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FILED ELECTRONICALLY AND VIA COURIER

September 24, 2012

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

Y. Monica Song
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DIRECT 613-783-9698

Dear Ms. Walli:

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

Pursuant to Decision on Preliminary Issue and Order dated September 13, 2012, the Applicant, CANDAS, submits for filing its written submissions on the costs issues identified by the Board at page 21 thereto.

Yours very truly,

(signed) Y. Monica Song

YMS/bac

cc: All Intervenors

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 the **Canadian Distributed Antenna Systems Coalition** for certain orders under the *Ontario Energy Board Act, 1998*.

COSTS SUBMISSIONS OF CANDAS

I. OVERVIEW

1. Pursuant to the Board's procedural directions at page 21 of the Decision on Preliminary Issue and Order dated September 13, 2012 ("CANDAS Decision and Order"), the Canadian Distributed Antenna Systems Coalition ("CANDAS") makes the following submissions on the issues related to the parties' eligibility for and obligation to pay costs in this matter, identified by the Board as follows:
 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.
2. With respect to issues No. 1 and No. 3 above – from whom the costs of the Canadian Consumers Coalition ("CCC"), the Vulnerable Energy Consumers Coalition ("VECC") and Energy Probe (collectively, the "Consumers Groups") and the Board should be recovered – CANDAS submits that such costs should be recovered from all Ontario electricity distributors for the reasons set out below. Under no circumstances should the members of CANDAS be required to pay the costs of the Consumers Groups and the Board.

3. Regarding issue No. 2, CANDAS should be found eligible for an award of costs in this matter, notwithstanding section 3.05 of the Board's *Practice Direction on Cost Awards* (the "*Practice Direction on Costs*"), by reason of the special circumstances that exist:
- (a) First, the unilateral denial of pole access by a number of electricity distributors and their affiliated entities, and, most particularly, Toronto Hydro-Electric Systems Limited ("THESL"), notwithstanding the clear wording of the *CCTA Decision and Order*,¹ gave rise to the CANDAS Application in the first place;
 - (b) Second, the false or disingenuous pretence of alleged "safety and operational concerns" was advanced as a rationale for this unilateral denial of pole access. These grounds were subsequently repudiated by THESL, itself, on the eve of the oral hearing on the Preliminary Issue;
 - (c) Third, although the members of CANDAS are commercial entities, in bringing this matter before the Board and in their participation throughout, they represented a public interest in ensuring fair and meaningful rights of access to utility assets falling within the statutory jurisdiction of the Board which public interest transcended the commercial interests of the individual members of CANDAS;
 - (d) Fourth, CANDAS has advanced broad public policy issues in much the same fashion as do the Consumers Groups. Indeed, the Consumers Groups and CANDAS were aligned in interest throughout this proceeding. In addition, CANDAS initiated and pursued its Application notwithstanding that the particular commercial market opportunity between its members represented by the originally planned Toronto DAS network had long since terminated; and

¹ Ontario Energy Board, Decision and Order dated 7 March 2005, File No. RP-2003-0249 (hereinafter the "*CCTA Decision and Order*")

- (e) Fifth, THESL, the Electricity Distributors Association (“EDA”) and Canadian Electricity Association (“CEA”) (collectively the “Electricity Distributors”) engaged in conduct that tended to prolong the proceeding unduly and unnecessarily for all parties and for the Board.
4. In light of the foregoing, CANDAS’ costs and those of the Consumers Groups and the Board should be paid by Ontario electricity distributors. CANDAS takes no position, at this time, regarding any special apportionment of the costs awards against one or more electricity distributors, such as THESL. Nor does CANDAS take any position, at this time, regarding the appropriateness of a direction that the shareholders of the electricity distributors, and not their ratepayers, bear these costs. However, in no event should Toronto Hydro’s own costs of this proceeding be borne by Toronto Hydro’s ratepayers.

II. CANDAS’ COST ELIGIBILITY

5. Although an applicant is *prima facie* not eligible for a cost award, section 3.07 of the *Practice Directions on Costs* states that “the Board may, in special circumstances, find that [an applicant] ... is eligible for a cost award in a particular process.” More generally, a party will be eligible to apply for a cost award under subsection 3.03(b) of the *Practice Directions* where a party “primarily represents a public interest relevant to the Board’s mandate.”

Practice Direction on Costs, ss. 3.07 and 3.03(b)

A. **Unilateral Denial of Right of Access for Wireless Attachments Led to the CANDAS Application**

6. The *CCTA* Decision and Order was and is clear on its face: it establishes a non-discriminatory, technology-neutral right of access to distribution poles for all Canadian carriers and cable companies. It was in effect when members of CANDAS approached THESL and Toronto Hydro Electric Systems Inc. (“THESI”) in 2008 seeking access to poles for the purposes of constructing the Toronto DAS network.

7. In the years from 2005 until August of 2010, THESL and THESI engaged in a course of conduct, including the execution of contracts with members of CANDAS, which clearly indicated that it did not dispute the applicability of the CCTA Decision and Order to wireless attachments.

Agreement for Licensed Occupancy of Power Utility Distribution Poles dated 1 August 2009 between THESL and DAScom Inc.; CANDAS(Board Staff)8 Schedule 1-1 revised 31 August 2011

Agreement for Licensed Occupancy of Support Structures dated 4 September 2009 between THESI and DAScom Inc.; CANDAS(Board Staff)8 Schedule 1-1 revised 31 August 2011

See also email dated November 14, 2008 from Victoria Iacovazzi (Toronto Hydro) to Natasha Ernst (ExteNet Systems) re Toronto Hydro Utility Structure Attachment, CANDAS Application, Tab 13

8. Then, with no prior notice to members of CANDAS, on or about 13 August, 2010, THESL wrote to the Board advising it of its new “no wireless” policy.

See CANDAS Application, paragraphs 7.1 to 7.10 and paragraphs 8.1 to 8.4

Letter dated 13 August 2010 from Pankaj Sardana (THESL) to Kirsten Walli (OEB) re THESL Policy Concerning Wireless Pole Attachments

9. In 2010-2011, members of CANDAS were met with similar resistance or unresponsiveness from other Ontario electricity distributors falling within the Board’s jurisdiction. These distributors, like THESL, either denied outright that the right of access established in the CCTA Decision and Order applied with respect to wireless attachments (Veridian Corporation, PowerStream, Inc., Newmarket Hydro), refused to provide members of CANDAS with copies of their standard pole access agreements (Oakville Hydro, Oshawa PUC Networks Inc.), or simply did not respond to enquiries regarding wireless attachments (Enersource Corporation).

CANDAS(Board Staff)7 filed 16 August 2011

10. The stated premise initially advanced in support of THESL's no-wireless policy was concern about safety hazards allegedly posed by wireless attachments. Prior to August 2010, THESL had not raised such issues with the members of CANDAS. THESL's about-face was also perplexing given the existence of industry-wide electrical safety and engineering standards in use for both wireline and wireless telecommunications attachments.
11. It eventually came to light that what THESL really wanted was a higher rate for pole attachments, as evidenced by its late-breaking revelation in this proceeding that it had entered into an agreement for the attachment of wireless equipment on its poles with a third-party wireless carrier at a rate considerably higher than the regulated rate of \$22.35 per pole per annum.

**Letter dated 12 July 2012 (Revised) from John A.D. Vellone (Borden
Ladner Gervais LLP) to Kirsten Walli (OEB) re Amendments to the
Evidentiary Record and New Information Confidential Filings**

12. The wasted time and effort spent by the parties and the Board to address the bogey-man of "safety and operational concerns" are discussed in further detail below. However, regardless of THESL's justification for its no-wireless policy – "safety and operational concerns"; the desire for a higher rate of attachment; or the alleged existence of vibrant market for wireless siting alternatives – the way that THESL and other electricity distributors went about resolving these concerns constitutes a "special circumstance" that should bear on CANDAS' request to recover costs in this proceeding.
13. It was abundantly clear that the distribution poles of electricity distributors falling within the Board's statutory authority were regulated assets. Given the CCTA Decision and Order and the Board's Compliance Bulletin issued 30 May 2005, THESL's and the other electricity distributors' unilateral repudiation of the right of access set out in the CCTA Decision and Order was, at best, unreasonable and, at worst, an act of bad faith.

Ontario Energy Board, Compliance Bulletin 200505 dated 30 May 2005 re Access to Power Poles; CANDAS Application, Tab 8

Decision and Order dated 11 February 2010 re Applications by THESL for leave to acquire THESI streetlighting assets and other relief, File Nos. EB-2009-0180, EB-2009-0181; EB-2009-0182, and EB-2009-0183 (hereinafter “MADD Decision and Order”)

Decision and Order dated 17 December 2010 re An Application by Hydro One Networks Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2010, file no. EB-2010-0228, paragraph 14 at 3 (hereinafter “Hydro One Decision and Order”)

14. If price was the prime motivating factor, as the owner of regulated distribution assets, THESL or any other distributor could have applied to the Board to vary the regulated rate. Instead, THESL unilaterally announced to the Board a new “no-wireless” policy, ostensibly because of alleged safety and operational concerns with respect to wireless attachments. Moreover, it was not until many weeks later that the members of CANDAS were able to obtain a copy of Toronto Hydro’s 13 August 2010 letter to the Board.

Email chain dated 29 November 2010, 6 December 2010, 22 December 2010 between Lawrence Wilde (Toronto Hydro) and George Vinyard (ExteNet Systems, Inc.), CANDAS Application, Tab 2

15. This is not the first instance of unilateral and unwarranted repudiation of pre-existing statutory and regulatory obligations by THESL. While the *Smart Meters* case involved a compliance proceeding initiated by the Board on its own motion (which is obviously not the case here), the pattern of behaviour on the part of THESL is similar.
16. In the *Smart Meters* case, THESL decided unilaterally that it would refuse to connect a certain class of customers – new condominium developments – thereby excluding this certain class from its existing statutory and regulatory obligations. The Board found that in refusing to connect at the bulk meter for one class of customers (new condominiums), Toronto Hydro had breached section 28 of *Electricity Act* and various sections of the *Distribution System Code*.

Significantly, the Board ordered THESL to pay the Board's and complainants' costs and further ordered that such costs be borne by THESL's shareholders and not the ratepayers.

Decision and Order dated 27 January 2010 in the matter of a Notice of Intention to Make an Order for Compliance against Toronto-Hydro Electric System Limited, File no. EB-2009-0308, paragraphs 14-16 at 5-6, paragraph 50 at 17 (hereinafter "*Smart Meters Decision and Order*")

17. An obvious parallel can be drawn between THESL's unilateral decision to "interpret" its statutory and regulatory obligations to connect at a bulk meter in the *Smart Meters* case and THESL's unilateral decision on or around 13 August 2010, that it would, similarly, no longer attach to a certain class of equipment – wireless telecommunications. This unilateral denial of a right of access contravened the clear wording of the *CCTA* Decision and Order. It was the unilateral about-face of this electricity distributor, and the subsequent knowledge that other Ontario distributors were taking positions in line with THESL, that made it necessary for CANDAS to bring this Application before the Board. In the circumstances, CANDAS submits that the Electricity Distributors' conduct constitutes a special circumstance warranting an award of costs to CANDAS.

B. CANDAS Represented a Public Interest Relevant to the Board's Mandate

18. In initiating this proceeding and in its participation throughout, CANDAS has represented a public interest relevant to the Board's mandate, namely the defence of a non-discriminatory, technology-neutral right of access to regulated utility assets by all Canadian carriers and cable companies.
19. First, the Application sought confirmation of the Board's earlier direction concerning attachment of telecommunications and broadcasting facilities to regulated utility assets falling within the Board's statutory jurisdiction throughout the Province of Ontario. In doing so, the Application raised important issues of public policy pertaining to all distributors. It was not an Application about a dispute between two parties. Accordingly, the scope of the Application was not

limited to resolving a narrow commercial dispute between the members of CANDAS and any one electricity distributor.

20. Second, the Application raised issues that go to the very root of the Board's regulation of utility assets in the public interest. The purpose of utility regulation is to "protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service." The utilities' ownership and control over valuable monopoly assets and the public interest in regulating the market power that the utilities derive from same, are the *raison d'être* of utility regulation.

***ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006]
1 S.C.R. 140, paragraphs 3-4**

21. The scope of the public interest protected by the OEB goes beyond the protection of electricity ratepayers and extends to providers and users of telecommunications. Section 70(2)(c) of the *Ontario Energy Board Act 1998* grants to the Board the power to impose licence conditions requiring a licensee to enter into agreements with third parties for the "use of ... any lines or plant owned or operated by the licensee." Like the Board, other provincial utilities regulators have established a right of access to electricity distribution poles for telecommunications and broadcasting purposes by invoking the public interest in mitigating the unnecessary proliferation of poles and the undesirability of permitting electricity distributors from exploiting their monopoly over pole infrastructure and over the necessary statutory easements. In particular, the British Columbia Court of Appeal has held that the "public interest" to be protected by the Commission was not just that of electricity ratepayers.

***FortisBC v. Shaw Cablesystems Inc.*, Commission Order G-63-10 (1 April 2010) at 7, affirmed 2010 BCCA 552, paragraphs 52 to 58**

New Brunswick Board of Commissioner of Public Utilities Ruling re Rogers Jurisdiction Motion dated 27 October 2005, being Appendix C to the Decision dated 9 June 2006 in the matter of a Rate Application dated 21

March 2005 by New Brunswick Power Distribution and Customer Service Corporation

TransAlta Utilities Corp. (1999), 1999 CarswellAlta 1760 (Alta E.U.B.) (Docket U99035), paragraph 651

22. The fact that the Consumers Groups and Electric Distributors applied to intervene in this matter, confirms that the Application gave rise to many important public policy considerations. Indeed, this proceeding could well have been initiated by the Board itself.
23. Finally, CANDAS sought the Board's guidance on the proper interpretation and application of the CCTA Decision and Order (and in the alternative, the modification of all Ontario electricity distributors' conditions of licence to permit wireless attachments), notwithstanding that the particular commercial market opportunity between its members, represented by the originally planned Toronto DAS network project, had long since terminated.
24. Thus, although the members of CANDAS are commercial entities, in bringing this matter before the Board, and in their participation throughout, they clearly represented a public interest that transcended the mere commercial interests of the members of CANDAS.

C. Parties' Conduct within the Proceeding

25. This Board has exercised its discretion in the past to make cost awards to parties not normally entitled to costs (such as applicants and municipalities) and has made special provisions as to the manner in which costs should be payable, based on a party's conduct in proceedings before it.

Decision and Order dated 19 November 2008 re An Application by Westcoast Energy Inc. and Union Gas Limited for Leave for the transfer of a controlling interest in Union Gas Limited, File No. EB-2008-0304 at 11 to 14

26. CANDAS participated responsibly in the proceeding, complying with procedural directions of the Board and seeking, at each juncture, to narrow the issues between itself and the Electricity Distributors.
27. In contrast, the Electricity Distributors attempted to change and conflate the issues raised by the Application and, then, subsequently and in effect, withdrew their “safety and operational” argument, thereby prolonging the proceeding unduly and unnecessarily for all parties.
28. As particularised below, the conduct of the Electricity Distributors is a factor that supports an award of costs for CANDAS and a finding that only Ontario electricity distributors (in a proportion to be determined by the Board) should be liable to pay the costs of the Board, Consumers Groups and CANDAS.

1. Alleged Insufficiency of the CCTA Rate

29. A recurring theme in THESL’s response to CANDAS’s Application has been to allege the insufficiency of the current rate for wireless attachments and to repeatedly attempt to drag into the debate the costs of alternate arrangements that Public Mobile had to take when it became apparent that THESL would not permit the attachments required for the Toronto DAS network to be completed in a sufficiently timely manner.
30. CANDAS’ Application was limited to three issues: whether the CCTA Decision and Order pertained to wireless attachments; if it did not, should such access be mandated by the Board; and, if so, on what terms and conditions. CANDAS’ Application did not seek to vary the current Board-approved attachment rate.
31. Notwithstanding the limited scope of the CANDAS Application, THESL’s interrogatories were replete with questions that addressed rates² and Public Mobile’s costs.³

² See for example, THESL IRs to CANDAS at 8(c)(i) to (xii), 11, 13(a), 18(b), 19(d), 20(b)(c), 23(a), 24(a), 27(a), 35(a)(e),

32. The CEA and EDA also submitted numerous interrogatories to CANDAS in respect of rates⁴ and Public Mobile's costs.⁵
33. THESL again brought the issue of rates to the fore of the proceeding when it filed a motion on 2 September 2011, seeking a Decision and Order of the Board that the access rate of \$22.35 arising from the CCTA Decision did not apply to wireless communications attachments and requesting that the Board forbear regulating such attachments. In so doing, THESL sought to expand the CANDAS proceeding to include a debate over the sufficiency of the level of competition in the attachment "market" and the appropriateness of the regulated attachment rate.
34. By letter dated 7 September 2011, the Board declined to address THESL's forbearance motion, holding it in abeyance.
35. In a letter dated 14 September 2011 precipitated by a further attempt by THESL to expand the issues in the proceeding, the Board clarified the scope of the CANDAS proceeding by very clearly stating that the setting of a new rate for wireless attachments was not a matter at issue in the CANDAS proceeding.
36. Again in its Decision and Reasons in this matter dated 9 December 2011, the Board reiterated that the amount of the attachment rate was not in issue.
37. Despite these three clear directions from the Board and despite the scope of the Application itself, THESL persisted in raising the issue of rates. In its late-filed motion on 22 December 2011 for further and better responses to its interrogatories, THESL sought information from CANDAS that clearly related only to rate-setting, as follows:

³ See, for example, THESL IRs to CANDAS at 1(b)(d)(e)(f), 5, 11(c)(d), 16, 31, 32, 33, 41(a), 42(a), 47, 48, 50 and 51.

⁴ See, for example, CEA IRs to CANDAS 10, 14, 9a)(b), 17(a)(b), 22(d), 26(a), 29(a)(b), 33(a)(b), 34(b), 48(g)(i), 49(h), 50(c), 52(a)(b)(c), 60(b), 64(d), 65. See also EDAs IRs to CANDAS at 4, 7, 16 and 22.

⁵ See, for example, CEA IRs to CANDAS 19(a)(b)(c), 22(b), 22(l), 30(a), 58(b), 60(a), 60(c), 61(a)(b), 63(c), 64(a)(b)(c)(d). See also EDA's IRs to CANDAS at 19 and 20.

- (a) copies of agreements relating to Public Mobile's use of rooftop and standalone macrocell tower sites in Toronto and details thereof, including fees payable by Public Mobile; and
 - (b) copies of agreements relating to ExteNet Systems' use of utility pole infrastructure in the United States and the fees payable by ExteNet Systems under such agreements.
38. The Electricity Distributors' interrogatories that focused on pricing information fell outside the scope of the proceeding and the issues clearly defined by the Board. The price of Public Mobile's network was not relevant to determining an electricity distributor's costs of maintaining a pole network. THESL repeatedly attempted to expand the scope of the issues raised by the Application and affirmed by the Board, to include arguments around whether rates should be market-based and/or that macrocells are a direct substitute for smaller-cell topologies such as DAS. The Electricity Distributors unnecessarily complicated and prolonged the proceeding in this regard; this resulted in costs thrown away for all participants to the proceeding. Given the Electricity Distributors' conduct in the proceeding, CANDAS should be eligible for a costs award and Ontario Electricity Distributors should be liable for the participants' (including CANDAS') costs.

2. THESL's Refusals and Repudiation of No-Wireless Policy

39. The impetus for the filing of the Application was THESL's "no wireless" policy announced in August 2010. One of THESL's main premises for this "no wireless" policy were the safety and operational concerns that THESL alleged precluded the attachment of wireless communications equipment on its poles:

With this letter, Toronto Hydro-Electric System Limited (THESL) wishes to inform the Board that, in light of the many safety and operational concerns about the attachment of wireless communications 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.

40. As a result of THESL's August 2010 letter, significant time, money and resources were expended addressing safety issues. Evidence, including expert evidence submitted by both parties, and interrogatories of the parties and participants, directly addressed safety issues as result of the concerns raised in THESL's August 2010 letter.
41. In its interrogatories, THESL continued to raise the supposedly unique safety concerns posed by wireless attachments and "operational" concerns posed by wireless attachments, including extra engineering and staff resources required to process and approve permit applications. In this regard, THESL raised the following issues related to its purported safety and operational concerns:
- (a) Who would attach and perform maintenance on wireless attachments, and were they qualified to work safely in doing so?;⁶
 - (b) Specifications of DAS-related equipment, including dimensions, weight, manner of attachment, etc.;⁷
 - (c) The location of fibre optic facilities for DAS and macro site systems and why DAS fibre optics should be attached to the THESL distribution system;⁸
 - (d) The location of the DAS antenna on the pole;⁹ and
 - (e) The configuration of DAS node network installations on poles;¹⁰
42. CEA¹¹ and EDA¹² followed THESL's lead, submitting a number of interrogatories to CANDAS related to the safety and operation of DAS wireless attachments.

⁶ THESL IR to CANDAS 20(a), 24.

⁷ THESL IR to CANDAS 21.

⁸ THESL IR to CANDAS 7.

⁹ THESL IR to CANDAS 31.

¹⁰ THESL IR to CANDAS 39.

¹¹ See, for example, CEA IRs to CANDAS 46(j) and 52.

43. As a result, CANDAS and other participants had to expend time and resources preparing and responding to interrogatories addressing safety and operational issues associated with wireless attachments that were raised in THESL's evidence. CANDAS submitted a number of interrogatories to the Electricity Distributors and THESL seeking further information on the particular safety and operational issues alleged to be associated with wireless attachments, and related information in respect of existing pole attachments and the differences or similarities between wireline and wireless attachments, as follows:

(a) Interrogatories to Ms. Byrne regarding:

- (i) safety issues;¹³
- (ii) operational issues;¹⁴
- (iii) existing pole attachments;¹⁵ and
- (iv) differences and similarities between wireless and wireline attachments.¹⁶

(b) Interrogatories to Mr. Starkey regarding:

- (i) safety issues;¹⁷
- (ii) operational issues;¹⁸
- (iii) existing pole attachments;¹⁹ and
- (iv) differences and similarities between wireless and wireline attachments.²⁰

(c) General interrogatories to THESL and Electricity Distributors regarding:

¹² See, for example, EDA IRs to CANDAS 1(c), 3, 11, 12, 19, 32(a), 45(a)-(f), 46(f) and (m)(ii)

¹³ CANDAS IRs to THESL and Ms. Byrne B-5(c),(d), B-6, B-11(a)-(c), B-21(a), B-31, B-35.

¹⁴ CANDAS IRs to THESL and Ms. Byrne B-13, B-16, B-39.

¹⁵ CANDAS IRs to THESL and Ms. Byrne B-7(d), B-11(d), B12(a)-(c), B-13(e), B-15(f)(i)-(vi), B-15(g)(i)-(vi), B-15(m), B-23(b), B-24(a)(ii)-(iv), B-24(b)(c)(e), B-26(a), B-29(a)(i)-(ii), B-29(b)(c).

¹⁶ CANDAS IRs to THESL and Ms. Byrne B-5(a)-(b), B-26(b)(c), B-28(a), B-30(a)-(e), B-31(a), B-32(a), B-33(a), B-34(a)(b), B-36(a)-(d).

¹⁷ CANDAS IRs to THESL and Mr. Starkey S-5(c), S-17(a), S-19(e).

¹⁸ CANDAS IRs to THESL and Mr. Starkey S-11, S-24(e).

¹⁹ CANDAS IRs to THESL and Mr. Starkey S-5(a)(c), S-17(b)-(d), S-18(a)-(d), S-19(h)(vii).

²⁰ CANDAS IRs to THESL and Mr. Starkey S-9(b)(c), S-12(a)(b)(d)-(j), S-16(a), S-18(e)-(f), S-19(i), S-22(a)-(f), (h), S-23(a)-(e).

- (i) safety issues;²¹
 - (ii) operational issues.²²
44. CANDAS also devoted further time and resources preparing evidence (including through Ms Kravtin’s expert report and Mr. Larsen’s reply evidence) responding to the safety and operational concerns raised by the Electricity Distributors. Furthermore, CANDAS devoted the majority of its examination of THESL’s witness panel at the Technical Conference held on 4 November 2011 to exploring the Electricity Distributors’ alleged safety and operational concerns.
45. Given the concerns set out in THESL’s August 2010 letter, the considerable time and resources expended by CANDAS to prepare evidence, interrogatories, reply evidence and for the Technical Conference, in respect of safety and operational issues, were more than justified.
46. However, despite their relevance to issues raised initially by THESL, THESL declined to provide responses to many of the interrogatories. In the result, CANDAS was forced to bring a motion on 3 November 2011, to compel answers to its interrogatories. CANDAS was largely successful in its motion: the Board, in its Decision and Order dated 9 December 2011, ordered THESL to answer questions relating to third party wireless attachments on THESL poles, agreements between THESI and Cogeco, comparisons between wireless attachments as they related to safety considerations raised by THESL, and THESL’s letter of August 2010.
47. THESL put safety and operational concerns in issue and obdurately maintained its position on alleged “safety and operational” concerns posed by wireless throughout the course of the proceeding. Notwithstanding the foregoing, on 12 July 2012, THESL filed a letter with the Board seeking to amend the evidentiary record to include an agreement for the attachment of wireless equipment on

²¹ CANDAS IRs to THESL G-10, G-12, G-14, G-18(i), G-19(b), G-24(d).

²² CANDAS IRs to THESL G18(j)-(k), G-25.

THESL poles that was recently negotiated with a wireless attacher at an attachment rate that exceeded the rate established by the CCTA Order of \$22.35 per pole per annum. THESL's decision to enter into a new wireless attachment agreement cannot be reconciled with its stated position that operational and safety concerns should preclude such attachments.

48. Inordinate time and expense were spent and in the final analysis, thrown away, addressing THESL's alleged safety and operational concerns that turned out to be nothing more than litigious posturing. The conduct of the Electricity Distributors and of THESL in particular is another factor that supports a finding that CANDAS is eligible for costs in this matter.

III. CONCLUSION

49. CANDAS submits that taken as a whole, the circumstances leading up to the Application, the scope of the Application, CANDAS' representation of the public interest in ensuring fair and meaningful access to regulated utility assets for telecommunications attachments on a non-discriminatory, technology-neutral basis, and the parties' conduct throughout the proceeding, amount to special circumstances justifying an award of costs in CANDAS' favour.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 24, 2012

FRASER MILNER CASGRAIN LLP



Y. Monica Song
Counsel to CANDAS