



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

Citation: 2013 TMOB 139  
Date of Decision: 2013-08-28

**IN THE MATTER OF SECTION 45 PROCEEDINGS  
requested by Conergy AG against registration  
Nos. TMA457,318, TMA457,762 and TMA575,274 for the  
trade-marks POWER PLUS & Design, POWER PLUS  
and POWERPLUS Design in the name of ATCO Electric  
Ltd.**

[1] At the request of Conergy AG (the Requesting Party), the Registrar of Trade-marks issued notices under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on May 4, 2011 to ATCO Electric Ltd. (the Registrant), the registered owner of registration Nos. TMA457,318 for the trade-mark POWER PLUS & Design, TMA457,762 for the trade-mark POWER PLUS and TMA575,274 for the trade-mark POWERPLUS Design. The two design marks are shown below:



TMA457,318 (POWER PLUS & Design)    TMA575,274 (POWERPLUS Design)

[2] With respect to registration Nos. TMA457,318 [POWER PLUS & Design] and TMA457,762 [POWER PLUS] the marks are registered in association with the following:

WARES: Automatic meter reading equipment; computer software; computer hardware; and communication systems, namely, telephone and microwave to be used to send and receive data to and from customers.

SERVICES: Automatic meter reading services; energy management services, namely, individual usage profiles, demand-site management including remote control of equipment; remote site monitoring and data acquisition services, namely, alarm and event notification from a remote site and the accessing of information from the customers place of business; electrical transmission system services, namely, providing peak demand, voltage and current readings to the customer; management services, namely, outage mapping, load research and direct load control, namely, the remote operation and monitoring of an electric distribution system; distribution automation services, namely, the remote or automatic operation of electric distribution control equipment; service bureau services, namely, the transfer of data to other computer systems that translate and convert the data for accounting purposes; installation services, namely, installation of an electric meter and terminal connection box use to provide automatic meter reading services; and training services, namely, training of customers to remotely obtain data and operate various devices.

[3] With respect to the registration No. TMA575,274 [POWERPLUS Design], the mark is registered in association with the following:

**WARES:**

- (1) Automated meter reading equipment for gas, electricity and water services.
- (2) Computer software, namely, for sending and retrieving data to and from customers.
- (3) Computer hardware.
- (4) Communication systems, namely, telephone and microwave to be used to send and receive data to and from customers.

**SERVICES:**

- (1) Automated meter-reading services.
- (2) Management services, namely, load research, outage mapping and direct load control, namely, the remote operation and monitoring of an electrical distribution system.
- (3) Energy management services, namely, individual usage profiles, demand-site management including remote control of equipment.
- (4) Remote site monitoring and data acquisition services, namely, alarm and event notification from a remote site and the accessing of information from the customer's place of business.
- (5) Electrical transmission services, namely, providing peak demand, voltage, and current readings to the customer.
- (6) Training services, namely, training of customers to remotely obtain data and operate various devices.
- (7) Installation services, namely, installation of an electric meter and terminal connection box used to provide automatic meter reading services.

- (8) Service bureau services, namely, transfer of data to other computer systems that translate and convert the data for accounting purposes.
- (9) Distribution automation services, namely, the remote or automatic operation of electric distribution control equipment.
- (10) Electrical transmission systems services, namely, providing peak demand, voltage and current readings to the customer.

[4] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and services specified in the registration at any time within the three year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is between May 4, 2008 and May 4, 2011.

[5] The relevant definitions of “use” are set out in sections 4(1) and 4(2) of the Act:

4(1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[6] In response to the Registrar’s notices, the Registrant furnished affidavits of Mr. Satarjit Parhar, a Senior Manager with the Registrant. I note that the evidence furnished in response to each notice is substantively identical.

#### Evidence Submitted by the Registrant

[7] In his affidavits, Mr. Parhar attests that the Registrant is a regulated company that pursues power distribution and transmission projects in Alberta. In particular, the Registrant builds, operates and maintains power transmission and distribution lines that deliver power to homes, businesses, farms and projects in cities, towns and communities. He attests that the Registrant has used the POWER PLUS marks in Canada in association with “services relating to automated meter reading (AMR) for electric, gas and water”.

[8] By way of background explaining the Registrant's AMR services, Mr. Parhar attaches to his affidavit a brochure (Exhibit A), an internal memorandum (Exhibit B) and a copy of a press release (Exhibit C), all of which clearly pre-date the relevant period.

[9] Mr. Parhar identifies eight of the Registrant's POWER PLUS customers, and provides, at Exhibit F, two example contracts, both entitled "PowerPlus® Automatic Meter Reading – Water Meter Reading Agreement". The agreements are dated September 15, 1998 and October 2, 2000 with terms of 20 years and 10 years, respectively. However, even if the agreements were still in force, they were signed prior to the relevant period and as such do not themselves constitute display of the marks in the performance of services during the relevant period. Furthermore, Mr. Parhar concedes in his affidavit that the Registrant did not sign any new POWER PLUS customers during the relevant period. He does state that the Registrant "promotes its POWER PLUS services to customers at trade shows", but provides no further evidence in this respect. Otherwise, he notably states that the Registrant "does not officially advertise its services". As such, the issue is whether the Registrant displayed the Mark in the performance of its services to its existing customers during the relevant period.

[10] In this respect, attached as Exhibit G to his affidavit, Mr. Parhar provides copies of nine invoices, which he attests are with respect to the Registrant's services under the POWER PLUS mark. Of the six invoices dated within the relevant period, I note that five invoices display the POWERPLUS Design mark in the "Description" section of the invoice and are addressed to the customers identified in the Exhibit F agreements. Furthermore, most of the invoices are for various quantities of "Meter Readings".

[11] Also displayed on some of the invoices is a line item described as "Inactive meter". At the oral hearing, the Registrant explained that this refers to the replacement of inactive meters by the Registrant. However, this explanation is absent from the evidence before me, and Mr. Parhar provides no details that would assist me in concluding that the invoices accompanied any of the Registrant's wares, such as "automatic reading equipment", at the time of transfer. Indeed, I note that Mr. Parhar refers to the invoices only in the context of the Registrant's "services". As such, I cannot conclude that the invoices constitute display of the Mark in association with any of the Registrant's wares within the meaning of section 4(1) of the Act.

[12] With respect to the registered services, it is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the wares and services specified in the registration during the relevant period.

[13] In this case, the evidence submitted by the Registrant is not strong. I agree with the Requesting Party that Mr. Parhar's assertion of use is at best ambiguous with respect to the registered services, with the exception of "automated meter-reading services". In any event, even with a generous reading of Mr. Parhar's affidavits, the invoices do not make any reference to the other registered services.

[14] With respect to "automated meter-reading services", I do not agree with the Requesting Party that such services, and subsequently the marks as a whole, should be expunged. The Requesting Party asserts that the invoices must refer specifically to the services as covered in the registration, and that the Registrar cannot imply services beyond the description presented on the invoices. In this case, as the invoices do not specifically refer to "automated meter readings", the Requesting Party submits that the Registrar cannot conclude that the invoices demonstrate use of the POWER PLUS marks in association with "automated meter-reading services".

[15] However, focusing on individual pieces of evidence is not the correct approach; the evidence as a whole must be considered [*Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB)]. In contrast to the other registered services, I am satisfied that the invoices, when viewed in combination with the exhibited contracts and background documents regarding the Registrant's AMR services, allow for the reasonable conclusion that the invoices are in respect to "automated meter-reading services".

[16] In view of the foregoing, I am satisfied that the Registrant has demonstrated use of the POWERPLUS Design mark in association with "automated meter-reading services" within the meaning of sections 4 and 45 of the Act

[17] Furthermore, I consider the use of the POWERPLUS Design mark as sufficient to demonstrate use of the POWER PLUS word mark in association with “automatic meter reading services”.

[18] As well, in applying the principles as set out in *Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA) and *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA), I consider the trade-mark as used to be a minor deviation from the POWER PLUS & Design mark. In my view, the dominant feature is the word portion, POWER PLUS. As such, the identity of the mark is preserved and the deviation would not, in my opinion, mislead an unaware purchaser.

[19] While the evidence with respect to each registration was substantively identical, there is no authority to support the Requesting Party’s submission that the evidence can only be used to support the registration for POWERPLUS Design mark. In each case, the evidence was properly furnished in response to the respective notice. Had a section 45 notice issued solely against the POWER PLUS & Design mark, the evidence furnished would have been sufficient to maintain the registration as discussed above. The fact that a registered owner has other registrations for similar or identical marks is irrelevant to any particular section 45 proceeding. I see no reason that a different conclusion should be reached simply because the section 45 notices were issued at the same time and the evidence considered at the same time.

[20] In view of the foregoing, I am also satisfied that the Registrant has demonstrated use of the POWER PLUS and POWER PLUS & Design marks in association with “automatic meter reading services” within the meaning of sections 4 and 45 of the Act.

[21] With respect to the remaining services and the wares for all three registrations, no evidence of special circumstances excusing non-use was submitted. The registrations will be amended accordingly.

Disposition for TMA457,318 (POWER PLUS & Design) and TMA457,762 (POWER PLUS)

[22] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act and in accordance with section 45 of the Act, registration Nos. TMA457,318 and TMA457,762 will

be amended to delete the statement of wares and all of the services with the exception of “Automatic meter reading services”.

[23] The amended statement of services for both registrations will be: “Automatic meter reading services”.

Disposition for TMA575,274 (POWERPLUS Design)

[24] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act and in accordance with section 45 of the Act, registration No. TMA575,274 will be amended to delete the statement of wares as well as services (2) through (10) from the statement of services.

[25] The amended statement of services for registration No. TMA 575,274 will be as follows: “Automated meter-reading services”.

---

Andrew Bene  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office