



EB-2011-0120

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.

PROCEDURAL ORDER No. 9

The Canadian Distributed Antenna Systems Coalition (“CANDAS”) filed an application on behalf of its member companies with the Ontario Energy Board (the “Board”), received on April 25, 2011 and subsequently amended by letters dated May 3 and June 7, 2011, seeking the following orders of the Board:

1. Orders under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act*, 1998 (the “Act”): (i) determining that the Board’s RP-2003-0249 Decision and Order dated March 7, 2005 (the “CCTA Order”) requires electricity distributors to provide “Canadian carriers”, as that term is defined in the *Telecommunications Act*, S.C. 1993, c. 38, with access to electricity distributor’s poles for the purpose of attaching wireless equipment, including wireless components of distributed antenna systems (“DAS”); and (ii) directing all licensed electricity distributors to provide access if they are not so doing;
2. in the alternative, an Order under subsection 74(1) of the Act amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for the purpose of attaching wireless equipment, including wireless components of DAS;

3. an Order under subsections 74(1) and 70(2)(c) of the Act amending the licences of all licensed electricity distributors requiring them to include, in their Conditions of Service, the terms and conditions of access to power poles by Canadian carriers, including the terms and conditions of access for the purpose of deploying the wireless and wireline components of DAS, such terms and conditions to provide for, without limitation: commercially reasonable procedures for the timely processing of applications for attachments and the performance of the work required to prepare poles for attachments (“Make Ready Work”); technical requirements that are consistent with applicable safety regulations and standards; and a standard form of licensed occupancy agreement, such agreement to provide for attachment permits with terms of at least 15 years from the date of attachment and for commercially reasonable renewal rights;
4. its costs of this proceeding in a fashion and quantum to be decided by the Board pursuant to section 30 of the Act; and
5. such further and other relief as the Board may consider just and reasonable.

Claims of Privilege and Confidentiality

On December 9, 2011 the Board issued a Decision and Order with respect to motions filed by each of the Consumers Council of Canada¹ (“CCC”) and CANDAS² for an order of the Board requiring Toronto Hydro Electric System Limited (“THESL”) to provide further and better responses to certain interrogatories (the “December 9, 2011 Order”).

THESL filed a letter on December 13, 2011 indicating that it would be able to produce some responses on December 23, 2011, but that satisfying the remaining requests made pursuant to the December 9, 2011 Order would require significant time and resources. THESL indicated it would make best efforts to generate the requested information as soon as possible. Some of the material was filed on December 23, 2011.

By letter dated January 11, 2012, THESL reported that it was continuing to make best efforts to file the information identified in the Board’s December 9, 2011 Order. The letter further set out the company’s estimates of when it expects to complete its filing of the ordered information. Although THESL did not formally seek an extension to the

¹ Notice of Motion filed October 31, 2011

² Notice of Motion filed November 3, 2011, and later amended November 7, 2011

deadline imposed by the Board's December 9, 2011 Order, the Board treated THESL's January 11 letter as a formal request for an extension.

THESL filed a letter dated January 19, 2012 that set out the significant volume of data involved in complying with the December 9, 2011 Order and requested that the Board consider a more limited scope of information. CCC responded to THESL's letter of January 19, 2012 seeking clarification in respect of two issues.

On January 20, 2012 the Board issued its Decision on Motion and Procedural Order No. 8. As part of that Order, the Board indicated that while it was prepared to grant an extension to January 20, 2012, as proposed by THESL, for the filing of materials related to other wireless communications on THESL's poles, February 17, 2012 (as proposed by THESL) was not an acceptable date to file the balance of the outstanding materials. The Board instead ordered THESL to produce a more limited scope of information falling into the following two categories: information related to the THESL letter to the Board of August 13, 2010; and information related to safety concerns;³ and the Board ordered filing of this information by January 30, 2012. THESL filed the information on January 30, 2012, which included a list of documents that THESL objects to producing because THESL claims that these documents are privileged .

The Board notes that materials were filed previously by CANDAS⁴, CCC⁵, and THESL⁶ in respect of the CANDAS and CCC motions filed on October 31, 2011 and November 3, 2011, respectively. The Board expects that parties will rely on these filings for the purpose of making submissions with respect to THESL's claims of confidentiality and privilege at the oral hearing on February 6, 2012. To the extent that THESL intends to rely on other cases, or to make other arguments, the Board expects that such materials will be filed with the Board and copied to CCC and CANDAS by the end of business on February 3, 2012.

Provision of Confidential Materials

THESL filed certain confidential materials on January 30, 2012. If counsel to CANDAS or counsel to CCC wish to obtain a copy of these materials for purposes of making oral argument on the confidentiality claim, then counsel is required to sign and return the Board's Form of Declaration and Undertaking, a copy of which is attached as an

³ Decision on Motion and Procedural Order No. 9, January 20, 2012, p.9

⁴ CANDAS filed submissions with respect to its Motion on November 3 and 8, 2011.

⁵ CCC filed submissions on its Motion and the CCC Motion November 11, 2011.

⁶ THESL filed reply submissions on each of the CCC and CANDAS motions on November 15, 2011.

Appendix A to this Order. The Board will then ensure that any such parties are provided with the materials.

Expert Pre-Hearing Conference

In Procedural Order No. 6, the Board gave notice to all parties that it intends to require the experts for all parties to, *inter alia*, participate in a conference for the purposes of, among others, narrowing issues; identifying the points on which their views differ and are in agreement; and preparing a joint written statement to be admissible as evidence at the hearing of this matter. The Board intends to set dates for the expert pre-hearing conference during first two weeks of March 2012. In the interest of efficiency, the Board will hold separate pre-hearing conferences on the two broad areas of expert evidence provided: technical issues, and policy and economics issues. The Board expects the parties to come to the hearing of February 6, 2012 prepared to reach agreement on **two** days over that two-week period in March 2012 for **each** pre-hearing conference that is relevant to their expert's evidence (a total of four days). The experts will be expected to produce a joint written statement (at a date subsequent to the pre-hearing conference) outlining the key issues, and points of agreement and disagreement on those issues. The joint statement will be filed as admissible evidence in this proceeding.

The Board has determined that it will allow counsel to the applicant, counsel to intervenors sponsoring expert evidence, and Board staff to attend the expert pre-hearing conference(s), but the Board wishes to advise counsel that their participation is expected to be limited to ensure that the objective of narrowing the issues, and producing a joint statement of the experts can be achieved. A facilitator retained by Board staff will facilitate the pre-hearing conference to ensure that the objectives of the pre-hearing conferences are achieved.

The Board considers it necessary to make provision for the following matters related to this proceeding.

THE BOARD ORDERS THAT:

1. Counsel to CANDAS or counsel to CCC that wishes to receive copies of the materials filed by THESL over which confidentiality is claimed must sign the Board's Form of Declaration and Undertaking and file it with the Board and THESL no later than **2:00pm February 3, 2012**. Board staff will ensure that the materials that were filed in confidence with the Board on January 30, 2012 are provided by **4:45pm on**

February 3, 2012 to all parties that have filed a properly signed Declaration and Undertaking.

2. THESL shall file any additional materials on which it intends to rely or reference for the purpose of oral submissions by **4:45pm on February 3, 2012**.
3. THESL shall file a written summary of its points of argument with the Board by **4:45pm on February 3, 2012**.

All filings to the Board must quote file number EB-2011-0120, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required. All communications should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, February 3, 2012.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

**APPENDIX A
PROCEDURAL ORDER # 9
CANDAS
EB-2011-0120**

Form of Declaration and Undertaking

EB-2011-0120

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*.

DECLARATION AND UNDERTAKING

I, _____, am counsel of record or a consultant for
_____.

DECLARATION

I declare that:

1. I have read the *Rules of Practice and Procedure* of the Ontario Energy Board (the "Board") and all Orders of the Board that relate to this proceeding.
2. I am not a director or employee of a party to this proceeding for which I act or of any other person known by me to be a party in this proceeding.
3. I understand that this Declaration and Undertaking applies to all information that I receive in this proceeding and that has been designated by the Board as confidential and to all documents that contain or refer to that confidential information ("Confidential Information").
4. I understand that execution of this Declaration and Undertaking is a condition of an Order of the Board, that the Board may apply to the Superior Court of Justice to enforce it.

UNDERTAKING

I undertake that:

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.

2. I will not divulge Confidential Information except to a person granted access to such Confidential Information or to the Board.
3. I will not reproduce, in any manner, Confidential Information without the prior written approval of the Board. For this purpose, reproducing Confidential Information includes scanning paper copies of Confidential Information, copying the Confidential Information onto a diskette or other machine-readable media and saving the Confidential Information onto a computer system.
4. I will protect Confidential Information from unauthorized access.
5. With respect to Confidential Information other than in electronic media, I will, promptly following the end of this proceeding or within 10 days after the end of my participation in this proceeding:
 - (a) return to the Board Secretary, under the direction of the Board Secretary, all documents and materials in all media containing Confidential Information, including notes, charts, memoranda, transcripts and submissions based on such Confidential Information; or
 - (b) destroy such documents and materials and file with the Board Secretary a certification of destruction in the form prescribed by the Board pertaining to the destroyed documents and materials.
6. With respect to Confidential Information in electronic media, I will:
 - (a) promptly following the end of this proceeding or within 10 days after the end of my participation in this proceeding, expunge all documents and materials containing Confidential Information, including notes, charts, memoranda, transcripts and submissions based on such Confidential Information, from all electronic apparatus and data storage media under my direction or control and file with the Board Secretary a certificate of destruction in the form prescribed by the Board pertaining to the expunged documents and materials; and

(b) continue to abide by the terms of this Declaration and Undertaking in relation to any such documents and materials to the extent that they subsist in any electronic apparatus and data storage media under my direction or control and cannot reasonably be expunged in a manner that ensures that they cannot be retrieved.

7. For the purposes of paragraphs 5 and 6, the end of this proceeding is the date on which the period for filing a review or appeal of the Board's final order in this proceeding expires or, if a review or appeal is filed, upon issuance of a final decision on the review or appeal from which no further review or appeal can or has been taken.
8. I will inform the Board Secretary immediately of any changes in the facts referred to in this Declaration and Undertaking.

Dated at _____ this _____ day of _____, _____.

Signature:

Name:

Company/Firm:

Address:

Telephone:

Fax:

E-mail: