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Pole Attachment Charge Approved by OEB Upheld on Appeal

By Fred D. Cass

The Ontario Divisional Court has issued a decision dismissing an appeal with respect to the charge approved by the Ontario Energy Board for wireline attachments to electricity distribution poles. The appeal arose from the OEB's policy review of miscellaneous rates and charges applied by electricity distributors for specific activities or services. The province-wide pole attachment charge, which applies by default when a utility-specific pole attachment charge has not been approved for a particular electricity distributor, had not been changed since 2005 and the OEB prioritized wireline pole attachments as a first component of the first phase of its policy review.

The OEB concluded its review of charges for wireline pole attachments with a final Report dated March 22, 2018. In the Report, the OEB determined that it was in the public interest to raise the province-wide charge to \$43.63, with annual adjustments based on the OEB's inflation factor. To mitigate the impact of the increase on the carriers (telecommunications and cable companies) who pay for wireline pole attachments, the OEB decided that there would be a lower charge for a transitional period and that there would be no inflationary increase for 2019.

A group of carriers appealed to the Divisional Court and asked the Court to set aside the Report. They argued that the OEB failed to follow provisions of the *Ontario Energy Board Act* requiring it to hold a hearing. Their position was that the pole attachment charge is a rate "for the transmitting or distributing of electricity" or "for the retailing of electricity" which is to be made by an OEB order, for which purpose the OEB Act requires the OEB to hold a hearing.

The Divisional Court noted that "the use (really the rental) of space on a pole by a telecommunication company has nothing to do with the retailing or distribution of electricity." The licences of electricity distributors issued by the OEB require the distributors to allow access to poles, and to charge the rate for each wireline attachment approved by the OEB, and the change to the pole attachment charge was made in the exercise of the OEB's jurisdiction to grant an approval or make a determination, "with or without a hearing", required for the matters provided for in a licence. The Divisional Court held that the OEB Act did not require the OEB to hold a hearing and it went on to reject the argument of the carriers based on the principle of legitimate expectation, which the Court referred to as "the promise of a process (in this case a hearing) either through a specific undertaking, or past practice." The Court also rejected the argument that the process adopted by the OEB violated the right of the carriers to a fair process, concluding that the process, in its particular circumstances, was procedurally fair.

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