



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.

BEFORE: Cynthia Chaplin
Vice Chair and Presiding Member

Ken Quesnelle
Member

Karen Taylor
Member

DECISION ON COST ELIGIBILITY AND COST RESPONSIBILITY AND ORDER

November 1, 2012

Background

The Canadian Distributed Antenna Systems Coalition ("CANDAS") filed an application on April 25, 2011, subsequently amended by letters dated May 3 and June 7, 2011. The Board issued its Decision on Preliminary Issue and Order on September 13, 2012 ("Decision on Preliminary Issue"), which concluded the proceeding.

CANDAS stated in its application that it was seeking to recover its costs directly from THESL because THESL's letter to the Board of August 13, 2010 was a major impetus for the application. THESL objected to CANDAS' request regarding costs. The Board indicated in Procedural Order No. 1 that it would make a determination at the conclusion of the hearing as to whether CANDAS would be eligible for costs. 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. The Board stated that it might ultimately determine that costs be borne by the applicant, one or more

electricity distributors, or all licensed electricity distributors in the Province, or some combination thereof.

The following parties were granted intervenor status in this proceeding: Canadian Electricity Association (“CEA”), Consumers Council of Canada (“CCC”), Electricity Distributors Association (“EDA”), Energy Probe Research Foundation (“Energy Probe”), Hydro One Networks Inc. (“HONI”), Hydro Ottawa Limited, Newmarket-Tay Power Distribution Limited, PowerStream Inc., Toronto Hydro-Electric System Limited (“THESL”), Veridian Connections, Vulnerable Energy Consumers Coalition (“VECC”) and Horizon Utilities Corporation.

Only CCC, VECC, and Energy Probe were granted cost eligibility.

The Board’s Decision on Preliminary Issue requested submissions from all parties on the following outstanding cost issues:

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.

The Board received submissions and replies from the following parties: CANDAS, THESL, CCC, VECC, the EDA, and Energy Probe. The Board also received a submission on October 3, 2012 from a group of LDCs, all but one whom were intervenors in the proceeding (“LDC Group”).¹

In their submissions, many parties have attempted to assign varying degrees of responsibility or fault to THESL for necessitating the application, and to CANDAS, THESL, and other intervenors for creating delays or complications during the hearing, and have argued that this should have some bearing on cost eligibility and the determination of cost responsibility. As the Board has stated in the past, the CANDAS application was not a compliance proceeding. In addition, the Board has made no findings of any kind on the evidence which was submitted. The Board concludes that no finding of fault can or should be made against any party. Therefore, the Board will

¹ Enersource Hydro Mississauga Inc., Hydro Ottawa Limited, Horizon Utilities Corporation, PowerStream Inc., and Veridian Connections Inc.

not award costs, nor will it determine cost responsibility, on the basis of some assignment of fault or alleged inappropriate behavior.

CANDAS' Costs – Issue 2

With respect to cost issue 2, CANDAS submitted that it should be eligible to recover its costs, and that those costs should be recovered from all LDCs. CANDAS took no position on allocation of costs between THESL and other distributors. CANDAS acknowledged that under the Board's *Practice Direction on Cost Awards* (the "Practice Direction") it would not be eligible for costs because it is the applicant, but CANDAS argued that there are a number of special circumstances which should be considered, including:

- The conduct of THESL and other electricity distributors gave rise to the application;
- CANDAS members represented a public interest in this proceeding; and
- CANDAS advanced broad public policy issues.

Board staff and all intervenors submitted that CANDAS should be responsible for paying its own costs. The chief argument advanced was that CANDAS represented its own private interests, and further, that based on section 3.05 of the Practice Direction, an applicant is not eligible for a cost award. Board staff submitted that, despite section 3.05, section 3.07 of the Practice Direction makes allowance for cost recovery where special circumstances exist. On that basis, Board staff advanced that THESL's refusal to connect CANDAS' members' wireless equipment to its distribution poles was unwarranted and may amount to a special circumstance with respect to recovery of costs.

Board Findings

Under the Board's Practice Direction, CANDAS, as an applicant, is not eligible for an award of costs unless there are special circumstances which would warrant a departure from that provision. The Board finds that that no special circumstances exist which would lead to treatment different from that identified in the Practice Direction.

The Board has already set out above that it will not make determinations regarding cost responsibility on the basis of the conduct of any party. Therefore, CANDAS' allegations against THESL are not relevant to this question. Further, the Board does not agree with CANDAS that it represented a public interest in this proceeding. CANDAS represents private interests, those of a small number of companies. Finally, although the Decision on Preliminary Issue is applicable to all distributors and all wireless attachers, the Board

finds that this does not warrant a finding that CANDAS should be able to recover its costs. The Board frequently renders decisions which have broad application. CANDAS chose to file an application as a means for having its own issues addressed, in full knowledge of the Board's Practice Direction and the ineligibility provision for applicants. The Board concludes that CANDAS is not eligible for an award of costs. The Board notes that this is consistent with the approach to costs taken by the Board in the CCTA proceeding.

Intervenor and Board Costs – Issues 1 and 3

With respect to cost issues 1 and 3, CANDAS submitted that it should not be required to pay the costs of CCC, VECC, and Energy Probe (the "Consumer Groups") or the costs of the Board.

Board staff submitted that THESL and all electricity distributors should be responsible for the majority of the costs incurred by the Consumer Groups and the Board because THESL created the impetus for the application and the outcome provides clarity for all electricity distributors around the issue of access for wireless attachments. Board staff proposed the following allocation for Board and Consumer Groups costs: 20% payable by CANDAS, 20% payable by THESL, and 60% payable by all distributors (including THESL).

CCC submitted that CANDAS should be responsible for all costs unless the Board finds that THESL's behavior warrants a finding that it should be responsible for some level of costs. If THESL is ordered to pay costs, CCC was of the view that the costs should be borne by the shareholders, not ratepayers. CCC also submitted that the ratepayers of other distributors should not be responsible for any of the costs because the proceeding was a resolution of a dispute between CANDAS and THESL.

VECC submitted that THESL expanded the scope of the proceeding which necessitated additional expenditures by the parties that were of questionable value. VECC concluded that if costs were awarded against THESL, then those costs should not be recovered from ratepayers. Energy Probe, in its reply submission, argued that the Consumer Group costs should be borne equally by CANDAS and THESL, and that THESL's share should be borne by its shareholders.

THESL argued that CANDAS should be responsible for the intervenor and Board costs because CANDAS was the applicant. THESL maintained that its participation was on behalf of its customers. In its reply, THESL noted that in the CCTA proceeding the Board's costs were shared equally by the electricity distributors and the cable and telecommunication companies.

The EDA argued that the Consumer Groups should not be awarded their costs because they did not demonstrate that they represented a public interest with a stake in the dispute between CANDAS and THESL. The EDA maintained that there was no reason to award costs against the electricity distributors. The EDA submitted that the distributors represented the interests of ratepayers in the proceeding and that it would be inappropriate for ratepayers to bear any portion of the costs of the proceeding because the applicant's interest was purely commercial.

Similarly, the LDC Group argued that other electricity distributors should not be required to bear the costs of the Board and the Consumer Groups. However, the LDC Group argued that the Board and Consumer Group costs should be borne equally by CANDAS and THESL on the basis that it was THESL's actions which formed the impetus for the application.

Board Findings

The Board does not accept the EDA's assertion that the Consumer Groups did not demonstrate that they represented the public interest. The EDA based this assertion on its premise that the dispute was between CANDAS and THESL. It is clear to the Board that the CANDAS application sought relief that had the potential to impact rates paid by consumers therefore garnering the legitimate interest of the Consumer Groups. The Board notes the EDA argument that distributors represented the interests of ratepayers in the proceeding. The Board finds this contention to be at odds with its assertion that there were no matters of interest to the groups representing ratepayers.

The Board has found above that there are no special circumstances that would result in a deviation from the prohibition on cost eligibility for CANDAS; however the Board does find that there are special circumstances which warrant a sharing of the intervenor and Board costs between the applicant and all electricity distributors. This proceeding is closely related to the CCTA proceeding, and the Board characterized the proceeding as such in its Decision on Preliminary Issue:

Much of the disagreement in the current proceeding stems 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, to the exclusion of wireless attachments.²

² EB-2011-0120, Decision on Preliminary Issue and Order, p.5

Typically, an applicant is responsible for paying the Board's costs and those of cost-eligible intervenors; however, in the CCTA Proceeding, the Board determined that the applicants and the electricity distributors would share the Board's costs equally. Recognizing that this was CANDAS' application, but that the proceeding resulted in an interpretation of the CCTA Order, the Board concludes that the costs of the Board and the Consumer Groups will be shared equally between CANDAS and the electricity distributors.

The Board finds that THESL will not be required to bear any additional costs, beyond its share as an electricity distributor. The Board has already determined that it will not assign cost responsibility on the basis of conduct before or during the proceeding. And while the specific dispute between CANDAS and THESL was a motivating factor for the application, the scope of the proceeding clearly encompassed all electricity distributors.

CANDAS shall pay 50% of the costs awarded and the remaining 50% shall be paid by all rate-regulated electricity distributors. The amount to be paid by electricity distributors shall be allocated to them on the basis of distribution revenue.

THE BOARD ORDERS THAT:

Cost Awards

The Board will issue a separate decision on cost awards once the following steps are completed:

- 1) CCC, EP, and VECC shall submit their cost claims no later than November 8, 2012. These cost claims will be made available for viewing on the Board's website.
- 2) CANDAS and any rate-regulated electricity distributor shall file with the Board and forward to CCC, EP, and VECC any objections to the claimed costs on or before November 15, 2012.
- 3) CCC, EP, and VECC shall file with the Board and forward to CANDAS any responses to any objections for cost claims on or before November 22, 2012.

All filings to the Board must quote file number **EB-2011-0120**, be made through the Board's web portal at, <https://www.pes.ontarioenergyboard.ca/eservice/> 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. Parties must 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 parties may email their document to 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 2 paper copies.

DATED at Toronto, November 1, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary