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By Same Day Courier

Ontario Energy Board
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ONTARIO ENERGY BOARD

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file # 035401-00036

Dear Sir/Madam:

**Re: OEB File: EB-2015-0141 ✓ Motion for Review and Variance of Decision
EB-2013-0416/EB 2014-0247**

Please find enclosed, two copies of the Notice of Motion of the Applicants (Moving Parties), Rogers Communications Partnership, et al.

Yours very truly,

T. Pinos/gmc

Timothy Pinos
TP/CS/gmc
Enclosures



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

AND IN THE MATTER OF a motion by Rogers
Communications Partnership et al. for the review and
variance of Decision EB-2013-0416/EB-2014-0247 as it
relates to the Specific Charge for Cable and Telecom
Companies Access to the Power Poles charged by Hydro
One Networks Inc.

**NOTICE OF MOTION OF THE APPLICANTS (MOVING PARTIES),
ROGERS COMMUNICATIONS PARTNERSHIP, ET AL.**

Rogers Communications Partnership, on its own behalf, as well as on behalf of:

- 1) Allstream Inc.;
- 2) Shaw Cablesystems Limited;
- 3) Cogeco Cable Inc. (on behalf of itself and its affiliate, Cogeco Cable
Canada LP);
- 4) Quebecor Media Inc., on behalf of Videotron G.P.;
- 5) Bragg Communications Inc., operating as Eastlink;
- 6) Packet-tel Corp. operating as Packetworks;
- 7) Tbaytel;
- 8) Niagara Regional Broadband Network ("**NRBN**");
- 9) Independent Telecommunications Providers Association; ("**ITPA**"), and
- 10) Canadian Cable Systems Alliance Inc. ("**CCSA**"),

(collectively, the "**Carriers**") will make a motion to the Board on a date to be determined
by the Board at the Board's office located at 2300 Yonge Street, Toronto, Ontario.

The Carriers request an oral hearing.

THIS MOTION IS FOR:

1. An Order setting aside that portion of Decision EB-2013-0416/EB-2014-0247 of the Board dated on March 12, 2015 which approved an increase in the annual rate Hydro One is permitted to charge communications companies such as the Carriers to access and occupy its poles (the "**Pole Attachment Rate**") for the years 2015 to 2019 (the "**Decision**");
2. An Order that a hearing *de novo* be held by the Board in respect of Hydro One's application to increase the Pole Attachment Rate;
3. A Procedural Order(s) setting forth the following timelines and notice requirements in respect of Hydro One's application to increase the Pole Attachment Rate:
 - (a) Hydro One shall file and serve on all parties any additional evidence with respect to its proposed Pole Attachment Rate within 30 days from the date of the Procedural Order by the Board in this matter;
 - (b) the Carriers, intervenors or Board staff shall request any relevant information and documentation from Hydro One that is in addition to the evidence already filed with the Board by written interrogatories filed with the Board and served on all parties on or before 50 days from the date of the Procedural Order;
 - (c) Hydro One shall file with the Board complete written responses to the interrogatories and serve them on the Carriers, all intervenors and Board staff on or before 70 days from the date of the Procedural Order.
 - (d) the Carriers, Board staff or intervenors that wish to file evidence in this proceeding shall do so on or before 90 days from the date of the Procedural Order;

- (e) the Carriers, Board staff, intervenors or Hydro One shall request any relevant information and documentation regarding evidence filed by the Carriers, Board staff, or intervenors by written interrogatories filed with the Board and serve on all parties on or before 110 days from the Procedural Order;
- (f) a transcribed Technical Conference shall be convened thereafter on a date to be determined by the Board. Parties participating in the Technical Conference shall file with the Board and copy Hydro One and all other parties, a list of issues, questions or matters on which they intend to seek clarification at the Technical Conference, by a date to be determined by the Board;
- (g) a Settlement Conference among the parties will be convened on a date to be determined by the Board;
- (h) if there is no settlement proposal arising from the Settlement Conference, Hydro One shall file a statement to that effect with the Board by a date to be determined by the Board. In that event, parties shall file and serve on the other parties by a date to be determined by the Board any submissions on which issues shall be heard in writing, and for which issues the Board should hold an oral hearing;
- (i) any submission from Board staff on a settlement proposal shall be filed with the Board and served on all parties within 7 days from the date any settlement proposal is filed; and
- (j) an oral hearing with witnesses will take place on dates to be determined by the Board.

GROUNDS FOR THIS MOTION:

The existing interim Pole Attachment Rate should be set aside

4. The Carriers submit that the existing interim Pole Attachment Rate should be set aside because the Carriers received absolutely no notice of any intention by Hydro One to seek a Pole Attachment Rate increase, which Hydro One failed to provide. Failure to give proper notice is a breach of natural justice, requiring that the proceeding be set aside and the matter be heard *de novo* regardless of other factors.

5. Hydro One's failure to provide notice, as follows:

- (a) the Carriers reasonably expected that Hydro One would provide a clear and specific notice of its intention to seek Board approval for an increase to its Pole Attachment Rate;
- (b) Hydro One's 2013 consultations, to which only Rogers was invited, did not address the Pole Attachment Rate increase;
- (c) both Hydro One's Notice of Application and evidence provided no effective notice of the Pole Attachment Rate increase; and
- (d) the requirement to provide notice is not dependent on the materiality of the decision affecting those parties requiring notice.

The Carrier's reasonable expectation of notice

6. Having regard to prior Board proceedings respecting the rates for pole attachments and the law regarding notice, the Carriers reasonably expected that Hydro One would provide a clear and specific notice of its intention to seek Board approval for an increase to its Pole Attachment Rate.

7. In a 2005 decision, following an application by 23 cable companies under section 74(1) of the *Ontario Energy Board Act* (the “**Act**”), the Board established, as a condition of licence, that all licensed electricity distributors must provide access to their power poles to all Canadian carriers and cable companies operating in Ontario at a Pole Attachment Rate of \$22.35 per pole (RP-2003-0249, the “**2005 Order**”).

8. While the rate of \$22.35 was established as a standard province-wide rate, the Board invited any electricity distributor that believed that the province-wide rate was not appropriate to its circumstances to bring an application to have its rate modified based on its own costing. Absent any such application, the province-wide rate was to apply as a condition of licence as of the date of the 2005 Order.

9. Therefore, it would have been expected that any electricity distributor seeking to modify its Pole Attachment Rate would bring an application to the Board, on specific notice to the parties to the 2005 Order and with reference to the 2005 Order, to amend its applicable condition of licence under section 74 of the Act. Hydro One did not do this. Instead, it brought its request to increase its Pole Attachment Rate as part of a distribution rate application under section 78. Neither Rogers nor any of the other Carriers expected, nor would reasonably have expected, this course of action.

10. To the knowledge of the Carriers, no electricity distributor has applied to the Board under section 74 of the Act seeking to amend its conditions of licence for a new Pole Attachment Rate. In fact, the Carriers believe that the inclusion of a new Pole Attachment Rate as part of a general rate application is the first time an electricity distributor has sought to increase its Pole Attachment Rate in Ontario since the 2005 Order was made. To the Carriers’ knowledge, until the applications of Hydro One, and more recently, Toronto Hydro and Hydro Ottawa, there have never been electricity distribution rate applications that included a request to modify the Pole Attachment Rate.

11. Accordingly, it was not a reasonable expectation that an electricity distributor such as Hydro One would bring a request to increase its Pole Attachment Rate as part of an omnibus electricity distribution rate application, particularly where such request is buried as a line item in thousands of pages of evidence.

Hydro One's 2013 consultations did not provide notice to the Carriers

12. Hydro One's 2013 consultations, to which only Rogers was invited, did not address the Pole Attachment Rate increase. Hydro One held four consultation sessions in 2013 prior to filing its Application. Rogers' representatives attended two of those sessions, as a consequence of its interest in the rate treatment of Unmetered Scattered Load (USL) customers. Rogers receives USL electricity for its cable signal amplification power supplies from electricity distributors throughout Ontario, including Hydro One. Rogers intervened in Hydro One's 2008 Distribution Rates Case (EB-2007-0681), all in respect of this issue, as well as other Board rate and policy proceedings, in pursuit of proper cost allocation and rate design treatment for USL electricity distribution customers.

13. Hydro One described its responsibility in and the purpose of the 2013 consultations as including the following :

“Inform and update key stakeholders about our Distribution and Transmission business, and the approaches and methodology used to determine revenue requirement and rate design”

“Give stakeholders a range of opportunities to provide input and feedback on all aspects of the application”

“Provide adequate background information to enable participation”

14. The proceedings at the four consultations were recorded in the form of an agenda, a PowerPoint presentation, and minutes for each. None of the proceedings for

the four consultations contains any mention of the Pole Attachment Rate or the possibility that an increase may be sought.

15. Further, while representatives of Rogers attended two of the four consultation sessions, neither recalls any mention of the Pole Attachment Rate or the possibility that an increase was being sought.

16. While Rogers may have been “consulted” based on its past participation and interest in USL rates, the other Carriers were not made privy to such consultations and, as admitted by Hydro One in its response, were not even invited to the stakeholder meetings. This confirms the fact that Rogers was invited because of its participation in a matter unrelated to the Pole Attachment Rate (i.e., its involvement in USL rates in 2008, a matter in which the other Carriers were not involved).

Hydro One’s Application did not provide notice to the Carriers

17. Rogers had a legitimate expectation that an issue that would be raised in the Application and that was relevant to a stakeholder’s interest would be discussed during the consultation process. Hydro One’s complete failure to do so in respect of the Pole Attachment Rate, contrary to its own representations, further compounds the fundamental unfairness arising from the lack of notice in the Notice of Application.

18. Neither Hydro One’s Application dated February 7, 2014 (the “**Application**”) nor its evidence provided any effective notice of the request for the Pole Attachment Rate increase. On its face, the Notice of Application applies to rates for “electricity distribution”, which, it goes without saying, has nothing to do with a Pole Attachment Rate, which relates only to the rental of space on a hydro pole and not to the distribution of power.

19. Furthermore, the specifics of the Notice of Application make it clear that it relates only to rates for the delivery of power by Hydro One to its residential consumers and

other customers. This is confirmed later in the Notice of Application where it is stated, “These proposed changes relate to Hydro One’s distribution services.”

20. There is no ambiguity as to what is meant by “electricity distribution” and “distribution services”. They refer to the charges for the delivery of electricity by Hydro One, acting as a local utility or distributor, to consumers, businesses and others end users.¹ Or, to quote Hydro One’s 2013 Annual Report, this is the “business of delivering and selling electricity to customers.”² This function in no way incorporates the activity of gaining rental revenue from pole attachments.

21. Accordingly, there is nothing in the Notice of Application that would alert a reasonable Carrier to the fact that the Pole Attachment Rate would be in issue at the hearing. Further there is no indication of how that rate might be affected by the hearing. Finally, there are express words in the Notice of Application that a reasonable reader would take to limit the scope of the hearing to issues relating to the distribution of electricity and rates charged for that service.

Materiality not relevant to notice requirement

22. The requirement to provide notice is not dependent on the materiality of the decision affecting those parties requiring notice and, in any event, a proposed 66% rate increase is material and significant on any standard.

A full hearing de novo is appropriate in the circumstances

23. The Carriers further submit that a full hearing *de novo* with respect to the Pole Attachment rate is appropriate in the circumstances considering:

(a) the failure by Hydro One to provide notice to the Carriers, as described above;

¹ See the OEB’s written and graphic representation of what is involved in distribution at http://www.ontarioenergyboard.ca/oeb/_Documents/2015EDR/bckgrndr_2015_distribution_rates.pdf.

² Hydro One 2013 Annual Report, p. 16.

- (b) critical public interest considerations; and
- (c) there would be no prejudice to Hydro One.

24. Important public interest considerations require a full hearing *de novo* in the circumstances. Hydro One's increase from \$22.35 to \$37.05 represents a 66% increase. A review of the costing inputs used to calculate the new rate shows that, when compared to the inputs approved by the Board in the 2005 Order, the net embedded cost per pole has increased by 56%, and maintenance costs per pole have increased by almost 1000% (from \$7.61 to \$82.41).

25. Many of the Carriers, such as the members of the ITPA and CCSA, operate networks in rural communities, where local access to telecommunications services is critical to economic growth and development. The financial feasibility of providing services to rural communities is inevitably impacted by any Pole Attachment Rate increase and, in particular, an increase of the scale approved in the Decision. Further, given the lack of notice, members of the ITPA and CCSA had no opportunity to anticipate or factor in potential additional costs into their budgeting process for the current year. Accordingly, it is necessary that the Board receive and consider submissions on the broader economic implications arising as a result of the Pole Attachment Rate increase.

26. The request for the increase in the Pole Attachment Rate proceeded completely unopposed and unchecked as a consequence of the failure to provide any kind of notice. The public interest requires that a full hearing *de novo* be given in these circumstances to allow a considered decision be made with respect to the increase sought on a proper record.

27. The Carriers submit that there would be no prejudice to Hydro One were the Board to order a full hearing *de novo* in respect on the Pole Attachment Rate. Implementation of the Decision regarding the Pole Attachment Rate increase does not

require Hydro One to expend resources undertaking any construction projects, significant planning, or logistics; Hydro One simply charges the increased Pole Attachment Rate amount to the Carriers.

28. The procedure and timelines proposed by the Carriers is substantially similar to the procedure adopted by the Board for the hearing of the Application, and is comparable to other pole attachments rate hearings in other jurisdictions.

MATERIALS TO BE RELIED UPON:

29. The Carriers will rely on the following materials:
- (a) The evidentiary record to date in the proceeding EB 2105-141;
 - (b) The Interrogatories, Answers to Interrogatories, Written Evidence, Oral Evidence and Submissions of the Parties to the Motion
 - (c) The *Ontario Energy Board Rules of Practice and Procedure*;
 - (d) Such other materials may be advised and the Board may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 20, 2015

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Bob Bryant, NRBN
David Wilkie, Tbaytel

AND TO: Participants on May 19, 2015 Board List

AND TO: Ontario Energy Board:
Harold Thiessen
Jennifer Lea
Ian Richler

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

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