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October 3, 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
THESL Reply Submissions on Costs

We write on behalf of Toronto Hydro-Electric System Limited ("**THESL**") in reply to the written submissions of the Applicant, Board Staff, CCC, the EDA, Energy Probe and VECC in respect of the three outstanding Cost Issues arising in respect of the Ontario Energy Board's ("OEB") *Decision on Preliminary Issue and Order* dated September 13, 2012 (the "**Decision**").

THESL submits that there are no special circumstances that are sufficient to justify awarding the Applicant its costs in this proceeding. As the Applicant in this proceeding, and because of its obvious and direct commercial interest in its outcome, CANDAS is both ineligible and not entitled as a matter of principle to recover its costs in this proceeding. Rather, in THESL's submissions, the Applicant should be responsible for its own costs. In addition, in conformity with the Practice Direction the Applicant should be asked to bear the costs of the Board and eligible intervenors.

By contrast, in addition to the consumer groups whom already have been granted costs recovery eligibility, THESL and other LDCs intervened on behalf of ratepayers to seek revenue offsets, which by necessary implication, would, if realized, offer ratepayers protection from inflationary pressure on rates.

THESL adopts its September 24, 2012 submissions and proposals on the Cost Issues in this regard (the "Initial Submissions").

I. The "Winner Takes All" Approach Proposed by the Applicant is Inappropriate

The Applicant argues that the unilateral denial of pole access by a number of electricity distributors, including THESL, was the driving force behind its application and constitutes a special circumstance that would justify it being awarded its costs.[1]

[1] CANDAS Submissions at para. 13-17.

This line of argument completely mischaracterizes THESL's approach in this matter. THESL took the position that it did in light of a perfectly reasonable assumption respecting the scope of the CCTA arrangement. It was THESL's reasonable, firmly held, and clearly expressed belief that the CCTA arrangement did not govern the placement of wireless attachments to its poles.

THESL did precisely what it should have done to protect its ratepayers. It denied access and promptly advised the Board clearly and unequivocally of its position. That the Board did not accept THESL's position in this proceeding is beside the point. It was a reasonable position to take, one that was ultimately endorsed by independent expert opinion.

This "winner takes all" approach adopted by CANDAS suggests that because the Applicant was successful in its arguments in respect of the Preliminary Issue, that it should be entitled to recover its costs. THESL submits that this is entirely contrary to the Board's practice with respect to costs.

The Board has routinely determined that the success of arguments in a proceeding is not a relevant consideration in assessing costs. It is commonplace that Applicants bear the costs of their proceeding even though they are substantially successful.

II. Identity of the Parties, Basis for Participation and Conduct in the Proceeding

(a) CANDAS

As set out in further detail in THESL's Initial Submissions, 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 position of having to pay the costs of the commercial entities benefitting from it.

The Applicant's attempt to equate their private commercial interests as the same as ratepayer groups is not only unsupported by facts and reason, but also unsupported by the ratepayers groups in this proceeding.

CCC, supported by Energy Probe, argues that that CANDAS be denied their own costs of this proceeding and CANDAS should pay for the costs of the Board and eligible intervenors. It is apparent that CCC and Energy Probe do not see ratepayers and the Applicant as being aligned in interest. The Applicant is a consortium of private cellular companies that represented their unique commercial interests. It should not be entitled to recover its costs, but should be required to bear the Board's and eligible intervenor costs.

Such a finding is consistent with the OEB's decision on cost awards in the original CCTA proceeding, where the Board noted that "[t]ypically, an applicant will pay the costs"[2] and determined that "[h]aving heard the submissions of the different parties, the Panel has concluded that each party should be responsible for its own costs. This is subject to the Board costs being

[2] Motions Day Transcript and Decision on Motions dated October 12, 2004 in RP 2003 0249 at para. 37.

shared equally by the cable companies and telecom companies on the one hand and the electricity distributors on the other."[3]

THESL also submits that the Applicant's conduct in this proceeding should factor into the Board's determination, and indeed, when considered, suggests that the Applicant should not be awarded its costs. Board Staff agrees.[4]

In particular and as set out in further details in THESL's Initial Submissions, the Applicant engaged in a series of conduct that complicated and unduly lengthened the proceeding. Most notably, the Applicant: (i) filed ultimately moot evidence that necessitated replacement evidence and replacement discovery; and (ii) delayed a hearing on the Preliminary Issue for over a year when it vehemently opposed[5] THESL's motion for a determination on the Preliminary Issue in the fall of 2011, and then later agreed in the fall of 2012 that it would be most efficient if the Board made a determination on the Preliminary Issue.

If, as CANDAS asserts, it was so obvious to CANDAS that the 2005 decision applied to wireless, it would stand to reason that they would have welcomed and supported the hearing of the preliminary issue rather than opposing it from being heard. It is unclear, given that the Applicant argued that the Preliminary Issue was strictly a question of legal interpretation, what value the Applicant saw in causing a year long delay (unless the Applicant's objective was to use the OEB's processes to engage in a form of pre-litigation discovery).

(b) THESL

As THESL has agreed to pay its own costs, THESL submits that what is relevant to the OEB's determination of any additional cost-responsibility of THESL is whether its engagement as an intervenor in this case was well-motivated and sensible. THESL submits that the fact that the OEB ultimately rejected THESL's view (which THESL respects) is not relevant to this determination.

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, it sought to add useful information to the record and to enhance the procedural efficiency of this proceeding.

As set out in detail in THESL's Initial Submissions, THESL put forward its interpretation that the CCTA Decision did not apply to wireless attachments, and it did so by way of its August 2010 letter to the OEB nearly a year in advance of when this proceeding was initiated. This position was founded on a number of factual and public policy considerations. THESL also brought a motion early in this proceeding where it sought to bring forward as a threshold issue the Preliminary Issue so that the Board could resolve the issues using the "most constructive, efficient and timely approach."[6]

[3] *Ibid*. at para. 643.
[4] See pgs. 5-6 of OEB Staff submissions dated September 24, 2012.
[5] See, for instance, the CANDAS letter dated Sept. 2, 2011 in response to the THESL Motion.
[6] THESL's September 2, 2011 Notice of Motion.

THESL prepared and filed, at considerable costs (which it will bear), detailed evidence, including expert reports, of the differences between wireline and wireless attachments and the active market for wireless attachments, all of which was accepted by the Board as intervenor evidence. This was evidence that was not contained the Applicant's filing and was directly relevant to the three issues raised by the Application. In addition, when the CEA sought to withdraw from active intervention in this proceeding, THESL voluntarily assumed responsibility for the CEA's expert evidence to ensure the Board would not lose the benefit of a valuable addition to the evidentiary record.

THESL submits that to further add to these costs would constitute an unfair penalty imposed on a good faith intervenor that added useful information to the record and attempted to enhance the procedural efficiency of the proceeding. It would serve as strong disincentive against distributors pursuing or contributing to proceedings by representing the public interest when their ratepayers, rather than the utility, stands to gain. It is also a chilling signal to ratepayers.

III. Specific Allegations of CANDAS

CANDAS makes a number of allegations and assertions in its September 24, 2012 submissions which, in THESL's submission, are not relevant to a determination on costs, and a line-by-line response would therefore not constitute an efficient use of the OEB's time and resources. THESL does however submit that the following two matters require a response.

(a) The existence of market rates for wireless attachments is directly relevant to the three issues raised in the Application.

CANDAS alleges at para. 28-38 that interrogatories from THESL, the CEA, and the EDA that focused on pricing information "fell outside the scope of the proceeding and the issues clearly defined by the Board."

In these submissions, and with respect, CANDAS has misconstrued the Board's determination on the relevance of pricing information. The Board spoke to the relevance of pricing information in its December 9, 2011 Decision (at pgs. 8-9):

> "The Board will be determining whether to mandate access for wireless attachments to distributor poles. The Board finds that information as to the other attachments THESL is making (type of attachment and quantity) and under what arrangements those attachments are being made (price and terms and conditions) is relevant to the issues in this proceeding. The Board also recognizes that these various other attachments may or may not be comparable to the wireless attachments sought by CANDAS. The Board will be able to assess that comparability better if it understands more fully the circumstances that surround these other attachments. THESL has provided evidence related to the potential alternative sites for wireless attachments. Similarly, the Board finds it relevant to understand the other types of attachments on distributor poles for comparison purposes."

Specifically, the question of pricing is directly relevant to the second and third issues raised by the CANDAS Application. If (in the hypothetical) the Board made a determination that the 2005 CCTA Decision did not apply to wireless equipment (and, by extension the rate of $22.35 per pole per year), but the Board did decide to regulate the attachment of wireless equipment and

establish terms and conditions – the next natural question would be at what rate would the Board establish such regulated access?

The determination of an appropriate attachment rate was a dominant and fundamental issue in the 2005 CCTA Decision, and it is THESL's position that this matter is central to the protection of ratepayer interests. THESL was concerned that CANDAS sought to exclude from the OEB's consideration relevant pricing information that did not serve the CANDAS member companies' narrow commercial interests.

THESL accordingly filed evidence about the existence of a market for wireless attachments in the City of Toronto, and the existence market based attachment rates. THESL compiled this evidence at its own costs to facilitate the OEB's decision making in the public interest.

Furthermore, since the OEB elected not to hear THESL's motion that sought to narrow the scope of this proceeding to the preliminary issue, THESL necessarily had to pursue interrogatories related to the second and third issues raised in the CANDAS application. This included, among other issues, pricing information. This line of inquiry arose directly as a result of the scope of the CANDAS application, with a view to providing valuable information to the Board when making a public interest determination.

(b) Raising operations and safety of the distribution system was appropriate.

The Applicant argues that THESL, in effect, manufactured safety and operational concerns vis-à-vis wireless attachments and therefore THESL should be punished by having to pay the costs of the CANDAS application.

As the owner and operator of the distribution system, THESL is legally responsible for the operational effectiveness and safety of its system. These issues were, and remain, core concerns to THESL. THESL stands by its evidence and the Applicant's bald assertions are without merit.

In any event, the OEB did not test the facts in this proceeding and made no findings on these points. Accordingly and with respect to CANDAS, allegations and assertions such as these are a red herring, and should be given no weight on this issue of costs.

Respectfully Submitted October 3, 2012, Borden Ladner Gervais LLP

Yours truly,

Original signed by J. Mark Rodger

J. Mark Rodger

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

JMR/jv