J. Mark Rodger
T (416) 367-6190
F (416) 361-7088
mrodger@blg.com

John A.D. Vellone
T (416) 367-6730
F (416) 361-2758
jvellone@blg.com

Borden Ladner Gervais LLP
Scotia Plaza, 40 King St W
Toronto, ON, Canada M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

Borden Ladner Gervais

September 24, 2012

Delivered by Email and RESS

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

Dear Ms. Walli

Re: CANDAS Application - OEB File No.: EB-2011-0120
Submissions on Costs

We write on behalf of Toronto Hydro-Electric System Limited ("**THESL**") pursuant to the Ontario Energy Board's ("OEB") *Decision on Preliminary Issue and Order* dated September 13, 2012 (the "**Decision**") in relation to the following 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 OEB's costs for this proceeding.

In making these submissions, THESL makes reference to Procedural Order No. 1 dated June 13, 2011 ("**PO#1**"), the OEB's *Practice Direction on Cost Awards* (the "**Practice Direction**") as well as the OEB's prior cost award decisions.

THESL's role as an intervenor in this matter

THESL intervened in this proceeding as a matter of public policy, and on behalf of its customers, the ratepayers in the City of Toronto. In this capacity, THESL put forward its interpretation that the CCTA Decision did not apply to wireless attachments. This position was founded on a number of factual and public policy considerations that, in our view, distinguished those attachments from wireline attachments.

THESL submits that its interpretation that the 2005 CCTA Decision[1] did not apply to wireless attachments was reasonable. Three independent experts corroborated that interpretation in evidence in this proceeding, based upon their knowledge of the wireless sector and their

[1] RP-2003-0249 dated March 7, 2005.

independent interpretations of the CCTA Decision. In addition, the precedent Model Agreement that resulted and endured from the original CCTA proceeding expressly excluded Wireless Transmitters.

The Board rejected this view, and of course THESL respects that decision. But THESL's engagement in this case was well-motivated and sensible.

Further, THESL was proactive in respect of its interpretation of the CCTA Decision. Promptly upon this matter becoming a concern to THESL, it wrote directly to the OEB on August 13, 2010, to clearly inform the Board of its view, and invited the OEB to notify THESL if it had any concerns with its position.

When CANDAS brought its application, THESL intervened because of a *bona fide* concern that a consortium of private cellular companies, represented by the moniker CANDAS, was attempting to attach to THESL poles at a regulated attachment rate that was orders of magnitude less than the existing market rate for wireless attachments in the City of Toronto.

THESL stood to gain nothing from a higher, arms-length, market based, pole attachment rate. The net revenue of those higher, market based rates would flow to the benefit of THESL ratepayers and would serve to help offset electricity system costs. Maintenance of what it considered (and considers) to be an artificially low attachment rate disadvantaged Toronto ratepayers and inured directly to the benefit of the commercial consortium that brought the application. Toronto Hydro considered that it had a duty to protect its ratepayers.

Further, THESL consistently attempted to make the proceeding as focused and efficient as possible. For example, THESL filed a Notice of Motion on September 2, 2011, seeking, *inter alia*, that the OEB determine as a "threshold issue"[2] whether or not the CCTA Decision applies to wireless attachments as described in the CANDAS Application. Through its motion, THESL sought to bring forward a central matter in dispute to have it resolved by the OEB using the "most constructive, efficient and timely approach."[3]

The threshold issue that was suggested by THESL on September 2, 2011 is identical to the Preliminary Issue which the OEB ultimately heard oral argument in respect of on July 23, 2012 and which led to the subject Decision.

CANDAS opposed the hearing of the THESL Motion.[4]

THESL submits that its effort to bring the preliminary issue into focus at this early stage in the proceeding further evidences its effort to seek an efficient resolution to the issue and this proceeding in its early stages.

[2] THESL's September 2, 2011 Notice of Motion.
[3] *Ibid.*
[4] See in particular CANDAS letter dated Sept. 2, 2011 in response to the THESL Motion.

I. CANDAS' COSTS

1. CANDAS Should Not Be Permitted Recovery of Its Costs

In Procedural Order No. 1, the OEB determined that:

> "Given the nature of the application, the Board is not yet in a position to determine whether the applicant is eligible for an award of costs. As such, the Board will make its determination on this matter at the conclusion of this hearing."

THESL submits that because CANDAS is the Applicant in this proceeding, and because of its obvious and direct commercial interest in its outcome it is both ineligible and not entitled as a matter of principle to recover its costs in this proceeding. To grant such recovery would be hard to understand for whatever cohort of ratepayers was to be burdened with CANDAS' costs. Not only would such ratepayers be disadvantaged by the low attachment rate, they would be in the odious position of having to pay the costs of the commercial entities benefitting from it.

THE PRACTICE DIRECTION

Pursuant to Rule 3.02 of the Practice Direction, CANDAS has the burden of establishing eligibility for a cost award.

Section 3.05(a) of the Practice Direction clearly states that applicants before the OEB are not eligible for costs awards. CANDAS is the Applicant in this proceeding, and is therefore *prima facie* ineligible to claim costs pursuant to the OEB's Practice Direction.

In THESL's submission, nothing in this proceeding justifies a departure from the OEB's standard rules regarding cost eligibility as outlined in its Practice Direction. This rule articulates the OEB's sensible public policy approach that requires applicants to take responsibility for, and bear the costs associated with their applications.

That is especially so when the Applicant, as in this case, is pursuing its unmitigated commercial objective, which is in direct and clear opposition to the interests of ratepayers.

Further, that the Applicant was successful has no relevance to the Board's determination with respect to costs. It has never been the Board's practice to adopt a "winner-takes-all" approach to costs. The Practice Direction and OEB practice evidences that the OEB's costs award process is predicated on fundamentally different principles.

First among these is that Applicants, whether successful or not, are ineligible for costs recovery. Second, commercial interests are similarly ineligible. This is codified in Section 3.03 of the Practice Direction. That must be particularly so when the commercial interest being pursued is necessarily inconsistent with the interests of ratepayers, as is the case here.

It is our view that to grant CANDAS any portion of its costs in this proceeding is contrary to the explicit provisions of the Practice Direction, its underlying principles, and contrary to good regulatory practice and common sense.

2. If CANDAS is Permitted Recovery of its Costs, then the Quantum Should be Reduced

THESL strongly opposes the granting of any costs recovery to the Applicant, CANDAS, in this proceeding. If, however, the OEB finds that CANDAS is eligible for an award of costs, then THESL submits that the aggregate amount that CANDAS would otherwise be allowed to recover should be reduced to take account of the factors set out in section 5.01 of the Practice Direction.

The applicant engaged in conduct that complicated and unduly lengthened the proceeding. For example, the applicant chose to retain Roger Ware as an expert, with knowledge of his role as a member of the OEB's Market Surveillance Panel. Parties asked interrogatories on Dr. Ware's evidence and conducted further discovery of him during the technical conference. Following questions of Dr. Ware posed by THESL at the technical conference regarding Dr. Ware's (in)eligibility to be a witness in this proceeding, the OEB invited submissions from parties on the issue of whether a conflict of interest or a reasonable apprehension of bias arises by having a member of the Market Surveillance Panel appear as an expert witness before a panel of the OEB in an application.

In the face of submissions that Dr. Ware was ineligible to appear as a witness before the OEB in this proceeding, CANDAS ultimately withdrew the evidence of Dr. Ware. CANDAS then filed replacement expert evidence from Patricia Kravtin, triggering the need for a new round of interrogatories on the replacement evidence.

THESL submits that to the extent that the OEB awards costs to CANDAS, any such award should be discounted to reflect the facts that: (i) ultimately moot evidence was filed for which parties engaged in an interrogatory and discovery; (ii) CANDAS only withdrew the subject evidence after parties had made submissions to the OEB; and (iii) parties were required to engaged in a second interrogatory process in respect of the replacement evidence.

We have already noted CANDAS' opposition to hearing the THESL Motion, filed September 2011, which contained *inter alia* the Threshold Question.

3. If CANDAS Is Permitted to Recover Costs, Costs Should be Recoverable from all Ontario LDCs

Finally, in the event that the OEB permits CANDAS to recover its costs, THESL submits that those costs should be recoverable from all LDCs in the Province of Ontario, in view of the Province-wide scope of CANDAS' Application and the province-wide effect of the Decision.

II. INTERVENOR AND OEB COSTS

1. Parties Should Cover Their Own Costs

In Procedural Order No. 1, the OEB determined that:

> "Similarly, the Board is not yet in a position to determine what party or parties shall be assessed the costs of this proceeding. The Board may ultimately determine that costs be borne by one or more of (1) the applicant, (2) one or more of the electricity distributors

(i.e. an individual distributor, such as THESL, or a group of distributors) who participate in this proceeding, (3) all licensed electricity distributors in the Province."

THESL submits that CANDAS should pay its own costs, and the costs incurred by the OEB, and those of non-utility intervenors in prosecuting its application.

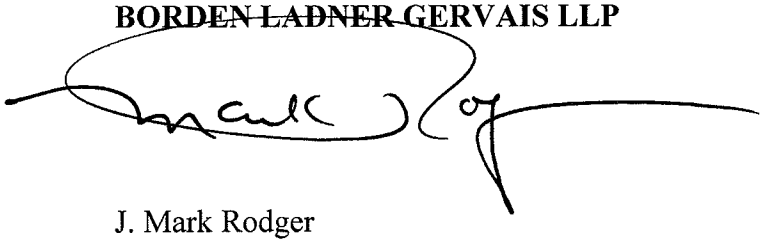
THESL further submits that the LDC intervenors, including THESL, should cover their own costs. In our view this approach, and only this approach, is supported by and consistent with the Practice Direction and its underlying principles.

The only reasonable departure from that approach would be to have CANDAS cover the costs of the LDC intervenors. In this case THESL intervened to protect the interests of its ratepayers in an attempt to offset upward pressure on distribution rates.

If there is any activity that clearly falls within the principled and codified costs recovery regime administered by the OEB, this is it - ratepayer protection from inflationary pressure on rates. In this case this role was assumed by the LDCs on behalf of their ratepayers in addition to the consumer groups whom already have been granted costs recovery eligibility.

Respectfully Submitted September 24 2012,

BORDEN LADNER GERVAIS LLP



J. Mark Rodger

copy to: Amanda Klein, THESL
Helen Newland, counsel to CANDAS
All Parties