

December 14, 2012

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Dear Ms. Walli:

Electricity Distributors Association (EDA) Stay Application
OEB File No.: EB-2012-0414

Please find enclosed the Submissions of the EDA regarding the above-noted application and the brief of authorities cited therein, both of which are filed pursuant to Procedural Order No. 2 dated December 10, 2012.

Yours very truly,

Original Signed by

Christine Kilby

CK/rp

Enclosures

Copies to: All Participants in CANDAS Application, EB-2011-0120

BOEESTOR: 2584823\1

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 the Electricity
Distributors Association for a stay of the Board's September 13,
2012 Decision and Order in EB-2011-0120, pending disposition of
the EDA's appeal of the Decision and Order to the Superior Court
of Justice (Divisional Court).

ELECTRICITY DISTRIBUTORS ASSOCIATION
Submissions on Stay Application

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Lawyers for the Applicant

Introduction

1 The applicant Electricity Distributors Association (**EDA**) is an Ontario industry association which advocates on behalf of electricity distribution companies (**LDCs**). The EDA participated in EB-2011-0120 as an intervenor.

2 On October 12, 2012, the EDA filed a Notice of Appeal to the Divisional Court from the decision and order of the Ontario Energy Board (**Board**) dated September 13, 2012 in EB-2011-0120 (the **Decision**).

3 The EDA filed an application with the Board on October 15, 2012 (**Application**) seeking a stay of the Decision pursuant to section 33(6) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (**OEB Act**).

4 These submissions supplement the grounds set out in the Application and are made further to the Board's Procedural Order No. 2 dated December 10, 2012 in this proceeding (**PO 2**).

5 In the EDA's submission, the Board ought to grant a stay of the operation of the Decision pending the disposition of the EDA's appeal of the Decision to the Divisional Court for the following reasons:

- (a) The OEB Act requires the Board to rule on the stay; and
- (b) The test for granting a stay is met in this case.

The Statutory Framework

6 The OEB Act clearly provides that the Board has the power, and the jurisdiction, to stay the operation of an order under appeal.

7 Appeals from Board orders are governed by section 33 of the OEB Act, which provides:

Appeal to Divisional Court

33. (1) An appeal lies to the Divisional Court from,

(a) an order of the Board;

(b) the making of a rule under section 44; or

(c) the issuance of a code under section 70.1. 2003, c. 3, s. 28 (1).

Nature of appeal, timing

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code. 1998, c. 15, Sched. B, s. 33 (2); 2003, c. 3, s. 28 (2).

Board may be heard

(3) The Board is entitled to be heard by counsel upon the argument of an appeal. 1998, c. 15, Sched. B, s. 33 (3).

Board to act on court's opinion

(4) The Divisional Court shall certify its opinion to the Board and the Board shall make an order in accordance with the opinion, but the order shall not be retroactive in its effect. 1998, c. 15, Sched. B, s. 33 (4).

Board not liable for costs

(5) The Board, or any member of the Board, is not liable for costs in connection with any appeal under this section. 1998, c. 15, Sched. B, s. 33 (5).

Order to take effect despite appeal

(6) Subject to subsection (7), every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise. 2006, c. 33, Sched. X, s. 1.

Court may stay the order

(7) The Divisional Court may, on an appeal of an order made by the Board,

(a) stay the operation of the order; or

(b) set aside a stay of the operation of the order that was ordered by the Board under subsection (6). 2006, c. 33, Sched. X, s. 1.
(emphasis added)

8 The Board's authority to stay the operation of its own order pending appeal to the Divisional Court is clear from section 33 in general and from the plain language of subsections 33(6) and 33(7) in particular. The Board has acknowledged this in previous proceedings wherein it has considered a stay pending appeal.¹

9 As such, the questions for consideration are:

- (a) Is there any reason why the Board should not deal with the Application?
- (b) Assuming the Board deals with the Application, should a stay be granted?

10 In the submission of the EDA:

- (a) The Board is required to deal with the Application; and
- (b) The stay should be granted.

The Board Must Hear and Dispose of the Application

11 While section 33 empowers the Divisional Court to issue a stay if the Board does not, the OEB Act clearly contemplates that the initial application for a stay will be made to and heard by the Board.

12 Section 33(6) states that a Board order will take effect notwithstanding an appeal unless the Board orders otherwise, indicating that the Board has the authority to stay the operation of an order under appeal. It is reasonably clear that section 33(6) presumes that the question of a stay pending appeal will be directed to the Board upon the taking of an appeal. The words "unless the Board orders otherwise" is a plain indication that the initial consideration of the stay issue is intended to be by the Board.

¹ See, for example, *Re: ACH Limited Partnership*, 2011 LNOEOB 146 (*ACH*)

13 Moreover, section 33(7)(b) contemplates that the Board will have considered the issue of whether or not to stay an order under appeal before the matter goes before the Divisional Court. While the Divisional Court has the discretion to stay a Board order on appeal, it also has discretion to set aside a stay of the order already ordered by the Board under section 33(6). This language suggests that the Divisional Court's consideration of a stay of the Board's order is to be engaged after the Board has directed its mind to the issue.

14 Based on section 33 of the OEB Act, the EDA has sought an order from the Divisional Court for a stay only "if needed", i.e., if its application to the Board for a stay is refused.

15 In the past, the Board has ruled on applications for a stay of a Board order which was under appeal. Therefore, the Board accepts, and has acted on, its clear legislative authority to consider an application for a stay pending the outcome of an appeal, notwithstanding any additional power granted to the Divisional Court to consider the issue.

16 In this case, the Board should direct its mind to the question of whether to stay the operation of the Decision in the first instance.

The EDA has Satisfied the Test for Granting a Stay

17 The test to determine whether a stay application should be granted was articulated by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*.² The Board has adopted and applied this test in previous stay applications, including *ACH*.

18 In order to satisfy the test, the applicant must show:

(a) There is a serious question to be tried;

(b) The applicant will suffer irreparable harm if a stay is not granted; and

² [1994] 1 S.C.R. 311 (*RJR MacDonald*)

(c) An assessment of the balance of convenience favours granting a stay.³

19 In this case, all three criteria for granting a stay are satisfied.

There is a Serious Question to be Tried

20 According to the Supreme Court of Canada's decision in *RJR MacDonald*, an extremely limited review of the merits of the case is all that is necessary in order to assess the first element of the test. Unless the case is frivolous or vexatious on the merits, the second and third elements of the test should be considered.⁴ As the Supreme Court stated:

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.⁵

21 Accordingly, it is not appropriate at this stage of the analysis to assess the possible success or failure of the applicant's case. The Board has previously held that the appropriate analysis is whether there is any prospect for success on the appeal applying the lowest possible threshold.⁶

22 In this case, the EDA has appealed the Decision on the basis that the Board improperly declined to consider whether or not to forbear from exercising its authority as required by section 29 of the OEB Act, and that it failed to comply with its statutory mandate and objectives in reaching the Decision. The appeal raises serious issues in relation to the proper interpretation and application of section 29 of the OEB Act and of the Board's jurisdiction and the limits of its regulatory authority.

³ *RJR MacDonald*, *supra*, pp. 348-349

⁴ *RJR MacDonald*, *supra*, p. 348

⁵ *RJR MacDonald*, *supra*, pp. 337-338

⁶ *ACH*, *supra*, at para. 14

23 The EDA's appeal raises questions that go to the core of the Board's purpose and practice. It is neither frivolous nor vexatious. As a result, the appeal clearly satisfies the first element of the test for granting a stay of the Decision.

The EDA's Members will Suffer Irreparable Harm if the Stay is not Granted

24 Harm is irreparable if it can not be remedied. As the Supreme Court of Canada explained in *RJR MacDonald*:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.⁷

25 As explained by the Supreme Court of Canada, "irreparable" refers to the nature, rather than the magnitude, of the harm suffered.⁸

26 As a result of the Decision, the EDA's members are required to enter into agreements with telecommunications carriers for the attachment of equipment of varying sizes and functions for the Board-determined annual fee of \$22.35, and to allow that equipment to be attached to their utility poles. LDCs will suffer irreparable harm if they are obligated to enter into such contracts prior to the disposition of the appeal.

27 If such contracts are entered into, there is no remedy available to set them aside if the appeal is successful. Nor would the LDCs have any right to remove the attachments.

28 Nor would LDCs have any right to recover the substantial engineering and administrative costs they would incur in processing the applications to attach. As was discussed in the evidence led in the underlying proceeding, there are significant administrative and engineering

⁷ *RJR MacDonald, supra*, p. 341

⁸ *RJR MacDonald, supra*, p. 341

costs associated with processing and implementing applications for the attachment of wireless telecommunications equipment to utility poles.

29 The evidence in the underlying proceeding also indicated that compliance with the Decision will in some cases require the reconfiguration of the existing attachments on utility poles in order to comply with applicable technical and safety standards. Such an investment of time and effort to design and carry out a reconfiguration to accommodate new attachments is unrecoverable in the event that the Decision is set aside.

The Balance of Convenience Favours the EDA

30 The Ontario Court of Appeal has made it clear that:

...as a general rule it is in the interest of justice that the 'status quo' be maintained pending an appeal where such can be done without prejudicing the interest of the successful party.⁹

In this case, there is no evidence that maintaining the *status quo* will prejudice telecommunications carriers.

31 In fact, LDCs stand to be more inconvenienced by the operation of the Decision than telecommunications carriers would be by a stay. Allowing the wireless telecommunications carriers to secure attachment rights and attach represents a significant change from the current *status quo*. The attachment of wireless telecommunications equipment to utility poles would also be very costly, time-consuming, and irreversible even should the appeal succeed.

32 In contrast, there is no basis to believe that any delay in attaching equipment pending the disposition of the appeal would cause any harm to telecommunications carriers.

⁹ *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1986] O.J. No. 2128 (QL)

33 Moreover, any delay suffered by a would-be applicant for access is likely to be minimal. The Divisional Court office has advised that a hearing date for the appeal is likely to be set in February or March 2013. This Application is currently scheduled to be heard in January 2013. It is unlikely that a delay of a few months will seriously prejudice the interests of any would-be applicant for access to utility poles, and there is no evidence that any party will suffer such prejudice if attachments are not allowed pending the disposition of the appeal.

Conclusion

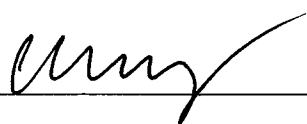
34 The Board is empowered, and required, to consider an application for a stay of the operation of its Decision pending the disposition of the EDA's appeal. In this case, the EDA has satisfied the test for granting a stay.

35 The EDA's appeal raises serious issues to be tried in respect of the Board's jurisdiction, regulatory authority, and statutory mandate. The EDA's members face irreparable harm should a stay not be granted which cannot be meaningfully redressed in the event that the appeal succeeds. The interests of justice favour granting the stay as there is no evidence that any party will be prejudiced if a stay is granted pending the disposition of the appeal.

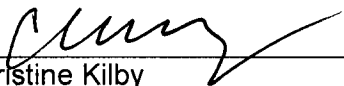
36 For the above-noted reasons, the Board should grant a stay of the Decision pending the disposition of the EDA's appeal.

All of which is respectfully submitted this 14th day of December, 2012

ELECTRICITY DISTRIBUTORS ASSOCIATION
By its Counsel, Norton Rose Canada LLP



for: Per: Alan H. Mark


Per: Christine Kilby

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