File 19

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Ontario Energy Board
P.O. Box 2319
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Toronto ON M4P 1E4

Attention: Kristen Walli, Board Secretary
Harold Thiessen, Case Manager
Jennifer Lea, Board Co-Counsel
Ian Richler, Board Co-Counsel

Dear Sir/Madam:

Re: OEB File: EB-2015-0141 – Motion for Leave to Bring a Motion for the Review and Variance of Decision EB-2013-0416/EB-2014-0247

Please find enclosed, two copies of the letter submitted by Rogers Communications Partnership on its own behalf, as well as on behalf of:

(1) Allstream Inc.,

(2) Shaw Communications Inc. and Shaw Cablesystems Limited,

(3) Cogeco Cable Inc. (on behalf of itself and its affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc.),

(4) Quebecor Media, on behalf of Videotron G.P.,

(5) Bragg Communications Inc. operating as Eastlink,

(6) Packet-tel Corp. operating as Packetworks,

(7) the Independent Telecommunications Providers Association, and

CASSELS BROCK
LAWYERS

(8) the Canadian Cable Systems Alliance Inc in respect of OEB File #EB-2015-0141 on May 19, 2015.

Yours very truly,

Cassels Brock & Blackwell LLP
Per:

Christopher Selby/gmc
Christopher Selby
CS/gmc
Enclosures

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May 19, 2015

By Email (BoardSec@ontarioenergyboard.ca) and Courier

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: OEB File: EB-2015-0141 - Motion for leave to bring a motion for the review and variance of Decision EB-2013-0416/EB-2014-0247

INTRODUCTION AND SUMMARY

1. This letter is submitted by Rogers Communications Partnership ("**Rogers**") on its own behalf, as well as on behalf of (1) Allstream Inc., (2) Shaw Communications Inc. and Shaw Cablesystems Limited, (3) Cogeco Cable Inc. (on behalf of itself and its affiliates, including Cogeco Cable Canada LP and Cogeco Data Services Inc.), (4) Quebecor Media, on behalf of Videotron G.P. (5) Bragg Communications Inc. operating as Eastlink, (6) Packet-tel Corp. operating as Packetworks, (7) the Independent Telecommunications Providers Association (the "**ITPA**") and (8) the Canadian Cable Systems Alliance Inc. (the "**CCSA**") (collectively, the "**Carriers**").

2. This letter consolidates and supplements the submissions contained in the following previous letters:
   (a) Rogers' letter dated April 1, 2015;
   (b) Eastlink's letter dated April 1, 2015;
   (c) Cogeco's letter dated April 1, 2015;
   (d) Shaw's letter dated April1, 2015;

(e) Quebecor's letter dated April 7, 2015;

(f) Shaw's letter dated April 10, 2015;

(g) Rogers' letter dated April 13, 2015;

(h) the ITPA's letter dated April 21, 2015;

(i) the CCSA's letter dated April 23, 2015; and

(j) Packetworks' letter dated May 12, 2015.

3. The Carriers seek leave of the Ontario Energy Board (the "**Board**") to file a motion pursuant to section 40.02 of the *Rules of Practice and Procedure* (the "**R&V Motion**") asking the Board to review and vary its March 12, 2015 decision approving electricity distribution rates for Hydro One Networks Inc. ("**Hydro One**") for the years 2015 to 2019 (the "**Decision**").

4. In the Decision, the Board approved an increase to 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**"). The Board approved an increase to the Pole Attachment Rate from $22.35 to, initially, $37.05.

5. The Carriers submit that leave to file the R&V Motion is appropriately granted in the circumstances where 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, and requires that the proceeding be set aside as a matter of justice, regardless of other factors.

6. In the alternative, the Carriers' motion for leave to bring the R&V Motion must be granted on the basis of the following additional factors which the Board has considered to be relevant in the context of motions for leave:

   (a) the failure of notice underpinning the Carriers' request to bring the R&V Motion justifies exercise by the Board of its discretion to grant leave;

   (b) the lack of any delay by the Carriers between the time when they became aware of the Decision and the commencement of this motion for leave;

   (c) the public interest requires that the Board grant leave to the Carriers;

(d) no prejudice to Hydro One arises as a result of the delay arising from the Board hearing of a motion to review and vary; and

(e) in any event, the Board lacked the jurisdiction to approve the Pole Attachment Rate as part of this proceeding.

DISCUSSION

Failure to Give Notice Requires that Proceeding be Set Aside

7. The Carriers submit that Hydro One's failure to give proper notice of the Pole Attachment Rate increase was a breach of natural justice, which requires that the proceeding be set aside, regardless of any other factors.[1] In particular:

(a) 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;

(b) Hydro One's 2013 consultations, to which only Rogers was invited, did not address the Pole Attachment Rate increase;

(c) 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; and

(d) 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.

Hydro One's Failure to Meet Reasonable Expectations Regarding Notice

8. 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

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[1] The Board has granted leave in circumstances in which the Board found failure to give sufficient notice: (1) *In the Matter of a Motion by Walter and Helen Kowal* (EB-2014-0152) (June 26, 2014); and (2) *In the Matter of a Motion by Brant County Power Inc.* (EB-2009-0062) (April 1, 2009).

Ontario at a Pole Attachment Rate of $22.35 per pole (RP-2003-0249, the "**2005 Order**").

9. 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.

10. 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 has not done this. Instead, it has 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.

11. 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.

12. 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.

Requirement of Reasonable Notice; Inadequacy of Notice of Application

13. It is a fundamental requirement of procedural fairness that any persons whose interests may be affected by an administrative proceeding have adequate notice of the fact that their existing rights may be affected by the hearing.[2] While the adequacy of a notice depends upon the circumstances of the case, it must at the very least put a reasonable reader on notice as to the issue that may affect the interests of that reader and some particulars of how they may be affected.

14. The Board has endorsed and adopted this requirement in its own public statements:

> "The purpose of the Notice is to inform the affected ratepayers and other stakeholders of the application, its nature and the impact on affected customers."[3]

15. The Notice of Application filed by Hydro One fails abjectly to give adequate notice of an application to seek an increase in the Pole Attachment Rate.

16. First, 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.

17. Second, 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."

18. 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

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[2] *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro et al* (1984) 46 O.R. (2d) 715, 1984 CanLII 19 (Div. Ct.).

[3] See: http://www.ontarioenergyboard.ca/oeb/Industry/Regulatory%20Proceedings/Applications%20Before%20the%20Board/Electricity%20Distribution%20Rates/2015%20Electricity%20Distribution%20Rate%20Applications

Hydro One, acting as a local utility or distributor, to consumers, businesses and others end users.[4] Or, to quote Hydro One's 2013 Annual Report, this is the "business of delivering and selling electricity to customers.[5] This function in no way incorporates the activity of gaining rental revenue from pole attachments.

19. 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.

20. Hydro One argued in its letter to the Board dated April 7, 2015 (the "**April 7 Letter**") that, in order for the Carriers to succeed on this motion, there must be sufficient grounds to doubt the correctness of the Board's decision in approving the new rate. This argument is incorrect as a matter of law.

21. Where no notice or inadequate notice has been given such that there has been a breach of natural justice, the proceeding based upon the defective notice must be set aside as a matter of justice. The law is clear that a failure to give adequate notice is a jurisdictional error, and does not involve any consideration of whether there are good grounds to set aside the decision on its merits.[6] Put another way, it is no answer to a failure to give adequate notice to say that the result would have been the same had proper notice been given, as neither the tribunal nor a court can speculate on what would have happened had proper notice been given.[7]

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[4] 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.

[5] Hydro One 2013 Annual Report, p. 16

[6] *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro et al* (1984) 46 O.R. (2d) 715. In any event the Board, in its decision failed to consider a clear jurisdictional issue on the face of the Notice of Application. This is discussed below at paragraphs 48 and following.

[7] *Supermarches Jean Labreque Inc. v Flamand* [1987] 2 SCR 219 at 238: "the absence of any real and present prejudice... can in no way remedy [the failure to give the parties proper notice and an

No Notice from Pre-Application Consultation or Post-Notice of Application Filings

22. Hydro One's assertion in the April 7 Letter that the consultation process it carried out in 2013 provided effective notice to Rogers is disingenuous in the extreme.

23. 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.

24. 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 <u>to provide input and feedback on all aspects of the application</u>"
>
> "Provide adequate background information to enable participation"

25. The proceedings at the four consultations were recorded in the form of an agenda, a PowerPoint presentation, and minutes for each. <u>None</u> of the proceedings for the four consultations contains <u>any</u> mention of the Pole Attachment Rate or the possibility that an increase may be sought.

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opportunity to be heard]". See also *Edmonton Police Assn v Edmonton (City)* 2007 ABCA 187 (Alta. C.A.) and *1657575 Ontario Inc v Hamilton (City)* 2008 ONCA 570 (Ont.C.A.).

26. 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.

27. 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).

28. From the foregoing, 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.

29. Hydro One further points to its Application and Evidence filed January 31, 2014 in support of its argument that the Pole Attachment Rate issue was clearly identified (or identifiable) to all those who would be affected by a change. This argument is only slightly less fantastic than that relating to the consultations, and has no merit whatsoever.

30. First, given the context of the 2005 Order as arising out of a one-issue proceeding relating to pole attachments and licence conditions, the absence of any mention in the consultation process, the absence of any prior inclusion of Pole Attachment Rates in a distribution application, and the complete absence of any reference in the Notice of Application, there would be no expectation that a Carrier should have to comb through an extensive application relating to electricity distribution on the off-chance that pole attachments would be included, and for the very first time.

31. In fact, had a Carrier engaged in a detailed review of *Exhibit A* of the Application, which includes the Exhibit List, Application, Summary of Application, Financial Summary and Summary of Distribution Business, it would have found no reference to pole attachments or Pole Attachment Rates. In the Application, the Carrier would have noted the statement by Hydro One in paragraph 15 that the persons affected by the Application are the "ratepayers of its Distribution business". Given that pole attachments are nowhere described in *Exhibit A* as part of Hydro One's distribution business, the Carrier would have no reason to suspect that they were part of the Application.

32. The only evidence about the Pole Attachment Rate is found on a single page buried about 2,900 pages later in a Supporting Schedule called "Miscellaneous Charges", which is one of 12 supporting schedules to *Exhibit G – Cost Allocation and Rate Design*. Significantly, the written direct evidence for Cost Allocation and Rate Design, which is contained in 15 other schedules, contains no reference to the Pole Attachment Rate.

33. Accordingly, the assertions that the Carriers should have been aware of the Application as it related to Pole Attachment Rates or that they failed to exercise due diligence in respect of the Application has no foundation or credibility whatsoever.

Size of Increase Not Relevant to Notice

34. Hydro One, in the April 7 Letter, takes the position that, because the proposed increase to its Pole Attachment Rate is "relatively small" when compared to the outrageous 300% increase sought by Toronto Hydro, notice is not required. This argument must fail on two grounds.

35. First, Hydro One's increase from $22.35 to $37.05 represents a 66% increase. The fact that Toronto Hydro was seeking an incredible and unprecedented 300% increase does not somehow make Hydro One's increase insignificant. Moreover, 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). No one could objectively assert that a 66% increase over 10 years is not significant or material.

36. Indeed, had the Carriers participated in this proceeding, they would have properly investigated and challenged these costs. In their absence, these costs and resulting Pole Attachment Rate were approved by the Board without any objection or variation.

37. Secondly, as submitted above, the principle of proper notice to those parties who may be affected by a decision does not turn on the "materiality" of the decision made pursuant to the defective notice. Since notice and the underlying principle of natural justice are jurisdictional in nature, a failure of notice is not subject to a materiality analysis. The legal principle that where there has been inadequate notice the proceeding should be set aside without consideration of the merits, is equally applicable here.

38. Hydro One states that joint use or pole attachment charges in this proceeding were not contentious. The inaccuracy of this bald assertion is evidenced by the numerous objections raised and, presently, motions brought by the Carriers. A 66% increase is contentious and is controverted by them.

Additional Considerations Support Granting of Leave

39. The Carriers submit that Hydro One's failure to provide any notice of the Application is the critical circumstance underpinning the Carriers' request and justifies leave being granted.

Minimal Delay; Reasonable Explanation for Delay

40. The Carriers submit that their delay in seeking leave to file a motion to review and vary the Decision was minimal and that their explanation for the delay was reasonable. On March 30, 2015, Rogers and a number of the other Carriers were

informed by Hydro One that the Board had approved the Pole Attachment Rate increase. As mentioned above, prior to March 30, 2015, the Carriers had no notice that Hydro One had applied to the Board for an increase to the Pole Attachment Rate and accordingly, the Carriers were unable to bring this motion seeking leave to bring the R&V Motion in a timelier manner.

41. Immediately after receiving notice of the Decision, each of Rogers, Shaw, Cogeco and Eastlink wrote to the Board on April 1, 2015, requesting leave to file the R&V Motion on an urgent basis. Quebecor filed its letter shortly thereafter. After learning of the above letters, the ITPA and CCSA contacted their members and wrote the Board on April 21 and 23 respectively. There was absolutely no delay in the bringing of this motion once the Carriers became aware of the Decision.

The Public Interest; Broader Economic Impact of Pole Attachment Rate Increase

42. The Carriers submit that the Board must grant leave for the Carriers to bring the R&V Motion as a result of critical public interest considerations. Hydro One's increase from $22.35 to $37.05 represents a 66% increase. As described above, 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).

43. 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.

44. Furthermore, the public interest requires that the request for an increase to the Pole Attachment Rate be subject to proper scrutiny by those who pay those rates and by the Board. The record of proceedings in EB-2013-0416/EB-2014-0247 shows that no other parties to the proceeding took issue with the increase requested. Certainly, no evidence in opposition to the Pole Attachment Rate increase was filed. None of the intervenors listed appear to be pole attachment customers, and therefore none of them could be expected to challenge the request for increase. Lastly, there is no mention of Pole Attachment Rates in the Decision. Accordingly, the only conclusion possible is that 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 leave be given in these circumstances to allow a considered decision be made with respect to the increase sought on a proper record.

No Prejudice to Hydro One Resulting from Delay

45. The Carriers submit that there would be no prejudice to Hydro One were the Board to grant leave to bring the R&V Motion. 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.

46. In fact, if the Board were to ultimately decline to review and vary the Decision and Pole Attachment Rate increase, any amount owed by the Carriers could be retroactively applied and charged to the Carriers, from the effective date of the Decision, without any prejudice or detriment to Hydro One.

47. Conversely, extreme prejudice to the Carriers would arise if the Board declined to grant leave to allow the Carriers to make submissions, namely, the requirement to pay a substantial Pole Attachment Rate without having had the opportunity to participate in the rate-setting process and properly test the Pole Attachment Rate.

The Board did not have jurisdiction to approve the Pole Attachment Rate

48. The entirety of Hydro One's Application, including its request for an increased Pole Attachment Rate, is made pursuant to subsection 78(3) of the Act. Section 78 of the Act concerns rate-setting for the *distribution of electricity*. It does not address rate-setting for other business. Accordingly, in the Carriers' submission, the Board did not have jurisdiction under section 78 to hear Hydro One's request for a Pole Attachment Rate increase.

49. The header for section 78 of the Act is "Orders by Board, electricity rates". Subsection 78(1) is the foundation of the Board's jurisdiction to set rates for the transmission of electricity. It refers only to electricity:

> 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.

50. Subsection 78(3) states:

> *Rates*
> (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*. [On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is amended by striking out "electricity or such other activity" and substituting "electricity, unit sub-metering or unit smart metering or such other activity". See: 2010, c.8, ss.38 (14), 40.]

51. Subsection 78(3) refers only to electricity and to "such other activity as may be prescribed". Pole attachment is not a prescribed activity.

52. In the 2005 Order, the Board determined that power poles are essential facilities, and concluded that "[d]uplication of poles is neither viable nor in the public interest". The determination of an appropriate access rate to essential facilities is crucial to the safeguarding of the public interest. It is not, therefore, a rate for "transmitting or distributing of electricity", but a rate designed to accomplish broader public interest goals.

53. The Carriers submit that the Board's jurisdiction to regulate Pole Attachment Rates is provided by section 74 of the Act, which gives the Board a broad power to amend the licences of electricity distributors in the public interest:

> *Amendment of licence*
> 74. (1) The Board may, on the application of any person, amend a licence if it considers the amendment to be,
> (a) necessary to implement a directive issued under this Act; or
> (b) in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.

54. In its plain and ordinary meaning and taking into context the different wording of section 78, section 74 confers upon the Board the jurisdiction that it requires to regulate licensees in the public interest in respect of matters other than electricity rate changes. The Board may consider that amendments to Hydro One's Pole Attachment Rates would be in the public interest pursuant to subsection 74(1)(b) as opposed to being just and reasonable under section 78.

55. This situation is distinguishable from the Board's conclusion and determination in its Decision and Procedural Order 10[8] in the EB-2014-0116 proceeding. In that Order, the Board determined that it did it have jurisdiction to deal with the Pole Attachment Rate of Toronto Hydro Electric System Limited ("**Toronto Hydro**") pursuant to section 78 of the Act because, in its view, it had prescribed the activity of setting the Pole Attachment Rate by amending Toronto Hydro's electricity distribution licence.

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[8] April 29, 2015.

56. Even if one were to agree with the Board's conclusion that it had jurisdiction with respect to Toronto Hydro's Pole Attachment Rate (which the Carriers do not), that conclusion cannot apply to Hydro One and its attempt to seek Board approval of its Pole Attachment Rate as part of a general rate application made under section 78 of the Act. Simply put, Hydro One does not have the same condition of licence as Toronto Hydro that allowed the Board to reach its conclusion. Toronto Hydro's condition of licence states as follows:

> *22.1 The Licensee shall provide access to its distribution poles to all Canadian carriers, as defined by the Telecommunications Act, and to all cable companies that operate in the Province of Ontario. For each attachment, with the exception of wireless attachments, the Licensee shall charge the rate approved by the Board and included in the Licensee's tariff.*

The original condition of licence set out in the 2005 Decision which applied to all electricity distributors, including Hydro One, stated as follows:

> *The licence conditions of the electricity distributors licenced by this Board shall as of the date of this Order be amended to provide that all Canadian carriers as defined by the Telecommunications Act and all cable companies that operate in the Province of Ontario shall have access to the power poles of the electricity distributors at the rate of $22.35 per pole per year.*

57. To the knowledge of the Carriers, Hydro One's distribution licence has not been amended to reflect similar language as that of Toronto Hydro's licence. Therefore, the Board cannot rely on the determination it made with respect to Toronto Hydro.

58. For these reasons, the Carriers submit that the Board did not have jurisdiction to consider Hydro One's request for an increase in its approved Pole Attachment Rate brought pursuant to section 78 of the Act, and this aspect of the Decision should be dismissed on this basis.

CONCLUSION

59. In summary, the Carriers submit that the motion for leave to bring the R&V Motion must be granted because the Carriers reasonably expected clear and specific notice of any intention by Hydro One to seek a Pole Attachment Rate increase, which it failed to provide. Failure to give proper notice is a breach of natural justice, which requires that the proceeding be set aside, regardless of other factors. In particular:

(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.

60. Furthermore, additional factors which the Board has considered to be relevant in the context of motions for leave overwhelmingly support the Board granting leave, as requested:

(a) the failure of notice underpinning the Carrier's request to bring the motion to review and vary the Decision justifies the exercise by the Board of its discretion to grant leave;

(b) there was no delay by the Carriers in seeking leave to bring a motion to review and vary the Decision;

(c) the public interest requires that the Board grant leave to the Carriers;

(d) no prejudice to Hydro One arises as a result of the delay arising from the Board hearing a motion to review and vary the Decision; and

(e) in any event, the Board lacked the jurisdiction to approve the Pole Attachment Rate as part of this proceeding.

61. The Carriers hereby confirm that they are requesting that the Board issue an Order:

(a) granting the Carriers status as parties to this proceeding and leave to file a motion requesting that the Board review and vary the Decision as it relates to the Pole Attachment Rate approved in the Decision;

(b) extending the deadline for the Carriers to file a motion to review and vary the Decision until 20 days after the date on which the Board grants the Carriers leave to file the R&V Motion; and

(c) staying that part of the Decision and any resulting Order that approves the Pole Attachment Rate.

We appreciate the Board's consideration of this motion.

Sincerely,

Pamela Dinsmore

Pamela Dinsmore
Vice President, Regulatory – Corporate Affairs
Rogers Communications Partnership

cc: Cogeco Cable
Allstream
Eastlink
Shaw
Videotron
ITPA
CCSA
Packetworks
Parties and Interveners