



**EB-2013-0234**

**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 Toronto  
Hydro-Electric System Limited for an order pursuant  
to section 29 of the *Ontario Energy Board Act*, 1998.

**Before:** Cynthia Chaplin  
Presiding Member

Cathy Spoel  
Member

Christine Long  
Member

### **DECISION ON CONFIDENTIALITY**

**April 8, 2014**

On June 14, 2013, Toronto Hydro-Electric System Limited ("THESL") filed an application with the Ontario Energy Board seeking an order pursuant to section 29 of the *Ontario Energy Board Act*, 1998 that the Board refrain from regulating the terms, conditions and rates for the attachment of wireless telecommunications devices ("wireless attachments") to THESL's utility poles.

THESL is currently required by the Board's Decision and Order in EB-2003-0049 dated March 7, 2005 to give Canadian carriers and cable companies access to its distribution poles for wireless attachments at a regulated rate. THESL is proposing to charge a competitive rate for wireless attachments to its utility poles.

A record of all procedural matters that have been dealt with up to this point in this proceeding is available on the Board's website and at the Board's office.

### **Request for Confidentiality**

THESL filed its interrogatory responses on February 28, 2014. THESL requested that certain interrogatory responses be kept confidential and the following interrogatory responses were filed confidentially:

- Issue 1: Consumer Council of Canada ("CCC") No. 3 and No. 5;
- Issue 6: Board Staff No. 21 and No. 22, Vulnerable Energy Consumer Coalition ("VECC") No. 12;
- Issue 9: Energy Probe No. 18 parts (b), (c), (e) and (f);
- Issue 10: CCC No. 16; and
- Issue 11: School Energy Coalition ("SEC") No. 7.

Board staff, CCC and SEC each filed submissions objecting to all or portions of THESL's request for confidentiality. The parties questioned some of THESL's claims of commercial sensitivity and submitted that the information should be disclosed because it relates to the costs and revenues for services which are currently regulated and is information which would be disclosed in a rates proceeding.

THESL responded that the Board should address the issue from the perspective of the specific application. THESL argued that its assertions as to the commercial harm it would experience from disclosure should be sufficient to grant confidentiality and that the other parties had not discharged the onus on them to substantiate harm to the public from confidential treatment.

### **Board Findings**

The Board will address the issue of confidentiality generally and then set out its determinations for each specific interrogatory.

THESL argues that the Board should approach the issue of confidentiality differently in this case because the application is being made under section 29. The Board does not agree. The *Practice Direction on Confidential Filings* is applicable to all of the Board's

proceedings, including rate cases, leaves to construct, mergers and acquisitions, licence exemptions, and applications under section 29. Under the Practice Direction, the expectation is public disclosure unless the circumstances warrant confidential treatment:

This Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential. The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

That approach is applicable to this case. While the nature and circumstances of the case are important factors for the Board to consider in a request for confidentiality, the Board's general expectation of public disclosure and the requirement that the onus rests with the party requesting confidentiality remain.

The Board does agree with THESL that commercial sensitivity is a relevant consideration, and the Practice Direction identifies "prejudice to any person's competitive position" as a relevant factor. The Board accepts that if the application is granted, and if the Board no longer regulates the rate for wireless attachments, then THESL will have a commercial interest in keeping cost and revenue information from being disclosed. However, this potential adverse impact on THESL's competitive position is not determinative; it must be balanced with the Board's interest in conducting open, transparent processes, including an open oral hearing and a fully public decision. THESL's *assertions* of commercial prejudice must also be balanced with the specific nature of the information, including the time period to which it pertains, and whether THESL can have a reasonable expectation of ongoing confidentiality.

The Board's concerns for an open and transparent process are both practical and substantive. From a practical perspective, it is difficult to retain information in confidence, to conduct proceedings *in camera*, and to produce decisions which are partially confidential. More importantly, from a substantive perspective, the credibility and the legitimacy of the Board and its decisions rests on the open and transparent processes the Board uses. This requires open oral hearings and decisions which are

fully disclosed to the public. In some cases confidentiality is warranted. When the Board allows information to be kept confidential, often there is little harm to the public process because there is no requirement for an *in camera* hearing or a confidential, or partially confidential, decision. This is the case when the confidential information is very limited or is only indirectly related to the key issues in the case. In those circumstances, the concerns of commercial sensitivity can be accommodated without harm to the process. There may even be instances where confidentiality concerns warrant a decision which is partially confidential. For example in the storage allocation proceeding (EB-2007-0724 / EB-2007-0725) the Board kept part of the decision confidential. However, this was to protect the privacy and commercial interests of specific customers, not information related to the utility. In any event, a decision which is partially confidential would only be appropriate in exceptional circumstances.

In considering THESL's requests for confidentiality, the Board will consider the potential adverse impact on THESL's competitive position, but this will be balanced with the Board's interest in conducting open, transparent processes, including an open oral hearing and a fully public decision. In considering THESL's claims of commercial prejudice, the Board will consider the nature of the information, the time period in question, and whether THESL can have a reasonable expectation of ongoing confidentiality.

### **Issue 1: CCC 3**

This interrogatory answer identifies the rate THESL expects to charge for current pole attachment applications. The Board finds that this answer should be disclosed on the public record.

Wireless attachments are currently a regulated service, and the current rates and charges by THESL are appropriately part of the public record. Further, given the nature of this information, the Board expects that the parties to the proceeding, including their experts, may want to refer to this information and may use it in their analysis. There is therefore a high probability that the Board will refer to this information in its decision. Given that likelihood, the Board finds that the interests of disclosure and public process are significant. The Board also finds that THESL has not demonstrated how disclosing the charges for a currently regulated service will prejudice its competitive position. In addition, the answer does not identify the wireless attachment customers or the attachment locations.

**Issue 1: CCC 5**

This interrogatory answer identifies the number of attachments by THESL and THESI each year since 2006, and the rate charged by THESI. The Board finds that the information related to THESL should be disclosed on the public record.

This historical information relates to a service which has been regulated by the Board. The Board finds that there is limited commercial sensitivity related to this information. In addition, given the nature of this information, the Board expects that the parties to the proceeding, including their experts, may want to refer to this information and may use it in their analysis. There is therefore a high probability that the Board will refer to this information in its decision. Given that likelihood, the Board finds that the interests of disclosure and public process are significant. The Board finds that THESL has not demonstrated how disclosing the number of attachments for a currently regulated service will prejudice its competitive position. In addition, the answer does not identify the wireless attachment customers or the attachment locations.

The Board will not order disclosure of the THESI information because the Board does not regulate THESI and the Board's concerns regarding the importance of public disclosure do not apply.

**Issue 6: Board Staff 21**

This interrogatory answer identifies the specific street address, district, and status of wireless pole attachments on THESL's poles. Both Board staff and THESL are content to have the district disclosed. The Board will accept this proposal: the address and status will be kept confidential; the district will be disclosed.

The Board is satisfied with this approach because the granularity of the confidential information is such that the Board does not expect that direct reference to it would be needed in the oral hearing or in the decision. If the circumstances change, however, the Board will revisit the confidential treatment of this information.

**Issue 6: Board Staff 22**

This interrogatory answer includes copies of two agreements: one between THESL and a wireless attachment customer and one between THESI and a wireless attachment customer. The Board finds that the agreement between THESL and the wireless

attachment customer should be disclosed, but the identity of the customer will be redacted and kept confidential.

The contract is for the provision of a regulated service. The customer should be afforded confidentiality, but the terms and conditions of the contract for this regulated service do not warrant confidential treatment. THESL argues that while the rate for wireless attachments is regulated, the other components are not. The Board does not agree. While specific terms and conditions may be left to negotiation between the parties, the service is fully regulated and therefore terms and conditions are appropriate for inclusion on the public record, subject to keeping the identity of the specific customer confidential. Given the nature of the information in this interrogatory answer, the Board expects that the parties to the proceeding, including their experts, may want to refer to the information and may use it in their analysis. There is therefore a high probability that the Board will refer to this information in its decision. Given that likelihood, the Board finds that the interests of disclosure and a fully public process are significant.

THESL also argues that the same contract was afforded confidential treatment in the CANDAS proceeding. However, the circumstances of the CANDAS proceeding were substantially different. The Board's decision on confidentiality in that case was made at the same time as its decision on the preliminary issue. The Board granted confidentiality but did not provide any reasons or analysis which would guide the Board's considerations in the current case. However, in the CANDAS case, the decision on the preliminary issue effectively concluded the case. Therefore, concern about the need for a fully public process, which is of concern to the Board in the current proceeding, was not a relevant consideration in the CANDAS case.

The Board will not require public disclosure of the agreement involving THESI, and the agreement will remain confidential. It would not be appropriate to require public disclosure of the agreement because the Board does not regulate THESI.

**Issue 6: VECC 12**

This interrogatory answer identifies the range of costs associated with modifying or replacing a streetlighting pole to accommodate a wireless attachment. The information is provided for THESL and THESI. The Board will require public disclosure of the information related to THESL.

Given the nature of this information, the Board expects that the parties to the proceeding, including their experts, may want to refer to this information and may use it in their analysis. There is therefore a high probability that the Board will refer to this information in its decision. Given that likelihood, the Board finds that the interests of disclosure and public process are significant. The Board finds that THESL has not demonstrated how disclosing a range of costs will prejudice its competitive position to such an extent that it should override the concerns for public disclosure. The answer does not identify any specific wireless attachment customers or locations.

The Board will grant confidentiality to the information involving THESI because the Board does not regulate THESI.

**Issue 10: CCC 16**

This interrogatory answer provides a cost analysis for telecommunication attachments (wireline and wireless) using the methodology adopted by the Board in the CCTA decision (EB-2003-0249). The Board will require public disclosure of this information.

Given the nature of this information, the Board expects that the parties to the proceeding, including their experts, may want to refer to this information and may use it in their analysis. There is therefore a high probability that the information will be referenced during the oral proceeding and that Board will refer to this information in its decision. Given that likelihood, the Board finds that the interests of disclosure and a fully public process are significant. THESL claims that this information is commercially sensitive and that disclosure would put the company at a competitive disadvantage should the Board decide to forebear from regulating wireless attachments. However, the fact that the costing information pertains to *telecommunications* attachments is an important consideration. If the application is granted, wireline attachments will continue to be regulated, and those rates will be derived from cost information. THESL cannot reasonably expect that information about wireline attachments will be kept confidential and therefore there is no basis for keeping the telecommunications attachment cost information confidential.

**Issue 11: SEC 7**

This interrogatory answer identifies the estimated revenue for wireless attachments for 2008 through 2013 and the forecast for 2014 and 2019. The Board will require public disclosure of this information.

For the period 2008 to 2013, these revenues related to a regulated service. Neither THESL nor its wireless attachment customers could reasonably expect confidential treatment for such information. THESL objects to disclosure on the basis that the information, in combination with other information in the proceeding, could be used to derive revenue-per-contract. THESL has failed to demonstrate how this customer specific information could be derived. All that has been disclosed is the number of attachments per year and revenue per year. No customers have been identified; nor information as to the number of attachments per customer. In any event, the answer pertains to the period in which this service was regulated and therefore information about the revenue from that service is appropriate for inclusion on the public record.

**Issue 9: Energy Probe 18 (b), (c), (e), (f)**

This interrogatory answer discloses the names of companies with wireless attachments in 2013, the total revenues from wireless attachments, and the estimated total costs for wireless attachments. The Board will require public disclosure for parts (b) and (c). The Board will require public disclosure for part (e), but the names of the specific customers will be redacted and kept confidential. The Board has already addressed disclosure of cost information and revenue information in relation to other interrogatories. The same reasoning applies to this interrogatory.

The Board will grant confidentiality to part (f) because it contains information related to THESI.

**THE BOARD ORDERS THAT:**

1. THESL will re-file the relevant interrogatory answers in accordance with the directions in this decision. The interrogatory answers are to be filed with the Board no later than April 15, 2014 and sent to all intervenors.

All filings to the Board must quote the file number, EB-2013-0234, and consist of two paper copies and one electronic copy made through the Board's web portal at [www.pes.ontarioenergyboard.ca/eservice/](http://www.pes.ontarioenergyboard.ca/eservice/), 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/OEB/Industry](http://www.ontarioenergyboard.ca/OEB/Industry). If the web portal is not available, parties



may email their documents to the address below. 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 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:00 p.m. on the required date.

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**DATED** at Toronto, April 8, 2014

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary