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 Toronto Hydro-Electric System Limited for an order pursuant to section 29 of the *Ontario Energy Board Act, 1998*.

REPLY SUBMISSIONS OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED ON THE ISSUE OF THE CONFIDENTIAL TREATMENT OF CERTAIN INTERROGATORY RESPONSES

1 Introduction and Overview

1. Toronto Hydro-Electric System Limited (THESL) has requested that the responses to certain interrogatories, more particularly described below, be kept in confidence pursuant to Rule 10.01 of the Ontario Energy Board's (Board) Rules of Practice and Procedure (Rules). The responses that are the subject of the request for confidentiality are referred to hereinafter, as, variously, the "confidential information" or the "interrogatory responses".

2. Three parties, Ontario Energy Board Staff (Staff), the School Energy Coalition (SEC), and the Consumers Council of Canada (CCC) (collectively the Objectors) have objected to that request.

3. This is the reply of THESL to the objections, delivered pursuant to Rule 10.04 of the Rules.

4. THESL's reply to the objections can be summarized as follows:

(a) What is at issue here is public disclosure. There is no threat to the ability of the Board to make a determination based on all of the relevant information, and no threat to the Objectors' ability to represent the interests of their constituencies;

(b) The Board's approach to preliminary issues, such as confidentiality, must be determined based on the nature of the proceedings before the Board, and the

interests that are engaged by those proceedings. It is uncontroversial that the Board has the jurisdiction to establish procedures for the conduct of hearings.

(c) THESL's application requests that the Board make a determination under section 29 of the *Ontario Energy Board Act, 1998* (the Act), which is very different from other applications typically before the Board, such as rate applications under section 78 of the Act. Applications before section 29 engage different interests, and thus require different considerations, than rate applications. This is a critical distinction, which the Objectors have not made.

(d) The nature of section 29, and the Board's role in applying it, require the Board to adopt an approach to requests for confidentiality that respects the legislature's intentions in drafting section 29 of the Act. This means, among other things, respecting the commercial reality within which THESL operates, and weighing the prejudice that could reasonably be expected to accrue to THESL if confidentiality is not maintained, against the harm that could accrue to the public interest if disclosure is withheld.

(e) THESL has demonstrated that there is a reasonable expectation that its ability to operate competitively in the wireless attachment business would be impaired, and that its ability to get the relief available to it under section 29 would be prejudiced, if its request for confidentiality is not respected.

(f) The Objectors, on the other hand, have failed to demonstrate that there could be any harm to the public if the confidential information is not disclosed. There have been no suggestions that the Objectors are deprived of any information which would impede their ability to represent their constituencies effectively, nor have there been any suggestions that the Board is hindered in its ability to make a determination of the issues that arise in the section 29 application due to THESL's request for confidentiality.

(g) In the circumstances, THESL's request for confidentiality should be granted.

5. In the following section, we set out the general considerations which we submit should govern the Board's determination of THESL's request for confidentiality. We will then consider the objections to the confidential treatment of individual interrogatory responses.

II General Principles

(a) The issue is whether the interrogatory responses should be disclosed to the public

6. What is at issue is whether the interrogatory responses should be released to the public. The Objectors have access to the confidential information. They have all of the information required to represent their constituencies. They do not, and could not in the circumstances, argue that their interests or those of their constituents would be harmed by keeping the information confidential.

7. The Objectors (and, in particular, the SEC and the CCC) conflate their interest in the disclosure of the confidential information, and the ability of the Board to consider all of the relevant information, with the interests of the public in having access to the confidential information. Those interests are different, although it is not apparent, from a review of the Objectors' submissions, that this difference has been acknowledged.

8. Indeed, the CCC in its letter, dated March 21, 2014, makes the following assertion:

> "Without a clear understanding of those costs, there is the potential for cross-subsidization to occur between the regulated and unregulated businesses."

9. The Board and the parties have all of the relevant information about "those costs". There is nothing that would prevent the Board from fully exploring the issue of cross-subsidization. Public disclosure of information about costs would not enhance the Board's ability to make a decision on that issue.

10. Moreover, the CCC's letter also contains the following statement:

> "The Council is of the view that the number (revenues) are important in terms of assessing the nature of this market."

11. Again, the CCC, the Board, and all of the parties who have signed the Board's confidentiality undertaking, have access to the confidential information about revenues. It is not necessary to disclose that information publicly in order to make the assessment the CCC claims is "important".

(b) Confidentiality before the Board generally

12. The Board's "Practice Direction on Confidential Filings" (Practice Direction) asserts that, as a matter of general policy, all filings should be placed on the public record. However, that Practice Direction also recognizes that some of the information the Board requires to make a well-informed decision "may be of a confidential nature and should be protected as such".

13. The Board places the onus on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case. The Board does not, however, provide specific criteria as to how that onus is to be met.

14. THESL submits that the Board's general proposition, namely that information should be disclosed publicly, needs to be considered differently in the context of a section 29 application. What follows are THESL's submissions on the appropriate approach for the Board to take with respect to confidentiality in the context of a section 29 application, as well as how the onus for a request of confidentiality may be discharged in that context.

(c) Section 29 requires the Board to take an approach to considerations of confidentiality that respects the legislature's intentions

15. It should be without controversy that the Board's approaches to various matters must be consistent with the nature of the issues that arise in those matters, and consistent with the intentions of the legislature in enacting the Board's enabling legislation. Thus, an application under section 29 of the Act requires the Board to take a fundamentally different approach to considerations of confidentiality than do other sections of the Act, and in particular section 78, which governs rates applications.

16. An application under section 29 is fundamentally different from a rates application under section 78. Among other things:

(a) The assumption underlying the enactment of section 29 is that competition is a benefit to the utility and to the public as a whole;

(b) Whereas the purpose of an application under section 78 is to regulate the rates that utilities may charge to ratepayers, the purpose of an application under section 29 is to forbear regulation by the Board;

(c) If an application under section 29 is granted, the utility will operate as any commercial entity, and be governed by commercial reality;

(d) On the other hand, a section 78 application ensures that the operations of the utility are governed by regulation, and Board oversight, as opposed to commercial reality. Board regulation necessarily entails a significant amount of public scrutiny and transparency;

(e) The purpose of an application under section 29 is not to recover costs from ratepayers – on the contrary, the underlying premise of the application is that ratepayers are not affected by the activities with respect to which forbearance is sought;

(f) Therefore, unlike with respect to applications under section 78, where the Board is required to consider the prudence of costs incurred under a contract to ensure that the amount that the ratepayers are being asked to pay is just and reasonable, there are no considerations that militate in favour of public disclosure.

17. It follows from the foregoing that the considerations necessary to the proper interpretation of section 29 militate in favour of maintaining commercial information in confidence, so as to allow the very relief sought under section 29 to remain meaningful.

18. The Objectors approach THESL's request for the confidential treatment of certain interrogatory responses as though THESL were making an application for approval of rates under section 78 of the Act. For example, Staff argues, in relation to THESL's request for confidential treatment of its costs for wireless attachments, that "this is the type of information that is routinely filed (publicly) in rate hearings". This approach is fundamentally flawed in an application under section 29, and should be rejected.

(d) THESL may discharge its onus for confidentiality by demonstrating that it would be prejudiced

19. While not providing a precise analogy, the requirements of the federal *Access to Information Act* (R.S.C., 1985, c. A-1) (AIA) provides some guidance as to the criteria the Board might apply in determining what should be kept confidential and to the onus of persuasion.

20. Section 20(1)(c) of the AIA precludes the disclosure of information "the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party." These requirements are similar to those in Appendix A of the Practice Direction.

21. Applying that test in this circumstance, the third party being THESL, the disclosure to the public of the interrogatory responses could reasonably be expected to prejudice the competitive position of THESL. It could also result in a material financial loss to THESL.

22. The question then becomes who bears the onus of establishing the expectation of material financial loss or the prejudice to the competitive position. The AIA requires a party seeking to prevent the disclosure of information to demonstrate "a reasonable expectation of probable harm". In the SCC decision in *Merck Frosst Canada Ltd. v. Canada (Health),* the majority framed the onus on the party claiming probable harm as follows:

> A third party claiming an exemption under s. 20(1)(c) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur.[1]

23. If successful in its application, THESL will compete in the market for wireless attachments. If it must disclose its costs for those attachments, its ability to compete effectively could be undermined, if not destroyed completely.

24. If competitors know THESL's costs, they will be able to offer prices below those costs or otherwise use the information to their commercial advantage. Just as important, the disclosure of THESL's costs, in undermining its ability to compete effectively, will undermine the very purpose for which section 29 was enacted.

25. THESL has asserted that risk of harm from the disclosure of its cost information, its revenue information, and its contracts with third parties, is more than a mere possibility; indeed it is a virtual certainty. THESL has asserted that the disclosure of that information will almost certainly make it difficult, if not impossible, for it to compete in the market. THESL has, thus, met the onus of persuasion.

[1] *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 S.C.R. 23 at pp. 199

(e) The Objectors have failed to meet the onus of demonstrating why disclosure of the interrogatory responses to the public is required

26. If, as we have argued above, section 29 requires a different approach to the onus of persuasion that lies on the party seeking to keep information confidential, it also places a heavier onus on the Objectors. Because of the different considerations that must apply in a section 29 application, the Objectors bear the onus of demonstrating why the confidential information should be disclosed to the public. They have failed to do so.

27. The Objectors are required to demonstrate why disclosure of the interrogatory responses to the public is required. They have failed to do so. In particular they have failed to do the following:

(a) account for the difference section 29 makes to the Board's consideration of requests for confidential treatment;

(b) to demonstrate that there will be material harm to the public if the interrogatory responses are treated as confidential;

(c) to account for the nature of the harm, to THESL, to its potential contracting parties, and to its ratepayers, from the disclosure of the responses;

(d) to distinguish between the disclosure of the responses to the Board and to the parties, on the one hand, and public disclosure on the other;

(e) to demonstrate that there will be material harm to the public if the responses are treated as confidential.

28. The Objectors rely solely on the general principle that information should be disclosed to the public. That general principle is, particularly in the context of a section 29 application, and for the reasons set out above, insufficient to allow the objectors to discharge the onus on them.

(f) The SEC and the CCC have failed to demonstrate why the interests of their constituencies would be harmed if the interrogatory responses are kept confidential

29. The SEC and the CCC were granted intervenor status to represent identified interest. In its letter to the Board dated September 20, 2013, the CCC stated that "The Council is a public-interest entity which represents the interests of residential consumers of electricity in Ontario." It is Notice of Intervention, dated September 5, 2013, the SEC stated that it is "…a coalition established to represent the interests of all Ontario publicly-funded schools in matters relating to energy regulation, policy, and management."

30. Neither the SEC nor the CCC have argued that keeping the interrogatory responses confidential will harm their ability to represent the constituencies on whose behalf they have intervened.

31. Both the SEC and the CCC have all of the information necessary to represent those interests. Neither the SEC nor the CCC have argued the contrary.

32. The unchallenged evidence of THESL is that, if it is allowed to charge market rates for wireless attachments to its poles, the interests represented by the SEC and the CCC would benefit. The SEC and the CCC's objections to the request for confidentiality are premised only on the Board's general policy in favour of disclosure. They are premised, in other words, on arguments about public policy. It is equally a matter of public policy that the Board require that intervenors who have been granted intervenor status to explain how the positions they take reflect the interests of those constituencies.

(g) Considerations of fairness dictate that the interrogatory responses should be kept confidential

33. Section 29 allows utilities the opportunity to demonstrate that they should be allowed to compete, for example, in the provision of a service, in the competitive market. Section 29 creates, in other words, a legitimate expectation that, if they are able to meet the standard required by section 29, they will be able to operate in the competitive market. That legitimate expectation would be defeated if, in making an application, utilities were required to provide information publicly which would have the effect of prejudicing their ability to compete. Doing so would not only, as we have suggested above, defeat the legislature's intention in enacting section 29, it would defeat THESL's legitimate expectation of fair treatment.

III The Interrogatory Responses

a) Consumers Council of Canada IRs 3, 5, 6(a) and 16;

b) Vulnerable Energy Consumers Coalition IRs 12 and 15;

c) SEC IR 6(a);

d) Energy Probe IR 18.

34. All of these interrogatories seek information relating to THESL's costs for wireless attachments. The general importance of not publicly disclosing information about costs is discussed above.

35. Information about the costs of operations are fundamental to any company's ability to compete in the market. No private sector company or individual is required to reveal its costs. The reason for that is obvious: Competitors would be able to price their services below cost, and potential customers would have an advantage in contract negotiations.

36. Release of the cost information would, therefore, fundamentally prejudice THESL's ability to compete in the market. It would also defeat the purpose for which the legislature enacted section 29.

37. SEC argues that the cost information is required in order to allow the Board to calculate the amount of revenue which might be allocated to ratepayers. The costs will be

recorded in a deferral account, and will be available to the Board when the issue of revenue allocation is determined in another proceeding. Disclosure is not required for that purpose in this proceeding.

38. CCC argues that the disclosure of cost information is essential to the assessment of whether there is cross-subsidy. Consideration of the issue of cross-subsidy does not require the disclosure of the information publicly.

e) Staff IR 21

39. THESL has objected to releasing information about the location of its poles, and those of its affiliate THESI, on which there are wireless attachments.

40. THESL's contracting parties elect to place wireless attachments in locations that they feel are necessary for their operations. They place wireless attachments in those locations for competitive purposes. If THESL were to disclose those locations, it would harm the contracting parties, and, in the process, THESL's ability to compete in the marketplace.

41. Having said that, however, THESL has no objection to Staff's proposal that the location of the poles by district be disclosed.

f) Staff IR 23

42. Staff objects to THESL's request that agreements with wireless attachers be kept confidential. Staff argues that the Board has, historically, held that it is not bound by contracts which utilities enter into. That is a policy which, with some exceptions, makes sense in the context of rate applications. However, as argued above, the correct interpretation of section 29 requires that the policy not be applied reflexively. And again as argued above, the disclosure of contracts would harm not just THESL, but its contracting parties, and ratepayers as a result.

43. Staff argues that all of the contacts were entered into at a regulated rate, and so there should be no objection to their being disclosed. As Staff is aware, the rate is only one component of the contracts. The other components are not regulated, thus removing that rationale for disclosure. In addition, and as Staff is aware, one of the contracts was for a rate different from the regulated rate. As noted below, the Board has already ruled, in similar circumstances, that that contract should be kept confidential.

44. Included in the factors to be considered in determining requests for confidentiality, set out in Appendix A to the Practice Direction, are:

(i) whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations; and

(ii) whether the information could interfere significantly with negotiations being carried out by a party.

Both factors militate strongly in favour of keeping the contracts confidential.

45. One of the contracts for which THESL seeks confidential treatment was filed by THESL in the CANDAS proceeding. In that proceeding, THESL requested that the contract be kept confidential. The Board granted that request. A copy of the Board's ruling on that request for confidential treatment of the contract in that case is attached hereto as Appendix "A". There is no reason why the Board should, in this application, make an opposite ruling.

g) SEC IR 7

46. SEC has asked for the production of THESL's annual revenues for wireless pole attachments from 2008 to 2013. THESL's objection to the production of the information is that it would, in combination with other information it has produced, allow SEC, and other parties to know the prices which contractors have paid for wireless attachments. Releasing it now would prejudice THESL's contracting parties, and THESL's ability to compete in the market. Because it would prejudice THESL's ability to compete in the market, it would harm its ratepayers, including SEC.

47. Staff argues that the revenue information has already been disclosed in THESL's rate applications. If so, SEC does not need it. The important point, however, is that, while it may have been disclosed it was without information about the number of contracts. There was, in other words, no means by which any party could determine the revenue-per-contract.

48. THESL has asserted that allowing it to charge market prices for wireless attachments, and to share some portion of the proceeds with its ratepayers, would benefit those ratepayers. That seems self-evident. None of the evidence filed has challenged that assertion. So it is anomalous that SEC, which claims to represent the interests of a ratepayer group, would seek the disclosure of information which would, if disclosed, harm THESL's ability to compete in the market and, therefore, its ability to provide a benefit to ratepayers.

49. THESL will not repeat the submissions set out in paragraphs 29 to 31, above. For the reasons set out in those submissions, THESL submits that the objections of the SEC and the CCC should be dismissed.

IV Conclusion

50. For the reasons set out above, THESL submits that interrogatory responses should be kept confidential.

March 28, 2014
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Ontario Energy Board

Commission de l'énergie de l'Ontario

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*.

BEFORE: Cynthia Chaplin
Vice Chair and Presiding Member

Ken Quesnelle
Member

Karen Taylor
Member

DECISION ON PRELIMINARY ISSUE AND ORDER

September 13, 2012

THE APPLICATION

The Canadian Distributed Antenna Systems Coalition ("CANDAS") filed an application on April 25, 2011, subsequently amended by letters dated May 3 and June 7, 2011, requesting the following:

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.

THE PROCEEDING

The Board issued a Notice of Application and Hearing on May 11, 2011.

The following parties were granted intervenor status in this proceeding: Canadian Electricity Association ("CEA"), Consumers Council of Canada ("CCC"),

Electricity Distributors Association ("EDA"), Energy Probe Research Foundation ("Energy Probe"), Hydro One Networks Inc. ("HONI"), Hydro Ottawa Limited, Newmarket-Tay Power Distribution Limited, PowerStream Inc., Toronto Hydro-Electric System Limited ("THESL"), Veridian Connections, Vulnerable Energy Consumers Coalition ("VECC") and Horizon Utilities Corporation.

CANDAS stated in its application that it was seeking to recover its costs directly from THESL because THESL's letter to the Board of August 13, 2010 was a major impetus for the application. THESL objected to CANDAS' requests regarding costs. The Board indicated in Procedural Order No. 1 that it would make a determination at the conclusion of the hearing as to whether CANDAS would be eligible for costs. The Board also indicated that it would determine which party or parties would be assessed costs after the Board had heard and considered the record of the proceeding. The issue of costs is addressed at the end of this Decision.

The Board made provision for the filing of evidence by the applicant, Board staff, and intervenors. CANDAS[1], THESL[2], and the CEA[3] filed evidence.

On September 2, 2011 THESL filed a Notice of Motion to Dismiss the CANDAS Application. The Board responded by letter to THESL on September 7, 2011 indicating that it would hold THESL's Notice of Motion in abeyance until the CANDAS application was heard and determined. The Board accepted the affidavit evidence provided in the THESL motion as intervenor evidence.

A settlement conference was held on March 5, 2012, and a Board appointed facilitator presided over the conference.

[1] Filed July 27, 2011
[2] Filed September 2, 2011 – The Board determined that THESL's Motion Record would be treated as evidence filed in this proceeding.
[3] Filed September 2, 2011

On March 14, 2012 CANDAS filed a letter on behalf of the active parties requesting a suspension of the proceeding for the purpose of negotiating a bilateral settlement agreement between CANDAS and THESL. The Board granted this request. On May 22, 2012 CANDAS requested a further extension to June 25, 2012. The Board also granted this request.

On June 14, 2012, CANDAS filed a letter with the Board advising the Board that in its view there was no reasonable prospect of reaching a bilateral settlement. On June 15, 2012, THESL filed a letter proposing that the Board convene a further settlement conference with a Board appointed facilitator. A one-day settlement conference was held on June 22, 2012. No settlement was reached.

BACKGROUND

The first request in CANDAS' application is for:

> 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;

The CANDAS application is motivated in large part by the CCTA proceeding and the decision and order in that proceeding (RP-2003-0249). The CCTA proceeding concerned an application by the Canadian Cable Television Association[4] brought on April 15, 2004. The Application sought an amendment to the licences of all regulated electricity distribution utilities in Ontario. The CCTA's proposed amendment was to require a standard pole attachment

[4] Later renamed to the "Canadian Cable Telecommunication Association".

agreement, including a standard pole rental charge as part of the standard terms and conditions.

The CCTA Decision and Order was issued on March 7, 2005, granting access to local distribution company ("LDC") poles at a rate of $22.35 per pole per year. The Board did not establish a standard pole attachment agreement through the CCTA Decision and Order. The Board accepted the agreement reached by the parties during settlement discussions that they should negotiate terms and conditions of access after the Board had determined whether access would be granted and, if so, the rate. The parties subsequently negotiated a model joint use agreement. This agreement was filed with the Board but was never formally approved by the Board. There is more detail about the CCTA Decision and Order later in this Decision.

Much of the disagreement in the current proceeding stems from the interpretation of the CCTA Decision and Order and whether it applies to all attachments to poles for cable and telecommunications, or whether it applies only to wireline attachments, to the exclusion of wireless attachments.

THE PRELIMINARY ISSUE

In Procedural Order No. 12, the Board determined that it would sit on July 23, 2012 for one day for the purpose of hearing oral argument from the parties on the first request by CANDAS in its application to the Board, namely:

> Does the CCTA decision apply to the attachment of wireless equipment, including DAS components, to distribution poles? (the "Preliminary Issue")

The Board had considered hearing this issue earlier in the proceeding, but at that time, CANDAS did not agree that sequencing the application was appropriate. The Board, in its letter of September 14, 2011, accepted CANDAS' position and stated:

> The Board continues to be of the view that, in the absence of an alternative advanced to the Board that is agreed upon by all parties, the procedure as established in the previously issued Procedural Orders and written communications of the Board is appropriate and effective and will stand.

Subsequently, the parties requested the suspension of the proceeding for purposes of bilateral negotiations, as described above. When those negotiations were ultimately unsuccessful, it became apparent to the Board that all parties were now prepared to argue the issue concerning the applicability of the CCTA Order in advance of the rest of the application. On that basis, the Board determined that it would hear and decide the Preliminary Issue first.

The Board held an oral hearing on July 23, 2012 to hear argument on the Preliminary Issue. The Board heard submissions from CANDAS, CCC, VECC, Board Staff, THESL, the EDA, and Energy Probe.

BOARD FINDINGS

The Board finds that the CCTA Order applies to the attachment of wireless equipment, including the DAS components of CANDAS, to distribution poles.

The CCTA Order establishes a non-discriminatory, technology-neutral right of access to power poles for cable companies and telecommunication companies. The complete Order section of the CCTA Decision and Order reads as follows:

> The licence conditions of the electricity distributors licensed by this Board shall as of the date of this Order be amended to provide that all Canadian carriers as defined by the Telecommunications Act and all cable companies that operate in the Province of Ontario shall have access to the power poles of the electricity distributors at the rate of $22.35 per pole per year.[5]

[5] RP-2003-0249, Decision and Order, p.11.

There is no dispute amongst the parties that because the Order applies to Canadian carriers as defined in the *Telecommunications Act* it applies to CANDAS members. What is in dispute is whether the Order covers the attachment of wireless equipment, including the DAS attachment which CANDAS proposes to make.

Those who argue the CCTA Order applies to this type of attachment (CANDAS, CCC, Board staff and VECC) claim that the Order is clear on its face and that in the absence of an explicit exclusion, the Order applies to the attachments proposed by CANDAS. CANDAS goes further and says that even if it is not clear on the face of the CCTA Order, an examination of the relevant facts and circumstances of the CCTA Order confirms that it applies.

Those who argue the CCTA Order does not apply (THESL and EDA) claim the CCTA Order on its face does not answer the question of what exactly is eligible for attachment at the rate of $22.35 per pole per year and that therefore an examination of the facts and circumstances is necessary. Further, these parties argue that an examination of the facts and circumstances leads to the conclusion that the CCTA Order does not apply to wireless attachments. The Board does not agree with these submissions, for reasons discussed below. At their core, these arguments by THESL and the EDA are arguments for why the CCTA Order *should not* apply to wireless attachments – not that the CCTA Order *does not* apply.

The Board finds that the CCTA Order is clear on its face and the CCTA Order applies on a technology-neutral basis. As a result, an examination of the facts and circumstances of the CCTA proceeding is not necessary. However, as discussed below, in the view of the Board, the findings in the CCTA Decision are consistent with this interpretation of the CCTA Order.

The Board will address the following issues:

1. What types of attachments are covered by the CCTA Order?
2. What significance is there to the identification of the "communications space" in the CCTA Settlement Agreement?
3. What significance is there to the definition of "attachment" in the model joint use agreement negotiated pursuant to the CCTA Order by Mearie and CCTA?

1. What types of attachments are covered by the CCTA Order?

THESL argues as follows:

> There is no other way to figure out whether or not the Board order applies to the attachment of wireless equipment without looking to the underlying transcript and facts considered by the Board in making its decision in the CCTA proceeding.[6]

Similarly, the EDA argues that the Board:

> …can only interpret the order and determine the circumstances in which it applies by reference to its context, by reference to the issue that brought it before the Board for consideration, and in reference to its reasons for decision.[7]

The Board does not agree that the scope of the CCTA Order is limited to the specific circumstances advanced in the CCTA application. The Board's Order quite clearly is not limited or circumscribed in that way.

The Order permits "access" and does not contain any wording limiting the type of access. There is no limitation to wireline attachments.

[6] Tr. Vol. 2, p.102.
[7] Tr. Vol. 2, p.116.

The Board could have limited its CCTA Order so as to limit its application to a specific set of circumstances or type of attachment. It did not do so. It adopted an inclusive and technology-neutral approach. This inclusive approach is consistent with the context of the CCTA proceeding, given the variety of participants in that hearing. Although the CCTA proceeding was initiated by cable companies, the scope was subsequently expanded to include telecommunications companies, in response to intervention requests from telecommunications providers (such as MTS Allstream, among others) that clearly described their interests which included but were not limited to wireless attachments.

That the Board adopted an inclusive and technology-neutral approach is also consistent with the Board's observations in the CCTA Decision regarding technology changes and convergence. In relation to who should have access, the Board stated in the CCTA Decision that:

> This market is changing rapidly and industries are converging. Cable companies are now providing the telecommunication services just as the electricity distributors enter this industry. The fact that the two groups that have been warring over the past decade are fast becoming competitors is an additional reason for the Board to intervene and establish clear guidelines.[8]

The Board therefore concludes that the reasons in the CCTA Decision do not support the narrow application of the CCTA Order advanced by the EDA and THESL. Rather the reasons and choice of words for the Order support the broad application advanced by CANDAS, CCC, Board staff and VECC.

[8] RP-2003-0249, Decision and Order, p.4

However, the Board does agree with THESL and the EDA that the CCTA Order cannot be interpreted to confer the right of attachment of absolutely anything by a Canadian carrier or cable company.

The Board finds that the scope of the access to be provided has been determined by the Board specifying to whom the access rights apply. The CCTA Order applies to Canadian carriers and cable companies in Ontario. Therefore, the scope of the access to be provided should be interpreted to be access for attachments that are required to conduct the business activities of the company making the attachment – namely telecommunication equipment or cable equipment.

The EDA argues that:

> …even if the Board were to find that the CCTA Order does apply or should be applied to the CANDAS circumstances, I would ask you to limit that direction to the City of Toronto. There is simply no evidentiary record upon which the Board could answer this question that it has before it today for the entire province.[9]

The Board does not agree. There is no basis in the wording of the CCTA Order upon which the Board would limit its application to a single LDC. The basis upon which the Board has reached its conclusion has province-wide application.

2. *What significance is there to the identification of the "communications space" in the CCTA Settlement Agreement?*

One of the issues in the CCTA proceeding was as follows:

> If the Board does set conditions of access, to what types of cable or telecommunications service providers should these conditions apply to?

[9] Tr. Vol. 2, p.131.

The parties reached agreement on this issue in a Settlement Agreement approved by the Board. The settlement on this issue reads as follows:

> If the Board does set conditions of access, these conditions should apply to access to the communications space on an LDC's poles by Canadian carriers as defined in the *Telecommunications Act* and cable companies; provided, however, that these conditions shall not apply to joint-use arrangements between incumbent local exchange carriers and hydro distributors that grant reciprocal access to each other's poles.[10]

THESL argues that this reference to "communications space" serves to limit the generality of the CCTA Order, and THESL further argues that the attachments proposed by CANDAS cannot be accommodated within the "communications space."[11] CANDAS disagrees but claims that this characterization does not present a difficulty for them in any event.

The Board finds that the reference to "communications space" in the Settlement Agreement on issue 2 does not serve to limit the application of the CCTA Order to a discrete portion of the LDC pole.

Most importantly, the CCTA Order makes no reference to "communications space"; nor does it identify any specific physical limitation on the nature of the attachments to be allowed. The Board must consider what relevance the reference to "communications space" in the Settlement Agreement has to the interpretation of the CCTA Order.

The issue which the Settlement Agreement addresses was focussed on *who* should be provided access. The Settlement Agreement does so by agreeing the "*who"* should be limited to Canadian carriers and cable companies. The

[10] RP-2003-0249, Settlement Agreement, p.4.
[11] As defined in the Settlement Agreement filed October 19, 2004, "Communications Space" means a vertical space on the pole, usually 600 mm in length, within which Telecommunications Attachments are made.

reference to the "communications space" in the Settlement Agreement, which goes to *what* may be attached, is essentially beyond the scope of the issue. The Board interprets the reference to the "communications space" in the Settlement Agreement as a general descriptor of the types of attachments these parties might seek to make.

It is clear that the parties themselves did not see the reference to the "communications space" in the Settlement Agreement as a physical limitation on access. The definition of "Attachment" in the model joint use agreement (negotiated by the parties) refers to items which may be placed in locations other than the "communications space". Also, other terms and conditions in the model joint use agreement refer to access to areas other than the "communications space." Finally, there is evidence on the record of the CANDAS proceeding that attachments have been made in locations other than the "communications space".

An examination of the Board's reasons in the CCTA Decision leads to the conclusion that "communications space" was used in that proceeding for the purposes developing the appropriate rate or charge, and that it provided a proxy for the development of the methodology and the derivation of a single representative province-wide rate rather than acting as a specific and limited description of where access would be made. This is reflected in the Board's reasons in the CCTA Decision as follows:

> For many years, electricity and telephone companies in at least four provinces have openly negotiated reciprocal access agreements to telephone and power poles. In all cases, these agreements appear to reflect equal allocation of common costs. This suggests that the per capita or equal sharing methodology is the appropriate one. ***Moreover, as more and more parties attach to these poles, the notion that there***

> ***is a discrete portion of space to be allocated to each becomes more problematic.***[12] [emphasis added]

The rate includes direct costs and indirect costs. The relevance of the "communications space" for the rate methodology was for purposes of establishing a benchmark level of sharing to determine the allocation of the indirect or common costs.

The Board also made it clear that to the extent the cost circumstances of an LDC differed from those used by the Board to derive the rate, it was open to the LDC to apply for a different rate. The CCTA Decision states:

> This is not to say there should not be relief available for electricity distributors who feel the province-wide rate is not appropriate to their circumstances. Any LDC that believes the province-wide rate is not appropriate can bring an application to have the rates modified based on its own costing.[13]

The EDA has suggested this was a reference to the situation of different common costs – in other words that the underlying costs associated with a pole (which are then shared as common costs amongst the attachers) might differ between LDCs and not to differences in costs arising because the variation in type of attachment. However, another component of the rate is the direct cost of the attachment related primarily to administration costs and loss in productivity. The Board's finding regarding flexibility to address specific LDC circumstances applies to both components of the charge.

Therefore, if the nature of the attachment is such that it results in costs not adequately covered by the $22.35, then it is open to an LDC to apply for a different rate.

[12] RP-2003-0249, Decision and Order, p.7.
[13] Ibid, p.8.

3. *What significance is there to the definition of "Attachment" in the model joint use agreement negotiated pursuant to the CCTA Order by Mearie and CCTA?*

As described above, a model joint use agreement was negotiated and filed with the Board on August 3, 2005, but was not approved by the Board. The cover letter accompanying the agreement states:

> The model agreement is now being used by the LDCs and CCTA members to put together local agreements.

The model joint use agreement includes the following definition of "Attachment":

> "Attachment" means any material, apparatus, equipment or facility owned by the Licensee which the Owner has Approved or Affixing to poles or other equipment of the Owner or In-span, including but without limiting the generality of the foregoing:
>
> - Licensee-owned cable not directly attached to a pole, but Over Lashed to a cable or Support Strand not owned by the Licensee;
> - Service drops Affixed directly to the Owner's poles;
> - Service Drops Affixed In-span to a Support Strand supported by poles of the Owner; and
>
> Unless otherwise agreed by the parties, Attachment excludes Wireless Transmitters and Power Line Carriers.

THESL argues that this creates a limitation on the application of the CCTA Order. The EDA argued similarly that the Board did not move to include wireless attachments, and so it therefore excluded them. The Board does not agree.

The model joint use agreement cannot act to circumscribe or limit the CCTA Order. The Board in the CCTA Decision left it to the parties to negotiate the terms and conditions of access (but not the charge) and indicated that if an

agreement could not be reached then the Board would take further steps. As indicated, the Board did not approve the model joint use agreement. If wireless transmission equipment had been included as one of the enumerated types of equipment in the list contained in the definition, then there would be no dispute at this time. The fact that the model joint use agreement contains a limitation on wireless equipment indicates that the terms and conditions for this particular type of attachment were not agreed on a generic basis when the model agreement was negotiated, and were left to subsequent direct negotiations.

Importantly, the definition does not *exclude* wireless attachments; rather it limits them to circumstances where both sides agree. The Board notes that if the CCTA Order did not apply to wireless attachments, then there would be no requirement for the limitation on the definition at all. In other words, the presence of the limitation supports the conclusion that the CCTA Order was accepted by the parties as inclusive and not limited to wireline attachments. The addition of the limitation implies that but for that limitation it would be considered included within the general characterization of "Attachment."

The Board also notes that the THESL agreement with DAScom Inc. (filed in evidence in the CANDAS proceeding) contains a list of items under the definition of "Attachment" which is more extensive than the list in the model joint use agreement and does not contain the limitation on wireless attachments which is found in the model joint use agreement. The Board views this as consistent with the Settlement Agreement which contemplated a mutual agreement for purpose of making wireless attachments.

It may be appropriate for the model joint use agreement to be re-visited with a view to addressing the matter of terms and conditions for wireless equipment attachments on a generic basis – or it may be appropriate for these to continue to be negotiated individually. Those issues are beyond the scope of the Preliminary

Issue. What is clear is that LDCs cannot deny access for wireless attachments, including DAS components, on the basis of the model joint use agreement.

The EDA and THESL also point to the fact that the disagreement about the inclusion or exclusion of wireless attachments was identified in the CCTA Settlement Agreement. Appendix B to the Settlement Agreement contains a list of definitions (identified as Revision No. 5 of the MEARIE/CCTA draft model agreement). In that list, under the definition for "Attachment" the following words appear: "Attachment excludes wireless transmitters and power line carriers. NOT AGREED." The Board does not agree that this reference, and the subsequent approval of the Settlement Agreement, supports the conclusion that wireless attachments were to be excluded from the CCTA Order. The reference appears in an appendix to the Settlement Agreement, and the appendix is only referred to in one place in the Settlement Agreement. That one reference is by one group of parties as part of the explanation of their position on an issue which itself was unsettled. Therefore, although the Board would be aware this aspect was unsettled, on the face of the Settlement Agreement, the whole issue was unsettled, not just whether attachments included wireless attachments.

The CANDAS Application

The Board concludes that the CCTA Order confers a broad right of access to all Canadian carriers and cable companies to the poles of LDCs and the right of access extends to all attachments that are related to the service which the telecommunications or cable company is providing. The CCTA Order applies to the attachment of wireless equipment, including DAS components, to distribution poles. This addresses the first request of the CANDAS application. The second request is now moot.

If a Canadian carrier or cable company is of the view that an LDC is not in compliance with the Board's CCTA Order, it may make a complaint to the Board, and the Board will investigate.

To the extent parties are using the model joint use agreement or some mutually agreed variation of that agreement, that will be acceptable, provided the limitation related to wireless attachments is removed from the definition of "Attachment." The Board notes that in the agreement between THESL and DAScom Inc., the definition of "Attachment" does not include the limitation on wireless attachments.

The parties may wish to negotiate different terms and conditions for wireless attachments (but not a different rate), or to negotiate modifications or additions to the model joint use agreement. The Board concludes that this is best left to the parties in the first instance. If the parties are unsuccessful, then the matter may be brought to the Board for consideration. The Board concludes that it does not need to address CANDAS' third request as part of this proceeding.

Finally, in accordance with the CCTA Order, the charge for attachments remains $22.35 per pole per year.

The Board, in its letter of September 14, 2011, stated as follows (in relation to the CANDAS proceeding):

> 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 part of the current proceeding or in a new proceeding.

As indicated in the CCTA Decision, "any LDC that believes the province-wide rate is not appropriate can bring an application to have the rates modified based

on its own costing." In light of the CCTA Decision and the caution in the Board's letter of September 14, 2011 regarding notice and evidence, the Board concludes that the CANDAS proceeding should not be continued for purposes of addressing whether the current rate is appropriate.

As a result of the Board's findings on the Preliminary Issue and the consequential impact on the remaining requests of CANDAS, the Board has determined that, subject to the two outstanding issues addressed below, the CANDAS application may now be concluded.

THESL CONFIDENTIALITY REQUEST

On July 12, 2012, THESL filed new evidence in response to the Board's Decision and Order of December 9, 2011 in this proceeding. This new evidence relates to a new agreement for wireless attachments on THESL's poles. THESL requested that this evidence be held in confidence, and specifically requested that it not be disclosed to any employee of the members of CANDAS, even if the individual has signed the Board's Declaration and Undertaking. The Board issued a letter on July 19, 2012, indicating that it would hold the evidence in confidence for the time being, but that a final determination on confidentiality would be made after the Board has rendered its decision on the Preliminary Issue. The Board also accepted CANDAS' undertaking not to disclose the evidence to any employee of the members of CANDAS, even if the individual has signed the Board's Declaration and Undertaking.

The Board has now determined that the evidence will be kept confidential and that it will only be disclosed to the external counsel and external consultants that have executed the Board's Declaration and Undertaking. The material will not be disclosed to any employee of a member of CANDAS, or any employee of any other party to this proceeding.

THESL MOTION OF SEPTEMBER 2, 2011

THESL filed a motion on September 2, 2011, seeking a Decision and Order of the Board:

1. finding that the license condition setting access and the access rate of $22.35 per 22 pole attachment per year arising from the Ontario Energy Board's (the "Board's") 23 March 7, 2005 CCT A Decision does not apply to wireless communications attachments, including related wireless equipment and wireless components and other equipment associated with distributed antenna systems other than wireline attachments (hereinafter referred to as "Wireless Attachments"); and finding that the license condition setting access and the access rate of $22.35 per pole attachment per year arising from the Ontario Energy Board's (the "Board's") March 7, 2005 CCTA Decision does not apply to wireless communications attachments, including related wireless equipment and wireless components and other equipment associated with distributed antenna systems other than wireline attachments (hereinafter referred to as "Wireless Attachments"); and

2. pursuant to Subsection 29(1) of the Ontario Energy Board Act, 1998, to refrain from exercising any of its powers, including imposing any distribution license conditions governing the access of Wireless Attachments to the electricity distribution system, on the basis that there is or will be competition in the market for siting of Wireless Attachments sufficient to protect the public interest; and

3. in the alternative to number 2, pursuant to Subsection 29(1) of the Ontario Energy Board Act, 1998 (the "OEB Act') to refrain from exercising any of its powers, including imposing any distribution license conditions governing the access of Wireless Attachments to THESL's electricity

distribution system, on the basis that there is or will be competition in the market for siting of Wireless Attachments within the City of Toronto sufficient to protect the public interest; and

4. denying the relief sought by CANDAS and dismissing the CANDAS application; and

5. such other relief as may be requested by THESL or as the Board may deem appropriate.

By letter dated September 7, 2011, the Board stated that it would hold the motion in abeyance until the CANDAS application was heard and determined.

The Board's findings on the Preliminary Issue address the first part of the Motion. The second and third parts of the Motion advance the view that the CCTA Order *should not* apply to wireless attachments on the basis of competitive market conditions, and that therefore the Board should refrain from regulating the activity Having determined that the CCTA Order does apply to wireless attachments, the Board concludes that these issues related to forbearance will not be heard within the CANDAS application. CANDAS has sought particular relief and the Board has addressed those issues. THESL's Motion raises other, different issues, which while related to the CANDAS application, have broader implications and considerations. Therefore the Board denies the motion on the basis that it is out of scope in the context of this proceeding. The Board will therefore not hear the motion on its merits at this time.

COSTS

There are three outstanding issues related to costs in this proceeding (the "Cost Issues):

1. CCC, VECC and Energy Probe have been found eligible for an award of costs. It remains to be determined from whom these costs should be recovered.

2. CANDAS is seeking recovery of its costs, and it remains to be determined whether CANDAS will be permitted to do so, and if so, from whom the costs should be recovered.

3. Finally, it remains to be determined who will bear the Board's costs for this proceeding.

The Board will take submissions in writing on Cost Issues. The Board will permit all parties and Board staff, to make submissions, and will permit all parties and Board staff to reply to the submissions of others.

THE BOARD ORDERS THAT:

1. All parties and Board staff shall file written submissions on the Cost Issues on or before **September 24, 2012.**

2. All parties and Board staff shall file written submissions, if any, in reply to the submissions of other parties or Board staff on the Costs Issues on or before **October 3, 2012**.

All filings to the Board must quote file number **EB-2011-0120,** be made through the Board's web portal at, https://www.pes.ontarioenergyboard.ca/eservice/ 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. Parties must 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 parties may email their document to 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 2 paper copies.

DATED at Toronto, September 13, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary