from pole costs

   (d) the appropriate treatment of vegetation management; and

   (e) the inputs to and methodologies for determining administrative costs and loss in productivity costs.

   These issues all have a significant effect on the pole attachment rate.

3. The data collected for the LDCs was unreliable and, for the most part, unusable

(a) Costing inputs provided by the LDCs were undisclosed, inconsistent, incomplete and untested

8. Nordicity and the Board proudly boast that the data collected from the participating LDCs represents more than 90% of the province's pole population – "the most comprehensive pole attachment data ever collected"[6] (even though not all of the LDCs provided the requested data for most of the categories). However, as suggested by Briggs, the mere act of providing an input to a request has nothing to do with the quality of the data, nor with the consistency of the data, either over time or across LDCs. Simply collecting data from the LDCs in a mechanistic manner as inputs into the pole attachment rate model, without a thorough review and vetting of the quality and appropriateness of these inputs, leads to inappropriate results for the pole attachment rate.[7]

9. Indeed, our review and analysis of this data raises considerable doubt as to its utility, not to mention its integrity. As Briggs points out, there are numerous instances where the data provided by the LDCs raises serious quality questions and thus its suitability for inclusion in the pole attachment rate model.[8]

10. There were also huge variances among the data inputs collected, none of which was examined or explained by Nordicity or the Board. In addition, there was no evidence to suggest that the age, size and other characteristics of the pole populations were similar across LDCs – factors which have a significant impact on pole costs.

11. There were also inconsistencies in what data was provided by the five participating LDCs. In some cases, all five LDCs provided data. In other cases, it was two or three, and for one input, only a single LDC contributed. This lack of cooperation and discipline did little to instill confidence in this whole fact-gathering experience, and undermined any confidence in the results.[9]

12. Most of the data collected by Nordicity was not disclosed to the PAWG participants. Instead, Nordicity consolidated and aggregated the data and presented it in a series of slides that lacked sufficient details for the rest of the Group to fully comprehend. Without full disclosure of all the data, as well as the

6 Nordicity Report at p.3, Draft Report at p.10.

7 Briggs Report, Issue 3.

8 Briggs Report, Issues 18, 19, 20, 22, 24, 26.

9 See the Briggs Report pages 5 - 6 for a summary of the data collection.

approaches the LDCs used to come up with their cost estimates, it was and is just not possible to determine if the data is consistent and comparable.

13. Further, without full disclosure of the data and estimation approaches, as well as an understanding of all the inconsistencies across the data, it is not possible to determine whether the averages derived from this data are representative of costs incurred by other LDCs.

14. In our view, Nordicity's data-gathering efforts resulted in a comprehensive assortment of incomparable data that is completely unreliable in reaching any conclusion, much less a once-size-fits-all rate.

(b) PAWG did not provide opportunities for participants to actually test the costing data collected from the LDCs

15. As stated above, much of the data submitted by the LDCs to Nordicity (as well as the underlying inputs and assumptions used to generate the data) was not even disclosed to the rest of the Group. Further, none of the assumptions, inputs to those assumptions nor resulting cost estimates were tested or challenged through interrogatories and cross-examination, meaning that parties were unable to assess the quality and probative value of any of this material.

16. What data was disclosed showed significant differences in cost estimates among the LDCs. These significant differences and inconsistences remained unexplained. More generally, there was no clear understanding regarding how cost inputs should be estimated and, as result, what the numbers do or might represent. In our view, therefore, the data is entirely unreliable for the purpose of setting a pole attachment rate.

(c) The Draft Report's reliance on data from the Toronto Hydro pole rate proceeding is inappropriate and illegitimate.

17. For various inputs to the pole attachment rate, the Draft Report uses data taken from the Toronto Hydro pole rate proceeding in 2015[10] (the "**Toronto Hydro Proceeding**"). The use of this data as a basis for the pole attachment rate is both inappropriate and illegitimate. The final rate of $42.00 in the Toronto Hydro proceeding was established by way of a settlement agreement without any reference to costing data or methodology.[11] None of the costing inputs in that proceeding were ever reviewed or confirmed by the Board. At the time of the

10 EB-2014-0116.

11 EB-2014-0116, Decision on Settlement Proposal, July 23, 2015.

settlement, these matters were still in dispute, and Rogers and other carriers had submitted evidence demonstrating that the costs filed by Toronto Hydro were significantly overstated.[12]

18. In fact, the Toronto Hydro data used in the Draft Report actually came from Toronto Hydro's offer to settle dated May 20, 2015, for which it had proposed a pole attachment rate of $58.34. It is entirely inappropriate for the Board to consider these proposed costs, which formed part of a privileged and confidential settlement offer, as valid inputs to a provincial pole attachment rate.

(d) Results are skewed to favour one single LDC – Hydro One

19. Throughout its report, Nordicity attempts to create provincial averages using various combinations of LDC data that are weighted based on the LDCs' respective pole populations. Given that Hydro One represented 85% of the sample pole population that was collected, any "averages" are unnaturally skewed by Hydro One's numbers and would not by definition be representative of the pole costs, as well as the pole and attacher populations, of the rest of the LDCs in the Province. This exercise ended up being overly simplistic and unreliable.

(e) Crucial data was not provided leaving Nordicity to use unsuitable numbers

20. We note that, while Toronto Hydro, with 8.3% of the poles sampled, provided input on its total number of poles to Nordicity, it refused to submit data on the corresponding number of telecom and other attachers on its poles. This required Nordicity and the Board to rely on unsubstantiated numbers from the Toronto Hydro Pole proceeding. It is not surprising that Toronto Hydro did not want to reveal this number given that it recently signed a deal to share thousands of poles for Bell's FIBE project.[13]

(f) The LDC data is mismatched and full of mistakes.

21. As reviewed comprehensively by Briggs, there are numerous errors in the data that was provided, as well as the resulting calculations that raise considerable doubts regarding most of the conclusions reached by Nordicity and the Board in their reports. There errors are discussed in detail in Part E.

12 EB-2014-0116, Expert Evidence of Suzanne Blackwell on behalf of the Carriers, March 26, 2015.

13 Briggs Report, para. 80.

B. The PAWG did not comply with the OEB's own policies and procedures

22. In this Part, we explore the mechanics of the PAWG process to demonstrate how it failed to meet the OEB's own policies, procedures and practices for setting rates, not to mention the high level of regulatory quality and expertise for which the OEB is known.

23. This Part is based on the conclusions from the report authored by Paula Zarnett of BDR NorthAmerica, which can be found at **Appendix B**. The following discussion serves to identify at a high level the shortcomings of the PAWG process in this regard.

1. The outcome of the PAWG does not meet its initial scope and mandate

24. The creation of the PAWG was prefaced with the mandate "to provide advice on the technical aspects and related details to be addressed in respect of pole attachments"[14]. There was no intent or mention of the PAWG to develop into a typical rate-setting process. This is inherent in the fact that there were no traditional rate-setting roles assigned to parties, such as applicants or interveners. In fact, the process was defined as a "review of wireline pole attachments and the methodology used for determining charges, including the appropriate treatment of any revenues that carriers may receive from third parties"[15].

25. There was no scope or mandate for the PAWG to proceed as a rate-setting process. Even the Draft Report acknowledges that the key objectives of the pole attachment review did not include a rate-setting process.[16] Despite this, the Draft Report proposed to increase the pole attachment charge by 233%. This was the only warning to PAWG participants of the true purpose of the methodology review.[17]

14 https://www.oeb.ca/oeb/_Documents/EB-2015-0304/Brdltr_Misc_Rates_Charges_Review_20151105.pdf

15 https://www.oeb.ca/industry/policy-initiatives-and-consultations/review-miscellaneous-rates-and-charges

16 Draft Report, p.9.

17 BDR Report at p.7.

2. The PAWG process did not follow the OEB's process for setting rates

26. Notwithstanding the arguments that the initial intention of the PAWG did not include the setting of a new rate, in attempting to do just that, the PAWG failed to follow the OEB's standard rate-setting process. The appropriate rate-setting process usually undertaken by the OEB, and other North American regulators, includes an application, public hearings and presentation of evidence through an open and transparent process.[18]

27. The PAWG process did not fulfill the mandate of the OEB in setting just and reasonable rates through an open and transparent public hearing.[19] Inclusion in the PAWG was limited to those participants who were selected by the OEB without consideration as to the roles of applicant and intervener. All other stakeholders who wished to participate have only had the option of commenting on the Draft Report after its issuance.

28. If the Draft Report is approved and implemented, the OEB will have set a rate without any party to "take ownership" of evidence, and without an open and transparent public hearing which allows intervenors, especially including the customers who will pay the rate, the opportunity to publicly test the applicant's evidence with relevant questions, present their own evidence and be tested, and to be heard directly by a panel of the Board.[20]

3. None of the Board's policy consultations were used to set rates

29. As Zarnett observes, the Board frequently uses a process of stakeholder consultation, leading to a Staff or Board Report, to deal with methodology and policy issues. However, of the examples she reviewed on the OEB website, none of these processes were used for setting of rates.[21]

30. The PAWG process sticks out as an inappropriate use of this consultation process.

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18 Energy Sector Regulation – A Brief Overview, p.2 https://www.oeb.ca/oeb/_Documents/Documents/Energy_Sector_Regulation-Overview.pdf

19 Ibid.

20 BDR Report at p.9.

21 BDR Report at pp.12-19.

4. The rate increase is well beyond the Board's "rate shock" limits

31. The Draft Report proposes a pole attachment rate increase of 233%. The significant magnitude of increase is not consistent with the Board's usual policy of mitigating rate shocks to users.

32. By classifying utility poles as essential services, the Board has consistently called for rates that are just and reasonable.[22] As such, telecom attachers are a customer class unto LDCs and the Board has expressed the desire of avoiding rate shock for "any customer class".[23] Further, according to the Board's 2016 *Handbook to Utility Rate Applications*, "the OEB has a policy requiring the filing of a mitigation plan when the total bill impact is 10% or more for any customer class. [emphasis added]" The proposed increase of 233% is, without a doubt, a departure from longstanding Board policy that applies to other users of a distributor's services.

33. Zarnett concludes that the PAWG process leading up to issuance of the Draft Report was not consistent with the OEB's usual practice in rate-setting. Furthermore, it resulted in a rate increase qualifying as rate shock by the Board's own standards for "any customer class", as well as an annual adjustment approach that is inconsistent with cost allocation principles under price cap rate-setting.[24]

22 RP-2003-0249, p3.

23 *Handbook to Utility Rate Applications*, October 13, 2016, page v; EB-2012-0410 - *Board Policy: A New Distribution Rate Design for Residential Electricity Customers*, April 2, 2015, p.13.

24 BDR Report at p.21.

C. From a legal perspective, the PAWG process cannot form the basis of province-wide rate

1. The Board cannot set rates through policy statements

34. As discussed above, on November 5, 2015, the Board initiated what it called "a comprehensive policy review of miscellaneous rates and charges applied by electricity distributors for specific activities or services they provide to their customers". It stated that the first phase of the review would include:

> a review of wireline pole attachments and the methodology used for determining charges, including appropriate treatment of any revenues that the carriers receive from third parties.

35. In its letter, the OEB established the following process for 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 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.
>
> The OEB is seeking expressions of interest for participation in the proposed PAWG. Based on these expressions of interest, staff will select a representative group of people representing wireline industry, electricity distributors and consumer groups. It is expected that the PAWG will meet approximately four times.

36. The OEB subsequently retained Nordicity to facilitate the PAWG meetings and provide expert input and analysis of the key issues for discussion and feedback, culminating in a report to "recommend an appropriate framework methodology for setting pole attachment charges." The Nordicity Report was released along with the OEB's Draft Report on December 18, 2017.

37. In its Draft Report, the OEB went beyond a review of the Nordicity Report (which it did not adopt in its entirety) and set a default rate of $52.00 per pole to come into effect in early 2018. This rate will apply unless electricity distributors present different cost inputs to justify a different rate. There are a number of serious flaws in this process, which are discussed below.

(a) Pole attachment charges fall under s. 78 of the OEB Act

38. Section 78 of the OEB Act establishes the Board's power to establish rates. It provides as follows:

> **78 (1)** No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract.

39. The Board has a duty to establish just and reasonable rates, which is provided for in subsection 78(3):

> **(3)** The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the Electricity Act, 1998

40. The Supreme Court of Canada has referred to this requirement to set just and reasonable rates as the Board's ultimate duty.[25]

(b) Rates must be justified with evidence presented in an open and transparent public hearing

41. Subsection 21(2) of the Act states that a hearing must be held prior to making an order:

> (2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct.

42. Subsection 21(4) requires a hearing in all cases except where no person has requested a hearing and no other party is affected by the outcome:

> **(4)** Despite section 4.1 of the Statutory Powers Procedure Act, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,
>
> (a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or
>
> (b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the

25 Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, [2015] 2 S.C.R. 147, para 7.

proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

(c) The Board cannot make an order until it has held a hearing

43. In this case, it is obvious that the Carriers, including Rogers, will be affected by the rate set by the Board. In this case, notice of a hearing must be given and a hearing must be convened in order to test the Nordicity Report and the conclusions reached by the Board in its Draft Report, including its modifications to Nordicity's methodology. This requires a full hearing - not just comments on a proposed rate or policy.

2. The Board did not follow its own rules regarding expert evidence - only its own expert was involved and evidence was untested

44. There has been no opportunity provided to Rogers and other parties affected by the Board's determination to test the methodology proposed by Nordicity, which forms the basis of the Draft Report. While an opportunity was provided to participate in four meetings of the PAWG, this is no replacement for a public hearing in which differing evidence may be presented, and questioning of Nordicity may take place. The Nordicity Report was released at the same time as the Board released its Draft Report and announced the new default province-wide rate. This process was never viewed by the parties as being a rate-setting proceeding.

45. The Carriers were completely surprised by the Draft Report announcing a new province-wide rate for poles in 2018. The PAWG process was no substitute for a public hearing to set new rates.

3. Affected parties were not permitted to participate in the PAWG process

46. The process established by the Board for the PAWG did not give every affected party the opportunity to participate. The Board encouraged companies with similar interests to participate through representatives. While those representatives could provide input in the PAWG, they were not a party to the Nordicity Report submitted to the Board.

4. Parties were denied an opportunity to comment on a methodology that was used to generate a rate

47. The Draft Report was the first indication that the Board had used the Nordicity Report, with modifications, to set a province-wide rate. No opportunity was given to critique either the methodology adopted or the application of that methodology to the poles and financial data to arrive at a rate. The fact that the Board gave interested parties the opportunity to comment on the methodology and rate after the fact is not sufficient. It does not replace the requirement for a hearing in a rate case.

48. The Board has in fact attempted to side-step the requirement to hold a hearing in advance of setting rates by its policy review process. To make matters worse, it has used a process whose stated task was to review methodology and report its findings to the Board, as an actual rate-making proceeding. This is clearly inconsistent with the requirements of the Act and the Board's own procedures.

49. Subsection 21(2) is clear. The Board cannot set a rate without holding a hearing. The opportunity to comment on a rate already established by the Board is not sufficient. It is not a hearing with all of the attendant processes to test evidence and make arguments.

> 21(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct.

50. This provision is clear and unambiguous, and there is no provision to the contrary which would be applicable to these circumstances.

5. The burden is on the LDC to establish just and reasonable rates

51. In a rate case, the LDC has the burden of establishing rates that are just and reasonable.

> (8) Subject to subsection (9), in an application made under this section, the burden of proof is on the applicant.
>
> (9) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates that the Board may approve or fix under this section are just and reasonable, the Board shall make an order under subsection (3) and the burden of establishing that the rates are just and reasonable is on the transmitter or distributor, as the case may be. This ordinarily requires them to introduce evidence of investments and expenses

> related to the service in question and to support and defend those costs in a public hearing.

52. The Draft Report sidesteps this statutory requirement entirely. The Board has used "average" costs across the Province to arrive at a province-wide rate while ignoring significant cost differences among the LDCs and the disparate geographic regions that they serve. The same rate is to apply in urban and rural areas.

53. The Board has attempted to address this fundamental flaw by allowing LDCs with costs that differ from the province-wide average to apply for different rates if they wish. This will enable those LDCs with higher-than-average costs to seek rates that are higher than the default rate. However, LDCs with lower-than-average costs are extremely unlikely to bring applications to change from the default rate since they will be receiving a windfall. This means that subscribers to poles in those areas will pay a higher rate than would otherwise be justified. This presents a "lose-lose" proposition to telecom attachers. The default rate will not be based on an LDC's costs and will not have to be justified by the LDC charging this rate.

54. All of this is inconsistent with, and contrary to, the requirements of the Act related to rate-setting.

6. The PAWG process was a breach of procedural fairness

55. The Supreme Court of Canada has summarized the duty of fairness owed by Canadian administrative tribunals to the parties that are affected by their decisions. These principles vary depending on the statute that establishes the tribunal and the process that it normally follows. The key objective of the duty is to ensure a fair and open process appropriate to the decision being made and its statutory context.

> [T]he purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[26]

56. The OEB breached this duty by not allowing all the Carriers to be present in the policy review (representatives were chosen to represent everyone's interests)

26 Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para 22.

and by not allowing parties to engage their own experts (as required in Rule 13A of the OEB's Practice and Procedure). The principle of *audi alteram partem*, or a duty to be heard, "entitles a party to administrative proceedings of an adjudicative nature to present relevant evidence".[27]

57. In this case, the Carriers were given notice of the consultation process, and while only some of them were provided an opportunity to participate as representatives of parties with a similar interest, there was no call for all interested parties to intervene as is ordinarily the case in a rate proceeding. Potentially interested parties were told by the OEB that the main objectives of the consultation process was an "assessment of a number of technical issues and details related to pole attachments, and the review of the cost allocation methodology for setting wireline charges for pole attachments, including the appropriate treatment of any revenues that carriers may receive from third parties."[28]

58. In fact, the Draft Report proposes a new province-wide rate of $52.00 per attacher per year per pole to go into effect early 2018.

59. This process denied interested parties the opportunity to provide alternative evidence on the appropriate rate, or critique the methodology ultimately adopted by the OEB. It denied these parties their right to be heard. No opportunity was presented to comment or lead evidence on the rate until after the Board made its determination.

60. The current review does not correct the defects in the OEB's process. Under the OEB Act, the Board is required to hold a hearing to determine rates. This entails more than just commenting on a proposed rate and a methodology after it has been established in a report. It involves a process in which the LDCs lead evidence to justify the rates proposed, interested parties get the opportunity to question the proposed methodology and the costs that they are told might justify the rates. Intervenors also get the opportunity to lead their own evidence, including expert evidence, contesting the evidence that has been filed in support of the proposed rate. Parties then have the opportunity to file submissions. All of this is set out in the OEB Rules of Practice. None of these practices have been followed in the current case and rights of intervenors, such as the Carriers, have been compromised.

27 Brown, DJM and Evans, JM, Judicial Review of Administrative Action in Canada (Canada: Thomson Reuters), Vol 2, pp 10-50.

28 https://www.oeb.ca/industry/policy-initiatives-and-consultations/review-miscellaneous-rates-and-charges

61. Breach of the duty of procedural fairness is a serious matter. A decision that results in a breach of procedural farness is void and should be set aside, as confirmed by the Supreme Court of Canada.[29]

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[30]

62. This fatal error of law can only be corrected by the Board reversing its decision on the proposed province-wide rate as premature, and having a full public hearing to establish the appropriate methodology and rates.

29 *Cardinal v. Kent*, [1985] 2 S.C.R. 643 at 660-661,; *Université du Québec v. Larocque*, [1993] 1 S.C.R. 471 ("Larocque") at 492-493.

30 *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 661

D. The recommendations in the Nordicity Report and the Draft Report on "key policy issues" are deeply-flawed and misguided

1. Allocation methodology

(a) There was no review of the methodology

63. While Nordicity did present an overview of the different types of cost allocation methodologies (including *equal sharing* and *proportional use*), there was no actual discussion or debate in the PAWG process on the pros and cons of the various methodologies. As the minutes of Meeting #3 show, there was a brief exchange with no discussion.

- Mr. Ahmed (of Nordicity) pointed out the most commonly used two methodologies: (a) equal sharing, and (b) proportional use.
- Mr. Ahmed also noted that the difference in rates using the two methodologies becomes increasingly material at higher common costs.

64. Moreover, there was no in-depth discussion of Nordicity's *hybrid equal sharing* methodology, which eventually became the methodology of choice in both the Nordicity Report and the Draft Report.

65. Following the last PAWG meeting, Nordicity went off on its own to develop its recommended methodology without the input of the PAWG. The PAWG participants did not learn of Nordicity's preference for *equal sharing* until its report was released on December 18, 2017. Its preference was supported by a host of analyses and justifications, none of which was presented or discussed during the PAWG meetings.

(b) Nordicity's "hybrid equal sharing" methodology is untested and its benefits are not shared equally

66. The OEB proposes to adopt Nordicity's *hybrid equal sharing* approach, calling it a "compromise" between the *proportional use* methodology and the *equal sharing* methodology. (Calling it a compromise is misleading because there is no aspect of *proportional use* included in this approach.)[31]

67. In fact, Nordicity's "hybrid" methodology was actually created by accident when Nordicity incorrectly attempted to describe the *equal sharing* methodology during the first PAWG meeting in one of its presentations. When informed of its error,

31 Briggs Report, para. 39.

Nordicity hastily declared it to be "*equal sharing* 2.0". By its own admission, the hybrid methodology is a "novel approach and has not been applied by any Canadian jurisdiction".

68. For the reasons discussed below, Briggs is of the view that the application of an untested, novel approach is not appropriate.[32]

(c) Nordicity's hybrid equal sharing is based on false assumptions

69. Neither Nordicity nor the Board provide any support demonstrating that the power and telecom attachers benefit equally under the *hybrid equal sharing* methodology. In fact, the *hybrid equal sharing* methodology fails to consider the different burdens placed on the common costs by the different attachers (power and telecom).[33]

70. This approach incorrectly assumes that all attachers place the same burden on the common space on a pole. The reality is that there are generally considerably more and bigger power attachments on a pole than telecom attachments, and these power attachments place greater weight and stress on the pole.

71. Further, this methodology incorrectly assumes that telecom attachers have the same rights and benefits as the pole owner. In fact, the rights of telecom attachers are subordinate to those of the pole owner.[34]

72. As Rogers has stated in all previous decisions and as Briggs opines in his report, the *equal sharing* methodology is not equitable, and these factors all consistently support the conclusion that the proportionate usage method is fair and appropriate. The *proportional use* methodology should be considered a superior methodology to the untested, novel *hybrid equal sharing* methodology.[35]

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32 Briggs Report, para. 40.

33 Briggs Report, para. 41.

34 For example:

- Telecom attachers must place their facilities on the pole as directed by the pole owner and must relocate their facilities if an LDC needs space for its own facilities.
- Telecom attachers have no control over the costs of poles and the timing of their replacement.
- Telecom attachers cannot earn revenues by providing access to the pole.
- Telecom attachers must pay all costs of making poles ready to accommodate their additional use of the pole, while the LDC owner gets the upgrades at no cost and is then able to earn attachment fee revenues.

35 Briggs Report, para. 4.

2. Nordicity's support for the *equal sharing* methodology is tenuous at best

(a) Nordicity has actually supported the proportional use methodology

73. Nordicity claims "that the *equal sharing* methodology is most appropriate to allocate common cost between two types of attachers on joint-use poles." Yet in a previous pole rate hearing before the New Brunswick Energy and Utilities Board, Nordicity unequivocally supported the *proportional use* methodology over the *equal sharing* methodology.[36] At page 28 of its expert report provided in support of its telecom client, F6 Networks, authors Tanveer Ahmed and Stuart Jack (who facilitated the PAWG meetings and prepared the Nordicity Report), stated as follows:

> We believe that the proportionate use methodology – which is consistent with regulatory best practices – is relatively simple to apply. It has been successfully demonstrated in multiple jurisdictions as a superior methodology and a much better alternative to [Bridger Mitchell's] proposed equal sharing methodology. [emphasis added]

We have difficulty understanding why an objective economic expert like Nordicity would take two very different views on a crucial matter.

(b) Nordicity's detailed analysis in support of equal sharing is flawed

74. Nordicity attempts to justify its hybrid approach with an example that demonstrates the sharing of cost savings between telecom and electricity users. As pointed out by Briggs, this example is based on simplified and unsupported assumptions and therefore has limited validity and usefulness.[37]

75. Nordicity attempts to use three different tests[38] to discredit or diminish *proportional use* allocation. However, in all three instances, Nordicity bases its conclusion on faulty assumptions, discussed in detail below.

36 NBEUB – NB Power 2015/16 General Rate Application, Matter No. 0272, Nordicity Critique of Bridger Mitchell ("BM") report, and proposed alternative methodologies (May 1, 2015)

37 Briggs Report, paras. 47-48.

38 Nordicity Report "OEB Wireline Pole Attachment Rates and Policy Framework", Prepared for the OEB, December 14, 2017, p 66-69.

(c) Nordicity assumes incorrect incremental costs

76. For pole attachment rates, incremental costs are the direct costs attributable from telecom attachers associated with the additional space for telecom attachers on an LDC pole. The incremental cost (IC) test is defined by the OEB as "[t]he lowest price for access that is consistent with economic efficiency"[39]. Essentially, LDCs needs to charge the incremental costs, at a minimum, so that their rate payers are no worse off providing the pole attachment service. This is the lower bound of the "subsidy-free range" as defined by Nordicity.[40]

77. Nordicity claims that "without a detailed examination of incremental cost there is a possibility that the proportionate use allocation may not satisfy the incremental cost test."[41] Nordicity assumes that, since the cost of a bare 40 foot pole (raw material only) is 36% more than the cost of a bare 35 foot pole, the total incremental cost of the attachers on the LDC's poles must also be at least 36% of all the costs.[42]

78. Nordicity's argument must fail as it ignores the cost of labour and other resources, which comprise the majority of embedded costs. In Rogers' experience as a network operator, the deployment of fibre is a reasonable proxy to the deployment of joint use poles. For example, the materials cost of deploying 24 fibre strands versus 48 fibre strands may indeed be double or more (due to double the fibre strands, more protective sheathing and a stronger cable core). However, the total cost or capital cost of deploying the fibre, including capitalized labour, increases only marginally and never in the same magnitude of the materials percentage increase. This is simply logical as there is no need to incur twice the initial deployment costs, twice the amount of labour use, dig two sets of trenches or obtain twice the number of permits.

79. This lends considerable doubt to Nordicity's argument that the *proportional use* methodology fails the IC test for the simple reason that the materials cost difference of 36% between two pole sizes does not represent a reasonable proxy to the net embedded cost difference of the same poles.

39 Ibid. p.26.
40 Ibid. p.65.
41 Ibid. 38, p.68.
42 Ibid. 38, p.70.

(d) Nordicity's "inelasticity of demand" for telecom services argument fails

80. Nordicity's second argument is based on the assumption that that the demand for broadband is no longer elastic.[43] An argument used to support *proportional use* was based on the premise that broadband demand is elastic, as compared to electricity demand which is inelastic.

81. Elasticity of demand is a measure used in economics to show the responsiveness (elasticity) for the demand of a good or service to a change in price. A service is said to be "inelastic" if the demand of that service is unaffected when its price changes, whereas an "elastic" service is sensitive to price changes. In the context of pole attachment rates, the most efficient cost allocation methodology is one that looks to distribute the cost savings between the rate-payer groups (telecom and electricity) based on their relative elasticities.

82. When broadband demand is elastic, economic theory dictates that the most appropriate and efficient cost allocation is *proportional use.* This is because it has the least effect on broadband end-users (as any pole attachment rate increase is ultimately passed along to the end-users), as they are relatively more price-sensitive compared to electricity users. Since broadband end-users are more price sensitive, any pole rate increase, passed along as a price increase to broadband end-users, will distort the end-user's behaviour, inducing them to substitute away from this higher priced service and towards a relatively cheaper alternative.[44] In theory this distortion lowers the total welfare of end-users because as end-users substitute away from the higher priced service, that same service is required to increase prices further to offset the lowered demand.

83. Nordicity argues that the commonly held assumption that broadband demand is elastic is no longer valid.[45] Instead, Nordicity, argues that broadband demand is inelastic and therefore the *proportional use* allocation is no longer the most efficient cost allocation methodology.

84. There are two fatal errors with Nordicity's reasoning. First, Nordicity's own research into the question leads it to conclude that broadband service is "increasingly becoming a necessity of every-day life" in Canada and accordingly demand is, like electricity demand, price-inelastic.[46] At the same time, it cites

43 Ibid. 38, p.80.

44 For a more complete definition of this theory see the "reverse elasticity rule" and "Ramsey pricing".

45 Ibid.38, p.80.

46 Ibid.38, p.80.

other published independent economic research that clearly supports demand-elasticity, particularly in the OECD countries.[47] Nordicity's conclusion that broadband service demand is inelastic is therefore contradictory and unconvincing. Its own "research" is highly impressionistic and is not of the quality of the serious economic research that it cites demonstrating the opposite result.

85. Second, Nordicity fails to recognize that the electricity consumer does not usually have a choice in its provider, whereas the broadband consumer has a choice of at least two providers - the ILEC and the cable company, and sometimes additional competitors such as satellite providers, mobile providers and resellers. This is further complicated by the fact that these providers offer other services to recover their costs of pole access, including television and phone services which would be highly elastic. All of these arguments serve to enforce the fact that the telecom attacher faces services that are much more price sensitive (elastic) than those faced by the LDC.

(e) Nordicity's "subsidization of rate-payers" argument is flawed

86. The third and final argument Nordicity uses to support its preference for *equal sharing* is an analysis of whether efficiency gains are "optimally distributed among the individual rate payers in each group of rate payers".[48] Nordicity claims that "the critical step missing in the analysis leading to the regulatory preference for the proportionate use methodology has been the understanding of the impact of the resulting allocated cost on individual electricity and telecom rate payers."[49] To support this claim, Nordicity again assumes that incremental costs may be up to 36% of the joint use pole cost.

87. This argument is predicated on the same faulty logic as previously explained in Section (c) above, *i.e.*, the bare pole cost differential is not a valid proxy to the net embedded cost differential for different pole sizes. Nordicity's Appendix B attempts to extent this faulty logic but as this is not a reasonable conclusion, Nordicity's analysis is no longer appropriate.

88. None of Nordicity's three arguments for discarding the *proportional use* allocation hold up to scrutiny or can be substantiated. Consistent with prevailing regulatory preference, Rogers submits that the *proportional use* allocation remains the most efficient allocation methodology.

47 Ibid.38, p.81.
48 Ibid.38, p.69.
49 Ibid. 38, p.70.

3. A province-wide average rate is not appropriate

89. Contrary to what is stated in the Nordicity Report and the Draft Report, all of the participants in the PAWG did not agree on the creation of a single province-wide rate. This is particularly so where it has been developed in such a haphazard fashion.[50]

90. As stated in the Briggs Report, the use of a province-wide rate across a large number of LDCs is appropriate only if the LDCs are homogenous in nature. However, the LDCs across Ontario are not a homogenous group – they vary significantly in size and type of geographic area served. Also, based on their costing data, the cost structure for pole attachments varies significantly.[51]

91. The Draft Report also proposes that, at the time of rebasing, LDCs will be allowed to either choose a custom pole attachment rate or simply adopt the provincial rate. This is problematic because there is no incentive for an LDC to apply for a custom rate if it realizes that its actual costs would produce a rate below the province-wide rate.[52]

92. Further, since the province-wide rate purports to be an "average" across LDCs, this implies that as LDCs with costs and rates greater than the province-wide rate opt for custom rates, the province wide-rate should correspondingly be decreased. Otherwise, parties that pay the province-wide rate will end up over-compensating LDCs subject to the province-wide rate for the cost of the service.[53]

4. Inflationary adjustments – The OEB cannot impose an inflation factor without an offsetting X-factor for productivity improvements

93. The Draft Report proposes an annual inflationary adjustment to the pole attachment rate (based on the OEB Input Price Index) but excludes productivity and stretch factors. It makes this determination on the mistaken belief that the "pole attachment charge components are generally sunk costs and most underlying cost items are not easily impacted by productivity improvements."[54] This is patently incorrect.

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50 The Carriers stated that, while there may be merit in establishing a single pole attachment rate, it was critical that such rate be reflective of the costs of the LDCs that apply it.

51 Briggs Report, para. 10.

52 Briggs Report, para. 14.

53 Briggs Report, para. 15.

54 Ibid. 38, p.34.

94. Pole costs are not necessarily sunk costs and can be impacted by productivity improvements. In fact, in other OEB proceedings, LDCs have identified efforts to become more productive in areas that include costs associated with pole attachments.[55] There is a significant labour and vehicle portion to pole installation costs and there are in fact opportunities for efficiency gains relating to pole construction, *e.g.*, better pole technology, better management techniques, etc.

95. The decision not to apply an X-factor is also inconsistent with how the OEB applies Price Cap incentive-based regulation to electricity distribution rates, which incorporate the same cost components included in the pole attachment rate.

96. Further, the Board completely ignores the fact that specific pole attachment costs are not sunk; they arise because the utility has decided to enter the pole attachment business and this decision imposes certain new pole-related costs on it. In fact, it is distribution business costs that are "sunk". These costs are incurred whether the LDC enters the pole attachment business or not.

97. Based on the above, there is no sound economic reasoning to exclude productivity and stretch factors and, consistent with the other components of the pole attachment rate model, the Board must include an X-factor that will be applied to restate pole attachment costs from 2015 to 2018 and be included as part of the annual rate adjustment going forward.

5. LDC collection of cost data – subaccounts won't solve anything

98. The Draft Report proposes that the LDCs set up subaccounts to track pole attachment costs that are directly attributable to telecom attachments. *i.e.*, direct costs. However, the Board's proposal does not address indirect costs, which form the majority of costs comprising the pole attachment rate. The OEB also does not proposed that the LDCs set up subaccounts to segregate power-specific assets and costs for all of the applicable cost categories.[56]

99. Further, while the implementation of sub-accounts may improve the data quality of costing inputs into the pole attachment rate model years from now, it is not a panacea and will do nothing to correct all of the errors and inconsistences that will be embedded into a rate based on faulty and deficient data.[57]

55 Briggs Report, paras. 180–182.

56 Briggs Report, Issue 4, paras. 27-30.

57 Briggs Report, Issue 5, paras. 31-34.

6. Separation Space is for the benefit of both the telecom and power attachers

100. We continue to argue that, as long as the Board endorses a form of the *equal sharing* methodology under which all users on a pole are considered to be equal beneficiaries of the pole, the Separation Space must be considered to benefit all users equally. Neither the power attacher nor the telecom attacher could benefit from a joint use pole without the Separation Space. In other words, the Separation Space is required equally by telecom and power attachers on a joint use pole. Without it, the pole cannot be a joint use pole.

101. If an LDC wants to build joint use poles and earn revenues from them, it must include Separation Space. If a telecom wants to build joint use poles and earn revenues from them, it too must include Separation Space. Separation Space is not specific to power or telecom because ownership of the pole changes. It is a common requirement of joint users and therefore qualifies as common space.

7. Vegetation management costs – The Board's use of an unsupported allocation factor is inappropriate

102. When it comes to vegetation management around poles, the practices amongst the LDCs, including who does what and how costs are shared with the telecom attachers, vary significantly. Given the magnitude of these costs, it is critical to understanding why the costs vary so significantly before they are included in the pole attachment rate model.[58]

103. A key factor for this cost input is what portion of the LDC's vegetation management expenses is attributable to telecom and other attachers. Unfortunately, the PAWG process did not request or collect any information from the LDCs that would shine light on this issue. Instead, the Draft Report proposes to use a percentage factor of 33% which comes from a completely untested estimate from Hydro One. This factor was not reviewed or discussed during the PAWG meetings. Nor is referenced or discussed in the Nordicity Report.

104. Moreover, the Draft Report completely ignores the conclusion of the Nordicity Report that vegetation management costs are already accounted for in other costing items and to include them here would result in double-counting. The Draft Report also ignored the views of <u>both</u> the LDCs and the Carriers during the PAWG process who all preferred that vegetation management costs be negotiated outside of the pole attachment rate. It is curious that OEB staff, with no prior experience in LDC poles and associated accounting practices saw fit to

58 Briggs Report, Table 23.

replace the views of industry participants and its own expert with its own uninformed opinions.

105. The proposed allocation is based on data and assumptions that were not disclosed and tested. Hydro One's proposal that 33% of an LDC's vegetation management costs be allocated to the telecom attachers is, at best, an overstated guess. Vegetation management needs and practices among LDCs and telecoms vary greatly. In our view, a proper analysis would comprise an entire hearing on its own. This allocation cannot be established through an unsubstantiated and unverified estimate provided by a single LDC.

106. Excluding vegetation management costs from the pole attachment rate model until further data is collected would be a far more reasonable approach given the issues with this cost input.

8. Overlashing revenues are not relevant, and have never been relevant, to the pole attachment rate

107. Even though this issue was discussed repeatedly and at great lengths during the PAWG meetings, it is clear that the Board has yet to grasp the concept of overlashing and its relevance to the pole attachment rate.

108. At page 41 of the Draft Report, the Board states that "the value of this overlashing charge is not known, and so it is unclear whether there is a significant commercial benefit to carriers that is not being captured and shared with ratepayers through this arrangement".

109. Later, at page 42, the Board states that:

> overlashing revenues are relevant to the pole attachment rate model because overlashers see a value in overlashing existing telecom attacher networks, particularly in highly congested and competitive urban markets. The OEB believes that the strand owner has a distinct commercial advantage over the overlashing carriers and there may be a significant commercial benefit that is not being captured and shared with ratepayers.

110. These statements are speculative and unfounded. There is no "significant commercial benefit" to the strand owner over the overlashers. As the first party on the pole, the strand owner may have a positional advantage, but the overlashers have an advantage in not having to install kilometres of steel

strand.[59] They simply overlash their cables to the existing strand and pay what make-ready is required for the additional loading they cause. After that, they must pay the same pole attachment rate as the strand owner, as well a relatively insignificant fee to use the strand.

111. As argued by the Carrier representatives in the PAWG meetings, overlasher revenues are no more relevant to the determination of a cost-based pole attachment rate than are any other revenues received by an LDC and other attachers that are established to cover their operating costs. Overlash charges (by a strand owner) are set by the CRTC to allow the strand owner to recover its cost of the strand. They do not recover, and have no correlation to, pole attachment costs.

112. The OEB hopes to uncover this "mystery" by requiring LDCs to start tracking the number of attachments and overlashers (as opposed to just the number of attachers), to determine if telecoms should share overlashing revenues with the LDCs in Part II of the Pole Attachment Review. However, even the LDCs recognized that overlashing revenues were not relevant to the determination of pole attachment rates. The Board should follow suit as no amount of attachment and overlasher data is going to make this issue any clearer.

9. The effect of the Bell agreements with LDCs is <u>not</u> neutral *vis-à-vis* the pole attachment rate

(a) This is a difficult but critical issue that continues to be misunderstood

113. In the Draft Report, the OEB (once again) determines that it will not consider the Bell and LDC reciprocal pole-sharing agreements as part of the new pole attachment rate methodology. At page 45 of the Draft Report, the Board describes its understanding of the relationship between LDCs and Bell as follows:

> The OEB is of the view that Bell and LDCs both have equal bargaining power, and access is not an issue as both own poles that have the possibility of accommodating the other party. *Presumably, Bell Canada and LDCs have reached agreements that are reflective of parties' costs. The OEB assumes that the 60/40 ownership ratio selected represents the differences in space, costs, and other requirements essential for each of the parties to share a pole*. *[Emphasis added]*

59 The strand owner also has a disadvantage as its own fibre has been covered and intertwined with the overlasher's fibre, making it much more difficult to work on.

114. The Board makes two key assumptions here: (1) that Bell and the LDCs have reached agreements that are reflective of their respective costs, and (2) that the 60/40 ownership ratio between the LDCs and Bell represents the differences in space, costs, and other requirements. The Board's assumptions are not supported by any evidence or further analysis. They are purely speculative. There was no request that the LDCs demonstrate their veracity and no evidence was offered.

115. The Board goes on to state that in the Draft Report:

> The OEB is of the view *that Bell is effectively paying the rate "in kind" where there are these reciprocal agreements*. Where there is no reciprocal agreement, Bell pays the OEB approved pole attachment charge. *[Emphasis added]*

116. The Draft Report also relies on the decisions in the Hydro Ottawa and Hydro One proceedings in which the Panel determined that these Bell agreements were not relevant and their production as evidence in the proceeding was not required. This determination was made, however, without any expert economic evidence. The Board quotes from the Hydro One decision[60]:

> The OEB finds that Hydro One's reciprocal arrangement with Bell has no impact on the pole attachment charge. *Bell "pays" for its attachments to Hydro One's poles by allowing free access for Hydro One to Bell's poles*. No money changes hands. Contrary to the Carriers' repeated statements, Bell does not pay for 40% of Hydro One's pole costs. [*Emphasis added.*]

117. Again, there was no evidence provided in the PAWG proceeding to demonstrate that the value of these reciprocal agreements was compensation "in kind" for not paying the OEB-approved pole attachment rate.

118. The Board's statements underlie its fundamental misunderstanding and misapprehension of the entire issue. This lack of understanding cam be seen in the minutes of Meeting #4.

> Mr. Lesychyn: The Bell issue. I knew this issue would come up anyways. When I looked at this I stepped back a bit and read the Hydro One decision. One of the things that I found was that Hydro One said there is no cross subsidization of costs. The OEB concluded that there is no impact on pole attachment arrangements.
>
> If you take the Bell attachments from the Hydro One poles, then the cost to other Carriers would actually increase.

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> Mr. Piaskoski: This is a really tough issue. The findings are a bit deceiving even though when you first read them they seem to make sense. John and I completely disagree on this issue.
>
> Let's imagine a world where Hydro One and Bell cooperate on building poles and let each other use the poles without charging each other. This works in a situation with no competition.
>
> Then other players come along and they need access too. My argument is that Bell has made a capital contribution to all the poles that Hydro One has access to. You can't treat Bell as a rate paying attacher because it has already paid for the pole by building all the other poles. Hydro One has already recovered, let's say, 40% of those poles from Bell. The balance is what it needs to recover from the other Carriers.
>
> Bell cannot be treated as a rate paying attacher.
>
> Mr. Ahmed: But most of the poles Rogers uses, Bell is already using.
>
> Mr. Rubenstein: I said take the embedded cost and take out 40% as Bell's contributions.
>
> Mr. Ahmed: It's the same formula that we were talking about in relation to the CRTC.
>
> Mr. Piaskoski: Yes, the CRTC did the exact same thing.

119. Because this issue has been determined, here in the Draft Report and in previous decisions, based on the "lay" understanding listening to the testimony of witnesses who are not experts in the matter, we did ask an expert to opine on how the issue should be approached. Andrew Briggs' full assessment can be found at pages 26-31 of the Briggs Report.

(b) The effect of the Bell pole-sharing agreement is to reduce the LDCs' pole costs

120. Using the pole-sharing agreement (or a joint use agreement as it is sometimes called) between Hydro One and Bell, Hydro One is responsible for installing and maintaining 60% of the poles that are subject to the Agreement and Bell is responsible for installing and maintaining 40%.

121. The underlying principle of reciprocal access implies that, for the Hydro One poles subject to the Joint Use Agreement, the indirect common pole costs (*i.e.*, depreciation, capital carrying charges and maintenance) are effectively covered by Hydro One having reciprocal access to the 40% of poles owned and maintained by Bell. Therefore, Briggs argues that, since these costs are already being covered by the Joint Use Agreement, it is inappropriate to require non-Bell telecom attachers to also contribute to the recovery of these costs through the pole attachment rate. As a result, he concludes that an adjustment must be made in the pole attachment rate model to account for this over-recovery by excluding the number of Joint Use Agreement poles from the pole attachment rate model.[61]

122. In other words, under a joint use agreement, an LDC's effective average cost per pole is lower than the embedded cost taken from its accounting information, and this must be reflected in the pole attachment rate model. Other regulators such as the CRTC have taken into account the impact of these joint use agreements in establishing the pole attachment rates. The CRTC expressly recognized that the effective cost to Bell of a joint use pole that is part of Bell's joint use arrangement with Hydro One is 40% of the cost of the pole, as the remaining 60% is recovered from Hydro One under the joint use arrangement.

123. This is not simply a matter of whether there is any "cross subsidization nor services provided". The Bell/LDC agreements are relevant to understanding the effective pole cost of an LDC for purposes of setting the pole rate. Absent a deduction for the effective recovery of pole costs from Bell (through joint ownership or reciprocal arrangements), the rate will require telecom attachers to over-contribute to the costs of a pole.

61 Briggs Report, paras. 89-93.

(c) Telecom attachers should not have to pay for poles with only Bell as an attacher - Nordicity completely misses the mark in rejecting this argument

124. It has always been the position of the Carriers that telecom attachers should not have to pay for poles that they do not use. No matter what perspective one takes, it is not reasonable or equitable for a telecom attacher to pay for poles they do not use, including those poles where Bell is the only attacher. In this regard, the Carriers have argued that the average number of attachers per pole should exclude those Bell-only poles.

125. Nordicity briefly considers the Carriers' proposal but dismisses it on extremely dubious grounds. It states that, in order to implement the Carriers' approach, it is necessary to determine the average cost per pole for the "subset of joint use poles that excludes the Bell-only poles". Nordicity concludes that, since the LDCs are unable to identify the Bell-only poles, it is not practical to isolate this subset in order to come up with an average cost per pole. We reject this conclusion. The average cost of a pole does not change because Bell is or is not on it. There is no need to determine an average cost based on a smaller subset of poles.

126. For the reasons set out above, we fundamentally disagree with the findings and conclusions set out in the Nordicity Report and the Draft Report.

127. In further support of this issue, we attach our original argument that was provided as part of our final comments on the PAWG process. This document, which employs a very similar theory towards Bell's contribution to LDC poles as was adopted in the Briggs Report, can be found at **Appendix D**.

E. The new provincial pole attachment rate and the costing methodologies used to establish this rate are deeply flawed

128. Here we examine the treatment by Nordicity and the Board of the various costing inputs to the pole attachment rate and how they should be allocated to the telecom attachers. As demonstrated in detail below, there are numerous problems with the integrity and selection of the data, as well as the logic and reasoning behind the calculations and methodologies employed.

1. Administrative costs

(a) There was no review of methodology

129. As stated earlier, the PAWG process did not address the methodological issues for determining administrative costs. There was no discussion as to what costs should be included and how they should be determined (or estimated) by the LDCs. Equally, no evidence was tendered by the LDCs on these issues.

130. The description of this cost category refers to “permitting, licensing, payroll, vehicle, OM&A and support services”. The source of this list is not identified. Further, the description does not provide any indication of what “licensing, payroll, vehicle, OM&A and support services” related to telecom attachments might be and, if they are related, how these costs can be estimated accurately.

131. Instead, Nordicity and the OEB have attempted to come up with “average” values with very little supporting data.

(b) Nordicity’s approach for administrative costs is untenable

132. It is concerning that only one LDC, Toronto Hydro, provided an input for administrative costs and even then, Nordicity decided not to use it. Instead, in coming up with an average cost of $3.63, Nordicity takes the lowest available value ($0.69 from the 2005 decision, adjusted for inflation) and the highest available value ($6.19 from the Toronto Hydro proceeding). As critiqued by Briggs, this is an absolute non-starter. The $0.69 was based on 1999 costs of a single LDC, Milton Hydro, and its age and remoteness completely strip it of any value.

133. Meanwhile, the $6.19 from the Toronto Hydro Proceeding is an illegitimate input as none of the costing inputs were reviewed or confirmed by the Board and Rogers’ evidence demonstrated that these costs were significantly overstated.

(c) The OEB's approach for administrative costs is defective

134. The OEB's approach is not much better. It takes the cost inputs from the Toronto Hydro, Hydro One and Hydro Ottawa proceedings and derives a weighted average based on their respective average attachers per pole.

$$\frac{\$5.03 \times 1.61 \text{ (Toronto Hydro)} + \$2.28 \times 1.74 \text{ (Hydro Ottawa)} + \$0.90 \times 1.3 \text{ (Hydro One)}}{(1.61 + 1.74 + 1.3)}$$

135. There are numerous problems with this approach.

(a) The cost inputs vary significantly across the three LDCs. These large variations inputs are concerning, particularly as it is expected that administration functions, and thus costs, would be similar across LDCs.[62]

(b) As explained by Briggs, the use of average number of attachers per pole is an entirely inappropriate weighting approach which leads to an overstatement of these costs (even before considering the validity of the individual cost inputs). There is absolutely no valid reason for using this weighting mechanism.[63]

(c) The use of the number from the Toronto Hydro proceeding is completely illegitimate. As stated above, it comes from Toronto Hydro' settlement proposal which supported a rate of $58.34. It was neither reviewed nor confirmed by the Board and Rogers' evidence showed that it was overstated.

2. Loss in productivity (LIP) costs

(a) There was no review of methodology or technical issues

136. Again, the PAWG process did not address any methodological issues in determining LIP costs. There was no discussion of what activities should be included and how their associated costs should be accurately estimated. There was no discussion on the possibility that these costs may be included in another account resulting in double-counting. No evidence was tendered on these issues. This is an essential first step in determining whether a "default" cost can even be considered.

62 Briggs Report, paras. 103-104.

63 Briggs Report, para. 98.

(b) The OEB ignores Nordicity's conclusion that LIP costs are already captured in other accounts and creates its own inappropriate costing model

137. At page 58 of the Nordicity Report, Nordicity concludes that LIP costs are already captured in two of the LDCs' other accounts – *Account 5120 – Maintenance* and *Account 5135 – Repair and Right-of-way.* Yet, the Board ignores this conclusion and, as it did for administrative costs, decides to use the cost inputs from the Toronto Hydro, Hydro One and Hydro Ottawa proceedings to derive a weighted average based on each LDC's average attachers per pole:

$$\frac{\$5.72 \times 1.61 \text{ (Toronto Hydro)} + \$1.96 \times 1.74 \text{ (Hydro Ottawa)} + \$2.10 \times 1.3 \text{ (Hydro One)}}{(1.61 + 1.74 + 1.3)}$$

138. Similar to the issues identified for administrative costs, this approach is entirely inappropriate and cannot be accepted. Most importantly, the Board provides no reason or justification for why it did not follow the advice of its expert consultant, who believed that LIP costs were already captured and to include them here would result in double-counting.

139. The LIP cost inputs vary significantly across the three LDCs. Hydro One, Hydro Ottawa and Toronto Hydro all took different approaches to estimating LIP costs and claimed very different cost amounts. Unless there are significant differences in operating cost structures, it is unreasonable that these LDCs undertaking similar activities – working around telecom attachers - would have such significantly different cost inputs.[64]

140. The use of the number from the Toronto Hydro proceeding is not legitimate. As stated above, it comes from Toronto Hydro's settlement proposal which supported a rate of $58.34. It was neither reviewed nor confirmed by the Board and Rogers' evidence showed it was overstated.

3. Embedded costs

141. The embedded and net embedded cost per pole vary significantly across LDCs. No explanation is provided in the Nordicity Report for these variances. For example, the average net embedded cost per pole also ranges from $1,387 for London Hydro to $2,389 for Toronto Hydro – a difference of 172%.[65]

64 Briggs Report, para. 116.

65 Ibid. 38, Table 21.

Understanding the reasons for this would permit an assessment of whether any adjustment is necessary for using the data in the pole rate attachment model.[66]

142. Given that the numbers vary significantly across LDCs, an average may not be representative of other LDCs. Significant discrepancies likely exist and, without a proper explanation, it is not possible to conclude that the averages are representative of any or all LDCs.

4. Power-only assets

(a) There was insufficient input from the LDCs, and what was provided was not assessed properly

143. Most of the data Nordicity used to determine the 14.7% factor for power-only assets was not disclosed. Further, none of it was tested. In fact, only Hydro One identified its proxy approach for estimating the power-specific deduction, and none of its underlying assumptions or data were tested. In any event, Hydro One's proxy approach addresses only the power-specific assets on its own poles - it does not capture the other assets and costs described below.

144. We have no visibility into the deductions and data submitted by other LDCs to Nordicity. Without full disclosure of their data and approaches, and an ability to test the numbers and assumptions, as well as to assess any discrepancies, there is no basis to conclude that the numbers submitted are meaningful, comparable or representative of an appropriate deduction for other LDCs.

145. Only three LDCs provided a ratio of costs attributable to poles. The Nordicity Report does not indicate whether the three LDCs undertook an analysis of sample data to arrive at the estimated breakdown of costs, nor whether Nordicity reviewed the analyses to assess the reasonableness of the analysis and the resulting cost breakdown.[67]

(b) The PAWG process failed to address significant power-specific assets that must be deducted

146. To ensure that the telecom attachers are not paying for assets they do not use and for costs caused solely by power requirements, the costs of the following assets must be deducted from Account 1830:

66 Briggs Report, para. 130.

67 Briggs Report, paras. 142-143.

(a) all power-specific assets and any other non-common assets on LDC-owned poles;

(b) all power-specific fixtures that are located on Bell poles;

(c) taller and more expensive poles that are required for power needs (including by generators);

(d) all make-ready and other contributions to the capitalized installed costs that form part of Account 1830; and

(e) poles that are replaced prematurely due to hydro (and/or generator) requirements.

5. Capital *Cost* - The average cost of capital rate is severely skewed by Hydro One's data

147. The Draft Report uses LDC specific average cost of capital rates weighted based on installed poles across the LDCs to derive an "average" cost of capital rate of 8.17%. However, an examination of the relevant cost of capital rates shows that Hydro One at 8.47% is significantly higher than the other LDCs, which are between 6.7% and 7.0%. The use of weighting that favours Hydro One's dominance by a significant margin artificially raises the cost of capital rate for every other LDC in the Province.

148. The cost of capital rate is part of every LDCs' filing requirements and is readily available. There is no reason to apply an "average" rate that reflects the economic reality of only a single LDC.

6. Pole Maintenance Costs

(a) There was no discussion of methodology

149. There was no discussion of what activities should be included in this category of costs. A normal pole attachment proceeding would consider and review at specific activities and corresponding times and costs. The PAWG did not.

(b) The cost inputs are inconsistent and have limited value

150. The numbers used to determine the proposed weighted average were not disclosed or tested. Further, the cost inputs vary significantly across LDCs.[68] Neither the Draft Report nor the Nordicity Report address the wide range in cost across LDCs. Understanding why costs vary so significantly among LDCs for the same cost input is important as maintenance costs are a key indirect cost in the pole attachment rate model.[69]

(c) Nordicity selected an entirely inappropriate allocation to assign maintenance costs to poles

151. The costs associated with pole maintenance are hidden in *Account 5120: Maintenance of Poles, Towers and Fixtures*. Only a portion of the costs recorded in this account are attributable to poles.

152. While Nordicity collected several years of the LDCs' Account 5120 costs but only two LDCs provided estimates of what percentage of these costs are applicable to poles, and they are wildly disparate – Hydro One at 5% and Hydro Ottawa at 92%.

153. The discrepancy between these two numbers is huge. Yet, there was no attempt by Nordicity or the Board to understand the reason for this discrepancy. Instead, Nordicity unwisely chose to use the median average (48.5%) of these two extreme estimates. The Draft Report simply endorsed this approach. An average of these two vastly different ratios is entirely inappropriate and provides no meaningful indication of the maintenance cost per pole.[70]

7. Calculation for average number of attachers per pole is full of *errors*

(a) Toronto Hydro data is missing from the data sample

154. Tables 17 and 18 of the Nordicity Report do not include any information on Toronto Hydro's attachers, notwithstanding that it has more installed poles than the three smaller LDCs (London Hydro, Hydro Ottawa and Horizon) combined. Without the Toronto Hydro data, quality of the average attacher per pole is called into question.

68 Briggs Report, Table 21.
69 Briggs Report, para. 151.
70 Briggs Report, Issue 25, paras. 182-158.

(b) Nordicity's inputs and calculations contain numerous errors

155. Nordicity's calculations for a provincial average number of attachers per pole has numerous errors, many of which arise from the inputs provided by the LDCs. These errors include:

(a) Table 17 purports to show the number of joint use poles (*i.e.*, all those poles with third party attachers). This is the information that is needed when calculating the average number of attachers per pole. However, as Briggs points out, Table 17 incorrectly shows the total (or close to the total) of all poles installed for three of the LDCs (London Hydro, Hydro Ottawa and Horizon). It does not make sense that anywhere from 97-100% of all the installed poles for these LDCs would have third party attachments on them. Unfortunately, there is no underlying detail for this data.

(b) Hydro Ottawa reports 52,619 attachers on 48,252 joint use poles for an attacher per pole number of 1.09. Almost 100% of its poles have attachments. Yet, in its 2015 pole rate hearing, it reported 62,153 attachers on 35,663 joint use poles for an attacher per pole number of 1.74. Only 74% of its poles had attachments. This drastic change in attachers and pole numbers makes no sense and is not explained in the Nordicity Report.

(c) Toronto Hydro provided its pole numbers but refused to provide its attacher numbers, leaving Nordicity and the Board to rely on the unconfirmed number of 1.61 from the Toronto Hydro proceeding. That number was not confirmed and, in any event, is likely inaccurate. Shortly after the settlement was reached, Toronto Hydro announced an agreement with Bell to put attachments on an additional 80,000 poles. This would have had a very significant impact on the average number of attachers Toronto Hydro was claiming.

(d) Table 18 performs the calculation to come up with an average attachers per pole of 1.30. Unfortunately, the total number of poles of 264,130 includes Toronto Hydro's poles but the total number of attachers does not include Toronto Hydro's attachers because Toronto Hydro didn't provide that number. This mismatch incorrectly reduces the number of attachers and increases the pole attachment rate.

(c) The Nordicity and Draft Reports do not properly address non-telecom attachments such as streetlights and power facilities

156. As discussed in the PAWG meetings, LDC poles frequently have third party attachers other than the telecom attachers, including streetlights and other power facilities. In most cases, these attachers pay a rate that is completely different than the rate for telecom attachers – usually much less and, in some cases, nothing at all (e.g., municipal streetlights).

157. None of the pole specification information used in the allocation methodology includes any allowance for or inclusion of space specific to these other attachers, notwithstanding that they make use of pole space.

158. The information used by the OEB is based on all third party attachers (wireline telecom and "other" attachers), not just wireline telecom attachers. However, the inclusion of "other" attachers inappropriately treats these "other" attachers as part of telecom attachers group. The allocation methodology specifically recognizes telecom space for wireline telecom attachers – but there is no specific allowance for space used by these other attachers. Furthermore, as these "other" attachments are a distinct and separate user group, they should not be included as part of the telecom user group for the purposes of allocating common space.

159. The Nordicity Report attempts to account for this fact by lumping these attachers with the telecom attachers to come up with the average number of attachers per pole and a telecom pole attachment rate. This approach is fraught with difficulties.

(a) It is one thing to include streetlights in the calculation for average number of attachers per pole to come up with the telecom attachment rate, but if the streetlights are not paying anything (or very little), then the ratepayers are actually subsidizing the streetlights. If you don't include the streetlights in the calculation, then the telecom attachers are subsidizing the streetlights as they are the attachers contributing to the common costs.

(b) Further, by lumping all attachers together with the telecom attachers, it implies that these attachers are all located within the 2 feet of communications space and should contribute to the common costs of the pole based on this location and space allocation. Again, this is not true. These attachers are not located within the communications space and likely take up a different amount of space on the pole. None of this was explored or discussed in the PAWG meetings.

(c) Under the *equal sharing* methodology, all attachers must contribute to the common costs of the pole equally. This principle falls apart if the certain attachers are not paying the same rate or are not paying a rate commensurate with their dedicated space.

160. For a more in depth discussion of the issue, please see the Briggs Report at pages 15-16.

F. The Board's proposal for "value-based" rates is misdirected

161. While the Draft Report adopts the *hybrid equal sharing* methodology recommended by Nordicity, the Board proposes to move from a "cost-based" approach to a "value-based" approach in its Part II review. The OEB states that while the Nordicity approach is an efficient and fair cost allocation *vis-à-vis* telecom party attachers "at this time",[71] it does not recognize the "tremendous value" these attachers have with access to Ontario's vast network of more than 200,000km of low-voltage distribution lines.[72]

162. By "value-based" approach, it is understood that the OEB intends to increase the attachment rate in order to reflect the perceived value the attachers gain by its ability to serve their existing customers and provide new services such as broadband in rural areas through access to the LDC's pole infrastructure.[73]

163. This "value based" approach goes against all previous OEB decisions. The Board has already declared pole networks to be "essential facilities where access must be allowed on a non-discriminatory basis".[74] It follows that owners of pole networks should not be allowed to charge higher prices for mandated access while electricity consumers continue to be charged either a cost-based rate or the rate determined under incentive regulation. A "value based" approach also ignores that poles are essential facilities, and as such may contravene the Competition Act which addresses the concept of access to scarce or essential facilities in Sections 78 and 79 relating to abuse of dominant position.[75]

164. Further the move to value based rates directly contravenes the OEB's requirement that the pole attachment rates be subsidy-free; meaning that neither the LDC's pole access business nor its electricity distribution business is permitted to subsidize the other. The Draft Report indicates that both non-discriminatory access and the absence of cross-subsidy are important. By this reasoning, the Board should ensure that the pole attachment rate be determined in a manner consistent with those qualities and reject the idea of adopting a "value-based" approach.

71 Ibid.
72 Ibid. 18, p.31.
73 Ibid. 18, p.1.
74 Ibid. 18, p.26.
75 Competition Act, RSC 1985, c C-34, <http://canlii.ca/t/532r1>.

G. Conclusion and recommendations

165. We are pleased to have had the opportunity to provide our comments in this proceeding. We believe that it was necessary to demonstrate unequivocally and repeatedly how fundamentally flawed the whole consultation process was and how these flaws were manifested and even amplified in the recommendations of the Draft Report.

166. In our view, the only way for the Board to remedy this situation is to dismiss the PAWG process and shelve the Draft Report, and hold a comprehensive and proper proceeding - similar to the pole rate hearing that took place back in 2003.

All of which is respectfully submitted by Rogers Communications Canada Inc.

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