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January 10, 2012

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
PO Box 2319, 27th Floor
Toronto, ON
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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 ("**Application**").

In accordance with Procedural Order No. 7, please find enclosed CANDAS's written submissions in response to THESL's motion for further answers to interrogatories, filed December 22, 2011.

CANDAS will file two paper copies of the above-noted evidence tomorrow.

Yours very truly,

(signed) H.T. Newland

YMS/ko
Encl.
cc: All Intervenors

EB-2011-0120

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

[Pursuant to Procedural Order No. 7]

A. INTRODUCTION

1. This is the response of the applicant, the Canadian Distributed Antenna Systems Coalition ("**CANDAS**"), to the motion of Toronto Hydro-Electric System Limited ("**THESL**"), filed December 22, 2011 and THESL's written submissions, filed January 3, 2012, pursuant to the Board Procedural Order No. 7.

2. THESL's motion should be dismissed. The information sought by THESL is not relevant to the matters raised by CANDAS in its Application. Moreover, the relief requested by THESL is inconsistent with the Board's prior determinations concerning the scope of the proceeding to determine CANDAS' Application. In effect, THESL's late-filed motion seeks, in mid-stream, to turn CANDAS' Application to clarify the scope of Canadian carriers' right of access to power poles established in the CCTA Order,[1] into a rate-setting proceeding to determine the adequacy of the rate established in the CCTA Order.

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[1] *In re Canadian Cable Television Association,* Decision and Order dated March 7, 2005, OEB File No. RP-2003-0249 (the "CCTA Order")

B. OVERVIEW

3. The information sought by THESL in its motion filed December 22, 2011 (the "THESL Motion") falls into two general categories:

   (a) copies of agreements relating to Public Mobile's use of rooftop and standalone macrocell tower sites in Toronto and details thereof, including fees payable by Public Mobile; and

   (b) copies of agreements relating to ExteNet Systems' use of utility pole infrastructure in the United States and the fees payable by ExteNet Systems under such agreements.

4. THESL characterises the information sought as relating to "market rates otherwise paid for [] attachments in the competitive wireless siting market"[2] and argues that the requested information *(i)* is required in order to avoid considering THESL's current rates for wireless attachments "in a vacuum"[3] and *(ii)* is directly relevant to the issue of whether or not there is a "significant gap between the Board-regulated rate of $22.35 and the competitive market rates for wireless attachments."[4]

5. In other words, according to THESL itself, the information sought relates to the sufficiency (or gross insufficiency, to paraphrase THESL[5]) of the Board's current annual per pole access rate for Canadian carriers, at least as far as wireless carriers are concerned.

6. THESL's Motion has an air of unreality. It is brought as if CANDAS' Application proceeded before the Board over a disagreement over the level of the rate for access. In fact, CANDAS was forced to make its Application to the Board because of THESL's denial of the fundamental right of access for wireless equipment attachments, and via the imposition of unreasonable terms and

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2 THESL, Notice of Motion filed December 22, 2011, paragraph 5.
3 THESL, Notice of Motion filed December 22, 2011, paragraph 4.
4 THESL, Notice of Motion filed December 22, 2011, paragraph 6.
5 THESL, Notice of Motion filed December 22, 2011, paragraph 13.

conditions, even for some wireline attachments. The central issue to be determined in the CANDAS proceeding is, and from the beginning has always been, whether access to THESL's and other Ontario electricity distributors' pole distribution assets is or should be mandated for all Canadian carriers for all types of telecommunications equipment.

7. It is in this context that THESL moves to uncover information that, at best, can only be considered relevant to rate-setting. And yet, as confirmed by the Board's direction to all parties dated September 14, 2011 (the "September 14 Decision"), the setting of a new rate for wireless attachments, assuming that a right of access is confirmed on a basis other than the Board's 2005 CCTA Order, is not a matter at issue in the CANDAS proceeding.[6]

1. THESL's Motion is a Collateral Attack on the Board's September 14 Decision

8. In the September 14 Decision, the Board made determinations on the matters at issue in the CANDAS proceeding by referring THESL and all parties to paragraphs 1(a), (b) and (e) of CANDAS' Application. The Board drew a clear distinction between "the question of whether the current Board-approved rate applies to wireless attachments" and the question of the "setting of a new rate for wireless attachments," as follows:

> With respect to the terms and conditions of access and what an appropriate pole access rate would be, 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. If, however, the current rate is not found to apply, the setting of a new rate for wireless attachments may require a new notice and additional evidence to be filed either as*

[6] CANDAS has consistently maintained throughout that this is not a rate-setting proceeding. By way of illustration, in addition to the disputed interrogatories in THESL's Motion, see also CANDAS' response to the following interrogatories: CANDAS responses to IRs CCC-19, EDA-4, EDA-22, CEA-65, THESL 20(c), THESL 23(a), THESL 23(b).

Whether or not the per pole access rate for Canadian carriers is found to apply, as a result of this proceeding, to wireless attachments, if any party, including THESL, develops a basis to challenge the adequacy of the regulated per pole access rate for Canadian carriers that was established in the CCTA Order, it will be open to such party to raise the issue on proper evidence and arguments in proper proceeding. However, this is not that proceeding.

> *part of the current proceeding or in a new proceeding*.
> [Emphasis added][7]

9. THESL repeatedly cites the first part of the italicized except above in its Notice of Motion and supporting submissions, but conveniently omits any reference to the latter underlined portion of the italicized text, which speaks directly to the "setting of a new rate for wireless attachments."

10. The question of the applicability of the current per pole rate for Canadian carriers along with the applicability of the CCTA Order as a whole to wireless attachments is a matter at issue in the CANDAS proceeding, but the Board has already determined that if the answer to this question is "NO", the setting of a new rate for wireless attachments is not.

11. The Board readily acknowledged that the setting of a new rate for wireless attachments might flow out of the determinations made in the CANDAS proceeding in relation to the *right of access* by Canadian carriers. However, the Board clearly distinguished between, on the one hand, the present proceeding to determine whether and under what terms and conditions a right of access exists or should exist, and on the other, a rate-setting exercise. With respect to rate-setting, the Board suggested that this "may require a new notice and additional evidence" as part of a follow-up proceeding of some kind, whether as an add-on to the current proceeding or as part of a new proceeding altogether.

12. Thus, the Board has already determined that the setting of a new rate and information that could arguably be considered relevant to such an exercise are not matters at issue in the CANDAS proceeding. THESL's Motion, therefore, represents a collateral attack on the Board's September 14 Decision. THESL is trying to re-litigate an issue already decided by the Board many months ago.

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[7] OEB, Board File Number EB-2011-0120, Letter dated September 14, 2011 to all parties at 3.

13. THESL has also delayed unduly in bringing its motion, considering that CANDAS filed its objections to the disputed IRs by August 19, 2011, the Board's September 14 Decision confirmed CANDAS' position, and CANDAS and CCC brought their motions arising from answers to interrogatories on November 3 (amended on November 8) and October 31, 2011, respectively.

14. THESL argues that it was not until THESL reviewed the Board's Decision and Order dated December 9, 2011 that it properly understood the scope of the matters in this proceeding, but the Board's December 9 Decision and Order is consistent with its September 14 Decision – nothing has changed that would justify THESL's latest manoeuvre.

15. If it was THESL's intention to turn this proceeding into a rate-setting proceeding to establish a new rate for the wireless attachments of Canadian carriers on the assumption that a right of access exists, then the time to have signalled this intention would have been in the weeks following receipt of CANDAS' answers to interrogatories, or at the latest, within a reasonable time following the Board's September 14 Decision.

2. Information Sought by THESL is Not Relevant to the Issues in the CANDAS Application

16. In its Decision and Reasons dated December 9, 2011, the Board ordered THESL to provide answers to certain interrogatories, including ones THESL had refused on grounds of relevance. The Board reproduced paragraphs 1(a), (b) and (e) of the prayers for relief set out in CANDAS' Application, provided a three-point summary of same, and stated that " [i]t is these issues which will guide the Board in determining the relevance of the disputed interrogatories … that are the subject of the motions brought by CANDAS and the Consumers Council of Canada.[8]

[8] OEB, Decision and Order dated December 9, 2011, Board File No. EB-2010-0120 at 3.

17. The Board's three-point summary of the issues in the CANDAS proceeding provides 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 distributors 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 arrangement be governed?[9]

18. Matters pertaining to the fundamental question of whether a right of access by Canadian carriers to power poles for wireless attachments exists fall within the scope of issues 1 and 2 above. With respect to the "terms and conditions" governing access, as stated above, the Board's September 14 Decision clearly distinguishes between the present proceeding to determine whether and under what terms and conditions, a right of access by Canadian carriers to power poles exists and a subsequent and contingent rate proceeding. The former is clearly within the scope of CANDAS' Application, while the latter is not.

19. THESL makes much of the fact that it was ordered to identify which third parties are currently permitted to access its poles for purposes of attaching wireless equipment and the price currently paid for such access.[10] It argues that if it is ordered to disclose this information, then the two categories of information that it is seeking through its late-filed motion must also be relevant to the matters at issue in this proceeding.

20. Again, THESL conflates the access issue with the rate issue. The access issue is whether access to THESL's and other Ontario electricity distributors' pole assets

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9 OEB, Decision and Order dated December 9, 2011, Board File No. EB-2010-0120 at 2-3.

10 THESL, Written Submissions filed January 3, 2012, paragraph 11.

should be mandated for wireless attachments, which is the principal matter at issue in CANDAS' Application. This is not to be confused with the subsidiary issue of the determinants of the rate for access for wireless attachments (again, assuming that the existing per pole rate does not encompass such attachments.)

21. Poles are monopoly assets; therefore, in determining whether access is or should be mandated for all Canadian carriers and for all types of telecommunications equipment and attachments, including wireless equipment, it is important for the Board to understand whether and in what manner THESL is discriminating amongst different attachers.

22. The Board found that it:

> … will be determining whether to mandate access for wireless attachments to distributor poles. The Board finds that information as to the other attachments THESL is making (type of attachment and quantity) and under what arrangements those attachments are being made (price and terms and conditions) is relevant to the issues in this proceeding. The Board also recognizes that these various other attachments may or may not be comparable to the wireless attachments sought by CANDAS. The Board will be able to assess that comparability better if it understands more fully the circumstances that surround these other wireless attachments. THESL has provided evidence related to the potential alternative sites for wireless attachments. Similarly, the Board finds it relevant to understand the other types of attachments on distributor poles for comparison purposes.[11]

23. The "price and terms and conditions" under which attachments, and in particular, wireless attachments are currently being made on THESL's poles are considerations that are relevant to the issue of discrimination which, in turn, is relevant to determining whether access should be given to similarly situated third parties. In particular, understanding how THESL currently prices access to its pole for wireless attachments will reveal whether THESL considers itself bound

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[11] OEB, Decision and Order dated December 9, 2011, Board File No. EB-2010-0120 at 8-9.

by the CCTA Order, the applicability of which is clearly an issue in this proceeding.

24. Not to be confused with the foregoing relevant determinants of a right of access to THESL's monopoly pole assets is the information sought by THESL via its motion. The information being sought by THESL is not relevant to the question of whether access should be mandated – it may be related, if only tenuously, to rate-setting (see submissions below). Whether or not it is determined that the CCTA Order applies to wireless attachments, if the Board then determines or THESL or other intervenors wish to contend, that the rate in the CCTA Order is insufficient, the issue of appropriate determinants of a new rate is a subsidiary one that is not a matter in the present proceeding, on the record as currently constituted.

25. In this regard, CANDAS notes that through THESL's Motion, THESL seeks to put the onus on CANDAS for supporting a rate previously set by a Board in a rate-setting proceeding that went on for two or more years. In a properly brought rate-setting proceeding to establish a new rate for Canadian carriers, it would seem that at a minimum, clear notice and cogent evidence from THESL and other electricity distributors evidencing their pole costs relative to their revenues (from all sources, both one-time and recurring charges) and their insufficiency to recover costs, would be required, as well as a fulsome opportunity to test such evidence.

C. SPECIFIC RESPONSE TO DISPUTED IRS

1. Costs of Build-Out of Public Mobile's Macrocell Network in Toronto: THESL Interrogatories 1(d), 1(e), 50(c), 50(g), 50(h) and 50(o) and CEA Interrogatories 19(b) and 60(b)

26. THESL has grouped together interrogatories THESL 1(d), 1(e), 50(c), 50(g), 50(h) and 50(o) and CEA 19(b) and 60(b) as interrogatories "relate[d]" to the "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."[12]

27. CANDAS notes that while no subparts of THESL Interrogatory 50 were specifically identified by THESL, given that THESL's Notice of Motion[13] and written submissions[14] focus entirely on "pricing information" and the costs to Public Mobile of launching its public mobile wireless service in Toronto using a macrocell network topology (due to the indefinite delays encountered in obtaining access to THESL distribution poles), CANDAS has also focused its submissions on the above-noted subparts of THESL Interrogatory 50, namely THESL interrogatories 50(c), 50(g), 50(h) and 50(o). In any event, it is impossible to understand, let alone speculate, as to the relevance of the remaining subparts of THESL Interrogatory 50.

28. As submitted above, *prima facie*, the information sought by THESL in this first group of interrogatories falls outside the scope of this proceeding as presently constituted, given that the setting of a new rate for wireless attaching is not a matter at issue in the CANDAS proceeding.

29. However, even if it were assumed, for argument's sake, that the setting of a new rate was a matter within scope, and moreover, that the Board's currently mandated rate of $22.35 per pole for Canadian carriers were assumed not to apply, the first category of information sought by THESL is not relevant to any rate-setting exercise by this Board.

30. In the CCTA Order, the Board stated that the "methodology used to determine [pole access] rates should be based on cost recovery, not some form of revenue sharing"[15] and that there are two basic elements to the rate: (i) the incremental or direct costs incurred by electricity distributors that results directly from the

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12 THESL, Written Submissions filed January 3, 2012, paragraph 22;

13 THESL Notice of Motion fiiled December 22, 2011, *viz.* paragraphs 5, 6, 8, 12 and 13.

14 THESL, Written Submissions filed January 3, 2012, paragraphs 5, 7, 8, 9, 10, 14, 16, 36, 42, 62, and 63.

15 CCTA Order at 6.

presence of the third-party attacher's equipment; and (ii) the contribution to common or indirect costs that should be borne by third-party attachers.[16] Therefore, the elements of the pole access rates for Canadian carriers relate to the underlying costs of maintaining a utility pole network of electricity distributors falling within the statutory jurisdiction of the Board.

31. Thus, even if rate-setting were deemed to fall within the scope of this proceeding and that the Board's current per pole access rate for Canadian carriers is deemed not to apply, knowing the overall costs of building out a macrocell network using rooftop and standalone towers has nothing whatsoever to do with either the incremental or common costs of electricity distributors falling within the jurisdiction of the Board.

32. Further, THESL's claim that the costs of building out Public Mobile's network in Toronto using a macrocell topology is somehow relevant to the question of the appropriate rate for access, based entirely on the unsupported presumptions that (i) the rates should be "market" based and (ii) the information sought reflects a relevant market; and on THESL's disputed contention that macrocell network topologies are direct substitutes for smaller-cell or microcell network topologies, such as DAS.[17] This allegation is contradicted not only by the evidence of Lemay and Larsen, but also by LCC International, Inc., whose evidence has now been adopted by THESL in this proceeding. Moreover, the extent to which macrocells serve or do not serve similar functions in the deployment of a Canadian carrier's public mobile wireless network as do smaller-cell technologies that would be deployed on pole infrastructure, does not render the costs of deploying the former at all relevant to determining an electricity distributor's costs of maintaining a pole network.

33. As a result, even if the Board were to overrule CANDAS' objections to THESL's motion relating to the scope of the proceeding as presently constituted, an order

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16 CCTA Order at 4.

17 THESL, Written Submissions filed January 3, 2011, paragraphs 22 and 26.

requiring CANDAS to provide further answers to this first category of information would not be justified.

2. Prices Paid by ExteNet Systems for Use of Pole Infrastructure in the United States: THESL Interrogatory 18(a), 19(d) and CEA Interrogatory 33

34. THESL has grouped together a second category of interrogatories as "relate[d] to the wireless attachment rates, terms and conditions accepted by the Applicant and its affiliates in other jurisdictions"[18]: THESL 18(a), 19(d) and CEA 33

35. CANDAS notes that while the interrogatories falling in this second category of request seek copies of agreements in their entirety, THESL' submissions, particularly at paragraphs 62-63 and paragraphs 65-66 underline the fact that again, THESL is primarily fishing for the prices paid by ExteNet Systems. *Prima facie,* the information sought by THESL in this second group of interrogatories falls outside the scope of this proceeding as presently constituted, given that the setting of a new rate for wireless attaching is not a matter at issue in the CANDAS proceeding.

36. Even if the Board were to find that the setting of an appropriate rate for wireless attachments was a matter at issue in the present proceeding, the information sought by THESL is clearly not relevant to even this question.

37. The distribution assets that are regulated by the OEB are assets over which electricity distributors exercise monopoly power, the duplication of which has been found not to be in the public interest.[19]

38. This Board has already determined that in the setting of a rate for access to electricity distributors' poles falling within its jurisdiction by Canadian carriers, the appropriate methodology is "based on cost recovery" by the electricity distributors within its jurisdiction.

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[18] THESL, Written Submissions filed January 3, 2011, paragraph 45.

[19] CCTA Order at 3.

39. The information sought by THESL in this second category of interrogatories pertains to ExteNet Systems' arrangements for access to pole infrastructure in the United States. It entails both regulated and unregulated arrangements for access to poles, which are wholly extraneous to the costs of Ontario electricity distributors and the manner in which they are supervised by the Board. This information cannot be considered relevant to the setting of rates for utilities falling within the jurisdiction of the OEB. The best evidence for purposes of rate-setting by the Board would be costs actually incurred in Ontario by electricity distributors.

40. An order requiring CANDAS to provide further answers to THESL's second category of information would, therefore, also not be justified.

D. CONCLUSION

41. For the foregoing reasons, CANDAS submits that THESL's late-filed motion for further answers to interrogatories, originally refused in August 2011, should be dismissed. Both categories of information sought by THESL clearly fall outside the scope of the matters at issue in the CANDAS Application, as confirmed by the Board's September 14 Decision. Not only does the requested information fall outside the scope of the proceeding, even if rate-setting were now deemed to be within scope, the information sought is not relevant to the exercise of the Board's jurisdiction to set rates based on the underlying costs of electricity distributors falling within its statutory jurisdiction.

42. CANDAS submits that should the Board grant THESL's motion at this juncture of the CANDAS proceeding on the basis that the setting of a new rate for wireless attachment is a matter that does fall within the scope of this proceeding, this may necessitate a significant enlargement of the proceeding, including a reopening of the evidentiary record. This will likely be required, because to date, CANDAS and other parties have proceeded on the basis that the setting of a new rate for attachments, wireless or otherwise, is not a matter at issue in this proceeding.

43. In the event the Board finds that THESL's Motion is an attempt to relitigate issues already decided, CANDAS asks that its costs of responding to this motion be payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 10, 2012

FRASER MILNER CASGRAIN LLP

(signed) H.T. Newland

Michael Schafler/Helen Newland
of Counsel to CANDAS