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Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
PO Box 2319, 27th Floor
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Y. Monica Song
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Dear Ms. Walli:

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

The Applicant, CANDAS, is in receipt of costs submissions dated 24 September 2012 from Board Staff, Toronto Hydro Electric Systems Limited, the Electricity Distributors Association, the Consumers Council of Canada, the Vulnerable Energy Consumers Coalition and Energy Probe.

Pursuant to the procedures set out in the Decision on Procedural Issue and Order dated 13 September 2012, enclosed please find the Applicant's reply submissions on costs.

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*.

**REPLY COSTS SUBMISSIONS OF CANDAS
(Revised)**

1. A review of the costs submissions of CANDAS and Board Staff, and Consumers Council of Canada (“CCC”),¹ the Vulnerable Energy Consumers Coalition (“VECC”), and Energy Probe (collectively, the “Consumers Groups”), reveals a number of areas of agreement on factors relevant to costs:

- (a) Given the straightforward wording of the *CCTA* Decision and Order, the refusal of THESL and other Ontario electricity distributors to connect wireless equipment to distribution poles was, as the Board Staff put it, “unwarranted and inappropriate”;
- (b) There are strong parallels between THESL’s unilateral and self-serving “interpretation” of the *CCTA* Decision and Order and THESL’s unilateral action in the *Smart Meters* case, in which the Board made its costs and those of the applicants payable by THESL’s shareholder;
- (c) In the context of THESL’s unilateral action, the issues raised by CANDAS’ Application are first and foremost matters affecting the public interest, most notably with respect to electricity ratepayers/consumers, electricity distributors, Canadian telecommunications carriers and their customers; and

¹ CCC was erroneously identified as the “Canadian Consumers Coalition” in CANDAS’ initial submissions on costs dated 24 September 2012.

- (d) THESL's argument that its unilateral adoption of a "no wireless" policy was a response to "safety and operational" issues was, at least, disingenuous, and ultimately abusive of the Board's process and wasteful of public and private resources.

2. While Board Staff and the Consumers Groups generally agree that the foregoing qualify as special circumstances relevant to costs, they raise countervailing points (that are also alleged in the submissions of THESL and EDA), specifically:

- (a) CANDAS' opposition to THESL's request made on or around 9 September 2011, which certain participants allege is the precise issue that the Board eventually identified in June 2012 as the "Preliminary Issue";
- (b) the withdrawal of Roger Ware as an expert witness for CANDAS; and
- (c) some concern that CANDAS itself contributed to delays in the proceedings.

3. CANDAS respectfully disagrees that these points outweigh the factors supporting an award of costs to CANDAS as set out in its initial costs submissions and those of the Consumers Groups and Board Staff.

4. In addition, CANDAS notes in reply that the various positions asserted by THESL beginning with its 13 August 2010 letter and continuing throughout this proceeding, had they been advanced in a more straightforward matter, would fundamentally amount to an application to review the CCTA Decision and Order. It was THESL who unnecessarily broadened the scope of this proceeding in its quest to persuade the Board to review and alter the clear, unequivocal words of the CCTA Decision and Order or in the alternative, to partially forbear from regulation of electricity distributors' pole attachment services only with respect to "wireless" attachments as defined (imprecisely) by THESL.

I. CANDAS' CONDUCT

A. THESL's "Threshold Issues" Bear No Resemblance to the Board' Preliminary Issue

5. Some participants in the proceeding contend that the proceeding might have been concluded earlier and at lesser cost had CANDAS not opposed THESL's request, by Notice of Motion dated 2 September 2011, that the Board adjudicate certain "threshold issues." THESL, in its cost submissions, goes so far as to say that

[t]he threshold issue that was suggested by THESL on 2 September 2011 is **identical** to the Preliminary Issue which the OEB ultimately heard oral argument in respect of on 23 July 2012 and which led to the subject Decision. [Emphasis added.]

6. This assertion is, quite simply, incorrect. The Board's Preliminary Issue as ultimately decided on 13 September 2012 was stated simply by the Board on 29 June 2012 as follows: "Does the CCTA decision apply to the attachment of wireless equipment, including DAS components, to distribution poles?"²

7. In contrast, a comparison of the material filed by THESL on 2 September and THESL's 9 September 2011 letter reveals that THESL's threshold issues encompass *all* of the many issues raised in its 2 September Notice of Motion. The headings in the Notice of Motion are excerpted below:

Part A: The CANDAS Application constitutes a fundamental misapplication of the CCTA Decision since the issue of Wireless Attachments was neither raised, considered nor included within the CCTA Decision.

1. The CCTA Decision did not address Wireless Attachments. In fact Wireless Attachments were expressly identified in the CCTA settlement agreement as an unsettled matter. It remains an unresolved issue.

2. Wireless DAS was only being commercialised and promoted after the CCTA Decision and been rendered by the Board.

3. Distribution poles are not "essential facilities" for Wireless Attachments because there are numerous commercially viable alternatives that serve the same purpose.

²

OEB, Procedural Order No. 12 dated 29 June 2012, OEB File No. EB-2011-0120 at 3.

4. The CCTA Decision focused on wireline attachments that were authorized by the Board and fit within the communications space on distribution poles, as was defined by the Board. Wireless Attachments were not discussed and do not fit nor can be contained within the communications space, which is further clear evidence that the CCTA Decision does not apply to Wireless Attachments.

5. There are fundamental differences between wireline and Wireless Attachments that further emphasize that the CCTA Decision does not encompass Wireless Attachments

Part B: The Board should forbear from regulating Wireless Attachments

1. There is a variety of alternatives for Wireless Attachments and workable competition exists or will exist in the market for Wireless Attachments.

2. THESL submits that the competition in the Wireless Attachments space is sufficient to protect the public interest.

(a) Protecting the interests of THESL ratepayers

(b) Protecting the interests of THESL consumers with respect to the safety, adequacy, reliability and quality of electricity service [emphasis added]

8. In its procedural directions issued 7 September 2011, the Board held this Notice of Motion in abeyance. In response, in its 9 September letter, THESL simply repackaged the sum total of the grounds and arguments set out in the Notice of Motion and proposed a phased hearing of its “threshold issues” (as excerpted below) in a first phase and certain so-called secondary issues in a second phase:

“threshold” issues, which can be determinative of the entire proceeding, or determinative of which secondary issues are relevant to the next phase of the proceeding. Threshold issues *include whether the CCTA Decision applies, whether the Board will amend distributors' licences as requested in the CANDAS Application and whether the Board should forbear in this matter pursuant to subsection 29(1) of the Ontario Energy Board Act, 1998; ...* [emphasis added]

9. THESL's threshold issues are clearly *not identical* to the Board's Preliminary Issue. They include the sum total of the manifold issues contained in THESL's Notice of Motion, as outlined above, and include not only the issue of whether the CCTA Order *does apply* to wireless attachments but also whether the CCTA Order *should* apply or whether the Board should simply *forbear* from regulating.

10. CANDAS opposed the procedural requests set out in THESL's 9 September letter.³ The Board had just issued Procedural Order No. 2 dated 26 August 2011, setting a two-day hearing for mid-October. CANDAS was concerned that the inclusion of THESL's so-called threshold issues expanded the scope of its Application to include issues raised in THESL's Notice of Motion. This would prolong and unnecessarily complicate the proceeding and jeopardize CANDAS' ability to have the issues in its Application heard in a timely fashion.

B. Replacement of Roger Ware and Delays in Proceeding

11. Although THESL alleged a conflict of interest on the part of Dr. Ware, the Board did not rule on this issue. CANDAS acted to save all participants and the Board the costs of a hearing to determine the issue by voluntarily withdrawing Dr. Ware. Furthermore, the time and costs incurred by the Board and interveners to review Dr. Ware's evidence likely pales in comparison to the time and costs incurred as a result of THESL's manoeuvres in this proceeding.

12. Board Staff also point to delays caused by CANDAS' request for extensions to deliver responses to interrogatories. Such concerns must be placed in the context of the proceeding as a whole:

- (a) First, the sheer number of completely irrelevant questions made it impossible to respond in the time allotted. In this regard, CANDAS endorses the points made by the CCC at paragraph 17.3, and the VECC at subparagraphs 4(ii) and (iii) of their respective costs submissions;
- (b) Second, there were no delays in CANDAS' responses to THESL's and Board Staff's interrogatories and the extensions requested were not significant in the overall context of the proceeding; and
- (c) Third, while it is true that by letter dated 22 September 2011, CANDAS requested certain procedural delays, this was a direct consequence of the failure of THESL to file its own interrogatory responses by the prescribed date. This left CANDAS

³ See Letter dated 14 September 2011 from Fraser Milner Casgrain (Helen Newland) to the Board (Kirsten Walli).

in the untenable position of being unable to finalize its Reply evidence by the deadline.

II. THESL'S CONDUCT

A. Genesis of the Application

13. Board Staff links THESL's 13 August 2010 "no wireless" letter to a commercial dispute with CANDAS members. Nothing could be further from the truth:

- (a) At no time in the relevant period did THESL attempt to negotiate different terms and conditions, including rates of attachment;
- (b) This was no "commercial dispute" in any sense – the genesis of the Application was THESL's unilateral "interpretation"⁴ of the *CCTA* Decision and Order communicated to the Board informally in August 2010; and
- (c) Not only did THESL not discuss this radical departure with CANDAS, THESL refused to provide CANDAS with a copy of the letter.⁵ When CANDAS did obtain a copy nearly three months later from Board Staff, CANDAS was astonished to read about THESL's concerns regarding operational and safety issues because not once had THESL raised such concerns with CANDAS members.

14. Accordingly, CANDAS' Application did not, as the Board Staff asserts, arise from an ongoing dispute or failed negotiations with THESL, but was driven by THESL's abrupt shift from a compliant to a non-compliant stance vis-à-vis the *CCTA* Decision and Order.

⁴ Submissions on Costs dated 24 September 2012 from Borden Ladner Gervais LLP (J. Mark Rodger) to the OEB (Kirsten Walli) at 2.

⁵ 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.

B. Costs Driven by THESL's Alleged Safety and Operational Concerns

15. As CCC noted in its submission, it is reasonable in light of subsequent developments to conclude that THESL acted disingenuously in citing safety and operational concerns.

16. CANDAS submits that THESL's ultimate about-face on safety and operational issues allegedly posed by wireless attachments is self-evident and does not require a finding of "bad faith." As set out in detail elsewhere,⁶ THESL espoused a position, used it as a sword against all Canadian carriers in its 13 August 2010 letter to the Board, generated vast numbers of interrogatories and debate at the Technical Conference at which its representatives suggested that, despite its plain language, the 13 August 2010 letter did not announce a "no wireless policy" (though the representative did not retract any of the statements therein relating to alleged concerns with safety and operational issues), refused to answer CANDAS' and Consumers Groups' interrogatories on the very issues it had raised, thereby necessitating costly motions, and then unceremoniously announced that it had entered into a wireless attachment agreement for a much higher price. In light of these circumstances, CANDAS does not agree with CCC that the Board may not take THESL's about-face into consideration as a factor favouring an award of costs to CANDAS.

C. THESL's Agenda Throughout Was to Review the Correctness of the CCTA Decision and Order

17. Fundamentally speaking, THESL's overall approach was in the nature of an application for review of the CCTA Decision and Order. This was expressly acknowledged by THESL in its arguments during the Board's oral hearing into the Preliminary Issue:

MS. CHAPLIN: So decisions only apply when all of the factual circumstances line up? So in any instance where the Board makes a decision, if some subsequent set of circumstances comes along, it just doesn't apply if it was wasn't expressly contemplated in the initial decision?

MR. VELLONE: I see where you are struggling. I am going to take one second to speak to my client.

MS. CHAPLIN: Sure. And maybe while you are thinking about that, you can also think about -- I believe it was Mr. Warren who brought up the Board's finding on page 8 of that decision, where it appeared to expressly acknowledge

⁶ See CANDAS submissions dated 24 September 2012, paragraphs 3(b), 10-12 and 39-48.

that specific circumstances might differ, which would lead to a conclusion that the uniform rate didn't apply. And would that -- does that not answer one of the key differences you have identified?

[Mr. Vellone confers with THESL representatives]

MR. VELLONE: Okay. To answer your first question, it's not a question of whether any facts -- whether the Board did or did not consider absolutely any fact in the making of its decision.

However, if circumstances have evolved in such a way that new facts have arisen that are material to the original decision, which would cause the Board to potentially reconsider and question the very correctness of that decision were it applied to the new factual circumstances -- so the materiality of the new factual information is really of importance here -- if those new facts have arisen and they are material to the reasons in the original decision, then the Board would typically consider those new facts.

By way of analogy, there is a process before this Board to bring a motion for review as new facts have arisen, because the Board recognizes that its original decision may be varied as new facts have come up. This is very analogous in the circumstance. The Board simply didn't consider wireless equipment. New facts have arisen around wireless attachments to distribution poles, and the Board now has to consider the key elements of its original decision, to determine whether or not it thinks those new facts vary its decision or not.

And we haven't even gotten to the factual exploration yet. So the --

MS. CHAPLIN: Sorry, what are you arguing? Are you arguing that that decision should be reviewed, or are you arguing that it does not apply?

MR. VELLONE: We are arguing that it does not apply.

MS. CHAPLIN: Well, I am having difficulty with your answer. Your answer seems to be suggesting that it may apply but it shouldn't, and that the Board, in the normal course, if it sees new circumstances reviews decisions, which I understand. That is entirely correct, but that is not what you are claiming to argue. [Emphasis added]⁷

18. THESL made the tactical decision to unilaterally announce its “interpretation of the CCTA Decision and Order” and chose to manoeuvre CANDAS into a situation where, as the Board Staff recognized at the end of their submissions, CANDAS was “effectively forced to make the application to the Board.”⁸ More particularly, it chose not to follow the Board’s comprehensive template for applications for review of Board decisions pursuant to the Board’s

⁷ OEB, Transcripts dated 23 July 2012, File no. EB-2011-0120 at 99, line 11 to page 101, line 25.
⁸ Board Staff submissions on costs dated 24 September 2012 at 7.

Rules of Practice.⁹ Rather, THESL “negative-optioned” the Board to tell it that its “interpretation” of the CCTA Decision and Order was wrong.¹⁰ While the Board is the master of its own procedures, to CANDAS’ knowledge, regulated entities are not at liberty to unilaterally exempt themselves from regulation by way of a negative option presented to the Board.

19. CANDAS can only speculate as to THESL’s reasons for not pursuing directly and in accordance with the Board’s established procedures, its review of the CCTA Decision and Order. What imports is that having successfully forced CANDAS to apply to the Board, THESL used the proceedings to pursue its agenda of questioning the correctness of the fundamental policy of non-discriminatory, technology-neutral access established in the CCTA Decision and Order. THESL, with the support of the other electricity distributors, raised factual and public policy issues that fell outside of the scope of the issues as defined by the Board at various points in the proceeding. This approach, more than any other factor, led to wasted time and effort on the part of all parties and the Board.

D. Electricity Distributors Have No Monopoly Over the Public Interest

20. THESL¹¹ and the electricity distributors acknowledge, as do the Consumers Groups, that the Application raised important public policy issues relevant to the Province at large.

21. Contradictorily, however, THESL and EDA each make the surprising accusation that the *Board’s decision* in this matter is adverse to the interests of ratepayers and to the public interest, and make no bones about questioning the wisdom and correctness of that decision. EDA baldly asserts that because of the Board’s decision, “the interests of electricity ratepayers will be significantly harmed,” and so accuses the Board of failing to perform its duties under s.1 of the

⁹ The Board has very specific procedures in its Rules of Practice to deal with reviews of its decisions. Sections 42 to 45 of the Board’s *Rules of Practice* provide a comprehensive template for motions to review, including guidance with respect to the grounds necessary to sustain such an application.

¹⁰ See Letter dated 13 August 2010 from Pankaj Sardana (THESL) to Kirsten Walli (OEB) re THESL Policy Concerning Wireless Pole Attachments at 2; CANDAS Application, Tab 3: “In the event that the Board has not at this point drawn the same conclusions as THESL regarding the non-applicability of the March 7, 2005 EB-2003-0249 Decision, THESL sets out in this letter and its Appendix information to assist the Board in its consideration of whether the above Decision should not apply to wireless equipment attachments.”

¹¹ THESL itself submitted in its costs submissions dated 24 September 2012 that the proper interpretation of the CCTA Decision and Order is a matter of public policy and that “in the event that the OEB permits CANDAS to recover its costs, ... those costs should be recoverable from all electricity distributors in the Province of Ontario, in view of the province-wide scope of CANDAS’ Application and the province-wide effect of the Decision.”

OEB Act.¹² In chorus, THESL suggests on p. 2 of its submissions that the Board's decision disadvantages ratepayers and inures only to the benefit of commercial entities.¹³

22. As submitted elsewhere by CANDAS,¹⁴ what appears to have been lost on the electricity distributors is that the Application invokes the core public interest in utility regulation – namely, the need to oversee and, where appropriate, reign in the exercise of monopoly power by utilities. As is also discussed elsewhere in CANDAS' submissions, the necessity for regulatory surveillance of THESL's actions, in particular, was further demonstrated by the facts and outcome of the *Smart Meters* case.

23. For present purposes, however, the more fundamental point is that if the electricity distributors believed, as they now suggest in their public critique of the Board's decision in this matter, that the CCTA Decision and Order and the universal access principles grounding it (or, for that matter, the rates and conditions associated with wireless attachments), are contrary to the public interest, they were entitled and empowered to do so directly by bringing a proper application to review this prior decision. Instead, THESL and electricity distributors presented the Board and, belatedly, the public, with a *fait accompli* having all the hallmarks of their monopoly power over pole infrastructure. The fact that THESL and the electricity distributors chose the latter course and continue to assert publicly that their view of the public interest is superior to the Board's weighs strongly in favour of an adverse costs order.

¹² EDA submissions on costs dated 24 September 2012, paragraph 3.

¹³ For its part, THESL has not made any showing whatsoever that any of its asserted positions were in the public interest or that the Board's decisions would have an adverse effect on ratepayers absent the failure of THESL or other electricity distributors to avail themselves of the appropriate procedures to assure that ratepayers are not compelled to subsidize telecommunications carriers and their customers, a result that CANDAS has never advocated or sought.

¹⁴ See CANDAS cost submissions dated 24 September 2012, paragraphs 19 to 21.

III. CONCLUSION

24. For the foregoing reasons and those set out in its initial submissions dated 24 September, 2012, CANDAS requests the following relief,¹⁵ in respect of the Board's three costs issues set out at page 21 of the Decision on Preliminary Issue and Order dated 13 September 2012 in this proceeding:

- (a) With respect to issues No. 1 and No. 3, CANDAS submits that the costs of the Consumers Groups and the Board should be recovered from all Ontario electricity distributors. Under no circumstances should the members of CANDAS be required to pay such costs;
- (b) Regarding issue No. 2, CANDAS should be found eligible for an award of costs in this matter, by reason of the special circumstances giving rise to this case and by reason of THESL's conduct throughout; and
- (c) In no event should THESL's own costs of this proceeding be borne by THESL's ratepayers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

3 October 2012

FRASER MILNER CASGRAIN LLP



Y. Monica Song
Counsel to CANDAS

¹⁵ As originally set out at paragraphs 2 to 4 of CANDAS' submissions on costs dated 24 September 2012.