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Dear Ms. Walli:

**Canadian Distributed Antenna Systems (CANDAS) Application
Board File Number EB-2011-0120**

We are counsel to the Electricity Distributors Association (**EDA**) in the above-noted proceeding. We enclose herewith EDA's reply submissions with respect to the costs. An electronic copy has been filed with the Board via the RESS system and hard copies will be delivered by courier.

Yours very truly,



for Alan Mark

AM/rp

Copy to: Mark Rodger, counsel to THESL
Helen Newland, counsel to CANDAS
All parties

DOCSTOR: 25293871

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*

**REPLY SUBMISSION OF THE ELECTRICITY DISTRIBUTORS ASSOCIATION
WITH RESPECT TO THE COSTS**

Overview

- 1 The Electricity Distributors Association (“EDA”) makes the following submissions in reply to the costs submissions filed on behalf of other parties and intervenors in this proceeding:

Payment of Costs by CANDAS

- 2 Under the Practice Direction with respect to costs, CANDAS is not eligible for an award of costs except in special circumstances. The special circumstances which CANDAS appears to rely on are:
 - (a) that it represents a public interest; and
 - (b) that it was successful in the proceedings.
- 3 CANDAS is not a public interest group nor even an industry advocacy group. It is simply a joint venture of three parties with the same commercial interest in a proposal to obtain access to the support structures owned by THESL at a cost-effective rate. It received no support from any other industry participant. The fact that certain intervenors representing a public interest supported the result says nothing about whether CANDAS itself represents a public interest. Indeed, the Consumer’s Council of Canada, upon whose intervention CANDAS relies to suggest it is a kindred spirit in the pursuit of the consumer

interest, itself asserts that CANDAS represents a bare commercial interest and should not be entitled to costs.

- 4 The fact that THESL's interpretation of the CCTA Order was ultimately dismissed by the Board cannot be the basis upon which to award costs to CANDAS. If success in the proceeding was a special circumstance, then the prohibition against an applicant obtaining an award of costs would serve absolutely no purpose. The intent of the Practice Direction is clear that, regardless of outcome, the applicant is not entitled to costs, and any special circumstances to be relied upon in seeking exception to that Rule cannot, *a fortiori*, be premised on success in the proceedings.
- 5 To the extent CANDAS bases its position on the assertion of bad faith on the part of either THESL or other LDCs, there is absolutely no basis in the record for such an assertion. There was a real contest as to the interpretation and application of the CCTA Order. That the Board ultimately interpreted the Order as contended for by CANDAS, says absolutely nothing about whether the interpretation advanced by THESL or other LDCs was advanced in good faith.
- 6 The EDA reminds the Board that the only interest represented in this proceeding by the LDCs was the interest of ratepayers, as all the revenue in question would serve to reduce rates, not to enrich shareholders or any other stakeholders in LDCs. It serves no legitimate purpose for applicants to this Board to assert various allegations of bad faith against LDCs who seek to protect only the interest of ratepayers.
- 7 In the circumstances, the EDA agrees with the CCC that CANDAS should be responsible for its own costs as well as the costs of the Board and other parties the Board rules eligible for costs in this proceeding.

No Basis for Award of Costs Against LDCs

- 8 The EDA submits that no good reason has been shown for an award of costs against the LDCs.
- 9 Board Staff supports its position that a portion of the costs of eligible parties should be payable by the LDCs on the basis that LDCs, other than THESL, had an interest in the matter under consideration and, as a result of the decision, receive "clarity" as to the interpretation and application of the CCTA Order.

- 10 With respect, every Board decision, by definition, results in clarity being brought to an ambiguous matter. This surely cannot, by itself, ever be a basis for a determination of who should pay costs. In the absence of some other circumstance, it cannot be the case that simply because LDCs have an interest in a proceeding they should, *ipso facto*, be responsible for costs.
- 11 This is all the more so in a proceeding where the applicant's interest is purely commercial and the interest represented by the LDCs is that of the ratepayer. It would be, it is respectfully submitted, poor regulatory policy to make the ratepayers bear any portion of the costs of these proceedings
- 12 There was a legitimate dispute regarding the interpretation and application of CCTA Order. THESL appropriately alerted the Board to this dispute. In due course, the matter came before the Board for resolution. LDCs participated in the process appropriately and responsibly. The only interest they represented was that of the ratepayers in maintaining the lowest possible distribution rates. There is, in those circumstances, simply no basis for an award of costs against LDCs as a class.¹
- 13 Moreover, leaving aside that CANDAS' allegations of bad faith and improper conduct against THESL are unsupported, the EDA submits that there is no basis to any of the other complaints by CANDAS regarding the behaviour of the LDCs as a class:
- (a) the LDCs did nothing to prolong proceedings. They filed no evidence. Their interrogatories were appropriately addressed at questions which were legitimately in play in the proceedings until the Board ruled that it would not consider the public interest issue under section 29 of the *OEB Act* which was properly put forward by THESL at the beginning of the proceedings. The LDCs supported the preliminary determination of the question which the Board ultimately heard on July 23, 2012. It was CANDAS that opposed this preliminary determination. It is

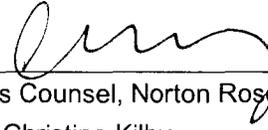
¹ CANDAS justifies its request for costs against the LDCs by, in part, adopting a clever literary trick. It combines THESL and all other LDCs in its defined term "Electricity Distributors". CANDAS then argues that the LDCs, by definition, are guilty of the bad faith and misconduct it attributes to THESL. The Board should ignore this transparent device.

clear, in this circumstance, that the LDCs did not prolong the proceedings but endeavoured to shorten them substantially;

- (b) there is no evidence to suggest that the LDCs acted in bad faith. The LDCs were of the view that CANDAS' attachments were of a different character than those contemplated by the CCTA Order. There is no question that the attachments engage different safety, technical, cost allocation and policy issues than the telecommunications wireline attachments which the CCTA Order was widely believed to govern. The fact that THESL, in due course, may have reconsidered its position on the evidence on safety and technical issues is hardly a sign of bad faith. Indeed, the Board should encourage parties engaged in proceedings before it to consider the evidence filed and resolve their differences and modify their positions as may be appropriate. In any event, LDCs other than THESL did not materially add to the costs or length of this proceeding by having an interest in the safety and technical questions.
- 14 Lastly, the EDA asks the Board to note how misconceived CANDAS' submission on costs is insofar as paragraphs 20 to 24 of its costs submission are concerned. CANDAS says this proceeding was necessary because what was in issue in the proceeding was the "monopolistic behaviour and the consequent inelasticity of demand with respect to the utilities' ownership and control over 'valuable monopoly assets'."
- 15 THESL tried to engage the very question of whether in fact the utilities' assets in question were monopoly assets, whether there was any inelasticity of demand, and whether there is any public interest to be protected. CANDAS opposed this offer to engage the public interest question and the Board ultimately terminated the proceedings before those issues could even be engaged. CANDAS thus cannot rely upon its allegations of improper monopoly conduct. It was successful in these proceedings on the narrow question of the interpretation of the CCTA Order without any consideration of the other issues raised in the proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of October, 2012

**THE ELECTRICITY DISTRIBUTORS
ASSOCIATION**



By its Counsel, Norton Rose Canada LLP

Per: Christine Kilby

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