Teresa Griffin-Muir
Vice President, Regulatory Affairs
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MTS Allstream

27 September 2013 **by RESS and Mail**

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Walli:

Subject: Written Comments – Review of Framework Governing the Participation of Intervenors in Board Proceedings – Consultation and Stakeholder Conference. Board File No. EB-2013-0301

1. Allstream Inc. (Allstream) is pleased to submit its comments on the above noted consultation. Allstream will confine its comments to responding to questions 3 and 4 from the "Cost Eligibility" section on page 3 of the Board's notice of this consultation.

I. Introduction

2. Allstream is a "Canadian Carrier" within the meaning of the Telecommunications Act. With its 30,000 km fibre-optic backbone, Allstream provides telecommunications services in Ontario and throughout Canada. It offers a full portfolio of business communications solutions, including data and voice connectivity, infrastructure management and information technology services to business customers.

3. In order to build a telecommunications wireline network, a telecommunications service provider must obtain rights of way for its transmission lines and secure access to support structures on which to place those lines. Regulators in Canada have recognized that duplication of support structures is not in the public interest and therefore mandated access to support structures at regulated rates. Consequently, telecommunications service providers are required to and frequently share support structures with other telecommunications service providers and with electricity distributors. This mandated sharing extends to poles, underground conduit, and towers for wireless service.

4. Since 2003, the issue of regulated access to the power poles of Ontario electricity distributors has been before the Board. The Board determined in Decision and Order RP-2003-0249 (the "CCTA Decision") that duplication of support structures was neither viable nor in the public interest.[1] Concluding that power poles are essential facilities over which distributors have monopoly power, the Board went on to grant access for all Canadian Carriers, as defined in the Telecommunications Act, and cable companies at a mandated rate.[2]

5. The CCTA Decision was a watershed decision of broad application. The Board has described it as establishing "a non-discriminatory, technology-neutral right of access to power poles for cable companies and telecommunications companies".[3] However, it is clear that it was not, and continues not to be, the final word on the issue. For example, in the EB-2011-0120 proceeding (the "CANDAS" case), the Board was called upon to decide whether the CCTA Decision applies to wireless attachments to power poles. After the Board determined that the CCTA Decision does indeed apply to wireless attachments,[4] Toronto Hydro-Electric Systems Limited brought an application for forbearance from regulation of certain wireless attachments in Toronto.[5] That proceeding is currently before the Board.

6. Moreover, although the CCTA Decision is broad in scope, it applies only to power poles. Electricity distributors use other forms of support structures besides poles. The regulatory status of such types of support structures is at present unclear and could well be the subject of a further proceeding.

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1 CCTA Decision, page 3.
2 Ibid, page 4.
3 Decision on Preliminary Issue and Order, EB-2011-0120, September 13, 2012, page 6.
4 Ibid.
5 Toronto Hydro-Electric Systems Limited, Application and Evidence, EB-2013-0234, June 14, 2013.

7. For the last decade and for the foreseeable future, the Board has been and will continue to be a forum for dispute resolution between telecommunications service providers and electricity distributors. In Allstream's submission, the rules governing participation of intervenors and the treatment of cost awards for intervenors should be amended to reflect this function of the Board.

II. Responses to Questions

4. *Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?*

8. Under the current Board rules, the "applicant" is typically required to bear not only its own costs of the proceeding,[6] but also those of eligible intervenors.[7] While this might be appropriate for situations in which the regulated entity is applying for changes to its own licence, permission to raise rates, etc., Allstream submits that it is inappropriate for a carrier to bear all these costs when seeking regulated access to monopoly-controlled facilities. A successful applicant could easily see any benefit flowing to it evaporate completely once all intervenors are compensated. Since the Board has concluded that shared use of support structures is in the public interest, there is a public interest in ensuring that cases dealing with these essential facilities are brought before the Board. Cases that should be brought and would serve the public interest will not be brought if the cost consequences can eliminate all potential benefit to the applicant.

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6 Ontario Energy Board, *Practice Direction on Cost Awards*, revised March 19, 2012, s. 3.05.

7 See, for example, Decision on Cost Eligibility and Cost Responsibility and Order, EB-2011-0120, November 1, 2012, page 6.

9. The Board has recognized that the existing rules are an uncomfortable fit for dispute resolution cases. In the recent CANDAS case, the Board made the communications companies and electricity distributors each responsible for 50% of the cost awards. However, this is not a formal policy of the Board: the CANDAS cost award was based on the characterization of that case as an interpretation of the CCTA Decision, which itself split the costs award between the applicant and distributors.[8] The Board may not view future support structure proceedings to be as closely related to the CCTA Decision, so the approach to costs is therefore unknown to potential litigants. In Allstream's view, a more formal policy is preferable.

10. Such a policy should reflect the fact that where a Canadian Carrier such as Allstream requires an order of the Board to access support structures, it is because of the negotiating positions taken by the owner of the support structures. Accordingly, it is the behavior of the party with market power that has necessitated the proceeding. It would therefore be appropriate for the party with market power (i.e. the electricity distributor) to be responsible for the costs of the proceeding.

3. ***What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?***

11. Board proceedings engage the broader public interest and, as such, there is often need for the representation of the public interest by cost-eligible intervenors. The Board must, however, strike a balance between the need to hear from intervenors and the need to

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8 Decision on Cost Eligibility and Cost Responsibility and Order, EB-2011-0120, November 1, 2012, pages 5-6.

ensure the effectiveness of its procedures. The public interest will not be served if disputes are not resolved because the cost of adjudication is excessive. Furthermore, the public interest will not be served by the duplication of support structures where negotiated agreements are impossible and regulatory relief inaccessible.

12. In Allstream's view, the same goals identified in the response to question 4 could be achieved by finding ways to limit the scope of the costs incurred. Intervenor costs can be very significant. For example, in the CANDAS Case, intervenors were awarded total costs of more than $280,000. Fundamentally, that case only involved a determination of whether an existing decision of the Board applied to a specific type of equipment. Allstream would support Board efforts to combine the participation of cost-eligible intervenors, limit the number of cost-eligible intervenors, or otherwise finding ways to make proceedings more efficient in an effort to improve access to the Board.

Yours truly,

for Teresa Griffin-Muir
Vice President, Regulatory Affairs

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