

October 31, 2011

Robert B. Warren
T: 416-947-5075
rwarren@weirfoulds.com

VIA EMAIL AND COURIER

Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2701
2300 Yonge Street
Toronto ON M4P 1E4

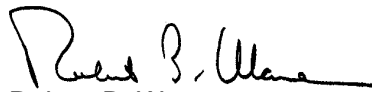
Dear Ms Walli:

Re: Notice of Motion of the Consumers Council of Canada/EB-2011-0120

We are counsel to the Consumers Council of Canada. On behalf of our client we enclose herewith its Notice of Motion and the Affidavit of Dina Awad.

Yours very truly,

WeirFoulds LLP



Robert B. Warren

RBW/dh

cc: Helen Newland

cc: J. Mark Rodger

cc: All Parties
4094409.1

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 (“CANDAS”) for certain orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for an Order requiring further and better answers to Interrogatories delivered to Toronto Hydro-Electric System Limited.

NOTICE OF MOTION

THE CONSUMERS COUNCIL OF CANADA (the “CCC”) will make a motion on a date and at a time to be fixed by the Ontario Energy Board (the “Board”), at the Board’s Chambers at 2300 Yonge Street, Toronto, Ontario.

PROPOSED METHOD OF HEARING: the CCC proposes that the motion be dealt with orally.

THE MOTION IS FOR:

An order requiring Toronto Hydro-Electric System Limited (“THESL”) to provide further and better answers to CCC interrogatories 1, 2, 3, 4, 5, 6(d), and 7 (collectively, the “CCC Interrogatories”).

THE GROUNDS FOR THE MOTION ARE:

- (a) The information and material requested in the CCC interrogatories is necessary for an understanding of THESL's evidence and of its position with respect to the CANDAS application;
- (b) The information and material requested in the CCC interrogatories is relevant to the issues raised by the CANDAS application and by THESL's evidence in response thereto;
- (c) THESL has, in its responses to CCC interrogatories 1, 5 and 7, declined to provide information and material on the basis of solicitor/client and/or litigation privilege without identifying the documents for which privilege is claimed, or indicating for each document the grounds for claiming the privilege, or indicating the litigation referred to;
- (d) The information and material requested in CCC interrogatories 1, 5 and 7 is not protected by solicitor/client and/or litigation privilege;
- (e) THESL's claim for solicitor/client and/or litigation privilege would, even if established, not apply to all of the information and material requested in CCC interrogatories 1, 5 and 7;
- (f) THESL claims, in respect of some information and material requested, that it is confidential, but does so without describing the nature and extent of the confidentiality;
- (g) THESL's claim for confidentiality can, in any event, be accommodated using the Board's Rules with respect to the handling of confidential material;
- (h) Such further and other grounds as Counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the pre-filed evidence of CANDAS and of THESL;

- (b) the interrogatories of the CCC to THESL and THESL's response to those interrogatories;
- (c) the affidavit of Dina Awad sworn the 31st day of October, 2011;
- (d) such further and other material as counsel may advise and the Board permit.

October 31, 2011

WeirFoulds LLP

Barristers & Solicitors
Suite 1600, The Exchange Tower
130 King Street West
P.O. Box 480
Toronto, ON M5X 1J5

Robert B. Warren

(LSUC # 17210M)
Tel: 416-365-1110
Fax: 416-365-1876

**Lawyers for the Consumers Council
of Canada**

TO: Fraser Milner Casgrain LLP
1 First Canadian Place
100 King Street West
Toronto, ON M5X 1B2

Helen Newland

Tel: 416.863.4511
Fax: 416.863.4592

Lawyers for Canadian Distributed Antenna Systems Coalition

AND TO: Borden Ladner Gervais LLP
Scotia Plaza, 40 King Street W
Toronto, ON, Canada M5H 3Y4

J. Mark Rodger

Tel: 416.367.6000
Fax: 416.367.6749

Lawyers for Toronto Hydro-Electric System Limited

AND TO: ONTARIO ENERGY BOARD

Suite 2701

2300 Yonge Street

Toronto, Ontario M4P 1E4

Tel: 416.440.8111

Fax: 416.440.7656

4072930.1

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 ("CANDAS") for certain
orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for
an Order requiring further and better answers to Interrogatories delivered to
Toronto Hydro-Electric System Limited.

EB-2011-0120

ONTARIO ENERGY BOARD

NOTICE OF MOTION

WeirFoulds LLP
Barristers & Solicitors
The Exchange Tower, Suite 1600, P.O. Box 480
130 King Street West
Toronto, Ontario M5X 1J5
Robert B. Warren
(LSUC # 17210M)
Tel: 416-365-1110
Fax: 416-365-1876

Lawyers for the Moving Party,
The Consumers Council of Canada

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 ("CANDAS") for certain orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for an Order requiring further and better answers to Interrogatories delivered to Toronto Hydro-Electric System Limited.

**AFFIDAVIT OF DINA AWAD
SWORN OCTOBER 29, 2011**

I, Dina Awad, of the City of Toronto, make oath and say as follows:

1. I am an articling student employed by WeirFoulds LLP, lawyers for the Consumers Council of Canada (the "CCC"), and as such have knowledge of the matters herein deposed.

2. The CCC has filed a motion seeking further and better answers to the CCC interrogatories number 1, 2, 3, 4, 5, 6(d) and 7, to Toronto Hydro-Electric System Limited ("THESL").

1. CCC Interrogatory 1

3. In its application, CANDAS seeks, among other relief, an order determining that the Ontario Energy Board ("Board") RP-2003-0249 Decision and Order, dated March 7, 2005 ("CCTA Order") requires electricity distributors to provide "Canadian carriers" with access to

power poles of such distributors for purposes of attaching wireless equipment, including wireless components of distributed antenna systems.

4. CANDAS's pre-filed evidence includes a copy of a letter dated 13 August 2010, from THESL to the Board. In that letter, THESL takes the position that the CCTA Order does not apply to wireless attachments. Exhibit "A" to my affidavit is a copy of the letter dated 13 August 2010 from THESL to the Board.

5. The pre-filed evidence of CANDAS asserts that, notwithstanding its claim that the CCTA order does not apply to wireless attachments, THESL had permitted wireless attachments to some of its poles.

6. CCC Interrogatory 1 states:

INTERROGATORY 1:

The evidence of CANDAS, at paragraph 2.2, is that, until August, 2010, THESL permitted access to its poles for wireless attachments. In paragraph 2.3 of that evidence, CANDAS indicates that THESL sent a letter to the Ontario Energy Board (Board), on August 13, 2010 advising the Board of a new policy not to permit the attachment of wireless equipment to its power poles.

Please provide copies of all reports, analyses, written communications, including email, with respect to the policy referred to in the letter of August 13, 2010. Please include copies of all reports to THESL's management and board of directors with respect to that policy.

7. In its response to CCC Interrogatory 1, THESL states, in part:

With respect to the request to produce the above-noted information and documents, THESL declines this request on the basis that the materials and information sought are privileged as communications between solicitor and client and/or being in contemplation of litigation.

Exhibit "B" to this affidavit is a copy of THESL's response to CCC Interrogatory 1.

8. The information requested is necessary to examine the basis for the positions expressed in THESL's letter of August 13, 2010, and is relevant to the issues raised in the CANDAS application and THESL's response thereto.

9. THESL does not identify the nature and date of the documents in respect of which such privilege is claimed, or the litigation referred to, or the grounds for claiming privilege for each such document.

2. CCC Interrogatory 2

10. THESL's pre-filed evidence includes the affidavit of Adonis Yatchew, sworn the 1st day of September, 2011. In that affidavit, Dr. Yatchew makes the following assertion:

The treatment of pole space as a valuable and limited resource by utilities does not constitute anti-competitive behaviour. Treating it as such and ensuring that sufficient space is available for current and future power company uses as well as the potential needs of entities for which power poles are an essential facility, constitutes prudent management of this resource. Its proper use and valuation contributes to ensuring that a viable siting market for wireless company facilities is not undermined. In the absence of proper valuation the siting market itself becomes distorted and may be limited in its development.

11. CCC Interrogatory 2 states:

Please provide copies of all communications, including correspondence and emails, between THESL and the Electricity Distributors Association or its members with respect to the following:

a) The interpretation of the Decision and Order of the Board in RP-2003-0249 (the CCTA Order);

b) The attachment of wireless communication equipment to electricity distribution poles;

c) THESL's policy reflected in its letter to the Board dated August 13, 2010.

12. In its response to CCC Interrogatory 2, THESL declines to answer the question on the basis that it "does not pertain to THESL's evidence" and that "the information sought is not relevant to this proceeding, and/or is unduly onerous to produce in relation to the probative value". Exhibit "C" to this affidavit is a copy of THESL's responses to CCC Interrogatory 2.

13. The information sought by CCC Interrogatory 2 is necessary to explore the accuracy of, among other things, the assertion, by Dr. Yatchew, that the treatment of pole space by utilities “does not constitute anti-competitive behaviour”, and is relevant to the issue of whether there is, as Dr. Yatchew asserts, a market for the provision of wireless attachments.

3. CCC Interrogatory 3

14. CCC Interrogatory 3 provides as follows:

Please provide copies of all communications, including correspondence and emails, between THESL and the City of Toronto with respect to the following:

- a) The interpretation of the CCTA Order;
- b) The attachment of wireless communication equipment to THESL’s electricity distribution poles;
- c) The policy reflected in THESL’s letter of August 13, 2010 to the Board.

15. THESL declined to answer CCC Interrogatory 3 on the basis that, among other things, “the information sought is not relevant to this proceeding, and/or is unduly onerous to produce in relation to the probative value.” Exhibit “D” to this affidavit is a copy of THESL’s response to CCC Interrogatory 3.

16. THESL is owned, ultimately, by the City of Toronto. The City of Toronto also owns, among other entities, the Toronto Transit Commission (“TTC”). The TTC uses THESL’s poles for communications attachments. CCC Interrogatory 3 is relevant to the issue of whether THESL’s position on the use of its poles for wireless attachments is affected by the needs or desires of its ultimate shareholder, the City of Toronto, or of its affiliated entities. It is also relevant to the nature and extent of a market for the provision of wireless attachments.

4. CCC Interrogatory 4

17. CCC Interrogatory 4 states:

Please provide copies of all studies, reports, and internal communications including correspondence and email, from the date of the CCTA Order to the present, with respect to the wireless communication plans of THESL, the City of Toronto and any related or affiliated entities, including business plans with

respect to the development and implementation of wireless communications systems.

18. In its response to CCC Interrogatory 4, THESL states:

As THESI is not a party to this proceeding, THESI declines to produce any information related to this proceeding.

In addition, THESL states "Any plans of the City of Toronto are not within THESL's knowledge." Exhibit "E" to this affidavit is a copy of THESL's responses to CCC Interrogatory 4.

19. The information requested in CCC Interrogatory 4 is relevant to the issue of whether, or to what extent, THESL's position on the use of its poles for wireless attachments is affected by the needs or desires of its ultimate shareholder, the City of Toronto, or of any of its affiliated entities. It is also relevant to the issue of the nature and extent of any competitive market for wireless attachments.

5. CCC Interrogatory 5

20. In its letter to the Board, dated 13 August 2010 THESL states, under the subheading: "Safety is Compromised":

- (i) For reasons of both efficiency and THESL will not permit communications equipment including antennas to be installed on pole tops or otherwise within the distribution equipment zone. Working safely within the distribution zone in the vicinity of voltages up to 27,600 volts requires several years of training and specialized equipment. It would be dangerously irresponsible for THESL to permit telecommunications personnel to work within the distribution zone without training and equipment, and given its own demanding workplans, THESL cannot commit its own trained staff to the installation and maintenance of non-distribution equipment.
- (ii) Wireless communications attachments outside the distribution zone also have the potential to impede safe and efficient access to both distribution equipment and other wireline attachments, particularly in situations involving unplanned emergency restoration work which occur frequently on THESL's system.

21. CCC Interrogatory 5 states:

With respect to the letter from THESL to the Board of August 13, 2010, please provide copies of all reports, analyses, and communications, including correspondence and emails, in support of the contention that wireless attachments impair operational efficiency and present incremental safety hazards to electricity distributors.

22. THESL declined to answer CCC Interrogatory 5, stating that "In any event, production of the materials and information sought is unduly onerous in relation to its probative value, and/or the information and materials sought are privileged as communications between solicitor and client and/or being in contemplation of litigation." Exhibit "F" to this affidavit is a copy of THESL's responses to CCC Interrogatory 5.

23. The information sought in CCC Interrogatory Number 5 is required in order to examine, among other things, whether, or to what extent, the policy reflected in THESL's letter to the Board dated 13 August 2010 was based on considerations of safety. The information is also relevant to THESL's position that considerations of safety preclude it from allowing wireless attachments to its poles.

24. THESL does not list the documents for which privilege is claimed, does not set out the nature and date of the documents, and does not indicate the grounds for claiming privilege for each document. In addition, THESL does not indicate the litigation in respect of which litigation privilege is claimed.

6. CCC Interrogatory 6 (d)

25. CCC Interrogatory 6 states:

In paragraph 28 of her Affidavit, Ms Byrne states that, pursuant to the CCTA Order, THESL has granted wireline attachers access to THESL poles on the basis of those attachments fitting within the communications space on THESL poles and assuming 2.5 attachments per pole.

a) Please set out the process THESL followed in determining whether a wireless pole attachment application would be granted.

b) Does THESL have the discretion to reject an application? If so, what criteria are applied in deciding to reject an application?

c) Please indicate how many applications for wireless attachments have been rejected?

d) Please provide copies of all documentation related to each such rejection.

26. In its response to CCC Interrogatory 6 (d), THESL states that “THESL declines this interrogatory on the basis that the requested information is not relevant to this proceeding, and in any event contains confidential customer information.” Exhibit “G” to this affidavit is a copy of THESL’s responses to CCC Interrogatory 6.

27. The pre-filed evidence of THESL includes the evidence of Mary Byrne, sworn September 1, 2011. In that Affidavit, Ms Byrne asserts, among other things, that “THESL has safety, operational and cost concerns with hosting wireless attachments”.

28. CCC Interrogatory 6(d) seeks information which is required in order to examine whether, or to what extent, THESL rejected applications for wireless attachments on the basis of “safety, operational and cost concerns”, and is relevant to an examination of THESL’s position that considerations of safety operations and costs preclude it from allowing wireless attachments to its poles.

29. Any concerns with respect to confidential customer information can be accommodated through the Board’s rules with respect to the production of confidential information.

7. CCC Interrogatory 7

30. CCC Interrogatory 7 states:

In paragraph 40 of the Affidavit, Ms Byrne asserts that “wireless attachments create unique issues that affect the safety, adequacy, reliability and quality of electricity service”. In paragraphs 42 to 46, inclusive, Ms Byrne provides details of those issues. For the period from the CCTA Order to August 13, 2010, please provide all reports, analyses, and communications, including correspondence and emails, describing or reporting on the issues described in paragraphs 42 to 46, inclusive, of Ms Byrne’s Affidavit.

31. THESL’s response to CCC Interrogatory 7 states:

To the extent that this interrogatory seeks further information and material, THESL declines on the basis that production is unduly onerous relative to its

This is Exhibit "A" referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011

Application of CANDAS
Filed 04/21/2011
Tab 3
Page 75 of 1378

Pankaj Sardana
14 Carlton St.
Toronto, Ontario
M5B 1K5

Telephone: 416-542-2707
Facsimile: 416-542-2776
regulatoryaffairs@torontohydro.com

A COMMISSIONER, ETC.

ROBERT B. WARREN

toronto hydro
electric system

2010 August 13

via courier and email

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

Dear Ms. Walli:

RE: THESL Policy Concerning Wireless Pole Attachments

With this letter, Toronto Hydro-Electric System Limited (THESL) wishes to inform the Board that, in light of many safety and operational concerns about the attachment of wireless telecommunications equipment to its pole infrastructure that are set out in this letter and its Appendix, THESL has adopted a policy not to attach such equipment to its poles.

In adopting this policy, THESL considered the Board's March 7, 2005 EB-2003-0249 Decision and concluded that its policy does not conflict with that Decision. The reasons for that conclusion are set out in this letter.

Furthermore, this policy does not violate THESL's obligations to provide non-discriminatory access to its electricity distribution infrastructure.

For clarity, THESL emphasizes that it seeks no change whatsoever to its existing license condition pertaining to wireline attachments or to the existing ratemaking practice of treating all net revenues obtained from pole rentals as revenue offsets.

THESL refers here to 'wireline' attachments as any and all pole attachments consisting of wire, cable, or optical fibre, suspended from poles and running continuously between successive poles, used for the purposes of providing electricity distribution or telecommunications services to the public; and "wireless [communication] attachments" as any and all attachments used for the purposes of providing telecommunications services to the public that are not wireline attachments.

In the event that the Board has not at this point drawn the same conclusions as THESL regarding the non-applicability of the March 7, 2005 EB-2003-0249 Decision, THESL sets out in this letter and its Appendix information to assist the Board in its consideration of whether the above Decision should not apply to wireless equipment attachments. A general description of THESL's pole infrastructure and non-distribution attachments to it is provided in Appendix A to this letter for the Board's reference.

THESL requests that the Board notify THESL if it has any concerns around THESL's recent policy in this area. Should the Board determine that this is an issue which requires a further or a more formal process, THESL will participate actively in such a process.

The 'CCTA Decision' Does Not Apply

On December 16, 2003, the Canadian Cable Television Association ("CCTA") filed an application with the Board on behalf of the twenty-three cable companies that operated in Ontario, seeking terms of access and corresponding rates for attachment of their equipment to electricity distribution poles in Ontario.

On March 7, 2005, the Board issued its EB-2003-0249 Decision in that proceeding (the 'CCTA Decision'). In that Decision, the Board ordered that:

The licence conditions of the electricity distributors licenced by this Board shall as of the date of this Order be amended to provide that all Canadian carriers as defined by the Telecommunications Act and all cable companies that operate in the Province of Ontario shall have access to the power poles of the electricity distributors at the rate of \$22.35 per pole per year.

Wireless Attachments Were Not Included in the CCTA Decision

THESL has carefully reviewed the evidence, Settlement Agreement, transcripts, argument, and Decision in the CCTA proceeding. It is evident on the basis of that review that the Board did not actually consider the issues (including physical characteristics, hosting cost differences, and availability of hosting alternatives) presented by wireless attachments in arriving at its CCTA Decision, and that there was no substantive discussion with respect to wireless attachments in the CCTA Decision or during the hearing.

The sole reference to wireless attachments occurs in Section 1.5 of Appendix A of the October 19, 2004 Settlement Agreement, where the question of whether the definition of "Attachment" would expressly exclude wireless transmitters was "not agreed". Clearly the parties to the Settlement Agreement could not agree on the proper treatment of wireless attachments. Despite this, the transcript of the hearing contains no substantive discussion and the CCTA Decision does not deal with or even mention the unique issues and challenges posed by wireless attachments.

In addition, the CCTA Decision makes a number of assumptions and findings of fact (e.g., that attachments will fit within the 2 foot communications space and that there is an average of 2.5 attachments per pole) in calculating the \$22.35 per pole per year charge, which clearly pertain only to wireline attachments and do not reflect the physical differences and much higher costs associated with

wireless attachments. Among the most important physical differences is the fact that wireless communication attachments occupy substantially more pole space than the two feet allotted as 'communications space'.

Examined as a whole, the CCTA Decision makes clear that the mind of the Board was focused on traditional wireline communication attachments. The Decision was rendered before the substantive emergence of utility-pole-mounted wireless attachments and the distinctly different characteristics of wireless attachments were nowhere addressed.

These observations make any supposition that wireless attachments were meant to be included in the Board's ruling untenable.

Additional Reasons Why the CCTA Decision Should Not Apply

There are strong reasons, set out below, as to why the CCTA Decision should not apply.

There are Substantial Physical Differences between Wireline and Wireless Attachments

Wireline communication attachments are similar in many respects to the electricity distribution equipment that THESL's pole infrastructure is designed and built to support. Both systems are largely composed of wire conductors which must run continuously between successive poles and terminate at the premises of customers in order to provide service.

In contrast, as a category wireless communication attachments are distinctly different from wireline attachments, and within the category they are highly variable in size and configuration. They consist of non-uniform equipment that is essentially self-contained and capable of being supported elsewhere than on utility poles, much as rooftop solar panels are, for example. Many alternative hosts for wireless attachments exist and are being used now. When mounted on utility poles, wireless attachments typically occupy a much greater portion of communication attachment space than wireline attachments, and require special assessments of engineering design and as-built construction.

Safety is Compromised

The overhead electricity distribution system in Toronto operates at voltages ranging up to 27,600 volts. All high voltage equipment is inherently dangerous and must be electrically insulated from supporting structures. In addition, safe limits of approach are defined and practiced on the overhead distribution system such that a zone of separation is required between high voltage equipment and any other attachments, as well as any personnel working in proximity to the poles.

THESL is responsible for the safety of its pole infrastructure. For reasons both of safety and operational efficiency, THESL will not permit communications equipment including antennas to be installed on pole tops or otherwise within the distribution equipment zone. Working safely within the distribution zone in the vicinity of voltages up to 27,600 volts requires several years of training and specialized equipment. It would be dangerously irresponsible for THESL to permit

telecommunications personnel to work within the distribution zone without proper training and equipment, and given its own demanding workplans, THESL cannot commit its own trained staff to the installation and maintenance of non-distribution equipment.

Furthermore the presence of non-uniform wireless communication equipment in the distribution zone or elsewhere on the pole changes the physical equipment configuration faced by THESL linepersons and could present contact hazards which in THESL's view are unnecessary and unacceptable.

Wireless communications attachments outside the distribution zone also have the potential to impede safe and efficient access to both distribution equipment and other wireline attachments, particularly in situations involving unplanned emergency restoration work which occur frequently on THESL's system. In addition, the drilling of holes through poles to mount wireless communications attachments below the distribution zone incrementally weakens poles and creates stress concentrations in areas where structural integrity must be maintained to support the significant loads exerted by the distribution equipment above. The loss of structural integrity can lead to sudden and catastrophic failure (i.e., total fracture) of poles, which in turn creates unacceptable safety risks and service interruptions.

Pole Attachment Space is a Scarce Resource

The primary purpose of THESL's pole infrastructure is to suspend its electrical distribution equipment securely and safely above public thoroughfares. Given that utility pole infrastructure is designed to suspend electrical distribution cables, and runs very extensively throughout utility service areas, it is incidentally very well suited to provide suspension of other wireline systems – specifically, telecommunications systems, which have traditionally been composed of telephone, television, and fibre optic cable equipment. Electricity and telecommunication wireline systems share the characteristics that:

- a) They must run continuously between successive poles or other points of suspension in order to convey electrical power or signals as the case may be;
- b) When run above ground they must be suspended securely above the public thoroughfare to prevent accidental damage and to ensure safety and reliability of service; and
- c) They must physically extend to every end-user terminal point in order to provide their respective services.

In any situation in which power or signal wireline equipment is required to be suspended above ground, there is no feasible alternative to utility poles, particularly as the systems reach their terminal points at homes and other premises. Since no other infrastructure meets the requirements of safety, access, and availability, utility poles are a practical necessity for the suspension of above-ground wireline systems.

At the same time, pole infrastructure is costly to erect and maintain, and impinges on the urban tree canopy as well as streetscapes. Duplication of pole lines along streets and elsewhere would not only represent a needless waste of resources but would also meet with strong public opposition for aesthetic and land use reasons. Therefore THESL cooperates with other utility pole owners and wireline

communication attachment owners to support all wireline equipment on the minimum number of poles consistent with safety and operational requirements.

Together with the fact that pole infrastructure is minimized for reasons of cost and public sentiment, the limited space available on poles for wireline communication attachments means that that space has become a scarce resource. On many THESL poles, that space is already fully occupied, and it is almost always partially occupied.

In contrast, although wireless communication equipment (antennas, power supplies, etc) needs to be connected to low voltage power and signal cables, that equipment can be secured and connected as necessary in a wide variety of settings other than on utility poles – buildings and rooftops, for example.

Furthermore, the demand for wireline communications capacity (i.e., fibre optic cable) to provide both wired and wireless internet access is growing very rapidly.

It is inappropriate in these circumstances to allocate scarce pole attachment space to devices that do not in fact require it. Utility pole infrastructure should be treated as an essential and scarce resource for the purpose of suspending wireline systems and should be reserved to that purpose with respect to communications attachment space. Mandated allocation of scarce pole space to uses that consume it but for which it is non-essential undermines the conceptual basis of the CCTA Decision.

Non-Discriminatory Access Requirements are Not Violated

THESL will of course continue to provide non-discriminatory access to its system to generators, retailers and consumers for the purposes of electricity distribution. However, the principle of non-discriminatory access does not and should not apply in respect of wireless attachments, when there are many alternative hosts for wireless attachments in use at the present time, because the use of poles for such attachments involves neither the distribution of electricity nor access to an essential monopoly resource. 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.

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.”

This conclusion does not apply in respect of wireless attachments, because multiple, viable market alternatives for hosting wireless attachments exist and are being used today. The relevant question in this context is not whether THESL would exercise market power to extract monopoly profits, but

rather whether it would unduly withhold access to an essential facility. Since utility poles are not essential for wireless attachments, the answer to this question must be no.

Conclusion

THESL has advised the Board of THESL's policy on this emerging issue because clarification of the regulatory framework pertaining to pole access will be helpful to all parties and the efficient planning and deployment of resources. THESL's policy, set out and explained above, is sound and operates in the best interest of ratepayers and furthers the safe and efficient operation of the electricity distribution system.

As noted earlier, THESL requests that the Board notify THESL if it has any concerns around THESL's recent policy in this area. Should the Board determine that this is an issue which requires a further or a more formal process, THESL will participate actively in such a process.

Yours truly,



Pankaj Sardana

VP, Treasurer and Regulatory Affairs
regulatoryaffairs@torontohydro.com

Copy:

Aleck Dadson, Chief Operating Officer, Ontario Energy Board
Mary Ann Aldred, General Counsel, Ontario Energy Board
Anthony Haines, President, Toronto Hydro-Electric System Limited
JS Couillard, Chief Financial Officer, Toronto Hydro-Electric System Limited
Lawrence Wilde, General Counsel, Toronto Hydro-Electric System Limited
Colin McLorg, Mgr, Regulatory Policy and Relations, Toronto Hydro-Electric System Limited

This is Exhibit B referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011

Toronto Hydro-Electric System Limited
EB-2011-0120
Interrogatory Responses
Tab 6
Schedule 1
Filed: 2011 Sep 22
Page 1 of 2

Robert B. Warren
A COMMISSIONER, ETC
**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

1 **INTERROGATORY 1:**

2 **Reference(s):** none provided

3
4 The evidence of CANDAS, at paragraph 2.2, is that, until August, 2010, THESL
5 permitted access to its poles for wireless attachments. In paragraph 2.3 of that evidence,
6 CANDAS indicates that THESL sent a letter to the Ontario Energy Board (Board), on
7 August 13, 2010 advising the Board of a new policy not to permit the attachment of
8 wireless equipment to its power poles.

9
10 Please provide copies of all reports, analyses, written communications, including email,
11 with respect to the policy referred to in the letter of August 13, 2010. Please include
12 copies of all reports to THESL's management and board of directors with respect to that
13 policy.

14
15 **RESPONSE:**

16 THESL disagrees with the premise of this question that "until August, 2010, THESL
17 permitted access to its poles for wireless attachments." THESL currently has a valid
18 contract with DAScom regarding wireless attachments.

19
20 It is not accurate to say that in its August 13, 2010 letter, THESL advised the Board of its
21 "new policy not to permit the attachment wireless equipment to its power poles." Please
22 see THESL responses to general CANDAS IR 1 and VECC IR 4.

23
24 With respect to the request to produce the above-noted information and documents,
25 THESL declines this request on the basis that the materials and information sought are

**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

- 1 privileged as communications between solicitor and client and/or being in contemplation
- 2 of litigation.

"C"

This is Exhibit _____ referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011

Robert A. Walker
COMMISSIONER, ETC.

Toronto Hydro-Electric System Limited
EB-2011-0120
Interrogatory Responses
Tab 6
Schedule 2
Filed: 2011 Sep 22
Page 1 of 1

**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

1 **INTERROGATORY 2:**

2 **Reference(s):** none provided

3

4 Please provide copies of all communications, including correspondence and emails,
5 between THESL and the Electricity Distributors Association or its members with respect
6 to the following:

7 a) The interpretation of the Decision and Order of the Board in RP-2003-0249 (the
8 CCTA Order);

9 b) The attachment of wireless communication equipment to electricity distribution
10 poles;

11 c) THESL's policy reflected in its letter to the Board dated August 13, 2010.

12

13 **RESPONSE:**

14

15 a) THESL declines this interrogatory on the basis that it is extremely broad, and does
16 not pertain to THESL's evidence. No reference to THESL's evidence is provided,
17 the information sought is not relevant to this proceeding, and/or is unduly onerous to
18 produce in relation to the probative value.

19 b) Please see the response in (a) above.

20 c) Please see the response in (a) above.

21

This is Exhibit "D" referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011

Robert S. Warren
A COMMISSIONER, ETC.

Toronto Hydro-Electric System Limited
EB-2011-0120
Interrogatory Responses
Tab 6
Schedule 3
Filed: 2011 Sep 22
Page 1 of 1

**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

1 **INTERROGATORY 3:**

2 **Reference(s):** none provided

3

4 Please provide copies of all communications, including correspondence and emails,
5 between THESL and the City of Toronto with respect to the following:

- 6 a) The interpretation of the CCTA Order;
7 b) The attachment of wireless communication equipment to THESL's electricity
8 distribution poles;
9 c) The policy reflected in THESL's letter of August 13, 2010 to the Board;


10

11 **RESPONSE:**

- 12 a) THESL declines this interrogatory on the basis that it is extremely broad, and does
13 not pertain to THESL's evidence. No reference to THESL's evidence is given, the
14 information sought is not relevant to this proceeding, and/or is unduly onerous to
15 produce in relation to the probative value.
16 b) Please see the response in (a) above.
17 c) Please see the response in (a) above.

18

19

This is Exhibit "E" referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011.

A COMMISSIONER, ETC.
ROBERT B. WARREN

Toronto Hydro-Electric System Limited
EB-2011-0120
Interrogatory Responses
Tab 6
Schedule 4
Filed: 2011 Sep 22
Page 1 of 1

**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

1 **INTERROGATORY 4:**

2 **Reference(s):** none provided

3

4 Please provide copies of all studies, reports, and internal communications including
5 correspondence and email, from the date of the CCTA Order to the present, with respect
6 to the wireless communication plans of THESL, the City of Toronto and any related or
7 affiliated entities, including business plans with respect to the development and
8 implementation of wireless communications systems.

9

10 **RESPONSE:**

11

12 Apart from the operations of its own radio systems used for electricity distribution
13 purposes (see affidavit of Ms. Byrne at paragraph 54 and Exhibit "K"), THESL does not
14 plan to operate a 'wireless communication' system. THESL has no plans to operate a
15 wireless communication system as a common carrier.

16

17 As THESI is not a party to this proceeding, THESI declines to produce any information
18 related to this proceeding. Please also refer to the response in Tab 5.1, Schedule 2, (b).

19

20 Any plans of the City of Toronto are not within THESL's knowledge.

21

This is Exhibit "F" referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011

Robert B. Warren
A COMMISSIONER, ETC.

ROBERT B. WARREN

Toronto Hydro-Electric System Limited
EB-2011-0120
Interrogatory Responses
Tab 6
Schedule 5
Filed: 2011 Oct 3
Page 1 of 1

**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

1 **INTERROGATORY 5:**

2 **Reference(s):** none provided

3

4 With respect to the letter from THESL to the Board of August 13, 2010, please provide
5 copies of all reports, analyses, and communications, including correspondence and
6 emails, in support of the contention that wireless attachments impair operational
7 efficiency and present incremental safety hazards to electricity distributors.

8

9 **RESPONSE:**

10

11 THESL declines this interrogatory. This interrogatory is not on THESL's evidence and
12 no specific reference to the evidence is provided. In any event, production of the
13 materials and information sought is unduly onerous in relation to its probative value,
14 and/or the information and materials sought are privileged as communications between
15 solicitor and client and/or being in contemplation of litigation.

This is Exhibit "G" referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011

Robert B. Warren
A COMMISSIONER, ETC.

**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

Toronto Hydro-Electric System Limited
EB-2011-0120
Interrogatory Responses
Tab 6
Schedule 6
Filed: 2011 Oct 3
Page 1 of 1

1 **INTERROGATORY 6:**

2 **Reference(s):** Affidavit of Mary Byrne

3

4 In paragraph 28 of her Affidavit, Ms Byrne states that, pursuant to the CCTA Order,
5 THESL has granted wireline attachers access to THESL poles on the basis of those
6 attachments fitting within the communications space on THESL poles and assuming 2.5
7 attachments per pole.

8 a) Please set out the process THESL followed in determining whether a wireless pole
9 attachment application would be granted.

10 b) Does THESL have the discretion to reject an application? If so, what criteria are
11 applied in deciding to reject an application?

12 c) Please indicate how many applications for wireless attachments have been rejected?

13 d) Please provide copies of all documentation related to each such rejection.

14

15 **RESPONSE:**

16 a) Please see affidavit of Ms. Byrne, Paragraph 18.

17

18 b) Yes. The specific criteria are provided in the agreement between THESL and the
19 particular attacher.

20

21 c) 69.

22

23 d) THESL declines this interrogatory on the basis that the requested information is not
24 relevant to this proceeding, and in any event contains confidential customer
25 information.

This is Exhibit "H" referred to in the
affidavit of Dina Awad
sworn before me, this 31st
day of October, 2011
Robert B. W.

Toronto Hydro-Electric System Limited
EB-2011-0120
Interrogatory Responses
Tab 6
Schedule 7
Filed: 2011 Oct 3
Page 1 of 1

ROBERT B. W. ACCOMMISSIONER, ETC.
**RESPONSES TO CONSUMERS COUNCIL OF CANADA
INTERROGATORIES**

1 **INTERROGATORY 7:**

2 **Reference(s):** Affidavit of Mary Byrne

3

4 In paragraph 40 of the Affidavit, Ms Byrne asserts that "wireless attachments create
5 unique issues that affect the safety, adequacy, reliability and quality of electricity
6 service". In paragraphs 42 to 46, inclusive, Ms Byrne provides details of those issues.

7

8 For the period from the CCTA Order to August 13, 2010, please provide all reports,
9 analyses, and communications, including correspondence and emails, describing or
10 reporting on the issues described in paragraphs 42 to 46, inclusive, of Ms Byrne's
11 Affidavit.

12

13 **RESPONSE:**

14

15 Please see the responses in Tab 1, Schedules 15, 16 and 22, as well as Tab 1, Schedules
16 32, 34, 35, 36, 37 and 38; and Tab 6, Schedule 15. To the extent that this interrogatory
17 seeks further information and material, THESL declines on the basis that production is
18 unduly onerous relative to its probative value, and/or the information and materials
19 sought are privileged as communications between solicitor and client and/or being in
20 contemplation of litigation.

21

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 ("CANDAS") for certain
orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for
an Order requiring further and better answers to Interrogatories delivered to
Toronto Hydro-Electric System Limited.

EB-2011-0120

ONTARIO ENERGY BOARD

**AFFIDAVIT OF DINA AWAD
SWORN 31 OCTOBER, 2011**

WeirFoulds LLP
Barristers & Solicitors
The Exchange Tower, Suite 1600, P.O. Box 480
130 King Street West
Toronto, Ontario M5X 1J5
Robert B. Warren
(LSUC # 17210M)
Tel: 416-365-1110
Fax: 416-365-1876

Lawyers for the Moving Party,
The Consumers Council of Canada