

DISCO RATE APPLICATION  
RULING - ROGERS JURISDICTION MOTION  
OCTOBER 27, 2005

IN THE MATTER OF AN APPLICATION DATED MARCH 21, 2005 BY NEW BRUNSWICK POWER DISTRIBUTION AND CUSTOMER SERVICE CORPORATION FOR THE APPROVAL OF A CHANGE IN ITS CHARGES, RATES AND TOLLS.

AND IN THE MATTER OF A MOTION BY ROGERS CABLE COMMUNICATIONS INC. REQUESTING THE NEW BRUNSWICK BOARD OF COMMISSIONERS OF PUBLIC UTILITIES TO ESTABLISH A RATE FOR CABLE ATTACHMENTS TO THE ELECTRIC POWER POLES OF NEW BRUNSWICK POWER DISTRIBUTION AND CUSTOMER SERVICE CORPORATION.

Background

The New Brunswick Power Distribution and Customer Service Corporation ("Disco") applied to the New Brunswick Board of Commissioners of Public Utilities ("Board") pursuant to section 101 of the *Electricity Act* ("Act") on March 21, 2005 for approval of a change in its charges, rates and tolls for the test year of 2005-2006 ("Application"). The increase in rates sought in the Application exceed the amounts described in section 99 of the Act.

In a letter to the Board dated May 5, 2005 Rogers Cable Communications Inc. ("Rogers") requested that the Board grant it formal intervenor status in respect of the Application and requested the Board establish a rate for cable attachments to the electric power poles of Disco ("Pole Attachment Rate").

In a letter to the Board dated May 13, 2005 Disco opposed the granting of formal intervenor status to Rogers on the grounds that the Board lacked jurisdiction to establish a Pole Attachment Rate.

During the Pre-Hearing Conference in respect of the Application the Board heard substantial arguments from Disco and Rogers on the matter of granting Rogers status as a formal intervenor. The Board subsequently granted Rogers formal intervenor status and stated that it would, in due course, set a date for consideration of Disco's assertion that the Board lacked jurisdiction to establish the Pole Attachment Rate. That argument occurred on October 6, 2005.

The Board heard from Disco, Rogers, the Municipal Utilities, and the Public Intervenor. Disco and Rogers submitted written briefs in support of their respective submissions that reiterated and expanded on the arguments and submissions made at the Pre-hearing Conference which also addressed the jurisdictional issue.

Relevant to the matters in issue in the present motion is a decision of the Supreme Court of Canada in *Barrie Public Utilities v. Canadian Cable Television Assoc.*, 2003 SCC 28. In that decision the Court determined that the CRTC did not have jurisdiction to provide access to or set rates for telecommunications company use of electric power poles owned by electricity utilities. As a result jurisdiction over such matters is a provincial matter.

#### Facts relevant to this motion

As a part of the March 21, 2005 Application Disco filed a new schedule of charges, rates and tolls for which it was seeking Board approval. On June 6, 2005 Disco requested and received approval from the Board to amend the Application to seek approval for a new schedule of charges, rates and tolls for the fiscal year 2006-2007 to be filed with the Board on or before October 1, 2005 ("Amended Application"). The revised new rate schedules were filed with the Board on October 1, 2005 ("Schedules"). Disco subsequently filed with the Board, on October 11, 2005, a binder containing evidence in support of its revenue requirements entitled "Evidence - Revenue Requirement, 17 October, 2005, Volume 1 of 1, Board Reference: 2005-002" ("Evidence").

Disco advised the Board in its submission on October 6, 2005 that it and the New Brunswick telephone service provider Aliant had entered into a Joint Use Agreement in the 1990s governing matters related to the use by each of them of the others poles. In addition, Disco advised that in late 1996 the parties entered into a sub-agreement regarding third party use of the poles and advised that Rogers had, pursuant to such sub-agreement, reached agreement with Aliant on the use by Rogers of the Disco and Aliant poles. Finally, Disco advised that it terminated the sub-agreement on third party attachments with Aliant and was now requiring Rogers to negotiate the use of Disco's poles directly with Disco. Both Disco and Rogers agreed that the termination of the third party sub-agreement by Disco was not in issue in this Application or in the present motion. However, it is the termination of the third party sub-agreement and the need for Rogers to negotiate directly with Disco, that prompted Rogers to seek intervenor status in the present Application and to request the Board establish the Pole Attachment Rate. An additional aspect of Rogers request is that it has been unable to negotiate a Pole Attachment Rate satisfactory to it with Disco.

Disco, in response to Board information request number 2 (Exhibit A-12), provided a "Class Cost Allocation Study Review of Distribution Allocations, December 2004". That study states that Disco owns 343,000 poles and Aliant owns 200,000 poles. In its submission Rogers states that 108,904 of the Disco poles are in issue between Disco and Rogers.

Disco's primary revenue source is the charges, rates and tolls it imposes for sale of electricity to retail customers, large industrial customers and distribution electric utilities. In addition Disco receives revenues from other sources.

In the direct evidence of Lorrie Clark, at page 9 of the Evidence, Table 5E is provided. It is entitled "NB Power Distribution and Customer Service Corp. Forecast Miscellaneous

Revenue, Fiscal Year Ending March 31 [2006-2007]" ("Miscellaneous Revenues"). Table 5E provides a list of six miscellaneous revenue items, their dollar value and is followed by an explanation of each item. Included in the list is an item referred to as "Other". That item covers revenues from: (1) miscellaneous third party arrangements, (2) tree trimming services, (3) gain on the sale of fixed assets, and (4) "services provided under a Joint Use Agreement with a telecommunication utility".

The Schedules were filed as a part of the Amended Application and appear in the Evidence as Attachment 2A. RSP N-23 is found at page 23 and, under the heading "Rental Facility Rate Schedule", rates are provided for: (1) Water Heaters, (2) Area Lighting, (3) Street lighting and (4) Pole. The pole category is described as: "That category of Customers renting poles from NB Power." ("R F Rate Schedule").

Disco holds a license issued by the Board pursuant to Part V, Division A of the Act authorizing it to conduct activities described in paragraph 86(c) thereof.

#### Issues

The Board considers there are three substantial areas that it should address in determining its jurisdiction in this matter:

- (1) The interpretation that is to be placed on section 97 of the Act in respect of the use of the term "services" as used in that section.
- (2) The inclusion by Disco in its Amended Application a request for approval, in its Schedules, of a rate relating to pole rentals.
- (3) As Disco is licensed by the Board pursuant to Part V, Division A of the Act, it may be in the public interest that the Board amend Disco's license to add a condition requiring Disco to provide Rogers with access to electric power poles and that the Board approve rates to be charged for such access.

#### (1) Interpretation of section 97 of the Act

The provisions of the Act relevant to the submissions of Disco and Rogers in respect of the interpretation to be placed on section 97 of the Act read as follows:

##### **Definitions**

##### **1 In this Act**

"distribution system" means a system for distributing electricity to consumers at voltages of less than 69 kilovolts, and includes any structures, equipment or other things used for that purpose;

"standard service" means the electricity service provided by the standard service supplier to a distribution electric utility or industrial customer directly connected to the SO-controlled grid at the charges, rates, tolls and tariffs authorized under Part V;

**Subsidiaries of Corporation**

4(1) The Lieutenant-Governor in Council may cause the Corporation to incorporate the following subsidiaries of the Corporation under the *Business Corporations Act*:

- (d) a corporation under the name New Brunswick Power Distribution and Customer Service Corporation, whose purposes include, in addition to any other purposes, owning and operating distribution systems and providing customer services in relation to the provision of electricity through those systems.

**Part V, Division B, DISTRIBUTION SERVICES**

**Application**

97 This Division applies to the Distribution Corporation in respect of the services provided by it to customers through its distribution system and in respect of electricity provided to distribution electric utilities and industrial customers in its capacity as standard service supplier, but does not apply in respect of electricity supplied under paragraph 77(3)(b).

**Application for change in charges, rates and tolls**

101(1) If a change in the charges, rates or tolls for its services would exceed the amount authorized under section 99, the Distribution Corporation shall make an application to the Board for approval of the change, and shall not make any change until it receives the Board's approval.

101(3) The Board shall, when considering an application under this section, base its order or decision respecting the charges, rates and tolls to be charged by the Distribution Corporation on all of the projected revenue requirements for the provision of the services referred to in section 97.

101(5) The Board at the conclusion of the hearing shall

- (a) approve the charges, rates and tolls, if satisfied that they are just and reasonable or, if not so satisfied, fix such other charges, rates or tolls as it finds to be just and reasonable, and

**Collection of charges, rates and tolls**

102(1) The Distribution Corporation shall not charge, demand, collect or receive a greater or less compensation for any service that is prescribed in the schedules than are at the time established, or demand, collect or receive any charges, rates or tolls not specified in such schedules.

The terms "services", "customers" and "electricity" are not defined. In Part V, Division B no mention is made of "tariff" as is found in Division C, Transmission and Ancillary Services in sections 107, 108, 110 and 111 of the Act.

Disco's submission is that the Board is a creature of statute and absent express authority in the Act cloaking the Board with jurisdiction to deal with the Pole Attachment Rate, the Board does not have jurisdiction. Disco says that there is no provision in the Act providing that jurisdiction to the Board.

In support of its position Disco says that Part V, Division B of the Act governs the Amended Application and that Division of the Act is the sole authority for the Board to approve the charges, rates and tolls sought by Disco. Disco says the words of a statute must be interpreted in their grammatical and ordinary sense as stated by E.A. Driedger in

his text *Construction of Statutes*, (2nd Edition, 1983) at page 87. When applying those rules of statutory interpretation, the word "services" as used in section 97 must apply solely to electricity services. That is the only interpretation that can be placed on the term "services" when the term is interpreted in the context of the entire Act.

Disco says the critical portion of section 97 is the phrase "in respect of the services provided by it to customers through its distribution system". To analyze that phrase Disco says you must look at the definition of "distribution system". That definition describes such a system as one that is for "distributing electricity to customers". Disco also says that the definition of "consumer" supports its interpretation as it speaks in terms of consumption of "electricity that the person did not generate".

Based on this analysis Disco says section 97 must be read to say:

This Division applies to the Distribution Corporation in respect of the services provided by it to customers through its system for distributing electricity to a person who uses, for the person's own consumption, electricity that the person did not generate ... and includes any structures, equipment or other thing used for the purpose of distributing electricity.

Finally, Disco says that when section 97 is read in that manner that Division B limits the Board to approving rates for the distribution of electricity only. As Rogers proposes to use the poles for the purposes of distribution of cable services and as cable services do not fall within section 97 the Board has no jurisdiction to set a Pole Attachment Rate. That is, a Pole Attachment Rate is not an electricity service rate and therefore the Board lacks jurisdiction to set such a rate.

Rogers submits that the Supreme Court of Canada has affirmed "...that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous." Rogers cites *R v. McCraw*, [1991] 3 S.C.R. 72, 128 N.R. 299 at para. 18 for that statement and relies on the *Barrie* Case (*supra*) in support of this contention.

It submits that the word "services" as used in section 97 includes all services provided by Disco pursuant to the Act and not just the provision of electricity services. Rogers notes that the services to be provided by Disco pursuant to section 97 are to be provided pursuant to its "distribution system". It then refers to the definition of "distribution system". That definition says that a system for distributing electricity includes "structures, equipment or other things used for that purpose". Rogers says electric power poles are clearly and unambiguously a part of the Disco distribution system referred to in section 97 and are an integral part of Disco's provision of the services addressed in that section.

In turn, Rogers says that the provision by Disco of space on its poles to a cable company is a service provided by Disco to customers through its distribution system. Finally, that there is nothing in the Act which suggests that the plain and ordinary meaning of section

97 should be read down to exclude the provision by Disco of space on its poles to cable companies. Accordingly, the Board has jurisdiction to set the Pole Attachment Rate.

The New Brunswick Court of Appeal in the case of *Charlebois v. the City of Saint John*, 2004 NBCA 49 (CanLii) (on appeal to the Supreme Court of Canada) addressed the current state of the law in New Brunswick with respect interpretation of statutes. The issue in that case was the interpretation to be placed on the word "institutions" as used in sections 1 and 22 of New Brunswick *Official Languages Act*. While dealing with the application of that Act to pleadings and evidence in court proceedings the case did not involve a Charter challenge. The specific question involved a determination of whether the term "institution" in those sections included a municipality. The Court concluded it did not. While the Supreme Court of Canada may disagree with the Court of Appeal's interpretation of the legislative provisions the following from paragraphs [17] and [18] and paragraph [43] of the *Charlebois* decision will remain as the expression of the current state of the law in New Brunswick with respect to interpretation of statutes:

A: Principles of Statutory Interpretation:

...

[17] The case law on statutory interpretation indicates that the Supreme Court of Canada has repeatedly articulated general principles for judicial guidance in the interpretation of legislation. In short, the Supreme Court has long adopted the modern approach to statutory interpretation and completely abandoned the literal approach which was often limited to considering the wording of a statute in its ordinary sense. In contrast, the modern approach to statutory interpretation involves a purposive analysis both of the impugned provision and the statute itself, the history of the specific provision, the overall scheme of the act and, finally, the intention of the Legislature both in enacting the specific provision and the act as a whole.

[18] The articulation of this method of statutory interpretation which has been cited by the Supreme Court as the preferred approach in these recent decisions is that stated by E.A. Driedger in his work entitled *Construction of Statutes* (2nd ed. 1983), at page 87:

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

and

[43] The principle of internal statutory coherence is clearly established and recognized in Canadian jurisprudence. Briefly stated, according to this principle of interpretation, there is a presumption that a statute is coherent and that it is to be construed, if at all possible, in such a way that there may be no incoherence or inconsistency between its provisions or portions. In *Driedger on the Construction of Statutes* (3rd ed., 1994), at page 176, Professor R. Sullivan expressed the presumption of coherence in the following terms:

It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework. [...] The presumption of coherence is virtually irrebutable.

The Board has approached the interpretation of section 97 of the Act from a slightly different perspective than that used by Disco and Rogers in light of these rules of statutory interpretation as expressed by the New Brunswick Court of Appeal.

Subsection 102(1) of the Act states that Disco is not entitled to collect or receive greater or lesser compensation "for any service" than that which is prescribed in an approved rate schedule. Subsection 101(5) authorizes the Board to approve the applied for charges, rates and tolls if it finds that they are just and reasonable. If the Board does not find the applied for charges, rates and tolls to be reasonable it may set those it considers to be just and reasonable.

The Board is directed by subsection 101(3) of the Act to base its order under subsection 101(5) on "... all of the projected revenue requirements for the provision of the services referred to in section 97."

Paragraph 4(1)(d) of the Act states, *inter alia*, that Disco is to be incorporated for purposes "... which include, in addition to any other purposes, owning and operating distribution systems and providing customer services in relation to the provision of electricity through those systems".

If the provisions of section 97 are to be read as limited to the provision of electricity services only there will be a lack of coherence and an inconsistency between paragraph 4(1)(d), section 97, and subsections 101(3), 101(5) and 102(1). That is, when the provisions of section 97 are examined in light of all the provisions of the Act the term "services" as used in section 97 must be interpreted as applying to more than simply the supply of electricity. If otherwise, Disco should not charge and receive revenues for the services described in *Miscellaneous Revenues*. Subsection 102(1) limits Disco to receiving compensation only for those services identified in an approved rate schedule. Unless *Miscellaneous Revenues* are included in charges, rates and tolls for which approval is sought the Board would not be taking into account all the projected revenue requirements for the provision of section 97 services contrary to subsection 101(3). If the Board were to ignore such revenues it would result in the Board approving charges, rates and tolls which are not just and reasonable contrary to the requirements of subsection 101(5).

Accordingly, the Board considers that section 97 includes authority for the Board to establish the Pole Attachment Rate.

(2) Inclusion in the rate schedules for which approval is sought  
of a "Rental Facility Rate Schedule"

Disco was incorporated pursuant to the *Business Corporations Act* of New Brunswick and as such has, as provided in that statute, all the powers of an ordinary corporation and person. Paragraph 4(1)(d) of the *Electricity Act*, as just described, identifies several purposes for the incorporation of Disco. Section 76 of the Act designates Disco as the exclusive standard service supplier for the Province. Section 77 requires the standard service supplier to provide standard service to all distribution electric utilities and

industrial customers. However, those provisions do not limit Disco's business to those activities.

If Disco, as an ordinary business corporation, engaged in business, charged for services and received revenue in respect of activities not covered in the Schedules for which approval is sought, it could maintain that such activities would not be subject to Board review pursuant to the Amended Application because they would not fall within section 97 of the Act.

As described above Disco objects to Rogers' request that the Board establish a Pole Attachment Rate on the ground that it is not based on the provision of "electricity services" as required by section 97 of the Act. Notwithstanding that objection, Disco has elected to include in the Evidence the Miscellaneous Revenues. A review of the revenue sources described in Miscellaneous Revenues indicates that not all are directly related to the provision of "electricity services" and relate more to corporate operations and other business arrangements. Included under "Other" is a revenue item described as: "services provided under a Joint Use Agreement with a telecommunications utility". That is, rental fees, not the provision of electricity services.

In addition, Disco has, in the Schedules forming a part of the Evidence (page 23 of Attachment 2A) included the RF Rate Schedule as described above. Included is a rate for pole rentals. The Schedules describe the rates for which Disco seeks the Board's approval in the Amended Application.

The Board notes the pole rental rate category in the RF Rates Schedule provides for the rental of whole poles. It considers it to be unduly restrictive to suggest that this category must be limited to the rental of whole poles and not to the rental of a portions of a poles. Accordingly, the Board considers that this category includes rental of a portion of a pole.

The Board has reached the conclusion that Disco's claim that the Board lacks jurisdiction to set the Pole Attachment Rate is in direct conflict with its request that the Board approve a rate included in the Schedules for pole rental and the inclusion in its requested revenues those received from Aliant pursuant to their joint pole use agreement.

The Board has determined that Disco has, for all practical purposes, applied to the Board for approval of a rate of the very kind that it objects to the Board setting. Based on this inconsistency the Board finds that Disco's submission that the Board does not have jurisdiction to set the Pole Attachment Rate fails. Accordingly, the Board considers Disco to have included in its rates for which Board approval is requested a rate for services which is broad enough to include the Pole Attachment Rate.

Based on the analysis of the forgoing two issues the Board concludes that it has jurisdiction to establish a Pole Attachment Rate and directs Disco to forthwith file additional evidence as to what it believes to be the appropriate rate.



Because of the conclusion reached on the first two issues it is not necessary for the Board to address the third issue. However, the Board did invite Disco and Rogers to address the third issue as a part of their submissions. The Board therefor believes it appropriate at this time to include its analysis of that issue.

(3) Amendment of Disco's license to add a condition to provide access to its poles by cable companies and to set rates for such access.

As mentioned the Board expressly requested Disco and Rogers to comment on the idea that the Board might act pursuant to its licensing authority in Part V, Division A of the Act to find jurisdiction to set the Pole Attachment Rate.

The relevant portions of the Act in respect of the Board's powers of licensing are as follows:

**Prohibitions**

86 No person shall, unless licensed to do so under this Division,

- (c) provide or convey, or cause to be provided or conveyed, electricity or ancillary services into, through or out of the SO-controlled grid, or

**Application for licence**

89(1) A person may apply to the Board for the issuance, amendment or renewal of a licence authorizing one or more of the activities referred to in section 86 as specified in the application, and shall, with the application, pay such fee as is determined by the Board under subsection (2).

**Conditions of licence**

90(1) The Board, when issuing, amending or renewing a licence, may specify the conditions under which a person may engage in an activity described in section 86 and may specify such other conditions as the Board considers appropriate, having regard to the purposes of this Act.

90(2) Without limiting the generality of subsection (1), a licence may contain conditions to address the abuse or potential abuse of market power.

**Amendment of licence**

91 The Board may, on the application of any person or on its own initiative, amend a licence if it considers the amendment

- (a) to be in the public interest, having regard to the purposes of this Act, or  
 (b) necessary to address abuse or potential abuse of market power.

Disco, in its response to the Board's request for comments argued that the licensing provisions of the *Electricity Act* deal exclusively with transmission matters. The Board would be exceeding its jurisdiction to invoke the licensing provisions of the Act to take jurisdiction over electric pole attachments and rates absent express authority elsewhere in the Act to do so. It said, contra to the suggestion made by Rogers, there is no public interest issue with respect to pole attachments. It says it is not exercising any market

power or monopoly power in respect of pole attachments or pole rates. Disco further says that it is not abusing the "market" for electricity or exercising monopoly power in respect of the "market" for electricity. Finally, Disco says that the provision of cable television ("CCTV") services is not an essential service.

Rogers said that Disco controls sufficient electric power poles in New Brunswick that it is exercising monopoly power in respect of access to them. Access to electricity power poles by CCTV is essential. It is in the public interest that every enterprise who wishes to provide services to the public which logically require access to electricity poles and telephone poles not have to obtain easements and erect its own poles when there are readily available poles to which the services can be attached with no technical interference with or harm to the owner of the poles. It is in the public interest to avoid the proliferation of poles. Accordingly Rogers suggested the Board could find authority in its licensing powers to address the Pole Attachment Rate.

The Board notes that the New Brunswick *Electricity Act* is patterned on and to some degree drawn from the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, (Schedule B) ("OEB Act"). The Board is aware that there is no express provision in the OEB Act cloaking the OEB with jurisdiction to deal with pole attachment issues. The Board has determined that the OEB dealt with virtually the same issue, as is raised in the present matter, in an Order and Decision dated March 7, 2005 (RP-2003-0249). That decision was rendered in respect of an application made pursuant to section 74 of the OEB Act by the Canadian Cable Television Association ("CCTA") for an order to amend the licenses of electricity distributors to provide its members with access to electric poles and establish a rate therefor ("OEB Pole Decision").

The Board has reviewed the OEB Pole Decision and finds the reasoning of the OEB on all fours with the Board's appreciation of the situation in New Brunswick.

As noted above Disco is licensed by the Board pursuant to Part V, Division A of the Act. Section 90 of the Act provides the Board with authority to impose conditions on a license the Board considers appropriate having regard to the purposes of the Act and to address abuse of or potential abuse of market power. Section 91 provides the Board with authority to act to amend a license on its own initiative if it considers it in the public interest to do so having regard to the purposes of the Act or if it considers it necessary to address abuse or potential abuse of market power.

It is clear that one of the overall purposes of the Act is to ensure the provision of electricity to residents of New Brunswick in a safe, reliable and economic manner. It is essential to these objectives that Disco utilize electric power poles. However, it would be uneconomic and wasteful if all utilities and persons seeking to provide services in New Brunswick were required to acquire their own easements and poles in areas already served by electric power poles. It would be appropriate to allow access to electric power poles to provide services provided it can be done without interference with the distribution system. In New Brunswick Disco and Aliant own virtually all the poles in the Disco operating area and they have a joint use agreement with respect to poles. The Disco

power poles are an essential service provided by Disco in delivering services pursuant to the Act. It is not in the public interest that there be a proliferation of poles. The arrangement between Disco and Aliant to share poles for attachment of their respective services is to be encouraged as being prudent and economical. The exclusion of Rogers from equivalent access to Disco's electric power poles is not in keeping with the provisions of the Act or in the public interest.

The Board could amend Disco's license by attaching a new condition. This condition would provide that all cable television companies that operate in the Province shall have access to the poles of Disco at rates to be set by the Board. However, in the present instance it is not necessary to do so because of the findings on the first two issues.

Oral Ruling  
October 27, 2005 Transcript