



**EB-2011-0120**

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

**AND IN THE MATTER OF** an application by Canadian  
Distributed Antenna Systems Coalition for certain orders  
under the *Ontario Energy Board Act*, 1998.

### **PROCEDURAL ORDER No. 5**

The Canadian Distributed Antenna Systems Coalition (“CANDAS”) filed an application on behalf of its member companies with the Ontario Energy Board (the “Board”), received on April 25, 2011 seeking certain orders of the Board, including requests for interim relief. In letters to the Board dated May 3, 2011 and June 7, 2011, CANDAS withdrew its requests for interim relief. The current application therefore seeks the following:

1. Orders under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act*, 1998 (the “Act”): (i) determining that the Board’s RP-2003-0249 Decision and Order dated March 7, 2005 (the “CCTA Order”) requires electricity distributors to provide “Canadian carriers”, as that term is defined in the *Telecommunications Act*, S.C. 1993, c. 38, with access to electricity distributor’s poles for the purpose of attaching wireless equipment, including wireless components of distributed antenna systems (“DAS”); and (ii) directing all licensed electricity distributors to provide access if they are not so doing;
2. in the alternative, an Order under subsection 74(1) of the Act amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for the

- purpose of attaching wireless equipment, including wireless components of DAS;
3. an Order under subsections 74(1) and 70(2)(c) of the Act amending the licences of all licensed electricity distributors requiring them to include, in their Conditions of Service, the terms and conditions of access to power poles by Canadian carriers, including the terms and conditions of access for the purpose of deploying the wireless and wireline components of DAS, such terms and conditions to provide for, without limitation: commercially reasonable procedures for the timely processing of applications for attachments and the performance of the work required to prepare poles for attachments (“Make Ready Work”); technical requirements that are consistent with applicable safety regulations and standards; and a standard form of licensed occupancy agreement, such agreement to provide for attachment permits with terms of at least 15 years from the date of attachment and for commercially reasonable renewal rights;
  4. its costs of this proceeding in a fashion and quantum to be decided by the Board pursuant to section 30 of the Act; and
  5. such further and other relief as the Board may consider just and reasonable.

The Board issued a Notice of Application and Hearing on May 11, 2011. A number of parties requested and were granted intervenor status in this proceeding.

On September 23, 2011, the Board issued Procedural order No. 3 in which it set certain filing dates and dates for a Technical Conference, a Settlement Conference and the related filing of any Settlement Proposal, and an oral hearing in this matter.

### **Motions by CCC and CANDAS**

On October 31, 2011, counsel for the Consumers Council of Canada (“CCC”), an intervenor in this proceeding, filed a Notice of Motion for an order of the Board requiring Toronto Hydro Electric System Limited (“THESL”) to provide further and better responses to certain interrogatories filed by CCC. On November 3, 2011, counsel for CANDAS also filed a Notice of Motion for an order of the Board requiring THESL to provide further and better responses to certain interrogatories filed by CANDAS .

The Board decided to hear both motions in writing and issued Procedural Order No. 4 on November 3, 2011, in which it set the dates for filing of written submissions in relation to the motions. In Procedural Order No. 4, the Board also set new dates for the Settlement Conference and for the related filing of any Settlement Proposal.

On November 8, 2011, CANDAS filed an Amended Notice of Motion requesting further and better answers from THESL to questions that were not part of CANDAS' November 3<sup>rd</sup> Motion. In addition, both CCC and CANDAS filed their respective written submissions on November 9, 2011 (i.e. two days after the date set in Procedural Order No. 4).

On November 10, 2011, THESL filed a letter with the Board in which it requested that the date for filing its written submission on the motions be extended to November 15, 2011, in part, as a result of the CCC's and CANDAS' late filing of their respective submissions.

The Board will grant a short extension to the dates established in paragraphs 2 and 3 of Procedural Order No. 4.

### **Expert Testimony**

The Board notes that Dr. Roger Ware was retained by CANDAS and provided expert evidence in this proceeding. The Board also notes in its interrogatory No. 18 directed to Dr. Ware, THESL raised a number of questions in relation to Dr. Ware's status as a member of the Market Surveillance Panel and in part (g) of that interrogatory asked "...how does Dr. Ware propose to address parties' legitimate concerns about an actual or apparent bias arising in the Board's decision making process given that the Board is now being asked to consider evidence prepared by one of their own colleagues (another Board Panel member)?" THESL pursued this issue further at the Technical Conference held on November 4, 2011 by questioning of Dr. Ware and by again raising the question of a potential "...perception of bias by having one panel member appear as an expert witness before another panel of the Board...".<sup>1</sup>

In light of the concerns raised by THESL, the Board is of the view that it is appropriate to invite submissions from the parties in this proceeding with respect to the issue raised

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<sup>1</sup> EB-2011-0120, Technical Conference Transcript, November 4, 2011, at pages 100-101.

by THESL's counsel. Specifically, the Board would like to receive submissions on whether a conflict of interest or a reasonable apprehension of bias arises by having a member of the Market Surveillance Panel appear as an expert witness before a panel of the Board in an application. The Board will therefore set dates for filing of written submissions and hearing oral arguments in relation to this issue. In addition, as a result of these new procedural steps, the Board will rescind the dates for the Settlement Conference and for the related filing of any Settlement Proposal that were set in paragraphs 5 and 6 of Procedural Order No. 4 and the dates for the oral hearing that were set in paragraph 8 of Procedural Order No. 3.

Please be aware that this procedural order may be amended, and further procedural orders may be issued from time to time.

**THE BOARD ORDERS THAT:**

1. The date in **paragraph 2** of Procedural Order No. 4 is extended to **November 15, 2011**.
2. The date in **paragraph 3** of Procedural Order No. 4 is extended to **November 18, 2011**.
3. THESL and any intervenors of the view that there could be a perception of bias by having a member of the Market Surveillance Panel appear as an expert witness before a panel of the Ontario Energy Board, shall file their written submission with the Board and copy all parties in this proceeding by **November 21, 2011**.
4. CANDAS and any intervenors that disagree with the view expressed in paragraph 3 above shall file their written submission with the Board and copy all parties in this proceeding by **November 28, 2011**.
5. THESL and intervenors referred to in paragraph 3 above, shall file their written reply submission with the Board and copy all parties in this proceeding by **December 5, 2011**.
6. An oral hearing will be held beginning at 9:30 a.m. on **December 12, 2011** in the Board's hearing room on the 25<sup>th</sup> Floor to hear the parties' oral arguments in relation to the issue of perception of bias.

7. **Paragraph 8** of Procedural Order No. 3 and **paragraphs 5 and 6** of Procedural Order No. 4 are hereby rescinded. The Board will establish new dates by Procedural Order on a later date.

All filings to the Board must quote file number EB-2011-0120, be made through the Board's web portal at [www.errr.ontarioenergyboard.ca](http://www.errr.ontarioenergyboard.ca), and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.ontarioenergyboard.ca](http://www.ontarioenergyboard.ca). If the web portal is not available you may email your document to the [BoardSec@ontarioenergyboard.ca](mailto:BoardSec@ontarioenergyboard.ca). Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

**DATED** at Toronto, November 14, 2011

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary