Ontario Energy Board

Commission de l'Énergie de l'Ontario

RP-2003-0249

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

AND IN THE MATTER OF an Application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by the Canadian Cable Television Association for an Order or Orders to amend the licenses of electricity distributors

BEFORE: Gordon E. Kaiser
Vice Chair and Presiding Member

Paul Sommerville
Member

Cynthia Chaplin
Member

DECISION AND ORDER

The Applicant, Canadian Cable Television Association ("CCTA") seeks access to the power poles of the regulated electricity distribution utilities in Ontario for the purpose of supporting cable television transmission lines. Specifically, the CCTA is seeking an Order under section 74(1) of the *Ontario Energy Board Act* which would amend the licences of these utilities in a fashion that would specify the uniform terms of access including a province-wide uniform rate or pole charge for such access.

In the past, the CCTA members have rented space on the utilities' poles under private contract. That contract came to an end in 1996. Since then, the parties have been unable to reach further agreement with respect to rates.

Background

In early 1997, the CCTA applied to the Canadian Radio and Telecommunications Commission ("CRTC") to set a charge for access by cable companies to the poles of the Ontario electricity distributors. After a lengthy proceeding, the CRTC set an annual pole charge of $15.89.[1]

The Ontario Municipal Electric Association ("MEA") appealed that decision to the Federal Court of Appeal which held that the CRTC did not have statutory authority under the Telecommunications Act to regulate access by cable operators and telecommunication carriers to power poles.[2]

On further appeal by the CCTA the Supreme Court of Canada upheld the Federal Court of Appeal decision.[3] Given the Court's decision that the CRTC lacked jurisdiction, the CCTA filed an application with this Board on December 16, 2003 on behalf of the twenty-three cable companies that operate in Ontario. None of the parties questioned the jurisdiction of this Board.

The issues before this Board in this proceeding are as follows :

1. Is it necessary that this Board set access charges?
2. Which parties should have access?
3. What is the appropriate methodology?
4. How many attachers should be assumed in calculating the rate?
5. Should there be a province-wide rate?
6. What costs should be used in calculating the rate?
7. Should new licence conditions impact existing contracts?

The Need to Regulate Access Charges

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1 *Part VII Application - Access to supporting structures of municipal power utilities - CCTA v. MEA et al - Final Decision,* Telecom Decision CRTC 99-13, 28 September 1999. [hereinafter "Telecom Decision CRTC 99-13"]

2 *Barrie Public Utilities v. Canadian Cable Television Assn.,* [2001] 4 F.C. 237.

3 *Barrie Public Utilities v. Canadian Cable Television Assn.,* 2003 SCC 28.

The CCTA Application is opposed by the Electricity Distribution Association ("EDA") and the Canadian Electricity Association ("CEA"). The EDA represents virtually all licensed electricity distributors in this province (sometimes referred to as LDCs) while the CEA is a national association representing electricity distributors, generators and transmitters. The position of these two parties is supported by Hydro One Networks Inc., Hydro One Brampton Networks Inc., and Hydro One Remote Communities Inc.

The position of the EDA *et al* is that regulatory intervention by this Board is not necessary. The argument largely is that the Applicant has not demonstrated that there has been a systematic abuse of monopoly power and absent that showing, the Board should allow the parties to continue to negotiate.

There has been some evidence on both sides with respect to abuse. In the end the CCTA says that the electricity distributors do have monopoly power and the fact that the parties have been unable to come to an agreement for over a decade demonstrates the exercise of that monopoly power whether this results in abuse or not.

The Board agrees. A showing of abuse is not necessary to justify the intervention of this Board in this matter. The fact is the parties have been unable to reach an agreement in over a decade. This degree of uncertainty is not in the public interest.

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

The Board concludes that it should set access charges.

The EDA *et al* further submits that if the Board is going to set rates it should set a range of rates based on its proposed methodology as opposed to a specific rate. The CCTA opposes this. The CCTA argument is that a range of rates would simply lead to continued delay, that monopoly power would continue to be exerted and in fact, the upper range would become the rate. In another words, the bargaining power of the cable companies would be as deficient with a range of rates as it is at present. The Board accepts this view. There is no rationale for a range of rates in the current circumstances.

Who should have access?

On this issue, the parties are in agreement. In the Settlement Agreement of October 19, 2004, all parties agreed that if the Board does set access conditions, these conditions should apply to access to the communications space on the LDC poles by all Canadian Carriers as defined in the Telecommunications Act and cable companies. The only exception is that these conditions would not apply to the current joint use agreements between telephone companies and electricity companies that grant reciprocal access to each others poles.

This Board has accepted the settlement agreement in this regard. In addition, the Board has heard submissions to the effect that the LDCs agree that their own telecommunication affiliates would access poles on the same conditions as other users of the communications space. The LDCs also confirmed that all users of the communications space should pay the same charge.[5]

This is an important clarification. This market is changing rapidly and industries are converging. Cable companies are now providing the telecommunication services just as the electricity distributors enter this industry. The fact that the two groups that have been warring over the past decade are fast becoming competitors is an additional reason for the Board to intervene and establish clear guidelines. From this Board's perspective, it is equally important that costs be properly allocated and that the electricity distributor (and ultimately, the electricity ratepayer) receives its fair share of revenue.

What is the appropriate methodology?

There are two elements to the proposed rate. The first is the incremental or direct costs incurred by electricity distributors that results directly from the presence of the cable equipment. Second, there are common or indirect costs which are caused by both parties. The parties agree that the direct or incremental costs should be borne by the cable companies.

The dispute relates to what share of the common cost each parties should pay. The cable companies say the portion of the fixed or common cost they should bear should be based on the cable companies "proportionate use" of the usable space on the pole. Electricity distributors claim that the portion of the common cost each of the parties bear should be equal. In other words, the common cost should be divided equally among attachers on a "per capita" basis.

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[5] Tr. Vol. 2 at paras. 800 and 804.

Both parties called experts. The cable companies called Donald A. Ford while the electricity distributors called Dr. Bridger Mitchell. Reply evidence for the CCTA was presented by Patricia Kravtin and Paul Glist. All witnesses were qualified as experts.

The CCTA Application seeks a pole attachment rate of $15.65, a similar amount to that decided by the CRTC. The rates proposed by the EDA are substantially higher.

The principal argument advanced by the cable companies is that proportionate use is the methodology adopted by the CRTC and it has also been followed elsewhere in Canada and the United States. They point out that there have been numerous reviews of this rate methodology and the methodology has never been set aside.[6]

The response of the electricity distributors is that these rates are unduly low and are driven by considerations of telecommunication policy. In particular, they were designed to foster competition in that sector. The witnesses, however, were unable to point to any particular articulation of that policy goal as the justification for the rate levels at least in the Canadian context.

In Canada, the two decisions that follow the CRTC decision have in fact been divided on this issue. The Alberta Energy Utility Board ("AEUB") established a pole attachment rate of $18.34 in 2000 using the per capita approach.[7] The Nova Scotia Utility and Review Board ("NSURB") set a rate of $14.15 in 2002 following the CRTC approach.[8] The Nova Scotia Board did point out however, they had not conducted any cost allocation studies on their own.

An additional argument to support the lower rate advanced by the cable companies is that they are only tenants while the electricity distributors own the poles. They argue that pole ownership confers a benefit.

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6 *FCC v Florida Power Corp. 480 US 245, (1987); In the Matter of Alabama Cable Telecom Association v Alabama Power Corp.;* 16 FCC 12, 12, 209 (2001)

7 *TransAlta Utilities Corporation,* Decision 2000-86 (Alberta Energy and Utilities Board), December 27, 2000 online: <http://www.eub.gov.ab.ca/bbs/documents/decisions/2000/2000-86.pdf>.

8 *In the Matter of the Public Utilities Act and In the Matter of an Application by Nova Scotia Power Incorporated for Approval of an Increase in its Pole Attachment Charge,* Decision 2002 (Nova Scotia Utility and Review Board) NSUARB-1, January 24, 2004.

The electricity distributors deny this, claiming that ownership has costs; they have to install poles whether they have an attacher or not and may face stranded assets. In the end, the Board is not persuaded that the ownership of the poles should effect the level of rates. The Board agrees with the electricity distributors that the impact of ownership is neutral.

The CEA argues that electricity distributors should be allowed to raise the rates charged to the cable companies because cable companies are now generating "massive new sources of revenue" from the use of electricity distribution plant. In particular, they point out that revenues from high speed internet service have increased from $0 in 1995 to over $900 million annually by 2003. The CEA requested that the Board infer that a large portion of these revenues are from Ontario cable operations. The Board notes that there is very little evidence on this issue. Moreover, the Board believes that the methodology used to determine rates should be based on cost recovery, not some form of revenue sharing.

Another rationale advanced by the cable companies is that it makes no sense to have different methodologies for setting rates on power poles compared to telephone poles. The argument is that since the CRTC methodology is used to price access to telephone poles, the same methodology should be followed in pricing access to power poles. The Board is not convinced. This Board may have a different policy rationale than the CRTC particularly in terms of the electricity ratepayer and the serving utility. In any event, it is worth noting that the rental charge paid by the cable companies for access to telephone poles is $9.60 per pole. This is certainly not the rate being advanced by the cable companies in this proceeding.

The most persuasive argument for equal sharing of the common cost is the practice that appears to take place when parties are in position of equal bargaining power. The LDCs point to the reciprocal agreements between the telephone companies and the
power companies that have existed for a number of years. Under those agreements, each of the regulated utilities has access to the other's poles. They essentially split the common cost equally.

The cable companies question this proposition. They argue that these are regulated entities that have a bias to invest more than optional amounts of capital based on the Averch Johnson principle. [9] The Board notes however, that both sides face the same incentive in terms of investing capital in rate base assets. It can reasonably be assumed that the telephone companies and the power companies are in an equal bargaining position and the resulting solution is a meaningful guideline.

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[9] Harvey Averch and Leland L. Johnson, "Behaviour of the Firm under Regulatory Constraint," *Amer. Econ. Rev.* (December 1962) LII: 1052-1069.

The CCTA responds that its members are not in an equal bargaining position. In the Board's view, that is not relevant. The free and open negotiation between the telephone and power companies is offered as a proxy for a competitive market solution. No party holds an advantage over the other or is in a position to exercise monopoly power.

For many years, electricity and telephone companies in at least four provinces have openly negotiated reciprocal access agreements to telephone and power poles. In all cases, these agreements appear to reflect equal allocation of common costs. This suggests that the per capita or equal sharing methodology is the appropriate one. Moreover, as more and more parties attach to these poles, the notion that there is a discrete portion of space to be allocated to each becomes more problematic.

The Board recognizes that a case can be made for both the proportionate use and the equal sharing methodology. On balance, however, the Board prefers the equal sharing theory for the reasons stated.

How many attachers should be assumed?

When the CCTA filed its Application, it assumed two attachers. This position was amended in Final Argument when 2.5 attachers was proposed. The Reply Argument of the CCTA appears to revert back to two attachers with reference to the CRTC rate of $15.65.

Two attachers were assumed in the CRTC decision. The industry however, has changed dramatically over the last five years. There is evidence that in one municipality there are as many as seven different parties seeking attachment. There is also evidence that poles are used by municipalities for the purpose of street lighting and traffic lights.

In addition, an increasing number of telecommunication providers are entering the market to compete with incumbent telephone company providing voice and data services. A number intervened in this proceeding and by virtue of the settlement agreement will have access to the poles in question. Finally, in a number of major markets the Ontario electricity distributors have established their own affiliates to offer telecommunication services. The LDCs have agreed that these affiliates should pay the same rates as the other parties attaching to the power poles. There is also evidence that Hydro One which accounts for a third of the poles in the province has more than two attachers.

The Board considers 2.5 attachers to be reasonable. Things have changed since the days of the CRTC decision. If anything, there will be more than 2.5 attachers in the future.

Should there be a province-wide rate?

The cable companies argued for a standard province-wide rate. There is precedent for this in terms of the CRTC decision as well as the Nova Scotia and Manitoba decisions. A province-wide rate has the advantage that it is simple to administer. This is certainly one of the goals the Board hopes to achieve in this decision. Moreover, the cost data at the individual LDC level is incomplete. Calculating these costs for ninety different utilities will be a challenge for all concerned.

This is not to say there should not be relief available for electricity distributors who feel the province-wide rate is not appropriate to their circumstances. Any LDC that believes that the province-wide rate is not appropriate can bring an application to have the rates modified based on its own costing. Absent any application, the province-wide rate will apply as a condition of licence, as of the date of the Order.

What costs should be used to calculate the rate?

The annual pole rental charge of $15.65 proposed by the CCTA is a function of both the direct and the indirect cost as set out in Appendix 1. The direct costs consist of the administration cost and the loss of productivity. The total direct cost estimate of $2.61 is based on the CRTC decision.

The EDA claims that there is no reason why the Board should use a $1.92 estimate of loss of productivity as advanced by the CCTA. The EDA points to different data from five different LDCs which range from $0.67 per pole in the case of Hydro One Networks to $5 per pole in the case of Guelph Hydro. References are also made to the evidence of Manitoba Hydro filed by the CEA which calculated a loss of productivity of $6.39 per joint use pole.

There is no question that there is a wide variation in these costs and estimates. The EDA recommends that if this Board determines that it should use the CCTA model to arrive at a uniform annual pole charge, the Board should use the highest Ontario data available to set that uniform rate. That rate would be $32.81 using the Toronto Hydro data and the productivity loss estimate for Guelph Hydro. The Board disagrees and concludes that province-wide representative cost data are more meaningful in the circumstances. For the purposes of calculating the rate in this proceeding, the Board has adopted the direct costs set out in the CCTA application and reproduced in Appendix 1.

Next there are the indirect costs which consist of the net embedded cost per pole plus depreciation, maintenance expense and carrying costs. Again a wide range of costs were proposed by the EDA depending on the particular utility chosen. The Board has concluded that the depreciation, maintenance and carrying costs proposed by the CCTA are representative as set out in Appendix 1.

The CCTA's proposed rate is based on an average net embedded pole cost of $478. This embedded cost is derived from material filed by Milton Hydro in the proceeding leading to the Telecom Decision of the CRTC 99-13 and is supported by the evidence of Hamilton Hydro in this proceeding that the embedded pole cost is $477.47.

EDA argues that local costs vary significantly and if the Board considers it appropriate to set a uniform rate, the rate should reflect the cost of the utilities having the highest embedded pole cost. The EDA then submits that the parties should be free to apply to the Board for a lower rate where they can demonstrate lower costs.

While the Board recognizes local costs vary, there are advantages to having a province-wide rate. That rate should to a maximum extent possible, be based upon representative cost. The Board accepts the CCTA's estimated average net embedded pole cost of $478.

The rate proposed by the CCTA assumed a pre-tax weighted average cost of capital of 9.5%. In response to an undertaking, the CCTA provided a revised weighted average cost of capital based upon a debt equity ratio of 50/50, an interest rate of 7.25% and a return on equity of 9.88% as provided for in the Board's current Rate Handbook. This cost of capital applies to distributors with a rate base of less than $100 million. Given that a large majority of distributors in the province have less than this amount, the Board believes that this new weighted average of capital is an appropriate one to use in calculating a province-wide rate.

Calculation of the rate

To calculate the rate, it is necessary to define the number of attachers as well as the embedded pole costs discussed above. It is also important to define the spacing on a typical pole.

The CCTA proposal assumes a typical pole height of 40 feet with two feet of communications space, 3.25 feet of separation space and 11.50 feet of power space. Mr. Wiebe, on behalf of CEA proposed slightly different space allocations. The CCTA argues that the space allocations adopted by Mr. Ford are virtually identical to those put forward by the Municipal Electric Association in the CRTC proceeding. In addition, the EDA put forward a model agreement developed co-

operatively by a number of LDCs (the Mearie Group) where the assumptions regarding space allocation for a typical 40 foot pole were identical to those used by Mr. Ford. The Board finds that the CCTA estimates are acceptable.

As stated, the Board believes that a single province-wide rate is in the public interest. As indicated, the Board believes its more realistic to use 2.5 as the number of attachers. The Board agrees with the EDA and CEA that the common costs should be shared equally among all attachers. On these principles and the cost data described above, the annual pole charge is $22.35 per attacher as set out in Appendix 2.

Should there be a standard form of agreement?

Under the Settlement Agreement, the parties agree to negotiate the terms and conditions once the Board has made its determination as to the rate. The parties agree to report back to the Board in four months as to the progress of these negotiations. The Board accepts this approach.

Impact on existing contracts

In the Settlement Agreement all parties with one exception, agreed that any new rate set by the Board should not apply to existing contracts. The rate would only apply when the current term of existing contracts expired. Where no contract exists, the licence conditions would apply immediately.

The acceptance of this position appears to be driven by the fact that most existing contracts provide for retroactive rate adjustment in the event this Board determines a rate.

The CCTA states that it would not object to a Board ruling that existing contracts without a retroactivity clause are immediately subject to the Board's decision regarding new licence conditions. They claim however, that few contracts do not have retroactivity provisions.

MTS objects to the Settlement Agreement and submits that any pole access rates set by the Board should be applied to all existing contracts not just those with retroactivity clauses. The Board will provide that the new rates and conditions resulting from this decision will apply immediately to those agreements without a retroactivity clause. Those are apparently few in number. This should provide immediate relief to those who are unable to benefit from a retroactivity provision.

THE BOARD ORDERS THAT:

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.

Dated at Toronto, March 7, 2005.

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Gordon E. Kaiser
Vice Chair and Presiding Member

Appendix 1: CCTA Recommended Charge (2 Attachers)

	Price Component - Per Pole	***$***	***Explanation***
	DIRECT COST		
A	Administration Costs	$0.69	CRTC estimate 1999 $0.62, plus inflation
B	Loss in Productivity	$1.92	MEA estimate 1991 = $3.08, plus inflation, and divided between two pole attachers
C	Total Direct Costs	$2.61	A + B
	INDIRECT COSTS		
D	Net Embedded Cost per pole	$478.00	Milton Hydro 1995 = $478
E	Depreciation Expense	$31.11	Milton Hydro 1995 = $31.11
F	Pole Maintenance Expense	$7.61	Milton Hydro 1995 = $6.47, plus inflation
G	Capital Carrying Cost	$45.41	Pre-tax weighted average cost of capital 9.5% applied to net embedded cost per pole (D)
H	Total Indirect Costs per Pole	$84.13	E+F+G
I	Allocation Factor	15.5%	CRTC allocation
J	Indirect Costs Allocated	$13.04	H x I
K	Annual Pole Rental Charge	$15.65	C + J

Appendix 2: 2.5 Attachers - Shared Costs Evenly Spread Amongst All Users

	Price Component - Per Pole	***$***	***Explanation***
	DIRECT COST		
A	Administration Costs	$0.69	CRTC estimate 1999 $0.62, plus inflation
B	Loss in Productivity	$1.23	MEA estimate 1991 = $3.08, plus inflation, and divided between 2.5 pole attachers
C	Total Direct Costs	$1.92	A + B
	INDIRECT COST		
D	Net Embedded Cost per pole	$478.00	Milton Hydro 1995 = $478
E	Depreciation Expense	$31.11	Milton Hydro 1995 = $31.11
F	Pole Maintenance Expense	$7.61	Milton Hydro 1995 = $6.47, plus inflation
G	Capital Carrying Cost	$54.59	Pre-tax weighted average cost of capital 11.42% applied to net embedded cost per pole (D)
H	Total Indirect Costs per Pole	$93.31	E+F+G
I	Allocation Factor	21.9%	Allocation based on 2.5 attachers
J	Indirect Costs Allocated	$20.43	H x I
K	Annual Pole Rental Charge	$22.35	C + J