



ONTARIO ENERGY BOARD

FILE NO.: EB-2011-0144

VOLUME: 4

DATE: November 17, 2011

BEFORE:	Cynthia Chaplin	Presiding Member
	Marika Hare	Member
	Paula Conboy	Member

THE 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 Toronto Hydro-Electric System Limited for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2012, May 1, 2013 and May 1, 2014.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Thursday, November 17th, 2011,
commencing at 9:48 a.m.

VOLUME 4

BEFORE:

CYNTHIA CHAPLIN	Presiding Member
MARIKA HARE	Member
PAULA CONBOY	Member

A P P E A R A N C E S

KRISTI SEBALJ	Board Counsel
TED ANTONOPOULOS	Board Staff
MARTIN DAVIES	
MARK RODGER	Toronto Hydro Electric System Limited (THESL)
IAN BLUE	City of Toronto
DAVID CROCKER	Association of Major Power Consumers in Ontario (AMPCO)
TOM BRETT	Building Owners and Managers Association of the Greater Toronto Area (BOMA)
ROBERT WARREN	Consumers Council of Canada
PETER FAYE	Energy Probe Research Foundation
DAVID MacINTOSH	
JAY SHEPHERD	School Energy Coalition
MARK RUBENSTEIN	
MICHAEL BUONAGURO	Vulnerable Energy Consumers Coalition (VECC)

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Description

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NO UNDERTAKINGS WERE FILED IN THIS PROCEEDING

1 Thursday, November 17, 2011

2 --- On commencing at 9:48 a.m.

3 MS. CHAPLIN: Please be seated.

4 Good morning, everyone. We are sitting today to hear
5 arguments from the intervenors and Board Staff on the
6 preliminary issue. I believe we have an order.

7 Are there any preliminary matters before we begin?

8 MR. RODGER: Just one, Madam Chair. Good morning.

9 At the November 11th proceeding, Toronto Hydro gave
10 various undertakings, and responses to those undertakings
11 were all delivered on November 15th.

12 MS. CHAPLIN: Thank you. So I have as an order for
13 arguments today the City of Toronto, then AMPCO and BOMA,
14 to be followed by Board Staff, then Energy Probe, VECC, CCC
15 and Schools.

16 So if there are no other preliminary matters, Mr.
17 Blue, are you ready to proceed?

18 **FINAL ARGUMENT ON THE PRELIMINARY ISSUE**

19 **SUBMISSIONS BY MR. BLUE**

20 MR. BLUE: Thank you, Madam Chair.

21 I understand that the order is chosen on the basis of
22 who supports THESL and who is opposed. And normally in a
23 procedure, those who speak first would get a chance to
24 reply to those who take a contrary position. I don't need
25 to do that, but I may make some anticipatory submissions,
26 just to deal with that point so that I don't have to speak
27 twice.

28 Madam Chair and Members of the Board, the City has had

1 an opportunity to read and fully consider the argument
2 presented by Mr. Rodger on Monday. I am happy to inform
3 the Board that the City fully supports Mr. Rodger's
4 argument on behalf of THESL and adopts that argument as
5 part of its own.

6 Now, because of the anticipatory nature of the
7 hearing, I believe that those who oppose THESL may well
8 argue that the Board has made its intentions to have
9 applicants conduct an IRM methodology very clear, and
10 therefore THESL should be bound by it.

11 So I draw your attention to the Board's decision in
12 EB-2006-0087, and Ms. Litt has copies which she can hand up
13 to you.

14 Madam Chair, what this decision points out is that on
15 April 27th, 2006 the Board stated its intention to develop
16 two codes in relation to multi-year electricity rate-
17 setting, a review of the cost of capital, and a generation
18 incentive regulation mechanism.

19 And it recites that the Board sought and received 14
20 submissions, representing 19 of 21 intervenors, and that
21 many intervenors had raised with the Board: Do you have
22 the jurisdiction to impose a multi-year mechanism?

23 And in the submission of Board Staff -- it's quoted on
24 page 2, and I just believe I should read it into the
25 transcript, the Board Staff stated:

26 "The issue of the authority for, and
27 appropriateness of, the proposed method for
28 setting distribution rates through codes and

1 licence amendments is unlikely to be resolved in
2 the short term. At the same time there is a need
3 to get on with establishing distribution rates
4 for 87 distributors to be effective May 1, 2007.
5 In these circumstances, Board Staff recommends
6 that the Board discontinue the code-based
7 approach and therefore discontinue this hearing.
8 The work underway in the two related co-
9 proceedings should continue in the form of
10 promulgation of filing guidelines for 2007
11 distribution rates..."

12 And then the Board's decision was:

13 "This Board Panel agrees with Board Staff's
14 submission that the first priority of the Board
15 is to proceed promptly with the 2007 distribution
16 rates. Therefore the Panel also submits the
17 Board Staff's recommendation that the Board
18 discontinue the code-based approach at this
19 time."

20 Perhaps we should mark that decision as just an
21 exhibit to this hearing, for identification.

22 MS. SEBALJ: Yes. It will be K4.1.

23 **EXHIBIT NO. K4.1: OEB DECISION IN EB-2006-0087**

24 MR. BLUE: And then, Madam Chair and Members of the
25 Board, on November 23rd, 2006, in a letter to all
26 participants in proceedings EB-2006-0087, EB-2006-0088 and
27 EB-2006-0089, the Board, referring to multi-year ratemaking
28 mechanisms, stated, and I quote:

1 "The Board will instead implement its cost of
2 capital second generation incentive regulation
3 policies by means of guidelines."

4 I only have one copy of this letter, but I'll hand it
5 up, and we'll get copies made at the break, if that could
6 be the next exhibit.

7 MS. SEBALJ: It will be marked as Exhibit K4.2.

8 **EXHIBIT NO. K4.2: OEB LETTER TO PARTICIPANTS IN EB-**
9 **2006-0087, EB-2006-0088 AND EB-2006-0089, DATED**
10 **NOVEMBER 23, 2006.**

11 MR. BLUE: Right. Now, Madam Chair, Members of the
12 Board, I can do no better than quote Captain Barbossa in
13 one of the "Pirates of the Caribbean" movies, when the
14 beautiful Elizabeth Swann threw herself on his mercy and
15 claimed the benefit of the pirates' code. And he said:
16 It's not really a code, Elizabeth, it's more of a
17 guideline.

18 And so a guideline -- guidelines are guidelines, but
19 they are not codes; they are not binding rules.

20 Now, because of the thoroughness and the force of Mr.
21 Rodger's argument on Monday, I don't need to go into and
22 argue the awkward question of whether the Board has
23 authority to say to any applicant: No, I will not hear
24 your case, and dismiss the case without hearing it, because
25 I don't like the way you've presented it.

26 The City submits that the Board should request Board
27 counsel to address that issue in argument. I also submit
28 that Board Counsel should have a look at section 4(5) of

1 the Statutory Powers Procedure Act, which gives only
2 certain limited rights to a board or any tribunal not to
3 process an application.

4 And with respect to what the Board had said
5 previously, it used to be said and I believe it's still the
6 law that the Board cannot fetter its discretion by previous
7 decisions when it's confronted with a new application. But
8 that's all I need to say.

9 Now, there are a couple of additional points I want to
10 make about why a cost-of-service hearing is necessary.

11 First, if we look at Procedural Order No. 1 in this
12 hearing, it defined the preliminary issue as basically,
13 first: Can THESL justify a cost-of-service hearing and say
14 that it is necessary, and why it can't manage its resources
15 under an IRM successfully? Can THESL do that? Or should
16 the application be dismissed?

17 Now, in Procedural Order No. 3, in respect of that
18 preliminary issue, the Board gave THESL the right to adduce
19 viva voce evidence. THESL did that in the testimony that
20 we heard last Friday from Mr. Haines, Mr. Couillard and Mr.
21 McLorg.

22 It was open to any intervenor or to Board Counsel
23 after they read THESL's evidence, had they wanted to, to
24 adduce viva voce evidence or affidavit evidence of their
25 own to contradict what was in THESL's evidence. No
26 intervenor sought that right. Board Counsel did not seek
27 that right.

28 So what we are left with is what inference does the

1 Board draw from the state of the evidence? The proper
2 inference that the Board should draw, in the City's
3 submission, is that the intervenors did not adduce evidence
4 contrary to THESL's because they could not.

5 The same is true of Board Counsel. It did not adduce
6 evidence contrary to THESL's because it could not.

7 Therefore, the evidence upon which this preliminary
8 motion is based is strictly the unchallenged evidence of
9 the THESL witnesses.

10 Now, my second point is that the City submits that a
11 cost-of-service hearing is necessary in order for the City
12 to be able to explore the street lighting rates issue. You
13 may take administrative notice of the fact that the City of
14 Toronto has a budget stringency. You have read in the
15 media about library closings, about flat-lining police and
16 TTC budgets, about sale of social housing, about other
17 initiatives because of the City's lack of funds. The
18 street lighting rates issue is central to the City's budget
19 needs, and it has been a burning issue in the City's mind
20 for several years.

21 The evidence is that the City is deeply concerned
22 about the level of street lighting rates to be charged by
23 THESL. That is clear from the letter that the City wrote
24 in 2010, which is Exhibit K2.4, and the THESL witnesses
25 agreed with that in the transcript at page 61, line 19 to
26 page 62, line 8.

27 Now, with respect to how the street lighting rates are
28 constructed using the Board's model of number of

1 connections as a cost allocator, the THESL witness
2 testified that it is not obvious that that method of cost
3 allocation is appropriate. Mr. McLorg said that in 2008.
4 He confirmed it last Friday on this witness stand in this
5 case.

6 And he said that there were still questions around the
7 application of that particular device. And he said that at
8 page 62, line 2 to page 63, line 8.

9 Mr. McLorg also agreed with respect to the street
10 lighting rates cost-allocation methodology by number of
11 connections that it was not the best allocation of costs
12 that could be used. Again, that was true in 2008, and his
13 evidence is that it remains true today. That's page 63,
14 line 9 to 18.

15 Now, you will recall that I asked Mr. McLorg if the
16 effect of his response to the City's Interrogatory No. 1,
17 which is Exhibit R1, tab 1, schedule -- tab 6, schedule 1
18 was that it detailed examination of the costs and costs
19 allocation underlying THESL's street lighting rates. I
20 asked him if that would be beyond the scope of an IRM
21 methodology, and he testified that it would be. And the
22 effect of that is that if you follow an IRM methodology the
23 City would not be able to explore street lighting rates.

24 Now, the evidence before you -- I'm sorry. That was
25 at page 63, line 26 to page 66, line 4.

26 Now, the evidence before you is that the street
27 lighting rates is \$1.30 per connection per month in fixed
28 charges, with a variable charge of \$28.72 per month per

1 kilovolt-ampere. That's Exhibit K2.5. And Mr. McLorg
2 testified that if THESL was required to use the third-
3 generation IRM methodology, that that level rate would not
4 change materially between now and 2015. They would remain
5 at that high level. And that's at page 67, line 18 to page
6 68, line 8.

7 So the City of Toronto is faced with rates set at a
8 rate they consider excessively high, when the evidence
9 before this Board that the basis on which they are set is
10 dubious. And that, I submit, is not appropriate.

11 Finally, the evidence is that a comparison of street
12 lighting rates shows that THESL's street lighting rates are
13 approximately 80 percent higher than those of Enersource
14 Mississauga, its nearest competitor. That's Exhibit K2.6,
15 the comparison.

16 Now, Mr. Haines testified that before we could
17 conclude finally that that comparison was invidious, that
18 we would have to do a detailed analysis of the underlying
19 data to determine whether the prima facie comparison is
20 justified or not. And he testified, as did Mr. McLorg,
21 that only a cost-of-service hearing would provide that
22 opportunity. That's at page 68, line 19 to page 69,
23 line 9.

24 So Board Members and Madam Chair, the City submits
25 that you should have a cost-of-service hearing so that the
26 City can explore the street lighting rates issue, which is
27 of deep concern to it and has been for some time.

28 Thank you very much. Those are the City's

1 submissions.

2 MS. CHAPLIN:: Thank you.

3 MS. HARE: Mr. Blue, you did show an exhibit which did
4 demonstrate that Toronto Hydro rates for street lighting
5 are the highest of any distributor's, but we later saw an
6 exhibit which showed that, for all rate class, Toronto
7 Hydro rates are the highest.

8 And so my question is, as the shareholder, is the City
9 of Toronto not concerned about the impact on all ratepayers
10 if this application goes forward as filed, which would have
11 an impact on all ratepayers, including street lighting?

12 MR. BLUE: The City believes that -- does not have a
13 concern about that, Madam Chair and Member Hare, because it
14 believes that if any of those rates are inappropriate the
15 cost-of-service hearing is the most appropriate forum to
16 sort that out and have them changed.

17 MS. HARE: Thank you.

18 MS. CHAPLIN: Mr. Blue, you took us through the
19 Board's decision back in 2006, wherein it set aside the
20 process of setting rates via code. So, yes, I think we've
21 established -- but the issue before us here isn't setting
22 rates by a code. So I just would like to be clear. Is it
23 the City's position that the Board is prevented from making
24 any decision at this stage other than to go forward and
25 hear the balance of the application?

26 MR. BLUE: Madam Chair, I would have to formulate the
27 position with the City, but the position I would formulate
28 is, yes, I think the Board has severe challenges in saying

1 to an applicant, an LDC, Sorry, you cannot file your
2 application in this form.

3 Your duty, I respectfully submit, is to -- your duty
4 is to make an order respecting the rates to be charged
5 under the act, under 78. That's the only statutory -- and
6 you have a broad discretion about how to do that. But you
7 cannot fetter your discretion in advance.

8 You have to -- my submission is the Board is required
9 to make sure that the application is complete. Once it
10 does that, it must hear the case that the applicant wants
11 to present, and it must hear the intervenors' submissions
12 on that case and then make a decision on that case. What
13 the Board cannot do is say, I don't like the form in which
14 you filed this. We're going to dismiss it to bring it back
15 in another form.

16 I would submit, absent specific regulations authorized
17 by your act, you do not have the authority to do that. But
18 I have not discussed that position with the City.

19 MS. CHAPLIN: Thank you.

20 MR. WARREN: Madam Chair --

21 MR. BLUE: I will get direction at the break and
22 confirm it.

23 MR. WARREN: Madam Chair, just as a follow-up to that,
24 is that Mr. Blue's position or not, that the Board is
25 fettering its discretion if it refuses to hear the
26 application in its present form? Is that the City's
27 position or not?

28 MS. CHAPLIN: Sorry, your mic is off now, Mr. Blue.

1 MR. BLUE: Sorry. That's my position. That's Ian
2 Blue's position, based on a long time of doing this work
3 and doing a lot of these cases and studying these statutes.
4 I will talk to the City about it as soon as I can.

5 MR. SHEPHERD: Madam Chair, I wonder if I could raise
6 a question of procedure.

7 The applicant's shareholder has raised legal arguments
8 that are properly the applicant's arguments to make. And
9 normally we have a process where the applicant makes their
10 submissions, and we have some time to then do research and
11 develop responses to be helpful to the Board. And then
12 indeed, they have time after today to respond to us.

13 We now have a new argument that what you're proposing
14 to do is illegal, a citation of the SPPA, which -- for
15 which we don't have any details, all of which appears to
16 have been assigned to the City to make that argument, as
17 opposed to the applicant, and puts us at a disadvantage.

18 I'm not going to make a submission as to what we
19 should do about it right now. What I would ask the Board
20 to do, if you're agreeable, is to allow us a short break so
21 that we can -- we, the parties on the other side, can
22 confer about what the best approach is to deal with that
23 and what proposal we would make to the Board.

24 We're taken aback at this; this is the first time
25 we've heard that anybody is suggesting that what you're
26 proposing to do is illegal.

27 MS. CHAPLIN: One moment.

28 MR. BRFETT: Madam Chair, I'd like to reply to that,

1 if I may.

2 MS. CHAPLIN: Why don't you hold that thought, and
3 give us a moment, please?

4 [Board Panel confers]

5 MS. CHAPLIN: Thank you. We have decided that the
6 best way to proceed will be to hear the other arguments
7 from the parties that we understand are supportive of
8 Toronto Hydro's position, and that's AMPCO and BOMA. We
9 will then take a break.

10 And actually even before that, we would ask you, Mr.
11 Blue, to perhaps get instructions, so that before we break,
12 we have clarity as to what the City's position is on this
13 question. And then before we take the break, we will
14 canvass the parties as to what length of time is required,
15 and we will take it from there.

16 So on that basis, Mr. Blue, you were finished, so I
17 have AMPCO next.

18 **SUBMISSIONS BY MR. CROCKER**

19 MR. CROCKER: Thank you, Madam Chair, Members of the
20 Board.

21 AMPCO's position is that THESL should have an
22 opportunity to present its case to you by way of a cost-of-
23 service application.

24 We have a short written argument that I can file. I
25 don't think you'll be making any decisions today that
26 you'll need it immediately. I want to summarize our
27 position quickly. It shouldn't take more than five
28 minutes.

1 There are six points I want to make. As I say,
2 they're quick.

3 The first one deals with pace, pace of capital
4 expenditure. You may recall that both Ms. Sebalj and I
5 cross-examined the panel on that issue in the context of
6 the settlement they had reached with respect to the
7 previous two hearings.

8 We submit that the issue of a reasonable pace of
9 capital investments and a responsible ratemaking pace
10 underpins the preliminary issue now before the Board, to
11 determine whether or not THESL is able to manage its
12 resources and financial needs.

13 We, at this stage of the process, can't accept THESL's
14 level of proposed expenditures or the consequences it
15 describes if regulated under IRM. And we don't see how the
16 Board can, either, on the basis of what you have in front
17 of you.

18 In order to make a determination on a reasonable pace
19 of investment, we believe THESL should have the opportunity
20 of presenting evidence with respect to capital and
21 workforce renewal, and we think the best way of doing that
22 is as part of a cost-of-service application.

23 With respect to the issue of your discretion: We
24 agree with THESL that there is nothing in the legislation
25 or the Board's own policy that fetters the Board's
26 discretion or should fetter the Board's discretion in a
27 particular case to determine rates on the cost-of-service
28 basis. We also agree with THESL's position that the

1 utility needs options to choose the best regulatory
2 construct in their circumstances, in their own
3 circumstances, for their customers. The Board should set
4 rates, we believe, on a case-by-case basis on the specific
5 circumstances of the applicant and the evidence in each
6 particular proceeding.

7 Comments with respect to the threshold test that the
8 Board has established: THESL's proposed capital budget and
9 workforce renewal plan has not been tested nor thoroughly
10 reviewed, we believe. Because of that, AMPCO is unable to
11 accept that the proposed spending and investments are
12 necessary and prudently incurred. As such, it does not
13 appear as if it is possible to determine whether THESL has
14 adequately managed its resources and financial needs.

15 And as such, THESL has not, in our submission, met the
16 threshold test that the Board has established. But we
17 believe to some extent that that threshold is arbitrary,
18 and THESL shouldn't be denied the opportunity of presenting
19 its case to you fully in a cost-of-service application just
20 because it has not met that test, and we don't believe that
21 it has.

22 With respect to the issue of testing the evidence, we
23 acknowledge that THESL has filed five volumes of evidence
24 in this proceeding, and THESL submits that taken in its
25 totality, the evidence is intended to show the Board
26 exactly what the system needs and what the requirements
27 are, and the utility's prudent plans to manage those needs
28 and requirements.

1 This evidence has not been adequately tested, in our
2 view, to determine if the expenditures are necessary and
3 prudent or whether they're overstated. THESL provided very
4 limited information on its efforts to achieve -- in our
5 submission, in its efforts to achieve gains in
6 productivity, certainly in the material filed as part of
7 this preliminary issue.

8 We submit that the Board's assessment of THESL's
9 proposed expenditures and investment requirements, the
10 testing of their evidence cannot be done without and should
11 not be done without a full cost-of-service application and
12 a full hearing.

13 The revenue requirement should be determined based on
14 the Board's review of those expenditures and any offsetting
15 productivity improvements, and as I've said, in a cost-of-
16 service application.

17 What we are requesting, therefore, is that the Board
18 determine this preliminary issue by way of -- and should
19 accept the application filed by THESL. And AMPCO further
20 submits that if the Board accepted THESL's application for
21 a cost-of-service application, the capital and workforce
22 renewal plans should be exempt from any settlement process;
23 in other words, they should go to a hearing.

24 And my last point is that, as you know, AMPCO
25 represents a cross-section of Ontario's major industries:
26 forestry, chemical, mining, minerals, steel, petroleum
27 products, cement, automotive and manufacturing, and
28 business consumers in general. Like THESL, these

1 industries have large capital budgets, and there is a
2 certain sympathy with THESL's plight, if I might put it
3 that way, with the AMPCO membership.

4 And subject to any questions, those are our
5 submissions.

6 MS. CONBOY: Mr. Crocker, could you please explain to
7 me: You had mentioned that if the application was to go to
8 hearing that the capital and workforce renewal program be
9 exempt from the ADR process.

10 I'm not quite sure I understand why you take that
11 position. Could you explain that, why that needs to go
12 through a hearing process but other issues may be subject
13 to a settlement conference?

14 MR. CROCKER: Those clearly seem to AMPCO to be the
15 two major issues as presented by THESL as to the
16 difficulties which prevent them from being adequately
17 treated by an IRM process.

18 It seems to us, it's our submission, that those issues
19 are best dealt with and best tested by a full hearing, with
20 cross-examination, with consideration by the Board in the
21 context of that cross-examination, rather than through a
22 settlement.

23 MS. CONBOY: Thank you.

24 MS. CHAPLIN: Thank you, Mr. Crocker.

25 Mr. Brett?

26 **SUBMISSIONS BY MR. BRETT**

27 MR. BRETT: Thank you, Madam Chair. Good morning,
28 Panel. In Procedural Order No. 1 in this case, at page 6,

1 the Board decided there should be a preliminary issue. And
2 they defined it as whether the application filed by THESL
3 is acceptable or whether it should be dismissed.

4 So that is the issue, I believe, that we are asked to
5 address, and that's a rather narrow issue, I think.

6 Now, the essence of BOMA's submission today is that
7 the Board should hear THESL's case as filed. The Board
8 should not dismiss its application. The Board can decide,
9 after hearing all the evidence in the case, the substantive
10 evidence, whether to approve the revenue requirement
11 request in whole or in part for one year, two years, three
12 years, or not at all. But the Board should not dismiss
13 this application in this preliminary proceeding.

14 Now, let me provide the reasons for that. My first
15 point is it's, I think, well recognized that it's the
16 distributor's choice as to what type of rates application
17 it should file. The Board has agreed with this. In its
18 decision at EB-2010-0142, at page 10, it stated among other
19 things that:

20 "The Board makes no determination as to what
21 THESL is required to file in its subsequent rate
22 application. It is for THESL to determine the
23 manner in which it chooses to apply for any
24 adjustment to its rates for 2012."

25 THESL has the obligation, as it always does, to
26 justify its request for new rates in its evidence, and
27 THESL has filed substantial evidence in this case which has
28 not yet been tested.

1 Now, our second point is that the Board has given no
2 explicit direction to THESL on what type of application it
3 should file in 2012. As I mentioned, it said it was up to
4 THESL.

5 But in answering -- in our IR, BOMA's IR No. 3 --
6 that's Exhibit R, tab 3, schedule 3 -- we asked BOMA -- we
7 asked THESL, rather, whether it had ever received an
8 explicit direction from the Board as to what it should file
9 in this particular case. And the answer we got was: Other
10 than for the 2010 test year when the formulaic update was
11 prescribed by the Board, and that was that two-year cost-
12 of-service decision, and followed for THESL's proposed
13 multi-year test period, the Board has not prescribed a form
14 of filing.

15 And we asked -- in the same question, BOMA asked THESL
16 to give us a table showing the type of filing that THESL
17 had made over the last several years. And that table,
18 which was on page 2 of that same interrogatory response,
19 indicated that since 2008 THESL has filed a cost-of-service
20 application in every year. So for the last five years,
21 this is the fifth consecutive year in which it has filed a
22 cost-of-service application.

23 And at no time over that period has the Board ordered
24 THESL to file a different type of application in a
25 subsequent year.

26 So it seems to me it's reasonable for THESL to expect
27 that it can file a cost-of-service application and have it
28 heard.

1 Now, there was another case where the Board dealt with
2 this. Somewhat different circumstances, but that was the
3 Horizon case, EB-2010-0131. And there Horizon had applied
4 for new rates effective January 1, 2011, one year ahead of
5 the time when it was normally expected to file a rebasing
6 case.

7 And it filed its application on August 26, 2010 in a
8 cost-of-service application. It offered four reasons why
9 it was doing that: 1, material and persistent shortfalls
10 in revenue; 2, an urgent need for increased investment in
11 the renewal and maintenance of its electricity distribution
12 network; 3, a heightened requirement to renew and increase
13 the skilled trades positions in its workforce; and a
14 requirement for a reasonable return on its investment.

15 The Board called a preliminary hearing in that case to
16 determine whether it should accept that case, and it
17 decided to do so. And at page 6 of its decision it said:

18 "However, the Board finds that it was reasonable
19 for Horizon to believe that the Board would
20 accept a cost-of-service application from Horizon
21 at this time. Therefore, the Board finds that
22 the considerations of it in its April 20th
23 letter..."

24 Which you've heard about and I'll come back to:

25 "...and the Hydro Ottawa decision do not apply to
26 this application."

27 Now, granted, the circumstances weren't identical, but
28 what is the same, we would contend, is that THESL had a

1 reasonable expectation that its case -- that it could file
2 a cost-of-service case and that that case would be heard.

3 Now, our third point is that THESL's current
4 application cannot be characterized as a rebasing
5 application since THESL hasn't been in an IRM regime for
6 many years. The Board recognized this reality in its
7 recent decision in the Hydro Ottawa 2011 rate case, EB-
8 2010-0133, which it rendered October 27th, 2010.

9 In that case, the Board determined that a preliminary
10 hearing should be held to determine whether Hydro Ottawa's
11 cost-of-service application should be considered or
12 dismissed. Hydro Ottawa was in the middle of a PBR regime
13 and was applying for an early rebasing. Hydro Ottawa
14 raised the fact that Toronto Hydro and Hydro One were
15 filing COS applications, so why couldn't it? And the Board
16 replied at page 10:

17 "The Board finds that comparisons to Toronto
18 Hydro are not pertinent, given that Toronto Hydro
19 was never on incentive regulation."

20 Was never on incentive regulation. So the Board, in
21 effect, was saying that Toronto Hydro's 2011 rates
22 submission could not be considered early rebasing. And I
23 would suggest the same is true now, with its 2012
24 application.

25 Now, note that the Hydro Ottawa decision was rendered
26 well after the Board's letter of April 20th, 2010 and that
27 the April 20th letter addressed the issue of filing rates
28 applications that would have a COS hearing earlier than

1 scheduled.

2 Our fourth point is that the April 20th letter --

3 MS. CHAPLIN: Sorry, Mr. Brett, just on that last
4 point?

5 MR. BRETT: Yeah?

6 MS. CHAPLIN: I'm just wondering is there any
7 significance -- you've quoted the Hydro Ottawa decision
8 where an observation was made about Toronto Hydro.

9 MR. BRETT: Right.

10 MS. CHAPLIN: Toronto Hydro's most recent decision was
11 subsequent to that decision. Do you think that that
12 represents any sort of change in circumstances, in the
13 sense in the last Toronto Hydro proceeding, the Board
14 considered to some extent this issue of what form of
15 ratemaking it should be on and whether there were two
16 different forms of ratemaking, and although it did not
17 direct Toronto Hydro to apply in a particular way,
18 certainly canvassed this issue in a different way?

19 In other words, have things moved on since what the
20 Board said about Toronto Hydro in the Hydro Ottawa
21 decision?

22 MR. BRETT: Well, we know in Toronto -- in Hydro
23 Ottawa, and your -- I think that given the timing of these
24 events, which I'll come to in a moment, and the timing of
25 the Board's circular, the April 20th letter, I don't think
26 they've moved on, at least for purposes of when this
27 application was being formulated.

28 Now, let me explain what I mean here. There's two

1 parts to this.

2 First of all, if you look at the April 20th letter,
3 it - and I'm not avoiding your question, I'm going to kind
4 of loop back to it - the April 20th letter says that -- and
5 I quote from the first paragraph:

6 "This letter addresses the issue of electricity
7 distributors filing rate applications to have
8 their rates set through a cost-of-service
9 proceeding earlier than scheduled."

10 So our view is this letter does not apply to Toronto
11 Hydro, because it's not talking about filing a cost-of-
12 service proceeding earlier than scheduled. Toronto Hydro
13 was not in an IRM proceeding and hadn't been for five
14 years.

15 MS. HARE: But Mr. Brett, there was a 2011 letter
16 which made it clear as to which distributors should file a
17 cost-of-service application for 2012. And Toronto Hydro
18 was not on that list.

19 MR. BRETT: Right. Well, I think, again, I'll come to
20 it; I have some other points to make that deal with that.

21 MS. HARE: Okay.

22 MR. BRETT: But I just sort of wanted to go through
23 the timing of this fairly carefully before I get to one or
24 two broader points, because some of this, some of my
25 argument hinges on the timing of these various events, and
26 the amount of time that Toronto Hydro had to react and when
27 it received information on these various letters and the
28 like.

1 So our fifth -- really, the issue of fairness, I
2 guess, and reasonable expectation.

3 Our fifth point is that the Board's decision - I think
4 the one you're referring to, Madam Chair, EB-2010-0142,
5 that was last year's Toronto Hydro decision - was issued on
6 July 7th, 2011. Now, that was about six weeks before
7 THESL filed its 2012 application. It filed that
8 application on August 26th, 2011.

9 Now, even if the Board's expression of its -- the
10 Board in that decision expressed its expectation that --
11 what THESL would do in a subsequent case. Now, my
12 submission is that came too late. That application would
13 have been virtually completed by then.

14 What THESL had before it when it was preparing its
15 2012 case was the Board's 2010 rate case decision, EB-2009-
16 0139, rendered on April 9, 2010. And given the wording of
17 the 2010 decision, it was reasonable for THESL to commence
18 to prepare a COS application. And that decision, you may
19 recall, was on a cost-of-service basis. The panel that
20 heard that case consisted of Howard Wetston, the OEB Chair
21 at the time, Gordon Kaiser, the OEB Vice-Chair at the time,
22 and Ken Quesnelle.

23 And that case, as you were told in Toronto Hydro's
24 chapter, in its evidence on this preliminary issue, the
25 issue of whether THESL's cost-of-service application was
26 appropriate was not on the Issues List. It was not
27 mentioned in either the settlement agreement or the
28 decision.

1 So in the circumstances, having just completed a two-
2 year cost-of-service approval in 2008 and 2009, and having
3 received a decision from the leaders of the Board approving
4 their cost-of-service application for 2010, it was a
5 reasonable expectation that they could prepare and submit
6 another COS application in 2012.

7 Our sixth point - and this is a practical point - is
8 that a decision to dismiss this application now would be
9 very wasteful of resources. THESL has spent a lot of time
10 and hard work in the preparation of this case, and on the
11 reasonable expectation that it can file a COS case and have
12 it heard.

13 Our seventh point is that the Board has other
14 realistic options in this case. It doesn't have to give
15 THESL what it wants once it has heard the full case. I'm
16 repeating myself, but it can decide how much of a rate
17 increase it wishes to approve and for how long. It doesn't
18 have to accept all of THESL's requests.

19 And it can substitute its idea of what is just and
20 reasonable. The only legal requirement on the Board is
21 that it set just and reasonable rates, and it can deal with
22 the issue of affordability in its decision at the end of
23 the case, after having scrutinized all of the evidence.

24 And I would mention AMPCO's comment that, you know,
25 this was a very complex amount of evidence, and there is a
26 lot to be said for the fact that -- I don't think anybody
27 in this room expects that they would support all of THESL's
28 proposals there. But you can't really determine very well

1 what should be supported and what shouldn't without a very
2 thorough review in a cost-of-service case, and without very
3 thorough cross-examination. I mean, that, certainly, has
4 been my personal experience, and dating back to the early
5 gas companies' -- the gas companies' early IRM proposals in
6 the mid-90s. You have to be able to get in and get your
7 hands dirty and find out exactly -- tear this thing apart
8 and put it back together again.

9 Now, with respect to what Hydro One (sic) has done,
10 I'm not going to dwell too much on this because you heard a
11 lot about -- I mean, you know the evidence you heard the
12 other day, the viva voce evidence. You've read parts of
13 the evidence, I'm sure. I just make two or three points in
14 terms of what you've got from Hydro in trying to discharge
15 its onus.

16 These are serious people. They have a sophisticated
17 staff. I believe their written evidence, both the initial
18 package on the preliminary, the tab A2, and the subsequent
19 evidence, with some exceptions, but for the most part, was
20 one of the clearest expositions that I've ever heard of
21 theory and practice of cost-of-service regulation versus
22 IRM. I thought it was very, very well done.

23 You heard about capital markets impacts and potential
24 down-rating. You heard about the impact of operating under
25 IRM on debt levels, debt/equity ratios, cash gaps and the
26 like.

27 And I think they made a pretty strong initial case,
28 you know, that there is an issue there, there is a big

1 issue there, about whether or not IRM is appropriate for
2 their circumstances at this time.

3 And I think they admitted that IRM might be very
4 appropriate for other utilities, some other utilities, and
5 I'm fairly certain that there are a number of utilities in
6 Ontario that would always wish to continue on IRM for a
7 variety of reasons which I don't want to get into now,
8 particularly because I think it's really not the issue.

9 But in any event, I think it's a strong case that they
10 put, whether you call it a prima facie case or whatever.
11 It's sort of an awkward situation, because no one's read
12 all the evidence, but you have to look at what's there and
13 I've read portions of it. I've read their capital plan.
14 We've asked questions about their capital plan.

15 It's, to me, a very impressive capital plan. I mean,
16 it may fall apart some in cross-examination, but it's a
17 fairly strong piece of work.

18 Okay. Let me move on.

19 Our ninth point is that there really is no provision -
20 well, this is really three points, but let me take it in
21 three slices.

22 The first is that the Board's own rules of procedure
23 do not provide -- they address in what circumstances the
24 Board can dismiss an application, as you know. And section
25 18 of the Board's rules of practices provide that the Board
26 can propose to dismiss a proceeding without a hearing on
27 three grounds: A, the proceeding is frivolous, vexatious,
28 or in bad faith. And I don't think -- I would argue that

1 this is none of those. The proceeding relates to matters
2 that are outside the jurisdiction of the Board. Clearly
3 that doesn't apply. This is a rates application. It's at
4 the heart of your jurisdiction. And C, some aspect of
5 statutory requirements for bringing the proceeding has not
6 been met. Now, I don't think there's any statutory
7 requirement that they would be -- that they have not met in
8 bringing their proceeding.

9 And so -- and I think the hearing that's being
10 referred to there in that section 18 is not this hearing,
11 it's the substantive hearing. I mean, it's -- putting it
12 another way, I don't think the Board could say in this
13 hearing, consistent with these rules of practice, as
14 somebody, one of my colleagues, mentioned a while ago:
15 Well, you know, we're going to dismiss this right now
16 because we don't think you followed the rules, our rules.
17 We don't think you put this in the right form. We're not
18 going to hear the substance of it.

19 So I think the hearing they're talking about here is
20 the substantive hearing. And they talk in terms of a
21 proceeding, not a hearing or not an application, but, you
22 know, the drafting might have been a little more precise,
23 but nonetheless, it's pretty clear what they're saying, I
24 think. They're saying, you know, if you're going to
25 dismiss something, it has to be pretty bad.

26 And that wording that is in your rules, as you
27 probably are aware, is a straight reprint of section
28 4(6)(1) of the Statutory Powers Procedures Act. It says

1 exactly the same thing, down to the comma.

2 So, in our view, the Board would contravene the
3 Statutory Powers Procedures Act if it dismissed the
4 application.

5 Now, let me look at the third prong of this, which is
6 the Board's own act. And as you have been told before, and
7 I would concur, the OEB Act doesn't talk about -- it talks
8 about you fixing just and reasonable rates. You don't have
9 to accept any rates submission that's made to you on this -
10 - you know, any set of rates. You can choose your own
11 rates.

12 And it does not -- it speaks also about codes and
13 rules, rules for gas and codes for electricity. It doesn't
14 say anywhere in the act that you can dismiss an
15 application. You don't have to agree with the rates that
16 are being sought. You can set your own rates, the rates
17 that you think are just and reasonable, but it doesn't say
18 anywhere you can dismiss an application because it doesn't
19 agree with your policy, a policy or guidelines or policy
20 guidelines.

21 And it's interesting -- and so the next point I wanted
22 to deal with is: What is a Board policy in this context?
23 Well, first of all, just to elaborate a bit on it, look at
24 the statute. The statute nowhere talks about a Board
25 policy. It talks about the government making policy
26 directives to the Board, either of a general policy nature
27 or on specific items.

28 Now, the statute does talk a lot about codes and

1 standards, and it puts elaborate legal provisions around
2 what a code and a standard -- how you go about making a
3 code and a standard, notice provisions, you know, all sorts
4 of -- it gives you a very good, strong procedural code --
5 for issuing a procedural code, pardon the pun, about how to
6 issue and promulgate codes and standards -- codes and
7 rules, and what their legal effects are. I mean, you can
8 appeal one, for example, so they clearly have legal effect,
9 the rules in the gas area and the codes in the electricity
10 area. It never mentions policy, whether general policy,
11 regulatory policy, policy guidelines.

12 Now, so what is a policy? What does the Board
13 consider the legal effect of its own policies to be? If
14 you look at EB-2009-0084, that's the report of the Board on
15 the cost of capital for Ontario's regulated utilities. It
16 was issued December 1st, 2009. Page 13. The Board
17 described the nature of a Board policy in this case -- and
18 now, this was in the cost-of-capital report, but it
19 described policy in this way. It was trying to
20 characterize the legal character of policy. And, you know,
21 I wasn't in that case, but I read it, and there were lots
22 of questions about whether notice was appropriate and so on
23 and so forth.

24 So the Board said in part:

25 "The final 'product' of this process..."

26 Talking about the process that led up to the cost-of-
27 capital guideline:

28 "...is of course the word 'policy'. This was not

1 a hearing process, and it does not, indeed
2 cannot, set rates. The Board's refreshed cost-
3 of-capital policies will be considered through
4 rate hearings for the individual utilities, at
5 which it is possible that specific evidence may
6 be preferred and tested before the Board. Board
7 panels assigned to these cases will look to the
8 report for guidance on how the cost of capital
9 should be determined. Board panels considering
10 individual rate applications, however, are not
11 bound by the Board's policy and, where justified
12 by specific circumstances, may choose to not
13 apply the policy or a part of the policy."

14 So I think a better word for "Board policy" would be a
15 "Board preference" or "practice". "Preference" would be my
16 preferred word. It has no legal force. It cannot be
17 insisted upon. And therefore, I think the Board cannot say
18 to an applicant, We won't hear your case because your
19 proposal isn't in accord with our policy.

20 That's assuming that you had difficulty with some of
21 the earlier points I made. But I think this is the sort of
22 -- this is a broader point but an important point.

23 Now, I have two more points, and then I apologize,
24 it's a bit long, but I'm trying to keep this thing in an
25 orderly manner.

26 I think you need to look at this decision through the
27 lens of your objectives. And those objectives are in your
28 act, of course. I won't read them all. You know them by

1 heart. But I think, you know, it's common ground that when
2 you're making decisions you need to take these objectives
3 into account. They don't dictate decisions, but they're
4 part of the backdrop. And they include the following:
5 Facilitate the maintenance of a financially viable
6 electricity industry; promote economic efficiency and cost-
7 effectiveness in the distribution of electricity; and
8 protect the interests of consumers with respect to four
9 things: 1, price; 2, adequacy; 3, reliability; and 4,
10 quality of electricity service.

11 Now, I know that some people in this industry sort of
12 conflate adequacy and reliability, but that's fine. There
13 are those four points that are part of the statute.

14 And I think when you look at those, when you're
15 examining those things, you also have to say, if you're
16 going to have a chain of decisions here, if this decision
17 you're making today is the first in a chain of decisions,
18 and the second decision is going to be an analysis -- just
19 bear with me for a moment -- of, let's assume it's going to
20 be a substantive analysis of the case, let's assume you
21 agree to hear this case on a cost-of-service basis -- then
22 I think you need to look at the combination of these fora
23 and say, well, in this chain of decisions, are we going to
24 have an opportunity to address all of the aspects that we
25 should address, taking into account our objectives?

26 And that's what I mean when I say you can deal with
27 affordability, which is a popular subject these days -
28 politicians take about it, which is to be expected - but

1 you can deal with affordability in a very real way at the
2 main hearing, if you choose to have it.

3 And then finally, my final point, really, is this: We
4 are on the cusp of a major review of regulatory policy.
5 You published the five reports. We're about to deal with
6 issues such as investment planning horizon and techniques
7 for electricity distributors, mitigation options, how
8 should a utility be judged as to its performance. I would
9 suggest that because we are moving into this sort of an
10 environment, it would be better to proceed, you know, hear
11 this case.

12 Certainly the issue is going to come up in this review
13 of the applicability and the strengths and weaknesses of
14 either of these two regimes, and they're -- probably not
15 right to say two; there are probably more than two.

16 You know, as I said before, many utilities, I believe,
17 will always wish to be dealing with an IRM regime. It's
18 simple for smaller utilities, for utilities growing very
19 fast. It's easy to deal with. A cost-of-service hearing
20 is not a very comfortable thing for a utility.

21 But in any event, we've got a number of things that
22 are happening. We have this review. We have this
23 assessment that was just filed a few weeks ago of the
24 performance of Ontario gas companies under -- utilities
25 under performance-based regulation. It's a massive
26 document; I haven't had a chance to analyze it. We've had
27 indications, if you look at the presentation that Enbridge
28 made last week as a precursor to its rebasing decision, you

1 will see in there -- and I haven't read it in detail, but
2 you will see in there, among other things, a paper on how
3 you square substantial capital investment programs with an
4 IRM regime and what some of the financial consequences of
5 that are.

6 So this isn't just a Toronto Hydro issue; this is an
7 issue that other people are looking at. And I think in the
8 circumstances it would be more prudent, better regulatory
9 practice, to proceed and hear this case.

10 Thanks very much.

11 MS. CHAPLIN: Thank you. Thank you, Mr. Brett.

12 Mr. Blue, have you been able to receive instructions?

13 MR. BLUE: Not yet. Sorry, I have not yet, ma'am.

14 MS. CHAPLIN: When will you?

15 MR. BLUE: I hope I'll connect at the break. If
16 not...

17 MS. CHAPLIN: Well, the purpose was to actually find
18 out the City's position before we take the break, because
19 the break was to assist the other parties.

20 MR. BLUE: Well, then I can -- I think that what I can
21 say is this, that I think, as far as my position goes, is
22 that for all the reasons I stated in response to your
23 question, the City believes the Board should consider the
24 question, the legal question of whether it has the
25 jurisdiction to dismiss this application because it doesn't
26 follow IRM methodology. It should consider that carefully.

27 MS. CHAPLIN: Okay. So that being said, now is an
28 appropriate time for a break, in any event.

1 MR. BLUE: And Madam Chair, I should say on the
2 record, in case people from the City are listening, that
3 I've tried to initiate contact with the City four different
4 times since we spoke, and I have not been successful.

5 MR. CROCKER: Madam Chair, before you break, could I
6 have one minute of the Board's time to more fully answer
7 Ms. Conboy's question as to why the issue shouldn't be
8 settled, but rather go to a hearing?

9 MS. CHAPLIN: Thank you. Go ahead, please.

10 **FURTHER SUBMISSIONS BY MR. CROCKER**

11 MR. CROCKER: The issue of how a utility deals with
12 the need to replace -- to apply significant capital to the
13 replacement of an ageing infrastructure is, in AMPCO's
14 submission, an important issue, goes beyond Toronto Hydro,
15 and it deserves a ruling by the Board, as opposed to being
16 settled in isolation of that ruling. Sure, subject to
17 cross-examination, but it's important, in our submission,
18 that the Board rule on the issue. And that's why, in our
19 submission, it shouldn't be settled.

20 MS. CONBOY: Over and above any other type of costs
21 that are in an application?

22 MR. CROCKER: Yes. That particular issue, yes.

23 MS. CONBOY: Thank you.

24 MS. CHAPLIN: So we will break now -- so are you
25 chomping at the bit to tell me something, Mr. Shepherd?

26 MR. SHEPHERD: I was anticipating that you would ask
27 how long the break should be, and I was --

28 MS. CHAPLIN: How long a break do you propose? We'll

1 see.

2 MR. SHEPHERD: It appears that since Mr. Brett is also
3 raising the legal issue, that whether or not Mr. Blue is,
4 we're going to have to deal with it at some point.

5 I doubt very much if it will take longer than 20
6 minutes or so for us to talk, but presumably we could
7 advise the Board Members if it looks like it's going to
8 take longer.

9 MS. CHAPLIN: Well, we'll give you until 11:30, and
10 with an expectation that that should be sufficient time.

11 MR. SHEPHERD: Thank you very much.

12 MS. CHAPLIN: Thank you.

13 --- Recess taken at 10:56 a.m.

14 --- On resuming at 11:42 a.m.

15 MS. CHAPLIN: Please be seated.

16 I gather we have some preliminary matters for
17 discussion? Who is going to go first? Mr. Blue, do you
18 have instructions?

19 MR. BLUE: Thank you, Madam Chair. Yes, I do.

20 Madam Chair, the question that you asked me, and I
21 noted this from the court reporter's notes, you asked me,
22 is it the City's position that the Board is prevented from
23 making any decision at this stage other than to go forward
24 with and hear the balance of the application.

25 And on that question, the City does not take a
26 position that the Board cannot do that. As I said before
27 the break, the City's position is the Board should consider
28 its jurisdiction to dismiss this application at this stage

1 for the reasons I have stated. It goes no further than
2 that.

3 The City's position strictly in this case relates to
4 street lighting rates, and it wants a cost-of-service
5 hearing so that the street lighting-rates issues can be
6 fully explored. That's it in a nutshell.

7 MS. CHAPLIN: Thank you, Mr. Blue. With that
8 clarification -- sorry, Mr. Rodger, do you have something
9 to say before Mr. Shepherd?

10 MR. RODGER: I was just going to offer the following,
11 if it would be helpful to the Board Panel and my friends,
12 because it seemed like the question that Mr. Blue addressed
13 was a little bit morphing into a larger question. And if
14 it's helpful, I'm happy to spell out my understanding of
15 what I heard this morning and what Toronto Hydro's position
16 is on this, because I also wanted to respond to one of the
17 things that you flagged about the 2011 Toronto Hydro
18 decision, which might be helpful.

19 MS. CHAPLIN: Okay.

20 **SUBMISSIONS BY MR. RODGER**

21 MR. RODGER: All right. So in terms of the big legal
22 jurisdictional question, our view is that it really is a
23 red herring in this case. Mr. Brett talked about, for
24 example, the Ottawa decision in October 2010. And I think
25 it's pretty clear at that point that when -- the Board's
26 observation that Toronto Hydro was never part of IRM, I
27 mean, there was no ambiguity around that statement. You
28 know, Toronto Hydro was not confused when it read that.

1 The decision we got in July of 2011 on our last case,
2 you had asked whether that kind of signalled a change, and
3 we would agree with that. Toronto Hydro put forward in its
4 argument that there was these two broad frameworks for
5 setting rates, and the Board said, We don't agree with
6 Toronto Hydro and how you have described that.

7 But you went on in that decision -- what you did not
8 say is, From here on in IRM is the only game in town, and
9 that unless you can fit your application in this box, we're
10 not going to accept it. You said the opposite. You said,
11 IRM is the approach that we've selected; however, we're not
12 going to tell you, Toronto Hydro or other utilities, how
13 you come forward, but when you do come forward, you're
14 going to have to show us why you don't fit within IRM.

15 And that was repeated in the procedural orders in this
16 case. So that's exactly what we've done.

17 Now, on the jurisdictional arguments, you know, if the
18 Board were to take the position now that, really, what we
19 meant in your 2011 decision and what we really mean in all
20 the procedural orders up to this point is that IRM is it.
21 That's it. There's no other option. There's no other
22 exception, then we would agree with Mr. Blue that the Board
23 does not have jurisdiction to restrict us to this one
24 option.

25 But the Board's not saying that. It is saying the
26 exact opposite. He said the Board is saying, You come
27 forward with the application of your choice. It's up to
28 you to show us why IRM doesn't work. And that's why, right

1 from the start, I've been acknowledging that the onus is on
2 us, as the applicant, to show why it's not working.

3 But as I say, that's not the question before the Board
4 unless you were to, essentially, change what you meant in
5 that decision, and in the procedural orders leading up to
6 this point.

7 So that's why I say it really is a red herring,
8 because that's not the issue before the Board or how you
9 have described how we have to proceed on the threshold
10 question. You have never at any point said, IRM is the
11 only game in town; it is the only option without exception.
12 The Board has never said that.

13 MS. CHAPLIN: Mr. Rodger -- I'm sorry, Mr. Blue
14 clarified, in answer to my question -- my question was,
15 does the City take the position that the Board is precluded
16 from making any decision other than to hear the application
17 in full? To which I understand his response: The City is
18 not taking that position. It takes no position now on that
19 question.

20 MR. RODGER: Yes.

21 MS. CHAPLIN: How is Toronto Hydro now answering that
22 question?

23 MR. RODGER: Well, I think we take the same position
24 as Mr. Blue.

25 MS. CHAPLIN: That you're not taking a position?

26 MR. RODGER: That's right.

27 MS. CHAPLIN: Okay. But that doesn't -- I'm sorry. I
28 am somewhat confused, because what you just took us through

1 seemed to indicate that you are taking the position that we
2 are -- just that our discretion does not extend to
3 dismissing the application at this stage and declining to
4 hear it in full.

5 MR. RODGER: If it was decided on the basis that IRM
6 is the only option available to distributors in Ontario,
7 and because we filed an application that's cost-of-service
8 and not IRM, if you decided we're not going to accept the
9 application because it's not IRM, then we think there's a
10 jurisdictional problem with that.

11 But as I say, that's not how the Board has presented
12 the issue, and how we've approached this whole case. So
13 the Board would have to, in our view, blatantly change the
14 meaning of both the 2011 Toronto Hydro decision and all the
15 procedural orders up to this point in time, because clearly
16 you've said: IRM is our preferred choice, but utilities
17 always have an option, they just have to prove it. They
18 have to prove why IRM doesn't work. And that's what we've
19 been doing.

20 MS. CHAPLIN: Okay.

21 [Board Panel confers]

22 MS. CHAPLIN: Mr. Shepherd?

23 MR. SHEPHERD: Madam Chair, I'd like to say that the
24 comments of Mr. Blue and Mr. Rodger are helpful, but I
25 don't actually know any better now whether at some point in
26 this process they are going to say you didn't have
27 jurisdiction to decide what you decided.

28 If you say, for example, and we're going make the

1 argument, that, We're not going to look at what you're
2 proposing, that the proper thing for us to look at is
3 whether you are in fact inherently different, and you
4 haven't made that case, we told you you had to make that
5 case, and therefore we're throwing your application out -
6 we haven't heard yet whether the argument is going to be,
7 You can't legally do that.

8 Furthermore, we haven't heard yet from Mr. Brett, who
9 very clearly said he's challenging the jurisdiction.

10 So we have Mr. Blue saying, I'm not challenging the
11 jurisdiction, but you have to decide that in this
12 proceeding. We have Mr. Rodger saying, Well, as long as I
13 understand what you've said last year or earlier this year,
14 then I'm not challenging the jurisdiction. But as soon as
15 you stray from that, oh, yeah, I'm there. And Mr. Brett's
16 saying, We're challenging it, absolutely. You simply can't
17 dismiss the application.

18 In our view, at some point, your jurisdiction to have
19 an IRM regime that works in a comprehensive way is under
20 attack. It's too important to just let it slide by. It
21 has to be dealt with.

22 MS. CHAPLIN: And so what are you proposing?

23 MR. SHEPHERD: Well, first I think we need to hear
24 whether Mr. Brett is in fact taking the position that he's
25 challenging your jurisdiction or whether he's taking a
26 softer approach along the lines of Mr. Rodger and Mr. Blue.
27 But if, indeed, the Board decides that - which I think you
28 should - that this should be argued out and you should make

1 a decision on whether you have jurisdiction to do this and
2 what the extent of it is, then we think that the
3 appropriate way to do that is through written legal
4 arguments.

5 We should hear whatever legal arguments they want to
6 make about the limits of your jurisdiction in this
7 proceeding. Mr. Rodger has given some of them now, but
8 let's see what his authority is. Let's see what statutory
9 and cases he's going to rely on. And he should write that
10 down, because this is very technical stuff. And you know,
11 it might end up in court, so we might as well get it right,
12 that we should hear that.

13 The parties -- and all parties who are going to have
14 any challenge to the jurisdiction of the Board should make
15 their submissions in writing. The parties who are going to
16 oppose that should have a full opportunity to reply in
17 writing. And we think that that's about two weeks, is the
18 appropriate time. And then the first parties should have a
19 right of reply, again in writing. And those are our
20 proposals.

21 MS. CHAPLIN: And therefore, would you propose that we
22 sort of conclude today's, or are you --

23 MR. SHEPHERD: No.

24 MS. CHAPLIN: -- suggesting that we bifurcate these
25 issues?

26 MR. SHEPHERD: It seems to us that the legal issues
27 can be done on a separate track. There is some
28 interaction. But I don't think it needs -- certainly it

1 wouldn't affect our argument today, and I think -- other
2 people can speak for themselves, but I think most that
3 people will not be heavily influenced by it.

4 MS. CHAPLIN: I'll assume that the other intervenors
5 are largely in agreement with Mr. Shepherd unless -- I'll
6 come back to you, Mr. Brett, in a minute -- unless you have
7 something further to say.

8 MR. WARREN: At the risk of doing so, Madam Chair,
9 with respect, I don't agree with what Mr. Shepherd has just
10 said.

11 It seems to me that what we've heard this morning, I'd
12 like Mr. Blue to answer the question whether or not it's an
13 issue whether the Board has the jurisdiction to dismiss the
14 application. I'd frame the question somewhat differently
15 than you did, but assuming that Mr. Blue says that's not
16 our issue, I see no value in making people argue about
17 jurisdictional issues that they're not going to make.

18 And subject to what Mr. Brett says, I think the
19 jurisdictional issues are now off the table, and there
20 really is no value in our taking time, effort and money to
21 make arguments about jurisdiction when they're not really
22 any longer at issue.

23 Those are my submissions.

24 MS. CHAPLIN: Thank you, Mr. Warren.

25 Mr. Brett, why don't you...

26 MR. BRETT: Two points, or three points, perhaps.

27 First is I hope I made it clear -- I think I did, but
28 I hope I made it clear that our position had two prongs to

1 it.

2 I mean, let's assume for the moment that you do have
3 jurisdiction to do this. You should not do it.

4 MS. CHAPLIN: Yes, we understand your position.

5 MR. BRETT: And that's the first and most important
6 thing.

7 The second thing is it seems to me that I don't follow
8 Mr. Shepherd's logic. It seems to me it's a sort of
9 disingenuous intervention at this point. I mean, first of
10 all, earlier on when he spoke to you, he talked about:
11 Well, you know, we weren't anticipating anybody talking
12 about jurisdiction, and so we were caught by surprise, and
13 so on and so forth.

14 MS. CHAPLIN: Mr. Brett, before we enter into a
15 discussion about the process and the procedure, I think it
16 would be helpful, the Panel would find it helpful -- you
17 know, our understanding from your argument this morning was
18 that you take the position that, under the Statutory Powers
19 Procedure Act, that the Board would be unab(a)(b)(c)(d)(e)
20 (f)(g)(h)(i)le to dismiss the application at this point.

21 Is that, in fact, BOMA's position or do you want to
22 modify it or clarify it or, in fact, confirm it at this
23 point?

24 MR. BRETT: I'd just confirm that. That is our
25 position.

26 MS. CHAPLIN: Okay. Mr. Crocker? Mr. Faye? Mr.
27 Buonaguro? Do you have anything you wish to add at this
28 point?

1 MR. BUONAGURO: Well, I was going agree with Mr.
2 Shepherd until Mr. Warren spoke, and I agree with him,
3 except that Mr. Brett has now made sure that jurisdiction
4 is on the table. So now I'm back to agreeing with Mr.
5 Shepherd.

6 MS. CHAPLIN: Okay. Mr. Faye?

7 MR. FAYE: Madam Chair, we agree with Mr. Shepherd's
8 submissions.

9 MS. CHAPLIN: Mr. Crocker?

10 MR. CROCKER: I'm surprised that Mr. Brett has taken
11 the position that he has, because it's not necessary, but
12 in light of the fact that he suggests what he suggests, I
13 suppose Mr. Shepherd's way of handling it is as good as
14 any.

15 Under the circumstances, I think you have no choice
16 but to deal with it, and Mr. Shepherd's approach is as good
17 as any.

18 MS. CHAPLIN: Excuse us a moment.

19 [Board Panel confers]

20 MS. CHAPLIN: Okay. At this point, what we're going
21 do, since there seems to be no disagreement that we can
22 continue to hear the balance of the submissions on all
23 matters other than the Board's jurisdiction, we will
24 proceed to hear those arguments today, in an attempt to
25 complete that phase.

26 And after which the Board will take, if there are any
27 final submissions on the process, if anybody wants to make
28 any -- what we've got now is a proposal for a written

1 process to deal with the legal question, and that at the
2 end of the day or subsequently, the Board will set out a
3 process by which it will hear submissions or receive
4 submissions on the legal issue.

5 MR. RODGER: Madam Chair, I think it would be helpful
6 -- although I'm not asking for it right now; perhaps after
7 the lunch break. But I think we do need to get clarity on
8 what specifically the jurisdictional issue is before the
9 Board. If it's does the Board have the jurisdiction or the
10 right to dismiss the application, on what grounds(j)(k)?

11 MS. CHAPLIN: Okay. Well, as I said, we're not going
12 to hash that out now. This is not a good framework to do
13 that. So we will -- as I said, we will proceed to hear the
14 arguments.

15 I would of course, as always, encourage the parties
16 over the lunch break, if they feel that they can narrow it,
17 focus it, bring some clarity to the question in a way that
18 everyone feels they can address it in a productive manner,
19 that would certainly be of assistance.

20 If they cannot and the Board needs to do that, we will
21 do that.

22 So Board Staff I have next on my list.

23 **SUBMISSIONS BY MS. SEBALJ**

24 MS. SEBALJ: Thank you.

25 I'm going start the submission by taking you through
26 some of the background, and you have been taken through the
27 background by some other parties, but I think it's
28 important for the purpose of clarifying the test in

1 particular, but also the onus and the standard of proof to
2 which Mr. Rodger has referred in his argument-in-chief.

3 So you have before you a Board Staff compendium of
4 documents - I hope you do - and there is nothing new in
5 this compendium except for behind tabs 10 and 11, so I
6 would like to mark it.

7 It will be K4.3.

8 MS. CHAPLIN: We're marking the whole thing?

9 MS. SEBALJ: The whole compendium, yes.

10 **EXHIBIT NO. K4.3: BOARD STAFF COMPENDIUM OF**
11 **DOCUMENTS.**

12 MS. SEBALJ: So the first tab of that compendium is
13 the letter that you've been referred to on many occasions,
14 send to distributors on April 20th, 2010, on the subject of
15 early rebasing applications. And I take you to page 2 of
16 that tab. It says:

17 "A distributor..."

18 And this is the first full paragraph:

19 "A distributor, including the four distributors
20 referred to above..."

21 And that's referring to the paragraph under
22 "Background," which were letters received from four
23 distributors indicating that they intended to file cost-of-
24 service applications to have their rates set in 2011, so
25 just to give you that:

26 "A distributor, including the four distributors
27 referred to above, that seeks to have its rates
28 rebased in advance of its next regulatory

1 scheduled cost-of-service proceeding must justify
2 in its cost-of-service application why an early
3 rebasing is required, notwithstanding that the
4 off-ramp conditions have not been met.

5 Specifically, the distributor must clearly
6 demonstrate why and how it cannot adequately
7 manage its resources and financial needs during
8 the remainder of its IRM plan period."

9 It goes on:

10 "Distributors are advised that the panel of the
11 Board hearing the application may consider it
12 appropriate to determine as a preliminary issue
13 whether the application for rebasing is justified
14 or whether the application as framed should be
15 dismissed. Distributors are also advised that
16 the Board may, where an application for early
17 rebasing does not appear to have been justified,
18 disallow some or all of the regulatory costs
19 associated with the preparation and hearing of
20 that application, including the Board's costs and
21 intervenor costs. In other words, the Board may
22 order that some or all of those costs be borne by
23 the shareholder."

24 And the reason that I read you that full quote is that
25 I am going to be referring to different parts of these
26 paragraphs throughout my submissions.

27 On March 1st, the Board issued a letter identifying
28 which electricity distributors it expected to file cost-of-

1 service applications in respect of 2012 rates, and that
2 letter is at tab 2. Toronto Hydro was not on that list.

3 And I just pause now to raise the issue that has been
4 -- it's been suggested by a number of parties that there
5 was no explicit direction given to Toronto Hydro with
6 respect to how it should file, and Board Staff is of the
7 view that this letter is fairly explicit, this marked first
8 letter that you have behind tab 2.

9 The Board was clear that distributors proposing to
10 file cost-of-service application for 2012 rates that were
11 not on the list were required to notify the Board in
12 writing as soon as possible, and no later than April 29th.

13 Toronto Hydro filed a letter dated March 25, 2011, and
14 you have that behind tab 3. It was actually filed during
15 Toronto Hydro's 2011 cost-of-service application, which is
16 EB-2010-0142, and it was Exhibit KH1.2 in that matter.

17 And the letter advised the Board and other
18 stakeholders of Toronto Hydro's intention to file a non-IRM
19 cost-of-service application for 2012 rates.

20 We'd like to highlight for context that in Toronto
21 Hydro's last rate case there was an issue on the issues
22 list that related to when it would be appropriate for
23 Toronto Hydro to commence filing rate applications under
24 IRM and whether or not the 2011 rate application would be
25 an appropriate base case for a future IRM application, and
26 if not, why not.

27 The Board's decision rejected Toronto Hydro's argument
28 that there is a distinction between cost-of-service

1 applications and rebasing applications, and we raise that
2 because that, I think, has been muddled somewhat throughout
3 this proceeding as well. The Board, as you know, did make
4 a determination on that.

5 I don't have the decision -- I didn't include these
6 portions of the decision in the compendium, but I will read
7 to you what we think are important excerpts from that
8 decision:

9 "The Board's rate-setting policies are not
10 composed of the two separate frameworks that
11 THESL describes. As stated above, the Board has
12 clearly articulated the mechanics of the multi-
13 year rate-setting plan and its expectations of
14 distributors. The Board believes that THESL's
15 submissions mischaracterized the Board's rate-
16 setting policies, and the Board does not accept
17 the construct as described by THESL as a Board-
18 sanctioned framework. The Board's findings in
19 the decision on this issue were in part, in
20 addition to dealing with THESL's assertion that a
21 cost-of-service application and a rebasing
22 application are two different things, as follows:
23 The Board makes no determination as to what THESL
24 is required to file in a subsequent rate
25 application. It is for THESL to determine the
26 manner in which it chooses to apply for any
27 adjustment to its rates for 2012. The
28 acceptability of the application will be

1 determined by the Board at that time."

2 Which is, of course, now.

3 "The Board notes that THESL is not included in
4 the list of expected cost-of-service applications
5 for 2012, as per the letter issued by the Board
6 on March 1, 2011. Should THESL file a cost-of-
7 service application for 2012 rates, the
8 expectations of the Board are clear. As set out
9 in the April 20th, 2010 and March 1, 2011
10 letters, a distributor that seeks to have its
11 rates rebased earlier than scheduled must justify
12 in its cost-of-service application why early
13 rebasings is required and why and how the
14 distributor cannot adequately manage its
15 resources and financial needs during the
16 remainder of the third-generation IRM plan term."

17 The Board's March 1 letter provided further guidance
18 regarding early rebasing proposals referred to in the
19 Board's April 20th letter, and indicating that a
20 distributor that makes such a proposal must justify why
21 early rebasing is required and why and how the distributor
22 cannot adequately manage its resources and financial needs.

23 The March 1 letter also referenced the three early
24 rebasings application heard in 2011. Those are Ottawa,
25 Norfolk, and Horizon. And they indicated that the Panel of
26 the Board hearing an early rebasing application may
27 consider it appropriate to determine as a preliminary issue
28 whether or not to proceed with the application as framed.

1 So that's all by way of background, and now I'm moving
2 into what THESL has applied for.

3 THESL has, of course, filed a multi-year cost-of-
4 service application. In that application, THESL expresses
5 a view that cost-of-service is the only approach that will
6 accommodate what it calls its extensive capital replacement
7 and other requirements. And I do have a reference for
8 that, at tab 4, lines 10 and 11. Sorry, it's page 1 of --
9 oh, there's only one page at tab 4, so lines 10 and 11.

10 In particular, in this case THESL has provided
11 evidence, entitled "the manner of regulation for THESL",
12 which is ostensibly to support its submission that a cost-
13 of-service application for the three rate years is the only
14 approach that will accommodate its extensive capital
15 replacements and other requirements.

16 We have also heard from three THESL witnesses in
17 support of the written evidence filed with respect to this
18 issue. And finally, you have heard argument from THESL's
19 counsel on a number of issues, including the onus, the
20 test, and the standard to be applied in making your
21 determination in this issue.

22 And at the risk of being overly legalistic about this,
23 I do think -- Board Staff thinks it is important to take
24 you through the onus, the test, and the standard of proof,
25 because it has been raised by Toronto Hydro.

26 In Board Staff's view, some level of confusion has
27 been created through the articulation of a number of tests.
28 And while they're not entirely contradictory, they're at

1 least different in scope and application than what we
2 understand to be the Board's test for the purpose of
3 determining this preliminary issue.

4 So starting with the written evidence provided by
5 Toronto Hydro, at tab 5 you have an excerpt. It's not the
6 complete schedule, but you have an excerpt from Exhibit
7 "A", tab 1, schedule 2 of the evidence. And at page 3
8 THESL says that:

9 "For the purpose of determining the preliminary
10 issue the Board need not make a final and exact
11 determination of THESL's revenue requirement
12 during the test period."

13 Staff is of the view that this has to be correct, and
14 that it's inherent in the Board's direction to determine
15 this issue as a preliminary matter.

16 But THESL also says on that same page that:

17 "The Board can find that given the 'genera.
18 magnitude' of THESL's expenditure and investment
19 requirements, the consequential revenue
20 requirements should not be determined
21 mechanistically, but should rather be determined
22 with specific reference to the expenditures that
23 the Board determines are necessary and prudently
24 incurred based on the evidence in this
25 proceeding."

26 THESL goes on to say that:

27 "In the alternative, after a full examination of
28 the evidence in the proceeding, were the Board to

1 find that as a matter of fact THESL's revenue
2 requirements for the test period would not exceed
3 those determined under the PCI mechanism, THESL
4 says the Board would have effectively found that
5 THESL has no continuing requirement to renew its
6 distribution infrastructure or its workforce,
7 contrary to its findings in THESL's previous
8 cost-of-service rate cases."

9 So just to take you through these statements in some
10 level of detail, we'd like to provide the Panel with our
11 understanding of the construct.

12 First, the test to be applied for determining the
13 preliminary issue, it's not the case, in Board Staff's
14 submission, that the Board can find that:

15 "Given the general magnitude of THESL's
16 expenditure and investment requirements, the
17 consequential revenue requirements should not be
18 determined mechanistically."

19 Instead, Staff takes the Panel back to the test as
20 enunciated by the Board. Now, admittedly, the preliminary-
21 issue construct was first enunciated and it continues to be
22 applied through the lens of a utility whose rates are
23 currently set under IRM, and we've heard from parties that
24 that could be an issue, that essentially, because Toronto
25 Hydro has been on cost-of-service for five years the
26 concept of early rebasing doesn't apply.

27 But in Staff's view, the same principles ought to
28 apply. And this Panel has effectively, through Procedural

1 Order No. 1, clearly indicated that these principles, as
2 enunciated in the April 20th and the March 1st letters, do
3 apply.

4 So that takes us back to the test that THESL -- that
5 applies in this case, which is that THESL must justify why
6 an early rebasing - and I say, or in this case a cost-of-
7 service - is required, notwithstanding that the off-ramp
8 conditions have not been met or in this case will not be
9 met. Specifically, the distributor must clearly
10 demonstrate why and how it cannot adequately manage its
11 resources and financial needs.

12 So, broken down, this clearly puts the onus on the
13 utility, and I don't think there's any dispute with respect
14 to the onus.

15 And then there is sort of a two-pronged test, which
16 is, why is an early rebasing required, notwithstanding that
17 the off-ramp conditions have not or will not be met, with
18 further specific guidance or a second prong, which is, why
19 and how can Toronto Hydro not adequately manage its
20 resources and financial needs on IRM.

21 And just to take it back to where I took you on
22 Toronto Hydro's submission, Board Staff is of the view that
23 this test that I've just told you Board Staff thinks
24 applies is very different and, we think, a higher burden,
25 than simply requiring a utility to provide evidence that
26 the "general magnitude of its expenditure and investment
27 requirements is such that the consequential revenue
28 requirement should not be determined mechanistically."

1 This just isn't the test to be applied.

2 On the contrary, in Board Staff's view, the Board is
3 saying Toronto Hydro, the Board's policy is that all
4 utilities -- or the Board's policy -- yeah, the Board's
5 policy is that all utilities should be on IRM. You have
6 applied for a cost-of-service, so show us why it is that
7 you cannot adequately manage your resources and financial
8 needs on IRM.

9 Just sort of by way of reference, we note that Toronto
10 Hydro has also taken you to the three relevant objectives,
11 Board objectives in the statute, and we are of the view
12 that those are quite correctly applicable and that they
13 guide all decisions made by this Board in the context of
14 electricity regulation.

15 But Mr. Rodger has also said that -- and this is at
16 transcript Volume 3, page 3, which I have at tab 6 of the
17 compendium, and you'll want to go to page 3, line 22:

18 "The Board should find that it is not in the
19 public interest to regulate Toronto Hydro under
20 IRM at this time."

21 And just so that you're following me, I'm just taking
22 you to various statements which could be construed as a
23 test or a threshold or -- and I'm just wanting for the
24 record to make clear, you know, how these things relate to
25 the test or that they are not the test.

26 And in this case, Staff agrees that if the Board were
27 to find, using the articulated -- what the Board Staff says
28 is the correct test, that Toronto Hydro can't adequately

1 manage its resources and financial needs on IRM, then it
2 follows that it would not be in the public interest for the
3 Board to require Toronto Hydro to file an IRM application.

4 But to be clear, that's not the test. The test is
5 not: Is it in the public interest? That's far too broad.
6 We have a much more specific test here.

7 Moving on to the standard, as Mr. Rodger has described
8 it, and I believe that he was referring to standard of
9 proof, Mr. Rodger has described a standard of
10 reasonableness. And in doing this, what I think Mr. Rodger
11 is saying is that the onus is on Toronto Hydro. We've told
12 you what we think the test is, but how -- what is the
13 standard by which you decide whether Toronto Hydro has met
14 the test?

15 And if you go to -- I'm still on Volume 3 of the
16 transcript -- page 4, Mr. Rodger argues that, starting at
17 line 6:

18 "Secondly, the standard to discharge the onus is
19 one that the Board knows well, the test of
20 reasonableness. However, it is a different
21 application of the standard in this case than
22 what the Board typically applies after a full and
23 complete cost-of-service proceeding has been
24 concluded. And it would be inappropriate for the
25 Board to require more than a narrow application
26 of the reasonableness test, since not all of
27 THESL's evidence has been subject to the Board's
28 typical hearing process."

1 He goes on at page 7, starting at line 10, to say:

2 "What the Board is doing is making a preliminary
3 assessment and the standard in making that
4 preliminary assessment, in our view, is whether
5 Toronto Hydro has provided sufficient evidence
6 within a band of reasonableness to permit the
7 Board to conclude that a cost-of-service hearing
8 should be held, because IRM does not appear to
9 permit THESL to adequately manage its resources
10 and financial needs."

11 And then finally, later on that same page, he says:

12 "Our submission is it will be enough if you are
13 persuaded that Toronto Hydro has put forward
14 credible evidence, again, within the span of
15 reasonableness, as to why IRM should not apply
16 and the unacceptable outcomes that are
17 foreseeable if the application is dismissed and
18 Toronto Hydro's only alternative is IRM."

19 In Staff's view, Mr. Rodger has raised two issues
20 here. The first is: What is the appropriate standard of
21 proof that the Panel should apply in reviewing the evidence
22 presented by THESL? And the second is: Is such a standard
23 applied differently in the context of a preliminary issue
24 than it would be for, for example, a full rates case?

25 So if we look first to THESL's proposed reasonableness
26 or a band of reasonableness standard, Staff thinks that
27 this term "reasonableness" is unnecessarily confusing, and
28 I'll tell you why.

1 Reasonableness, as you well know, is used in many
2 contexts, legally, and particularly within the context of
3 the Board's mandate. So from Staff's perspective, the term
4 "reasonableness" does not and should not import the
5 reasonable person test. And I'll tell you in a moment that
6 Mr. Rodger hasn't, obviously, said this, and I'm not
7 suggesting that he has, but I just want to clarify Board
8 Staff's view, because this could be confusing.

9 So the reasonable person test, as you know, is
10 commonly used in the legal context to invoke an objective
11 third party reviewing a situation or an issue. To the
12 contrary, as a specialized adjudicative tribunal, the Board
13 is in a unique position to review the evidence before it
14 from an economic and a regulatory perspective, and to
15 evaluate whether and to what extent that evidence and the
16 submissions meet the tests set out in the matter.

17 So I just wanted to put that one aside.

18 And further, reasonableness, as that term was used by
19 THESL, does not, in our view, have any relationship to
20 reasonableness versus correctness in a standard of review
21 sort of context. And again, THESL hasn't suggested that.

22 But the point where I think the greatest confusion can
23 be caused is the term "reasonableness" does not, in our
24 view, have any relationship to the setting of just and
25 reasonable rates.

26 This, of course, is the Board's legislative
27 requirement, regardless of the mechanism ultimately used to
28 set rates, but it has nothing do with the question of how

1 much do we have to show you, as Mr. Rodger said in his
2 submissions, for the purpose of this preliminary question.

3 So I take you now to a tiny bit of case law, and I
4 won't spend a lot of time on it. But Ontario courts have
5 consistently required that administrative hearings be
6 conducted according to a civil standard. This is
7 enunciated in the cases of Re Bernstein and College of
8 Physicians, which you have at tab 10 of the compendium, and
9 F.H. v. McDougall, which is a Supreme Court of Canada case,
10 at tab 11, where the Court says:

11 "The proof must be clear and convincing and based
12 upon cogent evidence which is accepted by the
13 tribunal."

14 Which is actually very similar to what Mr. Rodger said
15 in the final paragraph that I read to you.

16 In the McDougall case cited above, the Supreme Court
17 confirmed that the balance of probabilities standard
18 applies in all civil cases, and that evidence must always
19 be sufficiently clear, convincing, and cogent to satisfy
20 the balance of probabilities test.

21 The court clarified that in civil cases, there is only
22 one standard of proof, and that is proof on a balance of
23 probabilities. In all civil cases, the trial judge must
24 scrutinize the relevant evidence within the case to
25 determine whether it's more likely than not that an event
26 occurred.

27 So obviously we're not in a court. But at the end of
28 the day, in Staff's view, the Board needs to be persuaded,

1 through clear, cogent, and credible evidence, that it is
2 more likely than not that THESL will not be able to
3 adequately manage its resources and financial needs if it
4 is subject to IRM for rate-setting purposes.

5 This is in our view akin to the civil standard of
6 proof on a balance of probabilities.

7 Staff notes further that it disagrees with Toronto
8 Hydro's position that the standard of proof should be
9 applied differently for a preliminary issue than for a full
10 rates case.

11 In our view, the Board must apply the same standard,
12 but you are applying it to a different set of facts and to
13 determine whether those facts meet a different test.

14 So it's the facts that are different, the evidence
15 that is different, and it's the test that is different, and
16 which is of a different threshold, if you will. So in
17 other words, in this case, you have Toronto Hydro's
18 evidence in respect of the preliminary issue. It's
19 different evidence than you would have for a full rates
20 case. The test is different, as I have articulated to you.

21 So currently, you, in Board Staff's view, should be
22 asking yourselves whether, based on the evidence that
23 Toronto Hydro has provided, it's more likely than not that
24 Toronto Hydro will be able to adequately manage its
25 resources and financial needs if it is subject to IRM.

26 The evidence is different, the test is different, but
27 the onus and the standard are the same.

28 So turning back to the written evidence provided by

1 Toronto Hydro in this case, we note behind tab 5 - which
2 I've already taken you to, which is the piece of evidence
3 on the manner of regulation for THESL - Toronto Hydro
4 expressed the view that the implication of a determination
5 by the Board that it would not hear THESL's application -
6 and I've taken you to this previously - it would be that as
7 a matter of fact THESL's revenue requirements for the test
8 period would not exceed those determined under the PCI
9 mechanism or that this would result in a finding that THESL
10 has no continuing requirement to renew its distribution
11 infrastructure or its workforce, contrary to its findings
12 in THESL's previous cost-of-service rate cases.

13 Staff disagrees. It's our view that, in the event
14 that the Board determines that it will not hear Toronto
15 Hydro's application, its cost-of-service application, that
16 this would be simply because the Board had determined that
17 it did not meet the test. No further determination than
18 that would be implied or intended, and in particular, the
19 implication that it has no continuing requirement to renew
20 its distribution infrastructure.

21 So with my apologies, I'm now going to move on to the
22 meat of the matter, having dealt with sort of the
23 preliminary issues to the preliminary issue. Board Staff
24 is of the view that the Board Panel has two options in
25 determining this preliminary matter. The first is to apply
26 the test articulated in the April 20th letter of the Board,
27 which I won't repeat, because I think I've said it about
28 four times already.

1 And under this option, the question the Board would
2 ask itself is whether THESL's projected ROE for the IRM
3 period would trigger the off-ramp of 300 basis points as
4 measured against the Board-approved ROE.

5 Said another way, the Board must satisfy itself that
6 THESL has justified the need to remain on cost-of-service
7 for the next three rate years and that the utility has
8 shown that it cannot adequately manage its resources and
9 financial needs during the IRM term.

10 We note that, based on Toronto Hydro's responses to
11 the interrogatories related to the early rebasing issue,
12 there is no basis to conclude that Toronto Hydro would meet
13 the 300-basis-point test. Toronto Hydro has stated that in
14 the event the Panel declined to hear Toronto Hydro's
15 present application, it would reduce its cap-ex and op-ex
16 levels.

17 THESL's response to part (b) of Board Staff
18 Interrogatory 3, which quantified the impacts of these
19 reductions, shows that in the event the Panel declined to
20 hear Toronto Hydro's application, the effect of the
21 referenced cap-ex and op-ex reductions would be that THESL
22 would achieve an ROE of 8.1 percent in three test years,
23 which is 152 basis points short of the threshold.

24 Staff believes that if the Panel was to choose to
25 adopt this option, it would also have to conclude that
26 THESL has failed to demonstrate the unique circumstances
27 that would be necessary in order to justify an exception to
28 the Board's policies as established in the Hydro Ottawa,

1 Horizon, and Norfolk Power decisions, and those are EB-
2 2010-0133, EB-2010-0131, and EB-2010-0139 respectively.

3 This is not only because Toronto Hydro doesn't meet
4 the 300-basis-point threshold, but also because it has not
5 been able to provide evidence of the type of unique
6 circumstances demonstrated by Horizon Utilities, the only
7 one of the three applications that was allowed to proceed
8 by the Board related to the loss of large customer load.
9 Rather, the circumstances experienced by Toronto Hydro
10 related to significant requirements for cap-ex and op-ex
11 and flat load growth. They are challenges faced by many
12 other by many other distributors that have managed their
13 resources and financial needs under IRM.

14 Toronto Hydro itself has not claimed uniqueness in
15 this regard. This was evidenced in Toronto Hydro's
16 response to Board Staff Interrogatory 2(a), which is behind
17 tab 7, wherein it was asked to discuss the extent to which
18 Toronto Hydro regards its circumstances as unique relative
19 to other distributors in the province. And its response
20 was that:

21 "THESL does not regard its circumstances as being
22 unique among the distributors of the province.
23 However, THESL believes that its circumstances
24 are reasonably representative of those of a
25 category of distributors who share
26 characteristics that distinguish them from other
27 categories of distributors."

28 Staff believes that under this option the Panel should

1 determine that Toronto Hydro has not discharged the onus of
2 demonstrating that it cannot adequately manage its
3 resources and financial needs under IRM, and that its
4 application for early rebasing should be rejected -- or for
5 cost-of-service should be rejected.

6 Given the magnitude of Toronto Hydro's proposed
7 capital expenditures in particular, Staff suggests that in
8 the event that the Panel determines the application should
9 be rejected, the Panel might want to consider under such
10 circumstances whether it would be willing to allow Toronto
11 Hydro greater flexibility in presenting some of its
12 proposed capital projects under the incremental capital
13 module as part of a subsequent IRM application for the 2012
14 rate year.

15 THESL's witnesses rejected this possibility during
16 cross-examination by Board Staff counsel. Mr. McLorg in
17 particular stated that it was THESL's view that a case
18 cannot be made to characterize the bulk of Toronto Hydro's
19 spending as being in any sense extraordinary. And that's
20 under tab 8, at lines 21 through 23.

21 However, Staff notes in this context that the Board's
22 2011 IRM decisions for Guelph Hydro, which is EB-2010-0130,
23 and Oakville Hydro, which is EB-2010-0104, in which
24 municipal transformer stations were approved for recovery
25 through the ICM by the Board, might suggest less of an
26 emphasis by the Board on the extraordinary nature of
27 approval expenditures than Toronto Hydro is suggesting.

28 In its response to Undertaking J2.1, which is behind

1 tab 9 of the Board Staff's compendium, THESL acknowledged
2 that these decisions - referring to the Guelph and Oakville
3 Hydro decision - seemed to soften the interpretation of the
4 word "unanticipated" to some extent.

5 THESL expressed the view that, based on these
6 decisions and the Board's July 14th, 2008 report of the
7 Board on third-generation incentive regulation for
8 Ontario's electricity distributors, the only capital that
9 may be considered eligible by the Board for ICM treatment
10 in THESL's case would be the Bremner station, and
11 potentially contributions to HONI for Leaside-Birch
12 transmission reinforcement, representing 86.6 million of
13 the capital program in 2012 and 49.4 million in 2013 and
14 6 million in 2014.

15 This would suggest to Staff that THESL can prioritize
16 its projects in such a way that a modified ICM could work
17 to alleviate some of the capital spending issues they cite
18 as being problematic under IRM.

19 Staff notes that the potential weakness of this option
20 is that the Panel would have to make its determination one
21 way or the other without having been able to
22 comprehensively test the evidence of THESL, which seems to
23 indicate, at least preliminarily, that certain investments
24 that it claims are required to be made may not be made, and
25 that this in turn would create the snowplough effect
26 referenced by Mr. Haines and could potentially lead to the
27 rate-shock issues referenced in THESL's evidence in the
28 next rebasing year.

1 Which leads me to option 2. Staff is of the view that
2 there's also a second option open to the Panel, which is to
3 decline to determine the issue as a preliminary matter,
4 which, in our view, the Panel is entitled to do, and to
5 hear the capital-expenditures portion of the case and any
6 other portions the Panel may deem necessary, and then
7 determine whether the evidence supports the claims made by
8 THESL with respect in particular to capital expenditures,
9 the need and the consequences of deferral of those
10 expenditures, the need for.

11 Essentially, what the Panel would be saying is that,
12 while the reasons provided by Toronto Hydro for filing
13 under cost-of-service, including the large cap-ex, are not
14 unique, the Panel wants to determine whether the magnitude
15 of the cap-ex requirements are sufficiently more
16 significant to Toronto Hydro than for the previous cases,
17 meaning Ottawa and Norfolk, to cause Toronto Hydro to be
18 unable to manage its resources and financial needs under
19 IRM and therefore warrant the setting of rates through a
20 cost-of-service review rather than through IRM.

21 We note in this context THESL's use of the concept of
22 CEEDS, their term, which is -- stands for capital
23 expenditures in excess of depreciation. THESL's proposed
24 level of CEEDs would appear to be roughly double the CEED
25 levels of Hydro Ottawa and Norfolk Power, the two early
26 rebasings applications that were rejected by the Board last
27 year.

28 And to the extent that my friends are going to say

1 that I'm introducing evidence, we do have -- obviously this
2 is information that's on the record from last year, but Mr.
3 Davies has prepared a sheet which highlights that
4 information for the Board's purposes.

5 And I'll wait before I mark it, to see if anyone has
6 any strong objections, but I'll continue.

7 Under this option, in Staff's view, the Panel could,
8 at the end of its review, determine whether it should reach
9 a decision on the application as filed on a cost-of-service
10 basis, or, having heard the relevant portions of the
11 evidence, if THESL has not at that time adequately made its
12 case, determine that the application should be rejected and
13 THESL directed, then, to file an IRM application if it
14 wishes to proceed with a rate adjustment for 2012.

15 We're putting forward this option based on the view
16 that it may be difficult for the Panel to determine whether
17 Toronto Hydro can adequately manage its resources and
18 financial needs on IRM as a preliminary matter. In other
19 words, because in this case Toronto Hydro has put much
20 emphasis on the magnitude of what it says are required
21 capital expenditures and CEEDS, the Panel may feel it
22 cannot be persuaded that THESL cannot adequately manage its
23 resources and financial needs under IRM without hearing
24 more evidence as to whether the projected cap-ex budget is
25 reasonable.

26 It follows, in Staff's view, that exercising this
27 second option would also entail the Panel considering
28 removing most, if not all, issues that it determines will

1 be heard from the possibility of settlement. Without an
2 actual, full discussion of the evidence with the Panel
3 present, and a testing thereof, the clarity and
4 transparency in respect of the required analysis of the
5 evidence might not be achieved.

6 An advantage of exercising this option could be that
7 in the event that the Panel rejects the cost-of-service
8 application as filed for the purpose of setting rates for
9 the test period or periods, unlike with option one, the
10 Board will have had the benefit of testing Toronto Hydro's
11 capital plan and determining which capital projects would
12 be acceptable to the Panel to be included in an ICM module
13 that THESL may wish to file as part of an IRM application
14 for 2012.

15 In this scenario, the Panel could also articulate its
16 expectations for the scope of the remaining ICM adjustments
17 that THESL may wish to include in years 2 and 3 of the IRM
18 period. This could result in a more efficient approach
19 than re-hearing the evidence on that same capital piece as
20 part of an ICM application under IRM.

21 The Panel could also articulate that such a finding
22 would be contingent on the continuation of the current IRM
23 regime. Should the Board establish a next-generation IRM
24 regime during the course of THESL's IRM period, that would,
25 of course, override the approach that THESL would take in
26 filing rate applications with the Board for the remaining
27 period.

28 We note that option two is, in our view, consistent

1 with the approach the Board took in Hydro Ottawa case,
2 where it completed a portion of the discovery phase before
3 deciding to hear arguments on whether the application
4 should be dismissed or not. It's also consistent with the
5 April 20th letter that indicated that costs for hearing an
6 application might be disallowed if the Board determined
7 that the application for early rebasing is not justified.

8 We think this clearly contemplated that an application
9 could be heard by the Board. In other words, a preliminary
10 issue hearing was not the only way contemplated for
11 determining whether a utility meets the test for early
12 rebasing.

13 For the subject application, the Board would have the
14 flexibility under option two to phase the hearing of the
15 evidence. In other words, the Panel could determine how
16 much testing is required of the evidence before hearing
17 arguments on whether to dismiss the application or proceed
18 with the remaining portions of the hearing, in order to
19 establish rates on a cost-of-service basis.

20 That's the end of my prepared submission. I just want
21 to check to see if there's anything other than the
22 jurisdictional issue that I wanted to address from...

23 I guess just a couple of points, one with respect to
24 AMPCO's submission, where it was suggested that Toronto
25 Hydro has not met the threshold test, but that the test is
26 arbitrary. And Board Staff would argue that the test is
27 not arbitrary, that it was a test designed by the Board and
28 thought was put into it, and that it is deliberate, for the

1 purposes of hearing a preliminary issue. And so in our
2 view, it is not arbitrary.

3 Oh, and with respect to BOMA's submissions, there was
4 a suggestion -- and perhaps Mr. Rodger has already dealt
5 with this in his comments at the outset, but there was a
6 suggestion that what THESL had in preparing its 2012 rates
7 was only its 2010 rates decision, which was, of course,
8 from a 2009 docket number.

9 In our view, that's just simply not the case. We've
10 provided you with the information with respect to the
11 letters that were filed, and of course the decision in the
12 last case, EB-2010-0142, this was an issue in that case,
13 and there are -- we think there is a lot in the decision
14 with respect to this issue.

15 And so, as Mr. Rodger has suggested, I don't think
16 that this came as a surprise to Toronto Hydro.

17 I think most of my other notes here have to do with...
18 oh. I just wanted to address quickly. A couple of times -
19 and I think I've already done this in my submissions, but a
20 couple of times people have referred to Procedural Order
21 No. 1, and cited simply that the Board is to determine
22 whether or not the application filed by THESL is
23 acceptable, or whether or not it should be dismissed. And
24 that, of course, that part is part of a much larger
25 sentence, that says:

26 "The Board has determined that it will, in the
27 context of its EB-2010-0142 decision and the
28 Board's letters of April 20th and March 1st and

1 in advance of further procedural steps, consider
2 the question of whether the application filed by
3 THESL is acceptable or whether it should be
4 dismissed."

5 And I think that's an important point, going back to
6 my perhaps far too lengthy discussion of what the test is.
7 But by incorporating in that sentence the last rates
8 decision and those two letters, you have effectively
9 incorporated the test, and I think that is what is
10 applicable in this case.

11 So subject to any questions you may have, those are
12 Staff's submissions.

13 MS. CHAPLIN: We have no questions for you, Ms.
14 Sebalj, at this point.

15 Are there any objections to us entering this table as
16 an exhibit? I don't think so. So let's mark that.

17 MS. SEBALJ: It will be K4.4.

18 **EXHIBIT NO. K4.4: BOARD STAFF TABLE RE CEEDS**

19 MS. CHAPLIN: Mr. Faye, I have you next on my list.
20 About how long do you expect to be?

21 MR. FAYE: Madam Chair, I think I can be finished by
22 1:00 if I can have an accommodation. That is, some of the
23 same excerpts of Ms. Sebalj we were going enter on the
24 record, and I see no point in reading into the record the
25 same things that she read in. Some of her arguments we
26 agree with, and would just indicate support.

27 I have sufficient copies for the Panel or Board Staff,
28 for the applicant and a couple of extras, and we propose to

1 hand those up, so that you can follow along on paper on the
2 sections that I'm going to be very brief on. And we will
3 file the rest this afternoon for the benefit of the rest of
4 the intervenors, if they want a hard copy.

5 That would truncate my submissions, significantly, I
6 think.

7 MS. CHAPLIN: Sure. That's fine. Thank you.

8 Shall we mark that?

9 MS. SEBALJ: K4.5.

10 **EXHIBIT NO. K4.5: ENERGY PROBE MATERIALS**

11 **SUBMISSIONS BY MR. FAYE**

12 MR. FAYE: Madam Chair and Members of the Panel,
13 paragraph 1 of Energy Probe's submissions is simply a
14 reiteration of the sorts of effects that Toronto Hydro
15 predict if an IRM is imposed on them. And I'll just be
16 brief to enter them on the record.

17 The first effect would be that there would be no
18 additions to rate base during the IRM period, that capital
19 expenditures exceeding depreciation during that period
20 wouldn't be effectively funded by debt in the rates, that
21 THESL's shareholder would not be able to earn a return on
22 the equity portion of the CEEDS during the IRM period, that
23 depreciation associated with CEEDS during that period would
24 not be compensated in the rates, that OM&A expenditure
25 levels would be effectively frozen during the period, and
26 that should the OM&A actual expenditures exceed the frozen
27 level, the resulting shortfall would have to be borne by
28 the shareholder.

1 And we submit that these are all claims that the
2 applicant has made in its evidence, and we agree that those
3 effects would occur, but we submit that these were fully
4 anticipated in the report of the Board on third-generation
5 incentive regulation, and that all distributors, including
6 THESL, were or should have been aware of the consequences
7 of IRM and they should have planned their business
8 accordingly. And we'll have more to say about where we
9 think they could have planned their business accordingly
10 better.

11 Para 3 is that there are essentially in THESL's view
12 two alternative forms of regulation, and this has been
13 spoken to by others. Energy Probe is of the opinion that
14 there is just one single comprehensive regulatory regime
15 and all distributors are subject to it. Part of it is
16 cost-of-service, part of it is IRM, and at any given time
17 some distributors will be on one and some will be on the
18 other. The important point is that we don't believe that
19 they are free to choose the one that most favours them and
20 exclude the other.

21 The excerpt in paragraph 4 has already been entered in
22 the record by Ms. Sebalj, so we won't repeat that, but that
23 is the authority for making the statement we have just
24 made.

25 Paragraph 5 says that we believe THESL is currently
26 subject to IRM, whether they want to accept that situation
27 or not, and we find that the Board has made a comment on
28 that in EB-2011-0142, decision and order dated July 2nd,

1 2001 (sic), and there it says that "if a distributor wants
2 to be rebased earlier than scheduled, it must justify in
3 its cost-of-service application white can't manage its
4 resources and financial needs", and Ms. Sebalj has also
5 entered this in complete text in the record.

6 Our position is that the first way of demonstrating
7 that need is to demonstrate to the Board that they've
8 fallen outside the return on equity deadband of 300 basis
9 points. We note in their evidence and in their IR
10 responses that they won't be doing that in 2011. Their
11 response to IR, Energy Probe IR 15, where we ask what their
12 projected ROE is at the end of 2011, they replied
13 9.15 percent, and that's nowhere near 300 basis points
14 shortfall. So they clearly don't qualify under that
15 criterion for a cost-of-service review now.

16 According to their evidence, they project that they
17 will meet that trigger condition at the end of 2012, and
18 Energy Probe would have no objections to an application at
19 that time for relief on the basis of falling outside the
20 deadband.

21 But we do note that the application of that trigger is
22 a retrospective one, not a prospective one. They can't
23 come in and say, Well, we think that we are going to fall
24 outside in 2012, so we'd like to be considered for relief
25 right now. They actually have to fall outside and present
26 to the Board their audited financials at the end of 2012
27 and then apply for relief.

28 So in Energy Probe's submission, the earliest they

1 could come forward is 2013.

2 So I'm now about paragraph 16 on page 5. And Ms.
3 Sebalj has read this excerpt in. It is the alternative way
4 of exiting the IRM, and that is to demonstrate that they're
5 unable to manage their resources effectively in the third-
6 generation IRM plan.

7 And the test of reasonableness has been gone through
8 by Ms. Sebalj, and we agree with her analysis there.

9 Paragraph 18 is our analysis that any conclusion that
10 they cannot manage their resources must in some way rely on
11 the Board accepting that their evidence is approximately
12 right. If the Board could make no determination of that
13 question, then there would be no way of making a decision
14 on the preliminary issue.

15 So if the Board decides that, for example, they're
16 convinced that a cost-of-service application is warranted
17 here, that would by necessary implication mean that you
18 accept a large part of their evidence as being accurate and
19 truly reflecting the needs of the company and, in
20 particular, the cap-ex evidence.

21 And this would be so because there hasn't been an in-
22 depth scrutiny of any of that evidence in the preliminary
23 issue.

24 So we ask ourselves, is there evidence on the record
25 that would suggest to the Board that the cap-ex
26 expenditures requested are reasonable and fairly reflect
27 the company's needs, or is the opposite true? Is there
28 evidence on the record that would lead the Board to think

1 that maybe that evidence doesn't fairly reflect it?

2 And so at paragraph 20 we offer two examples from the
3 cross-examination record that we say supports a negative
4 finding of that issue. And that negative finding is that
5 the Board should be wary that Toronto Hydro has
6 demonstrated that its requests for cap-ex are reasonable.

7 The first excerpt appears in the transcript, Volume 3,
8 at page 44. Here we asked Mr. Haines whether the company
9 had considered using overhead distribution instead of
10 replacing its worn-out underground cables with new ones,
11 and his reply was that, essentially, Toronto Hydro replaces
12 plant on a like-for-like basis, and so that means that if
13 the system is underground now they will replace it as an
14 underground system, and if it's an overhead system now, it
15 will be replaced as an overhead.

16 The rationale for that policy you can find at lines 1
17 to 4 on page 45 of the transcript, where Mr. Haines said:

18 "In other words, because of the community issues
19 associated with going from an underground to an
20 overhead, we would tend to change out old
21 equipment with similar equipment."

22 In our submission, we think there's at least two
23 important issues associated with that policy that would
24 give the Board reason to question it is a basis for large
25 cap-ex expenditures. The first is that, in the face of
26 their rapidly expanding needs to replace plant and
27 therefore for cap-ex investment, the company does not
28 appear to have made a serious effort to reconsider its

1 capital replacement policies in order to mitigate the
2 costs. We were given an undertaking, J2.3, in which the
3 company was asked to provide an estimate of the difference
4 in cost between overhead and underground systems. And in
5 their response at lines 12-13:

6 "The cost of an overhead system is about
7 35 percent of the comparable underground system."

8 And at lines 8 to 10:

9 "The ten-year program for cable replacement is
10 estimated at 1.8 billion, of which the company
11 thinks that about 60 percent would be possibly
12 replaceable with an overhead system."

13 The other 40 for whatever reason they didn't feel
14 could be replaced by overhead, but just taking the
15 60 percent, that would translate into a program cost of
16 about \$1 billion. And if overhead costs only 35 percent of
17 underground, then there would be a 65 percent savings if
18 that entire program, the 60 percent part anyway, was
19 replaced with overhead lines. That's a savings of
20 \$650 million.

21 And in our submission, that's an investment big enough
22 that it requires a more critical decision-making approach
23 than to just invoke a like-for-like policy that's been
24 around for many years.

25 The second issue is that THESL's perception of
26 community issues associated with replacing distribution
27 plant may not be an accurate reflection of how the
28 community actually feels. And if they have based their

1 replacement policy on what they perceive to be the
2 community issues involved, then that may not be a good
3 basis for a like-to-like replacement policy.

4 In support of that proposition, we'd refer you to
5 witness cross-examination transcript page 47. Here Mr.
6 Haines offered an example of Toronto Hydro proposing to
7 replace back-lot construction, overhead back-lot, with
8 underground front-lot construction. And at lines 16 to 22,
9 Mr. Haines described Toronto Hydro's expectation of
10 customer reaction as -- and this is a quote:

11 "And so you would think, from a customer
12 satisfaction perspective, that that would be what
13 I would describe as a no-brainer, that the
14 community would embrace the loss of lines in the
15 backyard over landscaping, swimming pools, et
16 cetera, and that they would see an underground
17 system with transformers buried underground in
18 the front yard as being a positive to the
19 community."

20 In fact, the community response was exactly the
21 opposite, and in Mr. Haines' words at line 23, "the
22 community had a complete uprising over this issue".

23 And we would submit that that example suggests that
24 THESL does not understand what issues are important to
25 customers when their distribution system needs to be
26 replaced, and relying on that understanding of community
27 issues might not result in prudent investment decisions.

28 And we'd also point out in passing that replacing a

1 backyard overhead system with a front yard underground
2 system appears to be a violation of their like-for-like
3 policy. And that raises, for us, at least, and we think it
4 should raise for the Board questions about how their
5 capital replacement policies are actually applied in making
6 their decisions.

7 And we'd also like to note that in the Undertaking
8 J2.3 response, there's quite a lengthy rationalization of
9 why underground distribution is the preferred alternative
10 to overhead, and there's a number of statements in there
11 that, to us, raise more questions than they answer.

12 For example, on page 1, the reliability stats - these
13 continue at the top of page 2 - suggest that overhead
14 distribution is much less reliable than underground. But
15 the comparisons noted are in the form of ratios. An
16 example is that sustained customer interruptions are 2.1
17 times higher on the overhead system. That's at line 19 on
18 page 1.

19 The problem with this is it doesn't convey a clear
20 picture of whether those interruptions are within
21 acceptable standards. It doesn't make any conclusion or
22 explain why the overhead system is less reliable.

23 And we would conclude that if those interruptions were
24 not acceptable, were not within an acceptable band, that
25 the company would have a very serious reliability problem,
26 given that, according to Mr. Haines, two-thirds of their
27 system is overhead and only one-third is underground.
28 That's at transcript page 47, lines 3-4.

1 They also cite safety as a reason for underground
2 distribution. And this is characterized at lines 6-7 on
3 page 2 as:

4 "The increased risk of electrical contact for
5 employees and the public from the overhead system
6 infrastructure as opposed to the underground
7 equivalent."

8 Now, they don't make any comment about the
9 acceptability of the increased risk of this overhead
10 hazard, and -- significantly, to us -- they make no mention
11 of the contact voltage problems that they faced in 2009,
12 which to Energy Probe appear to be primarily related to
13 underground, not overhead, plant.

14 There does not appear to be a comparable event on the
15 overhead system that would substantiate the safety issue
16 they have cited.

17 A third rationalization is that dense forest cover in
18 a lot of neighbourhoods precludes using overhead
19 distribution as a viable replacement for underground. But
20 again, given that two-thirds of their system is already
21 overhead and has been for many years, Energy Probe would be
22 surprised if they haven't come up with strategies on how
23 you deal with trees that are in proximity to conductors.
24 In fact, in the main application evidence, THESL has a
25 program of using insulated aerial cables in forested areas
26 to deal with that very problem. And that appears at
27 Exhibit D1-9-2, page 14, lines 4-8.

28 So in our submission the rationalization of

1 underground provided in J2.3, although it's interesting, it
2 doesn't offer the Board persuasive reasons why overhead
3 should not be considered as a cheaper alternative.

4 And so we conclude from that if relatively obvious
5 alternatives like replacing underground with overhead
6 haven't been considered in a serious way by THESL, Energy
7 Probe thinks that the cap-ex evidence on which the company
8 relies for its application may not be reliable enough for
9 the Board to make a considered decision on the preliminary
10 issue.

11 And if the replacement policies for residential
12 distribution systems are based on a faulty understanding of
13 customers and community expectations, then the capital
14 investment decision they're making may not reflect their
15 actual needs.

16 Given the magnitude of the dollars involved here,
17 hundreds of millions, Energy Probe submits that the Board
18 cannot just accept their cap-ex evidence as proof that it's
19 even approximately correct.

20 We would conclude that if we can find this kind of
21 flaw in the only two areas that we questioned, we presume
22 that that kind of theme might run through the rest of the
23 cap-ex evidence.

24 Unfortunately, Energy Probe doesn't think that the
25 Board can just dismiss the evidence either. If you did
26 that and imposed an IRM on them, we think, without further
27 scrutiny, we think that that would invite an appeal of the
28 decision, based on the fact that it was made without an

1 adequate review of the evidence.

2 And so if those are the only two options - cost-of-
3 service or IRM - then the Board's in a bit of a position.
4 But we think that maybe there's a third option, and Board
5 Counsel has already alluded to this.

6 The third choice would be to conduct a more thorough
7 review of cap-ex and any other evidence the Board feels
8 necessary to examine, and do it within the context of the
9 preliminary issue hearing. That would expand the hearing.

10 We think possibly there might be an objection from
11 Toronto Hydro on this idea, because you initially narrowed
12 the scope and now you shouldn't, without good reasons,
13 change course and widen it. That could be argued as
14 changing the case to be met and a potential violation of
15 procedural fairness.

16 However, we would submit that the two cases we have
17 just gone through, that underground cable replacement and
18 their potentially faulty understanding of community
19 expectations, are good reasons for the Board to reconsider
20 the narrow scope of the issue herein.

21 And the reason that would be applicable is neither the
22 Board nor intervenors were aware that these flaws existed.
23 We were prepared to take their evidence as filed as an
24 approximate estimate of what is really needed, and you
25 didn't have to be exact to conclude that they really are in
26 trouble. But now we say: Well, we can't make that
27 conclusion. And neither can the Board, we don't think.

28 We also don't think expanding the hearing to a

1 conventional cap-ex hearing would offer any prejudice to
2 the applicant. If you were to find, through that review,
3 that the budgets were appropriate and supported their
4 application for a cause hearing, then the review could
5 stand as part of that hearing. You wouldn't have to
6 revisit all that capital evidence if it was done thoroughly
7 in a preliminary context.

8 If, on the other hand, you found that the cap-ex
9 budgets were not appropriate and didn't support the cause
10 application, then THESL would at least have had a thorough
11 hearing on the matter, and that's presumably what it wants.

12 So Energy Probe submits that the Board should expand
13 the scope of the preliminary hearing to encompass a full
14 review of cap-ex budgets, and that should include the
15 customary steps of interrogatories, intervenor evidence, if
16 any is forthcoming, and oral hearing on the evidence.

17 If the Board declines to take that course of action,
18 we would offer two other possible avenues for it to offer
19 relief to THESL.

20 Since most of their problems appear to be related to
21 very large cap-ex investments over a significant number of
22 years, the incremental capital module could accommodate
23 some of it, should you choose to relax the criteria.

24 Ms. Sebalj has already taken you to J2.1, where Mr.
25 McLorg expressed the limited amount of capital they think
26 would fit in the ICM, but if you were to expand the
27 definition of what ICM could include, then they could apply
28 using that mechanism. The downside of it, of course, is

1 that it kind of strains the Board's original intention for
2 that mechanism, that it be reserved for unusual
3 circumstances.

4 But by example of how this might be done, many of the
5 direct buried cables references in the evidence appear to
6 Energy Probe to be the result of premature failure; the
7 Board could accept that as an unusual circumstance.
8 Certainly premature failure wasn't expected at the time the
9 cables went in. The problem with that, of course, is that
10 there is lots of premature failure in electrical systems,
11 and I think that if you did relax the standards, you would
12 see a lot of other applications from other distributors for
13 relief under the same argument.

14 The other option is to modify the criteria for Z-
15 factor relief. And in our opinion, that might be a little
16 more problematic than the incremental capital module. The
17 Board has stated in its report on third-generation
18 incentive regulation that:

19 "The Board expects that any application for a Z-
20 factor will be accompanied by a clear
21 demonstration that the management of the
22 distributor could not have been able to plan and
23 budget for the event."

24 And clearly, ageing infrastructure is something that
25 management plans for every day, and probably wouldn't fall
26 into that basket.

27 So we don't think Z-factor is a good way to go, but if
28 it's the only option open to the Board, it could be

1 considered.

2 So in conclusion we don't think that THESL is entitled
3 to a cost-of-service application because it hasn't met the
4 off-ramp 300-basis-points criterion, and won't until the
5 end of 2012, and we also believe that in the preliminary
6 issue hearing so far it hasn't demonstrated its inability
7 to manage its resources and finance, but in our opinion
8 that's principally because you can't take their evidence at
9 face value and there hasn't been enough scrutiny to
10 determine how much of it is legitimate needs and how much
11 of it is not. And so for purposes of our final argument,
12 we would recommend that the Board conduct a comprehensive
13 review of capital expenditures before making its decision
14 on the preliminary issue.

15 And those are our submissions, Madam Chair, subject to
16 any questions.

17 MS. CHAPLIN: Thank you, Mr. Faye. We don't have any
18 questions for you.

19 We will take the lunch break now. And just before we
20 do, though, may I please get estimates from the remaining
21 parties. Mr. Buonaguro, how long do you expect to be?

22 MR. BUONAGURO: I expect it will be no more than 15
23 minutes, probably less.

24 MS. CHAPLIN: Mr. Warren?

25 MR. WARREN: Thirty minutes.

26 MS. CHAPLIN: Mr. Shepherd?

27 MR. SHEPHERD: I hope to be within 45 minutes, but if
28 I get excited about it I may be an hour.

1 MR. WARREN: Frightening thought.

2 MS. CHAPLIN: And Mr. Rodger, I realize you have yet
3 to hear all the submissions, but perhaps over the lunch
4 break you can be thinking about how long you will need for
5 a break, or if indeed you will need a break. You don't
6 have to tell me now, and how long you'll be. You don't
7 have to tell me now.

8 MR. RODGER: For reply, Madam Chair, there is a date
9 been set.

10 MS. CHAPLIN: Thank you. Yes. We'll take the lunch
11 break now.

12 --- Luncheon recess at 1:04 p.m.

13 --- On resuming at 2:17 p.m.

14 MS. CHAPLIN: Please be seated. Mr. Buonaguro?

15 **SUBMISSIONS BY MR. BUONAGURO**

16 MR. BUONAGURO: Thank you. Good afternoon.

17 I actually prepared a printed copy of what I'm putting
18 on the screen today and have given copies to Board Staff.
19 If they could be handed up and given an exhibit number?

20 MS. CHAPLIN: Do you have it in front of you?

21 MS. HARE: I think we do.

22 MS. CHAPLIN: Book of materials, Argument of the
23 Vulnerable Energy Consumers Coalition.

24 MS. HARE: Yes.

25 MS. SEBALJ: It will be K4.6.

26 **EXHIBIT NO. K4.6: BOOK OF MATERIALS, ARGUMENT OF THE**
27 **VULNERABLE ENERGY CONSUMERS COALITION.**

28 MS. HARE: It was put on our desk this morning.

1 MR. BUONAGURO: Thank you. Everything in here is from
2 this proceeding, except for the exhibit at page 10 of 31.
3 It's from Toronto Hydro's last rate case, EB-2010-0142, and
4 I'll talk about that as part of my submissions. But
5 everything else is either transcript or procedural order or
6 what have you, exhibits.

7 Now, if you can cast back your mind to just before the
8 break, and we had Ms. Sebalj giving her submissions on
9 behalf of Board Staff, she spoke about two options. First
10 she spoke about the test, and then about two particular
11 options. And I think I can fit my submissions quite nicely
12 in with hers.

13 First, in terms of the test that's applicable to the
14 preliminary threshold issue, I agree entirely with her
15 submissions, and you can see from the book that I put
16 together, and this is at page 2 of 31 of the book, it's
17 Procedural Order No. 1 in this proceeding. And I've
18 highlighted an excerpt from that, which sets out the test
19 that she was speaking about. In specific, I'm look at the
20 highlighted section I put on the computer, talking about if
21 THESL - and I'm going to paraphrase - if THESL files a
22 cost-of-service application for 2012 rates it, it must
23 justify in its cost-of-service application why early
24 rebasing is required, and why and how the distributor
25 cannot adequately manage its resources and financial needs
26 during the remainder of the third-generation IRM plan term.

27 And so, in terms of Ms. Sebalj's submissions, she was
28 talking about option one, which is look at that question,

1 determine if that test has been met -- i.e., has Toronto
2 Hydro demonstrated that it cannot adequately manage its
3 resources and financial needs during the remainder of the
4 third-generation IRM plan term -- and you could, she
5 suggests, based on a finding that they haven't met this
6 test, impose the third-generation IRM plan on them.

7 So in looking at this particular test, there was some
8 questions asked at the interrogatory phase related to the
9 preliminary issues.

10 So starting with -- well, actually starting from the
11 exhibit, and this is Exhibit A1, tab 1, schedule 2, we have
12 table 5: "ROE consequences of IRM-PCI," which has been
13 talked about before. And obviously this, as it comes from
14 the evidence -- sorry, this is page 3 of 31 of the book.
15 This talks about if Toronto Hydro was to execute the
16 spending that's in its cost-of-service application that's
17 before the Board, what would be the consequences, if at the
18 same time the Board was to impose an IRM regime on it in
19 the form of third-generation IRM; and then you see here,
20 obviously, the ROE under the PCI, which indicates how it
21 expects to perform if that were the case.

22 So the 9.58 percent from 2011 approved rates,
23 declining to 4.97 percent expected ROE in 2012, and then
24 the decline, as they've talked about.

25 Now, you'll see the highlighted part of this section,
26 lines 8-12, talks about the fact that this isn't really
27 what they would do if this IRM was going to be imposed on
28 it. So in my mind, that meant it's actually a theoretical

1 question, or it's just a theoretical model. This isn't
2 something that they expect would happen under IRM; this is
3 what would happen under IRM if they were going to execute
4 their plan as it exists in the filing in an IRM regime, but
5 that's not going to happen.

6 So that led to us the question which I put up on the
7 screen. It's page 4 of the book, so this is Exhibit R1,
8 tab 6, schedule 2. It's colloquially referred to as "VECC
9 IR No. 2."

10 And you can see the highlighted portion, where we
11 basically say: Well, we understand table 5 to be
12 hypothetical. What is it that you would actually do? So
13 we asked, to quote the IR:

14 "Please redraft table 5 based on THESL's
15 projected actual expenditures and investments, if
16 in fact third-generation IRM, using THESL's
17 assumptions, is imposed on THESL for the years
18 2012 to 2014."

19 And you'll see here in the response we refer to Board
20 Staff IR No. 3, which is Exhibit R1, tab 1, schedule 3.

21 So skipping into that, you'll see at part (b) -- so
22 this is Exhibit R1, tab 1, schedule 3, page 6 of the
23 compendium, part (b). Part of the response is:

24 "In the event the Board was to determine that it
25 would not provide THESL with the revenue
26 requirements referenced above and THESL made the
27 expenditure and investment cuts implied, please
28 provide any forecasts THESL has of its ROE level

1 in the 2012 to 2014 period under such
2 circumstances, or prepare an alternate version of
3 table 5."

4 So that's the response that we referred to when asked
5 the question: What would you actually do under IRM?

6 And I'm going skip ahead, and you've seen this table
7 before. This is page 9 of the book, Exhibit R1, tab 1,
8 schedule 3, appendix A. And this is essentially the answer
9 to the question: What does THESL actually do under IRM if
10 that's what happens?

11 And you'll see, and it's been talked about before, the
12 effective ROE of 8.1 percent for 2012, 2013, 2014.

13 And so to be doubly sure, I asked -- when we were
14 cross-examining the panel of THESL witnesses -- I asked
15 about this. I'm just going to pull it up.

16 So this is from the transcript of -- the Friday,
17 November 11th, 2011 transcript, as revised. It's Volume 2
18 of the transcript, pages 103-106. And I'm not going to
19 read the whole section; I put it in here for reference's
20 sake. And this is my discussion with the company about the
21 analysis I've just done.

22 This is the theoretical table 5. This is what you've
23 said to me is the actual table 5, and I'm confirming this
24 is actually what's going to happen to THESL during the IRM
25 years if, in fact, you get an IRM.

26 And I think it would suffice to say that's confirmed
27 in this set of transcript references.

28 And I asked a question -- and I've gone to page 16 of

1 the book. If you look at line 21, you'll see I've asked a
2 further question. I say

3 "My understanding is that..."

4 Ad this is also in the IR, the VECC IR No. 2.

5 "... you talk about the fact that you can't
6 actually tell us right now precisely what you
7 would do with the money that's implicit in or the
8 spending that's implicit in this table..."

9 That's the table 5, the renewed table 5 that appears
10 in Board Staff Interrogatory No. 3.

11 "... because you haven't actually planned for
12 IRM; you've planned for the cost-of-service and
13 presented cost-of-service."

14 Mr. Haines says:

15 "Right."

16 And then over the page at 17, I ask the question:

17 "But you would work backwards from whatever's in
18 here that produces an 8.1 percent effective ROE,
19 to come up with a plan?"

20 Mr. Haines:

21 "I think that's very true on a detailed level,
22 but we have sketched out -- I'll call it sketched
23 out -- back of the envelope what we do. And
24 maybe would it be helpful for me to describe that
25 or do you have a clear understanding of that?"

26 And I declined, because I think he had already gone
27 through it.

28 Now, when I first heard this or when I heard this idea

1 that they hadn't actually planned for IRM, despite the fact
2 that there was a very real possibility the Board would
3 impose IRM, I was somewhat concerned, and asked an IR, and
4 Board Staff asked the same IR: In fact, why haven't you
5 planned for it?

6 And there was an answer, again. Their answer going
7 forward, and I can go back to VECC IR No. 2, which starts
8 at page 4 of the book. At page 2 of that response they
9 say:

10 "Stated differently, THESL must use its best
11 judgment as to which scenario is most
12 probable..."

13 So in this case, they're talking about cost-of-service
14 or IRM,

15 "... and then plan accordingly."

16 So they're saying: We thought cost-of-service was
17 most likely, so we planned for cost-of-service.

18 "It cannot plan simultaneously for two radically
19 different scenarios because such scenarios would
20 imply conflicting commitments and plans for
21 resource acquisition and deployment."

22 Then they go on to talk about what would happen if IRM
23 was to be imposed. They would have to do a -- what they
24 call a "painstaking complex amount of --" they say
25 "ultimately unjustified exercise" of developing a plan.

26 Now, I asked a similar question of Toronto Hydro in
27 the previous rates case, and this is EB-2010-0142, Exhibit
28 R1, tab 11, schedule 35. So this starts at page 10 of the

1 book. You can see here I was asking -- I was asking them
2 about what Hydro One does. And we learned -- when I say
3 "we", whoever has interest in that application -- we
4 learned that Hydro One's planning process has a concept of
5 minimum-level risk -- sorry, minimum-level spending, in
6 terms of its capital OM&A plans, and then based on what
7 they perceive to be their minimum level needs over a five-
8 year term, and then they build the actual OM&A and capital
9 budgets that they're actually going to apply to the Board
10 to spend or try to spend in that term on top of those
11 figures.

12 And I was asking if Toronto Hydro had any kind of
13 similar planning, did they have a minimum-level spending
14 that they could share with us to get a same sort of a sense
15 for how much their minimum-level spending differed from
16 what they were actually asking for in any particular year,
17 and in this particular year was the 2011 test year.

18 And at page -- so question (c) -- well, question (b)
19 asks, do they have that similar type of analysis, and their
20 answer that I got was referred to in response (a), "THESL
21 is not familiar with the referenced minimum-level spending
22 approach", and then they talk about how they develop
23 budgets without any reference to a minimum-level spending.
24 The response speaks for itself.

25 And then at part (c) of the response I ask -- well,
26 part (c) of the question says:

27 "If THESL does not develop minimum-level spending
28 or comparable budgets for consideration in its

1 planning process, please confirm that THESL must
2 necessarily be unable to advise the Board
3 whether, in the face of reductions by the Board
4 to the applied-for budgets, THESL is either able
5 or unable to operate in the test year within the
6 bounds of acceptable risk without first reviewing
7 the impacts of its approved budget from scratch."

8 And the concern here I had when I was asking the
9 question was, if you don't have an idea of what your
10 minimum-level spending is that you can share with us, how
11 is it that we can be sure that any cuts that we might
12 propose to the Board or that the Board might impose on you
13 in as decision would still meet the bounds of minimum-level
14 risk -- or bounds of acceptable risk, I should say. And
15 the answer was, at part (c), in its 2008 decision with
16 reasons for EB-2007-0680, the Board stated at page 38:

17 "The Board does not approve or disapprove any
18 specific line items within the company's claim.
19 The company can apply to funds provided in the
20 envelope where it determines it ought to go.
21 This approach has allowed THESL the flexibility
22 necessary to defer or reshape programs, transfer
23 budget amounts, or adjust allocations or
24 contracting in a way that allows THESL to operate
25 within acceptable risks."

26 So I took that to mean, as long as we know what the
27 budget is, as long as we have flexibility, we can operate
28 within an acceptable risk.

1 Now, combining all this information together now, in
2 this hearing and the last hearing, in terms of how I
3 understand them to be planning and how I understand they
4 approach their budgets, and the fact that they've told the
5 Board in this case that if IRM were imposed on them this is
6 what they would do, and presuming that that's -- would be
7 something that they could do within an acceptable risk,
8 even though they don't necessarily -- they can't
9 necessarily tell you exactly that's how they're going spend
10 the money.

11 And it suggests to me that, in terms of the primary
12 question or the preliminary threshold issue, which again is
13 whether or not the distributor can adequately manage its
14 resources and financial needs during the remainder of the
15 third-generation IRM plan", it would seem to me that the
16 answer is it actually can. They've told us that they can
17 operate within the IRM regime. They've told us that the
18 expected ROE under the IRM regime would be around
19 8.1 percent. That would be well within the 300-basis-point
20 band around the embedded ROE in an IRM regime for THESL.

21 And so I would have to think that on its face the
22 answer to the question of the preliminary threshold issue
23 is THESL can manage its resources, and therefore there's a
24 prima facie case that it should go into IRM.

25 Notwithstanding that it wants to spend more money; it
26 can operate under IRM if it has to. And that would be
27 essentially what I think was told to Hydro Ottawa and to
28 Norfolk: You can operate - you may not want to - but you

1 can operate under IRM. And the information we have on the
2 record in this case is that, while they won't do as well as
3 they would like, they would still be operating within the
4 acceptable bounds that is implicit in the IRM.

5 And for that reason, the request that a cost-of-
6 service year be -- would -- should supplant the expectation
7 of a third-generation IRM in this particular case would be
8 -- should fail.

9 But that's not the end of the story for my
10 submissions, because, not to put it too plainly, but
11 there's some scary stuff in their application, I'll say.

12 And if I can refer to another transcript reference,
13 and this is in reference to a question from the Board
14 Panel, which was answered, I guess, largely by Mr. Haines.

15 The question was -- and I'm not going to read it.
16 I've included it in page 19 of the book, and this is --
17 hmm. Apparently when I convert transcript pages to PDF the
18 page numbers disappear. Luckily I have the page reference
19 here.

20 So this is from pages 142 to 146 of the transcript.
21 So there's a very long answer about what would happen under
22 IRM and what the company would look like at the end of the
23 3-year IRM. And it's not a good story for us to hear.

24 There's a suggestion about the OM&A cuts and what the
25 capital requirements will be at the end of the four-year
26 plan, and they're going to be in the billions of dollars,
27 and if in theory they could even make those expenditures
28 they would still be asking, on rebasing in four years, for

1 a massive capital budget and so on. I mean, the testimony
2 speaks for itself.

3 The point I'm trying to make is that we have from
4 Toronto Hydro a very stark look at the consequences of IRM,
5 even though I think it's been demonstrated that they could
6 operate under IRM, because, coming out of IRM, there may be
7 serious consequences, and because of that what we're
8 suggesting is that the ratepayers, through intervenors and
9 the OEB, should be concerned about these assertions and
10 should be concerned about taking a good hard look at how
11 much of this is actually plausible, testing the evidence
12 and so on.

13 Now, and in particular, there's a few specific items
14 I'll just mention briefly. I don't think I have to go too
15 deeply into them. Well, I guess the most obvious one which
16 was talked about is the capital budget. The numbers that
17 are shown in the capital budget -- and I put up page 31 of
18 the book, which is Exhibit R1, tab 7, schedule 23, page 2.
19 We have here that the various capital budgets over the
20 years, the ten-year capital plans that THESL's been -- put
21 forward, and it's a good graph, because it tells you how
22 things have changed drastically from application to
23 application over time.

24 So back in 2000 a ten-year plan going into 2016
25 suggested a spending of somewhere in the order of
26 \$150 million or less per year. In 20 -- I think it's 2009
27 it was looking at spending in the order of 350 to 400, and
28 then declining to somewhere around 300.

1 A year later, the company comes back in, and it's
2 asking for 400 per year, spiking to 500 and then declining
3 over time to somewhere in the order of 350. And now the
4 current capital plan, which is represented by the purple
5 line -- I think it's purple -- starts at \$500 million and
6 goes up, with no appreciable decline in the future, unlike
7 the previous two lines.

8 And we look at these graphs as a ratepayer and say,
9 well, what's going on here? Why is it that the plans vary
10 so widely year over year? How is it that Toronto Hydro is
11 approaching planning that produces these results? How
12 accurate are these results?

13 And I think this is along the lines of what Energy
14 Probe said in their submissions about wanting to look
15 deeply at the capital plan and the direction the company is
16 going on a long-term plan and see how that should be
17 fitting in to what kind of rates we're approving for them
18 on a year-to-year basis.

19 Now, I did include some references in the book of
20 materials -- I'll just pull them up briefly. So at page 26
21 of 31, this -- again, I don't have the exhibit number on
22 the page, but this is actually Exhibit K2.7 from the
23 hearing, which is the comparison of Toronto Hydro to
24 everybody else in -- well, a subgroup of the other
25 distributors in Ontario, and Exhibit K2.8, which is a
26 similar table with a slightly different grouping, I
27 believe.

28 I put these in only to show that there's been an issue

1 raised about fundamentally how is Toronto Hydro operating
2 relative to every other Ontario distributor that the Board
3 regulates? And I think we're going to hear a lot more of
4 that from Mr. Shepherd, I'm sure.

5 But that's also of concern, because if the reason that
6 they can't -- that they need such great increases because
7 there's something fundamentally wrong with their structure,
8 which this could be said to support, that's something else
9 we have to take a look at.

10 And again, I should point out that I did throw in a
11 reference here from the hearing. It's a question that --
12 sorry.

13 It's a question that Mr. Shepherd asked Mr. Haines
14 about these tables. And he was saying that, essentially,
15 Toronto Hydro's position is that they're not comparable to
16 any of the Ontario distributors, and really, if you wanted
17 to do a comparison, you would have to start looking outside
18 of Canada, in fact. And I think he talks here about
19 Chicago and LA. And just for reference, this is page 127
20 of Volume 2 of the transcript.

21 So on the one hand, if we were to follow option one
22 strictly, I think there is enough on the record to suggest
23 that Toronto Hydro should clearly be placed on IRM, because
24 they can manage under IRM.

25 On the other hand, we have evidence here -- and
26 without testing it, I'm not willing to be the one that
27 says: Completely ignore it -- that the direction the
28 company is going, even if it survives under IRM for the

1 next three years, is not one that we would necessarily
2 endorse, because of the impact it may have on the system
3 and the company and consumers in general.

4 So the question is: What kind of a solution should we
5 have? Now, I would note -- what's the company asking for?
6 The company is asking for, I think, a very specific relief.
7 And they've said -- and this is in reference to a question
8 that Mr. Brett, my friend Mr. Brett, asked them, and this
9 is page 25 of the book. This is page 69 of the transcript,
10 Volume 2. He asked them to confirm that:

11 "You're not seeking any assurances from the Board
12 that you will get one year, two years or three
13 years of approval, nor are you seeking any
14 assurances about a particular revenue
15 requirement. What you're really here to do is to
16 ask the Board to hear your case?"

17 Mr. Haines:

18 "That's absolutely correct."

19 I took that to mean, and from my understanding of the
20 rest of the material, they're asking for something along
21 the lines of what Ms. Sebalj was talking about as being
22 option two, which is extend the preliminary issue in the
23 sense that: Take a look at all the evidence before you
24 completely dismiss the idea of cost-of-service in any one
25 or two or three of the years that they're asking for.

26 And that is -- if my understanding -- I'm trying to
27 recap what I heard earlier today. I think that's
28 essentially what Mr. Brett has said in his submissions: At

1 least take a look at the evidence before you dismiss it. I
2 think there were slightly different variations on the
3 theme, but the theme so far has been: At least take a look
4 at it, in one form or another, to see how bad the
5 problem is, if the problems -- the problems that THESL are
6 suggesting we want to be concerned about.

7 Our position is slightly different, because we think
8 that there is value in having companies that have
9 demonstrated they can manage under IRM put under IRM for
10 some term, and there's value in making sure that the IRM
11 regime, which is part of our policy, is applied equally to
12 everybody unless they actually do qualify for the
13 exception.

14 And in our view, as I demonstrated or I think I
15 demonstrated through the evidence, THESL hasn't actually
16 met the obligation of showing that they can't manage their
17 resources under IRM, and for that reason we would suggest
18 that for the 2012 year, at least, Toronto Hydro be put
19 under IRM, but then, in view of these future problems which
20 they say repeated applications of the IRM to THESL is
21 actually going to create, the Board should allow a process
22 to proceed to start looking at these other questions, so
23 that -- and presumably -- and I haven't nailed this down in
24 terms of a submission, and I probably should have -- but
25 presumably in advance of the 2013 rate year, if a
26 proceeding were to go ahead in the way I've envisioned it,
27 there may be more and better information that the Board may
28 have in terms of whether or not the company should be taken

1 out of IRM at that point. So in that case, 2013 would be
2 an early rebasing year, or could potentially be an early
3 rebasing year.

4 There could also be an explanation of different
5 options. I think it was suggested that the ICM module
6 might be modified, if it's deemed to be necessary, once all
7 the evidence has been reviewed.

8 There would be flexibility there for the Board to
9 create a solution that creates, if necessary, a regime
10 specific to Toronto Hydro to accommodate what it says. And
11 they don't use the word "unique" but they seem to be
12 suggesting they're in unique circumstances relative to
13 everybody else. But it would be a solution, if necessary,
14 that would address that.

15 So in summary, what we're saying is that on the
16 preliminary threshold issue, as a discrete issue that the
17 Board is to decide, we think that they haven't met that
18 threshold, that they could very easily be under IRM.

19 We suggest, because of that, they should be put under
20 IRM, with the understanding that they could also have a
21 proceeding continue either on from this point forward, or I
22 guess they could reapply, to have these issues -- in terms
23 of how the company's progressing in the future based on its
24 remarkably large capital plan going forward or proposed to
25 go forward, and other issues that they're having in terms
26 of their projected OM&A -- looked at in detail by the
27 Board, so that if a solution is needed, 2013, 2014, before
28 rebasing would occur, that it's in the works, rather than

1 waiting until potentially the disaster scenario that we've
2 seen in the evidence has actually occurred.

3 Subject to any questions, those are our submissions.

4 MS. CHAPLIN: With respect to your proposal, the
5 option for a further examination, what would the benefits
6 of that approach be in comparison to continuing to hear --
7 you know, we have a full application and all of the
8 evidence already prepared. As I understand your proposal,
9 that evidence would potentially be set aside. They could
10 apply with new evidence to essentially look at the same
11 issues.

12 I'm wondering what's the benefit of putting them on
13 IRM for one year with a subsequent thorough review, as
14 opposed to proceeding to hear the full case now, with the
15 potential of setting rates for three years under any of a
16 variety of structures?

17 MR. BUONAGURO: Thank you. I think -- I'm not
18 necessarily suggesting that they would have to withdraw
19 this application and apply anew.

20 What I'm suggesting is that there is a threshold to be
21 met. There is an expectation that some sort of rates will
22 have to be set for 2012. And I think that based on the
23 evidence we have in front of the Board, there's no reason
24 not to impose the third-generation IRM on THESL.

25 At the same time, there are specific issues which,
26 even under -- even if you accept, as I've suggested that
27 you should, that IRM is appropriate for THESL, there are
28 issues which are going to have longstanding -- or, sorry,

1 long-reaching implications that need to be examined. And
2 the easiest one to identify and talk about is the capital
3 plan, the 10-year capital plan.

4 Part of the problem, if I can call it a problem, is
5 that for Toronto Hydro -- and I'm going back historically,
6 even though my history doesn't go back that far. It just
7 goes back far enough. We're going from a history of
8 applying on a one-year slice sort of capital plan, and then
9 asking Toronto Hydro: No, no, we actually want you to give
10 long-term plans. And they've given us a long-term plan,
11 but the long-term plan has never been looked at, and I
12 think it was Mr. Faye made the similar point.

13 The Board has not actually, in any proceeding that I'm
14 aware of, looked at the 10-year capital plan and said to
15 Toronto: Your approach is good, the implications for the
16 future are good, the path that you're going down is a good
17 one. That's questions that has to be answered at some
18 point. Otherwise we're going to keep running into this
19 problem. And that's what I'm trying to address.

20 That evidence isn't in front of the Board now; it
21 could be handled in this proceeding. If I were to be very
22 specific or technical about what I'm asking you to do, I'm
23 asking you to find that for year one, at a minimum, it
24 should be IRM. They have an application for you for 2013
25 and 2014 rates, as well. The evidence is on the record for
26 those rates. There may be modifications that could be
27 necessary, assuming you were to accept my submission that
28 2012 be an IRM year, but the underlying capital plan,

1 presumably, would still be something that could be examined
2 in this proceeding.

3 And that, I think, is one of the driving forces behind
4 all the problems that Toronto Hydro's telling us they're
5 going to have.

6 And to put it bluntly, we'd better find out now rather
7 than later.

8 And if I can go back to -- this is School Energy
9 Coalition IR No. 23, which is at the last page of the book.
10 You can see what sort of happened over the years as the
11 very specific approach that Toronto Hydro takes to planning
12 seems to be somewhat of an unresolved issue, at least in
13 our minds.

14 From year to year, from application to application, it
15 seems that there are fundamental shifts in what they are
16 doing, different -- and if I could -- I don't have the
17 wherewithal to go specifically to the evidence right now,
18 but they introduce new approaches to how they incorporate
19 risk, for example, in their planning, at certain points in
20 time.

21 There's never been a proceeding that I'm aware where
22 the Board has actually said, Yeah, your approach, the tests
23 that you're applying and the results are all reasonable,
24 and therefore we can start planning on this long-term
25 basis. And I think that has to be done.

26 And again, in terms of whether it's -- I suggested it
27 could be in another proceeding. I would expect, for
28 example, that there's a high likelihood if the Board were

1 to simply put the company on to IRM in 2012, there would be
2 a high likelihood that the company may come back in for
3 early rebasing, file a brand-new application for 2013 rates
4 as an early rebaser.

5 There's a possibility that the company, even though it
6 said it would operate to a 8.1 percent projected ROE, that
7 it actually spends some of the money that it says it needs,
8 and then come in, either having pierced the 300-basis-point
9 threshold or not.

10 It's going to -- I think it's, some way or somehow,
11 some form, it's going to come before the Board, and I'm
12 sort of saying: Why not get started now? And I think it
13 could be done in this proceeding. I don't think it has to
14 be done separately.

15 MS. CHAPLIN: Okay. So if I -- forgive me, I'm sort
16 of paraphrasing you here, but what you seem to be saying
17 is, well, put them on IRM for 2012 because, you know, they
18 didn't meet the test, and that's what should happen to
19 them. But, you know, there's this big issue, and therefore
20 we should still have a proceeding to look at that. And I
21 guess I'm just wondering, is there an alternative way that
22 we should explore, which is, if we were to proceed with the
23 application as it's filed, but perhaps set rates on a
24 formulaic basis. So in other words, work with the
25 information that we have in the case we have before us,
26 still accomplish an IRM type outcome, but also address the
27 issue that you've identified needs to be examined.

28 MR. BUONAGURO: I'm not sure I 100 percent explained

1 the proposal. It would be something like, rather than
2 doing what I suggested, which is strictly go to an IRM for
3 2012, some sort of modification for 2012? Is that what was
4 being suggested? Or were you suggesting deferring all the
5 review of the evidence and then go back whenever you come
6 to conclusions and impose whatever regime you're going to
7 impose for 2012?

8 MS. CHAPLIN: I'm saying if we were to -- would a
9 possible option be to say we are going hear the application
10 in full, and that the result of that might be three years
11 of rates which are formulaic and are IRM-like, but also
12 address in some way the capital requirements that are being
13 identified?

14 MR. BUONAGURO: Thank you. I think that's -- and I
15 don't want to put words in your mouth -- I think that's
16 contemplated in Mr. Brett's approach, in terms of him
17 suggesting, hear the application, and then you may come up
18 with a range of results. You may completely discount their
19 evidence and put them back on third-generation IRM for the
20 whole period. That's a possibility. You could put them on
21 cost-of-service for three years. You could do -- and
22 anything in between.

23 So I think that's essentially what, if -- again, I
24 don't mean to put words in his mouth. I think that's what
25 I understood his approach to be. I actually think that's
26 similar to what Toronto Hydro is asking for. They're just
27 asking for you to look at the evidence before you make a
28 final decision.

1 I'm going one step further and saying, well, actually,
2 there is a third-generation IRM regime. You don't meet at
3 this time the threshold for getting out of it, I guess you
4 would call it, or being exempted from it. That doesn't
5 mean we don't have concerns, though, about where you're
6 going in the future, and we should start looking that the
7 now.

8 So, I mean, it has to do -- I understand that you
9 could go back in time, once you've gone through all the
10 evidence, and fashion whatever rate regime you thought is
11 appropriate for 2012, 2013, 2014, under any different
12 number of scenarios, as long as you thought they were just
13 and reasonable.

14 I'm saying that right now, at this time, based on the
15 evidence from the company, they're actually qualified for
16 third-generation IRM for 2012. And if we're going to
17 deviate from that beyond 2012, it's not necessarily because
18 they qualify for it, but because there may be results
19 beyond 2012 that we want to avoid, as the Board regulating
20 the company or as ratepayers.

21 For example, one of the spectres that was put in front
22 of us was that if we operate under IRM for 2012, 2013, and
23 2014, we're going to come back in 2015 and ask for
24 \$2 billion in spending.

25 Now, to be fair, I don't think he said that -- he
26 called that theoretical, because they could never actually
27 accomplish \$2 billion in spending. But they would say we
28 would have the need in 20 -- on rebasing for \$2 billion of

1 spending. I hope I'm not misquoting the number.

2 If that's anywhere near close we might want to take
3 steps to avoid that, even though under the third-generation
4 IRM there's no reason not to put them under a third-
5 generation IRM for the intervening years.

6 I hope that answer your question.

7 MS. CHAPLIN: Thank you. Mr. Warren?

8 **SUBMISSIONS BY MR. WARREN**

9 MR. WARREN: Thank you, Madam Chair. I would ask that
10 the Board have in front of it for purposes of my
11 submissions a copy of the first procedural order in this
12 matter, a copy of the transcript of the proceedings on
13 November 11th, and a copy of Mr. Rodger's argument-in-
14 chief.

15 By way of overview, it is the position of my client
16 that Toronto Hydro has not met the test as described by my
17 friend Ms. Sebalj that the application should be dismissed.

18 I'll get to the reasons why it should be dismissed,
19 but I want pause at the outset to address generically some
20 of the suggestions you've heard from Mr. Faye, Ms. Sebalj,
21 I guess from Mr. Brett -- I'm not sure I understood what he
22 was saying -- and from my friend Mr. Buonaguro, which is,
23 reduced to its essence, that you adopt some kind of
24 hybridized mechanism, that is, hearing a bit of the
25 application, maybe a bit of IRM, maybe modifications to the
26 incremental capital module.

27 And what those suggestions raise as an issue for you
28 now to consider is -- and I don't want to put this more

1 grandly than it deserves -- really the integrity of the
2 regulatory process which the Board at some considerable
3 pain put in place when it considered the model for second-
4 generation IRM and then the third-generation IRM.

5 There is a model in place which, with the exception of
6 the special pleading from Toronto Hydro, the endless
7 special pleading from Toronto Hydro, appears to be working
8 for most utilities in this province, and believe me, based
9 on the evidence in this case, it's really working well for
10 ratepayers.

11 And I would ask the Board, when it considers the
12 various options that have been put forward, to reject the
13 notion of what I describe as a hybridized regulatory model,
14 and that the Board should stay with the model which on all
15 of the evidence is working well for utilities, for the
16 Board, and for the ratepayers.

17 Now, the outcome of this application, if it's
18 dismissed at this stage, is not the death of Toronto Hydro.
19 This cost-of-service application is dismissed, but it
20 brings an application to operate under the three-year IRM
21 regime. And it's important to keep in mind that there is
22 life after this application. There's life after this
23 application, and they may be alive and well and breathing
24 under that.

25 One of the concerns, I have, Members of the Panel, is
26 that Toronto Hydro has framed the issue more broadly than
27 has the Board in its procedural orders. And I'd ask you to
28 turn up to begin with the first procedural order, and in

1 particular page 4 of that, which is a recitation of a
2 portion of the Board's decision in the last main rates
3 application of Toronto Hydro.

4 If you look at the third full paragraph on page 4, the
5 Board recites Toronto Hydro's argument. It says, and I
6 quote:

7 "In order to justify its approach, THESL posits
8 that two separate frameworks exist and that it
9 has been operating within one of them, that being
10 a cost-of-service framework. THESL argues that
11 it would be inappropriate for the Board to now
12 treat it as though it were operating within the
13 other framework, that being an IRM framework."

14 And then two paragraphs down the Board says:

15 "The Board's rate-setting policies are not
16 composed of the two separate frameworks that
17 THESL describes."

18 A clear indication of what the Board's policy position
19 is.

20 Now, if -- I would invite you to turn up the
21 transcript first at page 31. I characterize this as
22 "special pleading". Mr. Haines says, and I quote,
23 beginning at line 16:

24 "I think our position is this, that there is
25 optionality, that there needs to be optionality
26 for the utilities to choose the best regulatory
27 construct in their circumstances for their
28 customers."

1 And then at page 96 of the transcript, Mr. Haines,
2 again in response to a question by my friend Mr. Crocker,
3 he says at line 9:

4 "Because we still believe that cost-of-service is
5 an option available to the utility."

6 They continue to believe, notwithstanding the Board's
7 Reasons for Decision, that there are two modes of
8 regulation and that they get to choose.

9 And the reason that I raised that at this point is
10 that the Board, in reaching its decision in this case,
11 clearly, in my respectful submission, needs to reiterate
12 that Toronto Hydro has it wrong. There aren't two models
13 that can be chosen by Toronto Hydro at its option.

14 The risk, Madam Chair and Members of the Panel, in
15 granting the relief that Toronto Hydro seeks is that it
16 would be tantamount to excluding Toronto Hydro from the IRM
17 regime, which, as a matter of public policy, the Board has
18 determined, again and again, is the appropriate for the
19 distribution sector in the province.

20 The implications of doing so would be serious, in my
21 respectful submission, not just for other utilities, which
22 may feel themselves to be in circumstances comparable to
23 Toronto Hydro, but for the Board's entire regulatory policy
24 for the electricity sector. And it's in this context that
25 the notion of hybridized models is important, because
26 various utilities have come forward, saying: We'd like you
27 first to hear all of our evidence -- a point to which I'll
28 return later -- but we can do some other things. We can

1 adjust in advance the incremental capital module or the
2 off-ramp. And those are things which, in my respectful
3 submission, the Board - may be one of the implications of
4 the way the Board makes its decision and how it articulates
5 it.

6 So the Board, in my submission, should be under no
7 misapprehension of the importance of the decision on the
8 preliminary issue.

9 By way of background, it strikes me that we should go
10 back to the rationale for the creation and maintenance over
11 a period of time of the IRM regime.

12 It provides incentives for local distribution
13 companies to reduce costs. It provides ratepayers with
14 stable electricity prices, plus it's designed or intended
15 to provide the ratepayers with the benefits of the savings
16 achieved, the efficiencies gained, at the end of the IRM
17 period.

18 It reduces the regulatory burden in three senses.

19 It reduces the regulatory burden on LDCs from not
20 having to bear the cost of annual cost-of-service
21 applications.

22 It reduces the regulatory burden on ratepayers, who
23 ultimately pay the costs of these annual cost-of-service
24 applications.

25 And it reduces the regulatory burden on the Board.
26 You don't have to consider 80-plus cost-of-service
27 applications annually.

28 I submit that it's important that IRM is now in its

1 third generation. The Board undertook extensive analysis
2 and consultation with, among others, Toronto Hydro when
3 developing the second- and third-generation IRM models. It
4 recalibrated those models, for example, to respond to the
5 concerns of the LDCs. For example, it introduced the
6 incremental capital module in the third generation, to
7 address concerns of LDCs about the need to be flexible and
8 responsive in addressing the unusual needs for capital
9 spending.

10 So it's a system which has been considered and
11 reconsidered, and in my respectful submission is working.

12 But the important thing to remember is that IRM
13 regimes are not prison terms. You can get out of jail.
14 And there are a variety of mechanisms by which you can get
15 out of jail.

16 You can, for example, apply to the Board to use the
17 incremental capital module. It's a policy, and the Board,
18 in applying the policy embodied in the incremental capital
19 module, can respond to whatever case is put before it.

20 It shouldn't do that in advance -- a position I'll
21 return to -- but it can do that in response to the
22 individual circumstances, just as it could, a year or more
23 from now, respond to an application by Toronto Hydro,
24 saying: We want to apply the incremental capital module in
25 this particular way.

26 That's a safety valve that the Board, after hearing
27 from the LDCs, built into the IRM model.

28 There's also an off-ramp.

1 Now, in dealing with Toronto Hydro's case here -- my
2 next point -- it strikes me as significant that Toronto
3 Hydro is not seeking relief from an IRM regime that it has
4 demonstrated cannot work. All of its concerns are, in
5 large measure, hypothetical. This is what might happen if
6 we had these constraints and didn't have the incremental
7 capital module. It's entirely hypothetical. It would be
8 fundamentally different if it had come before you and said:
9 We've been under IRM, and it doesn't work.

10 The second important point is that Toronto Hydro's
11 case, its entire case, is built on one single assertion,
12 and that is, namely, that its unique need for capital
13 spending means that an IRM regime will not only not work
14 for Toronto Hydro, but it will send it into some kind of
15 death spiral.

16 My friend Mr. Buonaguro says that there's some scary
17 stuff in the application. I submit, with respect, there's
18 sure a lot of scary rhetoric, and that's different than
19 scary stuff in the application.

20 It argues that it can't replace ageing infrastructure,
21 that more and more ratepayers will be left in the dark.
22 It's a grim doomsday scenario. If it spends what it feels
23 it must, its ROE will drop to the point where the
24 investment community will abandon it.

25 It's rhetoric.

26 But consider the scenario of the death spiral against
27 the reality of what Toronto Hydro did in its last two main
28 rate applications.

1 In EB-2009-0139, it agreed to cut its capital spending
2 from a claimed 423.6 million to 350 million.

3 A year later, in EB-2010-0142, it agreed to cut its
4 capital spending from a claimed 498 million to 378 million.
5 I note in passing that in the face of these awesome
6 obligations it says have been building up behind a
7 snowplough, it agreed from one year to the next to increase
8 its capital spending by about \$38 million -- sorry,
9 \$28 million.

10 The Board should conclude and I ask the Board to
11 conclude that Toronto Hydro, acting responsibly towards its
12 ratepayers and its shareholder believed it could deliver
13 electricity reliably and safely while operating within
14 those self-imposed limits on its capital spending.

15 Within the last year, it said it could do that at
16 \$378 million, and then it comes in here and says we're all
17 going to freeze in the dark. The claim, in my respect, is
18 simply not credible, given its positions in the last two
19 rate cases.

20 You will remember, as Toronto Hydro will vividly
21 remember, that the Ontario Court of Appeal a year ago, in
22 an appeal brought by my friends Toronto Hydro, reiterated
23 the obligation of utilities to have regard not just to the
24 interests of their ratepayers -- to their shareholders, but
25 also the ratepayers.

26 So this -- when Toronto Hydro comes to you with a
27 settlement agreement, it is representing to you, who is
28 ultimately responsible for the public interest, it's

1 representing to you that it can do this job within these
2 self-imposed constraints. And today it says: Sorry, we
3 can't live within the constraints.

4 Their position today, I say with respect, is simply
5 not credible.

6 Now, Toronto Hydro, through Mr. Haines, tried to
7 suggest that there is an implicit acknowledgement by the
8 intervenors in reaching the settlement about the pace of
9 capital spending. So somehow we were all on board the
10 snowplough. And I'd ask you to look at page 11 of the
11 transcript.

12 Mr. Haines, in response to a question from my friend
13 Ms. Sebalj, says:

14 "Why did we agree to that cut? It was a
15 position, an agreement, that was made between all
16 parties that that was a reasonable pace to move
17 from the 100 million up to the 600 million."

18 I say with respect it's not true. That was their
19 decision, for which they take responsibility, about the
20 limits in which they could operate.

21 Now, Toronto Hydro argues that it's fundamentally
22 different from every other utility in the province. The
23 question was put by my friend Mr. Crocker, I believe, at
24 page 99 of the transcript -- I apologize. My sticker
25 system doesn't work very well...

26 The question was put by Mr. Crocker, beginning at
27 line 8:

28 "You don't consider yourselves unique, but you

1 can't tell me or the Board who else is like you."

2 And then Mr. Haines says:

3 "Well, I think what we've tried to describe is we
4 can see circumstances that the model works. and
5 when it doesn't work, the circumstances can look
6 around the map together and say who is seeing
7 growth in municipalities, who isn't, and who is
8 old plant."

9 And so on and so forth. He doesn't answer the
10 question, who are you like, who are you not like? And
11 that's fundamental to the position that they're arguing
12 this case that they're unique.

13 What is clear beyond peradventure is that the
14 ratepayers have not enjoyed the benefits that they -- to
15 which they were entitled under an IRM regime. Now, my
16 friend Mr. Shepherd in his submissions will put in data
17 which, in my respectful submission, conclusively
18 demonstrates that Toronto Hydro is the most costly utility
19 in this province by almost every metric. IRM is intended
20 to bring benefits to ratepayers.

21 Where are the benefits that should have come to
22 ratepayers from imposing a modicum, a modest modicum, of
23 discipline on this utility over the years? And that's an
24 important consideration that the Board has to keep in mind.

25 The ratepayers of Toronto Hydro deserve to get the
26 benefits which IRM brings. I say respectfully it's
27 apparent from Mr. Shepherd's data that Toronto Hydro needs
28 the discipline which IRM necessarily imposes.

1 With respect to the tests that Toronto Hydro has to
2 meet, I adopt the able submissions of my friend Ms. Sebalj,
3 who in my submission has articulated...

4 MS. CHAPLIN: I think your mic perhaps turned itself
5 off or...

6 MR. WARREN: I think either Mr. Blue or Mr. Rodger is
7 up to mischief, or perhaps it's Captain Barbossa has
8 arrived back in the room.

9 I'll repeat what I was saying. My friend -- yes,
10 we're all going to be in the dark shortly. My friend Ms.
11 Sebalj in her able submissions has articulated the test
12 that Toronto Hydro has to meet.

13 I want to make this submission, however, about what -
14 and I say with respect - is a suggestion by my friend Mr.
15 Rodger in his argument that the Board is obligated to
16 review all of the evidence before it reaches the decision
17 in this case.

18 And I'd ask the Board in this context to turn up
19 page 7 of the argument-in-chief. Beginning at line 18 Mr.
20 Rodger says:

21 "So in this case we filed five volumes of
22 evidence, we filed three witness statements, and
23 we've answered numerous interrogatories from the
24 Board Staff and parties, but because we haven't
25 had an opportunity to make our full case or test,
26 that whole body of evidence at this time, the
27 Board will be making its decision without that
28 entire application first or hearing that first."

1 Now, what that is, although not articulated in these
2 terms, in my respectful submission, is an implicit argument
3 about a fairness test, that it would be unfair for the
4 Board to dismiss this application without having read all
5 of the evidence. And I want to address that implicit
6 argument.

7 First of all, the argument is premised on the notion
8 that Toronto Hydro will be harmed if it's required to
9 operate under an IRM. After all, fairness applies, is
10 important, in circumstances where there will be harm, the
11 outcome of a proceeding will be harmful to one of the
12 parties, which is why the rules of natural justice exist.
13 They're most fully articulated, for example, in discipline
14 cases.

15 But that would presume that Toronto Hydro is going to
16 be harmed by the outcome of your decision to dismiss the
17 application. That's the very case that Toronto Hydro has
18 failed to meet.

19 The argument presumes the correctness of Toronto
20 Hydro's argument and the need for capital spending and the
21 draconian effects on it of IRM.

22 But unless and until Toronto Hydro operates under an
23 IRM, no one knows whether there will be any adverse
24 effects. We don't know until they do.

25 As I say, a natural-justice argument is premised on
26 circumstances where a party will certainly suffer harm if
27 it is not allowed to present its case fully, and that is
28 not the case here. It may well operate, successfully

1 operate, under IRM, in addition to which it ignores the
2 availability of the off-ramp and the ICM. IRM is at its
3 worst a one-year matter for Toronto Hydro. One year.

4 The argument also ignores the fact that Toronto Hydro
5 has to be presumed, acting reasonably, that it's put its
6 best case forward. It certainly had ample opportunity.
7 It's made the same arguments three or four times. It's had
8 an opportunity to file witness statements. It can put in
9 whatever exhibits it wants. It has to be presumed that it
10 made its best case.

11 Finally on this point, the implicit argument about
12 fairness is that if Toronto Hydro succeeds in this argument
13 the Board would have to hear evidence in every single case,
14 from every utility that says IRM shouldn't apply to us, it
15 would have to hear all of its evidence. And the Board's
16 processes would simply bog down.

17 In addition to which, this fairness argument ignores
18 the Board's obligation to balance the interest of
19 ratepayers and Toronto Hydro. You have -- you're not just
20 deciding a case about the interests of Toronto Hydro. You
21 have an obligation to consider the interests of Toronto
22 Hydro and its ratepayers. The Board has a statutory
23 obligation which requires it to look beyond the interests
24 of Toronto Hydro alone, and the impact on Toronto Hydro is
25 not the only consideration in this case. The impact of
26 this decision on the ratepayers is also within the ambit of
27 the Board's consideration.

28 Now, a second argument, and it's a corollary argument

1 that is raised by Toronto Hydro, and it does so in a kind
2 of a sly, back-handed way -- I mean sly in a pejorative
3 way, that kind of slides by the argument. But I'd ask you
4 to turn to page 113 of the transcript, because this is an
5 issue which is before you.

6 This is Mr. McLorg, in response, Madam Chair, to a
7 question from you about the fair return standard. And Mr.
8 McLorg says on page 113, beginning at line 6:

9 "As to the first part of the question, of course,
10 none of us on the panel would venture a legal
11 opinion, but I think it is clear from our
12 evidence that we believe there are circumstances
13 under which the imposition of the IRM model could
14 lead to a breach" - I underscore these words - "a
15 breach of the fair return standard."

16 And we have detailed what those circumstances are, and
17 in particular the circumstances around two aspects, and he
18 goes on and on.

19 So the argument, the implicit argument, is that the
20 Board is obligated to keep them on cost-of-service in order
21 to allow them to earn a fair return. If you don't do that,
22 it's a violation of the fair return standard.

23 Now, in my respectful submission, that argument about
24 the fair return standard turns necessarily on accepting all
25 of Toronto Hydro's evidence about its need for capital
26 spending. So if it doesn't need that capital spending, and
27 if it doesn't spend that, if it operates responsibly under
28 an IRM regime, the issue of the fair return standard, the

1 level of its ROE, will never arise.

2 In addition to which it has the off-ramps and it has
3 the incremental capital module. In my respectful
4 submission, there is no threat to the fair return standard
5 as a result of your making the decision, which we invite
6 you to make.

7 In addition to which, if this issue arises then again
8 the Board would be in a position of having to consider this
9 issue in a raft of other applications by other utilities.

10 We ask the Board, in conclusion - I believe I'm within
11 my time constraint - to dismiss Toronto Hydro's application
12 in its present form. It can come back with an application
13 to operate under an IRM regime.

14 I say with great respect to the able submissions of my
15 friends Mr. Faye, Ms. Sebalj, and Mr. Buonaguro that you
16 should not make adjustments to the existing regulatory
17 framework by accepting some hybridized model. You don't
18 need now to adjust the incremental capital module. Let
19 them operate under IRM and come back and make a case, if
20 they want to adjust the incremental capital module, to
21 adopt their particular circumstances.

22 To hear a part of their evidence, as some of my
23 friends have suggested, or to have a separate proceeding,
24 as I understand my friend Mr. Buonaguro is suggesting, is
25 again to create - I apologize for using this term again - a
26 hybridized model of regulation that really responds to the
27 special pleading of Toronto Hydro. If it hasn't made its
28 case, then it should operate under IRM. If it doesn't

1 work, it can come back within a reasonable period of time
2 to demonstrate on the evidence why it doesn't work.

3 And those are my submissions. Thank you very much.
4 Board Panel confers]

5 MS. CHAPLIN: Thank you, Mr. Warren. We don't have
6 any questions for you. Mr. Shepherd?

7 MR. SHEPHERD: Madam Chair, I'm ready to proceed, but
8 do you want to take the break now, because I'll be --
9 unless you want to take the break after four o'clock?

10 MS. CHAPLIN: Well, why don't we take a break now for
11 15 minutes, and then we'll finish with your submissions.

12 --- Recess taken at 3:18 p.m.

13 --- On resuming at 3:44 p.m.

14 MS. CHAPLIN: Please be seated. Mr. Shepherd?

15 MR. SHEPHERD: Thank you, Madam Chair.

16 And on the break, my friends were urging brevity on
17 me, essentially unanimously, so I'll do my best.

18 MS. CHAPLIN: Yes. And I will encourage you further
19 on that, because we will need to rise no later than 5:00,
20 so --

21 MR. SHEPHERD: Oh, I won't be 5:00.

22 MS. CHAPLIN: Okay.

23 MR. SHEPHERD: No question. So -- Mr. Warren is
24 laughing.

25 MS. CHAPLIN: Chuckling, is he?

26 MR. SHEPHERD: He doesn't respect my restraint as much
27 as he should.

28 SUBMISSIONS BY MR. SHEPHERD

1 MR. SHEPHERD: I want to start by setting the context.
2 We've had a lot of discussion today about the various
3 details and what the evidence says, et cetera, et cetera,
4 and I just want to step back a bit before I get into the
5 details and make -- because it's easy to forget this. And
6 I'm sure the Board Panel has not, but I'm sure some people
7 in the room have started to forget that the applicant is
8 seeking rate increases of 10 percent a year for at least
9 three years, with the expectation of more after that, after
10 already having big rate increases in past years.

11 And they have offered no plan and no schedule for how
12 they're going to get out of this cycle of ever-increasing
13 costs. That's an important point that I'm going to come
14 back to.

15 They just say we need more money every year into the
16 foreseeable future, and there's nothing anyone can do about
17 it.

18 So I think it's useful for us all to keep this context
19 in mind. Imagine trying to explain to somebody down there
20 just what I said: Your utility is asking for 10 percent a
21 year indefinitely into the future. Tough luck. If you're
22 a residential ratepayer, for example, your \$30 a month
23 average bill is going to be \$80 a month at the end of that
24 time. If you're a school, the school boards in Toronto
25 should expect their bill to be \$10 million higher 10 years
26 from now.

27 So my grandfather, before he died at the age of 97,
28 used to talk to me when I was a little bit younger about

1 what he called "are you kidding" situations. There are
2 situations in which somebody says or does something, and
3 your natural reaction is: Are you kidding?

4 And this is that sort of situation.

5 Now, why am I raising this? I'm raising this because
6 when somebody comes in and tells a story and makes a
7 request that is this extreme -- and they won't tell you
8 it's extreme, but if you just look at the facts, it's
9 clearly very extreme -- there should be a pretty steep
10 uphill road before they're allowed to proceed. It
11 shouldn't be easy to say: Look at this. We need a
12 gazillion dollars and everybody to say: That's all right.

13 To put it in the vernacular, the nuttier somebody's
14 proposal is, the less willing we should all be to accept
15 it. Now, I'm not saying their proposal is nutty, but what
16 I'm saying is that it is extreme.

17 So now let me move to the details. And I just want to
18 say that, in going through some of the issues I want to
19 deal with, I'm going to refer to things that were said in
20 the hearing and things that were said in the evidence. I
21 was not planning to go directly to the references, because
22 that would take quite a long time.

23 If it would assist my friend Mr. Rodger in doing his
24 reply, I am happy to go through the transcript of this
25 argument tomorrow, in the morning, and give him all the
26 evidence cites and provide that and file that with the
27 Board, if that would be convenient.

28 I just wanted to shorten the time, because if we go to

1 the transcript and everything, if we go to the evidence and
2 everything, it can take a long time. So if that's
3 acceptable, that's how I propose to proceed.

4 MS. CHAPLIN: Yes. Why don't you proceed on that
5 basis?

6 MR. SHEPHERD: So as Ms. Sebalj has set out quite
7 clearly, and I think correctly, Toronto Hydro is seeking to
8 be allowed an exception to the Board's normal policy that,
9 for distributors, rates are set one year on cost-of-service
10 and three years on IRM.

11 And because they're not the first to ask for this, you
12 actually have a set of criteria that have been set out for
13 the circumstances under which you get that exception.

14 And there has been considerable talk about what the
15 Board said about that, et cetera. I don't need to repeat
16 that, but I do want to characterize it. And I think I'm
17 agreeing with Board Staff, but -- I'm not sure, but I think
18 so.

19 The test appears to us to be whether the applicant is
20 unable to manage its affairs under IRM in the test year.
21 My emphasis is on "able" and that's because the thesis of
22 the applicant appears to be that if their proposed cost-of-
23 service exceeds the revenues generated by IRM, they've met
24 the test. In fact, you've heard them say again and again:
25 Look at our proposal. Just hear our evidence, please.

26 And with respect, we think that entirely misses the
27 point. At this stage in the process, their proposed budget
28 is irrelevant. They have not at this point demonstrated

1 that they should be allowed to present that budget.
2 They're at the point of asking for permission to show you
3 their budget, and they have to meet a threshold test in
4 order to do that.

5 The threshold test is that the circumstances of IRM
6 make them unable to manage in the test year. It's not
7 about what they want to spend; what they want to spend is
8 irrelevant. It's about what they're able to do under IRM.

9 And I'm going to take you in a few minutes to some
10 comparisons, which you've already seen for the most part,
11 to other utilities similar to Toronto Hydro, all of whom
12 appear to be doing just fine - thank you very much - on
13 IRM, and spending lots of money on capital expenditures.

14 And in that context and in light of the evidence
15 you've heard, our conclusion and the only conclusion we can
16 reach is that the applicant is unable to operate with
17 revenues on IRM only on the basis of one of two possible
18 reasons.

19 One reason is there's something inherently different
20 about them as compared to their peers or as compared to the
21 population of utilities that were reviewed when third-
22 generation IRM was created. Remember, this wasn't numbers
23 picked out of the air; it was a very serious process.
24 There's something inherently different about them that
25 causes them to be unable to manage under IRM.

26 Or, alternatively, their management or their ownership
27 is unwilling or unable to do it.

28 There's only those two choices; we can't think of

1 another one.

2 So the reason why I raise this is that it appears to
3 us that inability to remain within the Board's policy is
4 either external, caused by something external, or caused by
5 something internal.

6 I'm going focus on external, because frankly, I think
7 if it's caused by something internal, it's not the Board's
8 problem, it's the shareholder's problem. And we've made
9 that submission before.

10 So I'm going to focus only on the external causes of
11 them being unable to manage under IRM. And I guess by
12 focussing on external, that makes clear that what we're
13 saying is this inherent difference we're talking about, the
14 inherent difference cannot be: We have a bigger spending
15 program.

16 The inherent difference has to be something that is
17 external to them. It's a cause that's not under their
18 control that changes their ability to handle IRM.

19 I'm going to give you some examples because this is
20 not -- the real question here is not whether they should be
21 under IRM, I suppose, but where's the line? And so I'm
22 going to give you some examples.

23 There's at least one utility in this province that has
24 a single customer with more than half their load. If that
25 company closes, that customer, the utility could wait for
26 an off-ramp or they could ask for a Z-factor, but the smart
27 thing to do -- and, I suspect, exactly what the Board would
28 do -- would be to say: Your situation has changed. You're

1 in a unique situation. Get in here now, and we're going to
2 do a cost-of-service and fix this problem right away.

3 To give you another example, you're aware that there's
4 a small utility in Goderich that has a tornado last summer.
5 And I saw the video. Their whole downtown was destroyed.

6 So they're applying for a Z-factor, but it may well be
7 that fairly quickly they have to come in for cost-of-
8 service, because their situation has changed. It's not the
9 norm. So they're quite unique. IRM doesn't make sense for
10 them. It makes sense to look at the situation in more
11 detail.

12 I'll give you another example. There are utilities in
13 the province - I think there are utilities in the province
14 - that have their key communities declining in population
15 at steep levels. So their revenues are going down, and
16 they will go down in the future. They can show the
17 statistics. They can show the future, what's going to
18 happen.

19 If they can show that, they have an inherent
20 difference from the other utilities. They are unique, and
21 then it makes sense for the Board to say, Well, let's go
22 take a good look at this.

23 What the applicant offers for the reason why they are
24 unable to live within an IRM budget are, they have an
25 ageing workforce and they have ageing infrastructure. I
26 didn't hear anything else. That's it -- no, they had the
27 CEEDS argument, sorry. I'm going to get to the CEEDS
28 argument later. They just got their math wrong, but on the

1 substance of their claim, it is ageing workforce and ageing
2 infrastructure.

3 If they have those problems in the same way as their
4 peers, they have the same problem with those things as
5 Ottawa or Horizon or London or EnWin, then in our view they
6 should be held to the same standard as their peers.
7 They're not special.

8 However, if they're indeed a special case -- that is,
9 that the nature or the quality of those problems in Toronto
10 is unique to them -- then it does make sense for the Board
11 to say, Well, let's take a closer look. Let's treat you as
12 a special case. But first they have to prove that they're
13 a special case.

14 So that's the essence of our submission on the test,
15 is, your budget is not relevant. What's relevant is
16 whether you're unique. They make very clear they don't
17 think they're unique. They think you have a bad IRM
18 system. It doesn't apply to a lot of utilities, so if you
19 won't fix it, you should exempt them.

20 All right. So I want to move to the comparisons
21 between Toronto and their peers. And I'm not going to
22 spend a lot of time on it. You've seen the evidence
23 anyway. And we talked about it a bit in the hearing. But
24 I do want to make a clear distinction between two types of
25 evidence. And I use "evidence" in quotes. The applicant
26 talks about evidence as being their plans for what they
27 want to do. And I guess you could call that evidence, but
28 it's not actually evidence, it's actually proposals.

1 We also have historical evidence, real facts, about
2 Toronto Hydro, and we have comparative facts, again, facts,
3 about other utilities and how they compare to those other
4 utilities. That's different. It's fundamentally different
5 to have claims and proposals and future forecasts, as
6 opposed to things that are verifiable and empirical.

7 My friend Mr. Rodger in his argument and his clients
8 in their evidence do not make that distinction, but we
9 think that it's very important for the Board to make that
10 distinction, because empirical information is inherently
11 more reliable, because it's true. We know it's true.

12 All right. So let me talk about the comparisons. And
13 I'm going to first deal with two general comments.

14 The first is, we put a variety of comparisons to the
15 applicant in interrogatories, and then in the oral
16 proceeding, and their position, clearly set out by their
17 CEO - and I want to be extremely clear on that - is no
18 comparison of any type between Toronto Hydro and other
19 distributors is valid. Period. End stop.

20 And I'm going to quote you on this, because it sounds
21 like, well, that's pretty ridiculous, so I'm going to quote
22 you what he said. And this is on page 21 of the transcript
23 from last Friday.

24 Mr. Haines, in response to Ms. Sebalj -- I didn't even
25 get a chance to ask the questions. They were already on
26 the record -- he says, in talking about comparisons with
27 other distributors, I quote:

28 "I think we have to be careful about these

1 studies that compare us against others."

2 And then he goes on later, in the next paragraph,
3 still referring to those same studies:

4 "What I find with all of them is, there's always
5 a difference that makes sense but is not obvious
6 when you look at the raw data."

7 And he went on to give us his marathon example, which
8 I'm going to come back to.

9 So I understand what he's saying, and indeed, you
10 know, comparisons may not always be right. But what he
11 appears to be saying, and how I read what he's saying, is
12 this. Toronto Hydro can't be compared to anyone. If you
13 dig into the data deep enough you can always find an excuse
14 for poor performance. That's not an answer to this Board.

15 So my second general comment relates to their then-
16 contradictory statement that if they're going to be
17 compared to anyone it should be to major international
18 cities, it should be to London and Paris and New York, not
19 to Ottawa and Hamilton and Mississauga, Windsor. Perish
20 the thought.

21 So aside from the fact that this appears to be a
22 desperate attempt to find a comparison where you don't look
23 so bad, it also, we think, misses an important point. This
24 is the Ontario Energy Board. If you accede to their
25 argument that they can't be compared to anybody else in the
26 province, they can only be compared to these other world-
27 class cities, in our view you're saying to the other
28 utilities you regulate: The people and the businesses in

1 Toronto are entitled to a higher level of service than you
2 are, because they're special and you're not. And by the
3 way, conversely, you're also saying to the people of
4 Toronto: You're in a world-class city now, so get used to
5 paying twice as much for electricity distribution as your
6 friends in any other Ontario city. Neither of those things
7 is appropriate for this Board to say.

8 So let's turn to the comparisons, then. As I said,
9 I'm not going spend a lot of time on them, because the
10 point is ultimately a simple one. And I'm going to ask you
11 to take a look at something I've provided to you, a six-
12 page set of spreadsheets, because I know the Board would be
13 unhappy if I appeared before the Board without spreadsheets
14 in hand.

15 And I will tell you that the first page and pages 4,
16 5, and 6 of these are already in the evidence. The second
17 and third pages are additional calculations from the same
18 spreadsheet that we already provided to my friend earlier,
19 and that just compare different things.

20 MR. RODGER: And Madam Chair, on that, I object to
21 pages 2 and 3. This is an attempt to provide new
22 information in argument. There is no explanation or basis
23 for how these numbers have been derived. They obviously
24 weren't put to the witnesses. And it's completely
25 inappropriate for my friend to try and introduce new
26 information to the Board at this point.

27 MR. SHEPHERD: I have an explanation.

28 MS. CHAPLIN: Perhaps we could get the material first,

1 because I don't think we have it here.

2 MS. SEBALJ: Oh, I'm sorry. I was signalled, and I
3 thought the answer was you had it, but I clearly
4 misconstrued the answer.

5 MS. CHAPLIN: All right. Perhaps, Mr. Shepherd, you
6 could explain what we have, and then, Mr. Rodger, we'll
7 come back --

8 MR. SHEPHERD: All right. So the first page was the
9 border -- comparisons from the 2010 yearbook which were put
10 in School Energy Coalition Interrogatories 2 through 5, I
11 believe, and in each case the applicant said, Yes, they're
12 calculated correctly. So they also say, By the way,
13 they're not valid comparisons because you can't compare us
14 to anybody, but they said they're calculated correctly.

15 These are part of a full spreadsheet that sets out
16 these ten utilities, all their data. And so we calculated
17 some additional ratios, percentages, on pages 2 and 3.

18 Page 2 is in response to the specific statement by Mr.
19 Haines at the end of the oral evidence where he said, Well,
20 you know, any - I'm paraphrasing, because I don't actually
21 have it in front of me - Well, you know, any comparison
22 that uses customers misses 300,000 of our customers,
23 because we have 300,000 customers behind bulk meters, and
24 that's different from everybody else.

25 And so I'm going to come to that later and talk about
26 that allegation. But in response to that I had to then
27 say, well, okay, what data isn't on a customer basis, from
28 the same set of data.

1 Then -- and so that's those four comparisons.

2 And then the last page is in response to Mr. Haines'
3 comment that -- and again I'm paraphrasing, but it's sort
4 of, The whole world is watching. All the other
5 distributors are looking to us as a lead, because a lot of
6 people have these same problems.

7 And so we said, okay, let's go look and see if that's
8 true. And we did. And that's what those four are.

9 So all we're doing is taking the same data set, it's a
10 public data set, and we're doing exactly the same type of
11 calculations as the applicant has already said we're doing
12 correctly. And I couldn't do it before, because this stuff
13 only came up -- the only reason it's being raised is
14 because they put it in oral evidence.

15 MS. CHAPLIN: So Mr. Rodger, which ones are you...

16 MR. RODGER: So it's pages 2 and 3.

17 MS. CHAPLIN: Okay.

18 MR. RODGER: And then I think Mr. Shepherd illustrates
19 my point. He just said that he's providing this new
20 information as a response.

21 Well, it's not Mr. Shepherd's right, first of all, for
22 him to give evidence, but on new information in final
23 argument.

24 MS. CHAPLIN: He's doing -- do I understand it
25 correctly, Mr. Shepherd, that you are doing different
26 calculations on information that was already put to the
27 witnesses for their verification?

28 MR. SHEPHERD: I'm doing different calculations on the

1 spreadsheet that was already put to my friend, to my
2 friend's clients.

3 Now, I want to be clear. What I put to the witnesses
4 on the record is page 1. What I -- but page 1 is
5 calculated based on a full spreadsheet of the yearbook
6 data. So then we took that same spreadsheet and did
7 further calculations on pages 2 and 3. So the same set of
8 data we already provided to them, so it's not new to them.
9 And it's all public information.

10 So if I'm not allowed to put this in, all I'm going to
11 say in my argument is I would like you, please, to go to
12 the yearbook and do the following calculations and you'll
13 get the following results, which I am absolutely allowed to
14 do.

15 MR. RODGER: No, you're not. This is inappropriate,
16 Madam Chair. This is new information. There's no basis
17 for how this is calculated. And our witnesses never had an
18 opportunity to respond to it.

19 So he can't, in final argument, introduce new
20 evidence.

21 MS. CHAPLIN: Is it new information or is it analysis
22 of information that's already been on the record?

23 MR. RODGER: I don't know. I don't know on what basis
24 it was calculated on, or where the numbers were taken from.
25 The witnesses were never -- these two sheets were never put
26 to Mr. Haines or anybody else on the panel.

27 MS. CHAPLIN: No, no, I understand that. I guess what
28 I'm asking is: Is your suggestion -- or is your position

1 that given all of the material and evidence and numbers
2 that are put on the record, are parties precluded from
3 doing calculations based on that, to show analysis and draw
4 conclusions?

5 MR. RODGER: They can draw a calculation, but I think
6 what my friend is suggesting is they're providing you with
7 this new information in a new form we don't know the basis
8 of and asking you to draw conclusions on it.

9 And as I say, it's not for my friend to put forward
10 evidence, particularly at this stage in the proceedings.
11 I've got no problem with page number 1; that was put to the
12 witnesses. But 2 or 3 are just wherever they come from.

13 MR. SHEPHERD: Maybe I could simplify this, Madam
14 Chair, because I think it's actually relatively simple.

15 So for example, take a look at page 2. The first one
16 is distribution costs per delivered kilowatt-hour. The
17 yearbook data has the distribution costs. It's right
18 there; it's the Board's number, not ours. In fact, it's
19 Toronto Hydro's number, really.

20 And the delivered kilowatt-hours is also in the
21 yearbook. It's a straightforward number. We didn't make
22 it up, we didn't change it, nothing. All we did was divide
23 one by the other. That's all we did.

24 MS. CHAPLIN: Sorry, so you're saying that what -- if
25 I'm looking at page 2 in the top left-hand corner, top
26 left-hand quadrant, that what doesn't show here but what
27 could have showed are two columns of data taken directly
28 from the yearbook? You've done a division?

1 MR. SHEPHERD: That's all.

2 MS. CHAPLIN: That's all.

3 MR. SHEPHERD: And by the way, those two columns of
4 information have already been provided to Toronto Hydro,
5 because it's in the same spreadsheet that backed up the
6 first set of calculations.

7 There's nothing new here. This is not magical.

8 MS. CHAPLIN: And the characterization of that table
9 in the top-left quadrant is equally applicable to all of
10 the other --

11 MR. SHEPHERD: Yes, in every single case.

12 MS. CHAPLIN: On page 2 and page 3?

13 MR. SHEPHERD: In every single case, it is a division
14 of one number into another -- oh, sorry, with one
15 exception. Sorry, with one exception.

16 If you take a look at page 3 in the upper-right
17 quadrant, this is a calculation of ROE, based, again, on
18 the same data but adjusting the equity as if it were at
19 40 percent; so solving for equity thickness.

20 But other than that, every one is just a ratio of two
21 numbers in the yearbook.

22 MS. CHAPLIN: Which you're confirming had already been
23 put in your --

24 MR. SHEPHERD: That have not been put to them on the
25 record, but have already been provided to the applicant, in
26 Excel format. We gave them the whole thing.

27 MS. CHAPLIN: Okay. Well, we'll adjourn for a few
28 minutes.

1 --- Recess taken at 4:08 p.m.

2 --- On resuming at 4:28 p.m.

3 MS. CHAPLIN: Please be seated.

4 The Board has considered the matter, including Toronto
5 Hydro's objection to the introduction of this material.
6 The Board has decided that it will allow these tables to be
7 entered on to the record, and we conclude that for these
8 reasons.

9 First, these tables represent the calculation of
10 numbers already -- that are in fact publicly available,
11 Board-produced numbers; that all -- that these tables in
12 the first instance represent the calculations based on
13 these publicly available numbers. Toronto Hydro will be
14 fully able to verify those calculations and, if they are
15 incorrect, will be able to bring that to our attention.

16 And the other reason is that we feel that this issue
17 was brought to our attention through the testimony, in
18 fact, of Mr. Haines. And I would reference in particular
19 transcript pages 128 and 129, where Mr. Shepherd was having
20 some discussion about the comparability of Toronto Hydro,
21 and Mr. Haines said:

22 "So when you compare us against a customer
23 number, as opposed to a volume number, you get a
24 vastly different outcome, you would agree?"

25 And therefore our conclusion is that Toronto Hydro was
26 introducing the idea that on a different type of comparison
27 a different outcome would arise, and we think that it is
28 helpful for us to understand what those calculations would

1 in fact show.

2 So we will admit them. What we will require is that
3 Schools provide the spreadsheets and the full detail to
4 Toronto Hydro so that they can see all of the underlying
5 calculations and numbers. And it will also be open to
6 Toronto Hydro in reply to make argument as to the weight
7 that would go to this, because we do realize that any
8 conclusions which -- or perhaps there may be conclusions
9 that Schools would wish us to draw from this data and that
10 those conclusions have not been put to the witnesses.

11 MR. RODGER: Thank you, Madam Chair. Maybe I could
12 also clarify, Mr. Shepherd gives us the basis of the
13 calculation. Page 1 he talks about -- or it's referenced,
14 the 2010 yearbook data. So I'm taking -- I take it this is
15 2009 actuals? And are pages 2 and 3 again, are they just
16 2009, or are they 2009 and 2008? If you could just spell
17 that out, what years we're looking at?

18 MR. SHEPHERD: The 2010 yearbook is the yearbook with
19 respect to 2010, so it's all 2010 data. It is the same
20 data for every calculation on these three pages. The exact
21 same data set, no changes.

22 MS. SEBALJ: So I'll give it an exhibit number. K4.7.
23 Thank you.

24 **EXHIBIT NO. K4.7: SET OF SPREADSHEETS OF SCHOOL**
25 **ENERGY COALITION.**

26 MR. SHEPHERD: Thank you, Madam Chair. I will still
27 remain within my five o'clock drop-dead time, that not
28 intending to be an invitation, but...

1 So I want to deal then with Mr. Haines' quote, where
2 he says they have 300,000 additional customers behind bulk
3 meters who are not counted.

4 We assume that these are -- we can't find that number
5 anywhere in their evidence, but we assume that he's talking
6 about apartment dwellers, because they're the only ones,
7 the residential customers that we know of, that are behind
8 bulk meters. So these are customers for whom they don't
9 pay for a service to the customer. They don't have a
10 meter. They don't bill them. They don't provide them any
11 customer care. None of those costs are associated with
12 these customers.

13 Their only cost is the system cost associated with any
14 incremental throughput or incremental peak load. So we
15 said, okay, well, then, if he's right, if in fact Toronto
16 Hydro is disadvantaged because they have more apartments
17 than anybody else, which, by the way, having been to these
18 other cities, I'm not sure that's true, but let's just say,
19 let's accept that for argument, then what measurements
20 could we use that would back that out?

21 And the answer is, we could look at distribution costs
22 per delivered kilowatt-hour throughput or distribution
23 costs per peak kilowatt, which then should be -- should
24 move the other way if they have a bunch of hidden
25 customers. But the fact is that on those ones they are
26 again the worst performers.

27 So then we said, well, okay, there's one other measure
28 you could use. You could use population of the area

1 served, because the population then, doesn't matter where
2 they live. You're still serving them, right? But then on
3 population served, ah, there is one that's worse than them.
4 EnWin is worse than them. Everybody else is better. The
5 average of the other nine is \$163.68 per person, per
6 population. Toronto Hydro is \$210.

7 We also thought we'd look at whether there's a density
8 issue here, but we cannot -- we've included this only for
9 completeness, just in case they want to argue about this as
10 well. We can't conclude anything from the density
11 comparison, except that they have a higher cost per
12 kilometre of line, but that may well be because they're
13 more urban.

14 So I'm not going to go to page 3 of that. I'm going
15 to come to that in a minute. What I wanted -- the only
16 point I'm trying to make here is this. Mr. Haines used the
17 metaphor of the marathon runners. He says, well, if you
18 compare the marathon runners on one basis and then you find
19 an additional fact, you might find that the comparison is
20 unfair.

21 What this shows -- because remember, we've already
22 compared them, on page 1 you'll see, on the basis of PP&E
23 per customer, they have the most expensive existing system
24 per customer. On distribution revenue per customer they
25 ask for more revenue than anybody else per customer. Their
26 revenue per customer is \$752.26 in 2010, the other nine
27 urban utilities, \$482. It's not a little difference, it's
28 a big difference.

1 Their capital spending is two-and-a-half times the
2 average of the others. Their OM&A per customer is
3 160 percent of the average of the others. It doesn't
4 matter what you measure them on -- and we looked. We tried
5 to find something that they might throw at us in reply that
6 would say, oh, yes, now, look at this measure, we're better
7 on this one. We can't find one.

8 So let's go back to the metaphor of the marathon
9 runners. In this situation Toronto Hydro is last in the
10 elite category, they're last in the novice category,
11 they're last in both gender categories, they're last in
12 their own age category and, by the way, all the other age
13 categories too. No matter how you compare them, they have
14 the worst performance.

15 So here's our point: Toronto Hydro shows itself on
16 empirical evidence to be a poor performer relative to every
17 other urban LDC on every metric possible. So faced with
18 those facts, we gave them lots of chance to explain them
19 away.

20 They chose not to. Again and again and again they
21 said, Oh, well, you just can't compare us. I'm sorry, but
22 the consequence of saying, You can't compare us to anybody,
23 should be -- the Board should conclude that they are poor
24 performers, simple as that. They had a chance to show that
25 they were not; they didn't.

26 All right. I have only a couple of other points to
27 deal with before I get to the grand finale. I was going to
28 spend some time talking about productivity, but I think in

1 the interests of time I'm going to shorten this.

2 We asked in interrogatories, how much have they saved
3 from productivity initiatives? And they said, Well, no, we
4 don't keep that sort of record; we don't keep track of how
5 much we save from productivity initiatives. Then in the
6 oral evidence Mr. Haines went on at some length describing
7 how they cut staff and they cut the number of job
8 descriptions. But all of that information is entirely
9 anecdotal. No data was provided as to how much they saved.
10 And we asked them, again and again, How much did you save?
11 They couldn't tell anybody.

12 This is what Mr. Warren was referring to as rhetoric.
13 There were lots of stories. There was a big speech. But
14 when the rubber hit the road, there was no data, no
15 information on productivity at all. Zero.

16 And indeed, the stories themselves were, you had to
17 ask yourself how much is exaggeration and how much is true.
18 And I'm going to give you one example. And this is -- I
19 don't actually have the reference, but I'll give it to you
20 in the morning.

21 Mr. Haines said they have 40 of their 1,700 feeders in
22 the worst-performing category. You'll recall that
23 discussion with MS. CHAPLIN:, that they used to have 80 and
24 now they have 40. And he went on to say since there are
25 3,000 customers on a feeder, that's 120,000 customers, with
26 at least two people served at each of those locations;
27 240,000 customers -- a terrible result -- that have regular
28 outages.

1 So I did the math. I said: Okay. 1,700 feeders,
2 3,000 customers per feeder, that's 5.1 million customers.
3 But they don't have 5.1 million customers. What do they
4 have? 700,000? Something like that?

5 So, then, how did he get to these 120,000 suffering
6 customers? That can't be right, unless -- unless -- the 40
7 worst-performing feeders are the longest ones they've got.
8 And then you would have to ask the question: Why would you
9 leave those ones to last?

10 That's just one example. There's exaggerations
11 throughout the evidence, and I'm sure that when the Board
12 Panel looks at it, in reading through excerpts from the
13 transcript, that lots will pop out to you, as well. This
14 was just one that popped out to us.

15 My point on productivity is this. Unlike every other
16 well managed large company that I know, and I know lots of
17 them, Toronto Hydro says they don't measure the costs and
18 benefits of their productivity initiatives.

19 If that's true, you have to ask yourself: How are
20 they managing the company? Because this sounds like
21 management 101 to me. In your first year of B school, you
22 learn you have to measure these things or else you won't
23 know if you're doing a good job.

24 So I'll leave that there, and let me go to the
25 argument on CEEDs, C-E-E-D-s.

26 Toronto Hydro has created this acronym, which they use
27 at every chance they get, and indeed, they've got lots of
28 other people using it now, which is I suppose what they

1 wanted.

2 And the acronym is the basis for their notion that IRM
3 only provides funds for capital spending equal to
4 depreciation. Anything above that -- which they call
5 "CEEDs" -- is unfunded. And further, there's an additional
6 amount that's unfunded because of the half-year rule.

7 So the first time I heard this, I was taken a little
8 aback. Not only is it mathematically incorrect -- if you
9 do the math, it's just not right -- but the Board's been
10 through this discussion in considerable detail. Not:
11 Let's take a look, but with submissions and spreadsheets
12 and several experts putting forward their proposals for
13 what the right number would be.

14 So I was originally planning to file a mathematical
15 model that actually demonstrates it, because it's not that
16 difficult to do, but it is quite a complicated model. But
17 I guess it's a good idea that I didn't.

18 But anyway, I decided not to file that, but I want to
19 deal instead with this question of CEEDs in three ways.

20 First, I'm going invite you to look at the debate that
21 went on in EB-2007-0673. That's the third-generation IRM
22 proceeding.

23 And you may recall that in the second phase of that,
24 one of the issues was: What should the threshold be for
25 the capital module? And the issue that was being debated
26 was how much cap-ex is funded by IRM, and there were
27 formulae put forward by two ratepayers groups, by two
28 utility experts and by Board Staff; all of those said that

1 IRM funds an amount in excess of depreciation, the minimum
2 estimate being 20 percent more than depreciation, assuming
3 no growth. Growth is on top of that.

4 Further, the Board's expert witness made a point - and
5 that's Larry Kaufmann of Pacific Economics Group - although
6 he didn't provide a number because he wasn't asked to,
7 stressed in very strong terms in his own presentation that
8 the method used to set the escalator already builds in past
9 capital spending levels. It already builds in that
10 trajectory of spending in excess of depreciation. It's
11 already in there.

12 And the Board ultimately settled on one formula, which
13 by the way wasn't a dead band. The formula - it turned out
14 to be Randy Aiken's formula - was based on the notion that
15 IRM funds that amount already. You don't need more money
16 for that.

17 So -- and I invite the Board to look at that debate.
18 It was in excruciating detail. There's algebra that -- I
19 mean, I presented algebra that I don't understand today.

20 Second, I want to briefly describe the logic of this.

21 When assets are put into service, the cost of the
22 asset is a fixed cost, spread evenly over its useful life,
23 but since the net book value is going down, the relevant
24 costs of capital -- that is, the interest, the ROE and the
25 PILs -- is also going down every year. So your revenue
26 requirement needs for that existing capital is dropping
27 every year.

28 What this means is that there are four sources of

1 funding for cap-ex.

2 The depreciation allowance, of course, is available.
3 You can spend that much, because you're just replenishing
4 what you had.

5 The IRM escalator, which escalates all costs,
6 including depreciation, including ROE, et cetera.

7 The decline in the cost of capital year over year for
8 the existing assets; what I just talked about.

9 And organic growth.

10 There is no way that the percentage of those things
11 can be zero. Mathematically, that's not possible. I
12 suppose if you had negative growth, it could be, but
13 otherwise it can't be.

14 And then, third, I want to take you back to Exhibit
15 K4.7, because on the third page of that decision, you'll
16 see that all of the applicant's peers spent considerably
17 more than inflation -- sorry, considerably more than
18 depreciation on capital spending. Most of them were in IRM
19 that year, but on average they spent 183 percent of
20 depreciation.

21 Now, I want to be clear here. This is CGAAP
22 depreciation, so it's actually considerably lower than the
23 current depreciation.

24 And so their average is 183 percent. However, if you
25 look above that at the two ROE calculations, you'll see
26 that most of them did fine, thanks very much. Their
27 average actual ROE was 9.31 percent in that year, and their
28 average ROE, if you adjust their equity to be 40 percent so

1 you take away the equity thickness issue, is 8.34 percent.
2 None of them appear to have a financial problem. They all
3 appear to be fine, and yet they're spending a lot of money
4 on capital.

5 So the third argument is, well, whatever you think of
6 the math, your peers, all of them, are doing just fine.

7 I was going talk about the implications of this for
8 regulation of distributors, and Mr. Haines' statement, you
9 know, the whole world is watching, everybody is listening,
10 watching this case, and we had Mr. Sasso in the room, and
11 we had, I'm sure, lots of other people listening. In fact,
12 we joked at the break that you should check your ratings
13 and see whether you could sell advertising, because, you
14 know, you might make some money.

15 But I think Mr. Warren's covered this properly, and I
16 don't need to say more. So I want to cut right to the
17 chase, what we propose. And what we propose is this.

18 In our submission, the Board has a policy on rate-
19 setting for distributors. One year cost-of-service,
20 followed by three years of IRM.

21 Toronto Hydro had a clear path to show that they
22 should be an exception. They had to show that they were
23 inherently different than the underlying basis for IRM;
24 they have not. They haven't, in fact, even tried. They
25 have just said: We want to spend more money.

26 And as a result, we agree with Mr. Buonaguro; the
27 Board really should not consider any other option but:
28 This utility is on IRM. However, I do want to make two

1 other comments about that.

2 First, as I think is now clear, and so I won't go into
3 it in too much detail, Toronto Hydro's talking about all
4 the terrible things that would happen if they were on IRM
5 forever.

6 The reality is that you don't have to deal with all
7 years. You can deal with 2012. And if you deal with 2012,
8 what's the worst that can happen?

9 Well, the worst that can happen is that they have
10 restrictions on what they can spend or restrictions on
11 their budget, what they can charge, at least, for one year.
12 But you'll also in your decision, presumably, give them
13 some clearer guidance -- clearer to them, it's pretty clear
14 to me already, but clearer to them -- on what they need to
15 show in order to come back on cost-of-service.

16 If they really are inherently different, as they claim
17 to be, then they should come back next year, in fact they
18 should come back next month, because it might be a long
19 one, and show you, with real empirical evidence, that they
20 are in fact different. They should come back and show you,
21 for example, that employee compensation levels in Toronto
22 are different than anywhere else in the province. And not
23 only is it different in the sense of what's built into
24 rates already but, in addition, it's increasing more
25 quickly. So IRM doesn't compensate for that.

26 They should come back with detailed vintage data that
27 shows that, yes, compared to other utilities their system
28 is older than anybody else's. It isn't, actually, but

1 let's theorize that that is part of their argument, that's
2 what they should do.

3 They should come back with -- let's say one of their
4 arguments is, We're an urban utility, and so as a result
5 our poles deteriorate faster than in the countryside
6 because of air pollution. They can come back with an air
7 quality analysis that says, Lookit, see? This is why --
8 one of the reasons why we're different. They have done
9 nothing like that. They've given you nothing like that.

10 But if they are able to do that, if any of those
11 things are true, or any other things like that are true,
12 they can come back for 2013 with clear evidence that meets
13 the test in a proper manner.

14 My second comment is that you saw the spending and ROE
15 results of the other urban utilities in the province, what
16 they have in OM&A, what they spend on capital. All of them
17 have been, for most of the last few years, on IRM.

18 You'll also be aware that Enbridge and Union have been
19 on IRM for five years and they've done very, very well, and
20 their systems aren't falling apart, by the way.

21 The worst performer of the bunch is the only one
22 that's been on cost-of-service for the last five years,
23 Toronto Hydro. Our conclusion from that is that it's time
24 that they had the discipline and the expectations that IRM
25 builds in.

26 In our submission, this applicant will continue to be
27 the worst performer in the province until the Board sets
28 some real expectations and expects them to meet them.

1 Doesn't accept any excuses; expects them to meet them.

2 Right now they focus on how to convince you to give
3 them more money. Maybe they would be better off and their
4 ratepayers would be better off if they spent all that
5 energy focusing on delivering their product at a lower
6 cost. In our submission, the best thing the Board could do
7 for Toronto Hydro and for its ratepayers is put them on IRM
8 and expect from them what their peers are already
9 delivering under IRM.

10 All right. The one other thing I want to comment on
11 is Mr. Buonaguro's submissions with respect to a review.
12 In addition to putting them on IRM, have some sort of
13 review, maybe cost-of-service for 2013, whatever.

14 And this is the -- Mr. Buonaguro talked about it as
15 "scary stuff", and I would say this is the "what if they're
16 right" question. They've said, The sky is falling, the sky
17 is falling. And I agree with Mr. Warren, I don't think
18 what they're saying is credible, and I think the empirical
19 evidence makes it pretty clear that it's not credible.

20 But what if they're right? You may conclude that
21 that's too much of a risk to take. On the other hand, if
22 they are right, then clearly this is not a normal cost-of-
23 service proceeding, whatever proceeding you have to look at
24 their costs, look at that issue. It's not a normal cost-
25 of-service proceeding. It's not business as usual. It's
26 not a normal situation.

27 They're saying, Compared to everybody else, we
28 need billions of dollars more per capita. We need billions

1 of dollars more than anybody else to serve our customers.

2 So we think that, if that's what they want, that you
3 need to set up a procedure for, whether it's cost-of-
4 service or whether it's a Board-initiated review of their
5 operations, it doesn't matter, really, it's all the same
6 issues, in which there is a much more thorough and
7 extensive review of their system and how they're running it
8 than would normally be the case in cost-of-service.

9 If there are several billion dollars at stake, it's
10 worth the effort to do that right. Now, it will take some
11 time, and I can tell you that the first thing that we're
12 going to do and probably with the other ratepayers is ask
13 you to allow us to retain engineers and other consultants
14 to actually look at their system, go in on the ground, have
15 access to their system and take a look and see, do they
16 have a big problem? How do they compare to other
17 utilities? Is there something they're doing wrong? All
18 those sorts of questions. We're going to ask to take a
19 look, and it will take a while, and it will be an expensive
20 process, but it's less expensive than authorizing \$5-
21 billion or whatever the number is over the next ten years.

22 And so our position is, we don't think it's necessary
23 to do that, because we think if the applicant is actually
24 right that the sky is going to fall in, they'll be back
25 pretty soon with some more evidence, and then you can do
26 that then.

27 However, if you're inclined to take a look at it and
28 answer the "what if they're right" question, we think that

1 it should be done with the gravitas that is necessary for
2 the seriousness of the problem as they've described it.

3 And so my final comment is this. I'm coming back to
4 the "are you kidding" discussion. If it's determined in
5 whatever forum that Toronto Hydro does need to go on some
6 massive spending spree, whether you allow them on cost-of-
7 service to appear or whether you have a carryover
8 proceeding or whatever, if the final determination is that
9 they do need to spend a whole lot of extra money, and if
10 it's to determine that the ratepayer rather than the
11 shareholder should bear some or all of the cost of that,
12 which is, of course, going to be another live question if
13 it turns out their system is a mess, then in our
14 submission, and it's an essential element of any decision
15 by the Board on that, authorizing that, is a clear and
16 credible plan in place at the outset for Toronto Hydro to
17 get out of that mess, so that you can see the trajectory,
18 and that you know that if you allow them to spend the money
19 it's not just going to get worse, it's going to get better,
20 and there is a point in the future that we can see where
21 they will be delivering a reasonable service at a
22 reasonable cost.

23 And it's our submission that, without that, you should
24 not authorize them to spend one more dime.

25 Those are our submissions.

26 MS. CHAPLIN: Thank you. The Panel has no questions.
27 So I believe that concludes for today. We will have
28 Toronto Hydro's reply argument on November 24th, and Mr.

1 Shepherd, you're going to deliver the evidence references
2 for your argument, as well as the detailed spreadsheet to
3 the Board and to the parties.

4 MR. SHEPHERD: I will.

5 MS. CHAPLIN: By tomorrow?

6 MR. SHEPHERD: Probably lunchtime.

7 MS. CHAPLIN: Okay.

8 MR. CROCKER: Madam Chair, one point, please, before -
9 - so that AMPCO doesn't feel slighted at the end of this --
10 it's not me where I'm concerned with, it's AMPCO -- could
11 we have the submissions which we filed after I summarized
12 for five minutes marked as an exhibit, please? Thank you.

13 MS. SEBALJ: Sure. I was actually going to do that,
14 so please don't feel slighted.

15 **EXHIBIT NO. K4.8: AMPCO SUBMISSIONS FILED BY**

16 **MR. CROCKER**

17 MS. SEBALJ: And can I just raise -- you indicated,
18 Madam Chair, that you were expecting reply from Toronto
19 Hydro on the 24th.

20 MS. CHAPLIN: Did I give the wrong date?

21 MS. SEBALJ: No, but I'm assuming that that's reply on
22 this piece and that whatever piece goes forward or not with
23 respect to the other issue.

24 MS. CHAPLIN: Right. On the jurisdictional question,
25 so we have the proposal that that would be dealt with in
26 writing. The Board will turn its mind to the timing, and
27 we will communicate that to parties shortly.

28 MR. RODGER: Madam Chair, I guess I was wondering, on

1 the jurisdiction question, it wasn't clear to me, and maybe
2 I'm just confused with some of the earlier submissions, but
3 I was under the impression that the Board was going make a
4 decision on whether in fact the written submissions on the
5 jurisdiction question was even needed at this point. And I
6 think that's what I flagged at the outset, that certainly
7 in our view we don't think it is needed, because we would
8 be dealing with a hypothetical situation, that the question
9 of jurisdiction will only arise once the Board has already
10 made a finding of fact and rendered a decision.

11 And then in that context the parties could then put
12 submissions on the jurisdiction, based on what you've
13 decided, but at this point it seems to me that we'd be
14 putting submissions on a hypothetical situation, which in
15 our view just is not needed and is not productive and
16 consumes valuable resources.

17 So unless I've misinterpreted your earlier statements,
18 I thought that was kind of the question that you were going
19 to address before the parties launched into actually making
20 submissions in writing.

21 MS. CHAPLIN: Mr. Rodger, was it -- and thank you,
22 yes, for reminding me of that.

23 I think the question that I have flowing from that is:
24 Is it Toronto Hydro's position that if the Board were to
25 make -- it would depend upon the grounds on which the Board
26 made its finding as to what would influence whether or not
27 Toronto Hydro is of the view the Board had the jurisdiction
28 to --

1 MR. RODGER: That's correct, that at this point we
2 don't need to address that issue, because the question of
3 whether the Board would have jurisdiction would only come
4 into play depending on the finding of facts and the
5 decision that you ultimately render.

6 Otherwise, we'd be speculating, if the Board decides X
7 on grounds A, B and C, the Board has jurisdiction or not.
8 But I'm saying I'm not sure we have to make any of that
9 speculation today.

10 MS. CHAPLIN: So if I understand you correctly, you
11 are saying that the Board might decide to dismiss Toronto
12 Hydro's application and there might be some basis upon
13 which that is within the Board's jurisdiction, but there
14 might also be other bases upon which that's not in the
15 Board's jurisdiction?

16 MR. RODGER: That's correct.

17 MS. CHAPLIN: So you can't give a clear answer to my
18 question of, you know: Does the Board have the authority
19 to dismiss Toronto Hydro's application?

20 MR. RODGER: That's correct. I think the Board has to
21 make that decision first, and as I say, it would just
22 become a hypothetical at this point.

23 MS. CHAPLIN: Mr. Warren? Mr. Shepherd?

24 MR. SHEPHERD: Madam Chair, I'll just have one
25 statement. It is unusual for the Board to exercise
26 jurisdiction without first deciding whether it has it. It
27 seems odd to me.

28 MR. WARREN: Madam Chair, this whole issue arose

1 because Mr. Brett feels it's incumbent on him to raise some
2 argument of some nature about jurisdiction. If Mr. Brett
3 doesn't raise the argument, then we don't need to do
4 anything about jurisdiction.

5 So I pass the ball back to Mr. Brett and ask him if he
6 is insisting on his -- that he wants to make some argument
7 about the Board's jurisdiction to make this decision.

8 If he says yes, then part of what the Board has to do
9 is decide on a structure of arguments, because he's the
10 only one who feels there's a concern, so everybody else has
11 to respond to Mr. Brett. So I'd ask Mr. Brett to tell us
12 if he's really insistent that he needs to make this
13 argument, because otherwise we don't need to do anything.

14 MS. SEBALJ: May I chime in at this point, before Mr.
15 Brett answers?

16 MS. CHAPLIN: Certainly.

17 MS. SEBALJ: I'm under a different impression, and
18 maybe -- I don't want to add any confusion, but what I'm
19 hearing Mr. Rodger say is that there may be a
20 jurisdictional argument, depending on what this Board
21 decides at the end of the day.

22 And to my mind, it is extremely important for the
23 Board to decide at the outset what its jurisdiction is and
24 not wait until any party in this proceeding dislikes the
25 outcome before finding that there is a jurisdictional
26 argument, and that we then engage in it.

27 I don't know. From the Board's perspective,
28 obviously, we don't want to waylay the schedule, from Board

1 Staff's perspective, but if there is a jurisdictional
2 argument on the table, whether contingent or present, in
3 Board Staff's view, we need to address it.

4 MS. CHAPLIN: Thank you. Mr. Brett?

5 MR. BRETT: Yes. Well, I've made my submissions on
6 this already, and I think it was Mr. Shepherd that first
7 raised the issue of: Well, we should have --

8 MS. CHAPLIN: Sorry. Mr. Warren, you're sharing a
9 microphone, so just --

10 MR. BRETT: You and I are linked at the hip here.

11 MR. WARREN: I'll slit my wrists now, Mr. Brett.

12 MR. BRETT: Yeah, well, I'm sure. Think about me.

13 [Laughter]

14 MR. BRETT: In any event, I mean, I've made my
15 submissions. Perhaps for clarity, and I -- you know, God
16 save me from people who take notes, as the late Grattan
17 O'Leary said, but this is a hearing.

18 For clarity, I said that if the Board were to -- that
19 the Board does not have the jurisdiction to say that --
20 does not have the jurisdiction to dismiss the application
21 on the grounds that it conflicts with -- on the grounds
22 that it's a cost-of-service application and not an IRM
23 application, and for that reason only. I think that's what
24 I said.

25 In other words, it cannot make a peremptory dismissal
26 of the case. And I don't know that I want to take it any
27 further than that; I don't know that I've thought any
28 further than that, but I'm reasonably comfortable with that

1 statement.

2 MS. CHAPLIN: All right. The Panel is not in a
3 position at this point to reach a conclusion, so we will
4 consider this matter and advise the parties as soon as we
5 are able. Thank you very much.

6 --- Whereupon the hearing adjourned at 5:04 p.m.

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