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Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
PO Box 2319, 27th Floor
Toronto, ON
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Helen Newland
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Dear Ms. Walli:

**RE: Application by Canadian Distributed
 Antenna Systems Coalition ("CANDAS");
 Board File No.: EB-2011-0120**

Introduction

We write on behalf of CANDAS in response to the letter from Toronto Hydro-Electric System Limited ("THESL") dated September 9, 2011.

THESL's letter is not only an attempt to reargue the issues already decided in the Board's letter of September 7th; it is also apparent that THESL is attempting to assume the role of applicant in this proceeding for the purposes of establishing its own agenda. In its letter, the Board dismissed THESL's Motion for a summary dismissal of the Application and held that the question of forbearance should be deferred. The Board expressly stated that "given that there is a process underway that deals with the substantive issues, the Board is of the view that remaining on the current schedule is appropriate" (emphases added).

While THESL was apparently preparing its letter challenging the Board's ruling of September 7th, CANDAS proceeded to prepare and file interrogatories to THESL and others based on the Board's clear direction. Accordingly, CANDAS did not address any interrogatories to THESL or to the CEA in respect of those portions of their evidence that speak to the forbearance issue that THESL attempted to introduce in its Motion and is now attempting to revive.

Discussion

THESL's September 9th letter:

- purports to accept the Board's decision on THESL's Motion but, nevertheless, characterizes THESL's forbearance request as a "threshold" issue in the current proceeding;
- characterizes CANDAS' request that the Board determine terms and conditions of access as a "secondary" issue that should be heard in a subsequent phase of this proceeding but only if the Board does not forbear from regulating pole access in a prior phase;
- attempts to expand CANDAS' request for approved terms and conditions of access to include the rate that should pertain to wireless attachments;
- states that THESL will submit a "new application" regarding terms and conditions of access, including rates, "should the Board makes [sic] such a finding" – a reference, presumably, to THESL's request for a phased proceeding;
- requests that, should the Board decide to include the issue of "new attachment rates" in this proceeding, it either stay the implementation of its decision on the CANDAS Application or establish a further phase to determine the appropriate attachment rate; and
- requests that the Board clarify what is at issue in this proceeding through an Issues List that includes three issues: "essential facilities"; "differences between wireline and wireless facilities" and "forbearance".

CANDAS' response to THESL is set out below.

The only issues that flow from CANDAS' Application are: does the CCTA Order pertain to wireless attachments; if it does not, should such access be mandated by the Board; and what should be the terms and conditions of access for both wireless and wireline attachments? CANDAS' Application, its Written Evidence and its Responses to Interrogatories address, in considerable detail, all three issues.

It is clear from its Application and Written Evidence that CANDAS is not seeking to vary the current Board-approved attachment rate. Generally speaking, this is within the purview of a distributor. There is no information on the record of this proceeding on which the Board could make a determination as to a new attachment rate. THESL suggests that the current attachment rate does not pertain to wireless attachments because the CCTA Order does not pertain to wireless attachers. CANDAS disagrees. THESL's position belies the fact that THESL is charging

DAScom the Board-approved rate in respect of wireless attachments installed on THESL poles in accordance with the 2009 Distribution Pole Access Agreement between DAScom and THESL.

Nevertheless, should the Board decide that the attachment rate approved by the Board in the CCTA Proceeding is not applicable to wireless attachments, it need not, as THESL suggests, stay the implementation of its decision on the CANDAS Application. It is open to the Board to declare the current attachment rate an interim wireless attachment rate, pending a decision on a new application from distributors for a final wireless attachment rate.

Turning to the issue of sequencing: it is CANDAS' position that there is no need for the Board to amend the current process by categorizing issues as "threshold" or "secondary" and phasing the proceeding. Firstly, the incremental and unnecessary steps referred to in THESL's letter would unduly complicate what should be a straightforward matter. Secondly, as explained above, CANDAS is seeking Board-approved terms and conditions applicable to all pole access, not just access for wireless attachments. Accordingly, the Board will need to address this issue whatever its decision on wireless attachments. Moreover, both the THESL and the MEARIE forms of attachment agreement are on the record of this proceeding. They are reasonable starting points for a debate on acceptable terms and conditions of access. There is no need for a stand-alone or second phase proceeding in this regard. Thirdly, we note that the incremental relief that THESL now wishes to pursue (e.g., rates, forbearance) would require notice to stakeholders who are currently not parties to this proceeding. This suggests that any applications for rate changes and/or regarding forbearance should proceed on a fresh, stand-alone basis and not in conjunction with the CANDAS proceeding.

THESL's request for an Issues List is unfounded for three reasons. Firstly, the issuance of such a list, at this time, may prejudice parties (including CANDAS) who have already filed their written evidence and responded to interrogatories. It could prompt requests to file additional additional evidence and interrogatories. Secondly, issues lists are important tools in structuring lengthy and complex proceedings, such as rate cases. This is not such a case. The issues here are relatively straightforward. The Board has allocated two days to hear them. Thirdly, the "issues" proposed by THESL are not really issues at all, but simply arguments that parties may choose to make in advocating their respective positions. If these types of so-called issues are going to make it onto an official list of issues, then there are many, other such "issues" that will need to be added. This could be contentious and an Issues Day may be required.

With respect to the evidentiary issue raised by THESL, it is plain and obvious that no witness may provide opinion evidence as to whether the CCTA Order applies to wireless attachers. That question, as a matter of law, including in an administrative context, is reserved exclusively to the tribunal. Whether such evidence is ultimately "struck out" or is simply ignored by the Board (as a matter of weight) is a matter that should be determined during the oral hearing and CANDAS will make its submissions at that time, unless the Board directs otherwise.

For all of the foregoing reasons, CANDAS requests that the Board rejects THESL's latest submissions and directs THESL to adhere to the procedures previously ordered by the Board.

Yours very truly,

(signed) H. T. Newland

HTN/ko

cc: Michael Schafler
George Vinyard
Mary Anne Aldred
Kristi Sebalj
All Intervenors