		ÑO	RTON ROSE		
	Barristers & Solicitors / Petent & Trade-r		Solicitors / Patent & Trade-mark Agents		
		TD Wate Toronto- 79 Wellin	tose Canada LLP rhouse Tower, Suite 2300 Dominion Centre agton Street West, P.O. Box 128 Ontario M5K 1H1 CANADA		
If this transmis	If this transmission is unclear or incomplete		F: +1 416.360.8277 nortoprose.com		
	ne +1 416.360.8511	On January Norton Ros	1, 2012. Macieod Dixon joined s OR to create Norton Rose Canada.		
From	Christine Kilby	Date	October 10, 2012		
Direct line	+1 416.216.1921	Our ref	01009188-0043		
Email	christine.kilby@nortonrose.com		Timekeeper No 17666 No of pages (including this one) 22		
Το	Kristi Sebalj ONTARIO ENERGY BOARD Toronto	Tel	416.440.7730		
Fax	416.440.7656				
То	Helen T. Newland Michael D. Schafler Kathleen Burke FRASER MILNER CASGRAIN LLP Toronto	Tel	416.863.4471 416.863.4457 416.862.3466		
Fax	416 863 4592				
Το	J. Mark Rodger BORDEN LADNER GERVAIS LLP Toronto	Tel	416.367.6190		
Fax	416.367.6749				
То	Colin McLorg TORONTO HYDRO-ELECTRIC SYSTEM LIMITED Toronto	Tel	416.542.2513		
Fax	416.542.3024				
То	Devin McCarthy CANADIAN ELECTRICITY ASSOCIATION Ottawa	Tel	613.688.2960		
Fax	1.613.230.9326				
То	Robert B. Warren WEIRFOULDS LLP Toronto	Tei	416.365.1110		

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Fax:



Fax	416.365.1876		
Το	David S. MacIntosh ENERGY PROBE RESEARCH FOUNDATION Toronto	Tel	416.964.9223
Fax	416.964.8239		
То	Anne-Marie Reilly HYDRO ONE NETWORKS INC. Toronto	Tel	416.345.6482
Fax	416.345.5866		
Το	Jane Scott HYDRO OTTAWA LIMITED Ottawa	Tei	613.738.5499 ext. 7499
Fax	1.613.738.6403		
То	Gaye-Donna Young NEWMARKET-TAY POWER DISTRIBUTION LIMITED Newmarket	Tel	905.953.8548 ext. 2260
Fax	1.905.895.8931		
То	Sarah Griffiths POWERSTREAM INC. Vaughan	Tel	905.532.4527
Fax	905.532.4505		
То	Steve Zebrowski Mark Turney VERIDIAN CONNECTIONS INC. Ajax	Tel	905.427.9870 ext. 3274 905.427.9870 ext. 3275
Fax	905.619.0210		
Το	Michael Janigan PUBLIC INTEREST ADVOCACY CENTRE Ottawa	Tel	613.562.4002 ext. 26
Fax	1.613.562,0007		
То	Indy J. Butany-DeSouza HORIZON UTILITIES CORPORATION Hamilton	Tel	905.317.4765
Fax	1.905.522.6228		



Dear Sir/Madam:

The Electricity Distributors Association and Ontario Energy Board OEB File No. EB-2011-0120

Please see the enclosed. If there are any problems with this transmission, please contact Rachel Pooransingh at 416.216.3937 / rachel.pooransingh@nortonrose.com.

Fax:

RORION ROSE

Barristers & Solicitors / Patent & Trade-mark Agents

Norton Rose Canada LLP TD Waterhouse Tower, Suite 2300 Toronto-Dominion Centre 79 Wellington Street West, P.O. Box 128 Toronto, Ontario M5K 1H1 CANADA

F: +1 416.360.8277

On January 1, 2012, Maclood Dixon joined Norton Rose OR to create Notton Rose Canada.

Direct line +1 416.216.1921

Our reference 01009188-0043

Your reference

EB-2011-0120

Email christine.kilby@nortonrose.com

October 12, 2012

Sent By Facsimile

Kristi Sebalj Ontario Energy Board P.O. Box 2319, 27th Floor 2300 Yonge Street Toronto ON M4P 1E4

Helen T. Newland Fraser Milner Casgrain LLP 77 King Street West, Suite 400 Toronto-Dominion Centre Toronto, ON M5K 0A1

J. Mark Rodger Borden Ladner Gervais LLP Scotia Plaza, 40 King Street W. Toronto, ON M5H 3Y4

Colin McLorg Toronto Hydro-Electric System Limited 14 Carlton Street Toronto, ON M5B 1K5

Devin McCarthy Canadian Electricity Association 350 Sparks Street, Suite 1100 Ottawa, ON K1R 7S8

Robert B. Warren WeirFoulds LLP 4100-66 Wellington Street West PO Box 35, Toronto-Dominion Centre Toronto, ON M5K 1B7

David S. MacIntosh Energy Probe Research Foundation 225 Brunswick Avenue Toronto, ON M5S 2M6

Anne-Marie Reilly HYDRO ONE NETWORKS INC. 8th Floor, South Tower 483 Bay Street Toronto, ON M5G 2P5

DOCSTOR: 2534569\1



Jane Scott Hydro Ottawa Limited 3025 Albion Road North, P.O. Box 8700 Ottawa, ON K1G 3S4

Gaye-Donna Young Newmarket-Tay Power Distribution Limited 590 Steven Court Newmarket, ON L3Y 6Z2

Sarah Griffiths Powerstream Inc. 161 Cityview Boulevard Vaughan, ON L4H 0A9

Steve Zebrowski Veridian Connections Inc. 55 Taunton Road East Ajax, ON L1T 3V3

Michael Janigan Public Interest Advocacy Centre ONE Nicholas Street Suite 1204 Ottawa, ON K1N 7B7

Indy J. Butany-DeSouza Horizon Utilities Corporation 55 John Street North Hamilton, ON L8R 3M8

Dear Sir/Madam:

The Electricity Distributors Association and Ontario Energy Board

We are counsel to the Electricity Distributors Association (EDA).

Please find enclosed the EDA's Notice of Appeal and Appellant's Certificate Respecting Evidence, served upon you pursuant to the *Rules of Civil Procedure*.

Yours very truly,

enz

Christine Kilby

CK/rp

Enclosures

Court File No.

ONTARIO SUPERIOR COURT OF JUSTICE (Divisional Court)

BETWEEN:

THE ELECTRICITY DISTRIBUTORS ASSOCIATION

Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

NOTICE OF APPEAL

APPEAL UNDER the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Sched. B, section 33 (the **OEB Act**).

THE APPELLANT THE ELECTRICITY DISTRIBUTORS ASSOCIATION APPEALS to

the Divisional Court from the Decision and Order of the Ontario Energy Board (the **Board**) dated September 13, 2012, in Board proceeding EB-2011-0120 (the **Proceeding**), made at Toronto (the **Decision**).

THE APPELLANT ASKS that a judgment be granted as follows:

- 1. If needed, an interim order staying the application of the Decision pending the conclusion of this appeal.
- 2. A declaration that the Board erred in law and exceeded its jurisdiction by completing the Proceeding and purporting to exercise its regulatory authority without addressing the application of section 29 of the OEB Act.
- 3. A declaration that the Board erred in law by failing to consider, and acting contrary to, its statutory objectives as set out in section 1(1) of the OEB Act.
- 4. An order setting aside the Decision and directing the Board to consider the evidence given in the Proceeding relating to the marketplace for siting of wireless attachments and directing the Board to (a) determine whether the

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Board should, pursuant to section 29(1) of the OEB Act, forbear from the exercise of its authority, or (b) reconsider the Decision and in doing so apply the Board's statutory objectives as set out in section 1(1) of the OEB Act.

THE GROUNDS OF APPEAL are as follows:

- The EDA is an advocacy and policy association that represents electricity distribution companies in Ontario (LDCs). The EDA was an intervenor in the Proceeding.
- The Proceeding was commenced on April 25, 2011 by a commercial consortium calling itself the Canadian Distributed Antenna Systems Coalition (CANDAS) in part as a result of a disagreement with Toronto Hydro-Electric System Limited (THESL) about the attachment of wireless telecommunications equipment to electricity distribution poles.
- 3. CANDAS sought a determination from the Board that the Board's Decision and Order dated March 7, 2005 in RP-2003-0249 (the **CCTA Order**) required electricity distributors to provide access to "Canadian carriers" as defined in the *Telecommunications Act*, S.C. 1993, c. 38, and an order from the Board directing all licensed electricity distributors to provide access accordingly. If granted, CANDAS would obtain the right to attach its equipment to distribution poles for an annual fee of \$22.35 per attachment per pole.

First Ground – Section 29(1) of the OEB Act

4. Pursuant to section 29(1) of the OEB Act, the Board shall refrain from exercising its jurisdiction in an application or other proceeding if the Board finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

- 5. In order to discharge its obligations under section 29(1) of the OEB Act, the Board is required to consider evidence as to the existence of competition in the relevant marketplace.
- 6. On September 2, 2011, THESL filed a motion with the Board seeking various relief, including a decision by the Board under section 29(1) of the OEB Act to refrain from exercising any of its powers, including imposing any distribution license conditions governing the access of wireless attachments to the electricity distribution system, or alternately to THESL's electricity distribution system, on the basis that there is or will be competition in the market for siting of wireless attachments either generally or in the City of Toronto sufficient to protect the public interest.
- 7. In support of its motion, THESL and an intervenor, the Canadian Electricity Association (CEA), filed extensive evidence in relation to the market for siting wireless attachments in the City of Toronto. The evidence indicated other telecommunications carriers paid, or had agreed to pay, owners of support structures, annual fees for the attachment of wireless equipment in the hundreds and thousands of dollars.
- 8. THESL requested that the Board first determine the question of the applicability of the CCTA Order (the **Preliminary Question**) and thereafter consider, if necessary, the applicability of section 29(1).
- 9. The Board directed that the Preliminary Question be heard and determined in advance of the rest of the application.
- 10. On September 13, 2012, the Board ruled on the Preliminary Question and ordered that the CCTA Order and the \$22.35 rate did apply to the wireless telecommunications equipment of CANDAS.
- 11. Notwithstanding its statutory obligation pursuant to section 29(1) and the motion by THESL asking that the Board decline to exercise its regulatory authority on the basis of section 29(1), the Board concluded the Proceeding without considering section 29(1) or the evidence filed in respect thereof.

The Board stated that consideration of section 29(1) and THESL's motion in respect thereof was "out of scope in the context of this proceeding" and granted the relief sought by CANDAS.

12. The Board erred in law, and exceeded its jurisdiction, by refusing to consider section 29(1) and by refusing to continue the Proceeding for the purpose of making the findings of fact necessary for the Board to exercise its duty under section 29(1).

Second Ground – Section 1(1) of the OEB Act

- 13. Pursuant to section 1(1) of the OEB Act, in the exercise of its powers the Board is to be guided by the objectives to (a) "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service", and (b) "promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry."
- 14. The Decision affects all Ontario LDCs and their ratepayers. The Board stated that its decision on the Preliminary Question applied to parties beyond THESL and CANDAS, and specifically to all LDCs.
- 15. All revenues received by LDCs from attachment fees are applied to reduce electricity rates paid by LDC customers. They are not retained by the LDC or its shareholders.
- 16. The Board, in interpreting the CCTA Order and in refusing to consider section 29(1) failed to even consider, let alone give effect to, its mandated objectives to protect consumers in respect to the price of electricity and to promote cost effectiveness in the distribution of electricity.
- 17. By expanding the application of the CCTA Order and the \$22,35 rate to CANDAS and wireless equipment without considering the evidence regarding a competitive marketplace for the siting of wireless attachments,

the Board acted outside the scope of its statutory mandate. The \$22.35 annual access rate is significantly below the market price for access to power poles for the siting of wireless attachments in the City of Toronto.

- 18. The Decision fails to protect the interests of electricity consumers and fails to facilitate the maintenance of a financially viable electricity industry by effectively forcing LDCs and electricity consumers to subsidize the cost of building a wireless telecommunications network.
- 19. Moreover, the Decision has the effect of depriving LDC customers of potential rate savings gained through the payment by telecommunications carriers of market rates for the use of LDCs' power poles.
- 20. The Board's refusal to consider the evidence of a competitive marketplace for siting of wireless equipment and the market price for such attachments, which consideration was required by section 1(1) of the OEB Act, was an error of law and exceeded the Board's jurisdiction.
- 21. Sections 1, 29, and 33 of the OEB Act.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- 1. There is a statutory right of appeal from an order of the Board, pursuant to section 33 of the OEB Act;
- 2. The Decision appealed from is final; and
- 3. Leave to appeal is not required.

THE APPELLANT requests that this appeal be heard at Toronto.

Fax:

October 12, 2012

NORTON ROSE CANADA LLP

TD Waterhouse Tower, Suite 2300 Toronto-Dominion Centre 79 Wellington Street West, P.O. Box 128 Toronto, Ontario M5K 1H1 CANADA

Alan H. Mark LSUC#: 21272U

Tel: +1 416.216.4865 Fax: +1 416.360.8277 Email: alan.mark@nortonrose.com

Christine Kilby LSUC#: 54323C

Tel: +1 416.216.1921 Fax: +1 416.360.8277 Email: christine.kilby@nortonrose.com

Lawyers for the Appellant

TO: ONTARIO ENERGY BOARD

P.O. Box 2319, 27th Floor 2300 Yonge Street Toronto ON M4P 1E4

Kristi Sebalj

Tel.: 416.440.7730 Fax: 416.440.7656 Email: Kristi.Sebalj@ontarioenergyboard.ca

Lawyers for the Respondent

6

AND TO: FRASER MILNER CASGRAIN LLP

77 King Street West, Suite 400 Toronto-Dominion Centre Toronto, ON M5K 0A1

Helen T. Newland

Tel: 416.863.4471 Fax: 416 863 4592 Email: helen.newland@fmc-law.com

Michael D. Schafler

Tel: 416.863.4457 Fax: 416 863 4592 Email: michael.schafler@fmc-law.com

Kathleen Burke

Tel: 416.862.3466 Fax: 416 863 4592 Email: kathleen.burke@fmc-law.com

Lawyers for Canadian Distributed Antenna Systems Coalition

AND TO: BORDEN LADNER GERVAIS LLP

Scotia Plaza, 40 King Street W. Toronto, ON M5H 3Y4

J. Mark Rodger

Tel: 416.367.6190 Fax: 416.367.6749 Email: mrodger@blg.com

Lawyers for Toronto Hydro-Electric System Limited

AND TO: TORONTO HYDRO-ELECTRIC SYSTEM LIMITED 14 Carlton Street Toronto, ON M5B 1K5

Colin McLorg

Manager, Regulatory Policy & Relations Tel: 416.542.2513 Fax: 416.542.3024 Email: regulatoryaffairs@torontohydro.com

AND TO: CANADIAN ELECTRICITY ASSOCIATION

350 Sparks Street, Suite 1100 Ottawa, ON K1R 7S8

Devin McCarthy Manager, Distribution Tel: 613.688.2960 Fax: 613.230.9326 Email: mccarthy@electricity.ca

AND TO: WEIRFOULDS LLP Barristers & Solicitors 4100-66 Wellington Street West PO Box 35, Toronto-Dominion Centre Toronto, ON M5K 1B7

Robert B. Warren LSUC # 17210M

Tel: 416.365.1110 Fax: 416.365.1876 Email: rwarren@weirfoulds.com

Lawyers for the Intervenor, Consumers Council of Canada

AND TO: ENERGY PROBE RESEARCH FOUNDATION 225 Brunswick Avenue

Toronto, ON M5S 2M6

David S. MacIntosh

Case Manager Tel: 416.964.9223 Fax: 416.964.8239 Email: DavidMacIntosh@nextcity.com

AND TO: HYDRO ONE NETWORKS INC.

8th Floor, South Tower 483 Bay Street Toronto, ON M5G 2P5

Anne-Marie Reilly Senior Regulatory Coordinator – Regulatory Research and Administration Regulatory Affairs Tel: 416.345.6482 Fax: 416.345.5866 Email: regulatory@hydroone.com AND TO: HYDRO OTTAWA LIMITED 3025 Albion Road North, P.O. Box 8700 Ottawa, ON K1G 3S4

> Jane Scott Manager, Rates and Revenue Tel; 613.738.5499 ext. 7499 Fax: 613.738.6403 Email: janescott@hydroottawa.com

AND TO: NEWMARKET-TAY POWER DISTRIBUTION LIMITED 590 Steven Court Newmarket, ON L3Y 6Z2

Fax:

Gaye-Donna Young Tel: 905.953.8548 ext. 2260 Fax: 905.895.8931 Email: gyoung@nmhydro.ca

AND TO: **POWERSTREAM INC.** 161 Cityview Boulevard Vaughan, ON L4H 0A9

> Sarah Griffiths Manager, Regulatory & Government Affairs Tel: 905.532.4527 Fax: 905.532.4505 Email: powerstreamregulatory@powerstream.ca

AND TO: VERIDIAN CONNECTIONS INC. 55 Taunton Road East Ajax, ON L1T 3V3

> Steve Zebrowski Regulatory and Key Projects Analyst Tel: 905.427.9870 ext. 3274 Fax: 905.619.0210 Email: szebrowski@veridian.on.ca

Mark Turney Tel: 905.427.9870 ext, 3275 Fax: 905.619.0210 Email: mturney@veridan.on.ca

AND TO: PUBLIC INTEREST ADVOCACY CENTRE

ONE Nicholas Street Suite 1204 Ottawa, ON K1N 7B7

Michael Janigan

Tel: 613.562.4002 ext. 26 Fax: 613.562.0007 Email: mjanigan@piac.ca

Counsel to Vulnerable Energy Consumers Coalition

AND TO: HORIZON UTILITIES CORPORATION 55 John Street North Hamilton, ON L8R 3M8

Indy J. Butany-DeSouza Vice-President, Regulatory and Government Affairs Tel: 905.317.4765 Fax: 905.522.6228 Email: indy.butany@horizonutilities.com

THE ELECTRICITY DISTRIBUTORS ASSOCIATION Appellant	and	ONTARIO ENERGY BOARD Respondent	Court File No:
			ONTARIO SUPERIOR COURT OF JUSTICE (Divisional Court) Proceeding commenced at Toronto
			NOTICE OF APPEAL
		-	NORTON ROSE CANADA LLP TD Waterhouse Tower, Suite 2300 Toronto-Dominion Centre 79 Wellington Street West, P.O. Box 128 Toronto, Ontario M5K 1H1 CANADA
			Alan H. Mark LSUC#: 21272U Tel: +1 416.216.4865 Fax: +1 416.360.8277 Email: alan.mark@nortonrose.com
			Christine Kilby LSUC#: 54323C Tel: +1 416.216.1921 Fax: +1 416.360.8277 Email: christine.kilby@nortonrose.com
			Lawyers for the Appellant

Court File No.

ONTARIO SUPERIOR COURT OF JUSTICE (Divisional Court)

BETWEEN:

THE ELECTRICITY DISTRIBUTORS ASSOCIATION

Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

APPELLANT'S CERTIFICATE RESPECTING EVIDENCE

The Appellant certifies that the following evidence is required for the appeal, in the Appellant's opinion:

1. The complete record from Ontario Energy Board matter number EB-2011-0120; and

2. Those portions of the record in Ontario Energy Board matter number RP-2003-0249 referred to by the Board or the parties in EB-2011-0120 that are not otherwise in the record from that proceeding.

October 12, 2012

NORTON ROSE CANADA LLP

TD Waterhouse Tower, Suite 2300 Toronto-Dominion Centre 79 Wellington Street West, P.O. Box 128 Toronto, Ontario M5K 1H1 CANADA

Alan H. Mark LSUC#: 21272U Tel: +1 416.216.4865 Fax: +1 416.360.8277 Email: alan.mark@nortonrose.com

Christine Kilby LSUC#: 54323C Tel: +1 416.216.1921 Fax: +1 416.360.8277 Email: christine.kilby@nortonrose.com

Lawyers for the Appellant

TO: ONTARIO ENERGY BOARD P.O. Box 2319, 27th Floor 2300 Yonge Street Toronto ON M4P 1E4

Kristi Sebalj

Tel.: 416.440.7730 Fax: 416.440.7656 Email: Kristi.Sebalj@ontarioenergyboard.ca

Lawyers for the Respondent

AND TO: FRASER MILNER CASGRAIN LLP

77 King Street West, Suite 400 Toronto-Dominion Centre Toronto, ON M5K 0A1

Helen T. Newland

Tel: 416.863.4471 Email: helen.newland@fmc-law.com

Michael D. Schafler

Tel: 416.863.4457 Email: michael.schafler@fmc-law.com

Kathleen Burke

Tel: 416.862.3466 Email: kathleen.burke@fmc-law.com

Lawyers for Canadian Distributed Antenna Systems Coalition

AND TO: BORDEN LADNER GERVAIS LLP

Scotia Plaza, 40 King Street W. Toronto, ON M5H 3Y4

J. Mark Rodger

Tel: 416.367.6000 Fax: 416.367.6749 Email: mrodger@blg.com

Lawyers for Toronto Hydro-Electric System Limited

AND TO: TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

14 Carlton Street Toronto, ON M5B 1K5

Colin McLorg Manager, Regulatory Policy & Relations Tel: 416.542.2513 Fax: 416.542.3024 Email: regulatoryaffairs@torontohydro.com AND TO: CANADIAN ELECTRICITY ASSOCIATION 350 Sparks Street, Suite 1100 Ottawa, ON K1R 7S8

> Devin McCarthy Manager, Distribution Tel: 613.688.2960 Email: mccarthy@electricity.ca

AND TO: WEIRFOULDS LLP

Barristers & Solicitors 4100-66 Wellington Street West PO Box 35, Toronto-Dominion Centre Toronto, ON M5K 1B7

Robert B. Warren LSUC # 17210M

Tel: 416.365.1110 Fax: 416.365.1876 Email: rwarren@weirfoulds.com

Lawyers for the Intervenor, The Consumers Council of Canada

AND TO: ENERGY PROBE RESEARCH FOUNDATION

225 Brunswick Avenue Toronto, ON M5S 2M6

David S. MacIntosh

Case Manager Tel: 416.964.9223 Fax: 416.964.8239 Email: DavidMacIntosh@nextcity.com

AND TO: HYDRO ONE NETWORKS INC.

8th Floor, South Tower 483 Bay Street Toronto, ON M5G 2P5

Anne-Marie Reilly

Senior Regulatory Coordinator - Regulatory Research and Administration Regulatory Affairs Tel: 416.345.6482 Fax: 416.345.5866 Email: regulatory@HydroOne.com AND TO: HYDRO OTTAWA LIMITED 3025 Albion Road North, P.O. Box 8700 Ottawa, ON K1G 3S4

> Jane Scott Manager, Rates and Revenue Tel: 613.738.5499 ext. 7499 Fax: 613.738.6403 Email: janescott@hydroottawa.com

AND TO: NEWMARKET-TAY POWER DISTRIBUTION LIMITED 590 Steven Court Newmarket, ON L3Y 6Z2

> Gaye-Donna Young Tel: 905.953.8548 Fax: 905.895.8931 Email: gyoung@nmhydro.ca

AND TO: **POWERSTREAM INC.** 161 Cityview Boulevard Vaughan, ON L4H 0A9

> Sarah Griffiths Manager, Regulatory & Government Affairs Tel: 905.532.4527 Fax: 905.532.4505 Email: powerstreamregulatory@powerstream.ca

AND TO: VERIDIAN CONNECTIONS 55 Taunton Road East Ajax, ON L1T 3V3

> Steve Zebrowski Regulatory and Key Projects Analyst Tel: 905.427.9870 ext. 3274 Fax: 905.619.0210 Email: regulatoryaffairs@veridian.on.ca

AND TO: VULNERABLE ENERGY CONSUMERS COALITION ("VECC") ONE Nicholas Street Suite 1204 Ottawa, ON K1N 7B7

> Michael Janigan Tel: 613.562.4002 ext. 26 Fax: 613.562.0007 Email: mjanigan@piac.ca

Counsel to Vulnerable Energy Consumers Coalition

Fax: -4AND TO: HORIZON UTILITIES CORPORATION 55 John Street North Hamilton, ON L8R 3M8

> Indy J. Butany-DeSouza Vice-President, Regulatory and Government Affairs Tel: 905.317.4765 Email: indy.butany@horizonutilities.com

THE ELECTRICITY DISTRIBUTORS ASSOCIATION Appellant an	ONTARIO ENERGY BOARD nd Respondent	Court File No:
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		NORTON ROSE CANADA LLP TD Waterhouse Tower, Suite 2300 Toronto-Dominion Centre 79 Wellington Street West, P.O. Box 128 Toronto, Ontario M5K 1H1 CANADA
		Alan H. Mark LSUC#: 21272U Tel: +1 416.216.4865 Email: alan.mark@nortonrose.com
		Christine Kilby LSUC#: 54323C Tel: +1 416.216.1921 Email: christine.kilby@nortonrose.com Fax: +1 416.360.8277
		Lawyers for the Appellant
STOR: 2530030\1	ı	