ONTARIO ENERGY BOARD

FILE NO.: **EB-2012-0414**

VOLUME: **1**

DATE: **January 23, 2013**

BEFORE:	**Christine Long**	**Presiding Member**
	Ellen Fry	**Member**

EB-2012-0414

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 the Electricity Distributors Association for a stay of the Board's September 13, 2012 Decision and Order in EB-2011-0120, pending disposition of the EDA's appeal of the Decision and Order to the Superior Court of Justice (Divisional Court).

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Wednesday, January 23rd, 2013,
commencing at 9:01 a.m.

VOLUME 1

BEFORE:

CHRISTINE LONG	Presiding Member
ELLEN FRY	Member

A P P E A R A N C E S

KRISTI SEBALJ	Board Counsel
JUDITH FERNANDES	Board Staff
ALAN MARK CHRISTINE KILBY	Electricity Distributors Association (EDA)
MICHAEL JANIGAN	Vulnerable Energy Consumers Coalition (VECC)

ALSO PRESENT:

AFREEN KHAN	Electricity Distributors Association (EDA)

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Wednesday, January 23, 2013

--- On commencing at 9:01 a.m.

MS. LONG: Good morning. My name is Christine Long and I will be the presiding Member in this matter. Next to me is my colleague Ellen Fry. We're sitting today on matter EB-2012-0414, which is an application by the Electricity Distributors Association for a stay of the Board's September 13th, 2012 Decision and Order in EB-2011-0120, pending the applicant's appeal of the Decision and Order to the Superior Court of Justice Divisional Court.

May I have appearances, please?

APPEARANCES:

MR. MARK: Good morning, Madam Chair. Alan Mark for the Electricity Distributors Association. With me is my colleague Christine Kilby, and Afreen Khan from the Electricity Distributors Association.

MS. LONG: Thank you, Mr. Mark.

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

MS. LONG: Thank you, Mr. Janigan.

MS. SEBALJ: And Kristi Sebalj, legal counsel for the OEB. And I'm joined by the case manager, Judith Fernandes.

MS. LONG: Thank you, Ms. Sebalj.

The way we intend to proceed today is to hear from each of the parties, starting with the EDA, then the Board Staff and then Mr. Janigan, to the extent that parties would like to do an overview of their submissions and highlight any points that they may have. We will then be

asking questions. And I suggest that after we've heard from everybody, Mr. Mark, we'll give you an opportunity to address anything that's come up in submissions that you may want to address in reply. You can also let us know at that time if you think a break might be advisable so that you can collect your thoughts.

So are there any preliminary matters? Ms. Sebalj?

PRELIMINARY MATTERS:

MS. SEBALJ: Can I ask as a point of order? You were indicating that we can give an overview of our submissions. Can I assume because Mr. Mark will have an opportunity to reply that we're permitted to address his reply submissions, give responses to his reply submissions, as well as an overview of our own submissions?

MR. MARK: I intend to go through my submissions. I'm not quite sure, Madam Chair, what you meant by an overview. I intend to go through my submissions. I would expect Ms. Sebalj would then go through her submissions, make all the submissions she wants, and similarly Mr. Janigan, and then I would have at the end a right of reply, as we typically do.

Did you have something else in mind?

MS. LONG: Is that fine with you, Ms. Sebalj?

MS. SEBALJ: I just want to make sure that I get permission from the Panel if it's acceptable to address points that the EDA has brought up in its reply submissions, given that Mr. Mark will have a final opportunity to address those responses to his reply.

MR. MARK: Typically, we go: applicant, respondent, reply. We don't typically have a surreply. My reply will address only the points that you have addressed. I will raise no new matters in my reply that I haven't raised in my initial submissions or which aren't responses to your submissions. I will not be raising new matters in reply that you haven't had an opportunity to address. I mean, that's the way it works; we don't have surreply.

MS. SEBALJ: Why don't we just proceed, and if I --

MS. LONG: I think that we should proceed, and I think it will become clear. The Panel has quite a few questions for all the parties, so I think we'll be able to flesh out the issues in that way.

So that being said, Mr. Mark, if you would like to proceed?

SUBMISSIONS BY MR. MARK:

MR. MARK: Thank you, Madam Chair. As you can see, we have a standing-room-only crowd for this morning's proceeding.

So as the Panel is well aware, this is a stay motion for an order staying the operation of the order made by the Board in the CANDAS proceeding, pending our appeal to the Divisional Court. That appeal is pending. We anticipate having a hearing date in late March or early April for that appeal. I had hoped in light of that time that this -- this wouldn't be opposed, but it is so. So we are here.

And I note that there are no telecom service providers participating today and none have filed any evidence

indicating that they have any business plans or intentions which would result in any harm or even inconvenience to them if the stay were granted.

Notwithstanding that, as I indicated, we appear to be opposed, so we are proceeding.

By way of overview of our submissions, firstly -- and I don't think this is in dispute -- it is clear from the Ontario Energy Board Act that this Board has the authority to order a stay of its prior order, pending the disposition of an appeal of its prior order to the Divisional Court.

The issue is whether the grounds for a stay can be established. By way of overview, the accepted test for the granting of a stay comes from the RJR-MacDonald case, and the three components of that test are: Does the appeal raise a serious question? Which means: Can it be said that the appeal is frivolous or vexatious? And failing that, that being the threshold, then it raises a serious question.

The second prong of the test is whether the applicant would, if the order is permitted to remain in force pending the appeal, suffer harm which could not be remedied later if the appeal were to be successful.

And the third branch of the test is: What is the balance of convenience, which is where you weigh the irreparable harm against any harm or inconvenience alleged by the respondents in the appeal.

I'm going to go through those submissions, so let me turn to those detailed submissions.

With respect to the first point, the Board's jurisdiction, Madam Chair, I don't understand this to be disputed, but the Board's jurisdiction comes from section 33(6) of the Ontario Energy Board Act. I'm going to be making a few references to the act. I don't know if you have copies of the act. I have copies I can provide.

MS. LONG: We have a copy up here. Thank you.

MR. MARK: So if I could just ask the Board to turn to section 33 of the act, section 33 deals with appeals to the Divisional Court.

We are appealing pursuant to section 33(1). The stay issue is dealt with in 33(6), which says:

> "Subject to subsection (7), every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise."

So we take two things from that.

Number one, it's necessary to bring an application to stay the order because it is not automatically stayed by an appeal, and it is within the jurisdiction of the Board to grant that stay, and that is why we requested the stay from the Board. So with the jurisdiction of the Board established, let me then, Madam Chair, turn to the facts and the test.

I know everybody in the room is familiar with the CANDAS proceeding and the CANDAS order. But I want to make sure that the Panel has at top of mind the nature of the conduct which could occur in the interim, if there is not a

stay.

As a result of the CANDAS order, the telecom companies wishing to attach to utility poles could compel LDCs to enter into contracts permitting the attachments, and permitting the attachments on certain conditions including at a certain price.

So it's not just a question that the attachers can compel attachment, but those attachments are pursuant to an agreement. So the process is, and what the CANDAS order entails because it follows upon the original CCTA order, is that the parties enter into the prescribed form of agreement which sets out the terms, conditions and price for the attachment.

There is then a process by which there is an engineering review and preparatory work done and, if necessary, relocation of other facilities on the poles. There is then the attachment, and then there is the carrying out of the contract, which is the permanent attachment and the payment of the prescribed annual rent.

And the concern of the LDCs is that if there is no stay then, pending the outcome of the appeal, they could be compelled to enter into these contracts, and there would be attachments pursuant to these contracts, and the contracts would not be rescindable or voided just because there was success in the appeal.

There is nothing in the contracts which would say they are set aside, and the attachments made pursuant there to must be removed if the appeal is successful. If, pending

the appeal, a contract is entered into on certain terms, and the attachments are made on certain terms, those are permanent in accordance with the terms of the contract, and there is no mechanism whereby, if the appeal is successful, any of those contracts entered into in the meantime are rescinded or can be set aside. There is no such remedy.

MS. LONG: Mr. Mark, I'm just going to ask you two questions at this point.

One, does it make any difference to this Panel deciding this stay application that the OEB did not approve the contract itself, that it was negotiated between the parties. That's my first question.

And secondly, is there no other way for the parties to negotiate an inevitability that this -- I shouldn't say inevitability, but the possibility rather that this case could be overturned, so there is no way they can do this by separate mechanism, or separate contract?

MR. MARK: So let me deal with the first question. You are correct that under the CCTA regime, the Board left it to the parties to settle the form of the agreement. But that settled form of agreement becomes part of the mandatory regime. In other words, while those terms may have been settled by the parties without intervention of the Board, it is clear from the CCTA order and the CANDAS order that it is mandatory for the LDCs to enter into the prescribed and settled form of contract.

The LDCs can't respond to an attachment request by saying that there is no form of contract here, and we have

to negotiate one with you from square one. We can't do that and, if we tried to do that, at some point CANDAS would clearly be within its rights to come forward and say the terms are settled, or should be settled, and let's get on with this.

MS. LONG: So the fact that the original contract did not – or, I guess, the original contract did not contemplate an out for the parties, should there be any change of law or anything like that. You're asking the Board to consider that, even though it was an agreement negotiated between parties?

MR. MARK: It was negotiated between the parties pursuant to -- the context of the original CCTA proceeding was there were going to be -- there were going to be attachments. It was a question of what the costs was going to be.

There was no issue about whether there had to be an out clause for any purpose, right? It was always agreed that the cable companies got to attach, the terms of the attachment were negotiated, there was no need for the parties to put in there this type of out clause, which says if there is some future change of law or regulatory event that entitles the LDCs to kick you off the poles, we're entitled to do that. That doesn't exist, because it wasn't required to exist.

If, a partial solution to this problem -- not a complete solution, but a partial solution could certainly be if these agreements had a provision which says if the

appeal is successful -- and we have to unpack that and specify what exactly that means, and what's success, and what orders may ensue -- that the agreement would be set aside.

But that would have to be done by either agreement between the parties or you, this Board, would have to make some order specifying that that would be a condition of every such contract that would be entered into.

That would at least solve part of the problem. I haven't frankly thought about the issue, about whether that order is something that -- is an order that this Board could make. But theoretically, if we were trying to problem solve this, that could potentially solve one aspect.

It would have to, though, be accompanied, in my submission, by further provisions which would make the LDCs whole with respect to other costs that they have incurred in proceeding with the contract, if they're successful in the appeal -- you know, if they're entitled to be put in the position that they would have been had the order not been made in the first place; there would have to be some consequential provisions in there as well. But theoretically, it is one way to approach it.

MS. LONG: And do I understand your comments, with respect to the Board making an order with respect to what that additional contract would be like -- I'm just trying to get to my second question, where I asked if there was anything contractually that could be done.

Am I understanding correctly from you that your position is the Board would have to make such an order in order to get the parties to negotiate something?

MR. MARK: Yes.

MS. LONG: Thank you.

MR. MARK: You could resolve the stay application, I think, and I would be interested to hear Board Staff's view on this. I haven't fully considered it, but one option would be to dispose of the stay application by saying no stay per se, but directing -- if there is a telecom company which wishes access, they're directed to negotiate the LDCs provisions in the contract, which would permit the contract to be unwound, and the parties put in the position they would otherwise have been in, in the event the appeal was successful.

MS. LONG: Thank you.

MS. FRY: Just a few questions to follow on from my colleague, Mr. Mark.

So if I understand you correctly, you're saying that once the negotiated standard form agreement was presented to the Board in the previous proceeding, then in essence it became written in stone and couldn't be amended.

It would assist if you're able to provide us with a specific references to that, to the places in that order that have led you to that conclusion, so that we can look at those and focus on them. That would assist. Thank you.

And I guess the other thing is in your reply submission -- I don't have a paragraph or a reference; I

think it was on page 4 -- you seem to be saying that, in your view, if the appeal were successful it would require a statutory provision to be able to get out of any contracts that had been made. And I wasn't sure I understood your reference to "a statutory provision."

Could you elaborate on that?

MR. MARK: Sure. And this follows on the discussion I was just having with Ms. Long.

In the absence of a clause consensually negotiated by the parties in the contract which would permit the contract to be dissolved, if you will, and the attachments removed if the appeal is successful, there is presently no -- neither the LDCs nor the Board have any authority to direct after the fact if the appeal is successful that these contracts be rescinded and the attachments removed.

MS. FRY: Oh. So when you speak about statutory authority, you're not contemplating about a situation where the parties do something based on their contractual rights; you're contemplating a situation where the Board --

MR. MARK: That's right. I'm contemplating a situation where --

MS. FRY: -- under its statutory authority would say: Thou shalt rescind?

MR. MARK: Right. I'm contemplating a situation where there is no contractual provision which provides for the rescission of the contract if the appeal is successful. If there is no such consensual provision, then you will have a contract which, by its terms, will last for -- I don't know

what the years are -- 30, 20, 40 years, whatever; attachment at $23.35. That's the contract between the parties, and there is nothing in the OEB Act or any other law of this province that I'm aware of that would permit the LDCs or the Board to come along if the appeal is successful and say: That contract should be set aside.

If we're obligated to sign that contract pending the appeal, tough for us if the appeal is successful. There is no mechanism for setting aside that contract, absent a consensual agreement to do so between the parties. You have no statutory authority if we're successful on appeal to come back after and say: So sorry. That contract is void.

MS. FRY: Thank you.

MR. MARK: So let me turn to the RJR-MacDonald test, and I don't understand there is any issue that that is the controlling authority and this Board has adopted that in the ACH case. The RJR-MacDonald test has three components, as I indicated previously.

First, whether the appeal raises a serious question.

Secondly, if the order is acted upon and enforced pending the appeal, whether the applicant for the stay would suffer harm which could not be remedied if the appeal is successful. That is typically referred to as the irreparable harm test.

And the third component of the test is, if you have found that there is a risk of irreparable harm, examining any harm which may accrue to the respondent in the appeal

and then determining where the balance of convenience lies in terms of granting or not granting the stay.

So we have serious question, irreparable harm and balance of convenience.

Let me turn first to the serious question. And it's important, Madam Chair, to actually look at the specific test. If you have our submission, our main submission, and turn to paragraph 20, you will see the formulation of the question by the Supreme Court of Canada in the RJR-MacDonald case, and it is as follows:

> "Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third test even if of the opinion that the Plaintiff is unlikely to succeed at trial."

For our purposes, substitute "appeal" for "trial". The RJR-MacDonald case was dealing with an interlocutory order prior to trial, but it's accepted that the test applies to a decision at first instance and an appeal.

> "A prolonged examination of the merits is generally neither necessary nor desirable."

So to be blunt about it, the Board's view of whether the appeal is likely or probable to be successful or unsuccessful is not the inquiry which is to be undertaken. The inquiry to be undertaken is whether the Board can determine at this point that, in fact, the appeal has absolutely no merit at all, and can be -- the stay application can be dispensed with because the appeal is

vexatious or frivolous. It has no hint of merit whatsoever.

And that of course is a very significant threshold, and is one -- that test, the determination of the appeal being frivolous and vexatious -- is one which could be made clearly in the most exceptional of cases.

Let me review briefly the grounds of the appeal which we advance, and why, in our submission, there -- they are clearly serious issues requiring determination by the court.

The first ground of appeal from the CANDAS decision and the principal ground of appeal, to be fair, relates to section 29 of the OEB Act.

You will be aware that one of the principal responses to the CANDAS application in that proceeding was a motion by Toronto Hydro invoking section 29 of the OEB Act, and the parties exchanged extensive evidence on the section 29 issues and there were interrogatories on the section 29 issues. There was a lot of time and money spent on the section 29 issue.

But let's look at section 29, because it is at the heart of our appeal.

Section 29 of the OEB Act, section 29(1) says:

> "On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class

of products, service or class of services is or will be subject to competition sufficient to protect the public interest."

So on its face, what that says is that if there is an application or proceeding before the Board where it is proposed that the Board exercise its authority, make an order -- and that's what the CANDAS proceeding was -- an applicant came and asked the Board to make an order if the Board finds, as a question of fact, that there is sufficient competition with respect to the service or product which is the subject of that application, the Board shall make a determination to refrain from granting the order that's requested.

So what we say is section 29 is clearly mandatory. When the Board is being asked to, or proposes on its own motion to make an order, as was the case in the CANDAS proceeding, it must, if evidence of sufficient competition to protect the public interest is put before it, make a determination of whether in fact there is sufficient competition to protect the public interest, and if so, must refrain from making the requested order -- not may refrain, must refrain from making the requested order.

Section 29 does not, in our submission, permit the Board to decline to consider the evidence of sufficient competition, and refuse to embark on the section 29 inquiry if asked to do so. Because that would, in effect, turn section 29 into a discretionary provision, which would permit the Board not to apply it by simply declining to

hear the evidence, and the motion for the application of section 29 put before it.

The only fair and reasonable interpretation of section 29 is that when there is a proposal, that the Board exercise its regulatory authority. And it is asserted that there is sufficient competition, the Board must deal with that issue and make that determination. It cannot avoid the operation of section 29 by not hearing the motion.

Section 29 does not reasonably admit of an interpretation that changes "shall refrain" to "may refrain" by simply permitting the Board to decline to consider the issue.

So we say, in the CANDAS proceeding, when there was the motion in the proceeding by Toronto Hydro which said you must refrain from exercising your authority here because there is sufficient competition, and Toronto Hydro put their evidence on that issue before the Board, section 29, on a fair and reasonable reading, required the Board to make a determination of that motion.

And on a fair and reasonable reading of section 29, it was not open to the Board to deal with section 29 by saying we're not going to deal with the motion.

And with respect, it's our position that's what the Board did. And it is our position that the Board didn't have the authority to do that, that section 29 is mandatory. It requires on reasonable reading the Board to refrain from exercising its powers when there is evidence of sufficient competition. And the Board does not have the

authority to avoid the application of that section simply by saying it's not going to hear the motion.

MS. LONG: So, Mr. Mark, do I understand your position to be that at the time that the panel dealt with the Toronto Hydro motion, I guess, by putting the motion in abeyance, it was at that point that this becomes your ground for appeal?

Had they dealt with it in the CANDAS hearing per se, would that have righted the wrong?

MR. MARK: Section 29 is clear. The Board was asked to make, and ultimately did make, an order in the CANDAS proceeding.

Section 29 says that order ought not to have been made if the condition in section 29 was satisfied.

The Board was obligated to make the determination under section 29 prior to making the CANDAS order and concluding the CANDAS proceeding.

And with respect, Ms. Long, to say that the Board put the motion in abeyance is incorrect. The Board -- for reasons that I confess I still don't understand today what the words mean when the Board said it is out of scope of this proceeding, we will not consider it, and it concluded the CANDAS proceeding -- it ended the CANDAS proceeding, made the order, and ended the CANDAS proceeding. It did not say we're now going to turn to section 29. It issued the CANDAS order and terminated the proceeding.

Now the only answer I've ever heard to that is the suggestion that the Board would be prepared to entertain a

similar motion, if brought now after the fact.

I'll say two things about that. With respect to the Board, the Board cannot rewrite the statute. Statute is mandatory as to when the issue of sufficient competition to protect the public interest is to be dealt with, and that is prior to making the CANDAS order.

That's the statutory mandate. The Board is a creature of statute. The Board does not have some additional plenary authority to say no matter what section 29 says, we think there is another way you can go about this and we would be prepared to entertain a similar motion in a separate proceeding tomorrow.

And with respect, that's not the regime set out in the statute, and the Board doesn't have the authority to posit that as an effective alternative to the statutory regime that is set out.

The Board has no power to not follow the mandatory statutory requirement because it feels it would like to fashion some other regime to deal with the issue.

As a creature of statute, the Board's powers are found in that statute and it cannot rewrite the statute, even though it may feel that its rewrite is as effective.

Secondly, it is a second best remedy at best. The parties to that proceeding retained the experts, gathered the evidence, put it before the Board. The Board declined to deal with it.

With respect again, to say to some other party now go out and marshal similar evidence again, and pay again for

the evidence that was already before the Board -- with respect that's neither efficient nor fair.

That evidence was marshalled, it was paid for, it was reviewed, interrogatories were past. It was incumbent upon the Board to deal with it.

So we say -- and I understand Board Staff, and perhaps the Board has a different view of whether section 29 sets out the mandatory process, as I have suggested it does. But, in my submission, there is clearly a real issue in terms of the proper interpretation and application of section 29, which is an honest and real debate.

And it could not by any stretch be said that the position of the EDA on the appeal, as to the proper interpretation and application of section 29, is frivolous and wholly without merit.

The second ground of our appeal --

MS. LONG: Sorry, Mr. Mark, can I take you back to your first ground?

In reading your materials, I think you had also said there were some other jurisdictional problems with respect to section one and the failure to --

MR. MARK: Yes, that's the second ground of our appeal, section one.

MS. LONG: Thank you.

MR. MARK: The second ground of our appeal to the Divisional Court is the Board did not discharge its mandatory obligation under section 1 of the OEB Act. And again, I would ask the Board to turn up section 1 so we can

read it together.

> "The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall..."

And I underline "shall":

> "... be guided by the following objectives:
>
> "1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> "2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry."

In our submission, the Board in the CANDAS proceeding, in determining the proper interpretation and application of the CCTA order in the circumstances of the CANDAS case, was clearly obligated pursuant to section 1 to undertake that inquiry, with a view to achieving the objective of protecting the interests of consumers with respect to prices, and to facilitate the maintenance of a financially viable electricity industry.

Many of the submissions made by Toronto Hydro and the LDCs in the CANDAS case were with respect to that very issue, that what was happening in the CANDAS proceeding is that there, the applicants were essentially requiring the LDCs, at the expense of ratepayers, to subsidize the CANDAS business, which the evidence was, amongst other things,

that what CANDAS was going to do, it was going to acquire the bandwidth that results from these attachments. It was going to use a small part of it itself, and then it was going to resell that bandwidth capacity to other telecom communication companies at a significant profit.

MS. FRY: Mr. Mark, I want to be clear on this. So if I understand you correctly, what you're saying is if it's a case where the Board has to interpret the wording of its own decision, in addition to looking at what the wording says and what the wording says in the context of the decision as a whole, if I understand you correctly, you're saying after doing that, the Board should apply a gloss, as it were, of the principles in section 1(1) as an aid in interpretation.

Am I understanding you correctly?

MR. MARK: And the task before the Board was taking the CCTA order and making a determination as to its proper interpretation and application to the facts.

MS. FRY: But I'm asking how --

MR. MARK: -- in the -- yes.

Its analysis, I'm not saying that it interprets, and then once it interprets, it then has to then say: Does it pass this objective and that objective?

Part of the very exercise of interpretation is interpreting its own orders in the context of the objectives that the Board was obliged to achieve when making the original CCTA order, and now in determining its appropriate application today.

And we say -- we say -- I mean, listen. I could talk about the CCTA order and its circumstances and the CANDAS application and its circumstances forever. Suffice it to say our position is that the evidence was clear that in the CCTA proceeding, for very good reasons, it was clear that what was afoot and what the Board was appropriately doing was selecting the appropriate cost allocation methodology.

All the parties in that proceeding were agreed that the task before the Board was allocating the cost of a pole amongst a variety of users.

MS. FRY: Yes, I understand that, Mr. Mark. Let me just go back, because I'm still not quite sure I understand you fully.

So if one were in a situation which, as I recollect, the Board thought it was in, in this decision, although obviously you may disagree, if the Board was in a situation where it was being asked to interpret its own order, and it had concluded that the wording of its own order was clear, if -- and again, you know, I understand that you may not agree with that, but just take that as a hypothesis -- in that theoretical situation are you saying that, even though the Board considered that the wording of its order was clear, nonetheless there would be the possibility of changing its interpretation of what it thought was the clear wording, to take into account the principles in 1(1)?

Is that what you're saying?

MR. MARK: No. I'm saying something a little bit different. This, of course, is a debate we're going to

have on the appeal, but I understand, Ms. Fry, your interest in the issue.

The way you put the question, with respect, posits that the initial interpretation question is a sterile one, which can be undertaken irrespective of the objectives in section 1. That --

MS. FRY: That's not at all what I'm saying.

What I'm trying to do is understand how -- under the argument that you're advancing -=- how one would plug in, as it were, the principles of 1(1) into interpretation.

MR. MARK: This way.

MS. FRY: I want you to explain it to me because I'm still not understanding.

MR. MARK: This way.

As in any interpretive exercise, whether it's of a contract or a statute or an order, the interpretation is conducted in the context of an analysis of the purpose of the provision, the context in which it was made, and the objectives of that provision.

So in interpreting the CCTA order, it had to be interpreted by the Board in the context of what was its purpose and what were the purposes specified in the act for that order.

And when the Board interprets its previous orders, it must undertake that interpretive task in the context of its mandatory objectives.

MS. FRY: Okay. Granted. Just --

MR. MARK: So when the Board is interpreting the CCTA

order, in our submission -- and this will be our submission on the appeal -- it is not sufficient for the Board to simply say: CCTA order uses the word "telecommunications carrier." That is defined in some other statute -- not our statute, but some other statute -- as meaning all these types of companies; ergo it clearly means these guys can attach.

The Board was obligated, when interpreting the words it used in the CCTA order, "telecommunications company," to give it an interpretation -- and "telecommunications carrier." It was obligated to approach the interpretive task not simply on the basis of how was that term defined in the Telecommunications Act; it was obliged to carry out the interpretive task, saying: What interpretation should we give it, having regard to, amongst other things, our mandate as specified in section 1?

And if the interpretation contended for by CANDAS would result in a situation where the protection of consumers with respect to price was being not observed and, in fact, harmed, and where the interpretation would result in promoting inefficiency in the electricity system, the Board was obliged to have regard to those factors in coming to an appropriate interpretation of the words "telecommunications carrier."

MS. FRY: Let me just zero in on the point that I still want to be sure I'm clear on.

That is: If I understand what you've just been saying, basically what you're saying is in a situation

where the wording is not completely clear, in your view one should use the principles in 1(1) to assist in interpreting it. And I assume that you're not saying that if the wording were clear, the principles in 1(1), even if they appeared to contradict that, would somehow overturn the clear wording. You're not saying that?

MR. MARK: I think the problem you and I are having, Ms. Fry, is this. The supposition of your question is that there is a clear interpretation of the words in the CCTA order which can be -- which is apparent and can be derived, regardless of the section 1 criteria.

MS. FRY: No, no, hold on --

MR. MARK: I apologize if I'm not getting your point.

MS. FRY: No, I'm using that, as I explained, as a theoretical construct. I am trying to understand, in perspective, generally what principles you are arguing should be applied to interpretation.

I'm not saying I think the wording is clear, or unclear, or somewhere in the middle. I'm just saying, in that theoretical situation, how would you apply the principles of 1(1) to that interpretation to assist? Ad I'm sure you'll agree that sometimes positing a theoretical possibility at one end of the spectrum helps in understanding that. That's what I'm doing.

I understand fully that your premise is that the wording isn't clear. I'm just saying if it were clear, in that theoretical situation, how do you think 1(1) principles would play?

MR. MARK: Here's the problem I'm having. The golden rule of interpretation which is now applied in the courts is that you never just look at the words in isolation and say this is what they mean. Words only take a meaning in the context that includes an assessment of the purpose and objectives of -- in the case of a statutory wording, what their objectives were; in the case of contract, what the business purpose what, and in the case of an order, what the purpose of the order was.

There is no such thing as the words say this on their face, and we need not look at any of these --

MS. FRY: Mr. Mark, obviously that principle is a given. We all know that’s a given, so that's not the issue.

MR. MARK: If having done that, including considering the statutory purpose as set out in section 1, the Board was of the view that you simply could not -- it would be unreasonable or too strained to give that interpretation to the words, then that's the end of it.

My point is the Board at least has to consider these objectives in the statutory analysis. And if you look at the CANDAS decision, with respect, the Board did not consider these objectives. The Board did not turn its mind, with respect, to these objectives in undertaking the interpretive analysis.

They did not avert -- they did not even aver to the arguments that were made that the interpretation that they proposed had to be undertaken in the context of whether it

was serving the interests of ratepayers, and the efficiency of the system. That's the point in our appeal. The Board didn't consider those issues in the interpretive exercise.

MS. FRY: Okay, thank you.

MS. LONG: Mr. Mark, not to belabour this point, but to get back to the facts of the case, is your argument that the Board did not consider that in its interpretation in the fact that it allows for LDCs to come back, if they feel that the rate that's proposed is not enough to cover off their costs?

I think one of the arguments you make is about cross subsidization and the worry that costs won't be recovered, but in --

MR. MARK: If I can answer the point -- and I've had this point put against me by others, and it is important to understand our point.

What the Board said in the CANDAS decision is you can come back if you don't think that the 23.35 is an appropriate allocation of the costs.

Our issue is the price should not be determined on the basis of cost allocation. There were very specific reasons why what the parties were engaged in in the CCTA decision was not an analysis of what's the market price for pole attachments. The parties were engaged in fundamentally different exercise of a -- they had already agreed that the access fee was determined on the basis of a cost allocation model. Our point in the CANDAS proceeding was it's not about cost allocation at all. There's a market; there's a

market for this that has -- market prices have nothing to do with us recovering the cost of the pole and the attachment.

There is a robust and sufficiently competitive market, which indicates that the appropriate price for attaching has nothing to do with an allocation of cost. It is not a question of whether the cost allocation is twenty-three bucks, or twenty-seven bucks, or forty-two.

We say there is a sufficiently competitive market and market prices should set the attachment fee, and that may be several hundred dollars. So when the Board in the CANDAS proceeding says you are protected, because you can come back and ask for revisiting the cost allocation, it misses our point.

This is not about cost allocation for us. It's about the argument that prices should not be set on the basis of cost allocation. And when the evidence is clear that the value of the right to attach to LDC poles is hundreds of thousands of dollars, and the CANDAS decision deprives the LDCs of the opportunity to earn those revenues, and the evidence was clear that those revenues go directly dollar for dollar to reduce customer rates, we say that squarely engages these objectives, that there is a cross subsidy here.

The electricity ratepayers are being asked to subsidize the CANDAS applicants by giving them access, on a cost allocation basis, to a product or service which has a market value many times greater.

That is a cross subsidy, a cross subsidy which is exacerbated when the evidence is -- it's not that you're giving CANDAS access for $23.35 when it has a market value of maybe $200, or $300, or $500, but the evidence was what CANDAS was going to do is it was going to use a small portion of that bandwidth itself, and it was going to resell the rest to other telecommunications carriers.

This was an arbitrage opportunity and the Board -- with the greatest of respect, the Board didn't even turn its mind to that issue. And we say the Board's failure to even avert to that issue was a failure to carry out its mandate to consider the consumer price protection, and whether there is a subsidy being enforced here, giving a subsidy from the LDCs and their customers to the telecom carriers.

And maybe the Board would have come to the same decision. But the Board, in considering that issue, was obliged to consider those facts and obliged to consider its statutory mandate, where it says it shall be guided by the following objectives, and it just didn't.

So again, in my submission, it can't seriously be contended that our appeal on that basis is entirely frivolous and without any hint of merit whatsoever. So if I've answered your questions on the serious question, I will now turn to irreparable harm issue.

On the irreparable harm issue, I want to start by referring again to the RJR-MacDonald decision, which gives us some elucidation of what that phrase "irreparable harm"

means. And if I could ask you to turn in our submission to page 6, paragraph 24, quoting from RJR-MacDonald.

> "At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."

In other words, the analysis for irreparable harm does not have to do with how great is the harm; the analysis -- or what is the type of harm. The analysis has to do with whether the harm could be remedied if the appeal is successful. And if it could not be, then it is irreparable.

And going back to the discussion we had at the outset of my submissions today, Panel, it's our submission that there would be irreparable harm to the LDCs if the order is not stayed and there are applications by telecommunications carriers to attach. We would be required to comply with the CCTA order in the CANDAS decision. We would be obligated to enter into agreement on the specified terms and then permit the attachment on the terms of the agreement. And absent a provision negotiated by the parties, or imposed by the Board as part of its disposition of this stay application, which would provide for the rescission of those contracts and the restoration of the parties to their position before the entering into those

contracts -- in other words, making the LDCs whole with respect to the costs they have incurred -- if the appeal were successful, we would be left with no remedy. The attachments which had been made in the interim pending the appeal would be permanent. Those contracts would be enforced, they would subsist, they would mandate the continued at the continued contractual rate at the continued contractual term. And if we were successful on the appeal such that we ought not to have been obligated to enter into those contracts, then we've clearly suffered a harm, and because there is no mechanism to set those contracts aside or adjust their terms, that harm would be irreparable.

Similarly, the evidence was clear that the process of implementing the attachment, the review of plans, the work on poles, et cetera, all creates a cost to the LDCs and ratepayers, and there would be no mechanism if we were successful in the appeal to recover those costs for the benefit of ratepayers.

And while Board Staff suggest in their submissions that we could, as I indicated before, Panel, absent some power in this Board to issue such an order at the time -- which power, in my submission, you don't have -- those contracts would remain in force and we have no right to recover damages from anybody.

So in our submission, if the order remains in force and can be acted upon and essentially enforced by the telecommunications carriers pending disposition of the

appeal, then clearly there is a risk that we will suffer a harm which is being made subject to these contracts and attachments, which, if the appeal was successful, would clearly be a harm and that harm could not be remedied.

There is also, of course, the risk of non-compliance proceedings, right? The only way we can avoid the harm is to float the order, which would of course, as Board Staff acknowledges, potentially result in enforcement proceedings. And that, of course, is a harm which we shouldn't be subject to, and with the greatest of respect to Board Staff, the suggestion that that can be avoided by we simply agree that the order can be implemented pending the appeal is to miss the issue on the stay motion completely.

So in my submission, I don't think there can be any serious argument that there is a risk of irreparable harm here if there is not a stay or some other mechanism for permitting the harm to be remedied if the appeal is successful.

Which brings us to the last of the three tests, which is --

MS. LONG: Sorry, Mr. Mark, I have a few questions on the second prong of the test that I think it's probably best to deal with now.

With respect to your issue on enforcement and the issue that this completely misses the mark, I take your point that that's your position, but what we're here to decide is whether or not this is irreparable, whether there

is irreparable harm.

So to the extent that Board Staff makes the argument that you could avoid irreparable harm by going along with the order, I would like you to delve down in that one a little bit deeper for me, as to how this Panel wouldn't consider that as being a way to avoid irreparable harm.

MR. MARK: Okay.

MS. LONG: I appreciate that you may disagree on the merits of the case, but that's not what we decide in this test.

MR. MARK: The only way we could avoid the prosecution is to enter into the contract and suffer the irreparable harm I've already addressed, right? The Board's just substituting one form of irreparable harm for another. With respect, it's a silly submission, saying if you acknowledge that if we're obliged to enter into these contracts, which we'll have no remedy for if the appeal is successful, then it's no answer to the risk of prosecution to say: Oh, you can avoid that harm by entering into the contracts. You can avoid that harm by incurring this other irreparable harm. That's silly.

Have I made my point?

MS. LONG: Finally, I'm going to take to you paragraph 31 of your submission, and I just want to be clear on what -- your main arguments on irreparable harm are, as I understand it, that you would enter an agreement that you are unclear how to get out of. You are concerned about costs you might incur, but you're not arguing that pole

attachments could not be taken off.

Here, when I look at the last paragraph of 31:

> "The attachment of wireless telecommunications equipment to utility poles would be very costly, time-consuming and irreversible."

So with respect to irreversible, is your reference there to the contract that you would have difficulty getting out of, and that's your concern?

MR. MARK: Yes. Clearly, we can take down the attachments if we're permitted to. I say we're not permitted to if the contract subsists.

And secondly, there is clearly a cost associated with both putting up the attachment and then taking down the attachment and we get no -- who is going to pay us those costs? Nobody.

MS. FRY: I have a few questions for you also, Mr. Mark.

The first thing is you can educate me a little bit about the membership of the EDA. We all know there are many, many LDCs in Ontario. Does EDA represent all of them, or some proportion?

MR. MARK: The membership of the EDA includes all of the municipal electric utilities in Ontario, and many -- there are a few privately-owned distribution utilities, which don't have their roots in the municipal system. I believe most of those are members the EDA. There may be a couple who -- all of them? All right. So I'm corrected.

So all electricity distributors are members of the

EDA.

Now --

MS. FRY: Okay.

MR. MARK: Of course, as you're aware, many members have, you know, intervened on their own in proceedings when they are of particular interest. They're certainly members of the association.

MS. FRY: But you are counsel for the EDA.

MR. MARK: Counsel for the EDA.

MS. FRY: So I'm assuming that in this proceeding today, if all LDCs are members of the EDA, therefore you're representing all members of the -- all LDCs?

MR. MARK: Representing the EDA.

MS. FRY: Of which all LDCs are separate members.

MR. MARK: The EDA was an intervenor, was admitted as an intervenor in the proceeding below, was a party to the proceeding. As a party, the EDA has a right to appeal, and our position on this stay is clearly that to the extent our members may be subjected to these requests, they will suffer irreparable harm.

So in that sense, the submission with respect irreparable harm is made with respect to our members, yes.

MS. FRY: Thanks. Now you can also help me with some references to the evidence that's on the record from the previous proceeding, since you referred to it a few times in your submissions. And perhaps you can just take these down and find the references.

I would be interested to look at the evidence on how

many LDCs have actually, despite your interpretation issues, forward to attach wireless to poles; how many have done it.

In paragraphs 28 and 29 of your main submission, you are talking about substantial engineering and administrative costs to process the applications, and the need to reconfigure existing attachments. So also if you can look up the references, and point us to where the evidence on that is.

MR. MARK: I'll have to do that following today. I will try and do that later today.

I don't have the complete record with me today, so I have to go away and give you that.

MS. LONG: That's fine, Mr. Mark.

MS. FRY: Okay. Thank you, those are my questions.

MR. MARK: So let me turn then, as I was going to, to the last prong of the test, which is the balance of convenience. And assuming you agree with me that there is a risk of irreparable harm, you then must balance that with the possibility of harm to the telecommunication carriers, if there is a stay issued pending the appeal. And then you must do a balancing exercise in determining where the interests of justice lie, having regard to those competing disadvantages which might result if, on the one hand, the stay is granted, or if, on the other hand, it is not granted.

In my – I have two submissions on this. One, the balance of convenience inquiry doesn't arise here, because

there is certainly no evidence -- and not even a submission before you on behalf of any telecommunications carrier, or anybody representing them -- that in fact any of them say that if this stay was ordered, there would be any harm or inconvenience to them at all.

Nobody is even here saying that, let alone there is no evidence of it. Nobody is even arguing that that to you. So in my submission, this inquiry simply doesn't arise in this case. There is no countervailing harm or inconvenience asserted that is to be balanced against the irreparable harm we say will be occasioned if there is no stay. So it's just not an inquiry which --

MS. LONG: Mr. Mark, is your argument that they're not here and haven't filed submissions, so that should be the end of our analysis, and we shouldn't consider delaying – you know, I think you've told us that the appeal may be heard in the next few months, and then a decision, I'm assuming, might be a few months after that.

So them being constrained from approaching LDCs to attach wireless equipment for, let's say, five or six months is really not a hardship?

MR. MARK: Well, the premise of your question is that there is a constraint occasioned by the hearing of the appeal. You don't even know that there is any telecom company out there who has -- who wants to come forward and do this.

I mean even the assumption that there is a constraint is speculation, with respect. Nobody is here to say that

we want to, or that given – you know, it may be that given the way the business plans work for this, the last thing in the queue is putting on the attachments, and that's not going to happen for a long time.

It would be speculation for the Board to say delay ipso facto results in harm to the telecommunications carrier. That would be speculation, which you're not permitted to engage in, in my submission.

MS. LONG: Thank you.

MR. MARK: And even if you were to go down that road, looking at the balance of convenience, having regard on the one hand to what we say is irreparable harm, which is we're stuck with these contracts forever, versus some few months delay and getting the landscape settled as to what the legal rights are before this goes ahead, we say the balance of convenience favours the LDCs in any event.

MS. FRY: Just a couple questions from me, Mr. Mark. In your view, under the RJR-MacDonald case test, what is the burden of proof in applying for a stay, and who has to meet it?

MR. MARK: The burden is clearly on the applicant for the stay to satisfy you that the appeal is not frivolous or vexatious, and that there is a risk of irreparable harm, and that the balance of convenience favours us.

We're moving. We have to satisfy you that all three of the elements of the test have been satisfied.

MS. FRY: And just to pick up on a point you were making when you were talking a minute ago to Ms. Long, you

said that there is no evidence that any telecom actually wants to connect wireless.

So if there weren't any telecom company that wanted to connect wireless, I guess there wouldn't be any risk of irreparable harm; is that right?

MR. MARK: The LDCs can only come forward based on the information which is available to us. I don't have access to the business plans of the telecom carriers.

I can only come forward on the basis of if a telecom carrier wants to pursue its right of attachment pursuant to the outstanding orders, there will be irreparable harm and there should therefore be a stay.

MS. FRY: Was there evidence in the previous proceeding as to how many telecom companies were kind of imminently lined up to attach wireless; was there anything like that?

MR. MARK: Yes, there was no evidence from any carrier, other than CANDAS.

MS. FRY: Was there any evidence on that from CANDAS?

MR. MARK: The evidence from CANDAS was that they had gone out and abandoned their proposed DASCOM network and built a microcell network, and their business was now being fully operated under a microcell network.

As I understand the evidence, they never -- there was no evidenced in that proceeding -- and if my friend recollects otherwise, I will stand to be corrected. But I don't believe there was any evidence in that proceeding that said if they were successful in the CANDAS proceeding,

they had imminent plans for deploying a DASCOM network.

They had clearly gone and built their network otherwise, and there is no evidence that think of imminent plans to proceed with a DASCOM network.

MS. FRY: Thank you.

MS. LONG: Mr. Mark, in considering this final prong of the test, does the Panel have an obligation to consider the public interest, or is our test merely one between the telecommunications providers and the LDC?

MR. MARK: It's a good question. Let me answer it this way.

I think it is clearly open to the Board to consider whether there would be a type of harm which should be weighed in the calculus of the balance of convenience. And I would not tell you that the public interest is not one of those matters that you're entitled to look to.

But again, it would have to be based upon some evidence somewhere in the record. And with respect, given the record we have, with no indication that there is any telecommunications carrier whose interests would be harmed if there is a stay in place for these few months, it seems to me axiomatic that the public interest won't be harmed either.

The public's interest, to the extent it's relevant here, it seems to me, would be the public's interest in having telecom carriers get appropriate access to the poles. But the public has no right to enforce that access itself. It is -- it really is that their right is, if you

will, the benefit, if any, that they get if telecom carriers wish to attach. So it seems to me axiomatic if there is no basis upon which you would conclude that there would be any harm to telecom carriers by the stay, there can be no impairment of the public interest either.

On the other hand, if there is no stay, there will be an impairment of the public interest, and the public interest here is as represented by electricity ratepayers.

And I say, again, despite Board Staff's attempts to characterize the LDCs here as pursuing private interests, the uncontradicted evidence in the proceeding is that the revenues from attachments go dollar-for-dollar to reduce rates, electricity rates to ratepayers. To the extent LDCs end up saddled with contracts which deprive them of revenue they would otherwise be entitled to, the interest of ratepayers and ergo the public interest will be harmed in the absence of the granting of a stay.

MS. LONG: Thank you.

MS. FRY: One follow-on question from that.

So you've talked about how the LDCs in this instance, in your views, would be advancing the interests of ratepayers.

How would the LDCs' responsibilities to their shareholders play into this?

MR. MARK: The LDCs' responsibility to their shareholders is to properly manage the business. And if the LDCs are of the view that -- and the business of the LDCs amongst -- the business of the LDCs is to run the most

efficient and reliable electricity distribution system they can, and maintain the lowest possible rates for their ratepayers.

In my submission, in this context, there's -- there is no different interest that the shareholders have here, because the interest of the ratepayers is consistent with and constant with the best interests of the LDCs, which has the objective of efficient operation of the system and the lowest possible rates. And I'm not aware that shareholders have any different objective for the business.

It's clear on the evidence that the revenues we're talking about here go to subsidize rates, and do not go to provide dividends to shareholders.

MS. FRY: Okay. So if I understand you, you're basically saying that the public interest, which you equate in this instance with the interests of the ratepayers and the interest of the shareholders -- which I assume you'd say is some kind of a private interest -- would be synonymous? Would be the same?

MR. MARK: Yes.

MS. FRY: Okay. Thanks.

MS. LONG: Mr. Mark, my final question to you is on this issue of status quo, where it seems that the Board Staff and the EDA take different positions.

The Board Staff take the position that the status quo is actually, you know -- the effect, I guess, of the order here is that the status quo continues, and that the Board provided guidance on what that decision was.

Your submissions seem to take the opposite view, that this is a change in status quo, and what the case law would ask us to do in many instances is to continue on with the status quo.

So I would like to hear your position on that, finally.

MR. MARK: Sure. So we colloquially use the term "status quo" to say that's what stay applications are all about. Let me say two things about that.

It is precisely that; it is a shorthand description for the purpose of the stay application. The purpose and the grounds for a stay application are, in fact, as are set out in RJR-MacDonald. The essential inquiry is whether, if there is no stay, will the appellant be at risk of suffering a harm which cannot be remedied if the appeal is not successful. There is no other definition of "status quo." There is not a separate question of whether issuing the stay maintains the status quo in some other respect.

The sole questions are the three questions set out in RJR-MacDonald. Again, while we may use a convenient shorthand, calling it the status quo, in fact the content of that term, "status quo," is defined by the RJR-MacDonald test. There is no scope to say: We meet the RJR-MacDonald test, but somehow that we should ask ourselves an additional or other question about whether granting of the stay will or will not maintain the status quo.

There is no separate question. So that's my first response.

My second response is that, with due respect to Board Staff, as a matter of logic and analysis their proposition, if you think about it for perhaps more than a moment, cannot be accepted. Board Staff is -- saying is that the Board's order has confirmed CANDAS's view of its rights. So in that sense, the Board order has confirmed the rights which existed all along, ergo those rights and the existence of those rights are the status quo, and therefore the continued existence of those rights pending appeal is the status quo that is to be preserved.

With respect, if that's the analysis, there would never be a stay. There would never be a stay. I mean, take a contract dispute before the courts. Party A says: My contract should be entered this way. Party B says: The contract operates this way. They have a dispute. One of them is right. One of them has always been right. Goes to court, the court issues an order saying: The contract operates this way, as the plaintiff says it operates. The defendant would never be able to apply for a stay pending appeal.

If my friend is correct, all the Board has done -- all the court has done -- is said: These are the rights of the parties as they have always been. We've now just clarified it, so the status quo is the rights as the court has found them to be. You'd never be able to apply to a stay; it would be a perfect answer to every stay application. It essentially says: The order appealed from is the status quo, and therefore the status quo gets preserved. It's an

inane argument.

Those are my submissions.

MS. LONG: Thank you, Mr. Mark.

I think, given the time, we'll take a short break and be back at quarter to eleven. Thank you.

--- Recess taken at 10:31 a.m.

--- On resuming at 10:50 a.m.

MS. LONG: Ms. Sebalj, if you could lead us through your submissions, please.

SUBMISSIONS BY MS. SEBALJ:

MS. SEBALJ: I would be happy to. I'm going to start by providing a few overarching and contextual observations with respect to the CANDAS proceeding in general. The Board submissions of January 4th provided a very high level overview of the CANDAS and the CCTA decisions. Board Staff thinks it's worth spending a few minutes to delve a bit more deeply into the context for the Panel.

The impetus for CANDAS's application, which was made April 21, 2011, was a dispute between CANDAS and Toronto Hydro Electric, THESL for short. And specifically, THESL had -- and this is evidence on the record of the CANDAS proceeding -- until August 2010 had been complying with the CCTA order, and that is it did not distinguish between wireless and wire line carriers or equipment when it had requests for attachment to its distribution poles.

It entered into pole access agreements permitting the attachment of both wireless and wire line equipment and it, for the most part, charged the Board-approved rate per

pole.

In August 2010, THESL adopted what it called the no wireless policy, and the impetus for the CANDAS application was that THESL refused to continue to entertain new applications for wireless attachments. And also at the time -- and this, I think, was later withdrawn from the CANDAS application, but at the time threatened to remove existing wireless equipment from the poles, at least CANDAS's existing wireless equipment from its poles which were already attached.

And why is this important for the purpose of the stay application? Well, in Board Staff's submission, two reasons.

One is this was a dispute between CANDAS and THESL. THESL is on the record, the public record as saying -- and this was in a letter to the Board which was copied to the applicant and all intervenors of record from the CANDAS proceeding, that it is not pursuing an appeal of the Board's CANDAS decision and order to the courts, that any relief it seeks will be from the Board and will relate to the fee it charges for wireless pole attachments, and that although it hasn't yet determined whether it will ask for the increased fee to be within the regulatory framework established by the CCTA order; in other words, the CCTA decision and order made clear that parties could come to the Board, if the fee that was established pursuant to that decision, the $23.35 per pole per year, was not reflective of the cost, that parties could come back to the Board and

ask for a different charge.

And so THESL indicates in its letter that it is not sure if it's going to pursue an increased fee, or if it's going to take the forbearance route. But it is clear that it's going to come to the Board regardless.

I do have a copy of that letter; it is in the public record. I don't know if the Panel has a copy of it, but I know the parties in the room are aware of it.

MS. FRY: Excuse me, you're saying the public record for this proceeding?

MS. SEBALJ: Sort of in a strange line between the two. It was filed on -- it was filed on October 23. The EDA's appeal application and the application for the stay were filed October 10 and 15, respectively.

I can look to see whether -- I don't know if they reference an EB number. The EB number they reference is the CANDAS EB number, 2011-0120. And so ostensibly, the letter is to advise the Board of what steps Toronto Hydro anticipates taking in light of the decision and preliminary order.

But it does reference – no, it doesn't. It doesn't reference the EDA appeal per se, but it was filed several days after the appeal was filed.

MS. FRY: So is it on the public record for a proceeding?

MS. SEBALJ: Yes, it's on the CANDAS public record, EB-2011-0120.

MS. FRY: Thank you.

MS. SEBALJ: So for Board Staff, this letter indicates that Toronto Hydro doesn't support the EDA's appeal and, by extension, this stay application.

And this is important because THESL was the only party, other than CANDAS and the CEA -- and the CEA, there's a bit of a side note there. The CEA had been an intervenor in CANDAS and filed evidence in CANDAS, but withdrew its participation and its evidence was subsumed by Toronto Hydro.

So Toronto Hydro was the only party, other than CANDAS and the CEA, that filed evidence in the CANDAS proceeding. And while Toronto Hydro is a member of the EDA, it has clearly and publicly distanced itself from the actions taken by the EDA in the courts, and at the Board in the form of this stay application.

I think it's also significant because Toronto Hydro has indicated that it may pursue a section 29 application in its reference to forbearance. But it says it will do so before the Board.

And so I will make remarks in a few minutes about the section 29, the seriousness of the issue to be tried. But it doesn't seem like Toronto Hydro is taking issue with the Board's suggestion that section 29 should be heard in a subsequent proceeding, or could be heard in a subsequent proceeding.

I note that the EDA indicates in all three submissions, the application for the stay, its submissions in-chief, and its reply, that it advocates on behalf of

electricity distribution companies and, in comments made this morning, that it represents all LDCs in the province.

But Board Staff notes that at least one of these LDCs has publicly stated that it does not represent its views, or at least the implications from the letter is that it does not represent Toronto Hydro.

The other reason I think this is important is that distributors, LDCs, specifically Toronto Hydro, but all indications are that others as well, were and may still be attaching wireless equipment to their distribution poles.

Board Staff believes that's in accordance with the CCTA order of March 2005. In other words, distributors, or at least some of them, must have understood that the CCTA decision required them to attach all Canadian carriers, as that term is defined in the Telecommunications Act, and all cable companies' equipment --

MS. FRY: Excuse me, Ms. Sebalj, are you referring to attachments since the Board's most recent order or --

MS. SEBALJ: No, I have no specific information since the Board's most recent order. All I'm saying is that distributors were operating -- some distributors, and I don't have specific evidence other than with respect to Toronto Hydro, because that was the party involved in the CANDAS proceeding -- attached wireless equipment to their distribution poles.

MS. FRY: I want to ask you the same question as I asked Mr. Mark, and you may come up with the same references, but records can be large. If you could provide

any references from the Board's previous proceeding to evidence on attachments by LDCs of wireless, that would also be helpful.

MS. SEBALJ: Well, if it's helpful to the Panel, I have at least two references with respect to Toronto Hydro from the CANDAS proceeding.

One is a response to an interrogatory, which is publicly filed on the CANDAS record, where the Board ordered THESL to identify the parties that currently have wireless attachments on the THESL poles, and then information related to those wireless attachments; the price, the master agreement, the approximate number of attachments, et cetera.

So that is one piece of information which is a filing of January 20, 2012 on the CANDAS record.

I also have a reference to a Cogeco agreement which was -- for which Toronto Hydro requested confidential treatment. But this letter of February 27, 2012, makes reference to a Cogeco agreement for the attachment of wireless to Toronto Hydro's poles.

So if you want to enter those, I can provide them to you.

MS. FRY: The precise references would be helpful.

MS. SEBALJ: Okay. So the first is a letter dated January 20, 2012, and it's from Toronto Hydro to the Board secretary. It's filed in EB-2011-0120, and it's re Toronto Hydro-Electric System Limited, additional responses to selected interrogatories of Canadian-distributed antenna

systems coalition, and in it the Board asked Toronto Hydro to identify the parties that currently have wireless attachments on Toronto Hydro poles.

The response by Toronto Hydro was that the following third parties have attachments on Toronto Hydro poles that are known to facilitate wireless communications: DASCOM, Cogeco, and TTC. And then there is further information about how many attachments and at what price, at what cost.

And the second is a letter dated February 27, 2012, wherein Toronto Hydro writes to the Board Secretary pursuant to the Board's decision and order dated February 22, 2012, which directed Toronto Hydro to file any representative boards of THESL health and safety committee meetings, which is not relevant.

But the second was to clarify for the Board whether the agreement between Toronto Hydro-Electric Systems Inc., THESI, its affiliate and Toronto Hydro Telecom Inc. which was purchased by Cogeco, filed in confidence with this Board on December 23, 2011, has been renewed and, if not, whether there is a document that governs the current relationship between THESI and Cogeco.

So that is at least a reference to the fact that there is a relationship with Cogeco.

MS. LONG: Are those copies of the documents themselves that you have in front of you?

MS. SEBALJ: Yes.

MS. LONG: And do the parties of those documents, or would they like copies in order to take a look at them and

be able to address them?

MS. SEBALJ: I should note this is obviously not a result of an exhaustive search on my part. There are -- and this is admittedly by my recollection -- a number of references to questions that were asked of Toronto Hydro with respect to wireless attachments on its poles at the technical conference of CANDAS and others.

So I will supplement per your instructions with other references.

MS. LONG: Just so I'm clear, Ms. Sebalj, when you say in your submission here on page 7 there is evidence on the record of the CANDAS case that makes clear some distributors have attached wireless equipment, are you just speaking of Toronto Hydro or are you speaking of other distributors?

MS. SEBALJ: I need to check that. The CANDAS record is voluminous and I wasn't able to pull, as quickly as I would have liked, any references to others with wireless attachments.

I'm not going to be privy to that information as much as, obviously, the EDA would be. But I'm not sure what is on the record with respect to distributors other than Toronto Hydro, because as I said, this was a dispute between Toronto Hydro and CANDAS. And although we did have individual interventions by some other large LDCs, they did not participate in a --

MS. LONG: Okay. Thank you.

MS. SEBALJ: -- in an active way.

So the reason Board Staff thinks it's important that LDCs were attaching, or at least Toronto Hydro was attaching, wireless attachments to its poles is because the operative decision from this Board is the CCTA decision. And that in spite of the arguments of my friend with respect to the inaneness (sic) of Board Staff's argument with respect to the status quo, we differentiate between the concept of a contract for which a court interpretation is sought, a contract between two parties for which a court interpretation is sought, and that interpretation is then -- one party seeks a stay of that interpretation while it does what it needs to do to implement it or to deal with any potential irreparable harm, and this own Board's interpretation of its own decision from 2005, and the fact that this Board, in interpreting it in the CANDAS decision, was very clear that it was -- that the original CCTA decision was clear on its face, that it didn't need to go into any substance, and that the word were clear and there was no real need for the Panel to go any further.

And for that purpose -- I'm not sure if you have the CANDAS decision in front of you, but I do have copies of it if you need it handy. And I did make reference to this in my submissions.

At the bottom of page 7 of the CANDAS decision, the Board says:

> "The Board finds the CCTA order is clear on its face and that the CCTA order applies on a technology-neutral basis. As a result, an

examination of the facts and circumstances of the CCTA proceeding is not necessary. However, as discussed below, in the view of the Board the findings in the CCTA decision are consistent with this interpretation of the CCTA order."

So Board Staff thinks this is important. This was not a situation where the Board said in its decision: This is very complex, this is very difficult; we've had a hard time with this analysis. They said outright: Clear on its face.

So the analogy that the EDA draws with an interpretation of a contract between two private parties in the courts, I think is not accurate. In this case, we have a Board decision from 2005 and we have a Board decision from 2012, September 2012, that say the same thing. And so or not the same thing, one that establishes something and one says that decision is clear on its face.

And so the idea that this is a tautology, Board Staff takes issue with that. The fact is the CCTA -- I cannot say that – at least not as fast as I would like to -- the CCTA decision is the operative decision that established the requirement to attach wireless equipment or equipment on a technology-neutral basis not the CANDAS decision. It's not a tautology; it's a fact. And it's one that Board Staff submits cannot be ignored by this Board.

Those are our overarching comments. Now I'll go to the overview of Staff’s submissions in particular.

And I note at the outset, for purpose of clarifying,

in Board Staff's view we have no dispute regarding the jurisdiction or the authority of the Board to grant the stay. So we're in agreement with the submissions of the EDA on that front. And we don't think there is a dispute regarding the applicable test as articulated in RJR-MacDonald, nor, given Mr. Mark's comments with respect to the onus, who needs to discharge the onus with respect to proving the three prongs of the test.

So the dispute really between Board Staff and the EDA is with respect to whether the EDA has discharged the onus upon it to prove to the Board that it has satisfied each of the three branches of the test. And Staff says, as you will have seen in our submissions, that it has not, and Staff says that it has not discharged the onus with respect to any or each of the three prongs.

So with respect to the seriousness of the issue to be tried, serious issue to be tried, Board Staff says, as Mr. Mark has indicated, that the Board did not preclude a separate section 29 application when it denied -- ultimately denied in the preliminary issue decision of CANDAS dated September 13, 2012.

It denied Toronto Hydro's motion for the section 29 filed in the CANDAS application, but it did not preclude a separate section 29 application being filed.

We acknowledge it wasn't an open invitation to go ahead and file, but it certainly did not shut the door.

And Mr. Mark has spent considerable time going into what I would consider the merits with respect to section 29

and objectives, and I'm happy to give a response to that.

But suffice it to say that at the threshold level, the Board Staff is of the view that because it is clear that the Board will entertain an appropriate section 29 application, and that ultimately in the result Board Staff's view is that the appeal -- a successful appeal will result in a requirement that the Board hear a section 29, that the EDA hasn't satisfied its requirement to pursue the alternatives before it seeks a decision of the court, that it can come to this Board and file a section 29, and that this is the most efficient process.

So with respect to going to court on the section 29, it doesn't satisfy the first prong of the test, that there was a serious issue to be tried.

MS. FRY: Can I just interrupt you here with a question?

Now, Mr. Mark made the point that, in his view, there was considerable submission and evidence on the record concerning section 29 in the previous Board proceeding.

And I'm just wondering if that circumstance -- assuming you agree with what he said about that, how does that play into your argument on the section 29 issue, if at all?

MS. SEBALJ: It is the case that there were experts retained by the CEA actually, although those experts didn't participate in the preparation of a joint written statement by the experts.

So essentially, it was Toronto Hydro's experts and

CANDAS's experts that were involved in the development of a joint written statement per the Board's rules with respect to concurrent expert evidence.

The purpose of that exercise was not explicitly and/or implicitly by the Board to determine whether there was a competitive market for the siting of wireless attachments. The purpose was that we had experts. We had essentially two sets of experts, and the idea was to get them in a room, have them discuss and come to terms with respect to potentially deciding what issues they could agree were important, and areas of agreement and disagreement.

The Board had explicitly, prior to that, held in abeyance the motion of Toronto Hydro, which among other things, and there were other things, asked for the Board to consider a forbearance application. And the Board had held that in abeyance.

The trajectory of the CANDAS proceeding is fairly convoluted, in that there was an original application by CANDAS, the first prong of which was a request for this Board to consider whether the CCTA order or -- I have the actual language. But essentially what they did in the preliminary issue, there were requests by parties to consider that preliminary issue as a threshold issue.

Those requests were objected to and, as a result, the Board did not go forward. But after a period of time, and after the experts were asked to provide their evidence, the Board determined ultimately, upon agreement of all the parties, to hear the preliminary issue.

And so while it is true that there was some expert evidence that was provided, and it was at considerable cost, the ultimate decision to hear the preliminary issue was not for the purposes of circumventing that evidence. It was simply a circumstance where finally parties were able to agree that the preliminary issue of whether or not the CCTA order applied to wireless needed to be heard.

MS. FRY: Thank you. So when Mr. Mark says, as I understood him, that there was considerable evidence in argument filed in that proceeding concerning the section 29 issue, are you saying you don't agree with that, or -- what are you saying?

MS. SEBALJ: I'm saying I agree in part. Certainly Toronto Hydro filed a significant volume of evidence when it – it was in the form of a motion and part of that evidence, a large part of that evidence was evidence with respect to its section 29 forbearance request.

The Board held the motion in abeyance, but accepted the evidence on the record, and said we're going to accept your evidence, but we're not going to call it a motion. We are holding the motion in abeyance and allowed interrogatories to be asked of that evidence.

So there were exchanges with respect to that evidence, and certainly CANDAS had evidence as well. The evidence was never tested beyond the interrogatory phase because, in the background, we had significant delays for the possibility of settlement. And then, at the same time, we had the experts get into a room and develop a joint written

statement.

So the only piece -- the pieces of evidence were the original filings, and the joint written statement was ultimately filed on the record. But there was no cross-examination on the evidence, and the experts did not appear before the panel in a concurrent expert panel.

And so I agree in part. It just -- in my view, it is just the way the case played out, because there were significant delays where we were asked -- the Board was asked to stop work while the parties went off and attempted to negotiate a settlement.

And during that period, to be efficient, the Board said, well, why don't we get the experts to meet. And then the culmination of that settlement -- the lack of settlement, during that period the parties came to terms and said, you know, let's ask the Board if they will consider the preliminary issue. And the Board did.

And so, as a result, yes, there's evidence on the record. But it did not come full circle where the Board was able to test the evidence.

MS. LONG: I just want to be clear on language here. So when we talk about the Toronto Hydro motion being put in abeyance, what the Board decided was that they were not going to hear the motion at that time, and they were going to move on to the preliminary issue, being whether the CCTA order applied to wireless communications; is that correct?

MS. SEBALJ: It is partly correct. They definitely put Toronto Hydro's motion in abeyance when it filed its

original materials, which was very early in the case. It wasn't for the purpose of hearing the preliminary issue. It was for the purpose of following along with its original trajectory for the case, which included the filing of IRs and IR responses on all of the evidence, and to -- just to move the case along.

The decision by the Board to hear the preliminary issue was made fairly late in the game, and it was as a result of all parties coming to agreement on the fact that that's what needed to happen, because originally there was some opposition to that.

And so ultimately, after long periods of time where the parties had attempted to come to settlement, the Board was asked whether it would consider hearing the preliminary matter, which it originally said it would not because the applicant had objected to doing that, to parsing out its application into steps. It wanted it all heard at the same time.

MS. LONG: Mr. Mark, do you object to that, or have some clarification?

MR. MARK: Here's my recollection, Ms. Long. Toronto Hydro clearly brought a motion under section 29 and I think -- I think Ms. Sebalj acknowledges that they filed, and the parties filed considerable evidence with respect to that motion.

Both parties initially were asking the Board to carve out the proceeding, and decide an issue before the other issues.

Toronto Hydro asked the Board to put the section 29 motion at the head of the queue and deal with that, because that may be dispositive of the whole case. And the Board said, no, we're going to have one hearing where we deal with all the issues, including section 29 and including the issue of the proper interpretation of the prior order.

And then the parties went ahead and they filed the evidence and they did the interrogatories and had the expert hot-tubbing.

And then, in a decision that I think surprised many, the Board said: We will hear in advance of the other issues the interpretation question. The Board never said: We're holding 29 in abeyance; we're not going to deal with 29. In fact, the Board said: After we deal with the interpretation question, we'll revisit, we'll deal with the balance of the proceedings. They simply said: We're going to deal with this issue first.

They dealt with the interpretation issue, and then, frankly, without receiving submissions from any parties, then terminated the proceeding and said they are not going to deal with section 29.

So my problem with Ms. Sebalj is saying they put the 29.1 motion in abeyance. No, they ended up sequencing the proceeding, but they never put it on ice.

MS. SEBALJ: I'm happy to file -- I've assembled on many occasions all of the correspondence related to the original request from Toronto Hydro, the responses of parties to that request, some in support of Toronto Hydro's

proposal to sequence and some opposed the Board's ultimate decision on that.

Then there was a further request from Toronto Hydro. Then the Board responded again and said: No, we really meant it. We're going to proceed with CANDAS's application as it is -- as it is filed.

So I'm happy to do that, and that way it will be what's on the public record and you can draw conclusions with respect to what the sequencing was and what the Board did.

The thing that I take issue with is the idea that it came as a surprise to parties that the Board was going to hear the preliminary issue, because it was clearly discussed with all of the parties in a room, and it was -- the mandate, for me, was to go forward and request from the Board that it reconsider the preliminary issue. And the EDA was in the room when that discussion was had, so --

MR. MARK: No question that happened. When I said, given what the Board had previously ruled, that we'll just proceed together with everything, it was a change of position. I don't mean you to take anything from my comment whether it was a surprise or not. I'm not sure I see how it's relevant, but...

MS. LONG: I'm just trying to establish here. I guess Mr. Mark's position is once the section 29 argument was put forward through the motion, that it was something that the Board should have dealt with. And I think what Board Staff's submission is, is that the fact that they've said

in this decision that a section 29 application can be brought is sufficient enough for them to have dealt with it; is that...

MS. SEBALJ: That's essentially it.

MS. LONG: Essentially the gist of it?

MS. SEBALJ: Yes. Delving into the merits, and obviously we're going to be having this discussion in a court, or someone is, the Board is the master of its own procedure. We're a tribunal; we're not a court. So there is a lot more leeway for the Board to determine the appropriate sequencing and the appropriate procedure for any case.

Board Staff also takes issue with the EDA's interpretation of section 29. Section 29, EDA contends that there is only one way to read it. We disagree, for both -- on the words of the section, but also for practical purposes.

The suggestion from the EDA because of the -- because, in my view, the sequencing of the words in the section and the use of the word "shall", the suggestion is that this Board must in every case consider whether there is a section 29, whether there is competition sufficient to protect the public interest.

This Board was essentially created to regulate monopoly operations, and so, taken to its extreme, it could grind the Board's operations to a halt if it had to consider section 29, if it -- on an application or in a proceeding:

"The Board shall make a determination to refrain in whole or in part."

And it goes on.

Our view of that section is that the clause -- the clause at the end that begins "if" is how it should be read. So:

"If the Board finds, as a question of fact, that a licensee, person, product, class of product, service or class of service is or will be subject to competition sufficient to protect the public interest, the Board shall make a determination to refrain in whole or in part from exercising any power or performing any duty."

The Board did not make that determination in CANDAS. The Board did not find, as a question of fact, that a licensee, person, product, class of product, service or class of services is or will be subject to competition sufficient to protect the public interest.

And so in our view it is not a requirement, certainly not a requirement in the general sense. Nor was it a requirement in the context of the CANDAS proceeding for it to hear the section 29, that it was perfectly acceptable for the Board to decide that it was going to sequence, and that if the section 29 continued to be something that an applicant wanted to pursue, it was perfectly permissible for it to pursue it once the Board had established the baseline. And the baseline was the CCTA order applies to wireless.

And the reason I think -- you know, at the risk of using after-the-fact evidence -- that that makes sense is that so far, no section 29 application from the very applicant who put it forward in the first place. We may get that in time, but the point is that Toronto Hydro is the one that put it forward. Toronto Hydro has indicated that it may ask for a fee increase or it may come to the Board for a section 29. It takes no issue with the sequencing and the Board's management and control of its own process.

I don't know if that's satisfactory on the section 29 issue, if you want me to move on or --

MS. LONG: I was interested in hearing your view was on that, given that it's a substantial part of the EDA's argument. Thank you.

MS. SEBALJ: And then -- and this is where I'm happy to be told to not pursue, but obviously the second piece of the serious issue to be tried, which the EDA has pointed out in reply that the Board didn't deal with objectives.

And I will do that if you would like me to, if that was going to be a question, but if raising it on my own creates issues, I'm happy to leave it.

MS. LONG: It's really up to you, if you think that there is something there that you would like to stress that we haven't heard, or something that you'd like to address based on Mr. Mark's comments this morning.

MS. SEBALJ: With respect to the objectives, it is true that Board Staff didn't address it in its submissions.

We took from both the appeal documents and the stay documents that section 29 was, as I think Mr. Mark indicated, the primary ground for appeal.

But having said that, the EDA says that the CANDAS decision flies in the face of the Board statutory objectives and that Board Staff didn't address it.

He has taken you to section 1(1) of the OEB Act and I won't do the same, but just by way of sort of general comments, although the Board is required to consider all applications in light of statutory objectives, they're not independent sources of statutory authority or jurisdiction, and it's not uncommon for the Board to not specifically reference the objectives in its decisions.

The objectives sort of inform and guide the act as a whole, but there's no requirement for the Board to refer to them. Sometimes they do, when it becomes a very prominent issue, but in Board Staff's submission, in this case, because the Board determined that the CCTA decision was clear on its face, it would have been difficult if not inappropriate for the Board to then go into whether it should or should not apply to wireless, in light of the Board's objectives.

And the Board actually dealt with this head-on in the CANDAS decision; not the objective piece which, of course, Mr. Mark has pointed out they did not refer to.

The Board -- there were arguments made orally, submissions made orally with respect to the preliminary issue, which is whether or not the CCTA decision applied to

wireless.

And in those submissions, there was the distinction between whether the Board needed to find that the CCTA order does not apply to wireless, or should not apply to wireless. And I think this is kind of the crux of the discussion you were having this morning about can the Board then apply the gloss of the objectives, after it is found that the decision was clear on its face.

And the Board, at page 7 of the CANDAS decision, indicated in the third full paragraph -- and I'm starting in the middle of the paragraph:

> "Further, these parties argue that an examination of the facts and circumstances leads to the conclusion that the CCTA Order does not apply to wireless attachments. The Board does not agree with these submissions, for the reasons discussed below. At their core, these arguments by THESL and the EDA are arguments for why the CCTA Order *should not* apply to wireless attachments -- not that the CCTA Order *does not* apply."

So the Board actually thought about this and decided the CCTA order is clear on its face. It does not apply to wireless; no reason to decide whether it should or not.

And so, in Board Staff's view, the original panel that decided the CCTA was subject to the same objectives in the act -- granted, they might have changed between those two periods of time -- and that it was not going to reinterpret what the original panel was thinking, or should have been

thinking. It was simply going to read the decision and if it could, on its face, clearly make a determination, it did; and that's what it did.

I'm sort of all over my own map here, but I think those are my submissions with respect to objectives, unless you have any questions.

And so, under the heading of serious issue to be tried in the RJR-MacDonald test, in our view the two grounds of appeal are section 29 and the objectives, and that the EDA has not proved to this Panel, because it can pursue a section 29 at this Board, and because it was not appropriate for this Board in the context of the CANDAS preliminary decision to reinterpret the original panel's decision, that the objectives argument is -- just simply is not a serious issue to be tried at the court.

So moving on to irreparable harm, and I've alluded to some of this with respect to my opening comments on Mr. Mark's analogy of a private contract, but I will also go through my submissions.

And in my submissions, I provide a quote from the RJR-MacDonald case:

> “Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other."

And I must confess at the outset that Board Staff, maybe it is I, remain confused about the notion that -- and

this will go to balance of convenience as well, but about the notion that there is no difference between the shareholder interest and the ratepayer interest in light of the request of CANDAS, both to this Board for the stay and to the court for the appeal.

Having some knowledge of the application of section 29, the only case that the Board has dealt with this previously, the point of section 29 is, of course, for the Board to cease to regulate an entity as a result of a finding that there is competition sufficient to protect the public interest.

If it so finds, it ceases to regulate. It no longer sets the rates, the charges, the fees, requires the filing of reports, or other applications before the Board. As a result, and I'm still trying to wrap my head around the concept that it would mean that the Board has found that there is a market that is sufficiently competitive in the siting of wireless equipment and that, as such, the market would set the price for the attaching of wireless equipment, whatever that price would be, presumably something other than $22.35 per pole per year.

At least in the end-year context, what this meant was that the shareholders of Union and Enbridge kept the money associated with ex-franchise storage.

And I still -- the reason I say I'm wrapping my head around it is because I don't fully understand, and there is reference to this even, to be fair, in Toronto Hydro's letter. When it says it may pursue forbearance, it makes a

reference to the fact that either way, the money earned will go to offset revenues.

I suppose that's allowable in a sort of the shareholder is a magnanimous entity that wishes to offset revenues with the money that it can otherwise keep. But I'm not sure that the Board could require it, because if the Board finds that that activity, that space on that pole is not something the Board regulates, then whatever revenues are generated by the LDC in that respect presumably don't go to offset rates.

And, of course, we would have to deal with all the same issues we dealt with in end-year with respect to affiliate relationships, and whether you need functional separation with respect to the siting of attachments, and all the mechanisms that have to go in place to separate the regulated entity from the unregulated piece of that entity.

It's complicated, it's complex, and I just -- I just don't understand how it continues to be a revenue offset, if they succeed in section 29. And so Board Staff had operated from the premise that it would not, and that ratepayers would seek to have -- cease to have the revenue offset, if the Board did not regulate the rate for the wireless attachment.

And so that's just sort of context for the irreparable harm discussion because, in our view – in our view, as our submissions indicate, there either is no irreparable harm -- there is no harm, or it's not irreparable. And we go, we go to our status quo -- we go to our status quo argument,

which I know the EDA doesn't like at all.

But our view is the status quo prior to the decision was that LDCs did not consider themselves obliged to allow access to their poles – sorry, the EDA says the status quo prior to the decision was that LDCs did not consider themselves obliged to allow access to their poles for the purposes of attaching wireless attachments. And Board Staff says that this Board should ask itself then why did they.

It's clear that Toronto Hydro did. We don't know who else out there did. We don't know who else out there – presumably, it's the larger LDCs where there is a market for wireless attachments on their poles. Maybe it’s not just large LDCs, but it's clear that between 2005 and 2010 little or no distinction was made between wireless and wire line attachments for at least some distributors.

And it's clear that there continue to be wireless attachments on the poles of some distributors.

So this, coupled with the clear language in the CCTA decision, argues for a status quo which is a requirement for distributors to continue to allow attachments on a technology neutral basis.

And the EDA goes on to say it's precisely because this issue was not clear that we had the CANDAS preliminary issue. And in Board Staff's view, that is not precisely why we had the CANDAS preliminary issue.

The CANDAS proceeding came about because of a dispute between Toronto Hydro and CANDAS, and that dispute was as a

result of Toronto Hydro shifting gears completely, attaching wireless, including -- you'll see from the material that I provided -- attaching DASCOM attachments, several hundred of them, on its poles, and ceasing to do that, refusing to do that. That's why we had the CANDAS proceeding. We didn't have the CANDAS proceeding because everyone was confused; we had the CANDAS proceeding because Toronto Hydro stopped doing something it was otherwise doing.

We repeat that it's the CCTA decision that's operative and it's the CCTA decision that indicated that it was -- sorry, the CANDAS decision that indicated that the CCTA decision was clear on its face.

MS. LONG: Ms. Sebalj, I want to get a better understanding if we're talking about irreparable harm here.

And Mr. Mark's argument is that there's an appeal to the Divisional Court, which is going to decide this case on its merits. So in the interim period, LDCs may suffer irreparable harm from having to incur costs and from entering into agreements that the EDA would argue are difficult to extricate themselves from, should the Divisional Court decide the merits of this case differently.

So are you saying that that doesn't matter because the status quo is that LDCs were attaching wireless? Or, like, are you saying that this Panel shouldn't be considering what the practical costs may be because the status quo is what the status quo is?

MS. SEBALJ: I think as a threshold that that is what Board Staff is saying, that the status quo is the status quo and it's disingenuous for the members of the EDA to suggest that it's otherwise.

Surely, it would have taken -- you know, if LDCs were confused about the CCTA order, it wouldn't have -- they wouldn't have waited five years to get an interpretation of it. This happened because someone stopped doing what they were otherwise doing.

So that's one piece of it. The second piece, though, I was going to address the actual financial losses that the EDA says its members may sustain as a result of this Board not granting this stay.

And our arguments go to the contractual provisions, which -- I think Mr. Mark said this morning that those contractual provisions are set in stone and cannot be changed, and Board Staff disagrees.

The agreement, the model agreement, which was created as a result of the CCTA order, while it was filed with the Board, it was not approved by the Board. And the CANDAS decision actually is helpful in this regard.

In a couple of places, the Board actually references -- so the CANDAS decision at page 15, last paragraph -- maybe I'll start at page 14, just for context.

Page 14 is where the Board actually specifically considers:

> "What significance is there to the definition of 'attachment' in the model joint use agreement

negotiated pursuant to the CCTA Order by Mearie and CCTA?"

And they say:

"As described above, a model joint use agreement was negotiated and filed with the Board on August 3, 2005, but was not approved by the Board. The cover letter accompanying the agreement states: The model agreement is now being used by the LDCs and CCTA members to put together local agreements."

It then goes on to talk about what, if anything, can be gleaned from the agreement with respect to wireless attachments, but if we go on to the last part paragraph on page 15, the Board says:

"It may be appropriate for the model joint use agreement to be re-visited with a view to addressing the matter of terms and conditions for wireless equipment attachments on a generic basis – or it may be appropriate for these to continue to be negotiated individually. Those issues are beyond the scope of the Preliminary Issue. What is clear is that LDCs cannot deny access for wireless attachments, including DAS components, on the basis of the model joint use agreement."

And then on page 17, top paragraph, it says:

"To the extent parties are using the model joint use agreement or some mutually agreed variation of that agreement, that will be acceptable,

provided the limitation related to wireless attachments is removed from the definition of 'attachment.'"

And then the next paragraph:

"The parties may wish to negotiate different terms and conditions for wireless attachments (but not a different rate), or to negotiate modifications or additions to the model joint use agreement. The Board concludes that this is best left to the parties in the first instance. If the parties are unsuccessful, then the matter may be brought to the Board for consideration. The Board concludes that it does not need to address CANDAS' third request as part of this proceeding."

And so in my view, the discussions that was a -- the idea that the contract between the LDCs and the wireless attacher is set in stone is erroneous. This agreement was struck between the parties as a result of a proceeding of the Board, but it is clear that the Board is of the view that there may be variations of that agreement out there and that there may be further negotiations.

And the submissions of Staff are that, per the references that were made this morning, the parties are sophisticated in general, and that surely they can negotiate regulatory change clauses, including early termination, price escalation and other clauses, which are a staple of contracts in this and other sectors.

A change, and even potentially a significant change in the rates for attachment to distribution poles was foreseeable even without the spectre of section 29. It was always available for parties to come, LDCs to come to this Board and ask for a different rate. So surely -- and that comes from the CCTA decision; that's not new. So surely it was foreseeable that there might have to be a new rate. Whether it was foreseeable that the Board might cease to regulate this area in light of the section 29, I'm not sure, but regulatory change clauses could surely be added, at least to the new agreements that are entered into in the meantime.

And just while I'm on in the meantime, this morning it was mentioned that we're likely to hear -- the court is likely to hear the appeal sometime in February, and then a few months, and so we were looking at five to six months. But presumably, the only possible remedy if the EDA is successful is that the Board is -- is that the court is going to send them back to the Board for a section 29.

And further to my previous comments, a section 29 is no small case. It's complex, it's difficult, and it's costly.

And in NGEIR, we were talking about an area where the Board lives and breathes, natural gas storage. The siting of wireless equipment on poles, which the Board has jurisdiction because the distribution pole itself is in rate base, and because of history of this case and the CRTC being told it did not have this mandate, is a whole

different ballgame for this Board. So I would suggest that it could be even more complex and more costly, and that we are not looking at five to six months if the EDA is successful; we're looking at 18 months, on a best-case scenario.

And then with respect to losses in the irreparable harm, still under the irreparable harm umbrella, what I tried to do was imagine the most extreme scenario, where distributor X entered into a contract with attacher Y the day after the CANDAS decision was released, so the contract was for $22.35 per pole per year. And we assume the distributor was operating under the notion that the contract was set in stone and that it couldn't put any regulatory change or price escalation or other clauses in there that, in Board Staff's view, any commercially sophisticated party would. And there is no stay of the operation of the CANDAS decision because this Board does not grant the stay, and ultimately the court orders the Board to hear a section 29 application and the Board determines that there is competition sufficient to protect the public interest.

Those are my most extreme facts for the LDC's purposes.

So now the LDC has a contract, which it's locked into, for $22.35. And the EDA says: That's it. That's the end of the story. And the losses, presumably -- although the EDA doesn't go into any detail -- I presume that the loss is the Delta between the market price that it claims, that

the LDC claims it could otherwise achieve, and the 22.35.

Firstly, that is clearly monetary. It's not any other form of harm. It's a monetary harm.

Secondly, if we consider the argument that apparently the Delta is going to be used to offset revenues and is not going to the shareholder. So it's not a loss to the LDCs as a shareholder; what we're talking about is a loss to the ratepayer.

And if we assume that the 22.35 actually is recovering costs, and if it's not then the Board would be, I presume, of the view that parties should get in here and get a rate that reflects the costs. But if we presume the 22.35 is reflective of the costs then, yes, there is a Delta and there is a notional loss, because if we assume it is a hundred dollars on a market-based rate and it is 22.35, that seventy-seven dollars and some odd cents is not going to offset the revenues of the shareholder.

But from Board Staff's perspective, it is sort of an incremental loss. It is a not as though the 22.35 isn't going to offset the revenues, and it is not as though for the period of the contract – and I am not sure how long it is. Mr. Mark referred to twenty, thirty, forty years. I actually don't know what the period of the contract is, but surely that is another mitigating measure for any new contracts, to make them a shorter term.

The offsetting of the revenues by 22.35, or whatever other reasonable amount actually recovers the cost of the LDC, is not harm. It's just not as good as it could be if

they can get a market price for the attachment.

MS. LONG: Ms. Sebalj, is it not harm if costs cannot be recovered? So if Mr. Mark's clients determine that based on engineering costs and admin costs, the cost to attach is, let's say, $123 and he comes to the Board and gets a rate marginally higher, but is not able to recover his costs, is that -- that's not harm?

MS. SEBALJ: It is, but it has nothing to do with this stay. The Board has been absolutely unequivocal, at both the CCTA level and at the CANDAS level, to say if you're not recovering your costs, please come in, tell us what your costs are and let's set a new rate.

So I don't understand how this really has anything to do with section 29. At the end of the day, if 22.35 isn't recovering costs LDCs, either individually or as a group, should be at the Board telling the Board this doesn't recover our costs.

For the same reason, I find it quite unbelievable that the contract doesn't contemplate doing that, because in March of 2005 when the CCTA order came out, the Board decision specifically said this is, you know, the current rate and if you need a new rate, come and see us. It was obviously agnostic of wireless versus wire line at that time, but – and CANDAS reiterates it; the CANDAS decision reiterates that.

So I am not sure that it is even relevant to this particular debate, because if LDCs are not recovering their costs, this is important and it's incumbent upon them to

get in here and get a rate that does recover their costs, because the cost-based rate is clearly within the bailiwick of the Board, the regulatory scheme that currently exists, and we can revisit if section 29 --presumably, if section 29 is heard and is successful, the market-based rates will more than recover cost.

MS. LONG: Thank you.

MS. SEBALJ: So the other piece of the puzzle for me on the section 29, and the idea that irreparable harm will be suffered, is that -- and again I take some experience, I guess from the NGEIR proceeding, the Board dealt extensively in its decision on NGEIR with transitional issues.

So it's clear that when you go from a cost-based regulated activity, for lack of a better word, to a completely unregulated and market-based rate, that there is going to be some growing pains, for lack of a better word.

And the Board dealt specifically in NGEIR and -- you know, the examples aren't exactly transferable. But the point is the Board, for instance, had a sharing mechanism for the first four years, so ratepayers were essentially weaned off of the revenues that had gone to offset its rates.

There were transitional mechanisms put in place by this Board to deal with going cold turkey from regulated to unregulated. So presumably this Board, in the context of a section 29 in this instance could do the same thing.

I'm sort of with Mr. Mark, in that I haven't

completely turned my mind to what the Board's authority would be with respect to contracts, and functional separation, and what this beast looks like if, you know, one piece of the pole is unregulated and the rest isn't. Frankly, it has implications for rate base; it has implications for all kinds of things.

It's not going to be easy, but in granting section 29 authority, presumably the legislator also meant do what you need to do to make this happen. And so the Board in NGEIR had a number of transitional provisions, and presumably the Board could do the same thing here, whether those be contractual or not.

I agree that dealing with contractual relations between two parties is difficult, especially when one of the parties is relying on the fact that they've got a rate of 22.35 for the next forty years, but not impossible. I mean, pulling out storage from a gas -- you know, an enormous gas distributor and telling, you know -- and isolating that from the rest of its activity was an enormous task.

It's something the Board can wrap its head around and can deal with, if it comes to a determination that there is indeed a competitive market for the siting of wireless.

Yes, and here I just reiterate that in the meantime, the EDA's members could enter into shorter-term contracts with robust price escalation and regulatory change clauses to address any potential for losses, which again the Board Staff doesn't completely understand to be irreparable harm.

And those were my submissions on irreparable harm. I don't know if you have any other questions.

So on balance of convenience, I think the nub of the issue for Board Staff submission is that we raised the public versus private interest consideration.

We quoted the Supreme Court of Canada in Manitoba versus Metropolitan Stores Ltd.:

> “In looking at the balance of convenience they, the courts, have found it necessary to rise above the interests of private litigants up to the level of public interest and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute."

And so the Board – sorry, Board Staff has indicated that the public interest favours maintaining the status quo for reasons of certainty. In our view, LDCs have been operating under the assumption that the CCTA order, which sets 22.35 per pole per year, is the operating sort of view.

And when Board Staff cited the private interests of its members, it wasn't meant to insult in any way any of the LDCs. At the end of the day, there is a shareholder and there is a ratepayer. And while it's true that for the majority of the LDCs, the shareholders also have a

different level of public interest, it's not the public interest that this Board protects.

So without going over the arguments I've already made, and maybe Mr. Mark can help us, I operated under the assumption that a section 29 meant deregulation of a particular area, and therefore whatever profits are earned will no longer go to offset revenues.

MR. MARK: Let's be clear. The pole is and will remain an asset in the rate base of the utilities. Therefore, costs and revenues associated with the regulated asset are for the account of the regulated business -- that means the rates. And just because the quantum of the revenue may not be subject to a charge by setting by the Board doesn't mean that the pole asset and its revenues are not part of the rate base. The revenues will be included in the rate base. Let's put this one to bed.

MS. SEBALJ: I don't think we can put it to bed. I don't think it's that simple.

It's like saying when you deregulated in NGEIR, the storage pool remains in rate base but you can get more money for it, so let's offset revenues with the more money you can get.

That is completely nonsensical. Sorry.

I don't think that you can do that. You either deregulate or you don't, and I don't think that it's appropriate for this Board to operate in some weird "no man's land" where we allow LDCs to go out and get as much money as they possibly can for this, but we don't take the

asset or the piece of the asset out of rate base.

And what I would like to just --

MR. MARK: This is section 29. Why are we dealing with this today?

MS. LONG: I would like to interject here and just say perhaps we can get your view, which I think we have on the record. And, Mr. Mark, I assume that you're going to be dealing with this in your reply submission.

Anything further, Ms. Sebalj?

MS. SEBALJ: I'm still operating under the assumption that these will be shareholder interests if section 29 is successful.

And so by way of concluding remarks, we continue to be of the view that the EDA has not discharged the onus on it to establish all three prongs of the RJR-MacDonald test in order to obtain a stay of the CANDAS decision, and that therefore the Board should dismiss the EDA's application.

MS. LONG: Thank you.

We have a few questions, but I want to be clear on the documents here, the two letters that you've put before us. Are you wanting to put those on the record?

MS. SEBALJ: I would like to. In the form of an exhibit? Is that what you're asking?

MS. LONG: Yes. Do we have any objections to that?

And the third letter, the October 23rd, 2012 letter, did you provide that to Mr. Janigan and Mr. Mark?

MS. SEBALJ: I did not, but I have copies.

MS. LONG: Are you proposing that as an exhibit, as

well? We don't have copies of that either. Thank you.

MS. SEBALJ: If there is no objection, I would propose to mark all three as exhibits.

MS. LONG: Mr. Mark, are there any objections to that?

MR. MARK: No.

MS. LONG: Mr. Janigan?

MS. SEBALJ: So the October 23rd, 2012 letter from Toronto Hydro to the Board Secretary will be K1.1.

EXHIBIT NO. K1.1: LETTER FROM TORONTO HYDRO TO BOARD SECRETARY, DATED OCTOBER 23, 2012.

MS. SEBALJ: The February 27, 2012 letter from Mr. Rodger to the Board Secretary will be K1.2.

EXHIBIT NO. K1.2: LETTER FROM MR. RODGER TO BOARD SECRETARY, DATED FEBRUARY 27, 2012.

MS. SEBALJ: And the January 20, 2012 letter from Toronto Hydro to the Board Secretary, signed by Amanda Klein, will be K1.3.

EXHIBIT NO. K1.3: LETTER FROM AMANDA KLEIN TO BOARD SECRETARY, DATED JANUARY 20, 2012.

MS. LONG: Thank you. I believe Ms. Fry has some questions for you.

MS. FRY: Yes, I do. The first question is: "Public interest," the wording of it, is a very broad term.

And of course, Mr. Mark, you can address this issue in your reply submission if you wish, also.

I guess my question to you is: In your view, what does it mean? Does it refer exclusively to the public interest that this Board has under its statute? Or is it a

larger concept of public interest?

MS. SEBALJ: Presumably when the Supreme Court of Canada was talking in Manitoba v. Metropolitan Stores, it was not talking about this particular -- or the particular tribunal's public interest mandate. And so it is, in Staff's view, the broader public interest, which brings in the question of whether telecommunications providers, and their customers, presumably, could be impacted by this stay. And there was some discussion of that previously.

I note that while the CANDAS representatives are not here, that they did send in a letter supporting Board Staff. And they also asked this Board to file -- to require the filing of the notice on all wireless providers, per a CRTC website that they provided.

And so I don't think we know what that side of the equation looks like, because we don't have the full participation of the telecom community at the hearing today. Certainly there is some evidence on the record of CANDAS with respect to -- as Mr. Mark says, the CANDAS represents ExteNet and Public Mobile and one other that's escaping me at the moment, but they were able to launch their project in Toronto using a different technology, microcell technology.

I think -- it's difficult for me, but I think their evidence is that it's not ideal, but it's what they had to do, given that they didn't have access to Toronto Hydro's poles.

I don't know what we would hear if we had a room of

telecom providers, so that aspect of the public interest. And granted, it is partly public and partly private interest, but certainly the availability of telecom service is something in the public interest.

So that's the broader public interest.

With respect to this Board, obviously our public interest mandate is -- usually translates into the interests of consumers. And I return to the objectives. It's:

> "To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service."

So I believe, at its simplest, in this case it's been boiled down to the ability to appropriately and fairly offset revenues to the extent possible, using rate-based assets.

MS. FRY: My question is a little bit more basic than that.

MS. SEBALJ: Okay. Sorry.

MS. FRY: I guess my really basic question -- and as I say, Mr. Mark, you may want to respond to this also when we get to your reply submission.

When the Supreme Court told us that we should be considering the public interest, in the third arm of the test in cases such as this, is it your view that the Supreme Court intended us to consider only the public interest as it is laid out in the statutes that govern the Ontario Energy Board specifically? Or is it your view that

the Supreme Court intended us to consider the broader public interest, which might well be argued?

Whereas the interests of ratepayers and so on is normally what we would consider to be covered under the OEB's statutes, the broader public interest would probably be considered to be -- include customers of telecoms.

So just at a very basic level, how broad an interpretation of public interest do you think the Supreme Court was asking us to consider, and how do you get to this view?

MS. SEBALJ: I don't think it is possible to -- for this Board in this case to -- for it to be the narrower public interest.

At the end of the day, there was a whole series of cases that resulted in this Board considering the question of wireless attachments to distribution poles, and it would be -- I'm trying not to repeat what I just said, but just because the telecom providers aren't in the room doesn't mean that that's an aspect of what you should consider.

I think you should consider the broader Supreme Court --

MS. FRY: Yes. And I do want to go back to a serious issue one more time.

Now, it's very clear from the submissions we've heard that Mr. Mark definitely considers that there are two serious issues to be tried, and you consider that he is incorrect, that -- to be colloquial -- both of these issues, in your view, are total losers.

What I want to explore with you is how you believe the Board should determine that fine line between an issue that may not be likely to succeed -- and I'm not saying I do or do not hold that view, Mr. Mark. But if one had an issue that was not likely to succeed, how does one draw the line between that kind of issue, which is still a serious issue to be tried, and an issue that is, I'll assume, vexatious? It is an issue here that isn't alleged, an issue that is frivolous. Where's the line?

MS. SEBALJ: Where the line is in general, I don't have the case law to back up what I would want to say, but where the line is specifically for us in this case -- and we are, as we acknowledged in our submissions, we're aware it's a low threshold test, the first prong of the RJR-MacDonald test.

But in this case, in our view, if you have not exhausted the alternatives, one of which is to just file your section 29 with the Board, then it is frivolous. Then you're wasting the court's time, because all the court can do is send it back, and the Board will hear the section 29.

So that's on the section 29, and on the objectives, I think -- again the facts of this particular case are such that the Board found that it was the CCTA order was clear on its face; it used the words "clear on its face."

The notion that it then has to go into an interpretive exercise about whether it should include wireless, which is the only context within which the Board could then start talking about the balancing of the public interest versus

the interest of an efficient and viable electricity industry, I think is completely wrong headed and it doesn't meet the threshold for a serious issue to be tried.

MS. FRY: Thank you.

MS. LONG: Okay, those are all our questions. So, Mr. Janigan, I believe we turn to you. Sorry Mr. Janigan, I've just been told we need to take a little bit of a break, to be fair to the court reporter who has been working quite hard this morning.

So fifteen minutes? We'll take a break until 12:30 and then – because we wanted to finish this morning.

I don't know, Mr. Mark. Do you think your reply is going to be very long?

MR. MARK: I don't think it would be so long that we should break for lunch. Let's soldier through. I'll make my points as briefly as I can.

MS. LONG: Mr. Janigan, do you know how long you'll be? I know it’s hard; we’ve asked a lot of questions this morning, but --

MR. JANIGAN: I think about twenty minutes.

MS. LONG: Why don't we break until 12:30, and then soldier through and see if we can finish prior to taking the lunch break. Thank you.

--- Recess taken at 12:11 p.m.

--- On resuming at 12:38 p.m.

MS. LONG: Mr. Janigan, we're ready for you.

SUBMISSIONS BY MR. JANIGAN:

MR. JANIGAN: Thank you very much, Madam Chair.

I'm indebted to Ms. Sebalj both for her submissions in general terms but also for the outline of some of the background and framework that went into this decision.

This was, as you've gathered, a fairly lengthy process that had a number of twists and turns, and to complicate matters, there was much information relayed in EDA's technical conference, some of which was relayed on a confidential basis.

So my memory of what was confidential and what was not confidential was somewhat -- a little bit clouded at this point in time, so I'll try to exercise some care in relation to what I've indicated in any of the numerical numbers that have popped up.

In general terms, VECC's submissions line up with Board Staff. We agree that the Board has jurisdiction in the matter of the stay. We also agree that the three-pronged test associated with the RJR-MacDonald decision is appropriate, as well.

The first prong of that test involves whether or not this is a serious issue. It is a fairly low bar to meet, as has been noted in the case law. But when we look at paragraph 22 of the applicant's argument -- and that is effectively that -- it indicates that:

> "In this case, the EDA has appealed the decision on the basis that the Board improperly declined to consider whether or not to forbear from exercising its authority as required by section 29 of the OEB Act, and that it failed to comply

> with its statutory mandate and objectives in reaching the decision."

And line it up with what, in fact, the Board decided, which is on page 20 of that decision, that -- midway through the page, that:

> "CANDAS has sought particular relief and the Board has addressed those issues. THESL's Motion raises other, different issues, which while related to the CANDAS application, have broader implications and considerations. Therefore the Board denies the motion on the basis that it is out of scope in the context of this proceeding. The Board will therefore not hear the motion on its merits at this time."

This is a workaday decision from a Board, deciding whether it's much more convenient from a logical standpoint to hear, first, what the status quo to determine what the status quo is, and then if -- once that's decided, if the parties wish to bring an application under section 29 or any other relief associated with the amount that is provided in the -- for the connection charge, that it should be brought. It's something that boards are entitled to decide, to hear issues in a logical manner.

And in fact, what -- the applicant's argument, stripped down to its essential, is an attack on the ability to manage its own hearing of the issues.

Now, the applicant's submission essentially is that once you throw in a section 29 application, it's a

showstopper. You have to deal with it and decide it before you can deal what the original application is.

And if we look at section 29, I commend the interpretation urged upon you by Ms. Sebalj that this is not: The Board shall make a determination to refrain. If, as I -- has a positive duty to decide the issue. If it was, it would be expressed in a different way.

It has to find first as a question of fact that a licensee, person, product, class of products, et cetera will be subject to competition sufficient to protect the public interest before it makes that determination.

If it decides that that determination is best made in another hearing, this does not somehow invalidate the decision that it made with respect to what is the status quo in this proceeding.

So coupled with the fact that the Board has left open the option to bring it back, and to bring it back with -- possibly with evidence that's associated with the amount of the charge itself, and whether or not it meets the costs of the individual applicant, in our view the position of the applicant has little merit as a serious question.

But if the Board accepts that it is a serious issue, we then go to the second branch of that test, and that involves irreparable harm.

And on the issue of irreparable harm, of course, it's -- we have an interesting situation, where we have both the applicant in the previous proceeding and the respondent and applicant in the section 29 proceeding missing from this

particular hearing.

So it is -- as my friend attempts to use the absence of CANDAS in a way to suggest that this is not a matter of irreparable harm or that this is something that is not so significant to them, THESL's absence may be equally construed with respect to the same.

Secondly, I wonder if I could ask you to look at the correspondence from the previous proceeding -- and I believe that Ms. Sebalj will have it for you -- that dealt with the cost aspects of that proceeding and who should pay. And the reason I'm bringing this forward is to draw the Panel's attention to part (b) on page 3 of that letter.

And you'll note that this is correspondence from Enersource, Horizon, Hydro Ottawa, PowerStream and Veridian, all of which are members of the EDA, and fairly substantial members of the EDA.

And their submission is:

> "The issues in this case arose because of the actions taken by THESL and CANDAS for their own purposes. Our group and other electric LDCs in Ontario were forced into this proceeding because CANDAS sought to extend rights and obligations it sought from THESL to all electric LDCs in Ontario."

Further down the page, at the third paragraph:

> "In THESL's submission on costs, it makes submissions that if the OEB were to grant recovery of CANDAS's costs in this proceeding,

those costs should be recovered from all LDCs in the Province of Ontario. Our group opposes the suggestion, since the impetus of the application was the result of the actions taken by THESL with regards to the access by CANDAS member companies that to THESL facilities. If the Board were to grant CANDAS recovery of its costs, then THESL should be responsible for recovery of all those costs."

Now, I would suggest that the flavour of that correspondence suggests that these members of the EDA don't seem to be grateful for THESL being at the bridge, defending their interest. Matter of fact, they seem to be more interested in whether or not they're going to be hit with costs than whether or not the order stands in itself.

I would suggest that this goes to certainly lessen the impact that Mr. Mark's argument may have with respect to the issue of irreparable harm. Clearly, in the view of these EDA members, this was a dispute between THESL and CANDAS, and they would have just as soon not been part of it.

With respect to the balance of convenience, the original application of CANDAS was replete with submissions associated with the necessity for these attachments in relation to their business plan. And so it related to the fact that they were -- some of the evidence related to the fact of what inconvenience and harm had been caused by the about-face of THESL in August of 2010 to say: No wireless

attachments.

So it's not a circumstance where there has been no evidence on the record of what might occur in the event that a stay prevented the order that's in place now from being carried out by CANDAS, or any other wireless provider.

In paragraph 31 of the EDA argument, it's noted that in fact the LDCs stand to be more inconvenienced by the operation of the decision than telecommunications would be by the stay.

And it goes on to say that

> "In contrast, there is no basis to believe that any delay in attaching equipment pending the disposition of this appeal would cause any harm to telecommunications carriers."

This, in my respectful opinion, is difficult to believe, given the state of telecommunications markets and wireless markets at this point in time. New entrant and incumbent competition proceeds at a rapid rate. It's hard to believe another hiatus would not be difficult for wireless attachers or, in particular, the CANDAS applicant.

There's a couple other areas I wanted to cover, some of which have been dealt with by Ms. Sebalj, so I'll run through them quickly.

First of all, we would like to respond to EDA's suggestion in their reply that they are on the side of the angels in this matter, and the Board decision and VECC are not. And I suppose it was based on a view of the public

interest that supposes that the efficient use of distribution assets always means the obtaining of the highest monetary compensation for the use of those assets.

From VECC's standpoint, the use of utility assets to provide a needed public service, such as wireless communications, requires a more balanced framework and approach.

VECC has been to school, to some extent, on this issue in a very different context, and a different statute and different legislation in the last decade or two. And that was particularly related to the laying of optic fibres on roadways and the rights-of-way.

A little over ten years ago, there was a fair amount of controversy and a large amount of contention between municipalities and carriers as to what amount the carrier should be paying to lay that optic fibre.

The approach of the CRTC was a cost-based approach, and there were serious disagreements that arose about the compensation based on those local costs and the allowance of those costs that ultimately ended up before the Federal Court of Appeal, and leave to appeal was dismissed by the Supreme Court of Canada in the Federation for Municipalities versus AT&T case.

Essentially, municipalities could not extract -- the end result of the decision was that municipalities could not extract what they thought carriers could pay on a market basis. And the words of the Federal Court of Appeal indicated that carriers cannot be held for ransom at each

municipal boundary.

So effectively, the approach was that they were entitled to reasonable compensation, but in fact it was not the highest price that the carrier could pay in order to lay that optic fibre. And that was because there obviously was a public benefit associated with the laying of optic fibre cable throughout Canada, and Ontario in particular.

Secondly, technological and scientific developments are such that no one can say whether an advancement or service developed by one public utility may be in demand by another entity offering a public service.

It's far more appropriate for such needed facility service to be available in a way that is in the public interest; namely, the recovery of all reasonable costs.

Today's advancements that are available, or facilities that are available by one utility may not be in demand in the future. In fact, they may be the party that demands services and facilities from another public utility or telecommunications provider, or whatever.

To adopt a policy that the public interest means that you have to be as rapacious as possible when dealing with entities that are providing a public service I don't think should fly.

Finally, as has been pointed out a number of times, there is no impediment to ensure complete cost recovery by the utilities in this case. The Board has left open completely the ability to come back and ask for costs that are reasonable. And by all means, if there is a subsidy,

if such a subsidy exists, then the utilities are within their rights to move to recover that amount in the form of -- to make up for that shortfall.

In our view, the position of the EDA is short-sighted and self-interested. The potential benefits of exploiting the technology advantage will ultimately come with a cost.

The last area that I want to deal with is section 29. Section 29 is effectively a legislative development that copied what occurred in the Telecommunications Act of 1993.

And the reason that it was in the Telecommunications Act was that effectively we were looking to deregulate retail services in the future, and when the point arrived when there was sufficient competition for retail services, then the regulator, the CRTC, would withdraw from regulation. The rates that were in place in the market would be charged to retail customers, and away they went.

In circumstances, for example, such as long distance, once the long distance services were deregulated, the long distance assets associated with those services were no longer part of rate base, or were no longer subject to regulation, okay?

Now the problem -- this is all well and good. The problem exists, however, when you have utilities with rate base that are providing services to other than retail customers, and obtaining revenue which goes to offset the revenue requirement.

So in the Union Gas Storage decision, it was found that the provision of storage was a competitive service,

and that it should no longer be regulated. And the storage that had been bought – well, had been bought and paid for with rates, or had been backed by the ratepayers when it was built, that went in at a rate base, and the revenues went on a rate base.

And there was an imposition of a staging of revenues that were to be shared with ratepayers over a period of time, and the fact that their storage needs would be met.

But all that extra storage that was being flogged in the market at high rates, that all went back to Union Gas. The shareholder got all the benefit of that, whereas before the ratepayers -- there was a split of 90-10 with respect to that.

So effectively, the experience is that once you refrain from regulating the service, the assets that are associated with that service walk out of rate base.

Now you might say that as a condition of forbearance, that might impose some obligations with respect to that, those amounts; that might be the case. What happens -- or we can rely upon the fact that municipalities are owned by taxpayers, the public ownership, to effectively -- or responsible for the municipalities, that this money will go into revenue requirement and will be assisting the utility.

But what happens in the case of a private utility? What happens in the case where public utilities have sold out to private utilities to operate the facilities?

In that circumstance -- in our view, there is nothing to stop a utility in that circumstances to say this rate

base is ours, and this money is ours.

So there are problems with this section, and the problems were exacerbated by the ATCO decision, which effectively said that really the only thing that ratepayers have a right to is just and reasonable rates. So there was no tie, or the rate base assets didn't have some kind of connection that enabled the ratepayers to say: Hey, look. So it's no longer used and useful; we still have a tie-in because we paid for it. No. No.

That's what ATCO decided.

So it's a roundabout way of saying that section 29 is not a section that is simply a slam-dunk way of determining the price of -- that a regulatory asset will be offered to customers.

And in effect, the way in which the Board has proceeded is appropriate in light of what was on the table at the time, and we would suggest that there is no reason at this point in time for a stay to go forward.

A little long, my section 29 soliloquy, but it's something that's come up a number of times. I apologize for that.

In our opinion, our submission is that there is little to commend the applicant's motion for a stay. We don't believe it is needed in the context of the three-pronged test that's put forward. And we would request that the Board dismiss the application with costs.

Thank you.

MS. FRY: One question for you, Mr. Janigan.

You've given us your views on section 29. I don't believe you've given us your views on section 1(1), so would you care to do so?

MR. JANIGAN: And if I could import the rest of the background, I think, of the question that you gave to Ms. Sebalj, it's whether or not the Board can look outside of the parameters of this objective in determining what the public interest is.

MS. FRY: That is also a question that, if you would like to respond to, I would love to hear the answer.

But actually the question I was asking is, on the serious issue, Mr. Mark has advanced two grounds, section 29 and section 1(1).

So before you decide if you want to talk about public interest, which I'm always interested in hearing, could you talk about your view on 1(1) as it relates to serious question?

MR. JANIGAN: As we indicated, in VECC's view, that it is not necessarily consistent with the best interest of customers to attempt to out and obtain the highest monetary price for rate-based assets in all circumstances.

If we were talking about billboard signs or other kinds of commercial entities that have no bearing upon the public interest as far as we can see, that is one matter. But we think that in looking at the interests of customers and even economic efficiency and cost effectiveness, it involves more than simply: Hey, we can get this amount at that point in time; let's do it.

MS. FRY: So if I understood Mr. Mark's argument correctly, he was saying that the Board, in interpreting its decision, should have applied what 1(1) says in performing that interpretation.

And I think what I'm hearing you saying you believe the Board has complied with 1(1). Is there anything you want to say about how 1(1) should or should not have applied in interpretation?

MR. JANIGAN: Even within the context of 1(1) or 1(2), these are still fairly broad considerations to be applicable to regulated services in Ontario.

And in our view, the Board, in fact, was within these objectives when it determined that the status quo that existed at that time was the CCTA order and the appropriate method of proceeding after that point in time was to look at whether or not they should refrain from regulation altogether. Or make some other change to the order.

MS. FRY: Okay. And if you wish to talk about public interest, certainly the floor is yours.

MR. JANIGAN: In our view, in looking at -- a lot of it depends upon the context. You cannot simply say that in every case where they're looking at the public interest, it's the same public interest involved.

But in general terms, we believe that this is not -- in all cases, these objectives do not necessarily bind the Board to this -- to these -- specific set, and they could look to other issues, such as the fact that we are dealing with other public utilities, providing other public

services to essentially the same group of customers.

MS. FRY: Thank you.

MS. LONG: Mr. Janigan, did you want to -- were you planning on putting this letter forward, October 3rd, 2012, as an exhibit?

MR. JANIGAN: Please.

MS. SEBALJ: K1.4.

EXHIBIT NO. K1.4: LETTER DATED OCTOBER 3, 2012.

MS. LONG: Those are all our questions. Thank you, Mr. Janigan.

Mr. Mark, we had offered you the opportunity to take some time if you wanted, in order to prepare your reply, but if you're ready to go?

MR. MARK: I'm ready to go.

REPLY SUBMISSIONS BY MR. MARK:

I will start by addressing what I took to be the three principle submissions of Ms. Sebalj, and then I'll go through a few miscellaneous points.

I think the most important point that Ms. Sebalj was making and Mr. Janigan, as well, was making was that what the Board did here was that it did not, in fact, dispose of the Toronto Hydro motion, but rather it was exercising its procedural authority to sequence the hearing of the issues in that proceeding.

And with respect, that's simply not an interpretation which is open on the record. If you can please turn to page 20 of the September 13, 2012 decision, the paragraph in the middle of the page:

> "The Board's findings on the Preliminary issue address the first part of the Motion. The second and third parts of the Motion advance the view that the CCTA Order should not apply to wireless attachments on the basis of competitive market conditions, and that therefore the Board should refrain from regulating the activity. Having determined that the CCTA Order does apply to wireless attachments, the Board concludes that these issues related to forbearance will not be heard within the CANDAS application. CANDAS has sought particular relief and the Board has addressed those issues. THESL's Motion raises other, different issues, which while related to the CANDAS application, have broader implications and considerations. Therefore the Board denies the motion on the basis that it is out of scope in the context of this proceeding. The Board will therefore not hear the motion on its merits at this time."

The Board went on to conclude the proceeding.

The Board sequenced absolutely nothing. It said: Your motion is denied. It said: Your motion is not to be heard in the application; it is denied.

It did not say: We will hear it later. Did not say: We are going to make the order. Or: We'll hold our order in abeyance until we've heard your motion. It said: Out. Denied. Didn't sequence anything.

Section 29 of the act says:

> "On an application... the Board shall make a determination to refrain... if it finds as a question of fact..."

That there is:

> "...competition sufficient to protect the public interest."

The Board was obliged on the application to make the determination of fact. Section 29 does not say the Board can set aside an order previously made if, in some other proceeding, it makes a determination of fact. It said if it makes a determination of fact in the proceeding, it shall not make the order in the proceeding.

So the Board didn't do what section 29 said it had to do, and I find the suggestion that it sequenced the motion, as opposed to denying it, unsustainable in the face of the Board's order that it denies the motion.

The Act clearly contemplates that the requested regulatory order shall not be made in the face of the fact that there is competition. And the Board did precisely what the Act says it cannot do, which leads me to the second point, Ms. Sebalj's suggestion that the Divisional Court will surely dismiss our appeal because the outcome of the Divisional Court proceeding, even if we are successful, will simply be that the Divisional Court says to us, go back and bring your section 29 application.

With respect, Ms. Sebalj is wrong. If we are successful in the appeal, if we persuade the Divisional

Court that the Board had to dispose of the THESL motion before it made the CANDAS order, it will set aside the CANDAS order.

The result in Div Court will not be the order stands; go back, and if you want to set it aside, bring your section 29 application. The result will be the CANDAS order is set aside.

Whether we then have a section 29 proceeding will not be up to the EDA. It will be up to the Board and/or CANDAS because there will be no order. And it will be up to the Board and/or CANDAS to decide whether they want to complete those proceedings or not.

So the Divisional Court, one thing it will not do is dismiss my appeal, because the result will be that I will be told just to come back and bring a motion to set aside the order on the basis of section 29. The order from the Div Court will be the order is set aside.

The third principal point that Ms. Sebalj made that I want to address, and it goes back to some extent to a discussion that we started earlier today, is the suggestion that really there is no form of contract my client is obliged to enter into, and it needs no protection whatsoever.

Ms. Sebalj read to you a portion from the CCTA order, and I am going to quote from what she quoted:

> "LDCs cannot deny attachment in accordance with the terms of the model joint use agreement."

That's what's said in the CCTA order. The LDCs cannot

deny attachment, in accordance with the terms of the model joint use agreement.

There is no obligation on the telecommunications carriers to agree to modify that contract to include a clause which says if the appeal is successful, we will take apart our CANDAS -- our DASCOM network that we've erected. We'll remove it at our expense, and compensate you for your unrecovered costs.

And to say that, Madam Chair, is to come to a realization that the telecom carrier would never agree to such a clause. There is no telecom carrier in the world that would come along and say, I want to invest -- pick a number, $50 million, in building out a DASCOM network knowing that six months from now the Divisional Court may tell me I have to take the bloody thing down.

So let's give our heads a shake, okay. Let's get into reality. My clients are obliged to enter into the existing model joint agreement, and that is what the telecom carriers will insist upon.

I would accept, as an appropriate disposition of this case, the Board's direction that we are entitled to insist upon such a clause as a condition of entering into any agreement pending such appeal. But absent the Board ordering that, there is no sane telecom carrier that would actually agree to that in a bilateral negotiation.

So let's keep firmly planted in reality and not in some fantasy land.

I have a few discrete points to finish. Ms. Sebalj is

correct that with respect to costs associated with attach -- putting up the attachments in the first place, the existing CCTA order does permit recovery of those costs and the rate is intended to recover those costs.

But it's imperfect in two important respects. Some of those costs will be recovered, as all of these costs are recovered, on an amortized basis over the life of the pole.

So if some of these up-front costs are included in the amortization and the contract is at an end after six months, or one year, or two years, we've incurred the costs and we have lost the recovery over the amortization period, number one.

Number two, some of the costs will be associated with removal of the equipment, and the associated costs and relocation associated with that, and those are not costs which are incorporated in the attachment fee and will not be recoverable.

Both Ms. Sebalj and Mr. Janigan have made repeated reference in response to the stay request by the EDA, which essentially says this is a fight between THESL and CANDAS, and the evidence is clear that the LDCs would just as soon they had nothing to do with this dispute and, ergo, why are we listening to them ask for a stay, when it seems this wasn't really their fight in the first place.

The record is clear. The LDCs would have been pleased as punch if this had remained just a spat between CANDAS and THESL. But it didn't. CANDAS insisted upon asking for an order amending the distribution licence of each and

every electricity distributor in the Province of Ontario. And the Board made an order which, on its face, it expressly made applicable to each and every LDC in Ontario.

So this notion that it's a spat between THESL and CANDAS – folks, it might have been at one point. But CANDAS and the Board made it into an issue for every LDCs in this province, and that's why we're here.

And Ms. Sebalj may or may not be correct, and I don't think there is evidence in the record that there were some other LDCs who, at one point in time, may have permitted the attachments.

But that has no impact on this stay because, number one, whether at one time an LDC thought this was a significant issue has nothing to do with whether they now think it's a significant issue; more importantly, the fact that one or two LDCs may have thought it was an issue says nothing about the 75 or 78 LDCs who are now subject to the CANDAS order.

So let's move away from this issue that the EDA has no business being here. We're here because CANDAS and the Board said we have to be here, because this order is now a condition of the distribution licence of each and every LDC in the Province of Ontario.

Now, Ms. Sebalj came to the issue of status quo and she focused -- and I'm not going to repeat my submission about the problem of arguing that the Board's order confirming one party's interpretation of the previous order is, in fact, the status quo. I've told you why I think

that's not a sustainable argument.

The point I want to make now in response to Ms. Sebalj is that may or may not be a good argument with respect to the second ground of appeal, section 1 appeal, which goes to the interpretation question. It's our second ground of appeal, which goes to the proper interpretation of the CCTA order. We say it should have been interpreted with section 1 objectives in mind, and if it had been, it would have come to a different interpretation result.

But the main appeal is with respect to section 29. It's not the section of interpretation. The main appeal is that the order should never have been made, because the Board was obliged to deal with section 29.

So this argument about the status quo, because it just confirmed the prior interpretation, doesn't address the main ground of our appeal. There can be no argument, there can be no serious argument that this analysis Ms. Sebalj puts forward that there was a status quo with respect to section 29 five years ago, it doesn't fit.

The section 29 issue is discrete from the interpretation issue. It is clear that the stay law is to be applied to that aspect of our appeal, which is our rights are not to be prejudiced pending disposition of our appeal, that the order -- the regulatory authority of the Board should never have been exercised.

Ms. Sebalj made the suggestion to you that there was some question about whether the expert evidence was filed in connection with THESL's section 29 motion, and really

was there any evidence?

The record is clear. THESL's evidence was all about its position that there was a sufficiently competitive market. I frankly don't understand the submission that there's an issue about whether they filed any evidence relevant to the section 29 motion. And the fact that there was no cross-examination on that evidence, I don't understand how this helps Ms. Sebalj. That's my point.

The Board was obliged to continue with the THESL motion and have cross-examination on the evidence. And really, if there was ever a definition of bootstrapping -- to say that the Board couldn't make a finding of fact, which is the condition precedent to the exercise of the section 29 power, because it didn't permit the motion to go to cross-examination, therefore it could never have exercised its 29 power -- that is bootstrapping of the highest order.

The Board cannot say that section 29 did not apply here because it chose to terminate the motion before it heard cross-examination.

Let's try and deal succinctly with this issue of public and private interests.

Let me start by saying we got into this discussion because the Panel wanted to know what role does consideration of the public interest play in this. And that's fair.

But one thing is clear: Private interests are to be considered here. So even if you were to find, contrary to

the record, that the interests being advanced by the LDCs is the private interest of its shareholders, I say: Well, so what?

The interest of CANDAS is the private interest of its shareholders. Its rates that it charges to its customers for its cell phone service are set by the market, right? The question of what it pays to construct its network is a question of how much profit goes into its shareholder's pocket.

So you know what? If Ms. Sebalj is right, then we're having a contest here between the two shareholders, and there is no public interest.

But so what? Right? Those private interests are every bit as legitimate.

But secondly, with respect, Ms. Sebalj is just wrong. The poles will always remain a regulated asset. Ms. Sebalj herself put before you the letter from Toronto Hydro, which said: Look, it is a regulated asset, and if there is a forbearance order, we will be asking the Board to determine the appropriate allocation of revenues in excess of costs between Toronto Hydro and the ratepayer.

The ratepayer clearly has an interest; there will clearly be a benefit to rates for any increment in the revenues received with respect to these poles.

Just give me a moment, Madam Chair, just to go through my notes.

Mr. Janigan said that section 1(1) of the OEB Act, which directs the Board to have regard to the interest of

ratepayers and the efficient operation of the system -- and he said that doesn't mean that you say in every case that those objectives can only be achieved by maximizing revenue from the assets for the LDC's shareholder or customer, that there may be countervailing public interests, which should be taken into account in that calculus.

Mr. Janigan may be right. He may be right that, when you consider section 1, there are all sorts of things that have to be considered, and it is not automatically section 1 is achieved only by maximizing the revenue recovery for electricity customers.

What that doesn't address, and my point in the appeal is, the Board didn't have that discussion. If the Board had that discussion and came out one way or another, that's fine, I wouldn't have a ground of appeal.

But the Board didn't have that discussion. It never even turned its mind to that issue.

And Ms. Sebalj similarly said the Board doesn't have to expressly refer to section 1(1) when making its decision.

I agree with her; the Board doesn't have to refer in those express terms to 1(1).

But what the Board has to do is turn its mind to the issue. Whether it calls it section 1(1) or calls it something else, it has to have the discussion. And the Board didn't have the discussion. It didn't even address the submission. And that's the point of the appeal.

So Mr. Janigan may be right at the end of the day that

my interpretation of section 1(1) is wrong, but what Mr. Janigan and Ms. Sebalj's submissions don't address is the Board didn't even go there.

And that's what I say was the error, and that's why I say there is prima facie merit in the appeal, because the one thing the Board can't do is ignore 1(1). It can decide how it wants to interpret and apply 1(1), but it can't ignore it.

Those are my submissions in reply.

MS. FRY: One question for you, Mr. Mark.

So you said that section 29 is your main ground of appeal, which I guess means that section 1(1) is not your main ground of appeal.

Can you just walk us through how having section 29 as the main ground of your appeal should affect the Board's approach and its analysis of the issues in the case?

MR. MARK: Okay. If the only -- I'm not quite sure how to address it. I think this is the point that I tried to make before, which is if we succeed on our section 29 appeal, the order -- the CANDAS order will be set aside.

So it's not the case that the result of the appeal will be the Divisional Court saying the remedy, if we're successful on the appeal, is to go back and bring our section 29 hearings – our 29 motion, so what was the point of the appeal.

That's what Ms. Sebalj says; what's the point of the appeal. The Divisional Court is going to laugh at Mr. Mark, because they're going to say, well, the remedy we

would give you is to go back and bring your section 29 motion, which the Board has invited to you do.

My point is, no, that will not be what the Divisional Court says. The Divisional Court, if I am right, will say the Board did not have the jurisdiction to issue the CANDAS order, because it did not first conduct the section 29 proceeding motion, and it will set aside the CANDAS order.

MS. FRY: Yes, Mr. Mark, that part of it I certainly did understand when you advanced that argument.

I guess what I would like to be clear on is a narrower question, as it were. If you're telling the Board that section 29, in terms of this proceeding, is your main ground and that section 1(1) is not your main ground, what --- are you trying to tell us something about how this should impact on the Board’s analysis in this proceeding, or --

MR. MARK: No, I simply say that because for purposes of the stay analysis -- one of Board Staff's responses is their status quo argument. They say because the decision being appealed from was a question of interpretation, and it confirmed the interpretation which the world appeared to have been living under prior to the CANDAS proceeding, all it did was confirm the status quo which was that interpretation. And if the object of the stay motion is to preserve the status quo, then it is that interpretation of the CANDAS order which is the status quo, and there is no need for a stay. Are you with me thus far?

MS. FRY: I'm – honestly, I'm trying very hard and

you're certainly making some interesting points. But I'm not sure its responding to my question.

MR. MARK: I just want to know if you're with me that far. Now I'll --

MS. FRY: Tell me what you're asking me to do in my analysis as a result of saying that section 29 is your main argument.

MR. MARK: The point of saying -- that argument does not address the section 29 appeal. It addresses the part of the appeal which deals with the interpretation question, but that's only a small part of our appeal.

The bulk of our appeal is not the interpretation question. The bulk of our appeal is the jurisdiction of the Board to have made the CANDAS order without having completed the section 29 inquiry.

And Board Staff's status quo argument has no application to our section 29 appeal. That's why I say it's important for the Board to understand the prominence of our section 29 appeal, because that means their status quo argument doesn't address what we say is in fact the most important ground of appeal.

MS. FRY: Okay. So your general point, if I might generalize, is that some arguments might impact on the section 29 discussion, some arguments might impact on the 1(1) discussion, and some impact on both and we should recognize that.

MR. MARK: Right, and the status quo argument only impact on one, the interpretation question, and doesn't

impact on the section 29 question. No more than that.

MS. FRY: Thank you.

MS. LONG: Thank you, Mr. Mark. Thank you, everyone, for your able very submissions today. They were very helpful. We are not prepared at this point to make a decision and issue it, but we do hope to have one out to you shortly.

In that vein, I would ask -- Mr. Mark, you've undertaken to provide some notes on evidence.

MR. MARK: Yes.

MS. LONG: And I believe, Ms. Sebalj, you're going to do the same. So I'm wondering if I might be able to get a time commitment from you on when you think that might be possible.

MR. MARK: Yes, I'll ask Ms. Kilby. When we get back to the office, we’re going to sit down and look at those, and try to gather them up immediately. Unless I advise you otherwise, it would be my anticipation that by sometime early tomorrow, at the latest, we should be able to get you that information.

MS. LONG: That would be great. Certainly by the end of the week; that would be helpful to us. Ms. Sebalj, is that doable on your end as well?

MS. SEBALJ: Yes, it is.

MS. LONG: That being said, we will conclude for today and I thank everyone for your submissions today. Thanks.

--- Whereupon the hearing concluded at 1:35 p.m.