



ONTARIO ENERGY BOARD

FILE NO.: EB-2011-0120

VOLUME: 2

DATE: July 23, 2012

BEFORE:	Cynthia Chaplin	Presiding Member and Vice Chair
	Ken Quesnelle	Member
	Karen Taylor	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 an application by Canadian
Distributed Antenna Systems Coalition for certain
orders under the Ontario Energy Board Act, 1998.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Monday, July 23rd, 2012,
commencing at 9:36 a.m.

VOLUME 2

BEFORE:

CYNTHIA CHAPLIN	Presiding Member and Vice-Chair
KEN QUESNELLE	Member
KAREN TAYLOR	Member

A P P E A R A N C E S

KRISTI SEBALJ	Board Counsel
VINCE COONEY	Board Staff
HELEN NEWLAND MONICA SONG	Canadian Distributed Antenna Systems Coalition (CANDAS)
JOHN VELLONE AMANDA KLEIN	Toronto Hydro Electric System Limited (THESL)
DEVIN McCARTHY	Canadian Electricity Association (CEA)
ROBERT WARREN SARAH YUN	Consumers Council of Canada (CCC)
ALAN MARK AFREEN KHAN	Electricity Distributors Association (EDA)
DAVID MacINTOSH LAWRENCE SCHWARTZ	Energy Probe Research Foundation
RUTH GREEY JOHN BOLDT	Hydro One Networks Inc.
MICHAEL JANIGAN	Vulnerable Energy Consumers Coalition (VECC)
ALSO PRESENT:	
COLIN McLORG IVANO LABRICCIOSA MARY BYRNE ROB BARRASS DIANA WEIR	Toronto Hydro-Electric System Limited

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U N D E R T A K I N G S

Description

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NO UNDERTAKINGS WERE FILED IN THIS PROCEEDING

1 Monday, July 23, 2012

2 --- On commencing at 9:36 a.m.

3 MS. CHAPLIN: Please be seated.

4 Good morning, everyone. The Board is sitting today in
5 the matter of application EB-2011-0120 submitted by the
6 Canadian Distributed Antenna Systems Coalition, CANDAS,
7 filed on April 25th, 2011, subsequently amended by letters
8 dated May 3rd and June 7th, 2011.

9 I will not go through the details of the requests in
10 that application. I believe they are well known to all the
11 parties.

12 This proceeding has carried on for some considerable
13 time. At the request of the applicant, the Board allowed
14 the applicant and Toronto Hydro to undertake settlement
15 discussions. When that was unsuccessful, the Board
16 convened a settlement discussion amongst all the parties.
17 That, too, has been unsuccessful.

18 The Board convened an experts' conference earlier this
19 month, and the experts' report was on that conference was
20 filed the Board on July 20th.

21 The Board sits today to hear argument on the
22 preliminary issue. The preliminary issue is whether the
23 Board's decision in RP-2003-0249, referred to as the CCTA
24 decision, applies to the attachment of wireless equipment,
25 including distributed antenna systems or DAS components.

26 The Board will hear first from those parties arguing
27 that the CCTA decision applies, beginning with CANDAS. The
28 Board will then hear from those parties arguing that the

1 CCTA decision does not apply, beginning with Toronto Hydro.

2 CANDAS will be provided with an opportunity to make
3 oral reply submission. All submissions, including any
4 reply, must be completed today.

5 My name is Cynthia Chaplin and I will be the presiding
6 member in this hearing. Joining me on the Panel are Board
7 member Mr. Ken Quesnelle and Ms. Karen Taylor.

8 May I have appearances, please?

9 **APPEARANCES:**

10 MS. NEWLAND: Good morning, Madam Chair, Panel
11 members. I am Helen Newland representing CANDAS, the
12 applicant in this proceeding. Appearing with me today is
13 my colleague, Monica Song.

14 MS. CHAPLIN: Good morning.

15 MS. SONG: Good morning.

16 MR. VELLONE: Good morning. My name is John Vellone
17 and I am representing Toronto Hydro in this proceeding, and
18 appearing with me today is Amanda Klein. As well,
19 observing today from Toronto Hydro are Colin McLorg, Mr.
20 Ivano Labricciosa, Ms. Mary Byrne, Mr. Rob Barrass, and our
21 summer student Diana Weir.

22 MS. CHAPLIN: Thank you, Mr. Vellone.

23 MR. MARK: Good morning, Madam Chair. Alan Mark
24 appearing for the Electricity Distributors Association.
25 With me is Ms. Afreen Khan from the Association.

26 MS. CHAPLIN: Thank you, Mr. Mark.

27 MR. WARREN: Robert Warren for the Consumers Council
28 of Canada. Appearing with me with me is Sarah Yun, Y-U-N.

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

2 MR. JANIGAN: Michael Janigan appearing for the
3 Vulnerable Energy Consumers Coalition.

4 MR. MacINTOSH: David MacIntosh for Energy Probe, and
5 with me today is Dr. Larry Schwartz.

6 MS. CHAPLIN: Thank you.

7 MS. GREEY: Ruth Greey from Hydro One, and with me
8 today is John Boldt from Hydro One.

9 MS. CHAPLIN: Thank you.

10 MS. SEBALJ: Kristi Sebalj, Board counsel, and with me
11 is Vincent Cooney.

12 MS. CHAPLIN: Thank you, Ms. Sebalj.

13 Before we begin taking submissions, the Board would
14 like to remind the parties of the Board's conclusion with
15 respect to Toronto Hydro's recent confidentiality request.
16 On July 12th, 2012, Toronto Hydro filed new evidence in
17 response to Board's decision and order of December 9th,
18 2011.

19 This evidence relates to a new agreement for wireless
20 attachments on Toronto Hydro's poles. Toronto Hydro has
21 recently negotiated this agreement with an arm's-length
22 party. Toronto Hydro has requested this evidence be held
23 in confidence, and specifically that it not be disclosed to
24 any employee of the members of CANDAS, even if the
25 individual has signed the Board's declaration and
26 undertaking.

27 The Board issued a letter on July 19th, 2012
28 indicating that it would hold the evidence in confidence

1 for the time being, but that a final determination on
2 confidentiality would be made after the Board has rendered
3 its decision on this preliminary issue.

4 The Board also accepted CANDAS's undertaking not to
5 disclose the evidence to any employee of its members, even
6 if the individual has signed the Board's declaration and
7 undertaking.

8 The Board understands that some parties may wish to
9 refer to the July 12th evidence or other confidential
10 evidence during today's proceeding. As indicated in our
11 letter of July 12th, we expect that any references will be
12 structured so that it will not be necessary to go in camera
13 today.

14 If there is time remaining at the end of today, we
15 will also hear submissions on the issue of interim cost
16 awards, which has again -- I think recently again been
17 raised by CCC. If insufficient time is available, we will
18 take those submissions in writing.

19 Once the Board has issued its decision on the
20 preliminary issue, we will look to complete the proceeding
21 as expeditiously as possible, and at that time we will
22 address the confidentiality request that Toronto Hydro has
23 made.

24 Are there any other preliminary matters? Okay.

25 MR. VELLONE: We did bring copies of the confidential
26 information, so anyone who has not yet received it can just
27 ask for a copy.

28 MS. CHAPLIN: Okay, thank you. I believe we have an

1 order of submissions, which I would just like to confirm,
2 and I would also like to confirm time estimates, as we will
3 have, I suspect, a fairly full day.

4 I have on my list that CANDAS has an hour in
5 submissions, followed by CCC at 40 minutes, VECC at 15
6 minutes, Board Staff with 25 minutes, Toronto Hydro with
7 one hour, EDA 30 to 45 minutes, and CANDAS in reply for 40
8 minutes to an hour.

9 Is there anybody I should have on my list who I have
10 not mentioned? Okay. All right, thank you. All right,
11 then, Ms. Newland, we will begin when you are ready.

12 **SUBMISSIONS BY MS. NEWLAND:**

13 MS. NEWLAND: Thank you, Madam Chair. I have given a
14 copy of the notes of my submission to the court reporter
15 and I have asked her, as is customary in cases like this,
16 to include the headings and the citations in the
17 transcription of my submissions this morning, but I will
18 not be reading those into the record. You will be grateful
19 for that.

20 I expect, as you said, to be about an hour, give or
21 take ten minutes.

22 I am pleased to present our oral argument today,
23 pursuant to Procedural Order No. 12, on the issue of
24 whether the CCTA order requires electricity distributors to
25 provide Canadian carriers with access to their power poles
26 for the purpose of attaching wireless equipment, including
27 distributed antenna systems, otherwise known as DAS
28 equipment.

1 I will refer to this, as you have, as the preliminary
2 issue, and this issue corresponds with the relief that
3 CANDAS sought in paragraph 1(a) of its application.

4 To be clear, we are not here today to debate the other
5 relief that CANDAS is seeking in its application, and, in
6 particular, we are not here to debate whether or not the
7 Board should require all electricity distributors to
8 provide Canadian carriers with access to power poles for
9 attaching wireless equipment.

10 That's the relief that CANDAS is seeking in paragraph
11 1(b) of its application, and we don't get there -- or let
12 me turn it around. We only get there if the Board rules
13 against us on the preliminary issue.

14 In our submission, the answer to the preliminary issue
15 is "yes". This case is all about whether the Board in the
16 CCTA order established a non-discriminatory,
17 technologically neutral right of access for cable
18 television providers and for Canadian carriers.

19 Parties opposite will argue that the right of access
20 granted in the CCTA order excludes certain types of
21 carriers and technologies and that it was only intended to
22 settle a private dispute between cable providers on the one
23 hand, and electricity distributors on the other hand. We
24 disagree.

25 On its face, the CCT order is very, very clear that it
26 applies to all Canadian carriers without distinction as to
27 technology or equipment. It's clear. There is no
28 ambiguity. There is no need to go behind the order.

1 My submissions in support of this position will be
2 divided into three areas.

3 First, I am going to set out the factual context that
4 gave rise to the CCTA proceeding and the resulting decision
5 and order.

6 Next, I will take you to passages in that decision and
7 order that articulate the regulatory and the policy
8 considerations that led the Board to decide that all
9 Canadian carriers should have access regardless of their
10 choice of technology or equipment.

11 And, lastly, I will describe the reasons that underpin
12 the CCTA order in 2005, and why those support our
13 contention that in making the CCTA order, the Board
14 intended, it intended to apply to all Canadian carriers and
15 not, as some suggest, to only a subset of wireline
16 carriers.

17 Turning first to the factual context that gave rise to
18 the CCTA proceeding, prior to 2003 when the CCTA filed its
19 access application -- and the CCTA, just for the record, I
20 should say stands for Canadian Cable and Television
21 Association -- prior to the time it filed its application,
22 cable companies and electricity distributors had been
23 embroiled in a dispute with respect to terms and conditions
24 of access to power poles, and this dispute resulted in some
25 instances in a complete denial of access to poles.
26 Ultimately the disputes led the CCTA, on behalf of certain
27 Ontario members - and those members are listed in
28 appendix A of the CCTA application - it led the CCTA to

1 file an application seeking an amendment to the licences of
2 all electricity distributors to establish uniform terms and
3 conditions of access to power poles for the purpose of
4 transmitting cable services.

5 We have included a copy of the CCTA application in
6 tab 2 of our compendium. And I should just pause here for
7 a moment, Madam Chair and Panel members. We have
8 distributed two documents. One is a red document and that
9 is our compendium of materials, and this will be the
10 document that includes all the references that I am going
11 to take you to today -- or some of them I will take you to,
12 some of them I won't. And the buff-coloured book is our
13 book of authorities, so that's decisions, regulatory
14 decisions and cases, as well as statutory references.

15 MS. SEBALJ: Would you like those marked, Panel, or
16 are you fine with just the titles of the documents?

17 MS. CHAPLIN: Let's mark them.

18 MS. SEBALJ: So we will mark the red-colour book, the
19 compendium materials of the Applicant, as J2.1; the book of
20 authorities of the applicant as J2.2.

21 **EXHIBIT NO. J2.1: APPLICANT'S COMPENDIUM OF**
22 **MATERIALS.**

23 **EXHIBIT NO. J2.2: APPLICANT'S BOOK OF AUTHORITIES.**

24 MS. NEWLAND: Thank you.

25 So as I was saying, in the red compendium at tab 2,
26 you will find a copy of the CCTA application. I don't
27 intend to take you to it; I have only included it for ease
28 of reference.

1 But I want to say this about it, that the reasons why
2 the CCTA felt compelled to ask the Board on behalf of its
3 members in 2003 for relief are precisely the same reasons
4 that the three members of CANDAS, DAScom, ExteNet and
5 Public Mobile are asking you to exercise your jurisdiction
6 in this proceeding. Nothing has changed.

7 The Board issued a Notice of Application and Hearing
8 calling for interventions in the CCTA proceeding, and
9 interventions were received and accepted from the Canadian
10 Electricity Association and the Electricity Distributors
11 Association, as well as a number of electricity
12 distributors in their own right. Interventions were also
13 received from a number of Canadian carriers, as defined in
14 the Telecommunications Act.

15 So this case is all about which Canadian carriers are
16 entitled to the benefit of the CCTA order and which are
17 not, so it's important to pause here for a moment and
18 understand what we mean when we are talking about Canadian
19 carriers. For this purpose I would ask you to turn up buff
20 book, at tab 1. It's our book of authorities. And that
21 is an excerpt from the Telecommunications Act.

22 The definition of "Canadian carrier" is in subsection
23 1 -- 2.1 on page 1, "Canadian carrier." I am going to read
24 it. It's the second definition on page 1:

25 "'Canadian carrier' means a telecommunications
26 common carrier that is subject to the legislative
27 authority of Parliament."

28 A telecommunication common carrier, or TCC, as they

1 are referred to, is:

2 "...an owner or operator of transmission
3 facilities used to provide telecommunications
4 services to the public for compensation."

5 And you will find that on page 3 of the excerpt from
6 the Telecommunication Act, and it's side-barred at the top
7 of the page. So I have now gone from the definition of
8 "Canadian carrier" to the definition of "telecommunication
9 common carrier."

10 That definition includes the phrase "transmission
11 facilities," so now we go down the page to a definition of
12 a transmission facility, and that is defined to mean:

13 "Any wire, cable, radio..."
14 Radio.

15 "...optical or other electronic magnetic system
16 or any similar technical system for the
17 transmission of intelligence between network
18 termination points."

19 So Canadian carriers own and operate systems that
20 transmit intelligence between network termination points;
21 put another way, Canadian carriers own or operate
22 communications systems.

23 What kind of communication systems? That definition
24 is also in the Telecommunication Act: wire systems, cable
25 systems, radio systems, and optical or other electronic
26 magnetic systems.

27 So there we have it. Owners and operators of radio-
28 based communication systems, also referred to as wireless

1 networks, are Canadian carriers within the meaning of the
2 Telecommunications Act.

3 So a number of these Canadian carriers intervened in
4 the CCTA proceeding in response to the filing of the
5 application. These included large companies such as MTS
6 Allstream, and Quebecor Media, as well as smaller Ontario
7 new entrant telcos, as we refer to them, such as FCI
8 Broadband and 360 Networks.

9 In their interventions, these parties urged the Board
10 to expand the scope of the proceeding to include the issue
11 of whether the Board should also consider pole access for
12 all telecommunication carriers and not just for cable
13 system operators.

14 May I have a moment, Madam Chair? We have spilled
15 some water. Thank you.

16 As I was saying, a number of new entrant
17 telecommunication carriers had intervened in the CCTA
18 proceeding, and we have included their interventions at
19 tabs 3 through 7 of our compendium. And I would like you
20 to turn to -- I would like to refer you to a couple of
21 these, not all of them.

22 If you could turn first to tab 3 of the buff-covered
23 book, and that's the letter from Quebecor Media, their
24 intervention letter. It was a late intervention, I
25 believe.

26 In any event, on page 2, over the page, second full
27 paragraph, I will just read it -- we are in the buff-
28 coloured -- sorry, we are in the red book. My apologies.

1 The red book, tab 3, page 2:

2 "It is with great concern that we learn of the
3 argument made by the electricity distributors to
4 the effect that when the Board makes its
5 determination, conditions, if any, that are to be
6 imposed on the electricity distributors would
7 only be available and restricted to members of
8 the CCTA.

9 And that concern was expressed, as I say, by other new
10 entrants, as well. If I could ask you to turn now to page
11 5 of the red book, this is a similar intervention from FCI
12 Broadband. If you look at paragraph 5 on page 2 of that
13 letter:

14 "FCI Broadband will demonstrate that there are a
15 number of other companies currently operating in
16 the telecommunications market that urgently
17 require relief identical to that requested by the
18 CCTA. Even though this issue has its roots in
19 the relationship between the cable companies and
20 the distribution companies, these other companies
21 have had experiences that are similar or
22 identical to those of the cable operators."

23 And then this letter goes on to describe the fact that
24 Bell Canada is well served. Bell Canada, a communication
25 carrier, is -- and the incumbent communication carrier in
26 the market is well served by the current arrangements, but
27 that the new entrants are having difficulty gaining access,
28 the same type of access, enjoyed by the incumbent carriers,

1 and so on and so forth.

2 And, lastly, I would like to take you to tab 7, and
3 that's an intervention from MTS Allstream, and on page 2 of
4 that letter, underlined, MTS Allstream makes a similar
5 submission. And this is a submission in the context of MTS
6 Allstream's concern that the scope of the proceeding would
7 not allow meaningful participation from MGS Allstream. And
8 they say:

9 "We fail to see the logic in this limitation.
10 There is no practical difference in terms of pole
11 impact or requirements between the cable or other
12 equipment that a cable television company
13 attaches to the communication space of a power
14 pole and the cable or other equipment that
15 another communication carrier attaches to a power
16 pole."

17 So, these intervenors, these new intervenors, continue
18 to press their case for an expansion of the CCTA proceeding
19 at an issues conference that was held in June of 2004, and
20 following that conference the Board Staff circulated a
21 proposed list of issues. We haven't been able to get our
22 hands on a copy of that list, but we do have a copy of a
23 letter from -- we have the copy of the letter from MTS
24 Allstream that I just referred you to commenting on that
25 list.

26 So clearly there was a concern that what -- the list,
27 as proposed by the Board Staff following the issues
28 conference, wasn't wide enough to include the participation

1 or the concerns of parties who were telecommunication
2 carriers, but who were not cable service providers.

3 So here we have other telecommunication carriers who
4 are participating in the CCTA proceeding saying to the
5 Board, Help us out. We are running into trouble, the same
6 type of trouble that the cable guys are running into with
7 the distributors. We need to attach our equipment to their
8 power poles, just like the cable, guys and our equipment is
9 really similar to the kind of stuff that the cable guys
10 want to put on the power poles.

11 And the upshot of all of this was that the Board in
12 its Procedural Order No. 3, which is included in our
13 compendium at tab 8 - you don't need to go to it - added an
14 additional list -- issue to the Board's list of issues, and
15 that became issue 2 in the CCTA proceeding.

16 And that issue is: If the Board does set conditions
17 of access, to what types of cable or telecommunication
18 service providers should these conditions apply? And it's
19 precisely this issue that we are here to talk about today.

20 Following the Board's decision to expand the list of
21 issues to include issue 2, and prior to the oral hearing,
22 the Board heard submissions on a number of motions, and it
23 ruled on those motions at the end of a motions day. And we
24 have included the ruling at tab 5 of our book of
25 authorities, and I will be referring to that decision on
26 motions a number of times in my submission, but I would ask
27 you to turn it up now.

28 So it's tab 5 in our red book -- sorry, buff book.

1 It's an authority. So starting at line 647, so roughly
2 halfway down the page, and in the context -- this was in
3 the context of a decision on a motion regarding
4 responsibility for costs. The Chair of the CCTA
5 proceeding, Mr. Kaiser, had this to say about the scope of
6 the proceeding.

7 "We realize we have departed from our earlier
8 decision with respect to costs in this matter,
9 but the proceeding has changed materially in its
10 complexion. In particular, the telecom companies
11 have intervened and we think this has made a
12 different. We think it is important that the
13 access to be enjoyed by the telecom companies be
14 dealt with at the same time as the cable
15 companies. It is not in the public interest or
16 in the Board's interest or any of the parties'
17 interest to split this into two separate
18 proceedings."

19 So this passage confirmed the decision in Procedural
20 Order No. 2 to expand the proceeding to include access to
21 telecommunication service providers, and not just to
22 telecommunication service providers who employed a certain
23 type of technology or equipment. There is no restriction
24 in that regard. It was to all types of telecommunication
25 service providers including, we would submit, wireless
26 carriers.

27 There is no restriction that the Board placed either
28 during its decision on motion or in the Procedural Order

1 No. 3, where the issue was articulated for the first time
2 on the record, no restriction to the scope of the issue.

3 Now I'd like to take a couple of minutes and talk
4 about the settlement conference that was held subsequently
5 in October of 2004 and the settlement agreement that was
6 filed with the Board also in October, on October 19th,
7 2004. And that settlement agreement is found in our
8 compendium, which is the red book at tab 9, if you could
9 turn that up, please.

10 The parties to the settlement are listed on page 3 of
11 the agreement, and they include the CCTA, the CEA, the EDA
12 and three telecommunication carriers, MGS Allstream,
13 360networks, London Connect and Quebecor Media Inc.

14 The parties to that settlement conference had more
15 success than the parties to the settlement conference in
16 this proceeding. They managed to reach agreement on one
17 issue, and that was issue 2. On issue 1, whether the Board
18 should regulate pole access, the CCTA, Energy Probe and the
19 telcos argued that it should. The EDA, the CEA, Hydro One
20 and Power Worker's Union took the opposite position, and
21 that is page 4 of the settlement agreement in the
22 articulation of parties' position on issue 1.

23 Getting back to issue 2, the issue that was added by
24 the Board in Procedural Order No. 3, who should get access,
25 there was agreement on that issue, that if the Board
26 established conditions of access, these should apply to,
27 number 1, all Canadian carriers as defined in the
28 Telecommunications Act, and to cable companies. There was

1 one exception.

2 The exception related to the joint use arrangements
3 between incumbent local use carriers and hydro
4 distributors. This is exception appears to have been
5 included to address concerns of the EDA, who took the
6 position that if the Board did regulate access, it should
7 do so only with respect to the cable attachers who had been
8 listed in the CCTA's application, so as not to disrupt
9 longstanding arrangements between local telephone companies
10 and distributors, so the incumbent telephone companies and
11 the distributors.

12 In presenting the settlement agreement to the Board,
13 CCTA's counsel emphasized that the agreement on issue 2,
14 who should get access, had been reached after some
15 considerable discussion amongst the parties, and that the
16 exception related to local exchange carriers was an
17 important exception.

18 So let's think about this for a moment. Both sides on
19 the debate consciously and deliberately considered the
20 question of which carriers required the benefit of
21 regulated access and which did not. Having consciously
22 addressed the "who gets access" issue, or who gets
23 regulated access, because of course the exception for the
24 incumbent telephone companies, such as Bell, was intended
25 so that the arrangements already in place, the historical
26 arrangements between Bell and distributors, wouldn't be
27 disrupted. So Bell had no problem getting on LDC poles
28 because they had joint use agreements. So Bell was carved

1 out of this, or the large incumbent telephone carriers were
2 carved out.

3 But the parties consciously addressed by the "who gets
4 access" issue. They could have included wireless carriers
5 in that exclusion, but they chose not to do so. These were
6 sophisticated parties, and they were all represented by
7 experienced and able counsel, and they consciously and
8 after considerable discussion decided who should have the
9 benefit of regulated access and who didn't need it.

10 And they did not carve out wireless carriers, and
11 that's important, in our submission.

12 MS. CHAPLIN: Ms. Newland, is the reference to the
13 communications space relevant or important?

14 MS. NEWLAND: I don't believe it is. I am not sure
15 what to take from your question, Madam Chair.

16 MS. CHAPLIN: I guess it's a reference to a physical
17 part of the pole.

18 MS. NEWLAND: Correct.

19 MS. CHAPLIN: And that seems to be the scope of the
20 agreement. I just wondered if anything turns on that.

21 MS. NEWLAND: Not in our submission. You will
22 probably hear from my colleague Ms. Song that we don't take
23 issue with that part of the agreement and it doesn't
24 present a constraint for our clients, our wireless
25 communication carrier clients for CANDAS members.

26 MS. CHAPLIN: Thank you.

27 MS. NEWLAND: Just to conclude on the settlement
28 agreement, the parties to the settlement agreement did not

1 agree on any of issues 3 through 5, the rate issues and the
2 implementation issues.

3 Moving to the oral hearing -- and I won't spend much
4 time -- it took place over four days in November of 2004.
5 Notably, the Board heard from witnesses for the CCTA, which
6 included Ms. Kravtin, who appears on behalf of CANDAS in
7 this proceeding. It heard from witnesses for the CEA,
8 including Dr. Yatchew, who appears on behalf of THESL in
9 this proceeding. And it heard from witnesses for the EDA
10 and MTS Allstream. So from four parties it heard oral
11 testimony.

12 The focus of the testimony of those witnesses was on
13 issue 1, should the Board regulate, and on issue 3, what
14 the attachment rate should be. The parties had already
15 agreed on issue 2, so there was really no debate in the
16 transcript of that proceeding on that issue.

17 On issue 1, CEA and EDA argued there was no need for
18 the Board to regulate pole access because there was no
19 compelling evidence that the market was not functioning
20 well, and that the use of shared facilities was routinely
21 negotiated in the private sector. Of course, those routine
22 negotiations had been referred to earlier by the new
23 incumbent telecommunication carriers; they recognized that
24 those negotiations and arrangements were in place between
25 incumbents such as Bell, but the new entrants did not have
26 such arrangements.

27 Turning now to the CCTA decision and order, and that
28 is included at tab 4 of our book of authorities, the buff

1 book, could I get you to turn, first, Madam Chair, Panel
2 members, to page 11, behind tab 4?

3 That, in fact, is the Board's order as distinct from
4 the Board's decision, and the order answers the three main
5 questions in the proceeding.

6 Issue number 1: Should access be regulated? Answer:
7 Yes.

8 Issue number 2: Who should have access? Answer: All
9 Canadian carriers, as defined by the Telecommunication Act,
10 and all cable companies that operate in the province of
11 Ontario shall have access.

12 Issue number 3: What should the attachment rate be?
13 Answer: \$22.35 cents per pole, per year.

14 Of the three main issues addressed in the order, only
15 issues 1 and 2 are germane to the preliminary issue that we
16 are debating today, and accordingly I don't intend to deal
17 at all with how the Board dealt with issue 3 in its
18 decision. For the same reason, I won't have anything to
19 say at all about how the Board dealt with issues 4 and 5,
20 terms and conditions of access and implementation.

21 So the focus of my submissions will be on issue 1,
22 should access be regulated, and issue number 2, if so, who
23 should have access.

24 Turning to issue 1, the Board gave three reasons for
25 deciding to regulate pole access, and those are set out
26 earlier at pages 2 and 3, primarily on page 3 of the
27 decision, under the heading "The need to regulate access
28 charges."

1 First, the Board found that the dispute between cable
2 companies and electricity distributors was evidence of the
3 exercise of monopoly power and that this justified
4 regulatory intervention. So the need to regulate
5 monopolistic behaviour is the raison d'être of economic
6 regulation.

7 I want to read and I think it's important to read what
8 the Board actually said about the exercised monopoly power.
9 This is what the Board had to say about this issue:

10 "There has been some evidence on both sides with
11 respect to abuse. In the end, the CCTA says that
12 the electricity distributors do have monopoly
13 power, and the fact that the parties have been
14 unable to come to agreement for over a decade
15 demonstrates the exercise of that monopoly power,
16 whether this results in abuse or not."

17 So the first thing is there doesn't have to be a
18 finding that there is actual monopoly abuse; there just has
19 to be a demonstration that there is a dispute that is a
20 result of the exercise of the power by a monopoly utility.

21 "The Board agrees. A showing of abuse is not
22 necessary to justify the intervention of this
23 Board in this matter. The fact is that the
24 parties have been unable to reach an agreement in
25 over a decade. This degree of uncertainty is not
26 in the public interest."

27 As I said at the outset of my argument, we are not
28 here to debate whether or not the Board should require all

1 distributors to provide pole access to wireless carriers.
2 We only get there if the Board rules against us on the
3 preliminary issue, but if we do get there, the fact of
4 nearly three years of acrimony between the members of
5 CANDAS and THESL and the resulting loss of ExteNet's
6 Ontario business should be sufficient evidence of the
7 exercise of monopoly power if a -- if a utility is acting
8 as if it were not subject to regulation, which, we submit,
9 has been the case here.

10 A second reason that the Board decided to regulate
11 pole access was that it found that duplication of poles is
12 neither viable nor in the public interest, and that's in
13 the paragraph just below the one I read.

14 This is not an unusual or unique finding. Many other
15 regulators have reached similar conclusions. In a 1999
16 telecom decision of the CRTC dealing with pole access, the
17 CRTC found that:

18 "The capital cost inherent in the construction of
19 duplicate infrastructure may operate as a barrier
20 to entry and a disincentive for the deployment of
21 networks which are essential to an information-
22 based society and economy."

23 I am quoting here from a case that is included in our
24 book of our authorities at tab 6. It is the Barrie
25 Utilities case.

26 That decision was overturned by the Federal Court of
27 Appeal on a matter of jurisdiction, affirmed by the Supreme
28 Court of Canada, but in its judgment the Supreme Court of

1 Canada stated that it did not disagree with the policy
2 statements made by the CRTC in the decision.

3 So the statement I just read to you about duplication
4 of infrastructure operating as a barrier to entry, that
5 statement was not affected by the subsequent appeal and
6 overturning of the CRTC's decision on a question of
7 jurisdiction.

8 Similarly, there was a 2005 decision of the New
9 Brunswick Public Utilities Commission on a request by
10 Rogers Cable Communications to establish rates for cable
11 attachments to power poles of the New Brunswick electric
12 utility. And that case is at tab 7 of our book of
13 authorities. It's also a case we relied on in our original
14 application. It's referred to as the DISCO case, after the
15 name of the utility.

16 In that case, the commission, in deciding to grant
17 pole access and set an attachment rate, relied on and
18 adopted the reasoning of the Ontario Energy Board in the
19 CCTA decision, and it went on and made comments about why
20 it was granting pole access in that case. And one of those
21 reasons was that it recognized that it was not in the
22 public interest to encourage a proliferation of poles, so
23 we would submit not a contentious point in the Board's
24 original decision.

25 In fact, the Electricity Act, one of the Board's
26 enabling statutes, recognizes that duplication of pole
27 infrastructure is not in the public interest. Section 42
28 authorizes pole sharing agreements with telecommunications

1 services. In effect, that section we submit removes the
2 legal barriers to the use of monopoly infrastructure in the
3 broader public interest.

4 I will be coming back to so section 42 of the
5 Electricity Act later in my submissions, so I won't take
6 you there at this time.

7 Now, in the CCTA proceeding, the Board reached the
8 conclusion that pole duplication was neither viable nor in
9 the public interest after hearing considerable evidence and
10 argument on these matters from the CCTA and Allstream
11 witnesses.

12 CANDAS, in this proceeding, has filed similar evidence
13 describing the technological, legal and economic barriers
14 it faces in constructing pole -- stand-alone pole networks,
15 whether in Toronto or elsewhere.

16 I think that's all we need to say about that aspect of
17 the Board's decision.

18 The third aspect of the Board's decision to intervene
19 and regulate pole access was its conclusions that power
20 poles were essential facilities. I would like to take you
21 back to the decision and read that conclusion.

22 In the fifth paragraph down on page 3 of the Board's
23 decision - and just to remind you, it's at tab 4 of the
24 buff book - the Board says this:

25 "The Board agrees that power poles are essential
26 facilities. It is a well-established principle
27 of regulatory law that where a party controls
28 essential facilities, it is important that non-

1 discriminatory access be granted to other
2 parties. Not only must rates be just and
3 reasonable, there must be no preference in favour
4 of the holder of the essential facilities.
5 Duplication of poles is neither viable nor in the
6 public interest."

7 This was actually the second time that the Board had
8 made this ruling in that proceeding, in the CCTA
9 proceeding. In its earlier decision on motions, the Panel
10 Chair, Mr. Kaiser, found that power poles were not only
11 monopoly assets, but also essential facilities.

12 If you could turn up tab 5 of our compendium, I just
13 want to take you to that one sentence. So it's tab 5 in
14 the buff book. Starting at 648, the panel chair of the
15 CCTA proceedings said this:

16 "We recognize that these are essential
17 facilities. They are not only monopoly assets as
18 Mr. Brett stressed, but they are essential
19 facilities and non-discriminatory access is
20 important. In this regard, the Board notes that
21 these industries are converging. The cable
22 companies are increasingly competing with telecom
23 companies, and vice versa, and the LDCs
24 themselves are entering into some
25 telecommunication activities. In such
26 circumstances, it is important that there be non-
27 discriminatory access and no undue preference to
28 any of the compelling entities."

1 Now, this statement by the Chair of the CCTA
2 proceeding reflects, in fact, the evidence that had been
3 filed on behalf of the CCTA in that proceeding in the form
4 of a written expert report from Ms. Patricia Kravtin, and I
5 would like you to turn that up. It's included in tab 11 of
6 our compendium, the red book.

7 That report was filed as a reply report - so filed in
8 reply - by the CCTA. The section I would like you to turn
9 up is on page 2. It is the sidebarred. I think it's
10 important, so I would ask your indulgence while I read part
11 of this into the record. Ms. Kravtin says this:

12 "Mitchell and Yatchew's approach..."

13 And let me pause there. She was replying to a joint
14 report that had been filed by the EDA and the CEA which had
15 been offered by Dr. Mitchell and Dr. Yatchew. And just to
16 remind you that Dr. Yatchew is also an expert in this
17 proceeding on behalf -- testifying on behalf of THESL. In
18 any event:

19 "Mitchell and Yatchew's approach is wrongly
20 premised on the hypothetical that cable operators
21 and utilities are in an equal position in
22 bargaining over rents. This makes little sense
23 in terms of the practical realities of pole
24 ownership. Almost all pole lines are exclusively
25 owned by telephone and electric utilities as a
26 result of public policies to establish widespread
27 availability of electric and phone service. In
28 contrast, from its inception, the cable industry

1 never had a similar opportunity to build a
2 parallel pole plant."

3 And then she goes down to talk about:

4 "Local laws, environmental restrictions and other
5 legal and economic barriers preclude cable
6 operators and competitive local exchange carriers
7 from placing additional poles in areas where
8 poles already exist. This economic reality is
9 the reason why pole attachments have generated
10 such a rich and ample history of monopoly abuse."

11 "Monopoly abuse"; those were the very words that the
12 Board used in its reason for decision.

13 "...why so many authorities have classified poles
14 as essential facilities and as bottlenecks to
15 facilities-based competition and why effective
16 regulation of these monopoly-owned facilities is
17 essential to ensure access at just and reasonable
18 rates."

19 In my submission, this passage informed the Board's
20 decision to regulate pole access in the CCTA proceeding.

21 This nicely sums up, I believe, the issues of
22 convergence, monopoly abuse, the need to ensure no
23 preferential access and no undue discrimination. This
24 passage sums it up and informed the Board's decision in the
25 CCTA proceeding.

26 Now moving from the general to the specific, our
27 submission is that power poles are equally essential for
28 wireless communication services as they are for wireline

1 services. There is no distinction made between wireless
2 and wireline services either in this passage or in the
3 Board's decision, but our submission is that's because the
4 reasons that are articulated by Ms. Kravtin that were later
5 articulated by the Board in its order pertain equally to
6 wireline and wireless service providers. Poles are
7 essential for both.

8 Interestingly, this was also the view expressed by Dr.
9 Mitchell and Yatchew on behalf the CEA in the CCTA
10 proceeding. For this, I would like you to go to the
11 compendium, the red book, at tab 12, so just over the page
12 from Ms. Kravtin's.

13 Tab 12 is a joint-use -- is a report that was offered
14 by Bridger M. Mitchell and Adonis Yatchew of Charles River
15 Associates on behalf of the Electricity Distributors
16 Association and the Canadian Electricity Association, and
17 it was filed on the record of the proceeding of the CCTA.
18 And you'll see the date on the bottom of it is August 13th,
19 2004.

20 It's entitled: "Joint-use agreements for power poles:
21 an efficient and equitable standard."

22 If you turn to page 6 of the report, halfway down the
23 page under the heading "Production with shared resources,"
24 this is what Drs. Mitchell and Yatchew had to say about the
25 essentiality of poles. They said:

26 "Utility poles, cable ducts and similar
27 structures are essential inputs into the economic
28 production of electricity distribution, telephone

1 service, cable television service and wireless
2 communications services."

3 And wireless communications services. This is what
4 Dr. Yatchew and Dr. Mitchell had to say in a report that
5 the Board relied on in the CCTA proceeding.

6 So the CEA's own witnesses in this CCTA proceeding
7 made no distinction between wireless communication networks
8 and wireline communication networks.

9 I misspoke a moment ago; I meant the CEA, the CEA's
10 own witnesses.

11 Surprisingly, or maybe not, Dr. Yatchew's view appears
12 to have changed today in this proceeding. The reason I say
13 that has to do with the expert report that was filed on
14 July 20th, which is not included in my compendium of
15 materials, and I apologize for that. I am not sure if the
16 Board members have a copy of that report available to them.
17 If not, I can make copies available at the break. But it's
18 only a short part that I want to read.

19 MS. CHAPLIN: Carry on. We clearly have it, we just
20 don't have it with us.

21 MS. NEWLAND: Sure. My point is that in the testimony
22 filed on behalf of the CEA in the CCTA proceeding, Dr.
23 Yatchew said it very clearly and unambiguously, that poles
24 were essential for wireless communications services, yet in
25 the expert report that was filed by THESL on July 20th, on
26 page 4 of that report, both parties, both sets of expert
27 witnesses, Mr. Starkey and Dr. Yatchew on behalf of THESL
28 and Ms. Lemay and Ms. Kravtin on behalf of CANDAS were

1 opining on an issue. And the issue was: What are the
2 guiding principles governing mandated access to utility
3 poles?

4 And Dr. Yatchew and Mr. Starkey stated this:

5 "Proper application of the essential facilities
6 doctrine holds that utilities poles are an
7 essential facility for wireline attachments."

8 For wireline attachments. And they go on to say:

9 "Distribution poles are not an essential utility
10 for wireless attachments, because wireless
11 carriers have numerous siting alternatives."

12 So Dr. Yatchew appears to have changed his position on
13 this fundamental issue from the day that -- the days when
14 he testified on behalf of the CEA in the CCTA proceeding
15 and in this proceeding. It's a 180-degree change in
16 position.

17 Moving on now, I am leaving issue 1, which was should
18 the Board regulate pole access, and I am moving on to issue
19 2: If so, who should have access.

20 The CCTA order is absolutely clear on its face - I
21 said this before - on the question -- on this question.
22 The Board accepted the settlement of the parties, that all
23 Canadian carriers, as defined in the Telecommunication Act,
24 and cable companies should have the benefit of the
25 regulated right of access.

26 Madam Chair, the Board didn't pull this designation
27 out of thin air. In our submission, it purposely adopted
28 the inclusive definition in the Telecommunication Act. In

1 our submission, the Board would not have made a reference
2 to a statutory standard if it had not intended to import
3 the entire established meaning of that standard. We have
4 already gone through that definition; it clearly captures
5 both wireline and wireless carriers.

6 It's significant -- and here I would like to take you
7 to the excerpt from the Electricity Act, which is included
8 in our buff book at tab 2. I am going to be referring to
9 section 42.

10 It's significant, in our submission, that in
11 subsections 42(5) and 42 -- sorry, 42(1) and 42(6), relies
12 on the inclusive and technologically neutral definitions in
13 the Telecommunication Act. These sections authorize
14 transmitters and distributors to share their statutory
15 easements and other land rights, and expressly contemplate
16 that they may do so for the purpose of attaching wires or
17 other telecommunication facilities to their poles.

18 Here I am reading from subsection 42(1)(a), so (1)(a)
19 says:

20 "Use the land that is subject to the easement or
21 other right for the purpose of providing
22 telecommunication services."

23 And subsection 42(6) over on the next page defines
24 telecommunication service to have the same meaning as in
25 the Telecommunication Act, which is:

26 "Any wire, cable, radio, optical or other
27 electromagnetic system for the transmission of
28 intelligence..."

1 Et cetera, et cetera.

2 So the Electricity Act itself imports this definition,
3 which refers to radio transmission. In our submission, in
4 light of this it would be absurd to read the exceptions
5 into the statutory definition of Canadian carriers for the
6 purpose of interpreting the CCTA order.

7 My point is you take the whole thing; you don't read
8 it down.

9 In deciding issue 2, the Board didn't just rely on the
10 settlement of the parties, because you will recall the
11 parties had actually agreed on this issue. The Board went
12 further than that. It went on to talk about the convergent
13 downstream telecommunication market, where multiple
14 telecommunication carriers compete to provide the same
15 service to the same set of consumers.

16 Here, I would like to take you back to the Board's
17 Order at tab 4 of the buff book and read you what the Board
18 had to say on this issue. So this is the Board saying:
19 Yes, we accept the settlement agreement, but -- and here on
20 the second paragraph it goes on to say:

21 "In addition, the Board has heard submissions to
22 the effect that the LDCs agree that their own
23 telecommunication affiliates would access poles
24 on the same conditions as other users of the
25 communications space. The LDCs also confirm that
26 all users of the communications space should pay
27 the same charge."

28 This is an important clarification. This market is

1 changing rapidly and industries are converging. Cable
2 companies are now providing the telecommunications services
3 just as the electricity distributors enter this industry.
4 The fact that the two groups that have been warring over
5 the past decade are fast becoming competitors is an
6 additional reason for the Board to intervene and establish
7 clear guidelines.

8 And I think I will end it there. The last sentence
9 has to do with the costs.

10 Now, in the course of the CCTA order -- my submission,
11 Madam Chair, is that this finding on convergence is very
12 significant as to what was in the Board's mind when it
13 decided to give access to the all Canadian carriers and why
14 we submit it intended to cover all carriers and not just
15 the subset of carriers.

16 We believe that this passage was informed by the
17 considerable evidence that the Board heard in the course of
18 the proceeding on the issue of market convergence and
19 competition in the downstream market for telecommunication
20 services.

21 I would like to spend some time taking you to that
22 evidence, because I think, as I said, it's very, very
23 important. It informs the Board's decisions.

24 First of all, the Board heard evidence from
25 representatives of the CCTA that cable companies provide
26 not only cable television services, but also cable phone
27 and cable Internet access services, and I have included in
28 our compendium at tab 10 a transcript excerpt to this

1 effect that takes you to this testimony.

2 I am not going to read it all into the record, but it
3 is an excerpt of the testimony of the representatives of
4 the CCTA, and you will see as you move -- starting at line
5 1502 and moving down to the bottom of the page, Panel
6 Members, you will see references to these technologies.

7 So here they are being cross-examined by Mr. Ruby,
8 counsel for the CEA in that proceeding, and the witnesses
9 are agreeing with him that there are many services provided
10 by cable service providers in the downstream market.

11 Now Dr. Yatchew also gave evidence in the proceeding
12 that cable companies and telephone carrier provide long
13 distance telephone service, as well as broadband Internet
14 access, and he noted that satellite distribution services
15 deliver video programming and broadband access.

16 And here I want to take you to tab 12 of our
17 compendium, which, again, is the joint use report by Dr.
18 Mitchell and Dr. Yatchew. I have already read you into the
19 record the part of their report on page 3 that deals with
20 cable telecom and convergence.

21 In that excerpt, quite clearly Dr. Yatchew and Dr.
22 Mitchell are speaking about the convergence in the
23 downstream market and the fact that all the carriers are
24 pro -- different carriers are providing different services.
25 Some carriers are providing long distance and telephone
26 service and video programming. So there is convergence in
27 the downstream market. That's the point.

28 The Board also heard -- but also -- there is another

1 place I want to take you to. If you turn over to page 6 --
2 no, I have already taken you there. My apologies, sorry.

3 The Board heard that power company affiliates were
4 also entering the telecom service market, and, notably --
5 again, I apologize. This is not in the compendium, but it
6 is on the record of our proceeding in the form of a
7 response to an interrogatory by CANDAS. I don't think you
8 need to have it in front of you.

9 But, notably, Toronto Hydro Corp. rolled out its One
10 Zone wifi service sometime after the CCTA order and
11 decision. So that was evidence, in our submission, that
12 the power companies themselves, the hydro companies
13 themselves, were entering into the converging downstream
14 market and participating in that market in competition with
15 other service providers in that market. So another reason
16 why regulated access -- the Board just -- in our
17 submission, the Board decided that regulated access was
18 required, because the holders -- the owners of the poles
19 themselves, through their affiliates, were participating in
20 the competing downstream market.

21 Lastly, if you could turn to page 10 of the
22 Yatchew/Mitchell report, and this is the last reference to
23 the evidentiary record on the issue of convergence, but
24 it's an important reference. Under the heading
25 "Competitive Neutrality", Drs. Mitchell and Yatchew had
26 this to say:

27 "As convergence of telecommunications
28 technologies proceed, telecommunications, cable

1 television and electricity distribution companies
2 or their affiliates will increasingly find
3 themselves competing for the same customers in
4 the telephone, video distribution, broadband data
5 and wireless marketplaces. Each of these
6 companies benefit from attaching its cables and
7 equipment..."

8 I pause here. Each of these companies benefits from
9 attaching its cables and equipment to share poles and
10 incurs pole attachment charges or, in the case the pole
11 owner, directly bears the unreimbursed costs of the pole.

12 So, Madam Chair, Panel members, in our submission, the
13 fact of convergence was not lost on the Board when it made
14 the CCTA order, and, indeed, earlier in its decision on the
15 motion at tab 5 of our book of authorities, the buff book,
16 I have taken you to this passage. The Board observed the
17 fact of this convergence and the need to ensure non-
18 discriminatory access and no undue preference.

19 The importance of the principle of non-discriminatory
20 access when it comes to providing regulated access to power
21 poles for telecommunications and broadcast attachers was
22 confirmed in the Board's decision in a Hydro One case, in
23 proceeding EB-2010-0028, and I am going to pass out that
24 decision, because a decision that -- it's not in our book
25 of authorities. We have included the wrong Hydro One
26 decision in the book of authorities, but I am passing out
27 right now the correct one, the one that I want to refer to.

28 MS. CHAPLIN: So this should replace which?

1 MS. NEWLAND: It should replace tab 8 in the book of
2 authorities.

3 MS. CHAPLIN: Currently at tab 8, it's Court of
4 Appeal?

5 MS. NEWLAND: It's the Court of Appeal's decision on
6 an appeal by THESL of a Board decision on the dividend
7 case. I am not relying on that in my submissions today,
8 no, no, Madam Chair.

9 MS. CHAPLIN: Okay. We will mark this addition.

10 MS. SEBALJ: J2.3.

11 MS. CHAPLIN: Thank you.

12 MS. NEWLAND: So in this Hydro One decision in EB-
13 2010-0028, the Board ordered Hydro One to provide pole
14 attachment services to electricity generators on a
15 regulated basis, and it is citing with approval the CCTA
16 order. So the Board relied on the CCTA order, and then it
17 went on to articulate principles that in its view should
18 govern pole access.

19 No, that's the wrong one, Madam Chair.

20 MS. CHAPLIN: This is not the right document either?

21 MS. NEWLAND: This is not the right document. Sorry,
22 I will fire my student, and if he is listening he should...

23 MS. CHAPLIN: That's a bit harsh, but anyway...

24 MS. NEWLAND: That is a bit harsh. It was late. I
25 think the Board knows the decision I am referring to. And,
26 Madam Chair, I observe that you sat on that Panel, if not
27 chaired it. But, in any event, in that decision the Board
28 did order regulated access for Hydro One attachments on

1 behalf of electricity generators.

2 And the only point I wanted to make was the Board
3 articulated three principles that should govern joint use
4 of poles, and the first and foremost principle was that
5 there should be no undue discrimination amongst parties
6 requesting joint use of poles.

7 The other two principles had to do with the sharing of
8 costs in such circumstances, but I am just taking you to
9 this decision. My point is that some six years after the
10 CCTA decision, the Board again reinforced what it first
11 said in the CCTA decision about the need to regulate
12 monopoly exercise of power and ensure no undue
13 discrimination.

14 So it's a theme for all regulators, and it's
15 recognized by the Board in this decision. And I can move
16 away from this case now.

17 MS. CHAPLIN: So I think we don't need this J2.3,
18 right? We can just --

19 MS. NEWLAND: Correct.

20 Madam Chair, Panel members, should you harbour any
21 doubt that wireless was not within the contemplation of the
22 Board at the time of the CCTA order, then you are going to
23 need to interpret the CCTA order.

24 Now, we say there is no need to do so because the
25 order is clear on its face, but if you should disagree with
26 us, it is our submission that you should be guided by the
27 well-established principle of statutory interpretation in
28 the seminal case of Attorney General and Edison General

1 Telephone Company of London.

2 And that case is included at tab 9 of our book of
3 authorities. And I don't think you need to turn it up.

4 It's a fairly dense decision, in that it was decision
5 of a British court in 1880, but it's an important decision
6 because it establishes the principles of statutory
7 interpretation that you should rely on if, indeed, you
8 decide that you need to interpret the CCTA order.

9 In that case, the court held that the provisions
10 governing telegraphs in the Telegraphs Act were also
11 applicable to telephones, even though the telephone had not
12 been invented at the time of the enactment, so at the time
13 that the Telegraph Act had been enacted. So the court
14 accepted that the relevant legislation -- so the Telegraph
15 Act, which had no reference to telephones, because
16 telephones didn't exist -- the court said that the relevant
17 legislation was:

18 "...intended to confer powers and to impose
19 duties upon companies established for the purpose
20 of communicating information by the action of
21 electricity upon wires, and absurd consequences
22 would follow if the nature and extent of these
23 powers and duties were made dependent upon the
24 means employed for the purpose of giving the
25 information."

26 And that excerpt is at pages 253 to 255 of that
27 decision.

28 That's what we have in this case. To sum up this

1 particular decision, the language that deals with a
2 particular technology should generally be extended to new
3 things which are species or functional equivalents of that
4 technology, even where the new things were not known and
5 could not have been contemplated by the lawmaker at the
6 time the language was enacted.

7 Now, that's not on all fours with the fact situation
8 here, because clearly, wireless networks were within the
9 contemplation of the Board in 2005. I mean, we had
10 wireless networks then. But the point is that the statute
11 is not frozen in time, and even your order -- and your
12 order is not frozen in time.

13 The general principle established in Edison was
14 followed by the Supreme Court of Canada in several other
15 cases, including the Radio Reference case, which is, for
16 lawyers anyway, a famous case for different -- many
17 different reasons. That case is included in our book of
18 authorities at tab 10. You don't need to turn it up.

19 It considered whether the federal government had
20 constitutional jurisdiction over a then-revolutionary new
21 technology -- wait for it -- wireless telecommunications.

22 So the issue in that case was did the federal
23 government have jurisdiction to regulate wireless
24 telecommunication, in light of the fact that the
25 Constitution Act of 1867 refers only to telegraphs.

26 And the Supreme Court followed Edison, followed the
27 ruling in the Edison case, and concluded that it was only
28 "consonant with common sense" and with certainty and

1 efficient regulation to adopt an interpretation of the word
2 "telegraph" in the Constitution Act that did not freeze the
3 Constitution in time.

4 Similarly in this case, should you determine that the
5 CCTA order is not clear on its face, it would, we submit,
6 violate the principles of non-discrimination and
7 technological neutrality, as well as plain common sense, to
8 limit the meaning of the phrase "Canadian carriers" to
9 carriers who use wireline facilities.

10 This is especially the case in light of the convergent
11 -- converging and competing downstream market for
12 telecommunication service providers, all of whom are
13 competing for the same set of consumers.

14 Madam Chair, Panel members, the issue before you is a
15 simple one: Does the CCTA order pertain to wireless
16 carriers? The order is clear on its face; it does pertain
17 to wireless carriers.

18 If you go behind the face of the order, you will see
19 the reasons why the Board intended the CCTA order to apply
20 to wireless and wireline, to all telecommunication service
21 providers. And I have referred to those in a theme of my
22 -- of my submissions; convergence and competition in the
23 downstream market requires regulators to ensure competitive
24 and technological neutrality in the upstream market for the
25 supply of poles. Simple as that.

26 Madam Chair, Panel members, these reasons are equally
27 applicable to the circumstances of today. One need only to
28 look at the front page of the Globe and Mail today --

1 again, I don't have copies, but the front page of the Globe
2 and Mail is an article that announces the entry into the
3 Canadian telecommunication market of a UK telco.

4 And the headline is "UK Telco Plans Canadian Foray,"
5 and it talks about a company called like Lycamobile, who
6 are going to shake up Canada's wireless market with a new
7 service aimed at immigrants. And they are going to do this
8 by being a virtual wireless service provider, so they are
9 not going to own their own network.

10 And notably, what they are going to do, it says on
11 page 9 of the Report on Business of the Globe and Mail this
12 morning, is they are in talks with a number of Canadian
13 carriers, and they don't specify, they decline to specify
14 which carriers. But the article goes on to speculate that
15 it might be Rogers Communications Inc.:

16 "...Canada's biggest GSM-based carrier, an
17 industry leader with respect to these types of
18 partnerships. The Toronto-based carrier..."

19 That is Rogers.

20 "...has signed less than 20 of these MVNO deals
21 and operates a national wireless network."

22 So the point is here is another new entrant coming
23 into the downstream market, and they are looking for just
24 another -- this article reinforces, in our submission, our
25 submissions today, that the Board must ensure competitive
26 and technological neutrality in the upstream market for the
27 supply of poles, and that was the consideration that caused
28 the Board in the CCTA decision and order to say that

1 wireless and wireline -- let me back up. That the Board to
2 be inclusive in the language that it used in that decision,
3 that that decision that gives access to all
4 telecommunication carriers is for the benefit of both
5 wireline carriers and wireless carriers.

6 That concludes my submissions, Madam Chair. I thank
7 you very much for your patience this morning, for your
8 attention this morning and for your patience throughout the
9 course of this long proceeding.

10 MS. CHAPLIN: Thank you. Ms. Newland, I have just one
11 question, and that is at the beginning you made a point of
12 distinguishing between issues 1 and 2 of the CCTA decision,
13 and issues 3, 4 and 5. And so I am -- I guess I am left
14 wondering. Is it your contention that although the Board's
15 order on page 11 of that decision and order, which
16 specifically refers to the rate. Are you -- what is your
17 position on that part? Is it only for purposes of issues 1
18 and 2 of the CCTA proceeding?

19 MS. NEWLAND: My submission is that the issue before
20 you today on the preliminary question, the issues in the
21 CCTA order that are particularly and principally germane to
22 that, your decision today, are issues 1 and 2. And my
23 submission is that what the Board ruled with respect to the
24 other issues doesn't really assist you that much.

25 What I would say is that its decision on the rate
26 methodology was technologically neutral. It was decision
27 to allocate costs on a per attachment basis and not on a
28 pro rata sharing of the space. So it was not -- for that

1 reason, we say it has no bearing on the issue before you
2 today. It was technologically neutral.

3 MS. CHAPLIN: All right, thank you. We will take our
4 break now for -- we will return at 11:15 on that clock.
5 Thank you.

6 --- Recess taken at 10:57 a.m.

7 --- On resuming at 11:19 a.m.

8 MS. CHAPLIN: I have CCC next on my list.

9 Just in case I forget, it's reasonably cool in here
10 now, but if anybody would like to remove their jacket, they
11 are welcome to do so at any point during the day. Just to
12 get that out of the way.

13 Mr. Warren?

14 **SUBMISSIONS BY MR. WARREN:**

15 MR. WARREN: Madam Chair and members of the Panel, you
16 should have before you three documents. One is a
17 compendium of materials in a yellow cover, a book of
18 authorities in a green cover, and I have handed up this
19 morning, unbound, a copy of a decision of the Supreme Court
20 of Canada in the case of Garland versus Consumers Gas.

21 By way of preliminary observation, Madam Chair, the
22 compendium of materials is marked confidential because it
23 contains the new confidential information that was filed
24 recently by Toronto Hydro. I have not distributed that
25 compendium other than to the Panel Members, to Ms. Sebalj,
26 and to the principal parties -- that is Toronto Hydro and
27 CANDAS -- in light of the sensitivity about confidential
28 information, in addition to which, while I will be

1 referring to it, I will not be referring to any of the
2 details in a way that would allow anybody to know what's in
3 the agreement.

4 MS. CHAPLIN: Well, Mr. Warren, would it be possible,
5 then, to remove that part of it so that we could just have
6 one document, which was your compendium, which could go
7 directly onto the public record?

8 MR. WARREN: If you wish, but I do intend to refer to
9 that document. If you'd like --

10 MS. CHAPLIN: I think that that's fine. I think it
11 would make it easier all around if -- you can certainly
12 refer to that document, and it hasn't been explicitly given
13 an exhibit number. We can do that.

14 Just extract that from your compendium, and that way
15 we can just have your compendium on the public record.

16 MR. WARREN: That's fine with me, Madam Chair.

17 MS. CHAPLIN: Thank you.

18 MS. SEBALJ: Can I just interject here? I am not sure
19 if the Panel has the green book. Do you? Okay, because
20 Staff doesn't.

21 MS. CHAPLIN: You had two compendiums. One was filed
22 sort of earlier than the other one, right?

23 MR. WARREN: The book of authorities, I believe was
24 filed on Thursday afternoon. The compendium was filed on
25 Friday.

26 MS. CHAPLIN: Yes. We both have -- all three of us
27 have both documents.

28 MS. SEBALJ: Do you have an extra copy of the green-

1 bound document for Staff's purposes? Thank you.

2 MR. WARREN: I should say, by way of just preliminary
3 observation, by way of advice to my friend, Ms. Newland,
4 given her observation about her intention to fire her
5 student, she clearly is not aware of the Law Society's
6 recent rules on our relationships with students.

7 They now have the authority to fire us.

8 [Laughter]

9 MR. WARREN: Which I -- and Ms. Newland's student can
10 do with it as he wishes.

11 MS. CHAPLIN: So shall we mark your books, Mr.
12 Warren?

13 MR. WARREN: Thank you.

14 MS. SEBALJ: So on the understanding that tab 8 is
15 removed from the yellow book, which is the compendium of
16 materials of the Consumers Council of Canada filed July
17 20th, we will mark that as J2.3.

18 **EXHIBIT NO. J2.3: CCC COMPENDIUM OF MATERIAL.**

19 Did you want to mark the confidential material?

20 MS. CHAPLIN: Yes, let's give that an exhibit number.

21 MS. SEBALJ: I think we usually mark it as X, so it
22 will be X2.1.

23 **EXHIBIT NO JX2.1: CCC CONFIDENTIAL MATERIAL.**

24 MS. SEBALJ: The green book, which is the book of
25 authorities of CCC as J2.4.

26 **EXHIBIT NO. J2.4: CCC BOOK OF AUTHORITIES.**

27 MS. SEBALJ: And then Garland, we want to mark
28 separately. So it's Garland v. Consumers Gas Co., 2004

1 Supreme Court of Canada decision, as J2.5.

2 **EXHIBIT NO. J2.5: SUPREME COURT OF CANADA DECISION IN**
3 **GARLAND V. CONSUMERS GAS CO., 2004**

4 MS. CHAPLIN: Thank you.

5 MR. WARREN: Members of the Panel, I propose to make
6 submissions on five points, as follows.

7 First, in my respectful submission, the -- just, I
8 should say by way of overview, it is our position that the
9 CCTA order of 2005 applies to wireless communications
10 devices.

11 I propose to make five submissions, as follows.

12 The first is that the wording of the order is clear.
13 There is no ambiguity to it. It applies to all Canadian
14 carriers, which includes wireless carriers.

15 My second submission is that in the absence of
16 ambiguity or uncertainty, there is no need for you to
17 determine what was or was not in the evidence or what was
18 not -- was or was not in the minds of the original
19 decision-makers. Indeed, for reasons which I will
20 elaborate on, it is my view that you should not do so.

21 My third submission is that Toronto Hydro acted as
22 though the order applied to it. It accepted applications
23 for wireless attachments and allowed those attachments
24 until it arbitrarily decided it wasn't going to do that
25 anymore. And that, in my respectful submission, is
26 relevant to an understanding both of how the order was
27 intended to apply and also to the question of whether or
28 not you should exercise your discretion -- because you do

1 have a discretion today -- to decide whether or not the
2 order applies, whether you should exercise that discretion
3 in favour of the position which my friends at Toronto Hydro
4 take.

5 My fourth submission is that if Toronto Hydro or
6 anyone else believed that the order was wrong and did not
7 apply to wireless, they both could and should have appealed
8 the decision or sought a review. And it is at this point
9 that I say that Toronto Hydro's position on the application
10 of the order amounts to a collateral attack on the Board's
11 original decision and that that collateral attack is
12 impermissible, for the reasons which I will express later.

13 My final point is that Toronto Hydro's new
14 confidential information in the form of the agreement for
15 wireless attachments is substantially the same, except for
16 a few minor differences which I will point to, as the
17 agreements which Toronto Hydro entered into following the
18 CCTA order with wireless attachments, and that the
19 similarity, the virtual identity of the agreements
20 undercuts, in my submission, fundamentally, both the
21 legitimacy of Toronto Hydro's argument that the CCTA order
22 applied, and also substantiates my submission that the
23 Board should not exercise its discretion in favour of
24 allowing this argument of Toronto Hydro to stand.

25 Where my friend Ms. Newland and I -- we agree on the
26 point that the CCTA order, on its face, applies. Where we
27 disagree -- and I suppose this is relevant for you to
28 understand any differences in our position -- where we

1 disagree is that the Board needs to embark on the analysis
2 which she has advanced to you this morning about what was
3 before the Panel originally and what was intended.

4 My respectful submission is that you do not need to go
5 there.

6 My friend Ms. Newland has dealt with the issue of the
7 wording of the order, that it applies to all Canadian
8 carriers. She has taken you through definitions in the
9 Telecommunications Act, and I don't propose to repeat that.

10 What I do want to do is turn to the issue of
11 collateral attack.

12 I'd ask you in that context to turn up the book of
13 authorities, including the Garland decision of the Supreme
14 Court of Canada. Now, I have included four or five
15 authorities in the book of authorities on the issue of what
16 constitutes a collateral attack, but in searching for a
17 succinct analysis of what constitutes collateral attack, I
18 decided that the decision, the analysis of the Supreme
19 Court of Canada in the Garland case, is as succinct a
20 summary of the issues as I could find.

21 And in that context, I'd ask you to turn up paragraph
22 71 of the Supreme Court of Canada's decision.

23 MS. CHAPLIN: Mr. Warren, just before we do that, can
24 you help me understand if -- we are here today to determine
25 the preliminary issue as to whether the CCTA order applies
26 in this case. And you have indicated that on the plain
27 reading of it, CCC's view is that it does.

28 How do these arguments with respect to collateral

1 attack assist us in making a determination on the
2 preliminary issue?

3 MR. WARREN: In this way, Madam Chair. What Toronto
4 Hydro has, from the beginning of this application more than
5 a year ago, invited you to do is to find that the CCTA
6 order doesn't apply, that Toronto Hydro's position in this
7 from the beginning has constituted a collateral attack on
8 the Board's earlier order, and that what you are being
9 asked to do today by Toronto Hydro is to exercise your
10 discretion in finding that the earlier order doesn't apply.

11 And the doctrine of collateral attack and the cases in
12 support of it, in my respectful submission, speak to the
13 point of whether or not you should accede to Toronto
14 Hydro's request that you find that the earlier order
15 doesn't apply; in other words, that this isn't just purely
16 an interpretive act on your part. It's a question of
17 whether or not you ought the grant the relief which Toronto
18 Hydro is asking you to grant. That's what they are doing
19 in this case, is asking you to find that the earlier order
20 doesn't apply, and that's why, in my submission, these
21 cases are relevant.

22 MS. CHAPLIN: Thank you.

23 MR. WARREN: Returning to the Garland decision, this
24 was a decision -- the factual background of the Garland
25 case I am sure all of the Panel members are fully aware of,
26 but one of the arguments that Consumers Gas advanced all
27 the way to the Supreme Court of Canada was that the Garland
28 argument amounted to a collateral attack on a decision of

1 the Board with respect to the payment of the penalties.

2 And so the Supreme Court of Canada was called upon to
3 deal with that issue, and beginning at paragraph 71, they
4 refer to the decision of the then Chief Justice, Justice
5 McMurtry, in the court below, the Ontario Court of Appeal,
6 saying as follows:

7 "In addition, McMurtry C.J.O. is correct in
8 holding that this action does not constitute an
9 impermissible collateral attack on the OEB's
10 order. The doctrine of collateral attack
11 prevents a party from undermining previous orders
12 issued by a court or administrative tribunal...
13 Generally, it is invoked where the party is
14 attempting to challenge the validity of a binding
15 order in the wrong forum, in the sense that the
16 validity of the order comes into question in
17 separate proceedings when that party has not used
18 the direct attack procedures that were open to it
19 (i.e., appeal or judicial review)."

20 I underscore the words:

21 "...when that party has not used the direct
22 attack procedures that were open to it (i.e.,
23 appeal or judicial review)."

24 Then citing the decision of the Supreme Court in
25 Wilson and the Queen, the Court goes on to say:

26 "... this Court described the rule against
27 collateral attack as follows:

28 "'It has long been a fundamental rule that a

1 court order, made by a court having jurisdiction
2 to make it, stands and is binding and conclusive
3 unless it is set aside on appeal or lawfully
4 quashed. It is also well settled in the
5 authorities that such an order may not be
6 attacked collaterally - and a collateral attack
7 may be described as an attack made in proceedings
8 other than those whose specific object is the
9 reversal, variation, or nullification of the
10 order or judgment.'"

11 Going over to the next page, paragraph 72:

12 "Moreover, the appellant's case lacks..."

13 And this is Consumers Gas's argument:

14 "...lacks other hallmarks of collateral attack.

15 As McMurtry C.J.O. points out at para. 30 of his
16 reasons, the collateral attack cases all involve
17 a party, bound by an order, seeking to avoid the
18 effect of that order by challenging its validity
19 in the wrong forum. In this case, the appellant
20 is not bound by the Board's orders, therefore the
21 rationale behind the rule is not invoked. The
22 fundamental policy behind the rule against
23 collateral attack is to 'maintain the rule of law
24 and to preserve the reputation of the administration
25 of justice'..."

26 Citing the case of the Supreme Court of Canada in
27 Regina and Litchfield:

28 "The idea is that if a party could avoid the

1 consequences of an order issued against it by
2 going to another forum, this would undermine the
3 integrity of the justice system. Consequently,
4 the doctrine is intended to prevent a party from
5 circumventing the effect of a decision rendered
6 against it."

7 Now, I have included, and you don't need to turn it
8 up, the decision of the Supreme Court of Canada in one of
9 the early foundational cases expressing principles of
10 collateral attack and the context of an administrative
11 decision, and that's the decision of the Supreme Court of
12 Canada in Regina versus Consolidated Maybrun.

13 The facts in that case are relevant -- are a useful
14 analogue for you in this sense. In that case the
15 defendant, the mine, Maybrun Consolidated, was issued an
16 order by the Ministry of the Environment. It didn't comply
17 with the order, and there was a proceeding begun to enforce
18 the order and to prosecute them for failing to comply. And
19 it was at that stage, having ignored the original order,
20 that they said, Well, the original order didn't apply.

21 And that provides a useful analogue to what Toronto
22 Hydro has tried to do in this case, with this important
23 difference, is that in the interim Toronto Hydro did in
24 fact comply with the CCTA order.

25 Now, in the present case, Toronto Hydro had ample
26 means to challenge the order's applicability to wireless.
27 It could have appealed the decision to the Divisional
28 Court, as is its right under the Ontario Energy Board Act,

1 or it could have sought a review back to this Board itself
2 using the procedures of the Board's Rules of Practice and
3 Procedure.

4 Now, in this context, I have included in my book of
5 authorities at tab 3D the decision of the Ontario Court of
6 Appeal in the Indalex case. The facts in the case turn on
7 the application of the complex rules in the Companies'
8 Creditors Arrangement Act proceedings.

9 And in that case a challenge was brought to an order
10 that was made by the court as part of the process of
11 managing the CCAA. There are way too many CC acronyms in
12 this case. And one of the parties challenged their doing
13 so on the basis of the collateral attack doctrine.

14 And the importance of the reasoning of the Ontario
15 Court of Appeal, if you will turn up page 44 of the
16 decision, beginning and continuing on pages 45 and 46, is
17 the Ontario Court of Appeal pointed to the fact that there
18 was -- that there was an appeal mechanism provided for in
19 the original order that was being challenged and that the
20 parties were using that mechanism and that that, therefore,
21 did not constitute a collateral attack.

22 The analogy I draw is that Ontario Hydro was provided
23 with a mechanism for seeking the relief it seeks. If you
24 turn to our compendium, tab 1, which is the CCTA order,
25 which is the subject of the submissions today, and turn to
26 page 8 of that, under the heading, "Should there be a
27 province-wide rate?", the Board said, and I quote, "This is
28 not to say" -- this is the second full paragraph on page 8:

1 "This is not to say that there should not be
2 relief available for electricity distributors who
3 feel the province-wide rate is not appropriate in
4 their circumstances. Any LDC that believes the
5 province-wide rate is not appropriate can bring
6 an application to have the rates modified based
7 on its own costing."

8 So not only could they have appealed the decision --
9 remember, they are coming to you today and saying it's
10 clear on its face and clear on their record that it didn't
11 apply. Well, if it was crystal clear, A, why didn't they
12 appeal it, because they could have gone to the Divisional
13 Court, they could have come back to another Panel of this
14 Board under the rules, in addition to which the decision
15 itself provided them a mechanism to review it. And,
16 instead, what did they do? Well, they entered into
17 wireless attachment agreements on the basis of the order.

18 Now, they not only didn't appeal it. They didn't use
19 the relief mechanism in the decision. They entered into
20 agreements and they waited four years, until August of
21 2010, to say the order doesn't apply.

22 There is an analogous circumstance, in my respectful
23 submission, which has been considered recently by this very
24 Board, and that's the decision of this Board in the
25 Goldcorp matter.

26 Now, the facts in the Goldcorp matter were -- as the
27 Panel members may be aware, that there was a -- the
28 decision with reasons of the Goldcorp matter are at tab 1

1 of our book of authorities.

2 The facts in that case was that Goldcorp applied to
3 the Board for leave to constrict a transmission line to its
4 mines in northern Ontario. And during the course of that,
5 implicitly or explicitly, the Board had to consider the
6 question of bypass compensation. That's part of the
7 Transmission System Code. And Goldcorp said, We will abide
8 by the Transmission System Code, when they could not after
9 the Board issued its decision, and there was no appeal from
10 the decision.

11 When Goldcorp couldn't enter into an agreement
12 satisfactory to it, it brought an application under section
13 19 of the Ontario Energy Board Act for a declaration, in
14 effect, that this Board didn't have the jurisdiction to
15 make a transmission code which included the requirement to
16 issue bypass compensation.

17 And what the Board did in its decision in December was
18 it found that this was, in effect, a collateral attack on
19 the earlier decision and impermissible for that reason.

20 Now, the narrow issue that the Board had to consider
21 was whether or not section 19 gave it the jurisdiction to
22 consider, on a freestanding basis, a legal issue.

23 But the core of the Board's decision in that case was
24 that what Goldcorp was trying to do was appeal the earlier
25 decision, seeking a change in that. And the Board said:
26 You can't do that, and it dismissed Goldcorp's application.
27 Goldcorp then took the matter to the Divisional Court on
28 appeal, and the endorsement of the Divisional Court is

1 included at tab 2 of my authorities. And of you turn to --

2 I should say, just by way of clarification, the
3 Divisional Court included in here is both the original
4 endorsement and an amended -- an addendum to the
5 endorsement. What happened was that there was a small
6 factual error in the original endorsement. The addendum
7 doesn't affect the substance of the reasoning of the
8 Divisional Court at all.

9 But if you look at page 6 of the decision, the
10 Divisional Court found, beginning at paragraph 29:

11 "We agree with the submission of the Board and
12 the intervenors that the central matters raised
13 in this appeal are not questions of law per se,
14 but rather an attempt to overturn an
15 interlocutory and discretionary procedural
16 decision by the Board as to how the challenge to
17 the vires of certain provisions of the Code
18 should proceed, given the determination that
19 Goldcorp's application was not a standalone
20 application."

21 Divisional Court upheld the reasoning of the Board
22 that Goldcorp's application was not standalone; it was an
23 attack on an earlier decision. And as the OEB found, the
24 proper way in which to do so was to have brought an appeal,
25 or to otherwise challenge it.

26 I say, with respect, that the reasoning of the Board
27 in the Goldcorp case is directly analogous to the
28 circumstances that you have before you today.

1 I ask the Board to conclude not only that the order is
2 clear on its face, but that the Board should not exercise
3 its discretion to find in Toronto Hydro's favour on this,
4 because to do so, given, unfortunately and
5 characteristically, the hyperbole -- and I will try and
6 avoid hyperbole here -- but I will say that what's really
7 at issue is an important matter of principle which is that
8 the integrity of decisions that are made by the Board
9 should not be attacked years after the fact, to meet the
10 convenience of the circumstances of a particular party,
11 particularly where they have complied with the order
12 throughout.

13 Now, I'd ask you to turn to our compendium of
14 materials at tab 2, and this is the letter which, in a
15 sense, I suppose, began this long and somewhat tortuous
16 process. This is the letter which Toronto Hydro delivered
17 or sent to the Board in August, on August 13th of 2010.

18 I invite the Board to look at the first paragraph of
19 that letter:

20 "With this letter, Toronto Hydro Electric System
21 Limited wishes to inform the Board that..."

22 And I underscore the following words:

23 "...in light of the many safety and operational
24 concerns about the attachment of wireless
25 communications equipment to its pole
26 infrastructure that are set out in this letter
27 and its appendix, THESL has adopted a policy not
28 to attach such equipment to its poles."

1 That's notwithstanding the fact that there is an order
2 in place, a 2005 order which says: You have to give
3 access. They just say: Well, we have got these safety and
4 operational concerns which preclude us from doing that.

5 And then, in this application, they filed the
6 affidavit of Ms. Byrne, which is at tab 3 of our materials.
7 I'd ask you to turn to page 40 of the compendium, the
8 number in the upper right-hand corner. Ms. Byrne says,
9 beginning at paragraph 40:

10 "Beyond the fundamental issue that wireless
11 attachments are not included within the CCTA
12 decision, THESL has a number of concerns with
13 attaching wireless attachments onto THESL poles.
14 Wireless attachments create unique issues that
15 affect the safety, adequacy, reliability and
16 quality of electricity services."

17 Now, the Panel will recall the effort that was
18 required to get from THESL information in support of those
19 assertions in Ms. Byrne's affidavit. At tab 4, I have
20 included -- and this is not intended to produce post-
21 traumatic stress disorder in the Panel, but it's the
22 decision and order of December 9th, in which the Board
23 finds at page 61:

24 "The Board finds that some of the information
25 sought by CCC IRs 5 and 7 will assist the Board
26 in examining whether safety will be compromised
27 by wireless attachments to distribution poles.
28 The Board therefore orders THESL to provide

1 copies of all reports including incident reports,
2 analyses and communication, in support of the
3 contention that wireless attachments impair
4 operations efficiency and present incremental
5 safety hazards to electricity distribution;
6 b) provide copies of all reports, analyses, and
7 communications, reporting on the issues described
8 in paragraphs 42 to 46 of Ms. Byrne's Affidavit."

9 Those are the safety and operational concerns.

10 Then on January 20th of 2012, after Toronto Hydro
11 complained it was too burdensome to provide all of the
12 information that it had been directed to provide, the Board
13 refined it to say, beginning at page 72:

14 "The Board will require the following information
15 to be provided by January 30th, 2012:

16 a) copies of reports, including incident reports
17 and analysis reports, that provide a
18 representative sample of all of the reports in
19 support of the contention that wireless
20 attachments impair operations efficiency and
21 present incremental safety hazards to electricity
22 distribution; and

23 "any reports on the issues described in
24 paragraphs 42 to 46 of Ms. Byrne's Affidavit."

25 Now, the reason that I mention the contention in the
26 August 2010 letter that there were safety and operational
27 concerns, and the effort to try and find the back-up of
28 information on that is that some 10 days ago, the Board was

1 provided by Toronto Hydro with a new wireless agreement.

2 I have included at what was tab 7 and is now a new
3 freestanding exhibit -- tab 7 consists of an agreement for
4 attachment of wireless communications. This was elicited
5 in response to Board Staff Interrogatory No. 8; it's an
6 attachment. And it is, if not the standard form, it is a
7 representative of the attachment agreements that Toronto
8 Hydro entered into in compliance with an order which it
9 says -- which it now says isn't binding.

10 I am going to ask the Board to compare that agreement
11 with the agreement that was filed 10 days ago.

12 There are differences. And in fairness to Toronto
13 Hydro, this reflects the fastidious work of Ms. Yun, who
14 will not be fired.

15 MS. CHAPLIN: Sorry, Mr. Warren, Mr. Quesnelle has
16 brought to my attention, I think, a relevant consideration.

17 If you are going to do an analysis which provides a
18 comparison, will that reveal in --

19 MR. WARREN: All I am going to do is refer you to the
20 section numbers, and say: These are new, and invite the
21 Board to draw its own conclusion when it reads the two
22 documents about whether they're material differences, that
23 constitute differences.

24 MS. CHAPLIN: All right. Well, we'll proceed on that
25 basis, then.

26 MR. WARREN: I won't refer, Mr. Quesnelle, to anything
27 that would allow you to determine what is actually in the
28 document. I simply, in fairness to Toronto Hydro, want to

1 point out that there are some new sections.

2 They include section 7.02, 7.11, 9.25, 26, 27, 28, and
3 various individual sections' changes in wording.

4 My position is that none of the changes in the
5 agreement address safety and operational concerns in a way
6 which makes it impossible to do these attachments. Except
7 for minor modifications in the responsibilities of the
8 respective parties, the two agreements are on all points
9 the same.

10 The central point, in my respectful submission, is
11 that nothing in the new agreement addresses safety and
12 operational concerns in a way that could not have been
13 satisfactorily, indeed easily, accommodated using the
14 existing agreement.

15 And this, in my respectful submission -- the new
16 agreement simply underscores the fact that the 2000 order
17 applies. It's beyond question that Toronto Hydro doesn't
18 like some of the constraints imposed in that old order, but
19 it had mechanisms to change them, one of which is contained
20 in the order itself. If you want different costing
21 arrangements, different prices, apply to the Board for it.

22 The question is: Why does this matter, because if the
23 Board finds that the 2005 order applies, then Toronto Hydro
24 may well say, Look, this ought not to be regulated. We are
25 going to proceed with a section 29 application. We are
26 going to get into the same basket of issues.

27 In my respectful submission, it matters for this
28 reason. Number 1, it's the integrity of the Board's

1 decision-making process. There was an order made in 2005
2 which, on its face, applied to wireless telecommunications
3 devices. Everybody acted as though it did until it was
4 inconvenient for them to do so anymore. And this Board's
5 orders cannot be set aside on the basis of the
6 inconvenience to a particular party. There are mechanisms
7 by which you can challenge them, one of which is not to
8 arbitrarily and unilaterally say, It doesn't apply to me
9 anymore.

10 That's an important principle. That's why the courts
11 have confirmed again and again and again the doctrine of
12 collateral attack. And it matters, in addition - and I say
13 this with respect - Toronto Hydro has presented what, in my
14 respectful submission, is a misleading argument about the
15 application of the order, because it says that there are
16 operational and safety concerns which preclude the
17 application of the order.

18 In my respectful submission, that new agreement puts
19 the lie to that submission. There are no operational and
20 safety concerns that preclude the application of this
21 order. There are other concerns, legitimate concerns,
22 costs and prices. This is not the way to do it. Those are
23 my submissions. Thank you very much.

24 MS. CHAPLIN: Thank you. Thank you. The Panel has no
25 questions. Mr. Janigan?

26 **SUBMISSIONS BY MR. JANIGAN:**

27 MR. JANIGAN: Yes. Thank you, Madam Chair. I will
28 attempt to be guided by the remarks of my friends before me

1 and attempt to avoid duplication, in light of the passing
2 of the time today.

3 First, I would say that the importance of this
4 particular proceeding is not geared around the devising of
5 an ideal order to fit the circumstances, all of the
6 circumstances before us, but only to examine the
7 applicability of the order that existed and was put in
8 place in 2005 regarding the CCTA application.

9 I believe that is an important point, but
10 unfortunately there is a constellation of issues that has
11 leaked out in various ways through the evidence of the
12 parties, some of which I intend to address in the context
13 of this decision.

14 On its face, VECC would submit that the order is clear
15 and should be applicable. However, in the event that you
16 should wish to examine some of the circumstances associated
17 with the promulgation of this order, we would like to take
18 you through some of the materials that we think lead
19 inevitably to that conclusion.

20 Let me first state that the involvement of my client
21 is informed in two ways: One, by the fact that they wish
22 the ratepayers, and, in particular, the vulnerable
23 ratepayers of Toronto Hydro, to be afforded fair treatment
24 in the context of whatever arrangements are made with
25 respect to rate base assets.

26 The second is, to some extent, informed by the sponsor
27 of VECC, and that is the Public Interest Advocacy Centre.
28 That centre has had -- of which I am a part -- has had

1 heavy involvement in the movement to attempt to induce
2 wireless competition in the market and to alleviate the
3 problems associated with market dominance.

4 We view the circumstance as one where it has an
5 opportunity to advance issues associated with competition
6 that may lead to changes in price, choice and quality for
7 our constituents, who also happen to be Toronto Hydro
8 ratepayers.

9 One further point on this matter, and something that
10 once again is a tangential issue that has spun off from
11 this proceeding, is the idea that there is some kind of
12 qualitative difference between wireless and wireline
13 facilities that exists in telecommunications as of this
14 juncture.

15 Admittedly, the order was made with respect -- taking
16 into consideration technological neutrality, and we are
17 aware of that, but we would emphasize the point that as of
18 this time in telecommunications, there is no bright line
19 that exists between wireless and wireline services
20 associated with the delivery of services.

21 And, in fact, if you consult much of the literature
22 that exists now and look at, for example, the development
23 of revenues by telecommunications carriers, one would say
24 the future is in wireless and it's not in wireline. And we
25 do not see any difference in the provision of services
26 through wireless at this point in time compared to
27 wireline.

28 MR. QUESNELLE: Can I stop you there, Mr. Janigan? I

1 just want to make sure I'm clear on your submission. Are
2 you suggesting there is no difference in the end service or
3 the facilities required, to make the distinction there?

4 MR. JANIGAN: I think there is no difference in the
5 end service in terms of the importance. So, for example,
6 where once wireline home service was the sine qua non of
7 local access, it is no longer the case.

8 What we are finding, particularly with respect to
9 lower income students and whatever, that in fact their
10 access to the telecommunications network takes place
11 through wireless services.

12 MR. QUESNELLE: Okay, thank you. Understood.

13 MR. JANIGAN: So in examining what took place in 2005,
14 we are a little bit perplexed as to the assumption of some
15 state of ignorance in relation to the importance of
16 wireless that existed at that time. In our view, wireless
17 was already taking its place as an important service. It
18 had one-third of all telecommunications revenues that
19 existed at that time, and certainly - and this is
20 reflected, I think, in the decision of the Board - its
21 importance in the general scheme of telecommunications was
22 well known to the Board, and certainly to the players that
23 were involved in this proceeding.

24 I would say that in referencing some of the
25 individuals that were engaged in the process of negotiation
26 and presentation of the positions of their various clients
27 in this context, they represent some of the more
28 knowledgeable telecommunications counsel across the

1 country.

2 The idea that a service that was generating one-third
3 of all the telecommunications revenues in Canada would be
4 completely ignored or would not be assumed to apply in a
5 definition that was agreed to in the context of agreement I
6 think stretches the bounds of understanding.

7 So what we have done, in addition to looking at the
8 order, of course, and looking at it in relation to the
9 Telecommunications Act, is also look at the application
10 that was initially made by the CCTA in relation to -- that,
11 in fact, gave rise to the order.

12 And I think if you turn up -- it is in the material of
13 the -- it is tab 2 of the compendium of materials of the
14 applicant, CANDAS, the red book.

15 One notes that a striking similarity to the issues
16 that are arising in this proceeding were arising in that
17 proceeding.

18 First of all, the application itself engaged in the
19 primary issue of access and access to the facilities.

20 Second of all, the application also -- and on page 3
21 notes that this is not simply a matter of access with
22 another utility; it is also involving competition, and
23 competition with respect to services.

24 Thirdly, it recounts difficulties that are associated
25 with negotiations following the Barrie decision in the
26 Supreme Court of Canada, the fact that negotiations have
27 been hard to come by and that, in fact, they don't believe
28 that they are able to make agreements. On top of page 5,

1 it's noted that:

2 "In some instances, distributors have refused to
3 issue permits for new pole attachments,
4 effectively prohibiting cable operators from
5 installing and upgrading their equipment."

6 It also notes the necessity for a single set of rules
7 be applicable across the board. It looks to the issues of
8 the cable options and what the prices might be in terms of
9 -- associated with attachment versus duplication of the
10 service itself through duplicate support structures. And
11 it's to be noted here that, unlike another tangential
12 general issue that has leaked out in the context of this
13 proceeding, the presence of alternate technology that
14 existed at that time, which included things like wireless
15 cable offered by Look TV, or local multipoint
16 communications services, all of these technologies that
17 existed at the time, which were not economic alternatives
18 to wireline attachment, weren't impediments to CCTA asking
19 for access to the power poles, which represented, in fact,
20 the most economically efficient way of delivering their
21 services to their constituents.

22 So unlike the current circumstance where we have
23 canvassed a variety of different methods for the applicants
24 to offer their product, obviously the most efficient and
25 most economic way of doing so was the one that was
26 considered in the context of this -- of the order.

27 Finally, when we look to the issue of the agreement,
28 and which is at, I believe, tab 5, paragraph 2, I think, of

1 the Staff compendium, we arrive at wording which has been
2 dealt with by my friend Ms. Newland, but I would like a
3 follow-up on a question that you asked, Madam Chair, that
4 you asked Ms. Newland with respect to access to
5 communication space.

6 I view that as a very important aspect of that
7 particular agreement clause, insofar as it defined in a
8 generic sense what was the subject matter of the agreement
9 itself, in a context which was important for the
10 development of a particular price for access. It didn't
11 say this is -- this is what we are pricing here. It is an
12 attachment by wireline cable, or is an attachment by
13 wireline carriers. It is a communication space that we are
14 talking about, and everyone is entitled to access that in a
15 situation of technological neutrality.

16 It seems to VECC that past is prologue; effectively,
17 all of the conditions that existed at the time of the
18 pronouncement of the Board order are really in existence at
19 this point in time, and there is little to distinguish
20 those circumstances from here.

21 So that, we, in first instance, have difficulty in
22 understanding the assertions that the order is not clear on
23 its face, but in the event that the Board wishes to look
24 further, I think it could look to the circumstances behind
25 the pronouncement of that order and see that, really, it is
26 all fours with the circumstances that exist now.

27 My friend Mr. Warren has spoken to you concerning the
28 way in which THESL has decided to contest the application

1 of this 2005 order. And in fact, it has been a rather
2 lengthy and unnecessarily prolix process to do so.

3 I am recalled, when I look at the entire range of
4 material that has been presented by THESL in the context of
5 this proceeding, I am recalling a circumstance very, very
6 long ago when I was law student and accompanied my labour
7 arbitration prof to an arbitration, where it involved a
8 dismissal on the basis of conduct in the context of a
9 circumstance in the workplace where a number of the workers
10 were playing cards, and while a mishap occurred.

11 Well, in the first few minutes of the proceeding, the
12 lawyer for the union presented an argument as follows.
13 They weren't playing cards; but if they were playing cards
14 it was on the lunch hour; but if they were playing cards
15 and it wasn't on lunch hour, then it wasn't against the
16 company rules to play cards not on lunch hour; and it was
17 contrary to the collective agreement to discipline them
18 without giving them warning.

19 In this context, we have had the assertion that the
20 order didn't apply, but if the order applies, then it is
21 contrary to health and safety provisions. If the health
22 and safety provisions can be met, then really it is a
23 competitive market. We shouldn't be setting the rate, and
24 if it's a competitive market and we shouldn't be setting
25 the rate, there is not enough money that is associated with
26 it. And finally, we come to an agreement that effectively
27 -- that THESL has agreed to.

28 Most of us have been in the circumstances where we

1 have attempted to use the litigation process in a way in
2 which we most benefit our client. I think that's fine.
3 But I think Board has other concerns, and particularly with
4 the integrity of the process, and, in our submission, that
5 it is important that the Board maintains its integrity
6 through ensuring that its orders are respected and that in
7 the event that those orders wish to be challenged, they are
8 challenged in a way in which that does not end up in
9 proceedings that are prolix, that in fact are contradictory
10 and represent some kind of smorgasbord of remedies that
11 applied in seriatim; as one fails, you jump to the other.

12 So in my view -- or in VECC's view we support the
13 submissions of Mr. Warren in that extent and we support the
14 submissions of the applicants in this matter that the 2005
15 order is clear on its face and they should have the full
16 benefit of the same.

17 MS. CHAPLIN: Thank you, Mr. Janigan. We have no
18 questions. Ms. Sebalj.

19 **SUBMISSIONS BY MS. SEBALJ:**

20 MS. SEBALJ: Good afternoon, Panel. Board Staff had
21 intended to be about 25 minutes. I am hoping that that
22 will be significantly less, because I will start by saying
23 that Staff is in full support of the submissions of CANDAS
24 this morning, and our submissions had a remarkably similar
25 look and feel and order to them.

26 So I will spend a little bit of time pointing out some
27 of the areas that I think continue to support, but just
28 emphasize different areas.

1 We were going to talk about three main things. The
2 first was that the CCTA decision and order on their face
3 are the primary place that the Panel should look to, and,
4 similar to what Mr. Warren said, that you needn't go any
5 further, because the conclusion is clear, in Board Staff's
6 submission, by looking at that decision and order.

7 We were going to look at some restrictions and
8 limitations that you might have thought about and deal with
9 those. We were going to look at other aspects of the
10 decision in exactly similar fashion to the way CANDAS did,
11 so we won't do those.

12 And you will note that this our compendium we have
13 transcript references from the CCTA proceeding that are
14 identical to those that Ms. Newland referred to, and so I
15 won't be taking you to them, but suffice it to say we were
16 going to take you to those, which sort of is the opposite
17 of what I just said, which is that you don't have to go to
18 those, but it was sort of, you know, if you are not
19 convinced by the definition of "Canadian carrier", here are
20 some other aspects of the record in that case that we think
21 support the notion that wireless is included.

22 And then we were going to talk briefly to your point,
23 Madam Chair, about what, if any, significance is there to a
24 decision you may make with respect to the rate in the CCTA
25 order.

26 So I won't take you through the very detailed analysis
27 we were going to do on the definition of Canadian carrier
28 in the Telecommunications Act. Ours was even more detailed

1 than CANDAS's, partly because we are neophytes in the world
2 of telecom, and so we had to figure some things out, which
3 apparently others have taken as a given, on our own, one of
4 which -- and you will see in our compendium, which I will
5 mark now as J2.6, although I think everything in our
6 compendium is reproduced elsewhere.

7 **EXHIBIT NO. J2.6: BOARD STAFF COMPENDIUM.**

8 MS. SEBALJ: But you will see, for instance, that we
9 reproduce some of the evidence of Mr. O'Shaughnessy and Mr.
10 Larsen at tabs 3 and 4, respectively, of the compendium,
11 and the purposes of that was that when you get to the piece
12 of the analysis of the definition of Canadian carrier,
13 which, as Ms. Newland told, you means a telecommunications
14 common carrier that is subject to the legislative authority
15 of Parliament, and you break down that definition in the
16 same way that she did, we had to satisfy ourselves at Staff
17 that wireless was indeed part of that definition.

18 So it was either cable, radio, optical or other
19 electromagnetic system. So to do that, we went to the
20 evidence, which is reproduced at tabs 3 and 4 of our
21 compendium, to satisfy ourselves that it was indeed radio
22 and that the spectrums that we are talking about in this
23 hearing by the evidence of Mr. O'Shaughnessy is indeed
24 within the radio spectrum. So that definition in Board
25 Staff's submission, does apply.

26 We also went further to look at -- because you will
27 recall that the definition of transmission facility at its
28 end says, But does not include any exempt transmission

1 apparatus.

2 And so we also went through the analysis, and I will
3 take you to that in a moment, of what, if any, application
4 that has. So perhaps just to be helpful to the Panel - and
5 I don't know if this is something you would have done, but
6 we certainly did it - we looked at exempt transmission
7 apparatus, and that definition is also in the
8 Telecommunications Act, which is reproduced at tab 2 of our
9 compendium.

10 And, again, we weren't trying to be offensive to the
11 trees, but we did reproduce the entire Act just so that the
12 Panel had it in case it wanted to have a read through,
13 because it's obviously something this Board is less
14 familiar with than some of the other Acts.

15 So in section 2, there is a definition of exempt
16 transmission apparatus on page 24 of our materials, or page
17 2 of the Act. It means:

18 "...any apparatus whose functions are limited to
19 one or more of the following

20 "(a) the switching of telecommunications,

21 "(b) the input, capture, storage, organization,
22 modification, retrieval, output or other
23 processing of intelligence, or

24 "(c) control of the speed, code, protocol,
25 content, format, routing or similar aspects of
26 the transmission of intelligence;..."

27 From our admittedly non-expert point of view, it
28 appears from all the evidence filed to date that what the

1 members of CANDAS -- they are mobile carriers licensed to
2 provide mobile wireless services to their customers, and
3 that's question 2 of the O'Shaughnessy evidence that I took
4 you to, and that the concept of the definition of "exempt
5 transmission apparatus", because it has to be limited to
6 one or more of those functions, whether or not the CANDAS
7 equipment does any one of those we don't think is relevant,
8 because it certainly does more than (a) through (c). In
9 other words, it transmits radio signals through the use of
10 transceivers and is not only about the switching of telecom
11 or the input or the control of the speed or code.

12 And so from our point of view, it's -- we are dealing
13 with a radio system for the transmission of signals, and,
14 therefore, the definition that is incorporated into the
15 CCTA decision and order, which again is reproduced at tab 1
16 of Board Staff's compendium -- sorry, page 4 of that
17 decision or page 6 of the compendium, and this is the piece
18 where the Board accepts the settlement agreement, and the
19 settlement agreement incorporates definition of Canadian
20 carriers as defined in the Telecommunications Act.

21 So Board Staff's submission is that the members of
22 CANDAS - in other words, wireless communications - clearly
23 fall within the definition of Canadian carrier, within that
24 definition.

25 Now, we did, as I mentioned, want to explore whether
26 there were any restrictions or limits to the inclusion of
27 wireless in that definition, and in that respect we had
28 three areas that we wanted to talk about. The first was

1 the exemption provided directly within the legislative
2 framework, so exempt apparatus, which I have dealt with.

3 The second is the question of whether, by clearly
4 indicating in the settlement agreement that access
5 conditions set by this Board should apply to the
6 communications space on the LDC poles, this was somehow
7 going to delimit the group to which the decision in that
8 case should apply.

9 And in this respect, the definition that I just took
10 you to and which you made remark of this morning, it
11 actually says these conditions should apply to access to
12 the communications space on the LDC poles by all Canadian
13 carriers as defined by the Telecommunications Act and cable
14 companies.

15 Without having examined all the evidence in this case,
16 of course, it's impossible for Staff to make any
17 submissions with respect to whether or not that is a
18 limitation in this case. We do note that the settlement
19 agreement, which is provided at tab 5 of our compendium, at
20 the very back of the settlement agreement -- in fact, the
21 last page of that tab defines communication space and says
22 it means a vertical space on the pole, usually 600
23 millimetres in length, within which telecommunications
24 attachments are made.

25 Staff thinks that's significant, because it was
26 obviously explicit both in terms of what the parties to the
27 settlement agreement meant when they used the term
28 "communications space", and also with respect to what the

1 Board incorporated essentially into its decision by
2 reference to that piece of the settlement agreement.

3 So in our view, in the current case, if some or all of
4 the attachments which the applicant intends to attach to
5 the LDC poles would not fit within that communication
6 space, this may present an issue for the applicants. There
7 is obviously room for argument there, in terms of whether
8 concept of communication space evolves, either as
9 technologies evolve and in general become smaller, or as
10 methodologies evolved for LDCs to fit more attachments
11 within the same amount of space.

12 And we are not, obviously, going to opine on that, but
13 the point is that we do think that the use of that term is
14 not -- clearly not an accident. It's expressly defined in
15 the Settlement Act, and that it's important for your
16 consideration.

17 The third thing that we just wanted to bring to your
18 attention with respect to this is if you stay -- if you
19 just flip one page backwards at tab 5 of J2.6, there was
20 definition of "attachment" provided at appendix B of the
21 settlement agreement. And that's section 1.5 on page 10 of
22 the settlement agreement or 113 of our compendium.

23 And we wanted to note that there was a definition of
24 "attachment" provided, which is inclusive, and then a note
25 in square bracket, which says:

26 "'Attachment' excludes wireless transmitters and
27 power line carriers, not agreed."

28 In our view, this exclusion was clearly not agreed to,

1 so it wasn't part of the ultimate settlement and it wasn't,
2 therefore, accepted by the Board when it incorporated any
3 piece of the settlement into its decision. But by
4 disagreeing as to whether wireless transmitters were or
5 were not included in the definition of "attachment" this
6 essentially creates a situation whereby wireless wasn't
7 included or excluded. In other words you can't -- in our
8 view, you can't conclude that no agreement on the exclusion
9 of wireless means inclusion of wireless. Sort of one of
10 those -- the parties just didn't agree.

11 However, in our view, this is a bit of a red herring,
12 and the reason I am dealing with it is simply because it
13 may have come up in your own analysis or it may be
14 mentioned by others this afternoon, because the term
15 "attachment" was actually not used by the settling parties
16 when they settled on the piece about what parties should
17 have access to the poles.

18 So in Staff's view, this potential sort of area of
19 uncertainty is not invoked, because the definition of
20 "attachment" was not invoked into the piece of the
21 settlement agreement that was ultimately adopted by the
22 Board.

23 But I just wanted to bring it to your attention,
24 because it is a mention of the concept of wireless and we
25 thought it was important to at least put it to bed, in our
26 view, in Board Staff's view.

27 So in conclusion on this piece, the Board Staff is of
28 the view that you look to the order, the decision and order

1 in the CCTA proceeding, that that decision and order is
2 clear on its face, that it adopted the settlement of the
3 parties on this matter, which incorporates the definition
4 of "Canadian carrier" in the Telecommunications Act and
5 that that definition explicitly includes wireless
6 providers.

7 Again, I am going to skip through the piece on other
8 references in the transcript -- because, as I said, those
9 are identical to what Ms. Newland provided to you this
10 morning -- and get right to: If the CCTA decision applies
11 to wireless, does the rate from the CCTA decision apply?
12 And as we have said, in our view, in Staff's view, the CCTA
13 decision does apply to wireless, and so this question of
14 whether the rate applies, I am careful here because I
15 understand that the question for this morning is very
16 narrow and that the question of whether the rate is even
17 part of this proceeding has been answered by the Panel
18 previously. However, it's difficult in doing an analysis
19 of a decision and the application of that decision to just
20 ignore a piece of the decision that follows logically from
21 a conclusion, if you choose to make it, that the decision
22 applies.

23 And so in Staff's view, the onus is on whatever party
24 may argue that the rate doesn't apply to convince this
25 Panel why it shouldn't. I am not sure that today is the
26 day to do that, but ultimately if this Panel makes that
27 decision, essentially Staff is saying that, in our
28 submission, you need to be explicit about the fact that it

1 may or may not mean that that rate applies.

2 On its face, my view would be if the CCTA order
3 applies, it applies in its entirety, and that if someone
4 wants to convince the Board otherwise, they would have to
5 make application or a motion within the context of this
6 proceeding to convince you otherwise.

7 Unless I have missed anything, those are Staff's
8 submissions.

9 MS. CHAPLIN: Thank you.

10 The Board has no questions.

11 Mr. Vellone?

12 MR. VELLONE: I am wondering if now might be an
13 appropriate time to take a lunch break. I have probably
14 just a bit more than an hour.

15 MS. CHAPLIN: I will ask Ms. Newland what her
16 preference is, in terms of would you prefer to THESL's
17 arguments now and then take a break, or take a brief break
18 and then hear them and then take another break?

19 MS. NEWLAND: Yes, we would prefer to hear them and
20 then the break could give us some time to consider them,
21 because we have a right of reply.

22 MS. CHAPLIN: I believe the EDA also has -- they also
23 have submissions.

24 MS. NEWLAND: We are in your hands. What we are
25 asking for is some reasonable amount of time to consider
26 the submissions.

27 I don't want to put Mr. Vellone in a difficult
28 position. If we don't break I would ask for a five-minute

1 break.

2 MR. VELLONE: May I make a suggestion, perhaps?

3 MS. CHAPLIN: Certainly.

4 MR. VELLONE: If we break for lunch now, give everyone
5 a chance to grab something to eat, Toronto Hydro and the
6 EDA will make their submissions, and we could take our
7 afternoon break maybe a little bit early, to allow Ms.
8 Newland to prepare for her reply.

9 MS. CHAPLIN: Well, between you, you have two hours.
10 If we break now to 1:30, that takes us to 3:30.

11 Having not heard those arguments, you don't know how
12 long you are going to be in reply. We would probably be
13 able to take a half-hour break, but we would need to start
14 reply submissions at 4:00 o'clock to ensure we complete by
15 5:00.

16 So is a half-hour break going to be sufficient? Or
17 would you prefer that we took a half-hour break now and
18 took a one-hour break then?

19 MS. NEWLAND: I think that would be our preference,
20 Madam Chair, if it's all right with the Board.

21 MS. CHAPLIN: We will do that. We will break now
22 until 1:00 o'clock.

23 Thank you.

24 --- Recess taken at 12:27 p.m.

25 --- On resuming at 1:03 p.m.

26 MS. CHAPLIN: Mr. Vellone, are you ready to proceed?

27 **SUBMISSIONS BY MR. VELLONE:**

28 MR. VELLONE: Yes, Madam Chair, I am.

1 To begin, I guess there were some materials filed this
2 morning both by the applicant, as well as some of the
3 intervenors, which we didn't have a chance to see before.
4 That being said, I will try to respond to them as best I
5 can in the context of my submissions to the extent that
6 they are relevant. I might have a few particular points
7 that I am going to tag onto the end, so just to respond to
8 very specific issues that were raised this morning that
9 weren't drawn to our attention before.

10 Respectfully, Toronto Hydro submits that CANDAS's
11 characterization of the preliminary issue ignores a number
12 of factual fundamental differences between wireline and
13 wireless attachments, which the Board simply did not have
14 an opportunity to consider in the course of the CCTA
15 proceeding or in making the CCTA decision.

16 Toronto Hydro's position, which has been clear on the
17 record, is that the CCTA decision does not apply and was
18 never intended to apply to the application of the
19 attachment of wireless equipment, including DAS components
20 to utility distribution poles.

21 Toronto Hydro does not dispute the applicability of
22 the CCTA decision to traditional Canadian carrier wireline
23 attachments within the communications space on utility
24 poles. However, it is Toronto Hydro's submissions that
25 there are essential factual differences between wireline
26 and wireless attachments and critical features of the CCTA
27 decision which render it inapplicable to the attachment of
28 wireless equipment, including DAS.

1 In short, the CCTA's decision addresses four key
2 questions. First, who should be given regulated access?
3 Second, for what should regulated access being given?
4 Third, where on the pole is regulated access being given?
5 Fourth and finally, why is regulated access being granted?

6 Starting with that first question, I think the answer
7 is clear. You have heard submissions both from the
8 applicant, as well as from Board Staff, that the Board
9 ruled that access is being given to Canadian carriers and
10 cable companies in the province of Ontario, and "Canadian
11 carriers" is defined in the applicable legislation.

12 In this way, the Board distinguished Canadian carriers
13 and cable companies from any other potential third-party
14 attacher that may seek to attach to utility poles pursuant
15 to the CCTA decision. I don't think there is any dispute
16 to this aspect of the decision, but this answer does not
17 tell the whole story.

18 Specifically, the CCTA decision does not confer onto a
19 Canadian carrier the right to attach absolutely any
20 attachment at their discretion to utility distribution
21 poles.

22 This brings us to our second question: For what is
23 regulated access being given? And this is a key question
24 faced by this Panel today. Does the decision include or
25 exclude the attachment of wireless equipment, including
26 DAS?

27 The evidence from the record on the CCTA proceeding is
28 clear. The Board and parties focussed principally on

1 wireline attachments and, in particular, coaxial cable
2 attachments that were of the concern to the CCTA itself.
3 Over the course of the four-day hearing in the CCTA
4 proceeding, wireless technology was mentioned only one, and
5 only in respect of wireless cable.

6 In the settlement agreement that was presented to the
7 Board, the question of whether wireless attachments were
8 included was simply not agreed.

9 My submissions today are that there are at least four
10 fundamental factual differences between traditional
11 wireline attachments and wireless equipment, including DAS,
12 that these factual differences were not at issue in the
13 CCTA proceeding and were not considered by the Board in
14 making the CCTA decision.

15 These factual differences merit a full and complete
16 exploration on the record, and that because of these
17 differences the CCTA decision simply should not be expanded
18 so as to include wireless equipment, including DAS.

19 The third question: Where on the pole is regulated
20 access being given? The answer to this is fairly clear.
21 In both the CCTA decision and in the settlement agreement,
22 regulated access is being granted to a two-foot
23 communications space on the pole.

24 Fourth and finally, why is regulated access being
25 given? And while I saved this question for last, it is
26 probably the most important. Under the CCTA decision, the
27 Board granted regulated access for traditional wireline
28 facilities for two key reasons: First, because poles

1 constituted essential facilities for those wireline
2 attachments; and, second, because there was evidence that
3 the parties were simply unable to conclude agreements for
4 over a decade.

5 These aspects of the CCTA decision are quite
6 important, because they inform the Board's reason for
7 regulating in the first place. And because of these facts
8 -- because these facts on the record -- my apologies --
9 because the facts on the record in this proceeding are that
10 for wireless equipment, including DAS, challenge these very
11 reasons why the Board chose to regulate in first place.

12 To recap, when reading the decision, it would be
13 reasonable to ask: Who was given regulated access, for
14 what type of attachments, where on the pole and why? There
15 is little disagreement on the "who". However, the CCTA
16 decision cannot be read so as to confer onto a Canadian
17 carrier the right to attach absolutely any type of
18 attachment at their discretion.

19 I am going to spend the focus of my discussion today
20 on the what, the where and the why. And in this regard,
21 there are at least four factual differences which the Board
22 simply did not consider and was not required to consider in
23 the context of the CCTA decision.

24 The first of those factual differences is that LDC
25 poles are, as a matter of fact, not an essential facility
26 for wireless equipment, including DAS.

27 One of the central characteristics of the CCTA
28 decision - and I won't ask you to turn up, up because Ms.

1 Newland already did this morning - is that the Board
2 determined at page 3 of that decision that poles constitute
3 essential facilities for wireline attachments. That
4 decision in itself was a fundamental reason why it chose to
5 regulate.

6 However, unlike wireline attachments, which require a
7 continuous network of poles for the suspension of wires,
8 proponents for wireless equipment, including DAS, desire
9 access to utility poles principally for convenience. This
10 is because for wireless equipment, including DAS, can be
11 placed in a variety of other siting locations, including on
12 the sides of buildings or the rooftops of commercial,
13 residential or industrial buildings, street furniture,
14 water towers, traffic lights, standalone communication
15 towers, and on other elevated structures.

16 CANDAS readily admits to the presence of these
17 multiple alternatives in response -- in respect of its
18 proposed Toronto DAS network in response to Toronto Hydro
19 Interrogatory No. 3. I will ask you now -- I guess we
20 should mark the Toronto Hydro document brief as an exhibit.

21 MS. SEBALJ: J2.7.

22 **EXHIBIT NO. J2.7: TORONTO HYDRO DOCUMENT BRIEF.**

23 MR. VELLONE: Thank you. Turning up tab 14, part C of
24 the Toronto Hydro document brief, this is CANDAS's response
25 to Toronto Hydro Interrogatory No. 3, and that page 7 of
26 90, which shows up as the third page in the document brief,
27 the CANDAS members respond to Toronto Hydro's questioning
28 about alternative siting.

1 In response to Toronto Hydro Interrogatory No. 3(b),
2 CANDAS members provide a list of alternatives that they
3 considered for their Toronto DAS network. Specifically,
4 ExteNet and DAScom identify streetlight poles, Bell Canada
5 poles, traffic light standards and other municipal street
6 furniture, as well as the installation of new poles in
7 public rights of ways as alternatives to THESL utility
8 poles that they considered in connection with the Toronto
9 DAS network.

10 When we asked this same question during the technical
11 conference to Public Mobile about what alternatives to
12 distribution poles did Public Mobile consider, Mr.
13 O'Shaughnessy clearly and without reservation answered
14 without reservation answered macrocell networks. That is
15 at page 10 of the technical conference transcript.

16 Various alternatives to utility distribution poles are
17 also discussed in the affidavits of Mr. Michael Starkey,
18 Dr. Adonis Yatchew, and in the Canadian Electricity
19 Association industry report prepared by LCC International.

20 I have included each of these documents in the THESL
21 document brief at tabs 8, 9 and 10.

22 Turning now to tab 8, I won't walk you through each of
23 these reports. I believe they largely stand on their own.
24 However, I will draw your attention to very specific
25 aspects, in particular, at page 27 and 28 of the report of
26 -- affidavit of Mr. Michael Starkey.

27 At this portion of his report, Mr. Starkey draws the
28 Board's attention to result of Industry Canada database

1 that indicates that there are roughly 7,000 antenna arrays
2 currently operating within 25 kilometres of the centre of
3 the City of Toronto, at more than 1,300 individual physical
4 locations.

5 To be clear, setting aside the few attachments that
6 the CANDAS member companies have on Toronto Hydro
7 distribution poles, the vast majority of these attachments
8 are not on utility distribution poles. That's why Mr.
9 Starkey, in his opinion on page 29 and 30, concluded that
10 each of these sites represents an alternative to placing
11 wireless equipment on THESL distribution poles.

12 Similarly, turning now to tab number 9, at page 27,
13 starting at the top of page 27, Dr. Yatchew concludes that:

14 "From the standpoint of an evolving siting
15 market, there are a myriad of structures within
16 the THESL service area of varying height. Power
17 supply is ubiquitous, and fibre can be accessed
18 in numerous locations. The empirical evidence
19 indicates that workably competitive siting
20 markets have evolved as the need has arisen,
21 given the availability of key elements, there are
22 therefore strong reasons to expect that they will
23 continue to do so."

24 Now, I would like to speak briefly to Ms. Newland's
25 reference to Dr. Yatchew's report, which was filed in
26 evidence during this CCTA decision. And I guess if she has
27 questions about Dr. Yatchew's report in this proceeding,
28 which -- I think his evidence is very clear he does not

1 believe that poles constitute essential facilities for
2 wireless attachments. If that in some way conflicts with
3 what she reads as a previous report, she is welcome to ask
4 him that in cross-examination, but we are simply not at
5 that stage of this proceeding yet.

6 Given the presence of so many alternatives, it's not
7 surprising that an active, extensive and competitive siting
8 market for the attachment of wireless equipment, including
9 DAS, has developed and continues to evolve. The existence
10 of this market is well supported by the presence of
11 companies whose primary business is the siting of wireless
12 equipment.

13 These include, in the United States, American Tower
14 Corporation and Crown Castle International. I have
15 included excerpts of their annual reports at tab 12 of the
16 Toronto Hydro document brief. You don't have to turn those
17 up. I won't be making specific reference to them.

18 But there are also companies active in the siting
19 market in Canada, and these include Antenna Management
20 Corporation and SPA Communications, which are both active
21 in the Toronto market, as is noted in Toronto Hydro's
22 response to Board Staff Interrogatory No. 14. And that
23 also included in the Toronto Hydro document brief at tab
24 13A.

25 All of this evidence indicates that a vibrant and
26 active wireless attachment siting market exists and will
27 continue to evolve, and points to the conclusion that
28 distribution poles are essential facilities for wireless --

1 are not essential facilities for wireless equipment,
2 including DAS.

3 Given this, it is perhaps not unsurprising that Public
4 Mobile was able to successfully launch its wireless
5 business quickly and without reliance on Toronto Hydro's
6 distribution poles.

7 So the first key difference in our submissions are
8 that distribution poles are simply not essential facilities
9 for wireless equipment, including DAS.

10 The second key difference for this Board to consider
11 is that the Board intervened in the CCTA decision because
12 the parties could not conclude agreements for over a
13 decade. This is, again, included at page 3 of the CCTA
14 decision. I believe Ms. Newland walked you through it, but
15 I will read it back on the record now, as well:

16 "The fact is that the parties have been unable to
17 reach an agreement in over a decade. This degree
18 of uncertainty is not in the public interest."

19 This conclusion is simply not true for the case of
20 wireless, the attachment of wireless equipment, including
21 DAS. Consider, for instance, the dispute between Toronto
22 Hydro and the CANDAS member companies. The evidence speaks
23 for itself.

24 A disagreement between the parties did not lead to a
25 stalemate, as it did in the circumstances leading up to the
26 CCTA decision. Rather, Public Mobile was able to
27 successfully launch its wireless business relatively
28 quickly and without reliance on THESL distribution poles.

1 In addition to this, on July 12th Toronto Hydro filed
2 evidence that it has recently successfully concluded a
3 commercial agreement with a third party, arm's-length
4 third-party attacher for the attachment of wireless
5 equipment to Toronto Hydro's distribution equipment.

6 I have included at tab 15 of the Toronto Hydro
7 document brief, simply, the cover letter that explains in
8 general terms the contents of that agreement. Since this
9 material was filed in confidence, I will limit my
10 submissions on it to matters that can be disclosed on the
11 public record.

12 First, this agreement was with an arm's-length third
13 party and evidences the existence of a market for wireless
14 attachments within the City of Toronto, with a wireless
15 attachment rate significantly greater than the CCTA
16 decision rate of \$22.35 per pole per year for wireline
17 attachments. The net revenues earned from these
18 attachments are accounted for as a revenue offset, and flow
19 through directly to the benefit of Toronto Hydro
20 ratepayers.

21 Second, the agreement evidences that, contrary to
22 CANDAS' assertions, and was explained in considerable
23 detail at the technical conference, Toronto Hydro simply
24 does not have a no-wireless policy.

25 Toronto Hydro's principal dispute with the CANDAS
26 member companies relates to its request for regulatory
27 intervention in the form of mandated access at a regulated
28 price. Toronto Hydro remains concerned that the CANDAS

1 members are pursuing a form of regulatory arbitrage in
2 attempting to obtain regulated access to wireless sites at
3 significantly less than fair market value. Why settle for
4 a market rate when you can ask the Board for a much, much
5 lower regulated rate?

6 Third, and finally, this new information evidences
7 that, while CANDAS members are not the only companies
8 seeking access to Toronto Hydro's distribution poles for
9 wireless attachments, they are the only ones who are
10 seeking access at a mandated rate of \$22.35 per pole per
11 year. THESL submits that this itself is a relevant
12 distinction between CANDAS, which represents a narrow set
13 of commercial interests aggressively pursuing a particular
14 business plan, and the CCTA itself, which was more broadly
15 representative of the wireline cable industry as a whole.

16 THESL has demonstrated with this new agreement that
17 not all wireless companies share CANDAS' view about the
18 CCTA decision.

19 Third, the third essential difference is that the CCTA
20 decision focussed on wireline attachments that fit within
21 the communications space on distribution poles. Referring
22 back to my introduction, this is really about the "where"
23 on the pole.

24 I will ask you now to turn up tab 4 of the Toronto
25 Hydro document brief. This is a copy of the settlement
26 agreement that was filed in the course of the CCTA
27 settlement proceeding.

28 If you turn to page 4 of that settlement agreement,

1 you will see at the bottom, issue number 2, which states:

2 "If the Board does set conditions of access, to
3 what types of cable or telecommunications service
4 providers should these conditions apply to?"

5 The question under No. 2 is "who." All the parties
6 agree as follows:

7 "If the Board does set conditions of access,
8 these conditions should apply to the
9 communications space on LDC poles by Canadian
10 carriers."

11 The parties to the settlement agreement clearly
12 intended to limit the scope of settlement to access to the
13 communications space.

14 I would ask you to now turn up the CCTA decision
15 itself, which is included at tab 1 of the Toronto Hydro
16 document brief, and turn to page 4 of that decision. At
17 the top of this page, the Board answers the question: Who
18 should have regulated access?

19 "Who should have regulated access? On this
20 issue, the parties are in agreement. In the
21 Settlement Agreement of October 19, 2004, all
22 parties agreed that if the Board does set access
23 conditions, these conditions should apply to
24 access to the communications space on the LDC
25 poles by all Canadian Carriers..."

26 Moving down to the first full sentence of the next
27 paragraph:

28 "This Board has accepted the settlement agreement

1 in this regard."

2 Clearly, each of these excerpts make it clear that the
3 CANDAS -- the CCTA decision was directly aimed at, and
4 limited to, regulating access for attachments that fit
5 within the communications space on LDC poles.

6 One of the questions that have consistently come up in
7 this proceeding is: What is meant by the term
8 "communications space"? I would suggest that this is also
9 addressed in the Board's decision at pages 9 and 10, and I
10 ask you to flip forward to that now.

11 It is here in the decision where the Board accepts the
12 CCTA's estimates for the configuration of a typical joint-
13 use pole which assumes a typical pole height of 40 feet,
14 with 2 feet of communications space. This configuration is
15 illustrated at tab 2 of the Toronto Hydro document brief,
16 which is simply an excerpt of figure 1 from the affidavit
17 of Dr. Adonis Yatchew.

18 Without putting too fine of a point on it, in the
19 context of the CCTA decision, the term "communications
20 space" was not arbitrary. It was quite well defined, and
21 it was accepted by the Board to mean it specified 2-foot
22 space on a typical 40-foot joint-use pole.

23 Clearly pole-top attachments of wireless equipment,
24 including DAS, would fall well outside of the defined
25 communications space, but setting aside the question of
26 pole-top attachments, let's look at the specific
27 attachments that the CANDAS members proposed.

28 While there is no typical or standard configuration or

1 type of attachment applicable to wireless equipment,
2 including DAS, the types being discussed by CANDAS for the
3 Toronto DAS network typically ranged between 5- and 8-feet
4 long and would simply not fit within the defined
5 communications space on LDC poles.

6 I would ask you to turn now to tab 3 of the Toronto
7 Hydro document brief. This document is an excerpt of
8 Exhibit D of the written evidence of Tormod Larsen, and
9 turning forward to page 4 of 4 - you might have to rotate
10 this to be able to see it - what we have here is an
11 illustration, a DAScom wireless illustration, titled as
12 "Fibre Optic Node 559", which, when you look at the
13 profiles in the bottom left corner of the plan view, show
14 that when measured from the bottom of the UPS to the top of
15 the antenna, the proposed DAScom installation stands 2.5
16 metres, or approximately 8.2 feet, of pole space.

17 Clearly this 8.2-foot-long attachment will fall well
18 outside of the defined 2-foot communications space on
19 distribution poles. CANDAS acknowledges this fact in
20 response to Toronto Hydro Interrogatory No. 2(b), and I
21 will ask you to turn up tab 14B of the Toronto Hydro
22 document brief now.

23 Turning forward to page 6 of 90 - that's the last full
24 page in the excerpt you have been given - you will see the
25 CANDAS response to Toronto Hydro Interrogatory No. 2(b),
26 and reading the last full sentence in that response.

27 "Components of the Toronto DAS Network that
28 attach outside (below) the allocated

1 communications space on node site poles include
2 remote radio units, power supplies and related
3 elements such as cables, connectors and switches,
4 as described in the Written Evidence of Tormod
5 Larsen (Exhibit D..."

6 That's the figures and diagrams that I just brought
7 you to a moment ago. Clearly the CCTA decision was
8 specifically focussed on wireline attachments that fit
9 within a defined 2-foot communications space. This
10 distinction between wired and wireless attachments was
11 considered by the New York Public Service Commission in its
12 June 2007 decision not to accept a petition by T-Mobile
13 requesting that the wired pole attachment policies and
14 rules set by that public service commission and rates be
15 applied to wireless equipment.

16 This is included at tab 11 of the Toronto Hydro
17 document brief. The decision is relatively short, but I
18 won't read the whole thing into the record. In short, the
19 New York Public Service Commission contrasted wireline
20 attachers with wireless attachers and found in its decision
21 that wireless equipment occupies a much larger portion of
22 the pole than the typical 12 inches used by standard
23 wireline attachments.

24 In addition, the New York Public Service Commission
25 found that wireless attachers have other options for
26 attaching their facilities, such as to buildings, existing
27 towers and newly constructed towers.

28 In its conclusion, the New York Public Service

1 Commission refused to apply its existing pole attachment
2 order and policy to wireless attachments. Rather, it
3 determined that those attachments should be governed by
4 arm's-length negotiations.

5 The fourth key factual difference between wireline and
6 wireless attachments relates to the assumptions made in the
7 CCTA decision around the calculation of the \$22.35 per pole
8 per year charge that is ordered by the Board in the CCTA
9 proceeding.

10 That calculation assumed certain occupancy proportions
11 of a user's pole of the poles -- of uses of the pole's
12 communications space that are simply not applicable to
13 wireless equipment, including DAS. For example, the Board
14 assumes, in calculating the attachment rate, that
15 attachments will fit within the 2-foot communications space
16 and that there will be an average of 2.5 attachments
17 connected per pole. That is included at tab 1, pages 9 and
18 10 of the CCTA decision.

19 These assumptions likely held true for the wireline
20 attachments that the Board was considering in the CCTA
21 decision. However, this rate is simply insufficient for
22 wireless equipment, including DAS. This conclusion is
23 explained in considerable detail in the evidence at tab 13B
24 of the Toronto Hydro document brief, which is Toronto
25 Hydro's response to Consumer Council's Interrogatory
26 No. 15.

27 You don't have to turn it up right now, but I did want
28 you to have it available for your reference when making the

1 decision. In short, the CCTA decision makes certain
2 assumptions in the allocation of non-incremental pole costs
3 to attachers that simply do not apply for wireless
4 equipment. Those include that 2.5 -- there will be 2.5
5 attachers per pole that fit within the defined 2-foot
6 communication space.

7 Second, similar assumptions are made for the
8 allocation of incremental costs, excluding make-ready work,
9 which are simply not applicable to wireless equipment,
10 including DAS, which as is evidenced in the affidavit of
11 Mary Byrne require considerably more resources to process,
12 consider and assess.

13 So, put simply, the \$22.35 per pole per year
14 attachment charge is simply not appropriate for wireless
15 equipment, including DAS, whether considered from a cost
16 perspective or from a market perspective.

17 So, in short, there are four essential factual
18 differences between wireline and wireless attachments.
19 These are, first, that LDC poles do not constitute
20 essential facilities for wireless equipment, including DAS;
21 rather, there is ample evidence of a competitive and active
22 siting market for the attachment of this equipment in
23 Ontario.

24 Second, there is no evidence of the systematic
25 inability of the parties to successfully conclude an
26 agreement in the absence of regulatory intervention.
27 Rather, Public Mobile successfully launched its wireless
28 service without reliance on Toronto Hydro distribution

1 poles, and Toronto Hydro has successfully concluded an
2 arm's-length agreement with a wireless attacher at market
3 rates.

4 Third, wireless equipment, including DAS, simply does
5 not fit within the defined two-foot communication space
6 that was subject of the CCTA decision.

7 And fourth and finally, the attachment rate of 22.35
8 per pole per year simply isn't appropriate for wireless
9 equipment, including DAS, whether from a cost perspective
10 or from a market perspective.

11 MS. CHAPLIN: Mr. Vellone, before you proceed, could
12 you help me? These differences, are these reasons that
13 would lead the Board to conclude that the CCTA decision
14 should not apply, or do they lead us to the conclusion that
15 does not apply?

16 I guess I am asking you to contrast your factual
17 differences you have outlined with the words of the Board's
18 order on page 11 of its decision and order.

19 MR. VELLONE: My view is that these four factual
20 differences would relate directly to the question that the
21 CCTA decision does not apply, for the following reasons.

22 When you take a look through the transcript of the
23 proceeding and what was discussed during the oral hearing,
24 if you look at the CCTA application itself and all the
25 materials that were filed in that proceeding, there is
26 simply no discussion of any of these four substantive
27 issues that I have raised to your attention today.

28 It wasn't that this CCTA decision does apply to

1 wireless equipment; the Board simply didn't have an
2 opportunity to consider the expert evidence and the factual
3 evidence about the distinctions between wireless and
4 wireline, and as a result, the CCTA decision does not apply
5 to wireless equipment, absent the Board making a
6 determination on these particular facts.

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

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

14 MS. CHAPLIN: Sure. And maybe while you are thinking
15 about that, you can also think about -- I believe it was
16 Mr. Warren who brought up the Board's finding on page 8 of
17 that decision, where it appeared to expressly acknowledge
18 that specific circumstances might differ, which would lead
19 to a conclusion that the uniform rate didn't apply. And
20 would that -- does that not answer one of the key
21 differences you have identified?

22 [Mr. Vellone confers with THESL representatives]

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

27 However, if circumstances have evolved in such a way
28 that new facts have arisen that are material to the

1 original decision, which would cause the Board to
2 potentially reconsider and question the very correctness of
3 that decision were it applied to the new factual
4 circumstances -- so the materiality of the new factual
5 information is really of importance here -- if those new
6 facts have arisen and they are material to the reasons in
7 the original decision, then the Board would typically
8 consider those new facts.

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

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

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

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

25 MS. CHAPLIN: Well, I am having difficulty with your
26 answer. Your answer seems to be suggesting that it may
27 apply but it shouldn't, and that the Board, in the normal
28 course, if it sees new circumstances reviews decisions,

1 which I understand. That is entirely correct, but that is
2 not what you are claiming to argue.

3 [Mr. Vellone confers with THESL representatives]

4 MR. VELLONE: Let me try to characterize it this way.

5 If the terms of the Board's order in the CCTA decision
6 speak to the "who" -- which there is no dispute about --
7 there is no other way to figure out whether or not that
8 Board order applies to the attachment of wireless equipment
9 without looking to the underlying transcript and facts
10 considered by the Board in making its decision in the CCTA
11 proceeding.

12 And the second half of my submissions will be focussed
13 directly on that. So the purpose of the first half of my
14 submissions was to articulate four factual differences to
15 make this Board aware of the substantive differences that
16 exist; the second part of my submissions today will look
17 through the proceeding and materials from the CCTA decision
18 to determine whether or not those were addressed or even
19 contemplated in making the original CCTA decision.

20 MR. QUESNELLE: Just on that, Mr. Vellone, then,
21 perhaps if you are on the first question as to who it
22 applies to -- and you say there is no dispute on that --
23 what do you see -- are you pointing us to anything that the
24 Board would have looked at in that application to land on a
25 conclusion that the "who" would be based on the definition
26 in the legislation as to: Why not any third party?

27 You made the submission that it is about ensuring that
28 the "who" is captured, that it wouldn't be another third

1 party. What is it about the identity of those individuals
2 that the Board looked at to make them the inclusive group,
3 but no one else?

4 MR. VELLONE: In that -- particular circumstances, the
5 identity of the individuals that the Board considered was
6 set out -- the Board accepted the settlement agreement in
7 that regard.

8 And that was specified by the particular cable
9 telecommunications attachers, as well as other intervenors
10 in that proceeding, that desired access for wireline
11 attachments.

12 MR. QUESNELLE: So there wasn't a principled
13 application by the Board or analysis by the Board? It was
14 simply the acceptance of the settlement agreement in that
15 terminology? Is that your submission?

16 MR. VELLONE: I believe it was. I believe the Board
17 asked itself in its decision who should attach, but it
18 wasn't specifically considering anywhere directly in its
19 decision what should attach. And I will get to a point in
20 the Board's determination where the Board was aware in the
21 settlement agreement of a dispute about what should attach.
22 There was not agreement on it.

23 The Board made a particular determination on what
24 terms and conditions should apply, knowing that that
25 dispute existed, and allowed the parties to go out and
26 figure out what should attach themselves.

27 MR. QUESNELLE: But back to the "who", on that
28 particular element of your submissions, you are suggesting

1 that the Board did not apply any kind of principled
2 analysis as to why that group would be the acceptable
3 group. What you are saying is it relied fully on the
4 settlement, and that the definition of the settlement is
5 what the Board relied on?

6 MR. VELLONE: I believe the Board made a policy
7 judgment in accepting the settlement - the Board has the
8 opportunity to deny accepting the settlement, as well - to
9 allow Canadian carriers and cable companies' attachments
10 because of a practical, common-sense notion that poles
11 constitute essential facilities for wireline attachments.

12 It does make sense to have a duplicate network of
13 poles in the City of Toronto, one for cable and one for
14 distribution utilities.

15 MR. QUESNELLE: My only reason -- I don't want to
16 spend a lot more time on this, but what I am wondering, I
17 am trying to understand your submission that the Board
18 accepted what was in the settlement agreement for its
19 prescription of who would be involved as opposed to
20 describing it on a facility basis and only going to the
21 "what".

22 What I am getting at is it has the identities of the
23 individuals that would fit within the description. I am
24 trying to understand your submission that there is only the
25 settlement to rely on that point the Board to who would be
26 engaged in that, and there isn't any articulation of who
27 within that group has the type of need that you are
28 suggesting that fall in line with the power line

1 requirements.

2 MR. VELLONE: Could you recharacterize that question
3 in a slightly different way?

4 MR. QUESNELLE: It strikes me that the two -- you have
5 got an expansive description, to your purposes and to your
6 client's purposes, that the descriptor in the legislation
7 that -- for the carriers includes entities that are not
8 interested in power line carrier. What purpose did it
9 serve the Board to use that parameter if it was only
10 interested in having its decision apply to power line
11 carriers?

12 MR. VELLONE: The use of the term "Canadian carriers"
13 serves a particular purpose of differentiating who the
14 Board would allow regulated access from any other third
15 party that may want to knock on Toronto Hydro's doors and
16 hook up some type of strand, that is not a communications
17 strand and is not regulated under the Telecommunications
18 Act, to utility poles.

19 The Board was being very specific, if you will, that
20 the purposes of its decision arising out of the Barrie
21 Supreme Court -- that came shortly after the Barrie Supreme
22 Court decision was to address what it viewed as a
23 regulatory gap between these particular types of attachers
24 and the history, over ten years, of inability to attach.

25 But answering the "who" doesn't answer the "what". I
26 guess to put it a different way: Would a wireline carrier
27 be allowed to attach posters to utility distribution poles?
28 Is the definition of the "who" meant to encompass any

1 possible attachment that they could ever conceive of to
2 utility distribution poles?

3 And I don't think that was the Board's intent. I
4 think the Board had a specific fact situation in its mind.
5 It related to the history around wireline and cable
6 attachments, and it was on those facts that the Board made
7 its decision.

8 MR. QUESNELLE: Thank you.

9 MR. VELLONE: I am going to turn now from a discussion
10 of factual differences to an explanation of what the Board
11 did or did not consider in the CCTA proceeding itself.

12 In short, our submissions are that the Board did not
13 consider wireless equipment, including DAS, in the CCTA
14 proceeding. It did not consider any of those four factual
15 issues that I raised to your attention today; and, second,
16 the parties to the CCTA proceeding themselves understood
17 from the terms of the CCTA decision that it excluded
18 wireless equipment, including DAS. The parties to the CCTA
19 proceeding themselves understood that the Board's order
20 excluded wireless equipment.

21 Turning to that first point, what did or did not the
22 Board consider during the CCTA proceeding, the sole
23 reference to wireless equipment, including DAS, in the CCTA
24 decision occurs at appendix A of the settlement agreement.
25 I won't ask you to turn it up now. I think Kristi already
26 showed it to you. It simply states that the parties were
27 unable to agree as to whether or not attachments included
28 or excluded wireless attachments.

1 I do not agree with Board Staff's characterization
2 that this issue is a red herring. The Board was made aware
3 by this particular disagreement that there was an open
4 question as to whether or not this decision would apply to
5 attachments of wireless equipment or not.

6 The Board chose not to address that open question in
7 its decision. What did the Board say about it? I would
8 ask you to turn now to tab 1 of the Toronto Hydro document
9 brief. This is page 10 of the CCTA decision.

10 So at this stage, the Board knew that the attachment
11 -- whether or not attachments include or exclude wireless
12 transmitters were not agreed to by the parties. Because of
13 the terms of the Board's order, which spoke to who and the
14 price, this portion of the Board's agreement, under "Should
15 there be a standard form agreement?", states:

16 "Under the Settlement Agreement, the parties
17 agreed to negotiate the terms and conditions once
18 the Board has made its determination as to the
19 rate. The parties agreed to report back to the
20 Board in four months as to the progress of these
21 negotiations. The Board accepts this approach."

22 "The Board accepts this approach."

23 I would ask you now to turn up the model agreement
24 that was filed after the CCTA decision was made, and this
25 is included at tab 5 of the Toronto Hydro document brief.
26 And if you turn over to section 1.4 of the model agreement,
27 which was filed jointly by the CCTA together with the
28 MEARIE group, representing some 60 LDCs, shortly after the

1 Board made its determination on the CCTA decision, the
2 model agreement in the last full sentence of section 1.4
3 states:

4 "Unless otherwise agreed to by the parties,
5 attachments exclude wireless transmitters and
6 power line carriers."

7 If you turn forward to section 1.31 of the model
8 agreement, you will see how the parties defined wireless
9 transmitters, and they mean:

10 "Standalone transmitters and/or receivers which
11 use electromagnetic waves rather than some form
12 of wire or fiber optic cable to carry voice,
13 data, video or signals over all or part of the
14 communications path."

15 So "wireless transmitters", as was defined in this
16 particular agreement, really are analogous to the wireless
17 equipment, including DAS, that we are talking about here
18 today. Toronto Hydro submits that this model agreement is
19 evidence that the very parties to the CCTA proceeding
20 themselves did not expect that the CCTA decision would
21 apply to wireless transmitters, what they referred to as
22 wireless transmitters, and what we are referring to as
23 wireless equipment, including DAS.

24 The CCTA decision does not, in their view, mandate
25 access; rather, it's open for the parties to come to an
26 agreement on that point.

27 The Board -- sorry.

28 MS. CHAPLIN: Mr. Vellone, does it narrow the scope of

1 the application of the rate? Or does it -- it narrows the
2 scope of the application of the decision in total?

3 MR. VELLONE: I don't draw the distinction, I guess,
4 that you do as to the application of the rate as being
5 severable from the application of the decision.

6 My view is that it narrows what was -- at least it
7 shows you what the parties' view was of the application of
8 the decision as a whole. They came to an agreement on this
9 point, and it was that attachments excluded wireless
10 transmitters.

11 MS. CHAPLIN: Thank you.

12 MR. VELLONE: Before moving into my conclusion, I
13 would like to speak briefly to some of the points that were
14 raised earlier this morning.

15 The first relates to whether or not the Toronto Hydro
16 August letter amounts -- or this proceeding amounts as a
17 collateral attack on the Board's CCTA decision.

18 I guess the first thing to point out -- and not to
19 make too fine a point on it -- is that Toronto Hydro is not
20 the applicant here. CANDAS applied to the Board for
21 specific relief, and they put specific questions to the
22 Board to consider. This Board then determined that it
23 would like to hear submissions on the preliminary issue;
24 Toronto Hydro has filed evidence in that regard, Toronto
25 Hydro is now making submissions today.

26 It is not an attack by Toronto Hydro on the Board's
27 prior decision; rather, it's Toronto Hydro's attempt to
28 comply with the processes the Board has set out in

1 determining the preliminary issue.

2 The second point is this. For it to constitute a
3 collateral attack, it necessarily assumes the conclusion on
4 the preliminary issue. Specifically, it assumes that the
5 CCTA decision does apply to wireless equipment and then
6 goes on to suggest that this amounts to a collateral attack
7 because -- to suggest that it doesn't apply.

8 It seems to me that this question of collateral attack
9 comes after a determination is made on the preliminary
10 issue.

11 The second set of submissions I would like to make are
12 just to clarify any confusion that may have been caused by
13 the August 2010 letter. I know my friend Mr. Warren made
14 reference to that letter in his submissions, so I would
15 just like to take you to that letter now to clarify.

16 This is included at tab -- it looks like 10 of the
17 THESL document brief -- I apologize. It is not. It is tab
18 7 of the Toronto Hydro document brief.

19 Mr. Warren took you to the first paragraph of this,
20 which provides Toronto Hydro's position that the CCTA
21 decision was not intended to apply to wireless equipment.
22 And if you stop reading the letter at the end of the first
23 paragraph, you might get the wrongful conclusion that
24 Toronto Hydro has a no-wireless policy. That's simply not
25 the case. Toronto Hydro has filed an agreement in this
26 proceeding showing that it has recently allowed for the
27 attachment of wireless equipment at market rates.

28 However, if you read through the balance of this

1 agreement and specifically just look at the categories and
2 headings in this letter, you will see that the headings are
3 the CCTA decision does not apply, wireless attachments were
4 not included in the CCTA decision, there are substantial
5 physical differences between wireline and wireless
6 attachments, pole attachment space is a scarce resource,
7 and non-discriminatory access requirements would not be
8 violated.

9 These are many of the same points that I just walked
10 you through in submissions today, except this time with
11 reference to evidence on the record that the Board could,
12 at its option, choose to explore on its merits.

13 Turning now to my conclusions, Toronto Hydro's view is
14 that the CCTA decision does not and never was intended to
15 apply to the attachment of wireless equipment, including
16 DAS components, to distribution poles. The problem is not
17 the "who"; the problem arises because of the "what," the
18 "where" and the "why."

19 The particular facts when you look at wireless
20 equipment as opposed to wireline equipment which was in the
21 minds of the parties and the Board during the CCTA
22 decision, suggest that there would be a serious question as
23 to the correctness of that decision where it extended to
24 apply to wireless equipment, including DAS.

25 The evidence is that wireless attachments do not fit
26 within a pole's two-foot communication space. The evidence
27 is that there is an active market for the siting of
28 wireless equipment, that illustrates that poles are not

1 essential facilities for wireless equipment. And finally,
2 the evidence before the Board is that the market is working
3 without the need for regulatory intervention, with Public
4 Mobile having successfully launched its service without
5 reliance on LDC poles, and with Toronto Hydro coming to an
6 agreement with an arm's-length third party for wireless
7 equipment.

8 The regulatory precedent sought by CANDAS, the
9 application of that CCTA decision to wireless equipment
10 includes DAS to every LDC in the province of Ontario would
11 have, in our view, substantial adverse consequences, both
12 for ratepayers as well as for the developing ancillary
13 telecommunications services market.

14 Were the Board to grant the relief sought by CANDAS,
15 Toronto Hydro and all other licensed distributors would be
16 required to forego significant revenue offsets that would
17 otherwise accrue to ratepayers.

18 By contrast, by ruling that the CCTA decision does not
19 apply to wireless equipment, including DAS, the Board would
20 simply be recognizing that there are practical, factual
21 differences between wireline and wireless attachments,
22 including DAS, that the Board did not have an opportunity
23 to consider during the CCTA proceeding and that merit a
24 further and more detailed consideration now.

25 Those are my submissions.

26 MS. CHAPLIN: Thank you.

27 We have no further questions, Mr. Vellone.

28 Mr. Mark?

1 **SUBMISSIONS BY MR. MARK:**

2 MR. MARK: Yes. Thank you, Madam Chair.

3 I have, in summary, four submissions to make, and I
4 will then deal with a couple of what I call odds and ends
5 which arise from my friend's submissions this morning, but
6 my four principle points in summary are as follows.

7 Firstly, the CCTA order on its face does not answer
8 the question of whether or not it applies to the
9 circumstances of CANDAS and the attachment that CANDAS
10 seeks to have you compel. In other words, the CCTA order
11 on its face doesn't deal with the circumstances in which it
12 applies.

13 That question can only be answered by looking at the
14 associated reasons and records, to adopt the words my
15 friend Mr. Vellone used, perhaps because there was a common
16 assumption which the Board didn't think had to be
17 articulated in the operative part of the order.

18 Nonetheless, in the operative part of the order the
19 Board only dealt with "who"; it did not deal with "what."
20 The "what" cannot be discerned from the face of the order
21 itself. The "what" can only be discerned from looking at
22 the record before Board.

23 Point number two. When one examines that record, it
24 is clear beyond any doubt that the Board was considering
25 and only considering the attachment of wirelines, and there
26 was no -- it is impossible to construe the Board as having
27 intended that its order would apply to an attachment such
28 as that advanced by CANDAS now.

1 Thirdly, there are no policy reasons why this Board
2 should feel constrained to interpret the CANDAS order --
3 pardon me, the CCTA order as applying to the circumstances
4 in respect of which CANDAS now applies. In fact, every
5 policy consideration that this Board considered at the time
6 it made the CCTA order militates against its application to
7 the CANDAS proceedings before you.

8 And, lastly, the collateral attack doctrine has no
9 application in this proceeding, this threshold proceeding
10 today. This threshold proceeding today is one to
11 essentially interpret the order. It either does apply or
12 it doesn't apply, and collateral attack has no role in that
13 analysis.

14 Toronto Hydro, as I understand Toronto Hydro, is not
15 saying, We accept that it applies to CANDAS, but we want
16 you to rule that you should exempt it for some reason.
17 Perhaps then the collateral attack argument would have some
18 force, but this is a first-level interpretive question,
19 which is unaffected by the collateral attack doctrine.

20 Madam Chair, at the risk of burdening you with yet
21 another bundle of largely duplicative documents, I too
22 never want to feel left out of proceedings, so I have given
23 you my own bundle. I think these are in other folks' sets
24 of materials already.

25 But, for starters, if I could ask you to turn up tab
26 6? Can we give this a number first?

27 MS. SEBALJ: Yes, please. It's J2.8.

28 **EXHIBIT NO. J2.8: COMPENDIUM OF CEA DOCUMENTS.**

1 MR. MARK: Thank you. So, Madam Chair, if I could
2 have the Panel turn up tab 6, which is the decision and
3 order? And you will note, of course, that the decision
4 itself, as reflected in the title, consists of two
5 components. There is a decision, the reasons for decision,
6 and there is the order.

7 The order itself is set out on page 11, and it bears
8 examination. It says:

9 "The licence conditions of the electricity
10 distributors licenced by this Board shall as of
11 the date of this Order be amended to provide that
12 all Canadian carriers as defined by the
13 Telecommunications Act and all cable companies
14 that operate in the Province of Ontario shall
15 have access to the power poles of the electricity
16 distributors at the rate of \$22.35 per pole per
17 year."

18 What the order does not say -- and, again, I say it is
19 because it was implicit that it applied to what the Board
20 had before it in the record, but to what the order, the
21 operative order, doesn't say is what you get to attach for
22 the \$22.35. It's silent. You simply cannot answer that
23 question on the face of the order.

24 I take it beyond doubt that nobody is going to advance
25 the interpretation that a Canadian carrier could attach
26 anything they wanted, regardless of its purpose, regardless
27 of its configuration, regardless of the amount of space on
28 the pole it took, for \$22.35. So on its face, the order

1 itself does not address the "what".

2 The question of who is a Canadian carrier that my
3 friend spent most of the morning on is with respect, a red
4 herring. That is not the issue, and it has never been the
5 issue. The issue is: What, in fact, does the order
6 authorize them to attach? That's not answered by the
7 question of who they are.

8 So the Board, Madam Chair, can only interpret the
9 order and determine the circumstances in which it applies
10 by reference to its context, by reference to the issue that
11 brought it before the Board for consideration, and in
12 reference to its reasons for decision.

13 Dealing with the application of Board orders to
14 circumstances is not, in my submission, Madam Chair, a
15 sterile exercise like contract or statutory interpretation
16 where, because you have a word, "Canadian carrier", ergo it
17 applies to a vast number of situations regardless of their
18 impact.

19 The Board is always engaged in the process of
20 determining whether its orders were meant to apply in
21 certain circumstances. And when you look at the
22 circumstances associated with that proceeding, it is, in my
23 submission, clear beyond peradventure that what initiated
24 the proceedings, what brought it before the Board, what was
25 the subject of the evidentiary record and what was the
26 subject of the Board's reasons - those are the three
27 principal things that one has to have regard to - all deal
28 exclusively with wireline attachments.

1 And, fourthly, if you look at the costing methodology
2 that the Board used to arrive at the \$22.35, again,
3 assuming that the Board wasn't being arbitrary but there
4 was a reason for it coming to \$22.35, it was a calculation
5 which was necessarily based upon a certain amount of
6 telecommunications space which, in turn, is dictated by a
7 certain use of the telecommunications space.

8 I am not going to take the Board through all the
9 factual references that I think Mr. Vellone has covered
10 quite adequately, but a couple will, I think, be worthwhile
11 noting.

12 The origin of the proceeding - the origin of the
13 proceeding - is clearly the application of the cable
14 companies to attach their wirelines; right? So that's what
15 -- that's the -- as we say in the law business, that's the
16 mischief that the proceeding was intended to address.
17 That's what started it, was the attachment of the cable,
18 the wirelines.

19 Secondly, all of the evidence was exclusively about
20 wireline attachment. You can scour the record as much as
21 you want, and, except for the statement about the lack of
22 agreement about application to wireless attachments, there
23 is no evidence about wireless attachments. There is zero.

24 There is a plethora of evidence about how you attach
25 wirelines and how much space they take up and how many
26 attachers you can assume will fit within that
27 communications space, and all of those discusses are about
28 wirelines.

1 And, indeed, it's clear from the application at tab 4
2 of my brief of materials, if you -- this is the application
3 by the Canadian Cable Television Association. If you look
4 at paragraph 7, for example, you will see the description
5 of their business that they brought before the Board on
6 page 3, paragraph 7:

7 "Cable operators deliver cable television service
8 and high-speed Internet service over co-axial and
9 fibre transmission lines and facilities..."

10 Nowhere do they say: And, in the coming years, we may
11 provide cable service in some other way and we would like
12 this order to encompass that technology, as well. They
13 don't.

14 This was a description of their business, and at
15 paragraph 23 you will see, as I said before, what the
16 mischief was. They say:

17 "If access to power poles is denied, cable
18 operators will be forced to remove existing cable
19 lines from these poles. The capitalized labour
20 cost of placing lines on support structures
21 represents a significant portion of the cost...
22 These lines cannot simply be transferred 'as is'
23 to a different location."

24 So there is no question how the proceeding was
25 commenced, what its purpose was, and what the Board was
26 asked to deal with. Nobody asked the Board to deal with
27 anything other than the wireline attachments.

28 The settlement agreement -- and I am not going to take

1 you to it, because you have heard about it at length --
2 clearly indicates that there was no agreement that the
3 scope of the order the Board was going to make should
4 include wireless transmitters. The Board had an option of
5 inviting evidence on that issue if they wanted wireless
6 transmitters covered.

7 And they would have had to, in my submission, because
8 the Board had no other evidence. It would not have been
9 legally permissible for the Board to have made its order
10 effective with respect to wireless attachments, in the
11 absence of any evidence in the record about whether that
12 could be done and could be done within the parameters the
13 Board approved in the settlement agreement.

14 MS. CHAPLIN: Mr. Mark, I have a question on that
15 point.

16 So we have in the settlement agreement a proposed
17 exclusion for wireless attachments, which was not agreed.
18 And then the Board left it to the parties to negotiate the
19 terms and conditions, or at least to attempt to negotiate
20 the terms and conditions, and then an agreed set of terms
21 and conditions came forward, which had the exclusion for
22 wireless subject to the parties agreeing.

23 But the argument you just made, would we be having an
24 entirely different argument if, in fact, that set of terms
25 and conditions did not have that exclusion, because then
26 would it -- then presumably it would have applied to
27 wireless, even though the Board did or did not consider it.

28 MR. MARK: The Board could have dealt with wireless and

1 included wireless in one of two ways, and my submission is
2 neither of which happened.

3 Number one, the Board could have made its own
4 determination based upon an evidentiary record, or the
5 Board can accept a settlement agreement of the parties to
6 include that.

7 The Board can do one of those two things, and it did
8 neither.

9 MS. CHAPLIN: Okay.

10 MR. QUESNELLE: May I suggest a third and ask you to
11 comment on it, Mr. Mark?

12 That the Board, the way it's drafted, the order is
13 drafted and the information that went in, that wireless, if
14 it fit within the communications space, would have been
15 acceptable, or could have read the settlement agreement to
16 consider that, had there been no exemption?

17 All else being equal, if that exemption was not there,
18 could you read it that wireless attachments could have been
19 made within that space?

20 MR. MARK: I don't mean not to address your question,
21 Mr. Quesnelle, but there is no evidence in this record --
22 nobody is asking us to approve the attachment of a wireless
23 transmitter that fits within the space.

24 So it really is hypothetical, but my direct answer
25 would be no, the settlement -- the evidence only dealt with
26 wirelines and the settlement agreement was clear in not
27 including wireless, regardless of size.

28 MR. QUESNELLE: Thank you.

1 MR. MARK: Now, in my respectful submission --

2 MS. TAYLOR: Sorry, just before we go on, one last
3 possible methodology of interpreting this. Given that
4 there was no settlement on the wireless, the Board did
5 specifically provide -- on page 8, paragraph 2 of the CCTA
6 agreement, under tab 6 of your compendium -- that they left
7 it open for a party who felt that a specific rate would be
8 more applicable to come in. So the Board knows there is no
9 consensus or agreement on the wireless, they have defined
10 the parties who are likely to request service, and the
11 Board is not expert -- at least I don't think we are today
12 certainly -- about what combination or permutation of
13 technology could come down the pipe, for which we will have
14 perfect clairvoyance and anticipate that they will want to
15 attach.

16 Why is it not reasonable that the Board, defining who
17 could apply for attachments, set a rate but leave it open
18 that, if that rate is not appropriate, as set out on page
19 8, paragraph 2, that THESL or any other LDC would apply for
20 a different rate specifically for -- reflected wireless?

21 MR. MARK: Two answers. Number one, the fact that a
22 distributor is given the right to apply for a different
23 rate doesn't address the question of whether the wireless
24 attachment should be permitted at all -- and I will get to
25 that when we talk about the policy reasons -- There is no
26 reason in the world why the Board should exercise its
27 regulatory function to permit those attachments. So just
28 dealing with the cost issue assumes that somebody has

1 already made a determination that the wireless attachments
2 come within the basket that should be attached. That's
3 fact number one.

4 Number two, Ms. Taylor, I am not going to read you
5 through every word in this, but if you look at these
6 several paragraphs that come under what costs should be
7 used to calculate the rate, none of them talk about the
8 amount of space being occupied, for example. It all is
9 talking about whether the direct and indirect costs
10 associated with the Guelph pole -- which was the standard
11 that the Board decided to apply to all utilities -- whether
12 those costs of the pole were actually reflective of the
13 pole costs incurred by other utilities.

14 And the Board said: Look, simplicity here. We are
15 taking -- I forget if it was the Guelph pole or the Milton
16 pole, it's been so long since I was involved in that
17 proceeding. They took one pole from a utility that had
18 their costing developed, and they said: This is it. If
19 something thinks their embedded cost of poles is so
20 different as to warrant a different rate, because you get a
21 different number when you apply the costing methodology,
22 come on down.

23 But there is nothing in these paragraphs that suggest
24 the Board had any intention that the variation application
25 would be because of a different type of attachment, as
26 opposed to the fact that my poles are more expensive in
27 Timmins than they are in Guelph.

28 Now, let me turn to the policy considerations. And

1 even if at this point you had any doubt whether the Board
2 intended its order to apply to wireless attachments,
3 consider whether there were any policy reasons at all why
4 the Board would have or could have intended the current
5 circumstances that surround the CANDAS application to come
6 within the ambit of the order it made in 2005.

7 First and foremost, if you look at the Board's own
8 decision, it articulates that the premise is that the
9 system of poles is an essential service. And even if you
10 go back to the original CRTC decision, the one which went
11 up to the Supreme Court and which was the basis for the
12 initiation of the whole process -- and the link is in the
13 materials -- and if you go to that decision -- I am not
14 going to take you to it -- at the very beginning even of
15 the CRTC decision, they say: Our regulatory jurisdiction
16 is not engaged unless the applicants can establish that
17 there are no alternative support structures that it can use
18 for its equipment.

19 They did not adopt the tautology that CANDAS continues
20 to propound here, that the applicable market is the pole
21 market. It's not. Even the CRTC said the applicable
22 question is alternative support structures.

23 And the evidence is clear. In fact, the evidence is
24 uncontradicted and, as Mr. Vellone indicated, largely even
25 adopted by CANDAS in the interrogatory responses, that
26 there is a market out there with alternative support
27 structures.

28 CANDAS' argument is: You've got a monopoly over poles

1 and we just want to talk about poles, but the evidence is
2 uncontradicted that there are alternative support
3 structures out there. It was the premise of the CRTC
4 decision. It was the premises of this Board's own
5 consideration of the CCTA order, and it simply doesn't
6 apply.

7 And if you go back to the CRTC decision, you will --
8 you are able to discern another essential policy
9 consideration which simply doesn't apply here, and it's the
10 public policy consideration to avoid the duplication of the
11 construction of poles on rights of way.

12 Remember, the wireline attachers who were parties to
13 the proceeding were the electricity distribution companies,
14 the wireline telephone companies and the cable companies,
15 all of whom, because of the nature of their business, are
16 required to be able to string wires along support
17 structures on the public rights of way.

18 Look at the CRTC decision and it is clear - and this
19 is accepted and not disputed - that public policy wants to
20 avoid the duplication of those poles both for economic
21 efficiency and aesthetic reasons, and that's why the poles
22 were considered to be an essential service.

23 When the evidence indicates, as it does here, that the
24 wireless telecommunication companies, including of course
25 the applicant before you - including the applicant before
26 you - can construct their systems without using the system
27 of poles on the public rights of way, the foundation for
28 the need for the order evaporates completely.

1 And just let me add parenthetically here I was
2 wondering before this morning's proceedings commenced, and
3 ultimately was proven right, we heard no reference from the
4 applicants this morning to the fact that they have -- they
5 have a system. They have their wireless system operating
6 without access to the Toronto Hydro pole system.

7 They cannot meet the fundamental requirement of
8 getting this sort of order from the Board, which is they
9 demonstrate that there is an essential service to which
10 they are being denied access.

11 Even more astonishing to me is that in the
12 interrogatory process, they refused to answer the question
13 about what's the cost impact on their business of doing
14 that. So there is no evidence -- the evidence before you
15 is A, they don't need the poles; and B, they filed no
16 evidence that says they can't compete in the wireless
17 marketplace without access to the poles.

18 They don't come before you and say, We have gone to
19 microcells and we have gone to billboards and we have gone
20 to towers, but it's killing us.

21 They don't say that. There is no evidence that they
22 are not able to compete in that market.

23 So the policy underpinnings for the invocation of the
24 Board's jurisdiction to make this order with respect to the
25 CANDAS circumstances simply are not there, and the Board
26 could not be taken to have intended the order it made in
27 2005 to apply to these circumstances.

28 The convergence argument misses the point completely.

1 It misses the point completely. The convergence argument
2 simply says they may both serve the same end-use customer
3 for the same purpose. That says absolutely nothing about
4 whether they should be given access to poles for their
5 wireless transmitters.

6 The Board did what the Board had to do. It said, if
7 you hanging wirelines and you are in the telecom business,
8 you all get access. So that's the level playing field.

9 Saying that there is convergence in terms of services
10 that are being marketed to the end user says absolutely
11 nothing about whether they need access to the Toronto Hydro
12 poles. That's another red herring.

13 I have put in the materials, as Mr. Vellone has, Madam
14 Chair, the expert evidence filed in this proceeding. As I
15 said before, I am not going to take you through it, but on
16 any reading of that, it is impossible to come to any
17 conclusion other than the case cannot be made that access
18 to poles is an essential service.

19 And consider this, Panel members, when you think about
20 this issue. It is glaringly obvious, from the description
21 of the CANDAS attachments, that the poles are not going to
22 be able to accommodate unlimited numbers of wireless
23 attachments even if you were inclined to permit them on.

24 That raises the question of how access to the poles
25 should be allocated. Again, in my submission, there is
26 absolutely no evidence that there is any need for this
27 Board to intervene with a regulatory order to allocate that
28 access rather than allowing the market forces to allow that

1 access.

2 We have the applicants here obtaining their support
3 structures elsewhere, and we have another telecom provider
4 who obtains access to these support structures using that
5 tried and true market mechanism of price.

6 So there is no basis for regulatory intervention. If
7 these facts were known to this Board in 2005, it would have
8 concluded there was no basis to include the CANDAS
9 application within the scope of that proceeding.

10 Bear in mind also this fact. There are no other
11 industry -- telecom industry participants here in support
12 of the CANDAS application. In fact, we should stop calling
13 them CANDAS. CANDAS is a group that consists of three
14 entities who are the three joint venturers in the specific
15 commercial proposition which was submitted to Toronto Hydro
16 and is the subject of this application.

17 Look at the Internet. There is no CANDAS. CANDAS is
18 nothing other than a name that these three commercial
19 parties have given to themselves to import a patina of
20 public interest when there is none.

21 CANDAS is a pseudonym for three people with commercial
22 interest in gaining access to Toronto Hydro's pole for
23 \$22.35. There is nobody else at this table who is saying
24 to you: I am in the telecom business and the CANDAS
25 participants are right; we need this access.

26 In fact, the telecom world is bypassing this and
27 saying, You know what? There is lots of competition in
28 this market. My friend Ms. Newland is right. There are

1 foreign entrants coming in here all the time, and they are
2 successful and they are setting up. How - how - is that
3 evidence that you need to give pole access to those people?

4 The evidence from other jurisdictions indicates that
5 there is no need to do it. We have the evidence from New
6 York, and elsewhere, that the market allocates this
7 function quite well. And with all due respect to Mr.
8 Janigan, his concern may be to influence conditions in the
9 telecom market, but that's not your jurisdiction. That's
10 no part of your mandate.

11 Your mandate is to determine what is in the interests
12 of electricity ratepayers, and, if there is no sound
13 regulatory reason for you to impose a \$22.35 cent rate on
14 electricity ratepayers, you cannot decide to do it because
15 you think it would be a good idea for the telecom business.

16 That's not your mandate, and with respect to Mr.
17 Janigan, it's nothing you should be taking into
18 consideration here.

19 Any regulatory order which exists in another
20 jurisdiction has been made by the telecom regulator. And
21 even the FCC order -- which is a telecom regulator --
22 permits local states to opt out, and as we know, many have.

23 Just take a moment to talk about the evidence of Dr.
24 Yatchew, which Ms. Newland took you to this morning. I am
25 not going to ask you to turn it up, but you will note two
26 things about that.

27 What Dr. Yatchew said there -- and I am think I am
28 quoting it correctly -- is he talked about poles, conduits

1 -- poles, ducts, and other support structures. He wasn't
2 talking just about poles.

3 Dr. Yatchew's evidence at that portion of his paper
4 was not about whether to conscript access; his evidence at
5 that point in his paper was, assuming you have shared
6 facilities, how do you go about allocating the cost? His
7 evidence was not directed, at that paragraph, to the
8 question of whether shared access should be mandated. It
9 was directed to how you allocate the costs when you have
10 shared access. And you will see throughout, he talks about
11 poles or other support structures. He is not saying poles
12 are the only support structures.

13 That evidence is of no assistance to my friend.

14 Let me close with, first, the collateral attack issue,
15 and then a couple of, as I said before, odds and ends.

16 My first submission on the collateral attack issue is
17 this, as I said before. The collateral attack doctrine
18 does not preclude for Toronto Hydro or CANDAS or anybody
19 else from asking this Board to interpret or to determine
20 the proper application of its prior order.

21 The parties are seeking clarification from you. If
22 you were to give your clarification and Toronto Hydro
23 decided to take matters into its own hands and deny access
24 notwithstanding your clarification against them, perhaps
25 the collateral attack doctrine would apply.

26 But with respect to Mr. Warren -- who usually at least
27 comes close in his arguments -- this one has no
28 application. And even if it did have application, the

1 collateral attack doctrine refers to bringing an attack on
2 the order in the wrong forum.

3 Toronto Hydro is here in this forum before the Ontario
4 Energy Board. This is the forum for dealing with questions
5 about the application of the order, and even if Toronto
6 Hydro wants to say you should reconsider the order, that is
7 not a collateral attack; that's asking this Board to
8 exercise its jurisdiction, which it always has, to
9 reconsider whether circumstances are such that one of its
10 prior orders should continue to apply or apply in certain
11 circumstances.

12 So in my submission, this is simply not a collateral
13 attack issue at all. I understand Mr. Warren's concern
14 about whether Toronto Hydro, in taking the negotiation or
15 other position it did with the applicant, was, in Mr.
16 Warren's view, acting appropriately or not, but -- to use
17 an old expression -- is water under the bridge. We are
18 here. And it makes no difference, in my submission,
19 whether we are here because CANDAS has brought us here or
20 if Toronto Hydro would have brought us here. We are here.

21 And it is always appropriate for this Board to
22 consider whether its order should apply in certain
23 circumstances, and that is not a collateral attack.

24 The last point, Madam Chair, is, I ask you to bear in
25 mind, that the order that the Board made in the CCTA order
26 applied to all LDCs throughout the province, because there
27 was evidence -- and this goes back to the policy function
28 that the Board was exercising at the time -- the wireline

1 businesses of the electricity distributors, the phone
2 companies and the cable companies ran throughout the
3 province.

4 And indeed, if you go back to the CRTC decision, you
5 will see one of the very motivators for allowing the cable
6 companies to have access to the support structures of the
7 telephone companies and the distribution companies was to
8 promote the expansion and availability of cable television
9 and associated services throughout Ontario, which was
10 considered a worthy policy objective. And therefore it
11 made sense, at that time, to have the order apply to all
12 LDCs.

13 There is no evidence in this proceeding about the
14 circumstances elsewhere in the province, other than in the
15 city of Toronto. Certainly there is no sufficient
16 evidence, I would suggest, for the Board to be able to make
17 any decision regarding the exercise of its regulatory
18 function in that regard.

19 And given that absence of evidence -- and I think
20 people understand from the evidence that this is a Toronto,
21 large urban area issue -- even if the Board were to find
22 that the CCTA order does apply or should be applied to the
23 CANDAS circumstances, I would ask you to limit that
24 direction to the City of Toronto. There is simply no
25 evidentiary record upon which the Board could answer this
26 question that it has before it today for the entire
27 province, in my submission.

28 So I ask, if my other submissions do not find favour

1 with you, to limit your determination of the application of
2 the CCTA order to Toronto.

3 Subject to any questions from the Panel, those are my
4 submissions on the preliminary question.

5 MR. QUESNELLE: Just one, Madam Chair.

6 Mr. Mark, I asked a question of Mr. Vellone -- I just
7 ask if you have a different response or if you accept his
8 -- of the purpose that the Board would have used the
9 Canadian carrier descriptor to capture the "who" even
10 though there is a distinction in a subset of that group
11 that you say are interested in the "what" that pertains to
12 this decision.

13 Is there any purpose for that?

14 MR. MARK: I think the purpose becomes apparent when
15 you look at the genesis of the proceedings as concerned
16 with wireline businesses who require access to the support
17 structures on the public rights of way.

18 And the Board intended to say that anybody who is a
19 telecom company, because telecom is an enterprise that
20 would tend to have the same need for a system of wires on
21 the public rights of way, that they consider that that
22 definition was appropriate to describe who would be
23 entitled to the benefit of the order.

24 I am not sure if that answers your question. I can't
25 see how else it would have been relevant.

26 But instructive in that, Mr. Quesnelle, is they didn't
27 say anybody could come along. I mean, the Board clearly
28 intended that there was only a certain class of people who

1 would get this access. Right?

2 And so that goes back to the policy drivers; there has
3 to be a policy driver. And all the evidence of the policy
4 driver is, as I've suggested before, limited to the
5 wireline businesses who require access because it's an
6 essential service. And I think they used the Canadian
7 carrier definition for that reason, and at the end of the
8 day, that order is another -- it's another indicator of the
9 circumstances the Board felt they were dealing with at the
10 time.

11 The CCTA order was a certain order made at a certain
12 time and a certain place in certain circumstances, and it
13 cannot simply be taken and presumed to be applicable to
14 somebody today simply because they are a common carrier.

15 MR. QUESNELLE: Thank you.

16 MS. CHAPLIN: We have no further questions, Mr. Mark.

17 DR. SCHWARTZ: Madam Chair, sorry to interrupt. Larry
18 Schwartz for Energy Probe. May we make a very, very brief
19 submission on a matter that hasn't been raised today?

20 MS. CHAPLIN: You weren't on my list.

21 DR. SCHWARTZ: That's because we didn't want to take
22 sides on the preliminary issue.

23 MS. CHAPLIN: How long will you be?

24 DR. SCHWARTZ: Maybe a minute.

25 MS. CHAPLIN: Okay.

26 **SUBMISSIONS BY MR. SCHWARTZ:**

27 DR. SCHWARTZ: Thank you, Ma'am. Energy Probe's
28 submission relates to the Board's review of the preliminary

1 issue. I don't know whether the Board should consider the
2 expert's opinion evidence or extracts therefrom in the
3 Board's review of preliminary issue.

4 However, Energy Probe urges that the Board should
5 ignore the experts' opinion as to the applicability of the
6 CCTA order. In fact, we submit that Board should
7 consciously and clearly rule out what the economists' views
8 and the other fact experts' views are on the applicability
9 of the order.

10 This would -- the salutary effect would establish a
11 precedent that economists and other experts who don't have
12 the right back background are wasting everybody's time
13 giving what amounts to legal opinions. But if the Board
14 does not do this, it may establish a precedent in the
15 opposite direction.

16 So to save time in future hearings, we would advocate
17 or suggest, recommend, submit, that the Board take this
18 matter seriously. If the Board does not rule out the
19 expert opinions relating to the applicability of the CCTA
20 order, it will be necessary for intervenors and others to
21 question those experts on their legal training and
22 expertise and a whole bunch of irrelevancies that will come
23 in.

24 So we submit that the Board, in its consideration of
25 the preliminary issue, might as a side matter indicate that
26 it is not taking into account what the economists think
27 about the applicability of the order.

28 MS. CHAPLIN: Well, none of the parties making

1 submissions so far today have done so.

2 DR. SCHWARTZ: I have noticed that.

3 MS. CHAPLIN: That may be sufficient. Ms. Newland, is
4 an hour sufficient, or is less sufficient? What...

5 MS. NEWLAND: Madam Chair, Ms. Song will be making
6 CANDAS's reply argument.

7 MS. SONG: We would appreciate about an hour.

8 MS. CHAPLIN: All right, we will return at quarter to
9 4:00.

10 --- Recess taken at 2:50 p.m.

11 --- On resuming at 4:03 p.m.

12 MS. CHAPLIN: Ms. Song, are you ready to proceed?

13 **FURTHER SUBMISSIONS BY MS. SONG:**

14 MS. SONG: Yes, thank you. I am going to do my best
15 to keep CANDAS' reply argument as brief as possible. The
16 way that the reply will be organized is, first of all, to
17 deal with matters that relate to the question of does the
18 CCTA order apply, and then, secondly, to deal with
19 questions relating to what we understand to be the position
20 of THESL and the CEA -- pardon me, the EDA, that even if
21 the order is clear, the order should not apply, with the
22 asterisk that, in our view, that question is out of scope
23 of the issues in this application and certainly out of
24 scope of the issues that have been designated for hearing
25 as a preliminary matter today.

26 So with respect to the question of does the CCTA order
27 apply, the first point that we would like to respond to is
28 that -- is the point that my friend Mr. Mark made, that if

1 you take the record of the CCTA proceeding and go through
2 the entire factual record, there is absolutely zero
3 evidence, no evidence whatsoever of discussion of wireless
4 technologies, the advent of wireless in the
5 telecommunications and broadcasting marketplace.

6 I don't have the time today to take you through that,
7 but in case the Panel is interested, we are going to leave
8 you with a reference to CANDAS' response to the
9 interrogatory of the CCC, No. 1, in which we set out the
10 discussions on the record of the CCTA proceeding to matters
11 pertaining to wireless.

12 And we would disagree that there was absolutely no
13 evidence before the Board with respect to wireless
14 technologies, wireless communication technologies.
15 Clearly, everyone knew that that was a fact and that it was
16 relevant to the issues.

17 The second thing that we heard today, somewhat to our
18 surprise, is an assertion on behalf of THESL and the EDA
19 that, clearly, wireline and wireless attachments are so
20 very different.

21 It's CANDAS' submission here today that the record in
22 this matter, the voluminous record in this matter, has
23 established exactly the opposite or that -- certainly the
24 thesis that THESL propounded at the outset of this
25 proceeding, that wireless attachments involved very
26 different considerations from wireline attachments, was not
27 proven to be justified on the factual record.

28 So if I may, to begin, I am going to -- we have in the

1 interim managed to compile a small package of material from
2 the record, which I would like to take you through, so if I
3 could ask Holly to distribute that.

4 So the purpose of these submissions is that should the
5 Board feel that the issue of whether or not wireless or
6 wireline attachment present different considerations for
7 electricity distributors, should they feel that that issue
8 is germane to the preliminary issue of whether the CCTA
9 order applies, we would like to put that -- put any doubts
10 that you may have to rest.

11 The first point to make is that electricity
12 distributors, including THESL, accommodate a wide variety
13 of wireless equipment already on their distribution poles.

14 In THESL's own evidence, THESL has stated that it has
15 known -- it has permitted attachments to THESL poles that
16 facilitate wireless communications in the case of DAScom,
17 which is a member of CANDAS, Cogeco and TTC. It also
18 accommodates its own equipment in the form of SCADA
19 equipment. And the reference to the record is to THESL's
20 response to the decision and order on motion, dated
21 December 9th, 2011, page 9, Interrogatory 6.

22 So I did not hand out this particular one, but the
23 point here is that already THESL accommodates a wide
24 variety of wireless equipment on its poles.

25 Secondly, with respect to the question of whether or
26 not wireless attachments present or represent a higher
27 burden on distributors than wireline, the Board Staff asked
28 CANDAS an interrogatory, Interrogatory 13, which CANDAS

1 responded to on August 16th, 2011.

2 Again, I am not sure that you have that in your
3 package. Do you? No? Okay. But I will leave you the
4 reference, and what the information in this interrogatory
5 response is -- responded to was to compare the dimensions,
6 the weight, so the size of wireline versus wireless
7 attachments, as well as where on the pole such equipment is
8 placed.

9 And if you look at the table that appears at page 25
10 of 42 of that interrogatory response, the conclusion is
11 that, in fact, the size of the equipment enclosures for
12 cable TV attachments is, in fact, greater -- in some cases
13 by a pretty hefty proportion -- than the size of the
14 equipment enclosures for wireless equipment.

15 The only additional piece of equipment that is
16 involved in a wireless system such as a small cell system
17 like DAS is that there is an antenna of about 12 to 24
18 kilograms, that is also a part of the equipment for which
19 there is no equivalent.

20 To assist the Board, we have reproduced in the package
21 that was distributed a diagrammatic representation of the
22 components that one would find in a typical wireline power
23 supply array on a distribution pole and a typical radio
24 node site in a DAS system.

25 So you should have a hard copy in front of you of that
26 information. This information appeared as appendix -- as
27 an appendix B to the reply evidence of Tormod Larsen, which
28 was filed on October 11th, 2011.

1 And if you look at page 4 of Mr. Larsen's appendix B,
2 you will see there a depiction of a cable TV power supply
3 box on page 4, and then if you turn over the page you will
4 see a depiction of a typical radio node installation in a
5 DAS system.

6 So the thing to note -- one of the things to note,
7 first of all, is that clearly, clearly the equipment boxes
8 that are associated with cable television systems do not
9 fit in the so-called communications space.

10 The communications space is reserved for transmission
11 facilities, wireline transmission facilities, and if you
12 turn over the page to look at the DAS picture, you will see
13 that the antenna can be mounted on a bracket in the
14 communications space, as well, on a side-arm installation.

15 The second thing that is depicted on these diagrams is
16 that the antenna in a DAS system can be installed on the
17 backside or what I understand, in the jargon of the
18 industry, is called the field side of the pole as opposed
19 to the street side.

20 So Mr. Larsen -- don't take my word for it, but Mr.
21 Larsen has attempted to depict this in the diagram that you
22 see on page 5 of his appendix B. So the title of his DAS
23 deployment picture is "Equipment Installed on the Field
24 Side". He is attempting to show that the antenna does not
25 interfere with the placement of the communication
26 transmission lines, and it can be put on the other side,
27 the field side, of the pole.

28 So taking all this information together, and I realize

1 that time and perhaps my presentation, not being Mr.
2 Larsen, will not permit us to go through all of the
3 evidence, but the point that we need to leave with you is
4 that we strongly disagree with the suggestion that wireless
5 attachments are substantially different than wireline
6 attachments, certainly for purposes of attaching to
7 communication -- sorry, distribution poles.

8 We are not -- we don't pretend to compare apples to
9 oranges. We are not going to compare your typical
10 macrocell tower antenna, which you would see on a stand-
11 alone tower or on a church steeple or a billboard sign. We
12 are not going to compare that to the types of antenna that
13 are germane to CANDAS, which are small cell antenna that,
14 for reasons of necessity and efficiency, can only be placed
15 on uniformly low, evenly spaced structures like poles.

16 MS. SEBALJ: Can I just interrupt to mark the appendix
17 B reply evidence of Tormod Larsen, the excerpt, as J2.9;
18 and I will just mark the next one, so as not to interrupt
19 you again, as J2.10, which is titled "Outdoor Distributed
20 Antenna System Network Topology".

21 **EXHIBIT NO. J2.9: EXCERPT FROM APPENDIX B OF REPLY**
22 **EVIDENCE OF TORMOD LARSEN.**

23 **EXHIBIT NO. J2.10: DOCUMENT TITLED "OUTDOOR**
24 **DISTRIBUTED ANTENNA SYSTEM NETWORK TOPOLOGY CONTAINED**
25 **IN REPLY EVIDENCE OF TORMOD LARSEN".**

26 MS. SONG: The next one, which has now been marked
27 Exhibit J2.10, was Mr. Larsen's attempt to explain the
28 frequency with which small cell systems, like a DAS system,

1 need to attach radio nodes to distribution poles is
2 actually less than the frequency with which one would
3 typically find the large power supply boxes that are
4 associated with cable television systems. So that is what
5 he has attempted to do.

6 Again, this is an appendix to his October 11th
7 evidence, reply evidence, and on the first page, so that's
8 page 3 of 5, he has explained that in a typical DAS
9 deployment, you would find radio node or antenna
10 installation in four poles out in a square kilometre. I
11 don't know if you can see it on the black and white
12 version, but it's the little triangles in a square that you
13 will see on this diagram.

14 Then if you turn over the page, on page 5 of 5 of his
15 appendix A, he is depicting the five triangles where the
16 cable provider would attach power supply boxes on
17 distribution poles. So the point there is that the
18 frequency or density of the equipment boxes that one would
19 find below the communications space in a cable TV system is
20 actually greater than in a typical DAS deployment.

21 The question came from Board Member Quesnelle that --
22 and there were several iterations or permutations of the
23 question, but I believe the last expression of the question
24 that came was: What is the purpose of the Board having
25 used the "who" question to describe the scope of the CCTA
26 order?

27 We would like to answer that question, because I am
28 not sure that we had a chance in our presentation in-chief

1 to do so. In our submission, the question of whether or
2 not wireless attachments should be included or not included
3 was clearly an issue that was debated between the parties.

4 There was a disagreement that was noted with respect
5 to that issue. It cannot have escaped the attention of the
6 members of the Board that there was a controversy with
7 respect to that issue. The way that the Board resolved
8 that controversy was to answer the question of who -- what
9 type of entity should have the right of access, by saying
10 that it should be entities that have the status of either a
11 Canadian carrier or a cable television provider.

12 In our submission, that is the way -- it's clear on
13 its face that it was an issue. The question of wireless
14 attachments and whether they should be included or not was
15 controversial, and, in our submission, the silence of the
16 Board on the question in favour of an order that expressed
17 the right of access as attaching to a particular type of
18 entity with a very clearly understood regulatory status of
19 either being a federal Canadian carrier or a federal cable
20 television undertaking answers the question conclusively.

21 We also find it significant, as pointed out by Board
22 members, that the decision leaves an opening at page 8 of
23 the CCTA order to make an application to come back before
24 the Board if circumstances arise that no one at the time
25 could predict or could know that would justify a different
26 rate or a different adjustment to the terms and conditions
27 that would be applicable.

28 That, in our submission, indicates or supports the

1 interpretation that we have propounded, which is that the
2 decision is clear on its face that the right is available
3 to those who have the status of Canadian carrier or cable
4 television provider.

5 MS. CHAPLIN: Ms. Song, maybe you are going to come on
6 to this, but what about the fact that the Board left it to
7 the parties to negotiate the terms and conditions, and the
8 negotiated terms and conditions expressly excluded wireless
9 attachment?

10 MS. SONG: There, if you are referring to the MEARIE
11 agreement -- is that what you are referring to?

12 MS. CHAPLIN: The terms and conditions that were
13 promulgated subsequent to the Board's initial order.

14 MS. SONG: In our submission, to the extent that the
15 MEARIE agreement, or any other agreement, purports to
16 exclude a party's right to attach pursuant to the order, we
17 would say that it's contrary to the order. We don't
18 feel --

19 MS. CHAPLIN: Well, that position wasn't advanced at
20 the time. That was an agreement that was reached by
21 negotiation, which all parties accepted and put forward to
22 the Board on that basis.

23 MS. SONG: I don't believe that it was all parties,
24 and I am not -- it's my understanding that the agreement
25 was never approved or -- approved or adjudicated upon by
26 the Board.

27 And so what I was going to say, though, is that to the
28 extent the parties would overrule or purport to create an

1 exception to the rule which was created in the CCTA order,
2 we just say that that would be contrary to the order.

3 The fact is that in this particular case, in the case
4 of THESL and CANDAS, THESL certainly did not have an
5 understanding that the CCTA order did not apply to wireless
6 carriers. They have agreements with TCC. They had - they
7 entered into an agreement with DAScom.

8 It's only after the fact, after the agreements were
9 signed and after the agreements were being performed, that
10 midway through they indicated that, on the basis of a
11 policy, a new policy that they had developed, they would
12 not be renewing these agreements. And there, I am
13 referring to the August 2010 letter, which has already been
14 referred to in the submissions of my friends before me.

15 MS. CHAPLIN: I am sorry, I can't find the reference
16 but in the terms and conditions that were filed, the
17 exclusion itself was limited as to not apply if there was
18 agreement between the parties.

19 So wouldn't that be THESL's position, that where
20 parties agreed, then that was -- wireless attachments were
21 one of the attachments included in the definition of
22 attachments.

23 MS. SONG: However, the -- I am not sure that that is
24 how one could fairly characterize THESL's -- THESL's
25 agreement with DAScom and with Cogeco for the placement of
26 the system that comprises the DAS system.

27 I mean, my understanding is that the agreement is a
28 standard form agreement that THESL uses when it is

1 providing attachment pursuant to the CCTA order. They have
2 the same form of agreement that they provide when they are
3 attaching pursuant to the CCTA order.

4 I am going to now move on to the meaning of the
5 "communications space" and its significance in the
6 interpretation of this order -- just one moment, please.

7 Before I move on, I am just going to point out that in
8 the compendium of the CCC for today's hearing, tab 7, you
9 will find a copy of the agreement between DAScom and
10 Toronto Hydro. And at article 11.03, which is at page 122
11 of the compendium of the CCC -- I am looking at the yellow
12 book. I am just pointing out here -- or Ms. Newland has
13 helped me find the provision in the DAScom Toronto Hydro
14 agreement that refers to the pole rental rate:

15 "Pole rental rate shall be \$22.35 cents per pole
16 in use per calendar year or such higher amount
17 approved or set from time to time by the OEB or
18 another authority with jurisdiction over the
19 owner's said pole rental rates."

20 And that is clearly an agreement for the attachment of
21 wireless equipment.

22 With respect to the communications space, we have
23 heard several submissions that -- to the effect that or
24 that seem to be premised on the suggestion that all
25 wireline equipment are placed in the communications space,
26 so within two feet, defined, fixed, two-foot space on
27 distribution poles.

28 So, again, this is not consistent with the evidence,

1 and what I understand is the practice of electricity
2 distributors.

3 From the evidence on the record of this proceeding,
4 it's a fallacy to say that for wireline systems all of
5 their attachments actually are accommodated within two
6 feet. It's clearly not.

7 The references that I would leave with you -- we have
8 had time to pull them up, but not to make copies -- is to
9 THESL's answer to CANDAS Interrogatory 24(a)(ii) and 24(d).
10 I am just going to try to find my copy of that.

11 But what that interrogatory response says is that
12 power supply boxes in a wireline CATV system are attached
13 or accommodated below the communications space in the
14 unused space, consistent with the diagram that we just went
15 through together from the evidence of Mr. Tormod Larsen,
16 appendix A.

17 So all the necessary -- it's common -- it is common
18 knowledge, it's not controversial that the only things that
19 are attached in the communications space are, one, the
20 wireline transmission facilities, and in the case of
21 wireless systems, the wireless antenna, but all the
22 necessary ancillary equipment that is required to power, to
23 give power, to amplify, to transmit intelligence over those
24 raw copper or co-ax or fibre facilities, need to be
25 attached somewhere else on the pole.

26 This, again, cannot have been a fact that was lost on
27 the members of the Board at the time of the CCTA order.

28 So when the Board is referring to the communications

1 space and the need to come up with an assumption with
2 respect to the communications space, our submission is that
3 the Board adopted the EDA/CEA's proposed methodology for
4 calculating the appropriate rate for pole attachments for
5 communication purposes, on the basis of an equal sharing of
6 common costs methodology, as opposed to the proportionate
7 share methodology proposed by the CCTA.

8 Ironically, the CCTA in that proceeding lost on the
9 issue of whether or not the rate should be set on a share
10 of proportionate use, as opposed to an equal sharing of the
11 common cost.

12 And because of this determination, this internal
13 determination of the Board, it became necessary -- it's my
14 understanding -- that to come up with an assumed number of
15 attachers, the operative -- one of the operative
16 assumptions that was used by the Board is of a, generally
17 speaking, two-foot communications space.

18 And the assumed number of attachers was 2.5.
19 Obviously, that's a theoretical number of attachers. You
20 are not going to have 2.5, you are going to have two or
21 you're going to have three or four, but 2.5 is the
22 theoretical number of attachers as a baseline to come up
23 with an assumption that related to the rate calculation
24 aspects of the decision.

25 As you know, the Board actually acknowledged in the
26 decision that up to seven possible attachers would be --
27 could happen, but every additional attacher over 2.5 would
28 obviously spell -- spare recovery over the actual cost of

1 providing the service, the pole access service.

2 So, in our submission, there is -- it's a fallacy to
3 suggest that the CCTA order was meant not to apply to
4 wireless because the communications space is a fixed 2-foot
5 space. It's clear that communication -- the communications
6 space -- or, sorry, it's clear that cable TV providers and
7 telecom providers and wireless providers are going to need
8 to attach equipment outside of that nominal 2-foot space.

9 That space is not cast in stone. It's a space that is
10 defined by safety clearances that are relevant, in
11 particular, to the wireline or aerial wires that span in
12 between poles.

13 I am now going to turn to not all, but some, of the
14 facets of the argument of THESL and the EDA pertaining to
15 the alleged - the alleged - lack of need to regulate, which
16 we say is not an issue that is within the scope of the
17 application itself, the CANDAS application as a whole.

18 It may relate to THESL's forbearance motion which the
19 Board has deferred in this matter. In particular, we
20 submit that they are not germane. The submissions of my
21 friends with respect to an alleged lack of need to regulate
22 are not within the scope of issues as defined by the Board
23 to be determined today on a preliminary basis.

24 THESL, in particular, if I understand correctly,
25 appears to be seeking to review and vary the CCTA order,
26 and we submit that the Board should be careful that it has
27 the right procedure to do this, and that, in our
28 submission, we are not -- the right procedure is not the

1 one that we are currently in for the hearing of that issue.

2 But out of an abundance of caution - and I will try to
3 get through this as quickly as possible - I do want to
4 reply on behalf of CANDAS to some of the allegations that
5 we have heard.

6 First of all, there were very quick references to the
7 alleged existence of third party tower companies, third
8 party wireless siting companies in the United States.
9 Again, without taking you to the record, and time does not
10 permit us to do justice to the record, I would say that all
11 of that evidence of American companies was refuted in the
12 reply evidence of Joanne Lemay dated October 11 of 2011.

13 There is two important points -- there is really one
14 important point and one subsidiary point. The main point
15 is that macrocell tower sites, like stand-alone towers that
16 you see on the sides of mountains or on rooftops or church
17 steeples or billboards, are not interchangeable with the
18 types of antenna that we are talking about in this
19 proceeding.

20 So to treat them interchangeably, to treat macrocell
21 tower sites interchangeably with power poles, is contrary
22 to economics and is contrary to common sense. They are
23 simply not interchangeable in economic parlance. And,
24 again, I feel somewhat uncomfortable that we are being
25 forced, in the context of this preliminary issue, to get
26 counsel to giving evidence that really should be coming
27 from the mouth of an expert.

28 But in economic parlance, the way that Ms. Kravtin and

1 Ms. Lemay would put that is poles and macrocells sites are
2 simply not close substitutes. So to point to the existence
3 of companies that manage, in some cases own, a stable of
4 stand-alone sites and rooftop leases for the purposes of
5 macrocell siting is neither here nor there. It's
6 irrelevant.

7 Secondly, and this really is a subsidiary point with
8 respect to the companies whose names were read out by my
9 friends earlier today, they are not in Canada. If you read
10 the evidence of Ms. Joanne Lemay, she will point out,
11 having researched the names of the companies that were
12 mentioned in the evidence of Mr. Starkey, that they are
13 primarily American companies and they have a grand total
14 of, in one case, two sites, two macrocell sites in Toronto,
15 and, in the case of another company, seven macrocell sites
16 in Toronto.

17 But that's -- we shouldn't lose the main point, which
18 is that they are clearly not interchangeable.

19 What we haven't heard from my friends is that there is
20 a -- you know, there is clear and convincing evidence of
21 the fact of unregulated distribution poles. My friend also
22 alluded to telecom decision 99-13, so this is a CRTC
23 decision, telecom decision 99-13 dated September 28th,
24 1999. And I believe that it is not in any of the compendia
25 or books of authorities, but that a link was provided.

26 He made a couple of points that we would like to reply
27 to. First of all, he says that the CRTC says or restricts
28 its regulatory jurisdiction unless there is a failure to

1 agree. And on that point, it's important to note that the
2 CRTC's jurisdiction in that matter -- and this was a
3 dispute between an association of municipal electrical
4 utilities and the CCTA, the same people who ended up in
5 front of you as a result of the court's treatment of this
6 decision.

7 The CRTC was hampered by two very important
8 considerations. First, the wording of the Telecom Act,
9 section 43(5), provides that CRTC only has jurisdiction to
10 mandate access to the supporting structure of a
11 transmission line constructed on a highway or other public
12 place on -- where a person who provides services to the
13 public cannot, on terms acceptable to that person, gain
14 access.

15 So the first point is that it's very specific to the
16 statutory provision that was being invoked by the CCTA.

17 MR. MARK: Madam Chair, just to be clear, I did not
18 make that submission with respect to the CRTC decision. I
19 think Mr. Vellone made the point with respect to this
20 Board's CCTA decision, but that wasn't a submission made
21 with respect to the CRTC decision.

22 MS. SONG: My apologies. I must have misunderstood.
23 Perhaps the transcript will clarify that.

24 But the second point which I do believe that I heard
25 Mr. Mark make is that the public policy against duplication
26 simply does not apply in the case of wireless the way that
27 it applies to cable television companies.

28 And as I understand or heard the argument, the

1 distinction that Mr. Mark would make is that wireless
2 providers can construct their systems without access to the
3 public right of way. And exhibit A would be Public Mobile,
4 which, after it was denied access to THESL's poles,
5 deployed using an alternative, second-choice technology,
6 which is the legacy macrocell technology deployment that
7 has historically been used by mobile wireless carriers.

8 But on this very point, I would like to point -- I
9 would like to bring your attention to the decision,
10 decision 99-13, at paragraph 179. And I realize that you
11 don't have it in front of you, but I will read it into the
12 record, just a portion of that paragraph.

13 So after having debated the issue of whether or not
14 the CRTC has statutory and constitutional jurisdiction of
15 the utilities - and that's the issue on which the CRTC was
16 eventually overturned - the CRTC then dealt with the merits
17 of the question, which is whether or not cable television
18 companies should have access to the support structures of
19 electrical utilities. And what the CRTC said in response
20 to the argument that cable television providers have
21 alternatives and don't need access to power poles is as
22 follows:

23 "The Commission notes that there is not
24 sufficient competition between support structure
25 suppliers, and further considers that the
26 alternatives to pole attachments suggested by the
27 MEA are neither practical or reasonable
28 alternatives in the present case. The business

1 of the Applicants is to distribute television
2 signals through cable, not through alternative
3 distribution technologies. Indeed, the
4 Commission has licensed them for that purpose."

5 So here we have the kernel of my reply to Mr. Mark's
6 point, that wireless is different because wireless can --
7 wireless providers can deploy without access to poles.

8 Well, so can cable. Cable television services that
9 are provided through wireline cable, co-axial cable
10 facilities and other equipment is a functional equivalent
11 to directly competitive services that are offered via
12 satellite, and in the past via fixed wireless facilities.

13 The issue is not whether -- it's not an impossibility
14 standard; it doesn't need to be impossible for the parties
15 seeking access to provide the end service without access to
16 poles.

17 What Public Mobile was forced to do in this particular
18 case -- and the argument that the CRTC rejected and the
19 argument, which, in our submission, the Board should reject
20 in this case -- is that unless Public Mobile or any
21 attacher can prove that it is impossible to deploy without
22 access to poles, access to poles should not be mandated; on
23 that standard, cable television providers should never have
24 obtained access to distribution poles either by the CRTC,
25 or, in the final analysis, by the Board in the CCTA order.

26 And secondly, I am going to just leave you with a
27 reference back to an interrogatory response that Mr.
28 Vellone filed in his compendium on behalf of THESL.

1 I believe it's at 14 -- yes, it's at tab 14A of
2 THESL's compendium of documents. And it is CANDAS'
3 response, revised response to Interrogatory THESL 1(f), in
4 which Public Mobile advises that it was forced to choose to
5 abandon its plans to use its preferred technology, which is
6 distributed antenna system technology, and had to redesign
7 its network based on legacy macrocell technology.

8 With respect to the issue of whether or not the
9 Board's decision should be limited to Toronto, in CANDAS'
10 application and in our submission, clearly the application
11 is meant to apply generally.

12 The electricity distributors have had an opportunity
13 and have, in fact, intervened. If there was any evidence
14 that they felt was germane to distinguish their case, as
15 the case may be, then they had the opportunity to do so.

16 We submit that any resulting order from today's
17 hearing or in this proceeding generally should not be
18 limited to the factual circumstances or to the geographic
19 limits of the City of Toronto.

20 Unless the Board has any questions, I am just going to
21 confer with my colleague briefly, if that's okay.

22 Sorry. Thank you for bearing with me. One
23 penultimate point before concluding, Panel members.

24 With respect to the argument that there is a
25 collateral attack by THESL on the CCTA order, in our
26 submission, the attack may not be in this proceeding, per
27 se. It was in the August 2010 letter that THESL, in our
28 submission, would have made its attack without directly

1 reviewing and varying the order. That's our point.

2 As we heard THESL's counsel this afternoon, what we
3 understood is that he is questioning the correctness or
4 seeking to review or vary the terms of the order. If that
5 was the case, then, in our submission, he should have done
6 it directly rather than -- I am not speaking about him
7 personally, but his client, THESL, ought to have done that
8 directly, not advised CANDAS members in August 2010 that --
9 or advise the Board in August 2010 that they had a no-
10 wireless policy that resulted in the destruction of Public
11 Mobile's plans for deployment in Toronto using DAS
12 technology, and destroyed ExteNet and DAScom's business in
13 Ontario.

14 So unless you have -- the Panel members have any other
15 questions, I am just going to briefly conclude.

16 MR. QUESNELLE: Ms. Song, just in response to the same
17 question that I had asked both Mr. Vellone and Mr. Mark,
18 you had stated that it was clear that there was a dispute
19 and that, in your submission, that the way the Board
20 responded to the dispute as to whether or not wireline or
21 wireless attachments was included or not was to use the
22 Canadian carrier delineator as to who and, therefore, what
23 would be allowed.

24 Can you point to anything that would make it clear?
25 When you say it was clear and there was a controversy, is
26 there anything on the record that you are aware of that you
27 can reference today as to the -- that highlighted that
28 controversy that would have made it obvious to the Board,

1 as you suggest?

2 MS. SONG: When I said that, I was referring really to
3 the disagreement that was noted in that portion of the
4 document which says that there is a disagreement between
5 the parties as to what attachment -- whether attachment
6 should be narrowed to refer only to these particular subset
7 of telecommunications attachments.

8 So to be clear, that is what I was referring to. I am
9 just going to consult with my colleague to see whether
10 there might be some other overt reference to the
11 controversy as I have framed it.

12 MR. QUESNELLE: Thank you. What I am looking for
13 specifically would be any evidence that was brought forward
14 to the contrary or the expanse that would provide the scope
15 that these issues had play.

16 MS. NEWLAND: Perhaps I can respond to that, Mr.
17 Quesnelle. The CCTA order was not about technology. As I
18 said in my submissions in-chief, it was about primarily
19 issues 1 and issues 2, which is: Should you regulate, and
20 who should have access -- sorry, and issue 2 had already
21 been settled.

22 So there wasn't a debate about which Canadian carrier
23 should get access. The one thing we could point you to,
24 and it's in the reference that my colleague, Ms. Song,
25 referred to you, in our response to CCC interrogatory 1, we
26 tried to sum up for the Board in one place all of the
27 references to wireless that were on the record.

28 Now, there weren't many because, as I say -- there was

1 certainly more than zero, which is what Mr. Mark said, and
2 there were more than -- I believe THESL said there was one.
3 We found a couple.

4 But I think, importantly, there was one exchange
5 between the witnesses for the CCTA and -- sorry, the
6 witnesses for the CEA, and the counsel who was questioning
7 them was a Mr. Engelhart, who represented Rogers. And he
8 was examining the CEA witnesses about their cost
9 methodology, and he referred to antennas. He said, Okay,
10 if there are antennas on poles, would you expect those to
11 be allocated a portion of the cost? And the witnesses said
12 yes. And I am going from memory, but the reference to that
13 exchange is in our response to CCC.

14 So I am not saying that there was a great deal of
15 testimony and debate, but, I mean, it was clearly in the
16 parties' minds that these wireless people were out there.
17 And as my colleague, Ms. Song, has said, the fact that
18 there was disagreement about whether certain types of
19 attachments could be on poles is further evidence that it
20 was in people's minds.

21 MR. QUESNELLE: And it was the Board's mind that I
22 wanted to get the reference to. She mentioned it was
23 obviously clear to the Board, so that's what I was looking
24 for. The parties may have been discussing it --

25 MS. NEWLAND: Well, I mean, if you are asking me is
26 there a pronouncement where the Board talked about wireless
27 attachments, the answer is no. What I would say is that it
28 was clearly in the mind of the Board when it wrote its

1 decision and when it made its decision on the motion which
2 I took you to this morning, because the Board had a lot to
3 say about convergence in the downstream market and the fact
4 you had many different service providers who were competing
5 for the same end use customers.

6 In our submission, the Board wouldn't have -- again,
7 we are trying to look into the mind of the Board having
8 regard to -- one of the Panel members is sitting before me,
9 but it seems to me that this whole emphasis on the
10 convergence in the downstream market and the need to make
11 sure that the regulatory framework that regulates the
12 upstream market, which is the supply of poles, doesn't
13 distort the downstream market, it would have -- I don't
14 think the Board would have spent so much time on that in
15 its decision and in its decision on the motion if it hadn't
16 had in mind that neutrality upstream had to pertain to all
17 carriers, not just a subset of those carriers.

18 MR. QUESNELLE: Thank you.

19 MS. NEWLAND: Thank you.

20 MS. SONG: Those are our reply submissions. Thank you
21 very much. I think Ms. Newland has just summed it up very
22 nicely.

23 **PROCEDURAL MATTERS:**

24 MS. CHAPLIN: Thank you. We have no further
25 questions.

26 So the Board will not issue a decision today. We will
27 issue our decision in writing, and, at that time, we will
28 address -- at least take initial steps in addressing the

1 issue of an interim cost award, which we realize CCC has
2 requested, but we don't take any submissions on that today
3 and we will address that in our decision.

4 MR. WARREN: Madam Chair, in that context, may have
5 the opportunity to make supplementary written submissions
6 with respect to it? In the letter I wrote to the Board the
7 other day asking if I could renew the request for an
8 interim, I said that the circumstances had changed.

9 I believe those circumstances, changed circumstances,
10 are relevant to the issue of whether or not -- they are
11 certainly relevant to my argument about whether or not
12 there should be an interim order of costs, and I would like
13 an opportunity to make brief written submissions in support
14 of that request, which I can do -- I can't do it by 5:30,
15 but I could do it by tomorrow, if the Board would like.

16 MS. CHAPLIN: All right. We will take those, but we
17 will -- we appreciate that probably other parties may have
18 submissions, as well, and the Board itself may want to sort
19 of structure how we want to receive those.

20 So go ahead and file those, but bearing in mind we may
21 not -- there may need to be further steps to ensure that
22 all parties have their rights respected.

23 MR. WARREN: I appreciate that other parties have
24 their rights. Of course they may accede to my arguments,
25 so persuasive will they be.

26 MS. CHAPLIN: Thank you very much. We are adjourned.

27 --- Whereupon the hearing adjourned at 5:01 p.m.

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