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Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street,
Ste. 2701
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Response to CANDAS' Letter Dated Nov. 28, 2011 on the issue of Perception of Bias/Conflict of Interest of Dr. Roger Ware (EB-2011-0120)

We write on behalf of Toronto Hydro-Electric System Limited ("THESL") in response to the November 28, 2011 submissions of Canadian Distributed Antenna Systems Coalition (the "CANDAS Submission"). THESL hereby adopts its submissions dated Nov. 20, 2011, and will limit this letter to a direct response to the CANDAS Submissions.

The CANDAS Submission at page 2 states that "THESL's submissions assume, erroneously, that Dr. Ware (by virtue of his role as a member of the MSP) is also a member of the Adjudicative Panel that will decide this Application." This is simply not true - THESL makes no such assumption. THESL would have the same concerns if any other currently serving Board member that is not a deciding member of this particular hearing panel appeared as an expert for a party in this proceeding. CANDAS' statements completely misconstrue and mischaracterize THESL's submissions on this point.

The CANDAS Submissions go on to present the untenable view that there is no conflict of interest or reasonable apprehension of bias with respect to Dr. Ware in this proceeding. However, even if the Board were to find that THESL's interpretation of some or all of the conflict of interest rules noted above do not clearly apply to Dr. Ware, THESL submits that to find there is no conflict on this basis would be to put form over substance. As set out in the particulars of THESL's November 20, 2011 submissions, it is clear that the spirit of the rules is to prohibit persons who hold positions with the Board, such as Dr. Ware's, from dealing with the Board in the course of any proceeding during the term of their appointment and for a period of time afterwards.

In any event, notwithstanding its position that there is no conflict of interest or reasonable apprehension of bias with respect to Dr. Ware in this proceeding, CANDAS claims that it is "compelled to withdraw the evidence Dr. Ware (including his responses to interrogatories)." CANDAS then stipulates that its withdrawal of the evidence of Dr. Ware is "conditional on the Board granting leave to CANDAS to file replacement reply evidence by a new expert in respect of the economic basis for mandating telecommunications attachments to distribution poles."

THESL submits it is completely inappropriate and improper for CANDAS to dictate the terms of the withdrawal of its evidence to the Board. We refer CANDAS to Rule 20 of the Board's *Rules of Practice and Procedure* which clearly specifies the terms governing when an applicant may withdraw all or part of its application.

Rule 20.03 provides that:

“The Board may impose conditions on any withdrawal or discontinuance, including costs, as it considers appropriate.”

In this matter CANDAS has placed the Board and parties in a very difficult position and has brought this situation entirely on themselves. CANDAS retained Dr. Ware knowing of his existing role at the Board, and either did, or should have, recognized the risks of such an aggressive strategy. The result is clear: wasted effort, wasted time, and wasted resources on the part of the Board, Board Staff and all parties to this proceeding in examining the report of Dr. Ware, preparing and reviewing written interrogatories, preparing and requesting further clarifications of Dr. Ware at the technical conference, and providing written submissions in response to the Board's Procedural Order on the questions of perception of bias and conflict of interest. This is yet another example of CANDAS engaging in conduct that failed to contribute to a better understanding by the Board of one or more of the issues in this proceeding, and has unnecessarily expanded the scope, complexity and duration of the hearing. THESL will have further submissions on this matter when the issues of costs are addressed at the conclusion of the hearing.

Rule 20.05 of the *Rules of Practice and Procedure* provides that:

“If the Board has reason to believe that a withdrawal or discontinuance may adversely affect the interests of any party or may be contrary to the public interest, the Board may hold or continue the hearing, or may issue a decision or order based upon proceedings to date.”

THESL submits that the Board should be conscious of the procedural advantages that it would bestow on CANDAS if the Board permits CANDAS to file additional evidence at this late stage of the hearing process (after written interrogatories have been filed and after the technical conference has long since concluded). The Board has graciously granted CANDAS numerous procedural accommodations in this hearing already. If the Board does permit CANDAS to file additional reply evidence, THESL submits that such evidence must be strictly limited in scope to those specific issues addressed by Dr. Ware and there should be a defined interrogatory process with respect to the new evidence prior to the commencement of the oral hearing.

Finally, CANDAS has announced to the Board that it intends to file additional reply evidence no later than December 16, 2011 (without even waiting to get permission from the Board to do so). CANDAS goes on to suggest “that the Board, as soon as possible, establish a new procedural schedule for the balance of this proceeding, including dates for the receipt of interrogatories on CANDAS' replacement evidence and responses thereto and the oral hearing.”

THESL submits that it is premature for the Board to issue a new procedural schedule at this time, and that, in any event, the basis for CANDAS demanding an expedited schedule has been eroded as a result of its own conduct which resulted in the lengthening of this proceeding. In this proceeding we await the outcome of the CANDAS and CCC Motions to compel further and better responses to specified interrogatories. In addition THESL is actively involved in other major proceedings and stakeholder consultations before the Board, including its 2012-2014 EDR application upon which a preliminary issue decision is pending, as well as the recently announced OEB consultation on Regulatory Reform.

THESL submits that scheduling around these other hearings/processes should be considered and taken into account by the Board to ensure that parties, such as THESL, are not prejudiced by being unable to reasonably manage active participation in multiple simultaneous OEB proceedings. Given that the cause of these latest delays in the commencement of the hearing is directly related to CANDAS' actions, we ask the Board to consider its other proceedings as higher priorities for scheduling purposes. In any event, we respectfully request that the Board not schedule any new intervenor filing deadlines in this case until the New Year, given previous commitments of THESL and its consultants (who have proceeded on the basis that the most recent hearing schedule would have had the CANDAS hearing concluded well before the New Year).

Yours very truly,

BORDEN LADNER GERVAIS LLP

Original signed by J. Mark Rodger

J. Mark Rodger
Counsel to Toronto Hydro-Electric System Limited

Copy To: Pankaj Sardana and Lawrence Wilde, THESL
Helen Newland and Michael Schafler, CANDAS

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