



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.

DECISION AND PROCEDURAL ORDER No. 6

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 and subsequently amended by letters dated May 3 and June 7, 2011, seeking the following orders of the Board:

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.

On November 14, 2011, the Board issued Procedural Order No. 5, in which, among other things, the Board invited written submissions on whether a conflict of interest or a reasonable apprehension of bias arises by having Dr. Roger Ware, an expert retained by CANDAS who is a member of the Market Surveillance Panel, appear as an expert witness before a panel of the Ontario Energy Board.

Both THESL and the Electricity Distributors Association filed submissions with the Board and were of the view that Dr. Ware’s retainer by CANDAS creates a reasonable apprehension of bias. CANDAS disagreed with this view. However, it proposed to withdraw Dr. Ware’s evidence “conditional on the Board granting leave to CANDAS to file replacement reply evidence by a new expert in respect of the economic basis for mandating telecommunications attachment to distribution poles”.

While the Board is of the view that it is not permissible for CANDAS to impose conditions on its withdrawal of Dr. Ware’s evidence, the Board will nevertheless allow CANDAS to withdraw Dr. Ware’s evidence and file replacement reply evidence. Given that Dr. Ware’s evidence will be withdrawn by CANDAS, the issue of 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 an adjudicative panel of the Ontario Energy Board need not be addressed. The Board will therefore not hear oral submissions in relation to this issue and will cancel the December 12, 2011 hearing date that was set in Procedural Order No. 5.

The Board will make provision for interrogatories on CANDAS' replacement reply evidence and responses to those interrogatories. Although the Board will not set the date(s) for the oral hearing at this time, the Board hereby notifies the parties that it intends to require the experts for all parties to:

- (a) in advance of the hearing, confer with each other for the purposes of, among others, narrowing issues; identifying the points on which their views differ and are in agreement; and preparing a joint written statement to be admissible as evidence at the hearing; and
- (b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the Board and others as permitted by the Board; and providing comments on the views of another expert on the same panel.

The Board will provide further directions with respect to the activities in (a) and (b) above in due course, including scope and timing, the involvement of legal counsel, and matters of confidentiality.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may amend this procedural order or issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. The oral hearing scheduled for **December 12, 2011** is cancelled.
2. CANDAS shall file its replacement reply evidence by **December 16, 2011**.
3. Interrogatories on CANDAS' replacement reply evidence shall be filed with the Board and sent to CANDAS and all other intervenors by **January 6, 2012**.

4. Responses to interrogatories on the replacement reply evidence by CANDAS shall be filed with the Board and sent to all intervenors by **January 20, 2012**.

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, 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. If the web portal is not available you may email your document to the 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, December 6, 2011.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary