**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* (the "CANDAS Application").

# NOTICE OF MOTION

Toronto Hydro-Electric System Limited ("THESL") will make a Motion to the Ontario Energy Board (the "Board") on a date and at a time to be determined by the Board.

**PROPOSED METHOD OF HEARING:** THESL proposes that the Motion be heard orally.

**THE MOTION IS FOR** a Decision and Order of the Board:

1. finding that the license condition setting access and the access rate of $22.35 per pole attachment per year arising from the Ontario Energy Board's (the "Board's") March 7, 2005 CCTA Decision does not apply to wireless communications attachments, including related wireless equipment and wireless components and other equipment associated with distributed antenna systems other than wireline attachments (hereinafter referred to as "Wireless Attachments"); and

2. pursuant to Subsection 29(1) of the *Ontario Energy Board Act, 1998,* to refrain from exercising any of its powers, including imposing any distribution license conditions governing the access of Wireless Attachments to the electricity distribution system, on the basis that there is or will be competition in the market for siting of Wireless Attachments sufficient to protect the public interest; and

3. in the alternative to number 2, pursuant to Subsection 29(1) of the *Ontario Energy Board Act, 1998* (the "*OEB Act*") to refrain from exercising any of its powers, including imposing any distribution license conditions governing the access of Wireless Attachments to THESL's electricity distribution system, on the basis that there is or will be competition in the market for siting of Wireless Attachments within the City of Toronto sufficient to protect the public interest; and

4. denying the relief sought by CANDAS and dismissing the CANDAS application; and

5. such other relief as may be requested by THESL or as the Board may deem appropriate.

## THE GROUNDS FOR THE MOTION ARE:

### Overview

1. THESL does not dispute the applicability of the CCTA Decision to traditional Canadian Carrier and cable company wireline communications attachments within the communications space of its distribution poles.

2. However, THESL does dispute the applicability of the CCTA Decision to Wireless Attachments.

3. In particular, given that the issue and subject of Wireless Attachments was not raised, considered or addressed in the CCTA Decision or the CCTA proceeding, what CANDAS seeks is a fundamental misapplication of the CCTA Decision.

4. Further, there are essential differences between wireline and Wireless Attachments that the Board did not consider in assessing whether or not it needs to regulate Wireless Attachments, including but not limited to:

a) Unlike wireline communications attachments, which require a continuous network of poles from which the wires must be suspended, Wireless Attachments such as distributed antenna systems desire access to distribution poles at a relatively small number of access points principally for convenience;

b) Wireless Attachments can be and are placed in a variety of locations, including on the roofs or sides of commercial, residential and industrial buildings; on street furniture; on traffic lights; on stand-alone communications towers; and on other elevated structures. There are numerous examples available of these alternative attachment options being utilized for Wireless Attachments across North America, including distributed antenna systems. The presence of numerous suitable alternatives undermines any claim that distribution poles are an "essential facility" for the purposes of siting Wireless Attachments; and

c) Given the above mentioned alternatives, an active, extensive and competitive siting market for Wireless Attachments has developed. The existence of this market is well supported by the presence of companies whose primary business is the siting of wireless and other communications facilities, such as American Tower and Crown Castle USA.

5. It is in this context that THESL submits that there is or will be competition in the Wireless Attachment siting market sufficient to protect the public interest, and therefore, pursuant to Subsection 29(1) of the *Ontario Energy Board Act, 1998*, the Board must forebear in these circumstances.

6. The regulatory precedent sought by CANDAS - which would require THESL and every other LDC in Ontario to attach Wireless Attachments to their distribution poles when there already are alternative siting options - could have substantial adverse consequences. Such adverse consequences include excessive demand for distribution pole space by nonessential users as well as thwarting the further evolution and development of siting markets in general.

7. By forbearing, the Board would enable siting markets to continue to provide these services to nonessential users and distributors would become just another option available in the competitive market for Wireless Attachments. The presence of siting alternatives provides a check on any potential exercise of market power by pole owners.

8. Further, by forbearing, the Board would enable siting markets to continue to develop without relying on regulatory intervention. In addition to avoiding the adverse consequences noted above at paragraph 6, forbearance will result in: (i) a more efficient allocation of resources; (ii) significant regulatory burden, together with the risks of regulatory imperfections or failures, will be avoided; and (iii) distributors will be able to realize the fair non-monopoly market value of distribution pole assets for the benefit of their ratepayers.

9. THESL may provide such further and grounds as counsel for THESL may submit and the Board allow.

## Detailed Grounds

**PART A: The CANDAS Application constitutes a fundamental misapplication of the CCTA Decision since the issue of Wireless Attachments was neither raised, considered nor included within the CCTA Decision.**

**1. The CCTA Decision did not address Wireless Attachments. In fact Wireless Attachments were expressly identified in the CCTA settlement agreement as an unsettled matter. It remains an unresolved issue.**

THESL submits that at no time during the CCTA proceeding did the Board consider the unique issues raised by Wireless Attachments.

On March 7, 2005 the Board issued its Decision and Order in RP-2003-0249 (the "CCTA Decision"). This proceeding was subject to a settlement conference, which concluded with the parties filing the Settlement Agreement of October 19, 2004 (the "Settlement Agreement"). The Settlement Agreement, which was accepted by the Board, indicated that the inclusion of Wireless Attachments was an unsettled issue.

The sole reference to Wireless Attachments in the CCTA Decision or in the Settlement Agreement occurs in Section 1.5 of Appendix B of the Settlement Agreement, which provides:

> **"[Attachment excludes wireless transmitters and power line carriers.]**
> **NOT AGREED."**

This reference is unequivocal that the parties to the Settlement Agreement were simply unable to agree whether or not the definition of "Attachments" should include or exclude Wireless Attachments.

With the exception of this sole reference in the Settlement Agreement, THESL was unable to locate any substantive discussion of Wireless Attachments in any of the following CCTA proceeding materials:

Settlement Agreement – dated October 19, 2004
Ontario Energy Board Transcripts – RP-2003-0249
October 12, 2004 – Motions Day
Volume 1 – October 26, 2004
Volume 2 – October 27, 2004
Volume 3 – October 28, 2004
Volume 4 – November 8, 2004
Decision and Order of the Board – March 7, 2005

Over the course of the four day hearing in the CCTA proceeding, "wireless" technology was only mentioned once, and only in respect of an exchange concerning "wireless cable" (Vol. 1, p. 137, paras. 1510-1520). The CCTA Decision together with the Settlement Agreement and the proceeding transcripts are included with this Notice of Motion at Exhibit 10.

Accordingly, the CCTA Decision, including the use of the definition "Canadian Carriers", was not intended to encompass Wireless Attachments. In other words, THESL respectfully submits the Board expressly excluded Wireless Attachments from the scope of the CCTA Decision.

THESL's interpretation is consistent with the interpretation of the parties to the CCTA proceeding. On August 3, 2005 the CCTA together with the MEARIE Group (representing some 60 LDCs) jointly filed a model joint use agreement with the Board pursuant to the CCTA Decision. In that model agreement, which is attached to CANDAS' response to CCC IR#3(a), the definition of "Attachment" at Section 1.4 expressly excludes wireless transmitters unless otherwise agreed to by the parties.

THESL's interpretation is also supported by consideration of the rate derivation formula established by the Board to determine the figure of $22.35 per attachment per year. That formula expressly depends on certain pole space occupancy proportions which are violated by wireless equipment. If the Board were contemplating wireless equipment at the time the formula was established, the formula would have recognized the significantly different pole occupancy required by wireless equipment, which it does not. Therefore, it is unreasonable to hold that the Board intended that wireless equipment be subject to the CCTA Decision.

**2. Wireless DAS was only being commercialized and promoted after the CCTA Decision had been rendered by the Board.**

At the time of the CCTA proceeding and the CCTA Decision, non-distribution attachments to THESL's and other distributors' distribution poles were primarily comprised of streetlights and wireline communications devices. Given this experience, it is unsurprising that the CCTA Decision focused only on wireline communications attachments.

However, in recent years, THESL has witnessed a dramatic growth in the number of applications for non-distribution pole attachments, and particularly for Wireless Attachments and related wireline support structures.

The affidavit of Mary Byrne, which is attached as Exhibit 3, explains at paragraph 49 that before 2008, THESL received no Wireless Attachment applications while in 2009 THESL received 249 requests for Wireless Attachments and through the third quarter of 2010 THESL had received 218 requests for Wireless Attachments. These Wireless Attachment requests were in addition to the 473 wireline attachment requests THESL received in 2006, 103 in 2007, 418 in 2008, 886 in 2009 and 813 in 2010. The near doubling of the number of wireline applications in 2009 and 2010 can, in-part, be explained by CANDAS' own explanation that of the applications submitted by Cogeco in

2009 and 2010, 303 were for the "wired" component that is necessary to support the DASCom Wireless Attachments.

**3. Distribution poles are not "essential facilities" for Wireless Attachments because there are numerous commercially viable alternatives that serve the same purpose.**

THESL submits that the evidence put forth by CANDAS is simply insufficient to demonstrate that distribution poles constitute, in effect, "essential facilities" for Wireless Attachments, and CANDAS inappropriately applies the CCTA Decision to suggest that they are. THESL submits that there are numerous examples available of alternative attachment options being utilized as viable commercial options to implement wireless communications networks, including distributed antenna systems, across North America.

The central characteristic of the CCTA Decision is contained in the Board's determination at page 3 that distribution poles constitute "essential facilities" for the purposes of wireline communications attachments. In arriving at this decision, the Board indicated its confidence that there are no technically viable alternatives available to the wireline companies. This stands to reason given the particular technical characteristics of wireline equipment, as is more explained the affidavits of Michael Starkey and Adonis Yatchew.

By contrast, CANDAS first applied for access in 2009 before Public Mobile decided in July 2010 to launch its service using another commercial viable alternative to using distribution pole infrastructure within the City of Toronto.[1] Unlike wireline communications attachments which require a continuous network of poles for suspension of the wires, proponents of Wireless Attachments such as distributed antenna systems desire access to distribution poles principally for convenience.

[1] See CANDAS Application at paragraph 7.10.

Wireless Attachments can be and are placed in a variety of siting locations, including on the roofs or sides of commercial, residential and industrial buildings; on street furniture; on water towers; on traffic lights; on stand-alone communications towers; and on other elevated structures.

Various alternatives to distribution pole attachments are discussed in the affidavits of Mr. Michael Starkey and Dr. Adonis Yatchew, attached hereto as Exhibits 1 and 2, as well as in the industry report prepared for the Canadian Electricity Association (the "CEA") by LCC titled *Outdoor Distributed Antenna Systems and their role in the Wireless Industry* (the "LCC Report").

CANDAS readily admits to the presence of multiple alternatives in respect of its proposed Toronto DAS Network in response to THESL IR#3. In particular, CANDAS explains that:

> "ExteNet and DAScom have considered the following alternatives to electric distribution utility poles:
>
> 1. Streetlight poles owned by THESI.
> 2. Bell Canada poles.
> 3. Various methods of installing fibre optic cabling in new underground conduits (as an alternative to new aerial fibre deployments by Cogeco).
> 4. Traffic light standards and other municipal "street furniture".
> 5. Installation of new node poles in the public rights of way.
>
> Except for the pole access agreement with THESI, there are no attachment agreements with respect to any of the foregoing alternatives because with the exception of the THESI streetlight poles none of the foregoing alternatives was deemed to be a viable alternative means of providing effective DAS network services to meet the needs of Public Mobile and possibly other wireless carriers in Toronto."

CANDAS fails to provide any evidence to support its assertion that none of these siting alternatives are viable, despite repeated attempts by several intervenors to obtain this

information.[2] Where a commercial party determines that it may be able to take advantage of a regulated rate for a service that is likely less costly and more convenient than a negotiated or market rate for the same or a substitutable service, it has little incentive to actively explore other options. While the attachment rate of $22.35 per pole per year was viewed by CANDAS as a very commercially attractive and convenient deployment option, and while CANDAS may prefer to avoid any discussions of alternative options, the fact that distribution poles may be convenient or preferable for CANDAS members does not establish that the infrastructure is essential for the purposes of Wireless Attachments.

There are numerous examples available of alternative attachment options being utilized as viable commercial options to implement wireless communications networks, including distributed antenna systems, across North America. This is well documented in the affidavit of Michael Starkey and in the LCC International Inc. Report filed by the Canadian Electricity Association.

Given the presence of so many alternatives, it is not surprising that an active, extensive and competitive siting market for Wireless Attachments has developed and continues to evolve. The existence of this market is well supported by the presence of companies whose primary business is the siting of wireless and other communications facilities, such as American Tower Corporation ("American Tower") and Crown Castle International Corp. ("Crown Castle").

We have included as Exhibits 8 and 9 an excerpt of the business overview portion of the American Tower and Crown Castle Form 10-K Annual Reports for the fiscal year ended December 31, 2010.

[2] By way of illustration, please refer to CANDAS' failure to provide full and complete responses to THESL IR#1, 3, 5, 7(a), 13, 18(a), 18(c), 19(b) and 50 (each of which is discussed further below).

The following excerpt from page 1 of American Tower's annual report provides an overview of its siting business:

> "We are a leading wireless and broadcast communications infrastructure company that owns, operates and develops communications sites. Our primary business is leasing antenna space on multi-tenant communications sites to wireless service providers and radio and television broadcast companies. We refer to this business as our rental and management operations, which accounted for approximately 98% of our total revenues for the year ended December 31, 2010. We also offer tower-related services domestically, including site acquisition, zoning and permitting services and structural analysis services, which primarily support our site leasing business and the addition of new tenants and equipment on our sites.
>
> Our communications site portfolio includes wireless communications towers, broadcast communications towers and distributed antenna system ("DAS") networks, which are collocation solutions to support seamless in-building and outdoor wireless coverage. Our portfolio consists of towers that we own and towers that we operate pursuant to long-term lease arrangements, including, as of December 31, 2010, approximately 20,900 towers domestically and approximately 13,900 towers internationally. Our portfolio also includes approximately 200 in-building and outdoor DAS networks that we operate in malls, casinos and other in-building applications, and select outdoor environments. In addition to the communications sites in our portfolio, we manage rooftop and tower sites for property owners."

Later, at page 3 of its Annual Report, American Tower describes the particulars of its DAS business in greater detail:

> "**DAS Networks.** We own and operate approximately 200 DAS networks in malls, casinos and other in-building applications in the United States, Mexico and Brazil. We obtain rights from property owners to install and operate in-building DAS networks, and we grant rights to wireless service providers to attach their equipment to our installations. We also offer outdoor DAS networks as a complementary shared infrastructure solution for our tenants, and currently operate such networks in the United States. Typically, we design, build and operate our DAS networks in areas in which zoning restrictions or other barriers may prevent or delay deployment of more traditional wireless infrastructures."

Finally, at page 8 of its Annual Report, American Tower identifies utility towers in particular as among its competition:

> "Our rental and management segments compete with other international, national and regional tower companies, primarily Crown Castle International Corp. and SBA Communications Corporation in the United States and Indus Towers in India, as well as wireless carriers and broadcasters that own and operate their own communications site networks and lease space to third parties, numerous independent tower owners and the owners of non-communications sites, including rooftops, utility towers, water towers and other alternative structures. We believe that site location and capacity, network density, price and quality of service have been and will continue to be significant competitive factors affecting owners, operators and managers of communications sites."

Similarly, the following excerpt from page 1 of Crown Castle's Annual Report provides an overview of its siting business:

> "We own, operate and lease towers and other wireless infrastructure, including distributed antenna system ("DAS") networks in the U.S. and rooftop installations (unless the context otherwise suggests or requires, references herein to "towers" include such other wireless infrastructure). Our core business is renting space on our towers via long-term contracts in various forms, including license, sublease and lease agreements (collectively, "contracts"). Our towers can accommodate multiple customers ("co-location") for antennas and other equipment necessary for the transmission of signals for wireless communication devices. We seek to increase our site rental revenues by adding more tenants on our towers, which we expect to result in significant incremental cash flows due to our relatively fixed tower operating costs."

And at page 5 of its Annual Report, Crown Castle similarly identifies utility poles in particular as among its competition:

> "Competition. CCUSA competes with (1) other independent tower owners which also provide site rental and network services, (2) wireless carriers which build, own and operate their own tower networks and lease space to other wireless communication companies, and (3) owners of alternative facilities, including rooftops, water towers, broadcast towers, DAS networks, and utility poles. Some of the larger independent tower companies with which CCUSA competes in the

> U.S. include American Tower Corporation, SBA Communications Corporation, Global Tower Partners and TowerCo. Wireless carriers that own and operate their own tower networks generally are substantially larger and have greater financial resources than we have. We believe that tower location and capacity, deployment speed, quality of service and price have been and will continue to be the most significant competitive factors affecting the leasing of a tower."

In light of the evidence that a vibrant and active wireless attachment siting market exists, THESL submits that distribution poles are "non-essential facilities" for Wireless Attachments and that for this reason the CCTA Decision does not and should not extend to these attachments.

CANDAS' claim that distribution poles are, in effect, "essential facilities" for Wireless Attachments is simply not credible. CANDAS repeatedly refused to respond to IRs that were intended to test this claim by exploring further the various alternative attachment options available to CANDAS.[3]

Perhaps the most compelling evidence that an active siting market exists for Wireless Attachments is the evidence that Public Mobile, one of the CANDAS member companies, was able to successfully launch its new Toronto wireless service quickly and without reliance on THESL distribution poles.[4] Notably, Public Mobile is able to offer low price cellular rates in Toronto without relying on distribution poles to affix Wireless Attachments.[5]

CANDAS' response to CEA IR#28(a) further confirms its view that successful DAS deployments are achievable without access to local utility poles. It provides, in part:

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[3] By way of illustration, see CANDAS' responses to THESL IR# 1, 5, 7(a), 13, 18(c), 19(b) and 50.

[4] See CANDAS application at para. 7.10 and CANDAS response to THESL IR#1 and the Affidavit of Dr. Adonis Yatchew at pages 15-16.

[5] See CANDAS response to VECC IR#3(a)(ii).

> "While it is possible that DAS network deployments may not be permitted or economically feasible in some areas where utilities are "wholly underground", CANDAS believes that in many such areas, the availability of underground ducts and other factors (such as greater willingness of local authorities to allow installation of DAS nodes on existing or new street lamp posts or other poles in the public rights-of-way) may enable successful DAS deployments."

Such a result is not surprising given that ExteNet Systems successfully deployed its own poles in Las Vegas to create a DAS network in a timely manner to meet its commitment to its wireless carrier customer.[6]

**4. The CCTA Decision focused on wireline attachments that were authorized by the Board and fit within the communications space on distribution poles, as was defined by the Board. Wireless Attachments were not discussed and do not fit nor can be contained within the communications space, which is further clear evidence that the CCTA Decision does not apply to Wireless Attachments.**

The focus of the CCTA proceeding was on whether or not to regulate access for wireline attachments in general, and cable attachments in particular, to the communications space on distribution poles.

In the CCTA proceeding, issue number 2 stated: "[i]f provided the Board does set conditions of access, to what types of cable or telecommunications service providers should these conditions apply to?" The parties to the Settlement Agreement responded as follows:

> "If the Board does set conditions of access, these conditions should apply to **access to the communications space on an LDC's poles** by Canadian Carriers as defined in the Telecommunications Act and cable companies; provided, however, that these conditions shall not apply to joint-use arrangements between

[6] See CANDAS response to Energy Probe IR#7.

> incumbent local exchange carriers and hydro distributors that grant reciprocal access to each other's poles." (emphasis added)

The parties to the Settlement Agreement clearly intended to limit scope of the settlement to access to the communications space on distribution poles. This is verified by CCTA counsel's presentation of the Settlement Agreement to the Board (the relevant excerpt is included in the CANDAS Application at Paragraph 3.10):

> "Number 2 is an example of an issue that we did agree on. Number 2 is:
>
> "If the Board does set conditions of access, to what types of cable or telecommunications services providers should these conditions apply to?"
>
> And you can see the answer there is that they should apply to - "These conditions should apply to **access to the communication space on an LDC's poles** by Canadian carriers as defined in the Telecommunications Act and cable companies..." (emphasis added)

That the CCTA Decision applies only to wireline attachments that fit within the communications space on LDC poles is also supported by the Board's findings at page 4 of the CCTA Decision:

> "In the Settlement Agreement of October 19, 2004, all parties agreed that if the Board does set access conditions, these conditions should apply to **access to the communications space on the LDC poles** by all Canadian Carriers as defined in the Telecommunications Act and cable companies.
> [...]
> This Board has accepted the settlement agreement in this regard." (emphasis added)

As is shown below, in its response to CCC IR#1, CANDAS omits the words "to the communications space on the LDC poles" from its excerpt of the quote stated above:

> "On this issue, the parties are in agreement. In the Settlement Agreement of October 19, 2004, all parties agreed that if the Board does set access conditions, these conditions should apply to access…by all Canadian Carriers as defined in the Telecommunications Act and cable companies. The only exception is that these conditions would not apply to the current joint use agreements between telephone companies and electricity companies that grant reciprocal access to each others poles."

THESL submits that all of the above excerpts make clear that the CCTA proceeding, and the Settlement Agreement that was adopted by the Board in the CCTA Decision, were directly aimed at, and limited to, regulating access for wireline attachments that fit within the communications space on LDC poles. That CANDAS argues otherwise amounts to it asking the Board to ignore the parties' intent in the Settlement Agreement, and to rewrite the Board's words in the CCTA Decision.

The Board accepted the configuration of a typical joint-use pole at page 10 of the CCTA Decision, which assumes a typical pole height of 40 feet with 2 feet of communications space. This configuration is illustrated in Figure 1 of the affidavit of Dr. Adonis Yatchew.

As is demonstrated in the affidavit of Mr. Michael Starkey, while there is no "typical" or "standard" equipment or attachment process applicable to wireless equipment, the Wireless Attachments of the type being discussed by CANDAS use will approximately 5 to 8 feet of pole space, and will simply not fit within the communications space on distribution poles.

CANDAS itself acknowledges that this fact is a problem for its proposed Wireless Attachments. In response to THESL IR#2(b) CANDAS notes:

> "Components of the Toronto DAS Network that attach outside (below) the allocated communications space on node site poles include remote radio units, power supplies and related elements such as cables, connectors and switches, as

described in the Written Evidence of Tormod Larsen (Exhibit D, sheets 3 and 4 of 4)."

Following this reference, Exhibit D of the written evidence of Tormod Larsen illustrates a DASCOM wireless installation (fibre optic node 559) which, when measured from the bottom of the UPS to the top of the antenna, spans 2.5 meters (roughly 8.2 feet) of pole space, clearly falling well outside of the communications space on the distribution pole.

Furthermore, the CCTA Decision makes a number of assumptions in calculating the $22.35 per pole per year charge that, as more fully discussed in the accompanying affidavits of Mr. Starkey and Dr. Yatchew, are simply not appropriate for Wireless Attachments (for example, that attachments will fit within the 2 foot communications space and that there is an average of 2.5 attachments connected per pole). In summary, the calculation of the $22.35 per pole per year charge assumed certain occupancy proportions for the users of the pole's communication space, and those assumed occupancy proportions are clearly violated by Wireless Attachments. This further demonstrates that the Board did not and could not have contemplated Wireless Attachments when arriving at its Decision and setting the corresponding charge.

Accordingly, when the Board ordered the CCTA Decision that the license conditions of all Ontario licensed electricity distributors be amended to provide that Canadian Carriers as defined by the *Telecommunications Act*, this order was necessarily constrained by the Settlement Agreement previously accepted by the Board, and excluded Wireless Attachments.

THESL submits that the question of whether Wireless Attachments should properly be considered among other wireline pole attachments for the purpose of direct regulation by the Board was not contemplated, and certainly not resolved, in the CCTA Decision. CANDAS' attempt to have the Board now apply that 2005 decision to Wireless Attachments constitutes a fundamental misapplication of the CCTA Decision.

## 5. There are fundamental differences between wireline and Wireless Attachments that further emphasize that the CCTA Decision does not encompass Wireless Attachments.

As is detailed in the attached affidavits of Dr. Yatchew and Mr. Starkey, these fundamental differences include (i) physical and engineering differences; (ii) the costs associated with the attachments; and (iii) the availability of suitable attachment alternatives.

Mr. Starkey explains on page 12 of his affidavit that Wireless Attachments for DAS are generally larger and more complex than traditional wireline attachments. In addition, Mr. Starkey explains at page 10 of his affidavit that:

> "There is no "typical or "standard" equipment or attachment process applicable to wireless equipment. Unlike traditional attachments intended to accommodate a self-contained cable within the communications space, wireless attachments come in many different shapes and sizes with as many different engineering requirements (intended to accommodate factors such as terrain, elevation, weather, etc.). Wireless pole attachments are likely to include some type of radio frequency ("RF") antenna, connections to transmission equipment (including a connection to fiber-optic cable either previously attached or appended in unison with the wireless attachment) in addition to power and control equipment attached to individual poles located throughout an engineered geographic region. The placement of these antenna is engineered in relation to the propagation properties of the equipment at issue in an attempt to provide necessary RF signal to as many potential customers as possible."

Wireless Attachments also pose numerous problems particular to them that traditional wireline attachments do not raise, including and to name just a few: aesthetic concerns of local residents; health and safety concerns around the proximity of wireless antennas; increased loading on specific distribution poles (which may then depreciate more rapidly than other poles); and ongoing operational and safety concerns such as utility crews having to maneuver around bulky Wireless Attachments to manage the distribution system. These concerns are more fully detailed in the attached affidavit of Mary Byrne.

As is described in the affidavit of Mary Byrne, the recent surge in requests for Wireless Attachments, which often require considerably more utility resources to process, contributed to placing a burden on THESL staff resources and led to longer waiting times for attachment approval regarding all telecommunications attachment requests.

The distinction between wired and wireless pole attachments was emphasized by the New York Public Service Commission (the "NYPSC") in its June 27, 2007 decision not to accept a petition by T-Mobile requesting that wired pole attachment policies and rates be applied to Wireless Attachments (the "T-Mobile Decision"), attached as Exhibit 6 hereto.

The NYPSC held at pages 3-4 of the T-Mobile Decision that:

> Unlike telephone, cable and power facilities, which may only be attached to utility poles, Wireless attachers have other options for attaching their facilities, such as buildings, existing towers, and newly constructed towers. Although attachers argue that it is sometimes difficult to get permission [*9] from local governments to erect new towers, it is appropriate for local governments and community residents to be involved in considering whether tall antenna structures should be placed in their communities. If Wireless attachers were given unrestricted access to all utility poles, local governments might be excluded from the decision-making process.
>
> Wireless attachments occupy a much larger portion of a pole than the 12 inches used by a standard wire attachment. The Wireless attachment contemplated by National Grid would use as much as 7 feet of pole space and include an antenna on top of the pole up to 9 feet tall. n6 Wireless attachment designs vary, which makes advance evaluation of their safety difficult. We are not applying pole attachment policies and rates to Wireless Attachments at this time. Because of the variation in Wireless configurations, the status quo of a negotiated rate and process is more appropriate until more information is developed about Wireless Attachments generally on utility poles.
>
> n6 National Grid Standard GS 1169 details practices and procedures for a 35kV Maximum Distribution Wood Pole Mounted Meter Power Supply and Antenna Installations (Fall 2003). The National Grid Standard for the installation of Wireless antennas demonstrates the uniqueness of these Attachments and provides specific guidelines for the antenna and its associated equipment. Figure 4 titled Wireless Communication Installation Details shows a communications antenna with a height of 9 feet at the top of a utility pole that is connected with communication cables that run from the antenna through the electric supply space to equipment enclosures, power supply and electrical meter that can be mounted at a minimum of 8 feet above grade. That installation demonstrates that the space used for such installations requires almost 100% of a utility pole if the antenna and all associated equipment and interconnecting cables are considered.

> [...]
>
> CONCLUSION
>
> Until more information about Wireless Attachments to utility distribution poles is developed, we will not apply the Pole Attachment Order and Policy Statement to Wireless Attachments. Opinion 97-10 remains in effect as to non-standard Attachments: they are subject to negotiation.
>
> ***Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, Case 07-M-0741, July 27, 2007, *Order Instituting Proceeding*.**

In the T-Mobile Decision, the NYPSC makes reference to its June 17, 1997 Opinion 97-10 ("Opinion 97-10"), attached as Exhibit 7 hereto. In Opinion 97-10, the NYPSC decided as follows:

> The record in this case indicates that wireless attachments to utility [*38] distribution poles may or may not resemble or conform to the traditional use of such facilities. This depends on the technology they use and the Wireless firms' requirements. To the extent wireless attachments conform to the traditional use of the utility pole structure, Wireless firms should be afforded the same rates and terms as are available to any other attacher. But if a Wireless firm requires a nonstandard or unique attachment to a utility pole, and if the electric company is willing to make the necessary pole modifications to accommodate such a use, the price and terms for such Attachments should be determined through private negotiations. As in the case of wireless attachments to high-voltage electric transmission towers, we would be available to the parties to consider their complaints and facilitate resolution of their differences should any unreasonable obstacles to negotiations arise.
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> ***Proceeding In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095*, CASE 95-C-0341, June 17, 1997, *Opinion and Order Setting Pole Attachment Rates*.**

## PART B: The Board should forbear from regulating Wireless Attachments.

THESL seeks a determination from the Board pursuant to Section 29(1) of the *OEB Act* that it will refrain from exercising any power or performing any duty under the *OEB Act* with respect to Wireless Attachments, on the basis that as a question of fact the market for siting Wireless Attachments:

(a) is subject to competition sufficient to protect the public interest; and

(b) will be subject to competition sufficient to protect the public interest.

Section 29 of the *OEB Act* provides, in part:

> **Refrain from exercising power**
>
> 29. (1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.
>
> **Scope**
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> (2) Subsection (1) applies to the exercise of any power or the performance of any duty of the Board in relation to,
>
> (a) any matter before the Board;
>
> (b) any licensee;
>
> (c) any person who is subject to this Act;
>
> (d) any person selling, transmitting, distributing or storing gas; or
>
> (e) any product or class of products supplied or service or class of services rendered within the province by a licensee or a person who is subject to this Act.

In its November 7, 2006 *Natural Gas Electricity Interface Review* (NGEIR) Decision with Reasons (EB-2005-0551) (the "NGEIR Decision"), the Board explained in detail its legal test for forbearance under Section 29 of the OEB Act. The NGEIR Decision is attached at Exhibit 4 hereto.

At pages 24-26, the Board explained the policy objectives that forbearance serves (emphasis added):

> The concept of forbearance and light-handed regulation first surfaced in the late 1970s and early 1980s. In 1979, the Economic Council of Canada issued its interim report entitled Responsible Regulation and a final report two years later, entitled Reforming Regulation with specific recommendations. The McDonald Commission in 1985 concluded that it would be appropriate to adopt "selective deregulation" in Canada.
>
> Regulators in Canada and the United States offered two related grounds for forbearance. The first was that markets were being redefined by new technology and, therefore, competition rather than regulation could produce better outcomes in terms of the quantity and prices of goods and services, all of which would maximize social welfare. Much of the early work was done in the telecommunications industry. Not surprisingly, the absence of market power was held by both the U.S. Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission (CRTC) to be sufficient grounds for the exercise of regulatory forbearance.
>
> [...]
>
> It is important to remember that the public policy rationale for forbearance is not limited to the belief that competition provided adequate safeguards in workably competitive markets. The second ground for forbearance is based on concerns related to regulatory costs. Those costs are not limited to the financial burden on utilities and ultimately consumers. As the Federal Communications Commission noted, the costs include reducing the firm's ability to react rapidly to the changing market conditions, dampening incentives to innovate and wasting resources through the regulation of firms that have no market power.
>
> There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of "competition sufficient to protect the public interest"; what economists refer to as a "workably competitive" market may well be sufficient.
>
> It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products "is or will be" subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

As is discussed further below, there are numerous policy reasons which indicate that the Board should, in THESL's submission, forbear from regulating Wireless Attachments.

***Onus of Proof***

Because the NGEIR proceeding was brought by the Board by its own motion, the Board found that it was not appropriate to assign the onus to a particular party.

Given the clear evidence of alternatives and evidence that there is or will be competition sufficient to protect the public interest, THESL submits that the onus to justify regulatory intervention should be imposed on the applicant, CANDAS, as the party seeking to impose regulation.

Placing the onus of proof on distributors would invite new applications from any number of parties for whom distribution poles are convenient, but not essential.

There is a very good reason to impose the burden of proof on CANDAS in this Motion. It relates to the advantage CANDAS has over all of the other participants in this process regarding access to specialized information relating to the competitive market for Wireless Attachments as alternatives to distribution pole attachments.

As is typical in competitive markets, information relating to siting alternatives, such as rates, terms and conditions agreed to between site suppliers and attachers is often treated as sensitive confidential and commercial information and is hence quite difficult to obtain.

In this proceeding, CANDAS has access to all of the relevant agreements and commercial terms the Board could use to consider all of the various alternatives to distribution pole siting and to better understand the competitive siting market. However, CANDAS has

failed to provide full and adequate response to the THESL's interrogatories – greatly limiting THESL's ability to test the various claims and assertions being made by CANDAS in its application and supporting evidence.

For example, CANDAS failed to provide full and adequate responses in respect of:

1. THESL IRs #1, 13 and 50, which were intended to allow THESL to further test the extent to which its poles are an "essential facility" for wireless, which in turn goes to the comparability, substitutability and economic viability as between macro cell sites and DAS. CANDAS' response amounts to a refusal to provide the requested relevant information.

2. THESL IR#2(d), which was intended to help the Board understand the differences between wireline and Wireless Attachments and goes to the applicability of the CCTA Decision. CANDAS' response, that there are no differences between wireline and wireless that are significant to the proceeding, amounts to a refusal to provide the requested relevant information.

3. THESL IR#3, which was intended to allow THESL to test extent to which its poles are an "essential facility" for CANDAS' proposed Toronto DAS Network. CANDAS' response was that other alternatives were considered, but determined not to be viable. However, CANDAS refused to provide any meaningful information that would help the parties understand and independently assess the basis for CANDAS' determination.

4. THESL IR#5, which was intended to allow THESL to test the extent to which THESL poles are an essential facility for wireless by assessing the technical characteristics of DAS equipment used by CANDAS to provide an independent analysis of whether they require access to a utility's poles versus other types of

infrastructure. CANDAS' response amounts to a refusal to provide the requested relevant information.

5. THES IR#7(a), which was intended to allow THESL to test the extent to which THESL poles are an essential facility for wireless. Notably, CANDAS admits in the response to question 34(a) that they would ordinarily look to existing fibre where constructing a network. Knowing the location of cabling that could be used to support wireless systems goes to the possible location of alternative attachment sites. CANDAS' response amounts to a refusal to provide the requested relevant information.

6. THESL IR#18(a), which was intended to allow THESL to assess the costs and terms of various alternative arrangements to host Wireless Attachments on distribution poles and on other structures. CANDAS provided only sample agreements instead of all material agreements, and redacted all pricing information, which did not allow for the relevant comparisons. This amounts to an insufficient response to the requested relevant information.

7. THESL IR#18(c), which was intended to allow THESL to test the extent to which THESL poles are an essential facility for wireless, and goes to the comparability, substitutability and economic viability of alternatives to distribution poles. CANDAS provided what amounts to an insufficient response. THESL asked for any agreements, not those which fell above a "meaningful number" threshold, and THESL's request asked for any agreements other than "power poles or lampposts" which would include agreements related to traffic signal standards.

8. THESL IR#19(b), which was intended to allow THESL to test extent to which THESL poles are an essential facility for wireless and to allow THESL to test costs of hosting attachments, which in turn goes to the comparability,

substitutability and economic viability of alternatives to distribution poles. CANDAS' response is insufficient as it failed to provide a listing of DAS networks in Canada, limiting its response to a list of known DAS networks in the US.

Put simply, even though CANDAS has access to relevant information that would assist the Board to assess CANDAS' argument that distribution poles constitute, in effect, "essential facilities" for Wireless Attachments – its refusal to provide the requested information in response to THESL's interrogatories demonstrates CANDAS' failure to provide full and complete disclosure and instead its intention to put before the Board only information that is self-serving.

Because of these deficiencies in the evidence, THESL submits that it is CANDAS that rightly bears the onus of proof as the applicant seeking to impose regulation. As is more fully described below, THESL submits that CANDAS has failed to discharge its onus of proof.

***Analytical Framework to Assess Market Power***

In the NGEIR Decision, the Board adopted a broad ranging analytical framework to assess the degree of competition and market power, encompassing:

1. Identification of the product market;
2. Identification of the geographic market;
3. Calculation of market share and market concentration measures;
4. An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

As is noted at page 26 of the affidavit of Dr. Adonis Yatchew, the relevant market in this proceeding is the market for siting of Wireless Attachments. This corresponds with the scope of relief requested by CANDAS in its application, which seeks to have the Board impose mandatory conditions of access to distribution poles for all Wireless Attachments.

Based on the broad nature of the relief requested by CANDAS in its application which it seeks to enforce against all distributors in Ontario - the relevant geographic market is the entire Province of Ontario. However, because CANDAS' evidence relates primarily to the siting of Wireless Attachments in the City of Toronto, Dr. Yatchew has focused his evidence on the presence of competition in this particular segment of the overall geographic market.

In the NGEIR Decision, the Board also articulated its test to determine whether and when a level of competition is sufficient to protect the public interest. Similar to its public interest test under Section 74(1) of the *OEB Act*, the Board made explicit reference to its objectives and the purposes of the *Electricity Act, 1998*. Those same objectives and purposes are relevant in this proceeding. The Board also acknowledged that financial and utility rate impacts were important considerations along with broader factors related to market signals, incentives and efficiency. THESL will address each of these factors in greater detail below.

The Board previously considered its public interest test in its Decision with Reasons dated February 27, 2004 in the Combined Service Area Amendment Proceeding (RP-2003-0044), which is attached at Exhibit 5 hereto. In that proceeding, the Board considered each of its statutory objectives in assessing the factors that were relevant in determining the public interest.

THESL submits that the following considerations are relevant for the purposes of this Application and the Board's determination of the public interest under Section 29(1) of the OEB Act:

1. there is or will be competition in the market for Wireless Attachments sufficient to protect the public interest;
2. forbearance will protect the interests of consumers with respect to prices and the safety, adequacy, reliability and quality of electricity service; and
3. forbearance will promote economic efficiency in the distribution of electricity, providing the right incentives and signals to ensure the efficient allocation and use of scarce pole resources, and will facilitate the maintenance of a financially viable electricity industry and a competitive Wireless Attachments siting industry.

THESL will certainly continue to provide non-discriminatory access to its distribution system to generators, retailers and consumers. However, THESL submits that the principle of non-discriminatory access does not and should not apply in respect of Wireless Attachments to its distribution poles, particularly when there is competition in the market for Wireless Attachments sufficient to protect the public interest.

As more specifically described below and in the affidavits of Michael Starkey and Dr. Adonis Yatchew attached, the market for Wireless Attachments is or will be subject to competition sufficient to protect the public interest and the Board should therefore refrain from exercising any of its powers, including imposing existing, amended or new distribution license conditions, to regulate this form of pole attachments.

## 1. There is a variety of alternatives for Wireless Attachments, and workable competition exists or will exist in the market for Wireless Attachments.

As discussed above, perhaps the most fundamental distinction between wireline and Wireless Attachments is the presence of competition in the market for Wireless

Attachments, as is more fully detailed in the affidavits of Mr. Starkey and Dr. Yatchew attached at Exhibits 1 and 2 respectfully.

In particular, Mr. Starkey explains at pages 27-31 of his affidavit that:

> "Industry Canada maintains Canada's national database of radio frequency licenses, the Assignment and Licensing System ("ALS"), which includes detailed information on all registered antenna sites used by cellular, PCS ("Personal Communications Services"), and AWS ("Advanced Wireless Services") system operators. This database demonstrates that there are roughly 4,000 cellular/PCS/AWS antenna arrays currently operating within 25 kilometers of the center of Toronto. Moreover, the database also indicates that there are approximately 1,343 individual physical locations at which one or more radio communication carriers' antenna arrays are currently operating within the city of Toronto. Each of these sites is a direct alternative to placing wireless antennae on a THESL utility pole for purposes of supporting the provision of wireless services.
>
> The City of Toronto maintains a database similar to that managed by Industry Canada that identifies potential sharing sites. At present, the database includes 140 pages of company names, location addresses, city ward numbers and antenna heights. These data identify more than 7,000 antennas operating within the city of Toronto. Moreover, they also identify more than 1,300 physical locations within the city of Toronto where site sharing, or co-location, is a possibility. To put this into perspective, there are, on average, more than 2 potential co-location sites per square kilometer within the City of Toronto.
>
> [...]
>
> The information above leads to two important conclusions. First, as pictured below, it is clear that there are roughly 1,300 unique locations in or near the City of Toronto that currently accommodate wireless antennae being used to serve the wireless services market. Those locations clearly exist as alternatives to THESL utility poles thereby undermining CANDAS' claim that THESL poles are an "essential facility." Second, it is clear that Industry Canada and the City of Toronto work diligently to ensure that the wireless services market is as efficient as possible when erecting additional antennae sites. The Board should consider these efforts before providing wireless service providers relative carte blanche in accessing THESL poles for additional sites aimed at supporting a particular technology (DAS) that serves merely as a substitute for technologies already supported by existing sites."

Dr. Yatchew also explains at page 26-27 of his affidavit that:

> "There are thousands of wireless sites currently operating in Toronto and owned by entities other than THESL. Public Mobile has availed itself of some of these sites to launch its services. Wireless attachments are affixed to THESL poles, but these are owned by the company itself, or in most other instances, by the City of Toronto or the Toronto Transit Commission. Consequently, though THESL plays a public service role in providing attachment space for public entities, it has a negligible share of the market for siting private wireless service provider attachments. The very fact that THESL does not have a material share in this market would support forbearance.
>
> One could ask whether, on a prospective basis, there will be sufficient competition in the siting market. It would be difficult to imagine otherwise.
>
> It is true that poles, in some respects, provide a convenient siting alternative for a certain, and at this point, narrow class of wireless attachments. Poles may be especially attractive if attachment rates are regulated at rates based on historic costs.
>
> From the standpoint of an evolving siting market, there are myriad structures within the THESL service area of varying height, power supply is ubiquitous and fiber can be accessed in numerous locations. The empirical evidence indicates that 'workably competitive' siting markets have evolved as the need has arisen. Given the availability of key elements, there are therefore strong reasons to expect that they will continue to do so.
>
> But it is not only markets that adapt and evolve; technology is also advancing constantly. Given the enormous market potential, technical advances with respect to siting can be expected to occur in the direction of greater not lesser flexibility of deployment. This 'endogenous technological change' is widely observed in many industries. Within the communications industry, spectrum re-use is an especially prominent example. Stealth deployment is another, less glamorous, but also valuable instance.
>
> I would therefore conclude that both on a current and a prospective basis, there is and, in all likelihood will be sufficient competition to protect the public interest. The source of this competition is rooted in economics, through continuing market evolution, and science, through technological change.

Wireless providers in Toronto and across Ontario have for quite some time taken advantage of alternative siting options to distribution pole attachments.

According to the City of Toronto's planning department, which maintains an online database of cellular towers located in the City of Toronto (http://www.toronto.ca/planning/telecommunications.htm), wireless companies (primarily Bell, Rogers and Telus, although Microcell, Soma Networks, Tele-Mobile and Steelcase are also listed) are identified for more than 7400 cellular antennas in the City of Toronto. The vast majority of this existing wireless infrastructure is not sited on THESL distribution poles.

The presence of competition in the market for Wireless Attachments siting is further illustrated in the annual reports of American Tower (NYSE:AMT) and Crown Castle (NYSE:CCI), two leading competitors in the siting market for Wireless Attachments, both of which explicitly identify utility towers as only one of numerous alternative siting options against which they must compete.

THESL submits that the expert evidence of Dr. Yatchew and Mr. Starkey demonstrates that THESL does not hold any material market power in respect of Wireless Attachments in the City of Toronto.

**2. THESL submits that the competition in the Wireless Attachments space is sufficient to protect the public interest.**

For each of the considerations noted below, and as is detailed in the attached affidavits of Dr. Yatchew and Mr. Starkey and the LCC Report, the competition in the Wireless Attachments space is sufficient to protect the public interest.

***(a) Protecting the interests of THESL ratepayers.***

CANDAS has applied for an order of the Board to impose a price of $22.35 per pole per year on distributors for Wireless Attachments. CANDAS has then repeatedly refused to respond to numerous IRs that were intended to assess whether such a rate was consistent

with the market rates otherwise paid for similar attachments in the competitive siting market.[7]

THESL submits that CANDAS is withholding this relevant information because the Board's regulated rate of $22.35 per pole per year is insufficient if it were to be applied to Wireless Attachments, and would represent an indirect subsidy from THESL ratepayers to wireless companies.

To the extent the Wireless Attachment charge is less than what it costs THESL to provide the attachment space and services, THESL ratepayers are directly subsidizing the costs associated with those Wireless Attachments. Considering the problems identified by Mr. Starkey with the assumptions used to calculate the $22.35 per pole per year, and considering the added effort many of these Wireless Attachments require of THESL staff, the conclusion that THESL ratepayers would be subsidizing any further Wireless Attachments is hardly surprising.

This motion is strictly limited in scope to the threshold issues of forbearance and whether or not the CCTA Decision applies to Wireless Attachments. However, even if the Board decides not to forbear and instead opts to set a new regulated price for Wireless Attachments, to the extent the regulated price is less than the market price for those attachments, THESL ratepayers would continue to subsidize these Wireless Attachments by the amount of the opportunity cost associated with lost revenue if THESL could charge market rates.

***(b) Protecting the interests of THESL consumers with respect to the safety, adequacy, reliability and quality of electricity service.***

THESL submits that Wireless Attachments cause unique issues that affect the safety, adequacy, reliability and quality of electricity service.

[7] For an example, see CANDAS' response to THESL IR#18(a) and 18(c).

Specifically, requests for new Wireless Attachments divert the attention of utility staff from other ongoing operational concerns associated with the distribution system. This concern has become particularly acute due to significant increase of applications for new Wireless Attachments since 2008.[8]

In addition, Wireless Attachments increase pole clutter and causes additional wear and tear which accelerates deterioration. Most distribution poles were not designed or installed with bearing the additional load of Wireless Attachments in mind.[9]

Wireless Attachments also cause a variety of safety and operational concerns as well as higher operations and maintenance costs as THESL staff must navigate around cumbersome Wireless Attachments to manage the ongoing safety and reliability of the distribution system.[10]

Finally, in other jurisdictions wireless facilities are often attached to other utility's distribution poles in locations other than in the dedicated two foot "communications space" which was the focus of attention in CCTA Decision. In other jurisdictions, wireless equipment may extend into the clearance or separation space or be attached to the top of the pole. If it is attached near or above electricity distribution wires, properly trained and equipped workers (often from the electricity utility) are required for service and maintenance, and new safety concerns arise.[11]

As the Board is well aware, THESL has a pressing need for infrastructure renewal, as well as its need to train a new generation of line persons. Accordingly, THESL cannot

[8] See paragraph 49 of the affidavit of Mary Byrne.
[9] See paragraph 45 of the affidavit of Mary Byrne.
[10] See the affidavit of Mary Byrne at paragraphs 43-44.
[11] See the affidavit of Mary Byrne at paragraphs 46.

prioritize its scarce resources for the purpose of installing and maintaining non-essential Wireless Attachments.

***(c) Promoting economic efficiency in the distribution of electricity and best facilitating the maintenance of a financially viable electricity and Wireless Attachments industry.***

As is explained by Dr. Yatchew and Mr. Starkey in their affidavits, the fundamental rationale for regulation of wireline attachments is the absence of alternatives siting options for wireline equipment.

THESL submits that the rationale for ongoing regulation is no longer present for Wireless Attachments because a potential attacher has other viable alternatives where it can locate its facilities. THESL does not wield 'monopoly' power over the prospective tenant as the latter can locate its facilities elsewhere.

This position is supported by the evidence of Dr. Yatchew and the evidence of Mr. Starkey, the latter of who notes at page 51 of his affidavit:

> "The underlying theory that generally supports regulatory oversight in the area of utility pole attachments for wired applications - i.e., the existence of an "essential facility" and ensuing market power on the part of the utility - fails in the context of wireless attachments. There a numerous suitable substitutes to utility poles for the placement of wireless equipment and I have seen no indication that electricity distributors have discernable market power in what has evolved into a robust competitive market for these types of applications. Likewise, whereas traditional wired pole attachment arrangements are relatively homogenous and "standardized" rules related to rates, terms and conditions are an arguably workable method of regulating those attachments, the same is not true in the arena of wireless attachments. The shapes, sizes and applications relevant to wireless equipment that might be attached to a pole are still evolving. As such, a "one size fits all" approach like that applied to wire line attachments is almost certainly to fail, thereby slowing necessary access at a time when demand is increasing dramatically."

THESL submits that the Board should forbear from imposing unnecessary regulation. In this way, distributors would become just another option available in the competitive

market for Wireless Attachments. For the following reasons, THESL submits that this approach best protects the interests of distribution ratepayers, promotes economic efficiency and facilitates the maintenance of a financially viable electricity and Wireless Attachments siting industry:

1. If the Board were to grant CANDAS its requested relief and extend the CCTA Decision to apply to Wireless Attachments, the Board would allocate extraordinary negotiating power to those parties, such as CANDAS, seeking to affix and profit from non-essential fixtures like Wireless Attachments. Unlike other property owners and competitors in the market for Wireless Attachments, THESL would be unable to refuse to attach the Wireless Attachments in the absence of safety, availability, or technical factors. In addition, such a decision could invite additional applications from other companies who seek to affix non-essential attachments to distribution poles for convenience.
2. The absence of monopoly power on the part of distribution pole owners fundamentally undermines the usual argument for regulation. Regulators often seek to inform their determination of regulated rates through market signals of one form or another. In the present setting, where a market exists with multiple providers of sites, it is unnecessary to attempt to introduce regulated rates when they can be achieved directly in the marketplace.
3. It is unlikely that regulatory proceedings could establish and maintain an optimal price to keep pace with rapidly evolving siting market conditions. Too low a price would create a subsidy from ratepayers to wireless attachers, either directly or by way of opportunity cost. Too high a price would prevent utility assets from attracting the optimal economic return.
4. Market-based rates would provide incentives to allocate resources more efficiently and enhance rather than impede the continued evolution of the siting market. Pole space is a relatively scarce resource and market mechanisms can achieve a more rational and efficient allocation of pole space for present and

future users. Regulatory intervention, for example through the assignment of prescribed rates, can impede the continued evolution of the market for siting Wireless Attachments and other facilities.

5. The imposition of regulated access and rates would contribute unnecessarily to regulatory burden, for the regulator and for utilities. Several issues would need to be resolved. These include, estimation of additional costs associated with maintenance and safety related issues; determination of the 'number of attachers'; estimation of additional administrative costs; how to set and maintain different rates reflecting different costs for different distributors; and how to reconcile detailed regulation of this relatively small revenue source with a light-handed approach to regulation.

Utilities routinely engage in free negotiation of numerous contracts without regulatory supervision or intervention. It is not at all clear that regulation is necessary to achieve the desired allocative outcomes or that it could produce the economically efficient or optimal outcome.

***(d) Non-discriminatory access.***

THESL submits that the principle of non-discriminatory access does not and should not apply in respect of Wireless Attachments, particularly when there is competition in the market for Wireless Attachments sufficient to protect the public interest.

Specifically, THESL submits that the principle of non-discriminatory access as articulated in the *Electricity Act, 1998* should be narrowly construed and should only apply to situations where the utility exercises monopoly power. This is consistent with the clear intent of Section 29 of the *OEB Act*.

In the CCTA Decision, at page 3 the Board justified regulatory intervention for wireline attachments in part on the basis of non-discriminatory access as follows:

> "The Board agrees that power poles are essential facilities. It is a well established principle of regulatory law that where a party controls essential facilities, it is important that non-discriminatory access be granted to other parties. Not only must rates be just and reasonable, there must be no preference in favour of the holder of the essential facilities. Duplication of poles is neither viable nor in the public interest.
>
> The Board concludes that it should set access charges."

As is fully explained above, THESL submits that this conclusion does not apply in respect of Wireless Attachments, because poles are not essential facilities for wireless attachments and any power that a distributor may have would at all times be mitigated by the presence of viable market alternatives for Wireless Attachments.

THESL further submits that the circumstances discussed in the CCTA Decision, where the parties were unable to reach agreement with respect to essential facilities for over a decade, do not apply to this case precisely because of the presence of viable market alternatives. Public Mobile was able to launch its low cost cellular service without reliance on THESL distribution poles, proving that even if THESL is unable to reach agreement with parties requesting Wireless Attachments, there are still a variety of other options available to those attachers.

Simply put, the Board should not impose as a condition of a distributor's license or otherwise, a requirement to allow Wireless Attachments access to distribution poles. THESL should be granted the same discretion in negotiations as other property owners involved in the competitive siting market for Wireless Attachments and the Board should forbear.

**MATERIALS TO BE RELIED UPON FOR THIS MOTION:**

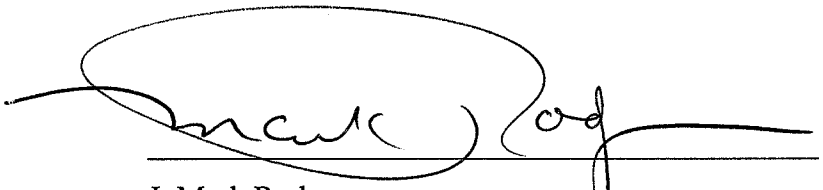
THESL will rely upon the following materials in this Application:

1. The affidavit of Michael Starkey at Exhibit 1;
2. The affidavit of Dr. Adonis Yatchew at Exhibit 2;
3. The affidavit of Mary Byrne, THESL at Exhibit 3;
4. The OEB's NGEIR Decision at Exhibit 4;
5. The OEB's Service Area Amendment Decision at Exhibit 5;
6. The NYPSC's T-Mobile Decision at Exhibit 6;
7. The NYPSC's Opinion 97-10 at Exhibit 7;
8. Excerpts of the American Tower Annual Report at Exhibit 8;
9. Excerpts of Crown Castle Annual Report at Exhibit 9;
10. The OEB's CCTA Decision, the CCTA Settlement Agreement and the transcripts from the hearing at Exhibit 10; and
    i. Such further evidence as may be filed during interrogatories or as part of the oral hearing.

Dated at Toronto, Ontario this 2nd day of September, 2011.

All of which is respectfully submitted.

BORDEN LADNER GERVAIS LLP



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