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Ontario Energy
Board

Commission de l'énergie
de l'Ontario



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 MOTION AND PROCEDURAL ORDER NO. 8

January 20, 2012

THE PROCEEDING

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, seeking the following orders of the Board:

1. Orders under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act*, 1998 (the "Act"): (i) determining that the Board's RP-2003-0249 Decision and Order dated March 7, 2005 (the "CCTA Order") requires electricity distributors to provide "Canadian carriers", as that term is defined in the *Telecommunications Act*, S.C. 1993, c. 38, with access to electricity

- distributor's poles for the purpose of attaching wireless equipment, including wireless components of distributed antenna systems ("DAS"); and (ii) directing all licensed electricity distributors to provide access if they are not so doing;
2. in the alternative, an Order under subsection 74(1) of the Act amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for the purpose of attaching wireless equipment, including wireless components of DAS;
 3. an Order under subsections 74(1) and 70(2)(c) of the Act amending the licences of all licensed electricity distributors requiring them to include, in their Conditions of Service, the terms and conditions of access to power poles by Canadian carriers, including the terms and conditions of access for the purpose of deploying the wireless and wireline components of DAS, such terms and conditions to provide for, without limitation: commercially reasonable procedures for the timely processing of applications for attachments and the performance of the work required to prepare poles for attachments ("Make Ready Work"); technical requirements that are consistent with applicable safety regulations and standards; and a standard form of licensed occupancy agreement, such agreement to provide for attachment permits with terms of at least 15 years from the date of attachment and for commercially reasonable renewal rights;
 4. its costs of this proceeding in a fashion and quantum to be decided by the Board pursuant to section 30 of the Act; and
 5. such further and other relief as the Board may consider just and reasonable.

THE THESL MOTION

On December 22, 2011, Toronto Hydro Electric Systems Limited ("THESL") filed a Notice of Motion for an order of the Board requiring CANDAS to provide further and better responses to certain interrogatories ("IRs") filed by THESL and the Canadian Electricity Association ("CEA").

THESL's Motion requests that CANDAS be compelled to provide responsive answers to THESL IR Nos. 1(d) and (e), 18(a), 19(d), and 50, and CEA IR Nos. 19(b), 33, and 60¹ (the "Disputed IRs"). THESL asserts that the Disputed IRs seek material that is relevant to the matters in issue in this proceeding and are necessary for the Board and parties to conduct a fair and complete examination of the record. THESL submits that the Disputed IRs relate to two general areas of inquiry with respect to the attachment of wireless attachments:

- What are the rates paid in Toronto on non-utility poles? (Public Mobile)
- What are the rates paid in other jurisdictions? (ExteNet Systems)

CANDAS declined to provide responses to the above referenced IRs on the basis that the requested material was either not relevant or would be unduly onerous to produce relative to its probative value, if any, or in some cases, both.

The Board determined that it would hear the THESL Motion in writing and provided dates for written submissions in Procedural Order No. 7, issued December 23, 2011.

In considering THESL's Motion, the Board is guided by the principles of relevance and proportionality. With respect to relevance, the Board requires the production of responses that are relevant to one or more of the issues in this proceeding. The Board has previously enumerated the issues which are before it in this case, namely:

1. Does the CCTA decision apply to the attachment of wireless equipment, including DAS components, to distribution poles?
2. If the answer to 1 is no, then should the Board require distributors to provide access for the attachment of wireless equipment, including DAS components, to distribution poles?
3. If the Board requires distributors to provide access for the attachment of wireless equipment, including DAS components, under what terms and conditions should those arrangement be governed?

These issues will guide the Board in determining the relevance of the Disputed IRs that are the subject of the THESL Motion.

¹ THESL adopted the evidence of CEA; CANDAS did not object.

With respect to proportionality, the Board considers the time and resources that may be required to produce the responses relative to the probative value of the evidence that is ultimately expected to be produced.

THE DISPUTED IRs

The Disputed IRs fall into two broad categories of information requests:

- the Macro Cell alternative to the Toronto DAS Network that Public Mobile is currently using (THESL IRs 1(d), 1(e) and 50 and CEA IRs 19(b)² and 60; and
- wireless attachment rates and terms in other jurisdictions (ExteNet Systems) (THESL IRs 18(a), 19(d) and CEA IR 33.)

THE MACRO CELL ALTERNATIVE

CANDAS responded that the information requested in THESL IR 1(d) and 1(e), and CEA 19(b) is not relevant to the issues raised in the Application.^{3,4} CANDAS also indicated at that response that it did not understand the relevance of parts (a)-(o) of THESL IR 50, and that that producing the information would be unduly onerous relative to the probative value, if any.

CANDAS responded to the three-part CEA IR 60 indicating that: (a) there is no operating DAS network in Toronto, (b) the information requested is not relevant, and (c) directing CEA to review the entirety of Mr. O'Shaughnessy's written evidence.⁵

CANDAS replied that THESL's submission on motion "focus entirely" on pricing information, which falls outside the scope of this proceeding.⁶ CANDAS also submitted that relevance of the price of Public Mobile's network is based on the disputed contention that rates should be market-based and/or that Macro Cell is a direct substitute for smaller-cell topologies such as DAS.⁷ CANDAS submitted that the cost of deploying Macro Cell is not relevant to determining an electricity distributor's costs of maintaining a pole network.

² CEA IR 19(b) was identical to THESL IR 1(d)

³ CANDAS Response to Interrogatories of THESL, August 16, 2011

⁴ CANDAS Response to Interrogatories of CEA, August 19, 2011

⁵ Ibid.

⁶ CANDAS response to THESL submission on motion, January 10, 2012, p.9, para 27, 28

⁷ Ibid, p.10, para 32

THESL submitted in its submissions on motion that this group of interrogatories is directly relevant to the issues raised in the Application, noting that CANDAS' claims that LDC poles constitute essential facilities for Canadian carriers seeking to make wireless attachments, and at the same time it is CANDAS' evidence that Public Mobile was able to launch its Toronto service without use of power poles.⁸ THESL submitted that CANDAS' evidence is contradictory.

THESL further submitted that pricing information with respect to the costs to make wireless attachments for a known feasible alternative option for launching a Toronto telecommunications wireless network would assist the Board in examining comparable costs of substitutable technology for launching a wireless network that is functionally comparable to the proposed Toronto DAS Network. THESL suggested that the information is necessary to enable a fair and complete examination of the record.

THESL submitted that evidence in this proceeding suggests that the Macro Cell alternative is not "temporary", as characterized by CANDAS, and that it is CANDAS' evidence that Public Mobile considers Macro Cell a direct substitute for DAS.⁹ THESL submitted that there is no information about other vendors that are in direct competition with THESL utility poles or the rates for equivalent service to the proposed Toronto DAS Network.

THESL submitted that CANDAS' did not provide any particulars to its claim that production of THESL IR 50 and CEA IR 19(b) would be unduly onerous, and CANDAS did not respond in its reply.

Board Finding

The Board has determined that the information that is currently on the record with respect to the comparability of other wireless systems is sufficient for the purposes of addressing the issues before the Board at this time. The Board will not require the filing of further information from CANDAS regarding the specific costs or specific technical aspects of the Macro Cell system used by Public Mobile in Toronto. The Board distinguishes this information from that which THESL has been ordered to produce. The Board has already determined in its December 9, 2011 decision and order that the price THESL charges for other wireless attachments is directly relevant to the issues

⁸ THESL submission on motion, January 3, 2012, p.10, para 35

⁹ THESL submission on motion, January 3, 2012, p.12, para 42

before the Board. That information is different from that requested under the current motion. The Board concludes that pricing information for potential non-utility substitutes is not required at this time.

WIRELESS ATTACHMENT RATES AND TERMS IN OTHER JURISDICTIONS

CANDAS originally responded to THESL IR 18(a) by providing two redacted copies of “representative” attachment agreements between ExteNet Systems and utility companies, removing pricing and other information. CANDAS did not set out the reasons for its redaction, nor did CANDAS indicate the reason for its refusal to provide the remaining 78 agreements as part of its original response to THESL IR 18(a).

CANDAS’ response to THESL IR 19(d) indicated that producing the information requested would be unduly onerous relative to its probative value, if any. CANDAS’ response to THESL 19(d) and CEA IR 33 indicated that the information requested is not relevant to the issues raised by its application. CANDAS reiterated in its reply to the motion that the information sought was either unduly onerous, not relevant, or both.

CANDAS replied to the motion stating that information pertaining to access to poles in other jurisdictions is wholly extraneous to the costs of Ontario electricity distributors, and the manner in which they are supervised by the Board. CANDAS submitted that the best evidence for purposes of rate-setting by the Board would be costs actually incurred in Ontario by electricity distributors.¹⁰

THESL submitted that the representative agreements provided by CANDAS in response to THESL IR 18(a) were redacted to exclude pricing information, among other things, and that CANDAS did not request confidential treatment of the information as required under Rule 10 of the Board’s *Rules of Practice and Procedure* and the Board’s *Practice Direction on Confidential Filings*.

THESL indicated that it had asked for the 80 agreements that ExteNet Systems entered into, and that CANDAS did not refuse to provide the information on the basis of relevance, or for any other specified reason, in its failure to respond.

THESL submitted that the information requested in THESL IR 19(d) and CEA IR 33 is relevant as it would indicate the price history as well as variation from jurisdiction to jurisdiction. THESL submitted that allowing CANDAS to produce only a sampling of the

¹⁰ CANDAS response to THESL submission on motion, January 10, 2012, p.12, para 39

relevant agreements would risk allowing CANDAS to selectively pick the most favourable “sample” terms and conditions. THESL submitted that CANDAS did not provide any argument or particulars of its claim that producing the information in THESL IR 19(d) would be unduly onerous.

Board Finding

The Board has determined that for the purposes of the issues before it, pricing information for attachments in other jurisdictions is not required at this time. The Board is further of the view that it does not need further information regarding the terms and conditions of attachments in other jurisdictions. The sample agreements filed as part of CANDAS’ response to THESL IR 18(a) are sufficient at this time.

THESL’S RESPONSE TO THE BOARD’S DECEMBER 9, 2011 ORDER

The Board issued a Decision and Order on December 9, 2011 ordering THESL to provide additional information by December 23, 2011. THESL filed a letter on December 13, 2011 indicating that it would be able to produce some responses on December 23, 2011, but that satisfying the remaining requests made pursuant to the Order would require significant time and resources. THESL indicated it would make best efforts to generate the requested information as soon as possible. Some of the material was filed on December 23, 2011.

By letter dated January 11, 2012, THESL reported that it was continuing to make best efforts to file the information identified in the Board’s Decision and Order of December 9, 2011. The letter further set out the company’s estimates of when it expects to complete its filing of the ordered information. Although THESL has not formally sought and extension to the deadline in the Board’s decision and order, the Board will treat THESL’s January 11 letter as a formal request for an extension.

The Board is prepared to accept the filing date of January 20, 2012, as proposed by THESL, for the materials related to other wireless communications on THESL’s poles. The Board will grant an extension to that date.

The Board does not believe the filing date of February 17, 2012 for the balance of the outstanding materials is appropriate in terms of ensuring an expeditious completion of this proceeding. The Board notes that a further letter from THESL dated January 19,

2012 sets out the significant volume of data involved and requests the Board consider a more limited scope of information. The Consumers Council of Canada ("CCC") responded to THESL's January 19th letter seeking clarification in respect of two issues.

The Board is interested in ensuring a practical approach to the resolution of this matter. For this reason, the Board will order THESL to file a subset of the information originally ordered to be produced. After that, the Board will convene an oral hearing to hear any claims of privilege and/or confidentiality that the company makes in relation to any of the materials and to address the issue of any remaining information outstanding under the December 9, 2011 Decision and Order.

The balance of the outstanding requirements for further information, as set out in the order fall into two categories: information related to the THESL letter to the Board of August 13, 2010; and information related to safety concerns. THESL proposes to file that information by February 17, 2012.

With respect to the first category, the Board's December 9, 2011 Decision and Order states:

The Board will therefore require THESL to produce the information and material requested in CANDAS IR 1(h) and CCC IR 1.

Those IRs read as follows:

- CANDAS IR 1(h): Were any presentations (oral or in writing) made to the THESL Board of Directors in relation to any of the subjects discussed in the THESL Letter, prior to the letter being filed with the Ontario Energy Board ("Board")? If yes, provide particulars of any oral presentations and copies of any written presentations, including, without limitation, power points, notes, memoranda, executive summaries and any similar writing.
- CCC IR 1: Please provide copies of all reports, analyses, written communications, including email, with respect to the policy referred to in the letter of August 13, 2010. Please include copies of all reports to THESL's management and board of directors with respect to that policy.

The Board will now require that the following information be provided by January 30, 2012:

Copies of any presentations or reports provided to the THESL Board of Directors or THESL senior management in relation to the subjects discussed in the THESL letter to the Board of August 13, 2010. Only materials which were provided to the Board of Directors or senior management during June, July or August 2010 shall be provided at this time.

With respect to the second category, the Board's December 9, 2011 Decision and Order states:

The Board therefore orders THESL to:

- a) provide copies of all reports including incident reports, analyses and communication, in support of the contention that wireless attachments impair operations efficiency and present incremental safety hazards to electricity distribution; and
- b) provide copies of all reports, analyses, and communications, reporting on the issues described in paragraphs 42 to 46, of Ms Byrne's Affidavit.

The Board will require the following information to be provided by January 30, 2012:

- a) *copies of reports, including incident reports and analysis reports, that provide a representative sample of all the reports in support of the contention that wireless attachments impair operations efficiency and present incremental safety hazards to electricity distribution; and*
- b) *any reports on the issues described in paragraphs 42 to 46 of Ms. Byrne's Affidavit.*

THE BOARD ORDERS THAT:

1. THESL shall file the subset responses to interrogatories as described by the Board herein **on or before Monday, January 30, 2012.**

2. A hearing will be held on **Monday, February 6, 2012** at 9:30 a.m. at 2300 Yonge Street, Toronto in the Board's hearing rooms on the 25th Floor with the objective of:
- (a) hearing submissions with respect to any claims of privilege or confidentiality made by THESL in respect of the subset of interrogatory responses required to be filed by THESL in accordance with this Decision on Motion and Procedural Order No. 8 or the materials that are expected to be filed on January 20, 2012;
 - (b) determining whether, to what extent and by what date the balance of the outstanding requirements for further information as set out in the Board's December 9, 2011 Decision and Order are required; and
 - (c) considering and setting remaining procedural dates for the proceeding.

DATED at Toronto, January 20, 2012.

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary