CANADIAN CABLE TELEVISION ASSOCIATION ("CCTA")

APPLICATION FOR INTERIM AND FINAL RELIEF:
REQUEST TO AMEND THE LICENCES OF ALL
REGULATED ELECTRICITY DISTRIBUTION UTILITIES IN
ONTARIO FOR THE PURPOSE OF ESTABLISHING
STANDARD TERMS AND CONDITIONS FOR ACCESS BY
CABLE COMPANIES TO POWER POLES

I. INTRODUCTION

1. This application is brought by the Canadian Cable Television Association ("CCTA") on behalf of its member companies operating in Ontario ("the Companies"), pursuant to s.16 of the *Ontario Energy Board Rules of Practice and Procedure.* A complete list of the CCTA members who operate cable systems in Ontario is attached as Appendix A to this application.

2. CCTA is seeking interim and final orders under subsections 74(1) and 21(7) of the *Ontario Energy Board Act* ("the OEBA"). Specifically, CCTA is seeking an amendment to the licences of all regulated electricity distribution utilities ("distributors") in Ontario. The generic amendment would establish uniform terms and conditions of access by the Companies to power poles in Ontario by means of a standard pole attachment agreement. CCTA's proposed standard pole attachment agreement is set out in Appendix B to this application. Justification for the specific pole rental charge requested as part of the standard terms and conditions is provided in the expert evidence set out at Appendix C to this application.

3. CCTA emphasizes that the need for intervention by the Ontario Energy Board ("OEB" or "the Board") is urgent and critical to the ongoing operations of cable companies in Ontario. While some distributors have continued to work cooperatively with cable companies to resolve outstanding issues, others have become increasingly intransigent. In some cases, distributors have indicated that they will no longer approve new permits for attachment of cable equipment to power poles. This

situation is untenable for the Companies and will cause them irreparable harm, since in the absence of permits the Companies are unable to either upgrade their existing distribution systems or extend their distribution systems to new customers or service areas.

4. In the circumstances, CCTA requests the Board to address the situation as expeditiously as possible with an interim order requiring all regulated distributors in Ontario to enter into pole attachment agreements with the Companies on the terms and conditions set out in the proposed standard agreement, including an interim pole attachment charge of $15.65 per pole per year, pending a hearing to consider the matter on a final basis.

5. CCTA also requests final relief in the form of an order amending the licences of all distributors in Ontario. The Board would require all distributors by condition of licence to enter into pole attachment agreements with the Companies in accordance with the terms and conditions set out in the attached proposed standard agreement. The terms of that agreement would govern, on a final basis, access by the Companies to the poles of the distributors.

II. BACKGROUND

a. The Cable Television Industry – Infrastructure Needs

6. More than 7 million Canadian households receive their television programming from cable operators. In addition, over 2.2 million Canadian households currently receive their Internet service by way of cable, including over 700,000 cable Internet subscribers in Ontario.[1]

[1] Statistics Canada, Service Bulletin, "Cable, Satellite and Multipoint Distribution Systems, 2002," Catalogue No. 56-001 XIE, Vol. 33, No. 3.

7. Cable operators deliver cable television service and high-speed Internet service over coaxial and fibre transmission lines and facilities ("cable lines"). As of 2000, cable operators had more than 211,694 kilometres of cable lines strung on poles and in underground conduit across the country, including 78,125 kilometres in Ontario alone. Distributors and telecommunications carriers own an overwhelming majority of these poles. In contrast, cable operators own less than 2% of the poles used to support their cable lines.

8. In Ontario, approximately 74% of poles are fully or partly owned by distributors. Many poles are subject to joint use agreements between Hydro One and Bell Canada involving shared ownership of the total network of poles. Under these agreements, Hydro One owns 69% of the jointly used poles and Bell Canada owns 31% of the jointly used poles. This arrangement provides Bell Canada, a major competitor, with assurances of access to these utility poles, while cable companies do not have any such leverage. The remaining poles are owned by the local and municipal distributors.

9. Cable operators depend heavily on access to space on poles for a number of reasons. First, the cable industry developed in the 1950s, long after the infrastructure of distributors and telephone companies was already in place. Second, unlike distributors and telephone companies, cable operators did not have the statutory right to enter onto public property for the purpose of constructing their own poles until 1993.[2]

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2 *Telecommunications Act*, S.C. 1993, c. 38, subsection 43(2).

b. History of Pole Attachment Agreements in Ontario

10. The Companies traditionally obtained access to power poles owned or managed by distributors through negotiated agreements. Co-operative joint use of power poles operated successfully for over 45 years prior to the mid-1990s.

11. The most recent pole attachment agreements between the Companies and the Ontario Municipal Electric Association ("MEA"), the predecessor to the Electricity Distributors' Association ("EDA"), expired on or before December 31, 1996. Despite lengthy negotiations through most of 1996, the Companies and the MEA were unable to agree on terms of new pole attachment agreements.

12. In early 1997, the CCTA applied to the Canadian Radio-television and Telecommunications Commission ("CRTC") to set a charge for access by cable companies to the poles of Ontario distributors. After a lengthy proceeding, the CRTC set an annual pole rental charge of $15.89.[3] The MEA appealed that decision to the Federal Court of Appeal, which held that the CRTC did not have the statutory authority under the *Telecommunications Act* to regulate access by cable operators and telecommunication carriers to power poles.[4] On further appeal by the CCTA, the Supreme Court of Canada upheld the Federal Court of Appeal decision.[5] The majority's decision in this regard has effectively eliminated the CRTC as a forum for dispute resolution where cable operators and distributors cannot agree on appropriate terms and conditions for access to power poles.

13. Since 1997, contact between the Companies and distributors has varied according to the individual cable company and the relevant utility. However, in the absence of an

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3 *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"]

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

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

agreement, many distributors are demanding access charges that are substantially in excess of the charge approved by the CRTC, including charges that are more than 100% higher. In some instances, distributors have refused to issue permits for new pole attachments, effectively prohibiting cable operators from installing and upgrading their equipment. Examples of correspondence to this effect from distributors are included in Appendix D.

14. The Companies cannot continue to have their ability to upgrade and extend their distribution systems frustrated in this manner. Cable operators require access to the support structures of electric power utilities in order to deliver both television programming and high-speed Internet service to millions of Canadian households. Increasingly, these systems are also being used for the distribution of other advanced combinations services such as digital television and video-on-demand. Cable operators have invested more than $5.5 billion in their distribution systems over the past four years in order to meet public demand for these new services. However, continued access to distribution systems and their supporting structures is essential to the ongoing provision of these services.

15. While the Companies would prefer to have been able to reach a negotiated agreement with the distributors, the Companies believe that in the present circumstances they have no choice but to seek relief from the Board under the OEBA.

b. Changing Circumstances in the Power and Telecom Industries

16. The traditional mandate of the electrical power industry was to supply the public with electricity on a cost-recovery basis. Construction of its infrastructure across the country was publicly funded. However, with the change in Ontario from not-for-profit public utility commissions to corporations, most of which have elected to operate in a commercial "for profit" mode, the distributors are now seeking to use the same infrastructure to generate profits.

17. Further, this last decade has seen the introduction of competition in the broadcasting and telecommunications industries. Regulatory changes have allowed distributors to provide services traditionally offered by cable companies and telecommunications carriers. For example, distributors or their affiliates in British Columbia, Alberta and Ontario offer fibre-optic telecommunications services using existing public utility assets in competition with telecommunications carriers. Distributors are also providing high-speed Internet service in competition with cable companies and telecommunications carriers.

18. In an application filed with the CRTC on October 1, 2003, the Coalition of Power Telecom Service Providers stated that they provide competitive telecommunications services in Ontario, including a wide array of broadband, high speed telecommunications services.[6] The Coalition further stated that its members "make a significant contribution to the Canadian telecommunications infrastructure, providing telecommunications services across an area spanning more than 4,000 km from Sudbury in the north, to Windsor in the west, as far east as Montreal and as far south as the Canada-U.S. border, and into the U.S.".[7]

19. More recently, the Financial Post reported that Canada's telecom market is getting more competitive as electric utilities roll out Internet services. In an article dated December 4, 2003, journalist Mark Evans made reference to Toronto Hydro Telecom's recent announcement that it has seen "good growth" in its telecommunications services, which include dedicated Internet access, private lines, video transmission, disaster recover and metro local area networks.[8] This puts Toronto Hydro Telecom in direct competition with cable and telephone companies.

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[6] The Coalition is a group of fifteen competitive telecommunications service providers, including many that are owned by related local electrical distributors.

[7] *Part VII Application by Coalition of Hydro Telecom Service Providers*, October 1, 2003, at para. 3.

[8] *"Utilities Shake up Telecom Market: 'they are a real spoiler'", Financial Post*, December 4, 2003.

The article quotes Tom Adams, executive director with Energy Probe, as saying that one of the challenges facing utilities with telecom operations is maintaining a "hermetic seal" between the two businesses. According to Adams, there is a danger that the regulated utility will subsidize unregulated business units.[9]

20. It is in this new competitive environment that access agreements are now being negotiated between suppliers of access to the poles and the Companies. Given that the supplier or its affiliate is also competing or will soon be competing with the cable applicant seeking access to the pole, distributors have little incentive to negotiate access agreements on terms that are based on the principles of cost-recovery.

21. For example, certain EDA members are currently demanding an annual access rental charge of $40.92 a pole, and in some cases even more. This amount represents approximately a 300% increase over the last MEA negotiated charge of $10.42 per pole and is more than 250% higher than the charge established by the CRTC in *Telecom Decision CRTC 99-13*. It is also more than double the amounts set by the Alberta Energy and Utility Board (AEUB) and the Nova Scotia Utility and Review Board (NSURB), which recently established annual pole attachment charges of $18.34 and $14.15, respectively.[10] By comparison, the rental charge paid by cable companies for access to telephone poles is $9.60 per pole.[11]

22. Since there is only a single set of poles to which access is available, the supplier of access – in this case the distributor – has the ability and incentive to exercise market power over the setting of the rental charge and terms of access. There is not a

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9 *Ibid.*

10 *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>; *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, 2002.

11 *Telecom Decision CRTC 95-13, Access to Telephone Company Support Structure,* 9 August 1995.

workably competitive market in the supply of access to poles. It is not reasonable, therefore, to rely on the market to establish a fair market value for pole access.[12]

c. Unnecessary and costly rebuild

23. If access to power poles is denied, cable operators will be forced to remove existing cable lines from these poles. The capitalized labour cost of placing lines on support structures represents a significant portion of the cost attributable to a cable operator's distribution network. These lines cannot simply be transferred "as is" to a different location. Therefore, denial of access would be tantamount to requiring the Companies to completely rebuild a significant part of their distribution network.

24. Rebuilding a cable distribution network across Ontario would obviously result in considerable expenditures, measured in the billions of dollars and years of effort. The costs of such a rebuild would need to be recovered for the cable operators to remain financially viable. As a result, the very consumers who have already funded the cost of building Ontario's electrical infrastructure would be asked to fund a duplicate infrastructure. Moreover, the Companies face competition in core video and Internet markets, including competition from providers that would not face these cost increases. Accordingly, the Companies may not be able to raise rates sufficiently to recover these costs.

25. In addition, where the Companies were unable to rebuild prior to having to vacate the power poles, service disruption would occur. Disruptions in cable high-speed Internet services could have especially dramatic consequences. Businesses and individuals throughout Canada have come to rely on these services as a vital part of their commercial and personal activities.

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12 Appendix C, Evidence of Donald A. Ford, December 1, 2003 at pp. 4-5.

d. Duplicate support structures

26. Access to power poles makes it unnecessary for cable operators to build duplicate support structures along streets and other rights of way. The construction of a duplicative set of support structures would have a serious economic impact on the cable industry with an inevitable consequential impact on the services and rates enjoyed by cable customers. In addition, the environmental and aesthetic repercussions flowing from such unnecessary construction would seriously affect all communities in Ontario.

27. In any event, the Companies could not realistically build an entirely duplicative set of support structures. To construct support structures, cable operators must seek permission from municipalities and other local authorities to access public rights-of-way. In many cases, these municipalities and authorities control the distributors that are seeking substantial increases to the pole rental charges. In addition, both sides of a street are already occupied by different support structures, including telephone, electrical power and municipal lighting, leaving no room for an additional set of cable support structures.

28. Municipalities are also sensitive to the need to prevent the proliferation of duplicative support structures for aesthetic and environmental reasons. In fact, certain authorities, such as the British Columbia Ministry of Transportation have a published single pole line policy.[13] Therefore, requests by the Companies to access public rights-of-way would in many cases end up back before the CRTC as disputes between cable operators and municipalities or other public rights-of-way authorities. This would only perpetuate the underlying problem of regulating shared access to a limited amount of public space.

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[13] Technical Circular T-12/94.

III. RELIEF SOUGHT

29. CCTA seeks final relief pursuant to subsection 74(1) of the OEBA, which provides as follows:

> 74.(1) Subject to subsections (2) and (3), the Board may, on the application of any person, amend a licence if it considers the amendment to be,
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> > a) necessary to implement a directive issued under section 27, 27.1 or 28; or
> > b) in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.

30. CCTA submits that an amendment to the licences of all regulated distributors in Ontario requiring them to enter into pole attachment agreements on specified terms and conditions is reasonable and in the public interest. CCTA's proposed terms and conditions are set out in the model pole attachment agreement in Appendix B.

31. Consistent with the expert evidence provided by Donald A. Ford in Appendix C, CCTA submits that the appropriate rental charge for pole attachments to Ontario distributors is $15.65. As set out in the expert evidence, in recommending a costing and pricing methodology to the Board for arriving at an appropriate pole attachment rental charge, two fundamental principles have been followed. First, the rental charge must provide for the recovery of all direct costs incurred by the support structure owner as a result of the occupancy by the cable operator of a portion of the communications space on the pole. Second, the rental charge should also provide for an additional payment in the form of a contribution toward the indirect costs, based on the actual costs of the support structure that the owner incurs, whether or not a cable operator has attachments on the pole.

32. As Ford points out in his expert evidence, the rationale for the second principle is based on considerations of "fairness, competitive equity and the public interest":

> From the perspective of fairness, a contribution allows for a reasonable sharing, between the support structure owner and its customers on the one hand and the cable operator and its customers on the other, of the benefits arising from the joint use of support structures. At the same time, it is important to recognize that, as tenants, cable operators do not have any of the rights, privileges or advantages of ownership and, therefore, it is appropriate to limit the level of contribution. From the perspective of competitive equity, it is important to ensure that the limited supply of support structures is not being used to extract monopoly rents from cable operators when they are often in competition with the owners of support structures for certain services, and that reasonable access is not being denied. At the same time, given the competitive situation, it must be ensured that cable operators are treated equitably relative to others that have access to the support structures. Finally, from the perspective of the public interest, owners of support structures should be provided with financial incentives to agree to their joint use so as to limit the number of poles on public lands.[14]

33. CCTA submits that an annual pole attachment rental charge of $15.65 per pole is consistent with the principles articulated by Ford and falls generally in the range of rental charges arrived at by other utility boards and commissions, including the CRTC, the Nova Scotia Utility and Review Board and the Alberta Energy and Utilities Board.

34. The Nova Scotia Board followed closely the approach of the CRTC in 99-13, in establishing the components and magnitude of the pole rental charges. For example, it noted at p. 23 of its decision that

> while the decision (CRTC 99-13) has been set aside for reasons noted earlier, for the purposes of this decision the Board finds the CRTC's approach to determining space allocation to be helpful.

Interim Relief

35. CCTA also seeks interim relief pursuant to subsection 21(7) of the OEBA, which provides that the Board "may make interim orders pending the final disposition of a

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[14] Evidence of Donald A. Ford, Appendix B, at p. 22.

matter before it". To this end, pending the outcome of a hearing to consider the matter on a final basis, CCTA asks the Board to make an interim order requiring all regulated distributors in Ontario to enter into pole attachment agreements with the Companies on the terms and conditions set out in the proposed standard agreement, included as Attachment C, subject to two qualifications.

36. First, the pole rental charge of $15.65 per pole per year would be made interim and subject to adjustment when the Board establishes a final charge. The Companies would emphasize that their request for a rental charge to be set on an interim basis is made without prejudice to their request for final relief.

37. Second, the distributors would be required to process permit applications within 30 days of receipt, failing which a permit application would be deemed to have been approved. An application could be denied solely on the basis of safety or technical concerns. CCTA submits that this minor procedural adjustment is necessary to ensure that during the interim period the Companies are able to proceed with their installation and upgrading plans in a timely manner.

38. CCTA considers that its request for interim relief is supported by an analysis of the criteria established by the Supreme Court of Canada in *Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110. Under the *Metropolitan Stores* approach, the applicant must demonstrate that three criteria are satisfied:

    i) there must be a serious issue to be decided by the tribunal;

    ii) the applicant would suffer irreparable harm if interim relief were denied;

    iii) the balance of convenience supports the grant of the requested relief, taking into consideration the public interest.

CCTA will address each of these criteria in turn.

i) A Serious Issue to Be Decided

39. The Companies cannot gain access to the poles of distributors on acceptable terms. Determination of this issue will provide the Companies with some measure of stability on a going forward basis, thereby ensuring that they continue to provide reliable television and Internet services to millions of Canadians. In these circumstances, CCTA submits there can be no doubt that there is a serious issue to be decided, namely, the terms and conditions on which access to power poles should be permitted.

ii) Irreparable Harm

40. The Companies have an immediate need to gain access to the distributors' utility poles in order to both upgrade existing plant placed on those poles and to extend their distribution systems to new customers and service areas. These upgrades and service extensions are required to meet the Companies' existing regulatory obligations and commitments under the *Broadcasting Act,* as well as to permit the Companies to compete effectively in the supply of broadcasting and telecommunications services.

41. At the same time, the advent of competition in the delivery of broadcasting services has made it crucial that the Companies upgrade and expand their distribution systems as quickly as possible in order to be able to compete with the offerings of other service providers. The Companies cannot afford to have their network plans delayed because distributors refuse to grant the Companies access to their support structures.

42. In a similar vein, the Companies' ability to provide Internet and other new services depend upon the modernization and upgrading of their distribution systems. Given the early stage of development of these markets, it is critical that the Companies be able to implement their plans quickly and efficiently. Every week that passes provides the Companies' competitors with a greater market share in these new services. Once a person selects an Internet service provider, for example, the chances

that one of the Companies will gain that person as a customer drops significantly. This, in turn, impairs the ability of the Companies to take advantage of the economies of scale associated with the development of a significant customer base. Consequently, the refusal of distributors to grant the Companies support structure permits is having both an immediate effect on the ability of the Companies to compete in these new services, as well as a longer term effect on the competitiveness of the offerings that the Companies can provide to the public.

43. In sum, the Companies are being placed in a position where they are or could soon be in breach of their regulatory obligations under the *Broadcasting Act.* They are also being placed at a significant competitive disadvantage in respect of the delivery of broadcasting services, as well as the introduction of two-way communications services such as high speed Internet access. Thus, the Companies submit that they are suffering and will continue to suffer irreparable harm unless interim relief is provided.

iii) Balance of Convenience

44. The third criterion that must be satisfied is that the balance of convenience must favour the granting of interim relief, taking into account the public interest.

45. As discussed in the preceding section, the refusal of some distributors to issue pole attachment permits is causing the Companies irreparable harm. In contrast, if the Companies were granted interim access to the poles of the distributors this would cause no inconvenience or injury to the distributors whatsoever.

46. It is important to recognize that the distributors have not said they cannot provide access. On the contrary, they have provided access to their poles in the past and are willing to do so in the future; the only issue is the terms of such access, particularly the price. In these circumstances, it is clear that distributors would suffer no harm or inconvenience if the Companies were granted access on an interim basis.

47. Under CCTA's proposed form of interim relief, the terms of access would be substantially similar to the access conditions that have applied for many years, up to the end of 1996. Moreover, the access rental charge in effect during the interim period would be subject to adjustment when the Board sets final rental charges. It cannot reasonably be said that distributors would suffer any inconvenience if the status quo were continued in this manner.

48. The case for interim relief is even stronger if the public interest is taken into consideration. There is a strong public interest that the regulatory requirements of the *Broadcasting Act* be fulfilled. The refusal of distributors to issue pole attachment permits is frustrating several of these regulatory objectives. In addition, the public interest in competition in the delivery of broadcasting and other communications services is adversely affected by the Companies' inability to upgrade their distribution systems as a result of the position of the distributors. Finally, by refusing to issue support structure permits, distributors are obstructing the public interest in the sharing of support structures.

49. Overall, CCTA submits that the balance of convenience favours the granting of interim relief. There would be no inconvenience for distributors if the terms of access that applied for many years were to be continued on an interim basis, subject to certain minor adjustments. On the other hand, if interim relief is not granted the Companies will continue to suffer serious inconvenience and irreparable harm. In addition, the public interest will be frustrated in the proper implementation of the regulatory objectives of the *Broadcasting Act*, in the sharing of support structures and in competition in the delivery of broadcasting and other communications services. In these circumstances, the Companies respectfully submit it is both appropriate and necessary for the Board to grant interim relief as soon as possible.

50. CCTA submits that the Board has the jurisdiction to grant the relief requested as outlined in greater detail below.

IV ONTARIO ENERGY BOARD JURISDICTION

51. The OEBA and the *Electricity Act* (the "EA") together constitute a comprehensive legislative framework for the regulation of the electricity distribution industry in Ontario. [15]

52. The Board's authority to regulate cable operators' access to the distributors' assets is found in the OEBA. The OEBA creates a hybrid form of regulation of the electricity industry in Ontario. The first form of regulation is classic economic regulation of the monopoly sectors of the industry including electricity transmission and distribution. The second form of regulation is the comprehensive oversight of both the monopoly and non-monopoly sectors (e.g. generation, marketing) through a licensing regime. The licences issued by the Board provide the licensees the authority to operate.

53. Section 70 of the OEBA provides a comprehensive and inclusive list of the condition on which the Board may grant these licences. Section 70(1) provides that

> A licence under this Part may prescribe the conditions under which a person may engage in an activity set out in section 57 and a licence may also contain such other conditions as are appropriate having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998.*

54. Under the next heading "Examples of Conditions", section 70(2)(c) states:

> The conditions of a licence may include provisions
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> > (c) requiring the licensee to enter into agreements with other persons on specified terms (including terms for a specified duration) approved by the Board relating to its trading or operations, or for the connection to or use of any lines or plant owned or operated by the licensee or other party to the agreement. [emphasis added]

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[15] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B; *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A

55. The distributor's poles are part of utility plant. Thus the Board can require the distributor to allow the cable operator continued access to its plant at a rental charge determined by the Board, and on terms and conditions determined by the Board, as a condition of the distributor's licence.

56. Because the poles are utility assets, the Board has a responsibility to ensure that they are managed in the best interests of the utility and its ratepayers, in accordance with the Board's statutory objectives and the purposes of the EA. The Board's objectives with respect to electricity are set out in section 1 of the OEBA, and include the objectives "to protect the interests of consumers with respect to prices and the reliability and quality of electricity services", and "to promote economic efficiency in the generation, transmission, and distribution of electricity" (our emphasis).[16] The purposes of the EA include the same objectives.[17]

57. Distributors currently receive revenues from the Companies for access to their poles. These revenues may be assigned in whole or in part by the Board under cost of service regulation as a credit against the cost of service, or included in the calculation of the base rates or revenue requirement for a PBR regime. As such, these revenues would contribute to the reduction of the overall cost of electricity distribution and thereby reduce the amount of revenues that need to be recovered from electricity ratepayers.

58. The OEB's Accounting Procedures Handbook ("the Handbook") deals with rental income from pole attachments under "Other Operating Revenues". The Handbook, published in November 1999 and most recently updated in December 2001, includes an account that would encompass revenues from pole rentals, "4210 – Rent from Electric Property".[18] There is also a balance sheet account, "1150 – Rents

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16 OEBA, s. 1.

17 EA, s. 1.

18 See sections 57, 70(2), and 78 of the OEBA; Article 220, OEB Uniform System of Accounts, at p. 89. The Handbook ,states the following under account 4210 – Rent from Electric Property: (A) This

Receivable", which is an account for "rents recoverable or accrued on property rented or leased by the utility to others."[19]

59. Poles are a critical component of the distributor's assets and, as such, are put in place for the primary purpose of supporting the distributor's business of distributing electricity. The costs of putting the poles in place do not vary when third parties are permitted to make attachments to unused space on the poles. If no third parties were provided with access, then the entire fixed costs of the poles would be recovered solely from the business of delivering electricity, which in turn would be funded by utility ratepayers. Providing third parties with access to this attachment space is a non-core activity that generates incremental revenue. The incremental revenue is an additional revenue source for the distributor that can be shared between ratepayers and shareholders, in a manner determined by the Board. Moreover, the regulation of the rental charges ensures a consistent treatment of the level of revenues and their allocation and thereby promotes economic efficiency by reducing transaction costs and lowering the net cost of energy distribution.

60. Section 42 of the EA deals with the use, *in connection with the provision of telecommunications services*, of the easements and other rights over, or to, land held by the distributor, and the access to those rights by third parties, including distributor affiliates, pursuant to agreements with the distributor. More particularly, subsection 42(1) of the EA states:

> 42 (1) If part of a transmission or distribution system is located on land with respect to which the transmitter or distributor has an easement or other right to use the land, the transmitter or distributor may,

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account should include rents received for the use by others of land, buildings, and other property devoted to electric operations by the utility. (B) When property owned by the utility is operated jointly with others under a definite arrangement for apportioning the actual expenses among the parties to the arrangement, any amount received by the utility for interest or return or in reimbursement of taxes or amortization on the property shall be credited to this account. (C) Records shall be maintained to show each source of rental income by category.

[19] OEB Uniform System of Accounts, page 5.

(a) use the land that is subject to the easement or other right for the purpose of providing telecommunications service; or
(b) enter into agreements with other persons, including affiliates of the transmitter or distributor, authorizing them to use the land that is subject to the easement or other right for the purpose of providing telecommunications service. [emphasis added]

61. The term "telecommunications" is defined in subsection 42(6) of the EA to have the same meaning as in the *Telecommunications Act*. That Act defines "telecommunications" in a manner that captures the provision of cable services:

> "telecommunications" means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system.[20]

62. Subsection 42(3) states that clause 42(i)(a) is subject to section 71 of the OEBA, which, in turn, provides that a distributor shall not, except through an affiliate(s), carry on any business activity other than distributing electricity.

63. Further, subsection 42(5) of the EA provides that any person authorized to use land by virtue of an agreement with a distributor entered into pursuant to subsection 42(1)(b) is not required to pay compensation to attach telecommunications equipment to a distribution or transmission pole pursuant to that agreement other than compensation required by the agreement itself.

64. The purpose of section 42 of the EA is to recognize that certain easements or other rights to use land acquired by distributors or transmitters, whether by agreement or otherwise (for example rights in relation to public streets or highways provided in subsection 41(1) of the EA), may be used to conduct a telecommunications business. The business may be conducted either by the distributor/transmitter itself (subject to section 71 of the OEBA) or by others pursuant to an agreement. Section 42 of the EA, together with section 73(1)6 of the OEBA, underlines the fact that the legislature contemplated the use of electricity utility assets and rights in the telecommunications

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20 *Telecommunications Act*, S.C. 1993, c.38, section 2.

business.[21] This special status accorded telecommunications is unique in the legislation.

65. Many of the largest electricity distributors in Ontario have, over the last few years, used the powers accorded them by the OEBA and the EA to create affiliates to conduct telecommunications businesses. These affiliates often use and/or acquire utility assets to conduct that business. The OEB has put in place an *Affiliate Relationships Code for Electricity Distributors and Transmitters* that requires, among other things, that standards be established to ensure that there is no preferential access to regulated utility services offered by distributors (or, presumably, to the utility assets used to provide those services, and which are included within the definition of a distribution system[22]).

66. CCTA submits that in light of the reduction in the revenue requirement and transaction costs, the specific authority given the Board in the OEBA, the public interest in joint pole use and the competitive context described above, the regulation of pole attachment rental charges by the Board is in the public interest and consistent with the Board's objective set out in the OEBA and the purposes of the EA.

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21 Section 73(1) 6 of the OEBA states:

"73.(1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

. . .

6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998.*" (emphasis added)

22 Section 56 of the OEB Act defines distribution system as follows:

"distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose; ("réseau de distribution")

The Impact of *Barrie Public Utilities*

67. CCTA notes that the Supreme Court of Canada decision in *Barrie Public Utilities et al. v. Canadian Cable Television Assn* was decided on statutory grounds; no conclusion was made with respect to the constitutional authority of the provinces to legislate in this area. As such, there is nothing in the *Barrie Public Utilities Decision* that requires the Board to decline jurisdiction over this application.

68. The distributors themselves have acknowledged that the Board has the requisite statutory authority to regulate the terms and conditions for access to power poles by cable companies. In their Memorandum of Law and Argument in the Supreme Court of Canada proceeding to consider *Barrie Public Utilities et al. v. Canadian Cable Television Assn*, the distributors stated at paragraph 20 that:

> The electricity industry in Ontario is in the midst of being drastically restructured. A new regulatory regime has been put in place. While electricity systems are now commercial enterprises, their activities and operations are regulated by the Ontario Energy Board. The Ontario Energy Board is vested with broad authority to regulate the respondents through, among other things, conditions of licence, rate orders and codes. While to date the Ontario Energy Board has not imposed on the respondents conditions of licence relating specifically to the use of power poles by cable companies (the appellant has chosen not to make an application), it has the requisite authority.[23]

69. The Federal Court of Appeal also noted in *Barrie Public Utilities et al. v. Canadian Cable Television Assn* that:

> The appellants represented that the Ontario Energy Board has such authority under section 70 of the *Ontario Energy Board Act,* 1998, being Schedule B of the *Energy Competition Act,* 1998, S.O. 1998, c. 15 in connection with its power to impose conditions on licenses granted to owners or operators of electric transmission or distribution systems. [24]

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[23] Factum of the Respondents in *Barrie Public Utilities et al. v. Canadian Cable Television Assn*, supra, note 5.

[24] *Barrie Public Utilities et al. v. Canadian Cable Television Assn*, supra note 4, at p. 266.

70. Further, as noted earlier, at least two other provincial utility boards have established terms and conditions for access to utility poles. [25] In fact, the AEUB in decision 2000-86 conducted a constitutional analysis and concluded that it had exclusive jurisdiction to deal with the issue of attachments to power poles.[26] In an earlier decision, U99035, the AEUB observed, with respect to its statutory authority:

> The Board considers that the various provisions of the EU Act and the PUB Act must be interpreted in light of one of the purposes of the Board; the protection of ratepayers against the monopoly power of the utility. Therefore the Board is of view that the Board's broad general powers provide it with the ability to regulate the tariff charged by TransAlta to cable or telephone operators, to the extent that there is an impact on ratepayers. To the extent distribution poles, an asset of the utility, are used by any party at a less than appropriate charge, ratepayers are subsidizing that party and the Board has the jurisdiction and obligation to set that charge to minimize or eliminate the effect on ratepayers.[27]

71. On the constitutional issue, the EUB, in Decision 2000-86 declared:

> The Supreme Court has stated that the Board's jurisdiction to "safeguard the public interest in the nature and quality of the service provided to the community by public utilities" is "of the widest possible proportions. In the Board's view, its duty encompasses approval of a just and reasonable rate for use of distribution poles forming part of an electric distribution system. Therefore, the Board concludes that approval of a tariff for an electric distribution system – including a rate for shared use of distribution poles forming part of that system – is, in pith and substance, a matter within provincial jurisdiction under sections 92(10) ("Local Works and Undertaking") and 92(13) ("Property and Civil Rights in the Province") of the *Constitution Act, 1867.* [28]

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25 *Supra*, note 7.

26 *Supra*, note 10.

27 U99035, at pp. 126-7 TransAlta Utilities Corporation: 1 1996 General Rate Application – Phase II August 1999

28 *Supra,* note 10 at p. 5

72. Further, at p. 9, in addressing the doctrine of interjurisdictional immunity in the context of the Alberta EU Act, the Board says:

> Consideration of these and related provisions of the EU Act make it clear to the Board that the EU Act in no way purports to regulate any federal undertaking, including the Cable Intervenors and TELUS, and clearly does not purport to regulate them in a vital or essential aspect. Therefore, the Board does not find of assistance the cases cited by the Cable Intervenors and TELUS respecting federal jurisdiction over broadcasting and telecommunications. In those cases, the legislation in question purported to apply directly to vital or essential aspects of federal undertakings.
>
> Applying *Irwin Toy*, if the EU Act does not apply directly to federal undertakings, does it nevertheless apply indirectly so as to impair the undertaking in a vital or essential aspect? In the Board's view, its jurisdiction to set just and reasonable rates for electric utilities does not affect a vital or essential aspect of the management and operation of a federal undertaking or the specifically federal nature of the undertaking. If the Board's regulation of utility rates does indirectly affect an essential aspect of federal undertakings, it does not impair those undertakings in the sense of sterilizing them in all their functions and activities.

73. While CCTA does not concede that Parliament does not also have the constitutional authority to deal with the issue, the jurisprudence to date suggests that in the absence of valid federal legislation the provinces have the jurisdiction to deal with the matter of cable attachments to power poles.

74. In the circumstances, CCTA submits that the Board has full authority to grant the relief requested in this application.

V CONCLUSION

75. The Companies are unable to gain access to distributors' poles on terms acceptable to the Companies. While CCTA would have preferred to reach a negotiated settlement to the question of access, given the inability of the parties to reach a mutually satisfactory agreement CCTA has concluded it has no alternative but to seek relief from the Board pursuant to subsections 74(1) and 21(7) of the OEBA.

76. As a result of the refusal by some distributors to grant pole attachment permits, the Companies are in some areas unable to either upgrade or extend their distribution systems as required by both their regulatory obligations under the *Broadcasting Act* and the competitive realities of today's communications markets. This is a totally unacceptable situation that in CCTA's submission requires immediate and effective resolution.

77. Immediate interim relief is necessary because of the Companies' urgent need to gain access to power poles so that they can fulfill their regulatory obligations and implement their plans for the maintenance and upgrading of their networks. The terms of relief are reasonable because they largely reflect the terms of access that were in effect at the time the distributors first began to refuse to issue pole attachment permits, subject only to the proposed rental charge increase and procedural adjustments described above.

78. Given that any interim order issued by the Board may subsequently be adjusted and the revised terms applied retrospectively, CCTA respectfully submits there is no compelling reason for the Board to decline to grant immediate interim relief. On the contrary, the public interest requires that the Companies be permitted to fulfill their regulatory obligations under the *Broadcasting Act* and that they be in a position to upgrade and expand their networks in order to compete effectively in existing and new communications markets. Consequently, CCTA requests the Board to issue an interim order as expeditiously as possible.

79. CCTA also requests final relief in the form of an order amending the licences of all distributors in Ontario. The Board would require all distributors by condition of licence to enter into pole attachment agreements with cable companies in accordance with the terms and conditions set out in the attached proposed standard agreement. The terms of that agreement would govern, on a final basis, access by the Companies to the support structures of the distributors.

80. CCTA respectfully submits that the relief requested by the Companies is both reasonable and necessary.

81. For all of the above reasons, CCTA requests that the Board grant the relief requested in this application in as expeditious a manner as possible.