



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

VIA E-MAIL & COURIER

July 17, 2012

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

Helen T. Newland

helen.newland@fmc-law.com
DIRECT 416 863-4471

Dear Ms. Walli,

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

We are writing in respect of the letter from counsel to Toronto-Hydro Electric System Limited ("THESL") filed with the Ontario Energy Board ("OEB" or "Board") on July 12, 2012, (the "THESL Letter"). The THESL Letter seeks orders:

- amending the evidentiary record in this proceeding to include an agreement for the attachment of wireless equipment on THESL poles that was "very recently" negotiated with a wireless attacher ("**Agreement**"), as well as a related term sheet (together, the "**Additional Information**");
- directing that the Additional Information be held in confidence; and
- restricting the disclosure of the un-redacted Additional Information to external counsel and CANDAS's external consultants only, provided they execute the Board's form of Declaration and Undertaking.

1. Should the Evidentiary Record be Amended?

CANDAS takes no position regarding THESL's request to amend the evidentiary record. That said, CANDAS disagrees with THESL's position that the issue of whether a market for wireless attachments exists in Toronto is relevant to the issues in the CANDAS Application. The Board will recall that this has been a recurring theme in THESL's response to CANDAS, first floated in its September 2011 summary judgment/forbearance motion (which the Board has deferred).

To the extent the Board accedes to THESL's request to amend the evidentiary record, CANDAS requests that the Board establish a process that permits parties to direct written interrogatories to THESL with respect to the Additional Information.

2. Confidentiality

In CANDAS's submission, the Board's response to THESL's requests for confidentiality orders will depend on how the Board rules on the threshold issue to be heard on July 23rd. Should the Board determine – as CANDAS says it should – that the Board's 2005 Decision and Order in Proceeding RP-2003-0249 ("**CCTA Order**") pertains to all telecommunication carriers (and not only to wireline carriers), then THESL's request for confidentiality becomes problematic. There is no rational basis for holding the terms and conditions of a regulated service in confidence. In this regard, CANDAS notes that DAScom Inc. filed its Distribution Pole Access Agreement with THESL in response to an interrogatory from Board Staff (Staff 8.1-1). In any event, in the circumstances, CANDAS is of the view that the Board should defer ruling on THESL's request for confidentiality orders until after it has rendered its decision on the threshold issue. Pending this determination, we will undertake not to divulge the Additional Information to employees of CANDAS members and will restrict such disclosure to CANDAS's external professional advisors.

If the Board agrees with CANDAS in this regard, the Board may also wish to similarly defer its decision on THESL's request to amend the evidentiary record.

3. THESL's Conduct

The Agreement that THESL now seeks to file brings us full circle to where matters stood in November 2008 when ExteNet Systems (Canada) Inc. ("**ExteNet**") first approached THESL about attaching both wireline and wireless infrastructure on utility poles. As described in CANDAS's Application, THESL's initial response was that it would be prepared to permit wireless attachments. It forwarded its standard pole attachment agreement to ExteNet, noting in its cover email that "the current Pole Rental Rate is \$22.35 per pole in use" (Application, para. 6.8). The Distribution Pole Access Agreement with THESL was concluded in August 2009 (Application, paras. 6.10, 6.11). ExteNet and DAScom Inc. commenced construction of the Toronto DAS Network, in reliance on this agreement and installed wireless equipment on a number of THESL poles pursuant to permits issued by THESL.

THESL's subsequent frustration of the Distribution Pole Access Agreement is described in the Application. So too is the letter that THESL sent to the Board on August 13, 2010, articulating a formal "no wireless" policy without any notice or disclosure to potentially affected customers (the "**August Letter**") (Application, Tab 3):

With this letter, Toronto-Hydro Electric System Limited (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. [emphasis added]

On April 21, 2011 (after learning about THESL's August Letter) CANDAS filed its Application. What has ensued since then has been 15 months of adversarial, time-consuming and expensive administrative litigation, in which THESL has defended its "no wireless" policy on the basis of alleged safety and operational concerns:

As I explain in further detail below, THESL's observation is that there are real and material differences between wireline and wireless NDAs. As a result, THESL has safety, operational and cost concerns with hosting wireless attachments. (Affidavit of Mary Byrne, p. 10 of 18, para. 33)

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Wireless attachments create unique issues that affect the safety, adequacy, reliability and quality of electricity service. (Affidavit of Mary Byrne, p. 12 of 19, para. 40)

How, then, can THESL's decision to enter into a new wireless attachment agreement be reconciled with these stated operational and safety concerns? How can safety and operational concerns that exist when the annual attachment rate is \$22.35 per pole disappear when the attachment rate is "significantly higher"? The answer, of course, is that THESL's safety and operational "concerns" are nothing more than ruses to discriminate against certain telecommunications carriers and to move to an unregulated sphere some portion of their regulated pole access services. THESL's grand plan in this regard became clear when it filed its forbearance motion in September, 2011.

Viewed in this light, there can be no question that THESL has flouted the CCTA Order in order to achieve its own objectives. It is troubling that a regulated entity such as THESL would execute a new wireless attachment agreement with an attachment rate significant higher than the current Board-approved rate in the face of the CCTA Order and CANDAS's pending Application, without any advance notice to the Board. This suggests a blatant disregard for the Board's process which should invite some form of sanction. Regardless, THESL's conduct in this regard should have a bearing on the Board's final determination on costs in this proceeding. THESL's conduct throughout this proceeding, including its latest manoeuvre, has unnecessarily and unreasonably lengthened and complicated this proceeding and resulted in increased costs to all parties.

Yours truly,

(signed) Helen T. Newland

Helen T. Newland
HTN/ko