

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Canadian Distributed Antenna Systems Coalition for certain orders under the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF a Notice of Motion dated December 22, 2011 filed by Toronto Hydro-Electric System Limited for further and better answers to specified interrogatories.

**WRITTEN SUBMISSIONS OF
TORONTO HYDRO-ELECTRIC SYSTEM LIMITED**

(Made Pursuant to Procedural Order No. 7)

A. BACKGROUND, RELIEF REQUESTED AND OVERVIEW

1. Toronto Hydro-Electric System Limited (“THESL”) filed a notice of motion dated December 22, 2011 with the Ontario Energy Board (the “Board”) seeking an order under section 23.03 of the Board’s *Rules of Practice and Procedure* requiring the Canadian Distributed Antenna Systems Coalition (“CANDAS”) to provide further and better answers to the following interrogatories: THESL interrogatories 1(d) and (e), 18(a), 19(d) and 50, as well as CEA interrogatories 19(b), 33 and 60 (collectively, the “Disputed Interrogatories”).

2. THESL and CEA filed the Disputed Interrogatories on August 9, 2011 and CANDAS responded to them before CANDAS had opportunity to consider the specific concerns raised by THESL and the CEA in the intervenor evidence filed on September 2, 2011. In an effort to save the Board’s and parties’ time by not bringing unnecessary motions, THESL first asked CANDAS

to reconsider many of the Disputed Interrogatories in light of the THESL and CEA evidence during the technical conference held November 4, 2011.¹

3. On November 16, 2011, in response to Undertaking JTC1.3, while CANDAS provided limited updates to its original undertaking responses, in respect of the Disputed Interrogatories that were the subject of this undertaking and are the subject of this motion, it stated:

“CANDAS maintains its objections to the remaining interrogatories identified by THESL.”

(a) The Information Sought is Relevant and Necessary

4. THESL submits that the information and material sought in the Disputed Interrogatories is relevant to the matters in issue in this proceeding and is necessary for the Board and parties to conduct a fair and complete examination of the record. Without this information, the Board and parties will be prejudiced by an inability to complete the level of analysis that is required by the matters in issue in this application.

5. In short, the Disputed Interrogatories sought (from ExteNet and Public Mobile) information regarding, and related to, comparable competitive market rates that they have paid to attach wireless attachments in other jurisdictions and in Toronto on non-utility poles.

(i) Relevant and Necessary Because of the Relief Sought by CANDAS

6. THESL submits that the information sought by way of the Disputed Interrogatories is relevant given the relief that CANDAS seeks in this proceeding, and is necessary for the Board to make an informed decision with respect to that relief.

7. In particular, CANDAS has applied for an order of the Board to impose a regulated price of \$22.35 per pole per year on distributors in respect of wireless attachments, and in the alternative, CANDAS seeks an order mandating access and imposing terms and conditions of access. CANDAS repeatedly refused to respond to the Disputed Interrogatories that were

¹ Technical Conference Transcript, p. 53-54.

intended to assist the Board in assessing whether this rate is consistent with market rates otherwise paid for similar attachments in the competitive wireless siting market.

8. The relevance of the information sought by the Disputed Interrogatories is brought further into focus given the presence of evidence on the record that there is a significant gap between the Board-regulated rate of \$22.35 and the competitive market rates for wireless attachments. For example, THESL has filed the evidence of industry expert Mr. Michael Starkey, who at pages 53-55 of his affidavit states that:

“Rates clearly vary dramatically depending upon the location, elevation, anticipated coverage available, access to power/fiber and numerous other factors. Indeed, consultants who negotiate arrangements for, and management of, these types of leases abound. Unfortunately, as is the case in competitive markets, rates, terms and conditions agreed to between suppliers and consumers are often confidential or difficult to obtain.

[...]

In summary, prices differ substantially depending upon the variables I described above, but range from \$500-\$800 per month on the low side to \$5,000 per month on the higher side for the more traditional tower and rooftop access. For example, the City of Chicago currently assess fees of \$1,654 and \$3,307 per pole, per year for use of light poles and traffic signals, respectively.”

9. For the proposed 780 node Toronto DAS Network, the difference between these competitive market rates and subsidized rates – especially when annualized – is vast. Put simply, THESL submits that CANDAS members are seeking to profit from regulatory arbitrage by gaining a direct subsidy from THESL and an indirectly subsidy from THESL’s ratepayers.

10. THESL submits that by refusing to answer the Disputed Interrogatories, CANDAS is making it difficult for the Board to consider whether the Board-approved rate of \$22.35 per pole per year is grossly insufficient when compared against competitive wireless attachment rates.

(ii) Relevant and Necessary Because of Board Findings

11. THESL further submits that the information sought by way of the Disputed Interrogatories is directly relevant as a result of the Board’s recent clarification of the matters that

are in issue in this proceeding. In particular, the Board determined in its Decision and Order dated December 9, 2011 on the CANDAS and CCC motions (regarding THESL's interrogatory responses) that pricing information with respect to wireless attachments is squarely relevant to this proceeding. The Board held that:

- “information related to all attachments which facilitate wireless communications in any form is relevant to the proceeding” (emphasis added); and
- “The Board will order THESL to...identify the price for [third party] wireless attachments [on its distribution poles].”²

12. THESL submits that the Board's clarification that pricing information with respect to wireless attachments is squarely relevant to this proceeding dovetails with the Board's description of the issues before it. In particular, in the December Interrogatories Motion Decision, the Board explained that:

“In summary, the issues before the Board are as follows:

1. Does the CCTA Decision apply to the attachment of wireless equipment, including DAS components, to distribution poles?”
2. If the answer to 1 is no, then should the Board require distributions to provide access for the attachment of wireless equipment, including DAS components, to distribution poles?
3. If the Board requires distributors to provide access for the attachment of wireless equipment, including DAS components, under what terms and conditions should those arrangements be governed?”³

13. As discussed above, THESL submits that these issues bring to the fore the fact that in deciding on the ultimate issues in this proceeding, the Board must necessarily consider whether the current Board-approved attachment rate should apply to wireless attachments. Indeed, the Board stated as much in a September 2011 letter in this proceeding:

² Decision and Order of the Board dated December 9, 2011 (the “December Interrogatories Motion Decision”), p. 9.

³ December Interrogatories Motion Decision, p. 2-3.

“The Board is of the view that the question of whether the current Board-approved attachment rate applies to wireless attachments is appropriately part of this proceeding.”⁴

14. THESL submits that to answer the “question of whether the current Board-approved attachment rate applies to wireless attachments”, the Board would benefit from information regarding market rates otherwise paid for similar attachments in the competitive wireless siting market.

15. A corollary of this point is that, for the reason that the Board has determined that the price charged for wireless attachments is relevant to this proceeding, THESL submits that the information ordered produced by way of the December Interrogatories Motion Decision should not be considered by the Board in a vacuum.

16. In short, if the Board seeks greater context for information, including pricing, with respect to wireless attachments, THESL submits that the Board should have the benefit of a complete sample of information available to inform its decision-making role in this proceeding. Information about what THESL charges for other types of attachments is only half of the story. The other half of the story is information regarding the competitive market rate charged for wireless pole attachments.

(b) Fairness Favours Production of the Information Sought

17. In addition to the information sought by the Disputed Interrogatories being relevant to the matters in issue in this proceeding and necessary to the Board and parties being able to conduct a fair and complete examination of the record, THESL submits that the principle of fairness favours production of this information.

18. As described above, by way of the December Interrogatories Motion Decision, the Board ordered THESL to produce additional information – including documents such as contractual agreements as well as pricing information – on the basis that the additional information related to

⁴ September 14, 2011 letter from Board, p. 3.

“attachments which facilitate wireless communications in any form” and is therefore “relevant to the proceeding”.⁵

19. Accordingly, given that the additional information sought by way of the Disputed Interrogatories – including documents such as contractual agreements as well as pricing information – constitutes information related to “attachments which facilitate wireless communications in any form”, THESL submits that it is therefore “relevant to the proceeding”.

20. A fair application of the Board’s determination of what is relevant in this proceeding favours the Board ordering CANDAS to answer the Disputed Interrogatories, especially when one considers that CANDAS is the applicant in this proceeding and so bears the onus of discharging the burden of proof for the relief that it seeks.

B. SPECIFIC DISPUTED INTERROGATORIES

21. Below THESL sets out its submissions on the specific Disputed Interrogatories, separated into two groups of similarly-themed interrogatories.

(a) Information on the Macro Cell Alternative to the Toronto DAS Network That Public Mobile is Currently Using

22. The first group of interrogatories relate the wireless attachment rates, terms and conditions accepted by Public Mobile in creating a Toronto wireless network that is a direct substitute for the proposed Toronto DAS Network. This group consists of THESL interrogatories 1(d), 1(e), and 50 and CEA interrogatories 19(b) and 60.

23. By way of THESL interrogatory number 1, THESL asked CANDAS:

“(d) What is the total cost being paid by Public Mobile for use of the Macro Cell Site alternative for coverage in the exact service area that is proposed to be covered by the Toronto DAS Network?

⁵ December Interrogatories Motion Decision, p. 9.

(e) What is the difference in total cost between Public Mobile's "Macro Cell Site" alternative currently being used by Public Mobile and the forecasted costs of the Toronto DAS Network proposed by ExteNet and DAScom?"

24. As stated in the preamble to this interrogatory, THESL based this question on the CANDAS' evidence, and in particular, its statements that:

"Canadian carriers who require access to power poles to enable their wireless networks are now effectively precluded from entering the market."

and

"Public Mobile decided to launch its new Toronto service using "temporary" Macro Cell Sites."

25. CANDAS' response to this interrogatory was:

"The information requested is not relevant to the issues raised by the Application"

26. Similarly, by way of THESL interrogatory number 50, THESL asked CANDAS to:

"(a) Please identify the precise date on which Public Mobile made this decision to switch to its Macro Cell Site strategy.

(b) Please provide the location of each of the "Macro Cell Sites", and please indicate whether and to what extent each site is located on a roof top, balcony, special-purpose structure or other location (specify if other).

(c) Regarding the response to (b), please also provide the coverage area for each site and describe the propagation characteristics of the antennas used at each site.

(d) Please identify the date on which Public Mobile began to utilize the traditional Macro Cell Sites.

(e) Please provide copies of the agreements entered into by Public Mobile associated with the said Macro Cell Site strategy including pricing paid by Public Mobile for these attachments.

(f) Please provide the particulars that demonstrate whether and to what extent the coverage area intended to be supported by the Toronto DAS Network (as originally conceived) differs from the coverage area supported by the Macro Cell Sites, including all reports, analyses, studies, working papers, memoranda, correspondence, and other documents

(g) Please provide the particulars that describe the costs that Public Mobile incurred to install the Macro Cell Sites, including all reports, analyses, studies, working papers, memoranda, correspondence, and other documents.

(h) Please provide the particulars that describe the costs Public Mobile incurred to upgrade "each temporary Cell Site to a permanent structure", including all reports, analyses, studies, working papers, memoranda, correspondence, and other documents.

(i) Please describe the extent to which each of the permanent antenna towers, sites or structures discussed are shared with other wireless providers in Toronto.

(j) Please provide the location of each permanent structure and indicate whether the site is located on a roof top, balcony, special purpose structure or other location (specify if other).

(k) Regarding the response to (i), please provide the coverage area for each site and describe the propagation characteristics of the antennas used at each site.

(l) Please provide the particulars that demonstrate whether and to what extent the coverage area intended to be supported by the Toronto DAS Network as originally conceived differs from the coverage area supported by the permanent structures, including all reports, analyses, studies, working papers, memoranda, correspondence, and other documents

(m) Please provide the particulars that demonstrate whether and to what extent the call carrying and data capacities intended to be supported by the Toronto DAS Network (as originally conceived) differs from the call carrying and data capacities supported by the permanent structures – please include with such particulars all reports, analyses, studies, working papers, memoranda, correspondence, and other documents.

(n) Regarding the response to (l), please also identify and describe the extent to which Public Mobile is currently capacity-constrained in that it is unable to provide call carrying and/or data related services to its current customer base in Toronto.

(o) Please provide the particulars that describe the costs (both initial costs and on-going monthly expenses) Public Mobile would have incurred for its part in the construction of the Toronto DAS Network had it been completed (as originally conceived), including all reports, analyses, studies, working papers, memoranda, correspondence, and other documents."

27. As stated in the preamble to this interrogatory, THESL based this question directly on CANDAS' evidence. The preamble stated:

“Mr. O’Shaughnessy describes a process by which Public Mobile first moved to temporary macro sites, and then from those macro sites to permanent structures. In particular, he states that “Public Mobile decided to switch to traditional Macro Cell Site strategy, installing antennas on building rooftops and special-purpose towers...It is now incurring the cost of upgrading each temporary Cell Site to a permanent structure.” and that “...Public Mobile has incurred the increased cost of building rooftop Macro Cell Sites as mentioned earlier.”

28. CANDAS’ response to this interrogatory was:

“CANDAS does not understand the relevance of the questions to the issues raised in the application. Moreover, requiring responses to the 15 sub-parts of the question, having regard to the probative value, if any, would be unduly onerous.”

29. Similarly, the CEA asked CANDAS in CEA interrogatory 19(b):

“What is the difference in total cost between Public Mobile’s “Macro Cell Site” alternative currently being used by Public Mobile and the forecasted costs of the Toronto DAS Network proposed by ExteNet and DAScom?”

30. As stated in the preamble to this interrogatory, the CEA based this question directly on CANDAS’ evidence that it was using Macro-Cell Sites for the Toronto network.

31. CANDAS’ response to this interrogatory was:

“The information requested is not relevant to the issues raised in the Application. Moreover, CANDAS does not possess the information required to respond to this interrogatory and production of this information would be unduly onerous relative to its probative value, if any.”

32. Finally, the CEA asked CANDAS in CEA interrogatory number 60 to:

“(a) Please indicate whether and to what extent Public Mobile’s competitors use access to utility poles for purposes of constructing, maintaining and/or operating an outdoor DAS in Toronto.

(b) Please identify the difference in compensation paid for wireless attachments associated with tower structures, traffic lights, signage, roof tops, other alternatives CANDAS and/or O’Shaughnessy is aware of, and distribution utility poles.

(c) Since Public Mobile is currently operating in the marketplace with an alternative technology, why is access to utility poles a requirement for “good public policy” and “in the public interest”?”

33. As stated in the preamble to this interrogatory, the CEA based this question directly on CANDAS’ evidence. The preamble states:

“At question 3, page 3 of O’Shaughnessy’s evidence, he describes the nature of Public Mobile’s interest in the proceeding, including “the creation of a level playing field with our competitors who do have access to power poles in Ontario and desire for “access to such poles on commercially reasonable terms and conditions.”

34. CANDAS’ response to this interrogatory was:

“(a) See response to THESL 47(b)

(b) The information requested in this question is not relevant. No party to this proceeding is requesting that the Board review and vary the current Board-approved pole access rate.

(c) See the entirety of Mr. O’Shaughnessy’s Written Evidence, including without limitation (Q. 10).”⁶

35. Notwithstanding CANDAS’ refusal to produce the requested information on the grounds of relevance, the requested information is directly relevant to the issues raised by the Application. For example, CANDAS claims at 2.8 of its Application that, in effect, LDC poles constitute essential facilities for Canadian carriers seeking to make wireless attachments. However, CANDAS’ own evidence that Public Mobile was able to launch its Toronto service without use of power poles clearly contradicts this assertion.

36. THESL submits that pricing information with respect to the costs to make wireless attachments for a known feasible alternative option for launching a Toronto telecommunications wireless network would assist the Board in examining comparable costs of substitutable

⁶ THESL interrogatory 47(b) asked CANDAS to “Please indicate whether and to what extent these competitors use access to utility poles for purposes of constructing, maintaining and/or operating an outdoor DAS in Toronto.” CANDAS’ response was “Large incumbent carriers, such as Bell and Rogers, have attached their equipment to poles of Ontario electricity distributors. At present, there is no operating DAS network in Toronto.”

technology for launching a wireless network that is functionally comparable to the proposed Toronto DAS Network.

37. Similarly, the information sought is necessary to enable the Board and parties to conduct a fair and complete examination of the record, and of CANDAS' evidence which gave rise to these interrogatories.

38. Indeed, Public Mobile has itself underscored the relevance and necessity of the information sought by these interrogatories, and in particular the way in which a macro cell site network is a substitutable technology for launching a functionally-comparable wireless DAS network in Toronto.

39. As Mr. O'Shaughnessy testified to at the November 4, 2011 technical conference, even if CANDAS was successful in the proceeding, Public Mobile would not scrap its Macro Cell network.⁷ This contradicts 7.10 of CANDAS' Application, in which it characterizes the Macro Cell alternative as "temporary". According to Mr. O'Shaughnessy, Public Mobile might use DAS to supplement what is already there (in terms of coverage demands, or where customer base grows), and indeed, may even look at using other technologies altogether (e.g. femtocells, picocells, etc).⁸ Mr. O'Shaughnessy explained that the Macro Cell option "as it relates to how the network is working today, it is largely working very well and we're not experiencing any level of broad issues."⁹

40. Finally, with respect to CANDAS' claim in response to THESL Interrogatory number 50 and CEA Interrogatory 19(b) that production of the information sought is unduly onerous, CANDAS has not provided any particulars of its claim in this regard. To the extent that CANDAS chooses to provide particulars of the onerous nature of producing the information in its responding submissions, THESL will respond to such new facts as is appropriate in reply.

⁷ Transcript of November 4, 2011 Technical Conference, p. 62 at line 16.

⁸ Ibid. at pg. 61, line 16 to pg. 62, line 13.

⁹ Transcript of November 4, 2011 Technical Conference, p. 62, line 23-25.

41. With this Application, CANDAS is effectively asking the Board to pick a technology “winner” by providing a LDC-funded and ratepayer-funded subsidy to CANDAS, and to promote a specific wireless technology, DAS, at the expense of other wireless technologies active in the competitive market for wireless service (Macro Cell, femtocell, picocell, wifi). The reports of Mr. Starkey and LCC International outline the role outdoor DAS plays to supplement Macro Cell service in the broader competitive wireless market.

42. Further, Application is not limited to mandating DAS wireless attachments to utility poles, but also encompasses Macro Cell wireless antennas to utility poles. The evidence is clear that even CANDAS member Public Mobile, by its own actions, considers Macro Cell a direct substitute for DAS. In fact, Public Mobile was able to negotiate agreements with numerous vendors (according to Mr. O'Shaughnessy “more than 50”) to attach roughly 125 antenna locations to provide comparable service the Toronto DAS Network.¹⁰ However, to date, there is no information about who these numerous other vendors that are in direct competition with THESL utility poles for wireless attachments are, and what are the market rates charged by these vendors for attachments that provide equivalent service to the proposed Toronto DAS Network.

43. It is in this context that THESL and the CEA asked a series of interrogatories aimed at better understanding the details behind the Public Mobile alternative network – which the evidence has demonstrated is a comparable substitute for, and as a result directly analogous to, the proposed Toronto DAS Network.

44. If Public Mobile has confidentiality concerns, the Board’s *Practice Direction on Confidential Filings* provides a comprehensive procedure for the filing of confidential materials during Board proceedings.

(b) Information on the Wireless Attachments Rates and Terms in Other Jurisdictions

¹⁰ Transcript of November 4, 2011 Technical Conference, p. 56, line 27 to p. 57, line 15.

45. The second group of interrogatories relate to the wireless attachment rates, terms and conditions accepted by the Applicant and its affiliates in other jurisdictions. This group consists of THESL interrogatory 18(a), 19(d) and CEA interrogatory 33.

46. THESL interrogatory 18(a), THESL asked CANDAS to:

“Please provide a copy of each [of the 80 attachments agreements that ExteNet Systems has entered into with over 35 utilities, most of which involve attachment to power poles].”

47. As stated in the preamble to this interrogatory, and as noted in the square brackets in the question above, THESL based this question directly on CANDAS’ evidence that “ExteNet Systems has entered into approximately 80 attachment agreements with over 35 utilities, most of which involve attachment to power poles.”

48. CANDAS’ response to this interrogatory was:

“Attached as schedule 18(a)-1 and Schedule 18(a)-2 are two redacted copies of representative attachment agreements between ExteNet Systems and utility companies...”

49. Importantly, the two copies of the “representative attachments agreements” that CANDAS provided were redacted to exclude the pricing information, among other things. CANDAS did not request confidential treatment of the information as required under Rule 10 of the Board’s *Rules of Practice and Procedure* and the Board’s *Practice Direction on Confidential Filings*.

50. Instead, CANDAS has chosen to dictate to the Board that the information is confidential and has refused to comply with the Board’s process for assessing claims of confidentiality. Specifically, CANDAS failed to provide a cover letter indicating the reasons for the confidentiality request. It is also unclear whether the Board has received a confidential, un-redacted version of the document containing all of the information for which confidentiality is requested.

51. Moreover, the interrogatory did not ask for a representative sample agreement, but rather asked for the 80 relevant agreements, that by CANDAS' own evidence, ExteNet Systems has entered into with various third parties. CANDAS does not refuse the information on the basis of relevance, or for any other specified reason. Instead, CANDAS simply failed to answer the question that was asked.

52. Similarly, in THESL interrogatory 19(d), THESL asked CANDAS to:

"Please provide all wireless attachment pricing information paid by ExteNet Systems over the past five years in respect of each of the [other DAS networks that ExteNet Systems operates in North America]"

53. As stated in the preamble to this interrogatory, THESL based this question directly on CANDAS' evidence that:

"ExteNet and its parent company have significant experience in the design and construction of DAS networks."

and

"ExteNet Systems has entered into approximately 80 attachment agreements with over 35 utilities, most of which involve attachment to power poles."

54. CANDAS' response to this interrogatory was:

"The information requested is not relevant to the issues raised by the Application; moreover, production of this information would be unduly onerous relative to its probative value, if any."

55. Similarly, the CEA asked CANDAS in CEA interrogatory 33 to:

"(a) Please provide the rates that attachers pay to access utility poles in other jurisdictions as well as the rates that attachers pay in other jurisdictions for attachments to structures other than utility poles.

(b) Please provide all underlying assumptions to support this response."

56. As stated in the preamble to this interrogatory, the CEA based this question directly on CANDAS' evidence that:

“[t]he principal method for avoiding the imposition of costs on utility ratepayers should be the establishment of appropriate rates...”

57. CANDAS' response to this interrogatory was:

“(a) The information requested is not relevant to the issues in this Application...”

“(b) See response to CEA 33(a).”

58. In its interrogatories, THESL sought copies of existing attachment agreements and a table summarizing a 5 year history of pricing information to provide to the Board and the parties with a complete understanding of wireless attachment rates and terms of access from various jurisdictions across the United States. The CEA sought similar information via a somewhat broader request.

59. Currently, the only party with access to this information is CANDAS, which as the Applicant, bears the burden of proof in this proceeding. However, in presenting its case CANDAS has chosen to withhold this information from the Board. It is not disputed that, should the Board require distributors to provide access to their poles, the Board considers the terms and conditions that should govern the attachment of wireless equipment an issue in this proceeding.

60. It is in this context that THESL asked the Applicant to provide copies of all 80 of its attachment agreements on the basis that they are directly relevant to considering what terms and conditions should apply in Ontario, by allowing the Board to consider the terms and conditions (including price) from various other jurisdictions in the United States. THESL asked for all 80 of the attachment agreements so that the Board and parties would have the benefit of a full set of the relevant information available for the purposes of examining and testing relevant evidence.

61. To allow CANDAS to produce only a sampling of the relevant agreements would risk allowing the Applicant to selectively pick the most favourable “sample” terms and conditions thereby obfuscating how agreements, in fact, likely vary from jurisdiction to jurisdiction, with some favouring utility concerns and other favouring attachers. The Board has a unique opportunity to consider a broad spectrum of readily available attachment agreements from a variety of other jurisdictions in considering the issues in this proceeding.

62. As THESL has detailed in its submissions above, this pricing information is directly relevant to understanding the competitive market rates that CANDAS members and their affiliates have paid to attach wireless attachments in other jurisdictions, and is necessary to enable the Board and parties to conduct a fair and complete examination of the issues raised by CANDAS in this proceeding.

63. THESL submits that a better understanding of what Extenet Systems has paid to attach their equipment to utility assets in other jurisdictions would assist the Board in answering “the question of whether the current Board-approved attachment rate applies to wireless attachments.”¹¹ That the Board has put squarely into issue pricing with respect to wireless attachments supports the view that the information sought by these interrogatories is relevant and necessary.

64. With respect to CANDAS’ claim in response to THESL Interrogatory 19(d) that production of the information sought is unduly onerous, CANDAS has not provided any particulars of its claim in this regard.

65. As this interrogatory simply asked CANDAS to produce a table of information containing wireless attachment rates paid by Extenet Systems over the past 5 years in the jurisdictions it operates, it is not clear how the production of such a straightforward table would be unduly onerous, particularly given that CANDAS is the applicant in this proceeding and therefore bears the burden of proof in this proceeding. To the extent that CANDAS chooses provide particulars

¹¹ September 14, 2011 letter from Board, p. 3.

of the onerous nature of producing the information in its responding submissions, THESL will respond to such new facts as is appropriate in reply.

66. THESL submits that a better understanding of what wireless attachers, and in particular, the Applicant and its affiliates have paid to attach their equipment to alternative siting locations in other jurisdictions, would assist the Board in answering “the question of whether the current Board-approved attachment rate applies to wireless attachments.” That the Board has put squarely into issue pricing with respect to wireless attachments supports the view that the information sought by this interrogatory is relevant and necessary.

C. CONCLUSIONS AND COSTS

67. For the reasons outlined above, THESL submits that the Board should order CANDAS to provide further and better answers to the Disputed Interrogatories. THESL submits that the information and material sought in the Disputed Interrogatories is relevant to the matters in issue in this proceeding and is necessary for the Board and parties to conduct a fair and complete examination of the record. Without this information, the Board (and parties) will be prejudiced by an inability to complete the level of analysis required to diligently and adequately consider the matters in issue in this application.

68. To the extent that the Board elects to award costs on this motion or to use this motion in consideration of costs at a later stage of this proceeding, THESL submits that the Board should be guided by the following observations in this regard:

- (i) THESL endeavoured to avoid this motion and save the Board’s and parties’ time by giving CANDAS a second opportunity to answer the Disputed Interrogatories at the technical conference;
- (ii) similarly, CANDAS’ repeated refusal to answer the Disputed Interrogatories has meant that THESL’s only recourse was to bring this motion, which has increased costs and tended to unnecessarily lengthen the duration of the proceeding; and

- (iii) by refusing to answer the Disputed Interrogatories twice, CANDAS failed to contribute, and indeed has hindered, the Board's ability to reach a better understanding of one or more of the issues in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 3, 2012

BORDEN LADNER GERVAIS LLP

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Counsel to Toronto Hydro-Electric System
Limited