

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 for certain orders under
the *Ontario Energy Board Act, 1998*.

**Cost Issues Reply Submissions On Behalf Of
Energy Probe Research Foundation**

October 3, 2012

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How these matters came before the Board

In its Decision on Preliminary Issue and Order, issued on September 13, 2012, the Board stated that it would take submissions on several Cost Issues arising out of the proceeding. All parties to the proceeding and Board staff could make submissions and reply to the submissions of others. The Board Order specified those Cost Issues as follows:

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.

Cost Issue 1.

- a) Response to the submissions of the Electricity Distributors Association ("EDA")

Energy Probe notes that the EDA in its submission to the Board, dated September 24, 2012, had difficulty focussing on the Cost Issues which were determined by the Board Order. The submission of the EDA in the first full paragraph on Page 2 states:

The EDA submits that the Intervenor, CCC, the ECC and Energy Probe should not be awarded their costs of this proceeding. Their interventions failed to demonstrate that they were representing any public interest with a real stake in the contest between CANDAS and Toronto Hydro. They may or may not have a legitimate interest in the cell phone market, but even if they do, that does not justify an award of costs in this proceeding.

A plain reading of that submission might lead to the conclusion that the EDA missed the starting point for Cost Issue 1: “CCC, VECC and Energy Probe have been found eligible for an award of costs.”

Energy Probe notes that the EDA experienced the same difficulty in RP-2003-0249, the CCTA proceeding frequently referred to by parties to this proceeding. In the RP-2003-0249 proceeding, Ms. Kelly Friedman, counsel for the EDA, in her pleading on Motions Day, October 12, 2004, stated that the EDA “does represent the direct interests of the ratepayers ... with respect to distribution rates”; and, “as well as the public interest to facilitate the maintenance of a financially viable electricity industry”.

The Board Panel in RP-2003-0249 did make a decision on Motions Day in respect of the treatment of costs arising from the proceeding as follows:

MR. KAISER: The Board's decision in this matter will deal with the matters in the order in which they were argued this morning. First, we'll deal with the cost issue.

Having heard the submissions of the different parties, the Panel has concluded that each party should be responsible for its own costs. This is subject to the Board costs being shared equally by the cable companies and telecom companies on the one hand and the electricity distributors on the other.

For the moment, we will leave the division of the costs in the two groups up to the members of those groups. If the cable companies and the telecom companies can't agree, they can speak to the Board; and, to the same degree, if the CEA and EDA can't agree, the Board may be spoken to in that regard.

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To the Board costs, we will add the costs of the expert evidence that has been prepared jointly by the CEA and the EDA, and we will add the costs of Energy Probe. We recognize that based on an earlier decision, expenditures were incurred with respect to that expert evidence. We also realize that Energy Probe is a non-commercial entity, and perhaps of all the parties is more aligned to what might be regarded as a consumer interest or the public interest. That's the reason we have dealt with their costs differently.

Here we are almost 8 years later and the EDA is once advancing a position that a non-utility Intervenor does not represent any public interest in a proceeding before the Board in respect of the use of assets that have been paid for by ratepayers – advancing an unchanged position but expecting a different decision from the Board.

On the other hand, Energy Probe does accept the EDA depiction that essentially this proceeding was a “contest between CANDAS and Toronto Hydro”.

b) Response to the submissions of Toronto Hydro-Electric Systems Limited

In Energy Probe’s view, THESL’s written submissions on the Cost Issues¹ are argumentative and self-serving.

By recounting the various steps it took as intervenor in this case, THESL calls into question the Decision and appears to seek to re-litigate the entire matter through the vehicle of cost recovery. In Energy Probe’s view, all such submissions are self-serving, irrelevant and should be ignored in light of the Decision.

The THESL Submission states:

“THESL submits that its interpretation that the 2005 CCTA Order did not apply to wireless attachments was reasonable. Three independent experts corroborated that interpretation in evidence in this proceeding, based upon their knowledge of the wireless sector and their independent interpretations of the CCTA Decision. ...” (p.1-2)

In Energy Probe’s view, such submissions are self-serving and incorrect as a matter of administrative law. Two of its “independent experts” (Dr. Yatchew, Mr. Starkey) could not have “corroborated” THESL’s interpretation of the 2005 CCTA order because they lacked the expertise to give such corroboration. Essentially,

¹ THESL Submission on Costs, by letter dated September 24, 2012. (the “THESL Submission”)
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their views on the applicability of the CCTA Decision were entirely irrelevant and did not constitute valid evidence on their part.

Moreover, Energy Probe doubts the independence of Dr. Yatchew. In the Technical Conference on November 4, 2011, Energy Probe questioned him on his response to Energy Probe Interrogatory 5 a).

DR. SCHWARTZ: Okay. Now, going to your response to Energy Probe Interrogatory 5(a), which I'll ask my colleague to pull up, because I asked you a question, I believe, about the conceptual basis of the essential facilities doctrine, and your response, beginning at line 15, is that:

"The essential facilities doctrine is regulatory and legal concept rooted in economic reasoning. I understand from my discussions with counsel that..."

And then it appears you have provided an extract from a document, and I wonder if you could give me the citation for that?

MR. RODGER: Perhaps I can help you with that. Because this was a legal regulatory question, we felt it was better to have an answer from counsel, so we prepared that answer and included it in the interrogatory.

So there is no other report. It just is the answer we created to try and be helpful to you.

DR. SCHWARTZ: Well, then who is responsible for the portion of that answer beginning at line 8 toward the end of -- it's on page 3 of 4 of that interrogatory response. It begins:

"First whereas in this case with THESL there was no vertical integration. The draft guidelines explain..."

And then there are other references in the following paragraph to the evidence put forth by CANDAS.

MR. RODGER: This is all part of the legal position, so this is all from counsel.

DR. SCHWARTZ: So, in other words, Professor Yatchew, you're going to tell me that that's not part of your answer. That's not your answer as an economist. Your lawyers have put that into your answers?

DR. YATCHEW: It was prepared in consultation with counsel.

(Transcript, Technical Conference, beginning at Page 183, Line 6)

As the transcript clearly shows, the counsel to THESL state that counsel provided the information to Dr. Yatchew on the basis that it was legal and beyond his knowledge. This indicates that Dr. Yatchew was influenced by counsel to THESL, and rather than state that he was not qualified to answer a legal question, he allowed counsel to draft his interrogatory response.

Conclusion

It is the submission of Energy Probe that the costs of CCC, VECC and Energy Probe should be shared equally between CANDAS and Toronto Hydro, with the Toronto Hydro portion of these costs to be borne by its shareholder.

Cost Issue 2.

Energy Probe has no Reply Submission on Cost Issue 2.

Cost Issue 3.

For the reasons outlined in the Energy Probe submissions above in respect of Cost Issue 1, it is the submission that the Board's costs should be shared equally between CANDAS and Toronto Hydro, with the Toronto Hydro portion of these costs to be borne by its shareholder.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 3, 2012

Energy Probe Research Foundation