



Fraser Milner Casgrain LLP

77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, ON, Canada M5K 0A1

MAIN 416 863 4511

FAX 416 863 4592

FILED ELECTRONICALLY AND VIA COURIER

November 22, 2011

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
PO Box 2319, 27th Floor
Toronto, ON
M4P 1E4

Michael Schafler

Michael.Schafler@FMC-law.com

DIRECT 416-863-4457

Dear Ms. Walli:

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

We represent CANDAS in connection with its application to the Board regarding access to the power poles of licensed electricity distributors for the purpose of attaching wireless telecommunications equipment.

Please find attached the Reply submissions of CANDAS regarding its Motion compelling THESL to provide proper answers to certain IRs.

Hard copies will be sent by courier in the usual fashion.

Yours very truly,

(signed) Michael D. Schafler

Michael Schafler

MDS/ag

Encls.

cc: Helen Newland
 Mr. George Vinyard
 ExteNet Systems, Inc.
 All Intervenors

ONTARIO ENERGY BOARD

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 the **Canadian Distributed Antenna Systems Coalition** for certain orders under the *Ontario Energy Board Act, 1998*.

WRITTEN SUBMISSIONS OF CANDAS

[IR Motion – Procedural Orders No. 4 and 5]

(i) Introduction

1. These are the reply submissions of the applicant, the Canadian Distributed Antenna Systems Coalition (“**CANDAS**”), to the almost *200 pages* that Toronto Hydro-Electric System Limited (“**THESL**”) filed¹ in response to CANDAS’ motion to compel better answers to *eight* IRs, three of which THESL now concedes were proper. It is ironic that a good deal of THESL’s material is devoted to allegations about lack of proportionality and legal fishing expeditions on the part of CANDAS. These allegations are mere attempts to detract from the real issues in this case.

(ii) Overview

2. The disputed IRs relate to two questions:
 - (i) Is THESL’s “no wireless” policy justified?
 - (ii) Is THESL discriminating amongst parties who seek to attach equipment to its poles?
3. CANDAS’ position is that the answers to these questions are “no” and “yes”, respectively.

¹ THESL, “CCC – CANDAS Motion to Compel, Responding Submissions”, filed November 15, 2011 (“Response”).

4. Through its interrogatories to THESL, CANDAS sought to elicit factual information relevant to these two questions. In its responses, THESL sought to conflate and confuse by providing evasive and incomplete answers or by refusing to provide answers at all to relatively straight forward questions. THESL did this by asserting that questions were not relevant or sought privileged information or that the production of the requested information would be unduly burdensome.
5. Although THESL refused to answer many questions, CANDAS chose to move on only those questions that it considered to be central to the two questions set out above. In order to answer these questions the Board requires factual information as to: (i) the circumstances that caused THESL to compose the “no wireless” policy letter of August 13, 2010 to the Board (i.e., the “**THESL Letter**”, as it is defined in paragraphs 2.3 and 2.4 of the Application); and (ii) the wireless equipment that THESL has allowed on its poles and the terms and conditions of such access. As is apparent from its unduly adversarial posture throughout this proceeding, THESL is playing every available card in order to avoid having to deal with these matters head-on.

(iii) The “No Wireless” Policy and the THESL Letter

6. The THESL Letter included a number of assertions:
 - (i) that the CCTA Decision does not apply to wireless attachments;
 - (ii) that there are substantial physical differences between wireline and wireless attachments;
 - (iii) that wireless equipment compromises safety;
 - (iv) that pole attachment space is a scarce resource; and
 - (v) that non-discriminatory access requirements would not be violated by THESL’s no wireless policy.

7. The disputed IRs related to the THESL Letter – General IRs 1(h), 1(i) and 3(d) – all elicit information as to the basis upon which THESL made the assertions set out above. THESL alleges that the information sought in these IRs is not relevant but, curiously, is nevertheless protected by privilege (it is trite law that a claim for privilege applies only to relevant documents and, if substantiated, absolves the party from having to make production of the relevant documents). For the reasons set out below, the information sought is relevant to the issue of whether THESL’s “no wireless” policy is warranted. As is also set out further below, THESL’s claim that the THESL Letter and the foundational information supporting it (or not) are privileged is without merit.
8. THESL has alleged (at paragraph 25 of its Response) that CANDAS “has taken [the THESL Letter] out of context and then ‘spun’ together a series of allegations on the basis of an uncharitable and, in THESL’s submissions, an entirely untrue reading of that letter”. THESL then goes on to allege, at paragraph 26 of its Response and in certain of its responses to IRs, that CANDAS has, in effect, misrepresented the THESL Letter as announcing a “no wireless” policy when, in fact, the Letter did not announce such a policy and THESL has no such policy.
9. THESL’s assertion that its Letter did not announce a new “no wireless” policy is contradicted by the evidence – in fact, nothing could be further from the truth. The subject line of the THESL Letter could not be clearer: ***RE: THESL POLICY CONCERNING WIRELESS POLE ATTACHMENTS***. Moreover, the THESL Letter goes on to state as follows:

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.

...

THESL has advised the Board on 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.

10. Consistent with THESL's new, "no wireless" policy, just four days after the THESL Letter, Lawrence Wilde, on behalf of THESL and THESI, advised Public Mobile, in writing, that neither THESL nor THESI was "entering into agreements allowing for access to their poles for the purpose of affixing wireless attachments" (see Application, Tab 16).
11. THESL's revisionism with respect to its "no wireless" policy typifies how THESL has chosen to conduct itself in this proceeding. Although THESL alleges (in paragraph 11 of its Response) that CANDAS and CCC are treating this proceeding "as if it were a commercial trial", in fact, it is THESL that is obfuscating, delaying and complicating at every possible juncture of this case.

(iv) *Is THESL Discriminating?*

12. The second question – whether THESL is discriminating amongst parties who seek to attach equipment to its poles – requires the Board to determine the reasons why TTC, Rogers, Bell and One Zone are allowed to enjoy the advantages of pole attachment while others, such as members of CANDAS, are not. In order to make this determination, the Board needs to know the extent to which and on what terms THESL has allowed telecommunication equipment, including fibre, equipment boxes and antenna, to be attached to its poles (and those THESI poles subject to the MADD Order). The disputed IRs that relate to this question are General IRs 5(e), 10(e), 10(o), 10(p), 10(q) and 32 and Byrne IR 15(g)(iv).
13. In seeking better responses to these particular IRs, CANDAS is not interested in creating "make-work" projects for THESL or violating solicitor-client privilege (a claim that THESL only made in response to the motion, but not in its original objections to the IRs, which were confined to litigation privilege). All CANDAS seeks is basic information that

will allow the Board to determine this case on the basis of a complete, accurate and balanced evidentiary record. THESL should not be allowed to decide what the Board gets to hear and what it doesn't.

14. The balance of this reply: (i) sets the record straight by commenting on the *procedural* and *evidentiary* manner in which THESL has chosen to conduct itself in response to this Motion; (ii) comments specifically on why THESL's position on the disputed IRs is in error; and (iii) clarifies certain minor procedural matters (i.e., which IRs are still in issue following certain concessions made by THESL).

(v) ***THESL's Conduct in the Motion***

15. Procedural Order No. 4, paragraph 2, directed THESL to file "any written submissions on the motions by CCC and/or CANDAS" by November 10, 2011. THESL did not comply with this direction. Instead, it chose to file written submissions (see Tab 1A of the THESL Response) *and new evidence* (see Tab 1B, the "**Labricciosa Affidavit**" which, incidentally, is missing Exhibit "A"). Thus, THESL augmented the evidentiary record *after* each of CANDAS and CCC had already made their arguments on the basis of the existing record. In so doing, THESL "split its case". This is procedurally unfair and should be considered by the Board in the context of any potential costs award.
16. Perhaps more troubling is the remarkable assertion, at paragraphs 18-21 of the Labricciosa Affidavit, that CANDAS submitted applications for wireless equipment that were not contemplated in the Distribution Pole Access Agreement between THESL and DAScom. Mr. Labricciosa refers to such equipment as "Unauthorized DAScom Attachments" and implies that DAScom somehow hoodwinked THESL's "front line permit processing staff" (including Mary Byrne, a senior THESL employee and a witness in this proceeding) into approving wireless attachments that were not authorized by senior management.
17. This "Alice-in-Wonderland" assertion flies in the face of what actually transpired, all of which is set out in detail at paragraphs 6.6 – 6.14 of the Application (CANDAS Motion

Record, pages 86-88). That THESL could not have been in any doubt as to what DAScom intended to attach to its poles is evidenced by a number of uncontroverted facts:

- (i) ExteNet Systems (Canada), Inc. first approached THESL through an e-mail sent on November 13, 2008 by ExteNet's Associate General Counsel. The email, which is reproduced at Tab 12 of the Application and attached for convenience hereto at Tab A, states unequivocally that ExteNet is "interested in attaching wireline *and wireless* infrastructure" to THESL's poles.
- (ii) THESL's response was *not* – "we have a no wireless policy". Instead, THESL responded by providing its "standard pole attachment agreement" and noting that the current attachment rate was \$22.35 per pole (in accordance with the CCTA Decision). That response, in the form of an e-mail dated November 14, 2008 from Victoria Iacovazzi (THESL's Senior Solicitor), is reproduced at Tab 13 of the Application and attached for convenience hereto at Tab B. CANDAS notes that Lawrence Wilde, THESL's Vice President and General Counsel, was copied on the e-mail.
- (iii) As set out at paragraph 6.9 of the Application, DAScom and ExteNet constructed a full-sized prototype of the proposed node (i.e., wireless) installations which THESL and THESI inspected and approved. A photo of the pole prototype is reproduced at Tab 14 of the Application and attached for convenience hereto at Tab C.
- (iv) As set out at paragraph 6.10 of the Application, on July 20, 2009 representatives of ExteNet and Public Mobile met with THESL's then President and Chief Executive Officer, David O'Brien, to discuss the Toronto DAS Network. It was clearly understood that Public Mobile was a wireless carrier. There was no confusion as to why THESL's poles were so important to the Toronto DAS Network. Notably, Mr. O'Brien (THESL's then most senior directing mind) expressed his support for the new wireless network. Brian O'Shaughnessy, Public Mobile's Chief

Technology Officer, wrote a letter to Mr. O'Brien, following the July 20th meeting, to thank him for his support. A copy of this letter was filed in response to THESL IR 14 and is attached for convenience hereto at Tab D.

- (v) Finally, the Labricciosa Affidavit refers, at paragraphs 22-24, to the "Public Mobile Meeting" of January 13, 2010 that involved Mr. O'Brien's successor, Anthony Haines (among others). As is admitted in the Affidavit, THESL was well aware that Public Mobile was intending to use THESL's poles to launch a new wireless service. In this respect the Labricciosa Affidavit is internally inconsistent – after suggesting in paragraph 21 that lower level employees did not understand that they were dealing with "unauthorized wireless attachments," two paragraphs later it is admitted that THESL's CEO was well aware of the nature of the attachments.
- (vi) Against this factual context, it is to be noted that the Distribution Pole Access Agreement, itself, belies the term "Unauthorized DAScom Attachments" sworn to by Mr. Labricciosa. The term "Attachment" is defined as "*any ... equipment ... owned ...or controlled... by [DAScom] that is Affixed to the poles of [THESL] ... including, without limitation...* [followed by a non-exhaustive list of examples]. (Mr. Labricciosa does not accurately reproduce those important words "including, without limitation" in paragraph 18 of his Affidavit.) Attached at Tab E are excerpts from the Agreement (which was filed in response to Board Staff IR 8 (Schedule Board Staff 8.1-1).
- (vii) In addition to incorrectly reproducing the definition of "Attachment" in his Affidavit, Mr. Labricciosa also incorrectly refers to a February 5, 2010 meeting in paragraph 27 of his Affidavit. There was no such meeting. Instead, on that date, Mr. Wilde on behalf of THESL and THESI wrote letters to DAScom indicating that THESL and THESI, would continue to

entertain applications for pole attachment applications in accordance with the applicable pole attachment agreement. These letters came after the parties met on January 22, 2010 to discuss THESL's policies with respect to wireless telecommunications attachments (the information in this sub paragraph is set out in greater detail in paragraphs 7.6 and 7.7, as well as Tab 15 of the Application – see Tab F hereto). Shortly put, there was no doubt that THESL understood that the object of DAScom's permit applications were wireless telecommunications attachments.

18. In the light of the foregoing, THESL's evidence regarding "Unauthorized DAScom Attachments" is not credible and should not be given any weight by the Board on these Motions. At all times, senior management of THESL, including Mr. O'Brien (and, subsequently, Mr. Haines) as well as Mr. Wilde were fully cognizant that the attachments proposed by DAScom were wireless. Moreover, by their conduct, these individuals approved these wireless attachments, at least until the THESL Letter. Any suggestion to the contrary is simply not defensible. CANDAS further submits that the Board should make it clear that Mr. Labricciosa's Affidavit does not form part of the record in this proceeding as it pertains to the Application. To the extent the Board does consider this evidence in the context of the Application (as opposed to only these Motions), CANDAS reserves the right to cross-examine Mr. Labricciosa before the Panel hearing the Application.

(vi) ***Outstanding IRs***

General IRs 1(h), 1(i) and 3(d)

19. General IRs 1(h), 1(i) and 3(d) were all refused, principally on the ground of litigation privilege (and more latterly, solicitor client privilege). In its written submission, at paragraph 98, THESL claims that the THESL Letter "was prepared by THESL and its counsel for the dominant purpose of anticipated litigation and that all of the information sought by CANDAS in these interrogatory [*sic*] is protected by litigation privilege...". Assuming without conceding that litigation privilege may have attached to the THESL Letter (and any foundational *fact* information upon which it was prepared) at some point,

when THESL transmitted it to the Board, any such privilege was waived. (See excerpt from Sopinka's Law of Evidence in Canada, 3rd ed. at §14.122, Tab G hereto.)

20. In this context it is important to note that THESL included the following conclusory language at the end of its Letter:

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.* (emphases added).

21. Two significant consequences flow from the foregoing. First, there can be little doubt that THESL waived any privilege pertaining to its new "no wireless" policy. THESL deliberately and unambiguously decided to permit stakeholders (including the Board) to examine whether the policy is "sound" and "operates in the best interests of rate payers". Having chosen to submit its policy to public scrutiny, THESL is now estopped from claiming litigation privilege, for the reasons set out in the passage from Sopinka, *supra*.
22. On the basis of the record to date, THESL's claim of privilege is simply untenable and should be dismissed. Alternatively, THESL should be required to submit a proper list of all documents over which it claims privilege (including the class of privilege) setting out the date of creation, transmission, author, recipient(s), subject matter and type of document, all of which would permit an objective evaluation of any claim for privilege.
23. The second consequence is that, by inviting public scrutiny of its "no wireless" policy, THESL is also estopped from arguing that because the THESL Letter was not filed as part of THESL's evidence in this proceeding, no one can ask questions about it (see Response, paragraph 95). This argument is specious. In the THESL Letter, THESL offered to participate in any proceeding should there be any concerns "around THESL's

recent policy in this area”. Such a proceeding is now underway and the IRs are relevant to the policy now in issue.

General IR 32 and 10(e)

24. General IR 32 asks for information relevant to the One Zone and TTC pole attachments and other telecommunications equipment (see CANDAS Motion Record, p. 25). The response to IR 32(a) – that THESI is not a party to this proceeding – is insufficient given the MADD Decision. Clearly, THESI poles that would now be deemed distribution poles are subject to this proceeding. That the One Zone network apparently resides on such poles confirms the relevancy of the information requested.
25. THESL’s original response to IR 32(b) – a plethora of cross-references to other IRs – is not adequate, as the cross-references provided are unresponsive to the question posed in General IR 32(b). IR 32(b) simply asks for the number of THESL poles, including affiliates’ poles, that are occupied by TTC, One Zone and other telecommunications equipment. None of the cross-referenced answers to IRs provides the requested information. While CANDAS agrees that cross-referencing is acceptable in certain instances, these cross-references are unresponsive. A clear answer is required.
26. CANDAS notes that THESL possesses relevant databases of information² and that, presumably, based on the information in these databases, it has already provided information in relation to the number of wireline NDAs³ and non-wireline NDAs⁴ on its poles, as well as ample information on the wireless electricity distribution attachments⁵ on its pole network. Given the amount of information that THESL apparently possesses on the current uses of its poles, the requested information in General IR 32(b), which simply asks for the number of poles with TTC, OneZone, and other telecommunications attachments, respectively, should be readily available to THESL.
27. As to General IR 10(e) (“What percentage of poles currently owned or controlled by THESL have wireless attachments? Please provide a breakdown by pole type and

² See THESL Response at para. 114, fifth line.

³ See THESL General IR 6(a), found at THESL IRs, Tab 5.3, Schedule 6.

⁴ See THESL Byrne IR 15(f), found at THESL IRs, Tab 5.1, Schedule 15

⁵ See THESL Byrne IR 15(g), found at THESL IRs, Tab 5.1, Schedule 15.

identify the number or type of wireless attachments.”), THESL’s updated response⁶ cross references Tab 5.3, Schedule 6. However, this Tab merely provides information regarding the number of NDA attachments, while the question as posed requested identification of wireless attachments. THESL has indicated that the DAScom wireless attachments are the only wireless attachments on its poles, when the record is clear that there is other wireless equipment, i.e., One Zone and TTC, on THESL’s poles (or THESI poles subject to the MADD Decision). CANDAS is unable to determine what the answer to General IR 10(e) is on the basis of Tab 5.3, Schedule 6 and requests that THESL provide a clear response to General IR 10(e).

***Byrne IR 15(g)(iv)*⁷ and *THESL General 5(e)*⁸, *10(o)*, *(p)*, *(q)*⁹**

28. In Byrne IR 15(g), CANDAS has requested information pertaining to wireless attachments to THESL’s poles for purposes related to electricity distribution. THESL has provided extensive information on the number and geographic location of both SCADA equipment and certain radio equipment, but has failed to respond to subparts of the interrogatory pertaining to the weight and dimensions of the different types of non-NDA wireless attachments, the location on the pole of such attachments and the attachment method of such attachments. In its written submissions, THESL has argued that the information requested is “simply not relevant to the matters at issue in this proceeding and that producing it would be unduly onerous relative to its probative value, if any.”¹⁰
29. The relevance of the information requested is that it would help the Board understand what the engineering dimensions are of current attachments and how they compare to the equipment associated with a typical DAS node installation. If they are similar, why have members of CANDAS effectively been kicked off the poles, but not other attachers? This information would also assist the Board in understanding the assertion in the THESL Letter that “there are substantial physical differences between wireline and wireless

⁶ See THESL Response, paras. 5 and 103.

⁷ Found at THESL IRs, Tab 5.1, Schedule 15 and CANDAS Motion Record filed 3 November 2011, Tab 3, pp. 28-45, viz. pp. 29 and 32.

⁸ Found at THESL IRs, Tab 5.1, Schedule 5 and CANDAS Written Submissions filed 9 November 2011, Tab 6, pp. 31-36.

⁹ See CANDAS Motion Record, p. 18.

¹⁰ THESL Response at para. 112.

attachments”. The information is readily available to THESL since all attachers (including THESL or THESL affiliates) are required to submit detailed engineering drawings of proposed pole attachments as part of THESL’s pole permitting and attachment process.¹¹

30. In General IR 5(e), CANDAS asked whether there are any third parties that currently have any wireless attachments on THESL poles and, if so, for copies of applicable agreements and a description of certain particulars of such third-party wireless attachments, broken down by attaching third party. In its original response to this interrogatory, THESL argued that it disagreed with the premise of the question, then provided a list of four obviously non-responsive cross-references to other THESL IRs.
31. Then, in its Response, THESL clarified that the basis of its refusal to this question was that THESL’s response to CANDAS “Tab 5.1 Schedule 15 ... together with Tab 5.3 Schedule 6, provides the best information available on the number of non-distribution attachments to THESL poles including wireless attachments” and that requiring THESL to provide further information would be unduly onerous.
32. THESL’s response remains confusing in that the cross referenced schedules are unresponsive. Further, as previously noted in relation to Byrne IR 15(g)(iv), information relating to the types, weights, dimensions and physical configuration of attachments, such as the wireless attachments referred to in General IR 10(e), should be readily available to THESL from its permitting and approval process for attachments.
33. CANDAS General IRs 10(o), 10(p), 10(q) all relate to the extent to which THESL or THESI (by virtue of the MADD Order as defined in paragraph 1.0(d) of the Application) have permitted third parties (or themselves) to use their poles for the purposes of attachments. THESL has argued that the requested information is not relevant or, because it involves THESI, is beyond the scope of this proceeding or is otherwise akin to a fishing expedition (see Response, para. 113).

¹¹ See Byrne IR 1 and Starkey IR18(a) to (c).

34. THESL's arguments are not persuasive. First, the terms of any attachment agreement regarding One Zone between THESL and Toronto Hydro Telecom (as it then was) are clearly relevant to the issues raised in this proceeding, i.e. discrimination and undue preference. That One Zone is now operated by another entity is not relevant. The issue is – how does the entity now operating One Zone get to use the poles, and on what terms?

(vii) *Clarifications and Confirmations*

35. THESL has now conceded that it is obliged to provide proper answers to THESL General IRs 4(a) and (f) and Yatchew IR 20(b). CANDAS looks forward to receiving THESL's responses as soon as possible, given that they have been outstanding for many months. On this basis, CANDAS no longer seeks the Board's assistance in this regard.
36. CANDAS also wishes to clarify that the object of its motion were THESL General IRs 10(e) and 32 (not *Starkey* IRs 10(e) and 32). It appears, THESL was able to determine this without any assistance from CANDAS. Further, as indicated in paragraph 1 of its Amended Notice of Motion, CANDAS has withdrawn its request regarding CANDAS General IR 2.

(viii) *Conclusion*

37. The outstanding CANDAS interrogatories are as follows: CANDAS General IRs 1(h), 1(i), 3(d), 5(e), 10(e), (o), (p) and (q), 32 (a) and (b) and CANDAS Byrne IR 15(g)(iv). For these reasons and those set out in its original submissions, CANDAS asks that THESL be compelled to provide responsive answers to these IRs. In the event the Board agrees with CANDAS, CANDAS asks for its costs of this Motion or, alternatively, an opportunity to make brief submissions on the issue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 22, 2011

(signed) Michael Schafler

Michael Schafler
of Counsel to CANDAS

(signed) Helen Newland

Helen Newland
of Counsel to CANDAS

TAB A

From: Natasha Ernst [mailto:nernst@extenetsystems.com]
Sent: Thursday, November 13, 2008 9:41 AM
To: regulatoryaffairs@torontohydro.com
Subject: Toronto Hydro Utility Structure Attachment

Dear Toronto Hydro,

I work for a telecommunications company that is interested in attaching wireline and wireless infrastructure to utility structures owned by Toronto Hydro Electric System Ltd in the Toronto area. In order to assess the feasibility of my company's project, I need to speak with someone at Toronto Hydro regarding your terms and conditions.

If you are not the proper person, please pass this request along to the appropriate department that handles Toronto Hydro's pole attachment requests.

Thank you in advance for your attention to this email.

Best regards,

Natasha Ernst
Associate General Counsel



3030 Warrenville Rd, Ste 340
Lisle, IL 60532
Office: 630.505.3844
Mobile: 206.419.9800

The information in this email message is confidential and may be subject to attorney-client or attorney work product privileges. This message and the information contained herein are intended solely for the addressee(s). Access to this message or any attachment hereto by anyone else is unauthorized. If you are not the intended recipient of this message, any use, disclosure, copying, distribution or other action you may take or omit to take with respect to it or in reliance upon it, is prohibited and may be unlawful. If you have received this message in error, please notify the sender by reply email and immediately delete all copies of the message and any attachments from your computer system.

04/03/2010

TAB B

-----Original Message-----

From: Victoria Iacovazzi [mailto:viacovazzi@torontohydro.com]
Sent: Friday, November 14, 2008 9:47 AM
To: nernst@extenetsystems.com
Cc: Lawrence Wilde
Subject: Re: Fwd: Toronto Hydro Utility Structure Attachment

Application of CANDAS
Filed 04/21/2011
Tab 13
Page 174 of 1378

Dear Ms. Ernst,

Further to your enquiry below, please find attached our standard pole attachment agreement. Please note in particular section 11 regarding Fees. The current Pole Rental Rate is \$ 22.35 per pole in use.

Please advise if we can be of any further assistance.

Regards,

Victoria Iacovazzi

This communication may be solicitor/client privileged and may contain confidential information intended only for the person(s) named above. Any other distribution, copying or disclosure is strictly prohibited. If you have received this communication in error, please notify the sender immediately by telephone and delete the original transmission.

>>> "Natasha Ernst" <nernst@extenetsystems.com> 11/13/08 10:40 am >>>

Dear Toronto Hydro, I work for a telecommunications company that is interested in attaching wireline and wireless infrastructure to utility structures owned by Toronto Hydro Electric System Ltd in the Toronto area. In order to assess the feasibility of my company's project, I need to speak with someone at Toronto Hydro regarding your terms and conditions. If you are not the proper person, please pass this request along to the appropriate department that handles Toronto Hydro's pole attachment requests. Thank you in advance for your attention to this email. Best regards, Natasha Ernst Associate General Counsel 3030 Warrenville Rd, Ste 340 Lisle, IL 60532 Office: 630.505.3844 Mobile: 206.419.9800 The information in this email message is confidential and may be subject to attorney-client or attorney work product privileges.

This message and the information contained herein are intended solely for the addressee(s). Access to this message or any attachment hereto by anyone else is unauthorized. If you are not the intended recipient of this message, any use, disclosure, copying, distribution or other action you may take or omit to take with respect to it or in reliance upon it, is prohibited and may be unlawful. If you have received this message

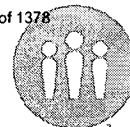
1

in error, please notify the sender by reply email and immediately delete all copies of the message and any attachments from your computer system.

Victoria Iacovazzi
Senior Solicitor
Legal Services
Toronto Hydro Corporation
14 Carlton Street, 6th floor
Toronto, ON M5B 1K5
Tel: (416) 542-2954 Fax: (416) 542-2683
mail: viacovazzi@torontohydro.com

This communication may be solicitor/client privileged and may contain confidential information intended only for the person(s) named above. Any other distribution, copying or disclosure is strictly prohibited. If you have received this communication in error, please notify the sender immediately by telephone and delete the original transmission.

TAB C

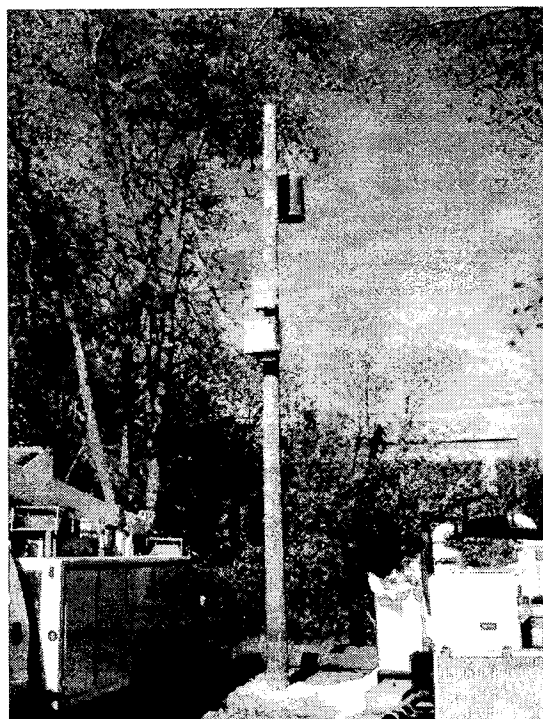


Public Mobile deployment uses Distributed Antenna System architecture

DAS architecture uses fiber distribution to amplifiers and antennas on utility poles similar to cable system deployments. Installation using contractors experienced with Toronto Hydro poles.



Actual installation in Rhode Island



Demonstration installation in Toronto

TAB D

Question:

14. *Reference: p. 18, para. 6.10*

CANDAS states that "On July 20, 2009, ExteNet and Public Mobile met with David O'Brien... to discuss the Toronto DAS Network project, including Public Mobile's new wireless network. Mr. O'Brien expressed his support for the new wireless network."

- (a) Please provide anything in writing that CANDAS has to support this statement.

Response:

- (a) Attached as Schedule 14(a)-1, please find a copy of the letter sent by Mr. O'Shaughnessy to Mr. O'Brien immediately following the meeting.

July 29, 2009

David O'Brien
President and CEO
Toronto Hydro Corporation



Dear David,

Let me start by thanking you for meeting with Alek Krstajic on July 21 and for your support of Public Mobile and our launch plans.

We have already seen positive progress as a result of that meeting with the Structural Services Agreement (SSA) terms with Toronto Hydro being agreed to and an expectation that the agreement will be signed within 1 week. Further, Girma Tewold of your team is currently exploring how to add additional resources to the approval process for our build.

We are also working with the Toronto Hydro Energy Systems to complete a similar SSA for installations on street and traffic light poles prior to Sept 4, 2009. We will work with them to see if an earlier approval date is possible.

The main outstanding issue for discussion with your team is to explore how we could streamline the process to allow for faster and approval of installations. It is worth noting that the City of Montreal and Hydro Quebec have adopted such a process to simplify the load on their resources while maintaining their high quality standards for all installations by DASCom and Public Mobile. We would be happy to share their practices with your team and explore what would meet your needs.

As we progress through the various activities above and work to streamline the Toronto Hydro approval process, it would be helpful to have a senior level contact within your organization to have regular check point discussions. Could you please let me know who you would like us to work with going forward?

Thank you very much for your support, and please call me if you have any questions.

Brian O'Shaughnessy
CTO
Public Mobile Inc.
416-605-2442 (cell)
130 Merton St, suite 600
Toronto, Ontario

TAB E

AGREEMENT
FOR LICENCED OCCUPANCY
of
POWER UTILITY DISTRIBUTION POLES
between
TORONTO HYDRO-ELECTRIC SYSTEM LIMITED
and
DAScom Inc.

Pole Attachment Agreement: Revision Date November 20, 2006

“Annual Pole Rental Fee” is defined in Section 11.02.

“Applicable Laws” is defined in Section 6.01.

“Application” means a written application submitted to the Owner by the Licensee requesting permission from the Owner to Affix its Proposed Attachments in accordance with the terms of this Agreement, in particular Section 7.07.

“Approval” means the written permission granted by the Owner, to the Licensee, for the Licensee to Affix its Proposed Attachments, as specified in the Permit.

“Attachment” means any material, apparatus, equipment or facility owned, in full or in part, or controlled and maintained by the Licensee that is Affixed to the poles of the Owner or In-span, including, without limitation:

- (i) Overlashed Cable;
- (ii) Service Drops Affixed directly to the Owner’s poles;
- (iii) Service Drops Affixed In-span to a Strand or Messenger supported by poles of the Owner;
- (iv) Attachments owned by the Licensee that emanate from a cable not owned by the Licensee;
- (v) Messenger or Strand;
- (vi) Cable Riser/Dips; and
- (vii) Power Supply/Rectifiers; and
- (viii) other equipment as may be approved in writing by Owner, in its sole discretion.

“Bonding” means the permanent connection of the Licensee’s Messenger or Strand and metallic cable sheaths to the Owner’s power system neutral.

“Business Day” means any day other than a Saturday or Sunday or a civic or statutory holiday in the Province of Ontario.

“Cable” means fiber optic cable, coaxial cable, or any other cable owned by the Licensee, in whole or in part, used to provide Telecommunications Services or to support cable used to provide Telecommunications Services.

“Cable Riser/Dip” means a Cable owned by the Licensee, in whole or in part, attached along the vertical position of the pole to allow the Cable to change its vertical position from/to an underground route to/from an overhead route.

“Clearance Pole” means a single pole of the Owner used by the Licensee solely to establish and maintain clearance for Service Drops.

“Communications Space” means a vertical space on the pole, usually zero point six (0.6) metres, within which communications attachments are made.

TAB F



**toronto hydro
energy services**

14 Carlton St.
Toronto, Ontario
M5B 1K5

Telephone 416.542.2896
Facsimile 416.542.2540
www.torontohydro.com

Lawrence Wilde
Vice-President & General
Counsel

February 5, 2010

DAScom Inc.
27 Fima Crescent
Toronto Ontario
M8W 3R1

Attention: Oliver M. Valente

Re: Agreement for Licensed Occupancy of Support Structures ("Agreement")

Further to our meeting, please be advised that Toronto Hydro Energy Services Inc. will continue to entertain applications for permits and process those applications in accordance with the terms of the Agreement and to exercise its discretion as described in the definitions of Attachment and Proposed Attachment as it relates to wireless and other equipment.

Yours truly,

Lawrence D. Wilde
LDW/rs

c.c. Ross W. Manire
President and Chief Executive Officer, ExteNet Systems Inc.

George Vinyard
General Counsel, ExteNet Systems Inc.



**toronto hydro
electric system**

14 Carlton St.
Toronto, Ontario
M5B 1K5

Telephone 416.542.2896
Facsimile 416.542.2540
www.torontohydro.com

Lawrence Wilde
Vice-President & General
Counsel

February 5, 2010

DAScom Inc.
27 Fima Crescent
Toronto Ontario
M8W 3R1

Attention: Oliver M. Valente

Dear Mr. Valente:

**Re: Agreement for Licensed Occupancy of Power Utility Distribution Poles
("Agreement")**

Further to our meeting, please be advised that Toronto Hydro-Electric System Limited will continue to entertain applications for permits and process those applications in accordance with the terms of the Agreement and to exercise its discretion as described in the definitions of Attachment and Proposed Attachment as it relates to wireless and other equipment.

Yours truly,

Lawrence D. Wilde
LDW/rs

c.c. Ross W. Manire
President and Chief Executive Officer, ExteNet Systems Inc.

George Vinyard
General Counsel, ExteNet Systems Inc.

TAB G

THE LAW OF EVIDENCE IN CANADA

THIRD EDITION

Alan W. Bryant

Justice of the Superior Court of Justice for Ontario

Sidney N. Lederman

Justice of the Superior Court of Justice for Ontario

Michelle K. Fuerst

Justice of the Superior Court of Justice for Ontario



LexisNexis®

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.²¹¹

(b) *Voluntary Waiver*

§14.121 It was once thought that certain requirements should be established in order for waiver of the privilege to be established; for example, the holder of the privilege must possess knowledge of the existence of the privilege which he or she is forgoing, have a clear intention of waiving the exercise of his or her right of privilege, and a complete awareness of the result.²¹² But, as will be pointed out, other considerations unique to the adversarial system, such as fairness to the opposite party and consistency of positions, have overtaken these factors.

§14.122 An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication.²¹³ Thus, the Court in *Frind v. Sheppard*²¹⁴ held that a client had waived the privilege which attached to letters passing between himself and his solicitor because they had been read into the record in a previous proceeding. In other cases, waiver was said to have taken place when documents over which privilege was claimed had been disclosed in proceedings in another jurisdiction²¹⁵ or were referred to in an Affidavit of Documents and had been inspected.²¹⁶ Similarly, if a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject matter.²¹⁷ Moreover, if the privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered.²¹⁸

²¹¹ *Ibid.*, at 875 (S.C.R.).

²¹² *Western Canada Investment Co. v. McDiarmid*, [1922] 1 W.W.R. 257, at 261, [1922] S.J. No. 55 (Sask. C.A.), *per* Lamont J.A.; see also *R. v. Perron* (1990), 54 C.C.C. (3d) 108, at 120, [1990] Q.J. no 274 (Que. C.A.).

²¹³ There will be waiver if one simply asserts an intention to disclose an otherwise privileged document for settlement purposes: see *Marlborough Hotel Co. v. Parkmaster (Canada) Ltd.* (1959), 17 D.L.R. (2d) 720, [1959] M.J. No. 51 (Man. C.A.).

²¹⁴ [1940] O.W.N. 135 (Ont. Master).

²¹⁵ *Western Assurance Co. v. Canada Life Assurance Co.* (1987), 63 O.R. (2d) 276, [1987] O.J. No. 1153 (Ont. Master).

²¹⁶ *Re Briamore Manufacturing Ltd.*, [1986] 1 W.L.R. 1429 (Ch.); *Kennedy v. Diversified Mining Interests (Canada) Ltd.*, [1948] O.W.N. 798, [1948] O.J. No. 272 (Ont. H.C.J.).

²¹⁷ *Smith v. Smith*, [1958] O.W.N. 135 (Ont. H.C.J.). If the solicitor signs an affidavit in place of the client, the privilege is considered waived: *Casino Tropical Plants v. Rentokil Tropical Plant Services Ltd.* (1998), 161 D.L.R. (4th) 750, [1998] B.C.J. No. 1098 (B.C.S.C.).

²¹⁸ *Doland (George) Ltd. v. Blackburn, Robson, Coates & Co. (a firm)*, [1972] 3 All E.R. 959 (Q.B.).