

ONTARIO ENERGY BOARD

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 ("CANDAS") for certain orders under the *Ontario Energy
Board Act, 1998*.

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA ON COST ISSUES

September 24, 2012

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I Introduction

1. In its Decision on Preliminary Issue and Order, dated September 13, 2012, the Board invited parties to make submissions on the following cost issues:

- (i) From whom the costs of the Consumers Council of Canada ("CCC"), the Vulnerable Energy Consumers Coalition, and Energy Probe, should be recovered;
- (ii) Whether CANDAS should be permitted to recover its costs and, if so, from whom; and
- (iii) Who will bear the Board's costs for the proceeding.

2. These are the submissions of the CCC on those issues.

3. The Board's ordinary practice would dictate that the applicant, CANDAS, pay all of the costs. However, the cost issues posited by the Board in its Decision on Preliminary Issue and Order suggest that the ordinary rules may not apply. Accordingly, it is necessary to consider the grounds on which those rules might not apply. Doing that requires, in turn, a consideration of the conduct of the parties during the course of the proceeding.

II The Proceeding

4. The genesis of the proceeding is a letter from THESL, dated August 13, 2010. In that letter, THESL asserted that the CCTA Order did not apply to wireless attachments. In addition, THESL asserted that operational and safety considerations precluded its allowing wireless attachments on its poles.

5. CCC represents the interests of residential consumers of electricity. The issues raised in the CANDAS application, and in THESL's responding motion, were important to residential consumers, for several reasons. Utility poles are assets paid for by ratepayers. Their use should be regulated. The revenues from that use should go to the benefit of ratepayers. The revenues should, to the extent reasonably possible, be optimized.

6. The implications of THESL's August 13, 2010 letter for THESL's ratepayers are significant. In particular, THESL's assertions that operational and safety considerations precluded allowing wireless attachments on the poles eliminated a source of revenue from the use of those poles. That meant that the revenue from the use of assets that ratepayers have paid for would not be optimized.

7. CANDAS applied, in April of 2011, for two orders. The first was that the CCTA Order applied to wireless attachments. If it did not, then CANDAS sought an order requiring THESL to allow such attachments on its poles.

8. THESL responded to the CANDAS application by, first, denying that the CCTA Order applied to wireless attachments and, secondly, by moving under section 29 of the *Ontario Energy Board Act* (the "Act") for an order that the market for wireless attachments was sufficiently competitive that it did not need to be regulated. The Board subsequently directed that THESL's Motion was to be held in abeyance pending the disposition of the CANDAS application.

9. For various reasons, which will be set out below, the proceeding was protracted, and involved numerous time-consuming and expensive steps being taken. In the end, those steps were shown to have been unnecessary.

10. Both CANDAS and THESL filed substantial volumes of evidence, which were the subject of lengthy interrogatories. That was followed by motions for further and better answers to a number of the interrogatories. That, in turn, was followed by motions, by both THESL and CANDAS, to address claims of confidentiality and privilege. A settlement conference, ultimately unsuccessful, was held. That was followed by a "hot tub" session for the experts of CANDAS and THESL.

11. The Board then decided to hear, as a preliminary issue, the question of whether the CCTA Order applied to wireless attachments. On the eve of the oral argument on that question, THESL filed a new agreement for wireless attachments. The parties to, and the terms of, that agreement are confidential. It is reasonable to conclude, however, from the existence of the agreement that safety and operational concerns do not preclude THESL from attaching

wireless equipment to its poles. Accordingly, an issue which was of great concern to ratepayers, and which prompted both the CCC's motion for further and better answers to interrogatories, and its participation in arguments about confidentiality and privilege, would appear, on the surface, to have no factual basis. It is at least possible to suggest that THESL may have misled the Board and the parties on the issue.

12. There was no hearing on the substantive issue of whether the Board should order THESL to allow wireless attachments on its poles. Given that, all of the evidence, including the interrogatories, the motions for further and better answers to interrogatories, and the arguments on confidentiality and privilege, were for naught. There was no opportunity for the CCC to examine, among other things, the good faith of THESL in claiming safety and operational concerns. There was also no opportunity for THESL to respond to what is, after all, a serious allegation, namely that it mislead the Board and the parties on the issue of safety and operational concerns.

III The Principles Governing the Issuance of Cost Awards

13. The Board's ordinary practice is that an applicant pays its own costs, as well as the costs of eligible intervenors and the Board. Indeed, section 3.05 of the Board's "Practice Direction on Cost Awards" ("Practice Direction") provides that an applicant is not eligible for a cost award.

14. However, section 3.07 of the Practice Direction provides that the Board may find, in special circumstances, that an applicant may be eligible for a cost award in a particular proceeding.

15. Although not set out expressly in the Practice Direction, the Board does not require utilities, and therefore their ratepayers, to pay the costs of a commercial entity.

16. The Board will depart from its ordinary practice when it finds the behaviour of a party unacceptable. In those circumstances, cost awards may be used as, in effect, a punitive device. In such cases, the Board's use of what amount to "fault" considerations typically comes at the end of a proceeding where there has been a full opportunity for parties to examine all of the relevant evidence and to explain their behaviour.

IV The Application of the Costs Principles to This Proceeding

17. There are a number of possible “fault” factors which the Board might apply in this case, as follows:

1. THESL’s failure to comply with the CCTA Order, without first seeking a Board determination of whether the Order applied to wireless attachments, arguably prompted the entire proceeding;
2. CANDAS opposed the request, by counsel for THESL, that the Board hear, as a preliminary issue, the question of whether the CCTA Order applied to wireless attachments. Had CANDAS acceded to that request, and had the preliminary issue been dealt with at the time, then all of the costs occasioned by intervenor interrogatories, and the subsequent motions, could have been avoided;
3. THESL’s claim that safety and operational concerns precluded allowing wireless attachments on its poles, a claim which prompted interrogatories and motions for further and better responses to those interrogatories, would appear, on the surface, to be groundless. Had THESL not made that claim, the expense of filing interrogatories, and bringing and arguing motions for further and better responses to those interrogatories, would have been avoided.

18. CCC acknowledges that there is a basis for the Board finding that THESL should be responsible for at least a portion of the costs. However, CCC is concerned about the Board making such a determination in the absence of a hearing and in the absence of an opportunity for THESL to respond, in particular, to the serious allegation that it, in effect, misled the Board in its claim for safety and operational concerns.

19. Against that background, CCC submits that the Board should apply the principles in the resolution of the cost issues in this proceeding, as follows:

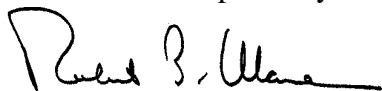
1. The Board should be reluctant to make findings of behaviour warranting an adverse cost award unless it is satisfied that there is sufficient evidence to warrant such a finding, and that it would be fair to do so;
2. Ratepayers should not be responsible for paying the costs of a commercial interest and should not be responsible for a cost award which is predicated on the finding of fault or misbehaviour by the utility;
3. Unless the Board is satisfied that the evidence warrants a cost award against THESL, CANDAS should be responsible for payment of all costs;
4. If the Board is satisfied that THESL's behaviour warrants an adverse cost award, THESL's shareholder should pay those costs.

V Conclusion

20. The CCC submits the following:

1. Following the Board's ordinary practice, the CCC's costs should be recovered from the Applicant, CANDAS. However, should the Board feel able to make a finding that THESL should be responsible for some or all of the CCC's costs, then responsibility for payment of the costs should lie on THESL's shareholder, and not its ratepayers;
2. CCC submits that CANDAS should pay its own costs. CCC submits that it is inappropriate for a commercial interest to recover its costs from ratepayers. If the Board feels that THESL, because of its behaviour, should be responsible for payment of some of CANDAS's costs, those costs should be paid by THESL's shareholder and not its ratepayers;
3. CCC submits that the Board's costs should be recovered from CANDAS alone. However, should the Board feel able to make a finding that THESL's behaviour warrants an adverse cost award, the Board's costs should be recovered jointly from CANDAS and THESL.

All of which is respectfully submitted.

A handwritten signature in black ink, appearing to read "Robert B. Warren". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert B. Warren
September 24, 2012

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