



# **ONTARIO ENERGY BOARD**

## **BOARD STAFF SUBMISSION**

**APPLICATION BY THE CANADIAN DISTRIBUTED ANTENNA  
SYSTEMS COALITION FOR CERTAIN ORDERS UNDER THE  
*ONTARIO ENERGY BOARD ACT, 1998***

**Board File No.: EB-2011-0120**

September 24, 2012

## Introduction

On April 25, 2011, the Canadian Distributed Antenna Systems Coalition ("CANDAS") filed an application, subsequently amended by letters dated May 3 and June 7, 2011, requesting 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.

On September 13, 2012, the Board issued its Decision on Preliminary Issue which addressed the first request by CANDAS in its application. The Board determined that it no longer needed to address the other two requests.

In its application, CANDAS stated that it was seeking to recover its costs directly from THESL because THESL's August 13, 2010 letter to the Board was a major impetus for CANDAS's application. THESL objected to CANDAS's request for costs. The Board indicated in Procedural Order No. 1 that it would make a determination on CANDAS's eligibility for costs at the conclusion of the hearing. The Board also indicated that it would determine which party or parties would be assessed costs after the Board had heard and considered the record of the proceeding.

In its decision on the Preliminary Issue, the Board set out three outstanding issues related to costs in this proceeding, on which it requested submissions:

1. CCC, VECC and Energy Probe have been found eligible for an award of costs. It remains to be determined from whom these costs should be recovered.
2. CANDAS is seeking recovery of its costs, and it remains to be determined whether CANDAS will be permitted to do so, and if so, from whom the costs should be recovered.
3. Finally, it remains to be determined who will bear the Board's costs for this proceeding.

## **Board Staff Submission**

### **(a) Cost Issue 2 – CANDAS Cost Recovery**

Board staff will first provide its submissions on whether CANDAS should be eligible to seek recovery of its costs and if so, from whom the costs should be recovered.

In its application, CANDAS stated with respect to the recovery of its costs as follows:

In the Smart Meter Case, the Board ordered THESL to pay the costs of all parties, including the Board's. CANDAS submits that THESL should also be directed to pay all parties' costs of this application. Here, as in the Smart Meter Case, THESL has unilaterally refused access in clear violation of the DSC, THESL's own licence and the CCTA Order.

Board staff notes that the Board's Practice Direction on Cost Awards provides at section 3.05 that an applicant is not eligible for a cost award. Section 3.07 states, however, that notwithstanding section 3.05, the Board may, in special circumstances,

find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.

Board staff is of the view that special circumstances may exist in this case. As is discussed under section (B) of staff's submission below, Board staff is of the view that THESL's refusal to connect CANDAS members' wireless equipment to its distribution poles was unwarranted and ultimately, as evidenced by the Board's Decision on the Preliminary Issue, inappropriate.

However, as will be discussed below, there are clear instances in the proceeding where CANDAS's actions caused significant delays and/or caused parties to incur costs that were, in the result, not required to be incurred. As such it is Board staff's view that CANDAS should not recover its costs and should bear some proportion of the costs approved by this Board for recovery.

#### (b) Cost Issues 1 and 3 – Responsibility for Intervenor and Board Costs

Board staff submits that there is no basis upon which to distinguish from whom intervenor costs should be recovered as opposed to the Board's costs in this case. As such the arguments put forward below with respect to appropriate cost responsibility apply equally to costs that will be claimed by eligible intervenors and for the Board's costs.

In Board staff's view, the Board's determination on costs responsibility related to issues 1 and 3 above should be guided by the following factors:

#### (a) The Impetus for the Application

In Board staff's view, a key driver for CANDAS's application stemmed from a lack of agreement between CANDAS's members and THESL regarding the attachment of wireless equipment, including DAS components to THESL's electricity distribution poles, and a subsequent refusal by THESL to permit the attachment of this equipment. That disagreement culminated in a letter to the Board dated August 13, 2010 in which THESL advised that as a matter of policy, the attachment of wireless telecommunications equipment to THESL power poles would not be permitted. THESL raised a number of points to support its claim that the CCTA Order was never intended to apply to wireless attachments and, if it was, that it should no longer so apply.

The letter makes clear that the underlying reasons for this disagreement arose from

the interpretation of the CCTA Decision and Order, and whether it applies to all attachments to poles for cable and telecommunications, or whether it applies only to wireline attachments and therefore excludes wireless attachments.

THESL's letter of August 13, 2010 informed the Board that THESL was taking a particular position and a certain course of action, but it was not an application to the Board, nor did it seek clarity around the issues. THESL acted unilaterally and, as ultimately determined by the Board in its Decision on the Preliminary Issue, in a matter that was inconsistent with a Board Order.

(b) Persons Affected by the Application and the Decision

Board staff submits that the Board's Decision on the Preliminary Issue has clarified the issue of whether the CCTA Order applies to wireless attachments for all licensed electricity distributors in Ontario and all Canadian carriers and cable companies. It clearly places an obligation on all distributors to provide access for all attachments that are related to the service which the telecommunications or cable company is providing, including the attachment of wireless equipment, as well as DAS components, to distribution poles. The Board's decision has clarified that parties may negotiate the terms and conditions of access but not the charge. The Board has explicitly stated that, in accordance with the CCTA Order, the charge for attachments remains \$22.35 per pole per year. Board staff notes that a number of licensed electricity distributors intervened directly in or were observers of the proceeding<sup>1</sup> and that both the Canadian Electricity Association and the Electricity Distributors Association were intervenors in the proceeding. While the fact of intervening in or observing the process is not determinative of any party's particular interest in or position on the issue of the attachment of wireless, in Board staff's view, this indicates that these parties were interested in the process and the outcome, and are likely to have therefore been seeking clarity around this issue.

(c) Delays in the Proceeding

During the course of this proceeding there were delays caused, in staff's view, by both CANDAS and THESL. For example, an expert witness proffered by CANDAS to provide evidence was, as a result of an allegation of conflict of interest, ultimately withdrawn and provision had to be made for the filing of new expert evidence, the filing of interrogatories and responses on that evidence. CANDAS required

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<sup>1</sup> The following licensed distributors intervened in the proceeding: Horizon Utilities Corporation, Hydro One Networks Inc., Hydro Ottawa Limited, Newmarket-Tay Power Distribution Ltd., PowerStream Inc., THESL and Veridian. The following licensed distributors were observers: Bluewater Power Distribution Corporation, Greater-Sudbury Hydro Inc., Halton Hills Hydro Inc., Kitchener-Wilmot Hydro Inc. and London Hydro Inc.

extensions of time within which to file interrogatory responses. CANDAS also opposed the proposal but forth by THESL, CCC and others that the issue of whether the CCTA Order applies to wireless attachments be heard by the Board first in an effort to streamline the application before the Board. While the Board deferred to CANDAS as the applicant in the process, the Board ultimately did hear the Preliminary Issue, upon the request of all parties (including CANDAS), but only after significant and protracted processes, settlement discussions and delays, all of which led to costs being incurred by all participating parties and none of which were ultimately required in order for the Board to make a decision on the Preliminary Issue.

For its part, THESL filed a motion with voluminous supporting affidavits (which the Board ultimately accepted as evidence in the proceeding) which was held in abeyance by the Board and ultimately denied in light of the Board's Decision on the Preliminary Issue. THESL also made repeated requests for extensions of time within which to file answers to interrogatories. In one instance, the Board was forced to revise the required information, in order to provide the parties with a subset of the originally requested information and to move the process along.

Staff submits that the Board should consider these and other delays in the process, by whom they were caused, and the extent to which these could have been avoided as a third factor in its determination on costs recovery.

In light of all of these factors, it is Board staff's view that CANDAS, THESL, and all licensed electricity distributors in the province other than THESL, should share in some proportion the costs incurred by eligible intervenors and the Board in this matter. Board staff do not support these costs being included in the Board's total costs and apportioned per Section 26 of the *OEB Act* because both CANDAS and THESL contributed to the magnitude of the costs and therefore should bear a greater share.

Board staff submits that THESL and all licensed electricity distributors should be responsible for the majority of the costs incurred by eligible parties and the Board due to the fact that THESL created the impetus for the filing of the CANDAS application and that the outcome provides clarity for all distributors around this issue. THESL's decision to refuse to connect the wireless equipment of CANDAS members was found by the Board to be inappropriate. As such, it is staff's view that THESL should bear a larger proportion of the costs than all other distributors in the province.

Board staff therefore recommends that THESL be responsible for 20% of all approved intervenor and Board costs and that all licensed electricity distributors, including THESL,

should be responsible for a further 60% of such costs. While CANDAS was effectively forced to make the application to the Board, Board staff submits that CANDAS was the cause of significant delays in the process and should therefore not recover its costs and should be responsible for 20% of all approved intervenor and Board costs.

All of which is respectfully submitted.