

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.

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

(Made Pursuant to Procedural Order No. 7)

A. INTRODUCTION

1. By way of the present motion, THESL seeks an order of the Ontario Energy Board (the “Board”) to compel the Canadian Distributed Antenna Systems Coalition (“CANDAS”) to provide further and better answers to certain interrogatories as set out in THESL’s Notice of Motion and January 3, 2012 submissions (the “Disputed Interrogatories”).

2. THESL is asking the Board to consider whether it would be of assistance to the Board in assessing the issues before it in this proceeding which engages a number of broad public policy issues to have available for the benefit of the record certain materials and information that CANDAS has repeatedly refused to provide. The information and materials at issue in the Disputed Interrogatories relate to comparable competitive market rates that CANDAS has paid to attach wireless attachments in Toronto and other jurisdictions on non-utility poles.

3. In its submissions filed January 3, 2012, THESL gave its reasons for why the Disputed Interrogatories are: (a) relevant to this proceeding; (b) necessary to the Board's and parties' ability to conduct a fair and complete examination of the record; (c) represent the "other side of the coin" regarding information and material that the Board has recently ordered THESL to produce; and (d) are appropriate to bring a motion on at this juncture.

4. THESL adopts and relies on its January 3, 2012 submissions, and limits this reply to responding to new matters raised by CANDAS in its responding submissions dated January 10, 2012. Capitalized terms used in this reply but not defined have the meaning ascribed to such terms used in THESL's January 3, 2012 submissions.

5. At the outset, THESL wishes to make clear that, contrary to CANDAS' allegations, THESL is not seeking to use this (phase of the) proceeding to change the current Board-approved attachment rate of \$22.35 per pole per year for access to utility poles made pursuant to the Board's decision in RP-2003-0249 (the "CCTA Decision"). THESL is aware of and recognizes the Board's direction in its September 14, 2011 letter that the setting of any new Board-approved rate would "require a new notice and additional evidence to be filed either as part of the current proceeding or in a new proceeding."¹ THESL acknowledges that the proper procedural mechanism to change the current CCTA Decision pole attachment rate would be to bring an application to vary that rate. It is in this context that THESL brought this motion and filed submissions - in awareness of the Board's direction and processes, and with no intention to challenge that direction.

B. CANDAS' RESPONDING SUBMISSIONS

6. Rather than engage directly with the arguments raised by THESL's notice of motion and corresponding submissions, CANDAS instead focussed its responding submissions on arguing that the Disputed Interrogatories are not relevant to the current proceeding because: (a) the information and material sought by the Disputed Interrogatories do not further the narrow outcome that CANDAS is trying to achieve with this proceeding; and (b) the Disputed

¹ Letter from Board dated September 14, 2011 in EB-2011-0120, p. 3.

Interrogatories may be relevant to a later phase of this proceeding, so are *automatically* rendered irrelevant to the current issues before the Board.

7. With respect, and as addressed in turn below, THESL submits that CANDAS' submissions fail on both of these points.

(a) ***This is A Public Policy Proceeding***

8. CANDAS characterizes the current proceeding as follows:

“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 conditions...”²

9. According to CANDAS then, what this proceeding is about is its ability to enforce its perceived “fundamental right of access” to utility poles.

10. However, this proceeding is not commercial litigation where one party who believes itself to be wronged, seeks judicial intervention for relief from that wrong. This is not a dispute between CANDAS and THESL. CANDAS' narrow perspective on this proceeding is not determinative of, nor consistent with, the way in which the Board has cast the “net of issues”.

11. Rather, this is a proceeding that engages broader issues of public policy which, THESL submits, should guide the Board with respect to its determination of what information and materials are relevant to the matters before it.

12. In particular, the Board has consistently indicated that it is focused on a number of specific questions of policy. First, “Does the CCTA Decision apply to the attachment of wireless equipment, including DAS components, to distribution poles?” THESL disputes that the CCTA Decision does apply to the attachment of wireless equipment to distribution poles, because its poles do not constitute “essential facilities” for wireless attachments because there is already or

² CANDAS Submissions filed January 10, 2012 (“CANDAS Submissions”), para. 6.

will be an active and competitive market for the siting of wireless attachments in the City of Toronto.

13. As is the case in competitive markets, evidence on the rates, terms and conditions agreed to between suppliers and buyers are often confidential and difficult for third parties (like THESL) to obtain. One does not need to look much further than Tuesday's Toronto Star³ to find examples of this competitive market in action in the GTA. But ultimately what matters is the evidence that is before the Board on the record in this proceeding. In this proceeding, CANDAS has access to all of the relevant agreements and commercial terms the Board could use to consider all of the various alternatives to distribution pole siting and to better understand the competitive siting market. However, CANDAS has failed to provide full and adequate response to the THESL's interrogatories – greatly limiting THESL's ability to test the various claims and assertions being made by CANDAS in its application and supporting evidence.

14. Moreover, CANDAS has not merely applied to the Board to determine whether wireless attachers should have a right of access to utility poles. It has instead made an application to the Board seeking to gain the benefit of access to utility poles *at the regulated rate of \$22.35 per pole per year*. In other words, CANDAS has asked the Board to make an order that the current Board-approved attachment rate should apply to wireless attachments. As THESL argued in its January 3, 2012 submissions at paragraphs 6 through 16, information regarding market rates otherwise paid for similar attachments in the competitive wireless siting market is germane to the Board's analysis in this regard.

(b) CANDAS Employs Flawed Reasoning

15. CANDAS also asserts that the Disputed Interrogatories could only be relevant to a "rate-setting" proceeding in which the Board would be asked to determine the appropriate regulated rate regarding third party access to utility poles. CANDAS reasons that since this is not a rate-setting proceeding, the Disputed Interrogatories are *automatically* not relevant.

³ *Bell targets churches for cell phone towers*, The Toronto Star, Tuesday, January 10, 2012 (available online at: <http://www.thestar.com/business/article/1113443--bell-targets-churches-for-cell-phone-towers>).

16. In an attempt to support this assertion, CANDAS points at language that the Board used in its September 14, 2011 letter in this proceeding. It argues:

“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””⁴

17. As noted above, THESL acknowledges this distinction between what is at issue in the current proceeding and what would be at issue in any further phase or proceeding if a new application was brought for the Board to consider setting a new attachment rate.

18. However, in the case of the Disputed Interrogatories, this is a distinction without a difference. It is flawed reasoning to assume that the mere fact that the material and information sought by the Disputed Interrogatories may, or even would, be relevant to a proceeding to determine rates of access automatically renders those interrogatories irrelevant to the current proceeding. As noted above and as explained in detail in THESL’s January 3, 2012 submissions, the information sought is directly relevant to the issues that the Board has established for this proceeding. CANDAS assumes away THESL’s valid submissions and concerns by making this logical error.

19. THESL has addressed throughout its January 3, 2012 submissions the various reasons for why, quite apart from whether they would be relevant to any hypothetical rate-setting proceeding, the Disputed Interrogatories are relevant to the current proceeding. CANDAS has left these submissions unaddressed.

(c) CANDAS Mischaracterizes This Proceeding

20. THESL afforded CANDAS the benefit of the doubt by asking CANDAS to reconsider many of the Disputed Interrogatories during the technical conference held November 4, 2011, particularly in light of the evidence that THESL and the CEA filed in this proceeding. Before CANDAS had the benefit of reviewing this evidence or considering the concerns that were raised

⁴ CANDAS Submissions, para. 8.

in that evidence, CANDAS could not have been expected to know the specific nature of these concerns and as result likely did not consider those concerns when it filed its initial response to THESL's original interrogatory questions.

21. Notwithstanding the fact that CANDAS did not file its response to Undertaking JTC1.3 until November 16, 2011, and that the Board did not issue its Motion Decision until December 9, 2011 (upon which THESL directly relies in its Notice of Motion), CANDAS argues that THESL has "delayed unduly in bringing its motion" and that "nothing has changed that would justify THESL's latest manoeuvre."

22. THESL disagrees. THESL attempted, as a matter of courtesy and practical civility, to give CANDAS a second chance by asking it to reconsider the Disputed Interrogatories during the technical conference. THESL's hope was that CANDAS would acknowledge the broader public policy concerns raised by its Application and produce the evidence for the benefit of the Board and the record rather than continuing to deny the Parties access to clearly relevant information in favour of forcefully defending their narrow theory of the case.

23. The Board determined in its December 9, 2011 Motion Decision that "information related to all attachments which facilitate wireless communications in any form is relevant to the proceeding" and ordered THESL to, among other things, identify the price for wireless attachments on THESL poles. THESL submits that in light of this Decision, the additional information requested in the Disputed Interrogatories is now clearly relevant to this proceeding.

24. Furthermore, THESL submits that it would be unfair and prejudice THESL's ability to test the numerous assertions made by CANDAS in its Application if CANDAS were allowed to continue to withhold the requested information.

25. Finally, THESL submits that information ordered in the Decision about what THESL charges for other types of attachments on its poles is only half of the story. To ensure a complete record in this proceeding, the Board should order CANDAS to provide full and complete responses to the Disputed Interrogatories.

26. One would expect that before making an important public policy determination, the Board would want to clearly understand the competitive market for wireless attachments in the City of Toronto (the information requested about Public Mobile's alternative siting arrangements) and to understand how other jurisdictions have approached the issue of wireless attachments in light of this competitive market (the information requested about Extenet's numerous U.S. attachments and rates), particularly when that information is readily available to the Applicant.

CONCLUSIONS

27. For the reasons outlined above and contained in THESL's January 3, 2012 submissions, THESL submits that the Board should order CANDAS to provide further and better answers to the Disputed Interrogatories.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 13, 2012

BORDEN LADNER GERVAIS LLP

Original signed by J. Mark Rodger

J. Mark Rodger

Counsel to Toronto Hydro-Electric System
Limited