EB-2011-0120

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*.

REPLY SUBMISSIONS

OF THE CONSUMERS COUNCIL OF CANADA

ON COST ISSUES

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REPLY SUBMISSIONS OF THE
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I Introduction

1. These are the Reply Submissions of the Consumers Council of Canada ("CCC") on cost issues, delivered pursuant to the Ontario Energy Board ("Board") Decision on Preliminary Issue and Order, dated September 13, 2012.

2. In these Reply Submissions, the CCC will address three matters, as follows:

(i) Whether anything in the cost submissions of the parties should affect the principle that ratepayers should not pay the costs of commercial entities or those found responsible for costs based on "fault" considerations;

(ii) Whether LDCs other than THESL should be responsible for payment of costs; and

(iii) The position of the Electricity Distributors Association ("EDA").

II ISSUES

(i) The Principle that Ratepayers Should Not Bear the Costs of a Commercial Entity or the Costs of a Party Where Responsibility is Based on Fault Considerations

3. The CCC submits that there is nothing in the cost submissions of the parties that would warrant the Board deviating from the principle that ratepayers should not be responsible for cost awards based on fault considerations.

4. The CCC acknowledges that, absent "fault" considerations, ratepayers may be responsible for the costs of a utility if the utility is taking a position that protects or advances the interests of its ratepayers. Again, absent "fault" considerations, ratepayers might be responsible for the costs of a utility even where the position taken by the utility would result in no direct benefit to ratepayers, for example in the form of enhanced revenue, but maintained the economic health of the utility.

(a) THESL

5. In its submissions on cost issues, THESL makes the following statements about the reasons for its intervention:

> 1. Maintenance of what it considered (and considers) to be an artificially low attachment rate disadvantaged Toronto ratepayers and inured directly to the benefit of the commercial consortium that brought the application. Toronto Hydro considered that it had a duty to protect its ratepayers (THESL Submissions on Costs, p. 2);
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> 2. In this case THESL intervened to protect the interests of its ratepayers in an attempt to offset upward pressure on distribution rates (THESL Submissions on Costs, p. 5).

6. These statements are a helpful clarification of THESL's position. However, they come at the end of a proceeding in which THESL appeared to take a fundamentally different position. Had THESL from the outset stated that its concern was with the pole attachment price, and with the protection of its ratepayers, then the course of the proceeding would almost certainly have been different. However, THESL's position appeared to be the opposite. THESL argued that, among other things, safety and operational concerns precluded the attachment of wireless communications devices to its poles. The logic of that assertion is that there would be no such attachments, and therefore that the revenue to be derived for the benefit of ratepayers from the use of THESL's poles, would be reduced.

7. As noted in the preceding paragraph, had THESL made it clear, from the outset, that its concern was with the level of pole attachment fees, and with the protection of ratepayer interests, and not made an argument about safety and operational concerns, the course of the proceeding would almost certainly have been different. Among other things, the time and cost spent trying to elicit information from THESL in support of its assertions about safety and operational concerns would have been avoided. The attempt to elicit this information required interrogatories, a motion seeking further and better answers to the interrogatories, and written and oral arguments about, among other things, privilege, all of which ultimately proved unnecessary.

8. The CCC acknowledges that THESL's attempt to enhance the amount of revenue to be derived from the use of its poles is a position that would, absent other considerations, entitle it to recover costs from its ratepayers. However, a great deal of the time in this proceeding was spent in pursuit of an issue, namely alleged safety and operational concerns, that proved to be of no consequence. Insofar as THESL incurred costs, and caused other parties, including the Board, to incur costs, as a result of advancing a phantom issue, the Board might regard that as a "fault" consideration. To the extent that "fault" played a part in the costs occasioned by THESL's position, the CCC submits that THESL's ratepayers should not be responsible for payment of those costs.

9. The CCC acknowledges that the Board has not, and should not, award costs against a party because the tactics the party uses were ill-considered. There is a distinction, however, between ill-considered or unsuccessful tactics, on the one hand, and advancing a case that has no substance, on the other hand.

10. The CCC acknowledges that the Board should apply a rigorous standard to the determination of fault. Having done so, if the Board finds that "fault" considerations dictate that THESL should pay some of the costs of CANDAS, the eligible intervenors and the Board, then the responsibility should lie with THESL's shareholder, and not with its ratepayers.

(b) CANDAS

11. The CCC submits that there is nothing in any of the cost submissions that warrant deviating from the principle that ratepayers should not be responsible for the costs of a commercial entity.

12. The CCC disagrees with the assertion, in the cost submissions of CANDAS, that the members of CANDAS "represented a public interest in ensuring fair and meaningful rights of access to utility assets falling within the statutory jurisdiction of the Board, which public interests transcend the commercial interests of the individual members of CANDAS". There is nothing in the evidence to support that assertion. On the contrary, the evidence suggests that the members of CANDAS were pursuing their own, purely commercial interests. There is nothing wrong with that. There is no point, however, in attempting to disguise that by claiming that the members of CANDAS represented some public interest.

13. CANDAS, in its cost submissions, argues that the behaviour of the electricity distributors, and in particular THESL, constitutes "special circumstances" such that section 3.05 of the Board's *Practice Direction on Cost Awards* should not apply, and that it should be entitled to its costs.

14. The CCC begins with the assertion that there is no evidence that the behaviour of electricity distributors other than THESL should make them, and their ratepayers, responsible for CANDAS' costs. That matter is discussed in greater detail below.

15. In support of its position, CANDAS argues that THESL's "unilateral denial of pole access", notwithstanding the clear wording of the CCTA Order required CANDAS' application. It also points to what it describes as the "false or disingenuous pretence of alleged 'safety and operational concerns'", grounds that were "subsequently repudiated by THESL, itself, on the eve of the oral hearing on the Preliminary Issue".

16. The CCC acknowledges that there is an argument that THESL should have itself sought an early determination from the Board as to whether the CCTA Order, applied to wireless attachments. However, it was open to THESL to take the position that the CCTA Order did not apply, however incorrect that position was proven to be. THESL's position, namely that the CCTA Order did not apply to wireless attachments, meant that there had to be a determination of the issue at some point. Accordingly, the fact that THESL's behaviour required a determination of the issue does not, in and of itself, constitute a "fault" consideration that should influence the allocation of responsibility for costs.

17. CANDAS must also accept some responsibility for itself opposing the early determination of the issue of whether the CCTA Order applied to wireless attachments. An early determination of the issue would have avoided most of the procedural steps, and consequent costs, from September of 2010, to June of 2011.

18. Accordingly, the CCC submits that CANDAS' behaviour, in opposing an early determination of the preliminary issue, could be a "fault" consideration used in the allocation of responsibility for costs. Such a "fault" consideration reinforces the principle that ratepayers should not be responsible for the costs of a commercial entity.

19. Regardless of whether the Board finds there to be any fault in CANDAS' conduct of the proceeding, ratepayers should not be responsible for payment of its costs.

(ii) **The Responsibility of LDCs Other Than THESL for the Payment of Costs**

20. Several parties, including Board Staff and CANDAS, propose that all LDCs should bear a portion of the costs. The CCC disagrees.

21. Six electricity distributors sought observer status and six electricity distributors filed interventions. The grounds on which they intervened were as follows:

1. Hydro One Networks Inc. states that "Hydro One appears regularly before the Ontario Energy Board and, as a distributor, may be affected by this Application";

2. Hydro Ottawa Limited asserts that "this proceeding could have a direct impact on Hydro Ottawa and its customers";

3. Veridian Connections Inc. asserts that it is "an electricity distributor operating under Ontario Energy Board licence number ED-2002-0503, and therefore has a direct interest in the outcome of this proceeding";

4. Powerstream Inc. asserts that "CANDAS' application directly affects our distribution assets";

5. Newmarket-Tay Power Distribution Ltd. asserts that "CANDAS' application directly affects our distribution assets";

6. Horizon Utilities Corporation asserts that it "has a direct interest in this proceeding and therefore seeks intervenor status".

22. These are neutral statements, reflecting no position on any of the issues raised by the CANDAS application, and are the only information any of those LDCs provided about their position on the issues.

23. What is striking about the intervention of the individual distributors is that none of them took a position on the substantive issues raised by the CANDAS application. None of those distributors filed evidence. None of the distributors made submissions on the preliminary issue. The CCC submits, therefore, that, based on their participation in the proceeding, there is no basis upon which the Board should award costs payable by those distributors, and, consequently, by their ratepayers.

24. The Board should not assume, from the mere fact that they intervened, that the LDCs were taking a position, one way or another, on the substantive issues. The substance of their participation was no different from that of the LDCs who were observers. The mere fact of having intervened should not expose their ratepayers to responsibility for payment of costs.

25. The EDA, which purports to represent the interests of all LDCs, filed no evidence. Had the issues in the CANDAS application been of importance to LDCs other than THESL, the EDA could, and should, have filed evidence to that effect. It did not.

26. Instead, the EDA merely parroted THESL's position on the issues. It added nothing on the perspective of the diverse LDCs it purports to represent.

27. The CCC submits that the mere presence of the EDA as an intervenor should not lead the Board to make a cost award payable by all LDCs. The CCC submits that it would be unfair to their ratepayers to do so.

28. The more important consideration, however, is that the ratepayers of LDCs other than THESL should not have to pay the costs incurred to resolve what turned out to be a contest between CANDAS and THESL, albeit a contest the resolution of which had important implications for THESL's ratepayers.

29. The CCC submits that, while it may not have been evident at the outset, it is clear on the record as a whole that the issues to be resolved were those between THESL and CANDAS. The differences between those parties came to animate every aspect of the proceeding. For example, the argument over privilege arose out of the prospect, never denied by CANDAS, that its members would make a claim for civil damages against THESL. The EDA itself characterized the proceeding as "the contest between CANDAS and Toronto Hydro".

30. That THESL's interest was solely its own was, in effect, confirmed by the new agreement it filed on July 12, 2012. The terms of that agreement, which cannot be disclosed because of the Board's order of confidentiality, suggest that THESL's position in the proceeding was largely, if not entirely, driven by its desire to be free to enter into that agreement, without regulatory constraint.

31. The only basis upon which costs might be awarded against LDCs other than THESL is that the Decision on Preliminary Issue and Order clarifies the CCTA Order and, therefore, the rights and obligations of the LDCs under that Order. However, there is no evidence in this proceeding that any LDC other than THESL sought such a clarification. That LDCs other than THESL were the passive recipients of a clarification they did not seek should not form the basis of a cost award that their ratepayers have to pay.

32. The CCC submits that other LDCs, and in particular their ratepayers, should not have to pay the costs for the resolution of a dispute between CANDAS and THESL.

(iii) The Position of the Electricity Distributors Association

33. The EDA argues that the "CCC, the ECC [sic] and Energy Probe failed to demonstrate that they were representing any public interest with a real stake in the contest between CANDAS and Toronto Hydro".

34. It is unclear what the EDA means by the words "failed to demonstrate". The CCC submits that the interests of the groups representing ratepayers were self-evident. The argument that the representatives of ratepayers do not have a "real stake" in the proceeding is nonsense. THESL argued that "safety and operational" concerns precluded it allowing the attachment of wireless communication devices to its poles. If that argument had prevailed, the revenue to be derived from the use of those poles would have dropped. Since ratepayers benefit from that revenue, that issue alone gives them a "real stake" in the proceeding.

35. What was at issue in the CANDAS proceeding was the regulatory treatment of utility assets paid for by ratepayers. The issues in the proceeding went to the heart of the regulatory arrangements in the electricity sector. That constitutes a "real stake" that warranted the active participation of groups representing ratepayers.

36. The EDA also argues that the only costs that are relevant are those "directly incurred with respect to preparation for, and attendance at the hearing of the preliminary issue on June 23, 2012". It argues that most of the costs incurred in the proceeding relate to a question the Board did not consider, namely "whether there is sufficient competition in the market place for support structures such that the Board should refrain from mandating access."

37. That argument misconstrues the course of the proceeding. As is clear from the record, a substantial portion of the costs were incurred addressing matters in THESL's evidence, evidence which the Board allowed THESL to file in response to the CANDAS application.

38. Had the Board determined, at the outset, that THESL's evidence was irrelevant, the EDA's argument about the primary position of the preliminary issue might have some validity. But the Board allowed the evidence to stand. Until such time as the Board decided to hear, separately, the preliminary issue, the evidence filed by CANDAS, and by THESL, had been deemed by the Board to be relevant to the determination of CANDAS' application and so had to be explored by the parties.

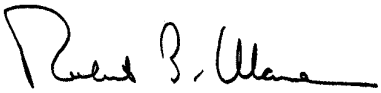
39. The EDA's argument also ignores the fact that the CCC asked the Board, in August of 2011, to bifurcate the proceeding and hear the preliminary issue first. The CCC should not now be punished because CANDAS opposed that request, and that months of what turned out to be unnecessary work ensued.

40. The CCC submits that the EDA's cost submission reflects, at best, a misapprehension of the proceeding, and, at worst, a deliberate distortion of the proceeding. The CCC submits that the Board should disregard the EDA's submission in its entirety.

III CONCLUSION

41. The CCC wishes to make one final observation. The CCC participated responsibly, and in good faith, in this proceeding because the issues were of critical importance to residential consumers. The "contest" between THESL and CANDAS has taken nearly a year and a half to be resolved. The CCC submits, with respect, that the issue of cost responsibility should be resolved as quickly as possible.

All of which is respectfully submitted.



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