New Brunswick Board of Commissioners of Public Utilities

Pre-Hearing Conference

In the Matter of an application by the NBP Distribution & Customer Service Corporation (DISCO) for changes to its Charges, Rates and Tolls

Delta Hotel, Saint John, N.B.
June 8th 2005, 9:30 a.m.

New Brunswick Board of Commissioners of Public Utilities

Pre-Hearing Conference

In the Matter of an application by the NBP Distribution & Customer Service Corporation (DISCO) for changes to its Charges, Rates and Tolls

Delta Hotel, Saint John, N.B.
June 8th 2005, 9:30 a.m.

CHAIRMAN:	David C. Nicholson, Q.C.
VICE-CHAIRMAN:	David S. Nelson
COMMISSIONERS:	Ken F. Sollows Patricia Leblanc-Bird Randy Bell Jacques A. Dumont Diana Ferguson Sonier H. Brian Tingley
BOARD COUNSEL:	Peter MacNutt, Q.C.
BOARD STAFF:	Doug Goss John Murphy John Lawton
BOARD SECRETARY:	Lorraine Légère

.....

CHAIRMAN: Good morning, ladies and gentlemen. The first order of business is to see the appearances for today. For the applicant?

MR. HASHEY: Thank you, Mr. Chairman. The applicant represented by counsel David Hashey, myself, Terry Morrison. And with us this morning are the normal group. I believe everyone has been introduced to them. So I

won't go through the list unless you request me to.

CHAIRMAN: Okay. That is great. Thank you, Mr. Hashey.

Canadian Manufacturers and Exporters, New Brunswick Division?

MR. PLANTE: Dave Plante appearing on behalf of CME New Brunswick.

CHAIRMAN: Would you raise your hand so I can get orientated here, way back. No wonder I couldn't find you. Okay. Thank you, Mr. Plante.

Conservation Council of New Brunswick?

MR. COON: David Coon for CCNB, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Coon. Eastern Wind Power Inc.?

MR. MACPHAIL: Peter MacPhail on behalf of Eastern Wind Power, Mr. Chairman.

CHAIRMAN: Thank you, Mr. MacPhail. Enbridge Gas New Brunswick?

MR. MACDOUGALL: David MacDougall on behalf of Enbridge Gas New Brunswick, Mr. Chair. And I'm joined today by Shelley Black of Enbridge.

CHAIRMAN: Energy Probe? Then the Irving group of companies? That is Irving Paper Limited, Irving Pulp and Paper Limited and J.D. Irving Limited?

MR. STORRING: Mr. Chairman, Thomas Storring on behalf of the Irving group of companies.

CHAIRMAN: Thank you, Mr. Storring. Is Jolly Farmer here today? Mr. Roherty for the New Brunswick System Operator I presume?

MR. MACNUTT: Mr. Chairman, Mr. Roherty on behalf of the SO has requested Board staff to extend their apologies. They have got a conflict and will not be here today.

CHAIRMAN: Thank you, Mr. MacNutt. Rogers Cable?

MS. MILTON: Leslie Milton on behalf of Rogers Cable. And I'm joined by Christiane Vaillancourt.

CHAIRMAN: Thank you, Ms. Milton. Then the self-represented individuals. And it was Mr. Rowinski last time around. Who is here today?

MR. DENIS: Oui, Monsieur President, Erik Denis. Je suis en compagnie de ma collégue, Jan Rowinski.

CHAIRMAN: Good. Thank you, Mr. Denis. And then the Municipal Utilities?

MR. GORMAN: Good morning, Mr. Chairman. Raymond Gorman appearing on behalf of the Municipal Utilities.

I'm joined this morning by Richard Burpee, Eric Mahar, Dana Young and Jeff Garrett from Saint John Energy, and Charles Martin and Pierre Roy from Edmundston Energy.

CHAIRMAN: Thank you, Mr. Gorman. And Vibrant Community Saint John?

MR. PEACOCK: Good morning, Mr. Chair. Kurt Peacock here.

CHAIRMAN: Thanks, Mr. Peacock. Public Intervenor?

MR. HYSLOP: Thank you, Mr. Chair. Peter Hyslop and Mr. O'Rourke, Ms. Power, Mr. Hegler and Mr. Barnett.

CHAIRMAN: Great. Thanks, Mr. Hyslop. And I will just go through quickly the informal intervenors. By the way the Board Secretary has confirmed that the City of Miramichi is quite content with being an informal intervenor. And I believe the other one that we had to ascertain was UPM-Kymmene Miramichi Inc. And they as well are quite agreeable to being informal intervenors.

In addition to that there is the Agriculture Producers Association of New Brunswick, Canadian Council of Grocery Distributors, Flakeboard Company Limited, NB Power Generation Corp., Genco, Noranda Inc. and Potash Corporation of Saskatchewan, New Brunswick Division.

And appearing for the Board, Mr. MacNutt?

MR. MACNUTT: Yes. I'm accompanied today by Doug Goss, Senior Advisor, John Murphy, Consultant and John Lawton, Advisor.

CHAIRMAN: Thanks, Mr. MacNutt. It just suggests an order of things. I think the first thing is for us to call upon Mr. Hashey to explain to us what it is that the applicant is desirous of doing?

MR. HASHEY: Thank you, Mr. Chairman. I believe that the

intent of the applicant in this matter is well explained and set out in the letter which has been forwarded to everyone dated the 6th day of June, 2005.

And in this letter we inform the Board that we are filing and requesting an amended -- we have filed an amended application which will effectively request changes in the Disco charges, rates and tolls for the year 2006, 2007. Obviously -- and there has been notice given to the Board that there will be a 3 percent rate increase effective July 7, 2005. And it will replace the request for a rate change in relation to the period 2005, '06.

We quite recognize that the procedures as a result of the last decision of the Board would go on for a lengthy time. And we also recognize that to deal with 2006, '07 is going to require some significant time to get things in place by the 1st of April next year, which we hope would be the case, which is the start of the fiscal year, rather than having to get into all the arguments about interim retroactivity, et cetera, et cetera again.

So we are requesting the Board to continue with this procedure, to agree to the application I guess and to start dealing with matters that we believe can be dealt with effectively in advance of a filing.

Now in the letter, which I'm prepared to table -- I don't know if it needs to be an exhibit, but it has been received and maybe it should be marked in some way as an official document. We indicate, and it has been very carefully canvassed, that it would be impossible to file the evidence necessary in relation to a rate increase for the 2006, '07 until on or about October 1st.

And I point out October 1st I believe is a Saturday. So we are probably suggesting October 3rd, and then to have the procedures go on.

Now if it pleases the Board our suggestion is further that we should deal with some matters in advance. And our suggestion is that we might today deal with section 156 arguments.

We could deal with a confidentiality policy which I don't think there is any significant issue. I know my friend Mr. MacDougall has made suggestions. I have talked to him. I don't have any problem with it.

We could then suggest that we deal with another issue here which is a request by -- and I believe two or three intervenors for additional information. We have been talking to the intervenors.

And what we are going to request the Board to allow us to do at some point today is to have a breakout session

with the intervenors that are looking for this information, so that we can tell them what we can supply and narrow the issues down to see if there really are any issues, to try to get that out of the way without asking the Board for any ruling on that.

But this would be a breakout within the session if possible. And it shouldn't take too long. We have our positions well established. We have had some discussions. I have had a number of discussions with Mr. Hyslop, including meetings this morning, to try to get down to this. And my friend Mr. Hyslop and his advisers have suggested that we should deal with that information, which they believe will affect their views on the proposed regulatory and filing schedule.

And if the Board does agree that we can proceed with this class cost allocation rate design principles and methodology, we would then like to set a schedule for that so that things could move ahead.

And that issue, which will be a significant issue in this matter, can have a decision in principle by the Board probably before we file the next evidence, so it can be properly adjusted to suit the Board's decision in that area. Then we will come to the filing of supplemental and dealing with other issues possibly that need to be dealt

with that the Board would think would be important.

So I believe that summarizes what we feel should happen today, that we request the Board consider following through.

And the other item that we are prepared to deal with -- and it is a mere suggestion, but an indication of interest that the Board has interest -- we could conduct an information session on the general class cost allocation methodology. And it shouldn't take more than a couple of hours at most.

We suggested tomorrow. We are prepared to do it today if the Board would prefer or if the Board wants it at all. But the intent there is merely to give a higher range overview of what this aspect of the application is all about.

And I guess if we are moving towards that aspect of the matter, then that may be of assistance to the Board, it may not be. But it is offered as -- it would be an informal session. I don't think that it would be formal. The proposed schedule that has been supplied with the letter of '06, June '06 to the Board does set out a schedule and a timetable, which is a fairly compressed timetable. But it shows I believe that the issue is fairly significant.

And we would anticipate, as you can see, interrogatories on the class cost allocation and rate design issues from all the parties. And we would anticipate probably some evidence that would be delivered by some of the intervenors. It is tight.

The one thing I would like to point out is the intent would be that the interrogatories deal solely with that topic. Because we really can't answer in specific on the financial. We would use the 2005, '06 as suggested with 3 percent as the base.

But then it would be a matter of giving the evidence to the Board later and filling in, as I understand it, the results of the evidence and the Board's decision on this, which would reflect itself in the next set of evidence on the revenue requirements for 2006, '07.

My friend Mr. Hyslop has asked are you going to be looking at a fuel surcharge in that evidence. Frankly we don't know. We can't say at this point. There would be a number of decisions that have to be made.

It is a complex issue to go through, all the levels, as you would understand at the Commission. We have to advance some of the fuel charge evidence. Efforts are being made right now to do that.

Because as you probably I believe were made aware in

the evidence, that that would be something that in October normally -- it is an October 1st date when those decisions are made on the procurement.

So things will have to be moved ahead. There will have to be decisions of the Board. And then it has to go to a finance corporation, et cetera for some sort of approval.

So we are moving expeditiously I would say towards that, so that we keep this process moving and hopefully get a decision from the Board on that as quickly as possible.

CHAIRMAN: Mr. Hashey, just so I understand then, the two-phase hearing has now -- that whole suggestion is abandoned.

And you are effectively amending the existing application and will be updating it with new and better evidence for the next fiscal period and looking to, what we would call, have a couple or three generics between now and the time that you file that evidence on the 1st or 3rd of October.

That is my understanding of where you are going, is that correct?

MR. HASHEY: I think you have summarized what I was trying to say very well. Thank you.

CHAIRMAN: Now I will be going around the room. But I would

like to indicate that the Board of course has been talking about how to proceed from this particular point.

And I will just outline those to save ourselves from having to go around the room 11 times or something or other, try and do it in one fell swoop. But certainly we felt that today there are a number of matters that should be covered. And if I can find my list we will talk about them.

The first thing is we should certainly have argument and decision concerning 156 and its application to the matters in front of us. And that includes looking, if the parties wish to, at the definition of first hearing which is a regulation that has been passed.

Then the second thing would be to deal with the confidentiality procedures you suggested, Mr. Hashey. We also were wondering about the PROMOD audit report, volume number 2 and where that stood.

And then I'm going to suggest something further. Rather than having a breakout session, in order -- we all anticipate there will be matters that will be asked for by Board staff and/or intervenors that Disco will prefer not to make public and/or even share with the parties here. And the consensus that was arrived at -- but we are open to whatever the parties to this hearing want to do --

the consensus was that after we made the rulings that I have just enumerated, et cetera, that is dealing with the confidentiality procedure and 156, the argument, that we -- all of the parties and Board staff give Disco a first set of interrogatories and ask for information that would not only deal with the cost allocation rate design matter but to deal with any other matters like Mr. Hyslop's preliminary list did with certain other matters as well, put them into interrogatory form, then set a day for a Motions Day in not-too-distant future.

Because I would anticipate that the applicant, once it sees the questions that are delivered, will know which it is prepared to answer fully or partially or whatever. And we can then deal with that in a day or two set aside specifically to do just that.

So then from that point on in the hearing process we would be able to know precisely what kind of information will be required of the applicant and will be filed and what will be filed in confidential form or at least asked for in confidential form by the applicant, et cetera.

Also in talking about trying to get things up and running and perhaps achieved, completion of the card hearing and the load forecast hearing by the end of September, that I see nothing wrong, and staff doesn't,

with trying to run the interrogatory processes of the two generics in particular parallel to one another.

Now what do I mean by that? I mean that in the first set of interrogatories dealing with the cost allocation and rate design hearing that the applicant will have a specific day to respond to them. And the next day will be the final day for the intervenors to file their first set of interrogatories in reference to the load forecast hearing. And we keep doing that in sequence.

It simply means that the applicant's employees will not be able to take a summer vacation. But we will certainly push them through and work them in parallel in that fashion. Okay.

Having said all of that, those are just ideas to put on the table. And, Mr. Hashey, what do you suggest? Do you want to take a couple of minutes and speak with your client about what I have as well just put on the table? Or shall we go around the room and call upon everybody to have an input on those various suggestions, yours and mine?

MR. HASHEY: I think it would be worthwhile to take a few minutes. But from my point the interrogatories that you are talking about, you are obviously not thinking of specific questions on income matters for 2005, '06 but

more general, where you supply information on this topic.

That is generally what we have had from Mr. Hyslop. And you have seen his letter of course that was filed with you.

CHAIRMAN: Yes. I would say some of the things that we have been thinking about are precisely what Mr. Hyslop has put forth as well. We have some additional ones, et cetera that are dealing with information that we believe is required to do a proper cost allocation rate design study, a number of things like that.

But that puts it all on the table. And we get it over with sooner rather than later and have our arguments. And the Board makes its rulings. And then we know going forward exactly what the rules of the game are. Rather than trying to sit down in a casual kind of setting and say we will give you this and we will give you that.

Then how you get it on the table -- if in fact say Mr. Hyslop has something that he wants by way of information and the applicant doesn't want to give it. And they say -- let's say in a session this afternoon, we don't want to give that, then we are going to have to still go through a process where Mr. Hyslop can get that in front of the Board and the Board rule on it.

So anyway those are -- if you would like to take a few

minutes, why don't we just take 10 minutes right now and everybody has an opportunity to -- yes, all right, that you folks can talk.

Mr. Hyslop, I understand that you are --

MR. HYSLOP: I just want -- just a point of clarification on your comments about the first set of interrogatories. My understanding would be that would be to essentially formalize the informal process that has been going on up until this point of time with regard to the need to file further evidence, Mr. Chair. Would I be oversimplifying if I said that?

CHAIRMAN: That might be oversimplifying. Really if we all have questions that we wish to ask now, and for instance the data is available for the current fiscal period, presumably that would be provided now. And then when the data for next fiscal period is available, that would be updated.

But if we know those things now let's put them on the table. And that gives the applicant very specific things to look at and decide whether or not they are prepared to give that information. That is all after we make our rulings in reference to the application to 156 and "first hearing", et cetera, that sort of thing, okay.

Let's take a 10-minute recess. Mr. MacDougall?

MR. MACDOUGALL: Mr. Chair, just another point of clarification for our benefit. Could you explain to us what the load forecast hearing is? That is the first that we have heard of a separate load forecast hearing. Just so that we know it is being discussed here.

CHAIRMAN: Mr. Hashey will do that in the break.

MR. MACDOUGALL: Thank you.

(Recess - 10:10 a.m. - 10:30 a.m.)

CHAIRMAN: Mr. MacDougall, how was Mr. Hashey's explanation?

MR. MACDOUGALL: It was very limited, Mr. Chair. So I think Mr. Hashey will have to explain to the group whatever the situation is. I have not become enlightened yet.

CHAIRMAN: There are a number of matters on the table. And Mr. Hashey, I will start of with you as to where your client stands in reference to them. Thanks.

MR. HASHEY: Thank you, Mr. Chairman. You mentioned PROMOD. And I will deal with that initially. Do you want me to deal with that one right now? That is one of the issues I believe you raised?

CHAIRMAN: Yes. That is one of the things that we had identified should be cleared up today. You don't have to --

MR. HASHEY: Okay.

CHAIRMAN: Is that report available?

MR. HASHEY: No. The report -- the second part of the report is not available. It should be in a couple of weeks. The discussion we had was whether really it is relevant because it dealt with the '05, '06 situation. But we have no problem filing it. There would probably have to be something additional in the new evidence of some type.

CHAIRMAN: I'm not -- I'm a generalist and not a technician in these matters, Mr. Hashey. And I think we are probably on an equal keel there.

But my understanding is that for many different purposes we can use the 2005, 2006 data to -- for instance for the -- let's say the load forecast or for the cost allocation rate design, you can use that data now. And then when the 2006, 2007 comes out, if necessary you can update it. So there is a lot of the 2005, 2006 we will use.

MR. HASHEY: As my friend Mr. Marois points out, the first -- the second stage of this, we are dealing with '04, '05 data as compared to '05, '06.

I say, we will file it. But you will then be looking at the predictions '05, '06 as against '06, '07, I would suggest, when the time comes to do the review of the new evidence.

CHAIRMAN: I'm sorry if I got my fiscal periods wrong. But I think you know what I'm trying to say.

MR. HASHEY: Yes. We will file this report when we get it. I'm not objecting. I'm just commenting on the worth of it. The next issue -- I have got three I think, Mr. Chair.

The next issue is the IR process that you are suggesting. We are concerned with the efficiency of this matter in that it does move ahead. We don't have any problem in answering the type of questions that the PI has put forward, which are general questions.

My concern is that if we get into an IR process we may be getting into a lot of stuff that may not be terribly relevant and should be handled in the IR process when you get to the '06, '07 revenue portion.

Now as far as anything in relation to this early portion of the hearing, I would call it, or the segment of the hearing I think that you have spoken of dealing with the cost of service, rate realignment, et cetera, I mean, it would seem to me that those questions could be handled quite efficiently within the interrogatory process that has been set out in the intended schedule, without the need of any long additional process.

I'm saying now I'm not objecting to give answers to

people, you know. We are interested in efficiency. And we are interested in seeing the Board gets the information that is necessary to deal with the hearing that we will have before it. So that would be my comment on that.

On the load forecast maybe I'm as confused as my friend Mr. MacDougall. There will be an application for a one-year rate increase. I don't understand why the PUB would need any load forecast review. We have filed one as requested. This isn't a facilities hearing, we believe. This gets to the 156. This gets to the whole issue. There isn't any -- we are not dealing with additional generation. We are using existing capacity. And we really need some clarification as to why the PUB believes that this would be relevant and what is being sought there. It would help us if we had a better understanding. But at this point we just don't see the reason for that hearing.

On the generics as called, or the other issues -- I like to call them segments of the hearing -- I'm not certain as to what is being mentioned there. I know there has been some discussion on accounting policy. And I believe that should await the '06, '07 evidence.

And then within that time frame following October I believe, accounting policies would be more effectively

dealt with, when that evidence is before you frankly.

Probably it would be best.

And the second aspect of that is frankly during September I expect the people that would be dealing with accounting policy would just be absolutely absorbed in trying to get the evidence together on '06, '07. There is an issue of timing and personnel there I would think that would certainly concern me.

And I don't know of others. But there may be other ones. And if there are any in the mind's of the Board we are certainly welcome to hear of them and work to assist the Board as best we can.

So that would be our position on the various issues that you have raised. If there is no question, that is it.

CHAIRMAN: Mr. Hashey, let me take a stab as a generalist on why the Board looks at it as being necessary that there be a load forecast that is greater than two years.

If you are going to send appropriate price signals in a cost allocation and rate design hearing in the rate design, then you should know what customer classes are going to be growing and what customer classes are not and out into the future. And as a result you can bring in marginal pricing in reference to those classes so that the

rates will pass an appropriate message on.

Now that is my layman's appreciation of why the Board wants it. I can't go any further than that. But certainly Board staff can provide more information if the applicant wants it. But that is where I'm coming from. And that is why we want it.

Now the second thing is is that under the Electricity Act the System Operator is responsible for providing a load forecast for the system and telling Genco or issuing calls for proposals if new generation is necessary.

And we have jurisdiction of course over the System Operator. We have asked the System Operator about the load forecast. And he said, I will get Disco to do it because I haven't got anybody to do it.

So that is -- we are rolling these things in together in reference to this hearing. Because we want that accurate picture when we start to set forth the rates and deal with the various differences between the classes, et cetera.

Thank you.

I have been given the nod of approval for my explanation on that.

Well then we will go around the room and get what comments, if any, the parties wish to make in reference to the things that Mr. Hashey and I have been discussing.

Mr. Plante for Canadian Manufacturers?

MR. PLANTE: Thank you, Mr. Chairman. I would just like to make a general comment with respect to the fact that much has changed over the past 10 days let's say. And we are still in the process of assimilating all the information and in determining what impact it has on our members. And the last piece of information I have with regard to a regulatory filing schedule shows a June 20 date in terms of having interrogatories into the applicant.

And I would suggest that that is quite an aggressive schedule for us to meet. Particularly given all the changes that have taken place over the last little while.

And we would respectively suggest and urge that perhaps a little bit more time should be taken in terms of looking at the information. And as well, we are still a little unclear as to the process that is being proposed. And some clarification in those terms would be very helpful to our members.

CHAIRMAN: Thanks, Mr. Plante. Mr. Coon?

MR. COON: Yes, Mr. Chairman. Thank you. I guess we -- I have a question and that is in trying to understand the process that is being proposed. Would the Board be rendering a decision on these various matters?

So in other words, would the Board be rendering their

decision on cost -- class cost allocations and rate designs specifically prior to the filing of the October filing of the renewed or new rate application?

CHAIRMAN: I don't know, Mr. Coon. Frankly, I am not going to sit up here and answer all these what if questions going into the future. I would expect that as a result of the cost allocation and the rate design generic-type hearing is that we would look at the methodology and how it is handled. And then everybody in the hearing process itself would have guidance on it. That might be extrapolated by -- or modified by looking forward to the test year as soon as those figures are available, applying the same principles and having the applicant do a new cost of service study for that test year with those figures on the basis of the methodology that we had approved of in this generic-type hearing. That would be my take on it. But again I am not the expert.

MR. COON: I guess I raise it, Mr. Chairman, only because I am concerned that because we are dealing at this point in the sense with generic issues in the absence of the actual evidence, because that's going to be filed in October, that we wouldn't want to get to October and issues around rate design, for example, come back up in light of the new evidence and the applicant arguing well, the water on the

beans has been changed here now because of our new evidence. And so rate design issues suddenly are back on the table after we have spent a lot of time and effort dealing with them in a generic way ahead of time.

So my concern is that we -- you know, we make some kind of -- I don't know -- some kind of -- some kind of closure on rate design in the sense, and then it's brought back up because of the new evidence. I would suggest -- or the applicant would suggest it's no longer relevant to the evidence at hand.

CHAIRMAN: Thank you, Mr. Coon. Anything else?

MR. COON: That's all. Thank you.

CHAIRMAN: Good. Anything on the suggestion which Mr. Hashey had concerning, for instance, to have an informal breakout of an hour or two this afternoon or tomorrow, trying to get a sense of what it is that the intervenors do want by way of evidence filed and what the applicant is prepared to file? Or the alternative suggested just put out there by us, the Board, is that we have an opportunity to put out that first set of interrogatories and have a Motions Day at which time the applicant will let us all know what they are prepared to answer and what they are not and we will argue and the Board rule on it. Any preference to those two methodologies?

MR. COON: Yes, thank you, Mr. Chair. We would prefer using interrogatory process to address those issues.

CHAIRMAN: Thank you. Mr. MacPhail, Eastern Wind?

MR. MACPHAIL: Eastern Wind Power makes no comment with respect to those issues.

CHAIRMAN: Thank you. Mr. MacDougall?

MR. MACDOUGALL: Yes, Mr. Chair. On the three points Mr. Hashey raised, we would certainly appreciate also receiving a copy of the PROMOD report when it is filed. On the process issues, we are satisfied with the process the applicant has put forward that we can try and ask for some information today. And then follow a process as they have set out in their schedule, which we do note has a Motions Day at the end of the two sets of IR's, if it's necessary, i.e., if they have not responded adequately on some questions. But we would think that their schedule -- or their process at least, is appropriate.

On the schedule we would note that having an actual hearing in August is often very, very difficult. So if anything did get moved out, it would probably be appropriate to try and move the hearing date out. It is often very difficult to get experts and groups of people together, particularly this wide a group for an August

hearing in our experience.

And on the load forecast, certainly we did not see -- or had not understood that there was to be a separate hearing on it. Having heard your comments on how the Board would see it being utilized, we would certainly think it would be appropriate to be able to ask questions on the load forecast that has been filed by Disco.

The forecast they did file is for a 10-year period, 2005 to 2015. And to the extent parties had questions on that load forecast as it may tie into cost allocation and rate design, we would think that those would be appropriately posed to the applicant.

CHAIRMAN: Good. Thanks, Mr. MacDougall. The Irving group?

MR. STORRING: Mr. Chairman, the Irving group of companies echo the comments raised by our colleagues, the Canadian Manufacturers and Exporters group. We are concerned that given the changes over the past several days, the timing of the first set of interrogatories is aggressive.

With regards to the other issues that you raised, Mr. Chairman, we have no comment.

CHAIRMAN: Thank you. Ms. Milton?

MS. MILTON: Thank you, Mr. Chairman. Rogers is comfortable with the proposal of the Board with one question or point of clarification.

Does the Board envision that after the interrogatories there would be the opportunity for an intervenor to file evidence on rate design? Or is that something that would be dealt with in the post-October phase?

CHAIRMAN: I guess conceptually where we are now -- and again it's always subject to what the hearing finds is the appropriate way to go, is that set of interrogatories is simply to set the parameters on what it is that the applicant is prepared to file without the Board having to rule or anything else. And we get that knowledge in hand. And then we can rule on what not.

And my suggestion would be after that original set of pretty general interogs that we design an interrogatory process for the cost allocation and rate design hearing. And as well for the load forecast hearing, if we hold one. We might also do the same thing for accounting and financial policies. However, I don't think -- I think that's more just simply an updating from the decision back in '93, than it is really having to go into a whole pile of things. But there is -- you know, as well, there may be depreciation and things of that nature that comments should be made on.

Anyway, so as a result of that, we go through the CARD hearing and all of the parties would be able to have one

or two sets of interrogs which would be specifically addressed to the information on the Cost Allocation and Rate Design, as I term it, generic portion. And then we would come forth at the end of that process approving of methodology and the methodology to carry into the future. Much the same as we did in the early '90s.

So that is the way we are doing it. Just a sec. Yes, Commissioner Sollows said I have missed your point which is where you in the process would be able to provide evidence?

MS. MILTON: Yes.

CHAIRMAN: Well that -- we will simply work that into the scheduling for the CARD hearing.

MS. MILTON: All right. Thank you very much.

CHAIRMAN: And hopefully if we do have two generic type hearings or three, whatever, we can start running them in a parallel fashion that I described, or attempted to describe to Mr. Hashey earlier on.

MS. MILTON: Thank you.

CHAIRMAN: Anything else on that, Ms. Milton?

MS. MILTON: No, Mr. Chairman.

CHAIRMAN: Mr. Denis?

MR. DENIS: Aucun comment, M. le prèsident.

CHAIRMAN: Okay. Thank you. Mr. Gorman?

MR. GORMAN: Thank you, Mr. Chairman. Essentially we would agree with the process that has been recommended by the applicant in this case. And in particular I would like to comment on the idea of having a breakout as opposed to interrogatories. It is not an either/or. Some of the people in the room maybe seem to believe that it is. It strikes me if we have a breakout session, we will know by the end of today or tomorrow whether certain information will be available to us. And if we rely entirely on the interrogatory process and if we were to look at the suggested timetable that the applicant has put forward, we might not know until July 5th that certain information is not going to be provided. So we think that the process that has been outlined by the applicant is one that would certainly work for us.

On the issue of parallel interrogatories, that might create a bit of a problem for the parties that I represent in terms of resources. So we think that it is an aggressive timetable that is being proposed. We are able to meet that timetable with respect to the Class Cost Allocation and Rate Design but would not want to be forced into having to do interrogatories on other subjects at the same time. Thank you.

CHAIRMAN: Thanks, Mr. Gorman. Mr. Peacock?

MR. PEACOCK: Mr. Chair, my comments, I think, would echo those of my colleagues across the table from the Irving Group of companies and the Canadian Manufacturers. I only have a slight concern with the schedule of the interrogatories.

CHAIRMAN: Good. Thank you. Mr. Public Intervenor?

MR. HYSLOP: Thank you, Mr. Chair. A couple of things. And I'm not sure if it is to be addressed now. I had comments on the amendment to the application. And I think I would be losing the train of thought if I went there.

So I will deal with the question of interrogatories and process. But I would like to have a point later perhaps to speak to some of these other issues.

I think what the Board is suggesting is a formalization of the informal process that started with the letters I believe that Mr. MacDougall and ourselves and a couple of the other intervenors filed with the Board, essentially asking for more prefiled evidence or prehearing filed evidence as a starting point.

And we had written and discussed with Mr. Hashey about a session to review this just to see what we agreed on, what we didn't agree on and what the issues were with regard to the reason we dispute it.

I think I can safely say that there is going to be

issues at the end of the day that neither -- we are not going to agree on. And we would have had to come to the Board anyhow.

I would suggest and I support the Board's suggestion that if that is going to happen in any event, it be done in a formal manner so that there is a proper paper trial.

So I support the Board's concept of generic interrogatories. These are not detailed interrogatories. I think the idea is please provide the following information and listen to what NB Power says back to it, then we can have it out in front of the Board.

And that having it out in front of the Board I think is going to happen. If we are going to do that then the interrogatory process on the CARD hearings that are suggested by Mr. Hashey, I do suggest have to be backed up, simply because let's get the general evidence out of the way first. Let's find out what that is going to be. And then let's get on with the generic issues as opposed to the generic evidence.

And look, NB Power has time issues even for 2006, 2007. The Public Intervenor takes the position if they have to work this summer doing duplicate sets of interrogatory process, we have to work doing duplicate sets. We are not here to obstruct or slow down the

process anymore than is necessary.

So other than the fact that the process is for either load forecast or for cost allocation and rate design in the generic sense have to be maybe backed up till we get these general evidentiary issues out of the way quickly and easily.

With that very minor comment we support your suggestion that we formalize the informal process so that there is a proper record to go ahead with.

With regard to the load forecast we concur with the Board's position. We -- you know, I learned a long time ago from one of my professors in business school that, you know, your revenues -- your number of widgets you sell times the price you sell them at.

And we would like to have a pretty good idea that how many widgets they are going to sell is accurate and not understated or overstated. Because that does affect the revenue requirement at the end of the day.

So some of the history of that and some of the going forward three, four years, so we have some idea of what rates might be down the road, we concur that the load forecast should be part of this hearing, as I believe it was in the 1991, '93 hearings.

Those are my comments, Mr. Chair.

CHAIRMAN: Thank you, Mr. Hyslop. We are going to take a 10-minute recess and come back and rule on how we proceed forthwith in reference to the interrogatories or breakout session, et cetera, et cetera, all those questions that are on the table.

And none of you talked about 156 or the confidentiality procedure. But I will give you an opportunity right now that if anybody objects -- you know, for instance we will come back in. If it is 11:15 we will start to hear our arguments in reference to the section 156 and first hearing.

And we will go around the room and get that over with and done as quickly as we are able. And then we will decide whether or not we can seek consensus arising on the Board's part, give a decision orally, immediately, or if we will not give the judgment till perhaps tomorrow morning.

And then we get on with discussing confidentiality procedure, which frankly I agree with Mr. Hashey's comments that from the Board's perspective it would appear that the suggestions that have been made by I know EGNB and I think your Municipals, I'm not sure -- it doesn't matter, but those are pretty relevant.

And the wind producers had some suggestions there to,

one of which we will talk about. But the other one sounded okay to me. However, we will get on with that.

So if anybody has any problems with us proceeding in that fashion then just hold up your hand. Otherwise we will take a 10-minute recess, make our rulings and we will start on 156.

Mr. Hashey?

MR. HASHEY: Just one comment if I might, Mr. Chair. And that is in relation to the comments of Mr. Plante and of the Irvings.

There is no change in the cost of service evidence. That is the evidence that is there with one minor amendment that we will deal with the effect of the 3 percent on the '05, '06.

But there is nothing that is going to be thrust upon them that is going to be that new that should require a lot of extra time. They have had it like everybody else has for quite awhile now. Thank you.

CHAIRMAN: Thanks, Mr. Hashey. Anybody else any comments? Okay. We will take 10 minutes.

(Recess - 11:00 a.m. - 11:10 a.m.)

CHAIRMAN: Sorry about the length of our 10-minute breaks.

As far as the Board is concerned, why the breakout session that the applicant has proposed can certainly go ahead,

and that will achieve whatever purpose it can. The Board itself will not partake in that. No staff, no Commissioners required.

And I would suggest that either later on this afternoon or maybe even first thing tomorrow morning that before we break today we will find out about that. We will make a decision on that.

We will go ahead with the suggested interrogatories. And we will set some dates again before we break from here, either today or tomorrow, as to the various dates.

I want to -- the Public Intervenor talked about them being general. That certainly is not the intention of Board staff.

The Board staff will be making very specific requests for information. Because we believe we might as well get it all on the table right now as to what will be provided and what won't be provided and where we go.

As well, before we break, we will set a date for a Motions Day in that interrogatory process. Then also we will set the time for the answers to be given for those questions that the applicant will answer.

And at the end of the Motions Day itself, after the Board has made its rulings in reference to information, we will set the ensuing schedule of events for the hearing

itself. So we will handle all that on Motions Day.

So I think that once we are through with our discussions in reference to 156 and the confidentiality matter here today and perhaps a few other small things, why then the parameters of the hearing and the information and whatnot will become clearer.

So what is your pleasure? Do you want to start argument now on 156? Or do you want to break for lunch and come back at 1:00 o'clock?

MR. HASHEY: We would be prepared to start. Mr. Morrison, would make the argument.

CHAIRMAN: Anybody got any problems starting now? We will probably end up breaking for lunch in the middle of it. But we will start now then. Okay. Mr. Morrison?

MR. MORRISON: Thank you, Mr. Chairman, Commissioners. I know that there -- I think the Chairman mentioned two aspects to this, sort of the general 156 argument and the question surrounding the definition of the first hearing. I will be dealing with the general arguments with respect to 156. And Mr. Hashey will address the issue with respect to the first hearing.

I would like to frame my argument in terms of the restructuring. Section 156 is really the logical extension of restructuring and must be viewed it in the

context of restructuring.

And just as sort of a general overview, the restructuring of NB Power resulted first in the establishment of Holdco and four operating companies, Disco, Genco, Transco and Nuclearco.

Disco and each of the other companies are at law separate legal entities governed by the Business Corporations Act.

Restructuring itself involved the apportionment of assets and employees and liabilities among the various operating companies and the allocation of risk between the shareholder and the ratepayers.

These were in essence public policy decisions implemented after a long and complex process involving various studies and advice and recommendation to government from financial advisers and industry experts.

What resulted from that were transfer orders which essentially apportioned the assets and employees, et cetera and the PPAs, which were required and are required to enable the purchase and sale of power between the generating companies and Disco.

The spirit and intent of section 156 I submit is to reinforce the inappropriateness and indeed, I would suggest, the impossibility of revisiting the public policy

decisions which drove the creation of the transfer orders and the PPAs.

I submit that what section 156 says is that this Board must accept the asset, liability and employee transfer and the costs resulting from the PPAs. If this Board cannot disallow those costs in setting rates, then information and documentation concerning them is not relevant to your deliberations. Only evidence that is relevant to the determination of just and reasonable rates for Disco should be considered.

Now section 156 does not prevent disclosure of information. And Disco is not seeking to shelter information. From a practical perspective there are tens of thousands of pages of documents relating to restructuring.

If production of these documents is required, I would suggest that this hearing will become hopelessly bogged down with information which in the end is of no use to this Board in setting just and reasonable rates for Disco.

Disco is asking this Board to recognize that because section 156 deems that the assets acquired by Disco were prudently acquired and any expenditures arising from the PPAs are deemed necessary for providing the service, therefore information and documentation relating to the

transfer of the assets and how the PPAs were derived is by virtue of section 156 not relevant to this Board in setting just and reasonable rates for Disco and therefore does not have to be produced and scrutinized.

Essentially the issue to be decided by this Board is what is the role of the PUB in examining elements of Disco's cost of service covered by section 156?

So I would like to talk a little bit about restructuring and how section 156 fits into the whole scheme of restructuring.

The first aspect of restructuring, as I mentioned earlier, was the creation of the corporate structure.

Ms. MacFarlane's evidence explores the restructuring of NB Power. I think -- and in her evidence there are some fundamental aspects of restructuring, in particular the key policy objectives of restructuring.

And they were to facilitate a managed transition to a competitive market for energy in New Brunswick and to assign risk between the shareholder and the ratepayers.

Those were the key policy objectives of restructuring.

The process was a consultitative one involving NB Power but also numerous other players. It was complex and involved public policy decisions coming forth from various studies and based on advice and recommendations to

government from financial advisers and policy and industry experts.

So out of that came Holdco and the operating companies. And they were incorporated pursuant to sections 3 and 4 of the Electricity Act. By doing that the integrated utility was converted into a holding company and four subsidiaries.

It is important to note that Holdco and Disco, as well as Genco and the other subsidiaries, were created by the Electricity Act. But as all other business corporations in New Brunswick, they are governed by the Business Corporations Act.

And pursuant to section 13 (1) of the Business Corporations Act, Disco and the other corporations have the capacity, powers and privileges of an actual person. Furthermore section 8 of the Electricity Act specifically provides that Disco, Genco and Transco are not agents of the Crown for any purpose.

Now what does that mean? I would suggest that the clear intent of section 4 of the Electricity Act and the provisions of the Business Corporations Act is to create distinct and separate legal entities to be governed by the same regime as any other business organization in New Brunswick.

Now it has been suggested that because the board of directors of Holdco and the subsidiaries share common members then there really is no distinction between them, and they should be created as a single integrated utility. It is my submission that that argument is without any legal foundation whatsoever. It is not uncommon in the business world and certainly in my experience in numerous commercial transactions that the same people that sit on the board of directors of the holding company almost invariably are the same people that sit on the boards of directors of the subsidiaries of that holding company. Furthermore, the board of directors of a subsidiary, regardless of whether these people were also directors of the holding company, they have legal obligations to act in the best interest of the corporation.

Specifically section 79 (1) of the Business Corporations Act requires that directors of Disco exercise due care and diligence and act in the best interest of Disco.

Under section 79 (2) they must comply with the articles and bylaws of Disco. And they are legally liable if they breach that obligation.

The principle that an incorporated company is a distinct legal entity is one that I would suggest to you

is almost sacrosanct in law. The courts have consistently held fast to the rule and have refused to pierce the corporate veil except in the most exceptional of circumstances, invariably involving fraud.

And there are a number of cases on the point. I will only refer to one which summarizes the law quite nicely in Canada. And it is a fairly recent decision. But it is one that has been cited very often. And it is 642947 Ontario Ltd. versus Fleischer.

And I'm going to quote from one portion of it. And it says "Typically the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated those in control expressly direct a wrongful thing to be done."

In short Disco must be treated as a separate corporate entity. It is so at law. And the courts will only retreat from that position if there is evidence of fraud or wrongdoing. And certainly there is absolutely no evidence of that before this Board.

So underlining the independence of each of the operating companies is the fact that they also are subject different regulatory regimes. Under the Electricity Act, Disco and Transco are subject to the regulatory

jurisdiction of this Board, while Genco and Nuclearco are not.

So that was the first step in restructuring, was essentially creating the corporate structure, the separate legal entities.

What had to happen next is to transfer, or a portion, the assets, employees, liabilities of the old integrated utility among the new butterflies. And this was accomplished by use of the transfer orders.

And as outlined in Ms. MacFarlane's evidence, one of the key considerations in this apportionment was the allocation of risks between the shareholder and the ratepayer.

These decisions were public policy decisions. The implementation of these public policy decisions and the allocation of assets and liabilities was accomplished using two vehicles, transfer orders and the PPAs.

I will deal first with the transfer orders. First of all they are orders. They were not the subject of negotiation on the part of Disco or any of the other operating companies. The value of the assets transferred and the method of payment were set in the transfer orders.

Now transfer orders are dealt with by a completely separate division in the Act. And that is part 2,

division B. Section 12 (1) of the Act authorizes the government to transfer assets, employees, et cetera from NB Power Holdco to each of the subsidiaries.

Section 12 (2) states that the transfer order is binding on the subsidiary, in this case Disco. Section 12 (4) states that a transfer order does not require the consent of either Holdco or the subsidiary.

Section 17 (2) and 17 (5) provide that the price and method of payment are either fixed by the transfer order or determined by the Minister of Finance.

Section 20 provides that the transfer order can require Holdco and the other subsidiaries to enter into and execute other agreements as specified in the transfer order.

And what all this means is that it is clear from a review of those sections that the transfer orders that assign the assets to the various subsidiaries are tools of public policy and are binding on Disco and the other subsidiaries.

An examination of the assets transferred and the cost of those assets by this Board would necessarily entail an examination of the public policy decisions which are the basis of the creation of the transfer orders.

One might agree or disagree about how the assets and

employees were transferred. But with respect that debate is a public policy debate and belongs in the Legislature and not in this hearing room.

So that is my submissions with respect to the transfer orders. I would like to go on and talk a little bit about the PPAs.

This was the second vehicle of restructuring. Once the assets, employees and liabilities were transferred using the transfer orders, a mechanism regarding the sale and purchase of power between the generating companies and Disco was required.

The PPAs are agreements that were required as a result of restructuring. They are the vehicle by which the generating companies charge Disco for the supply of power.

They are an integral part of restructuring because they are the direct result of the creation of the new operating companies under the Electricity Act and the assignment of the assets and employees.

Like the transfer orders, the PPA prices were established by government. Like the transfer orders, the PPAs are instruments of public policy.

Now there are two key factors which drive the PPA prices. The first chunk if you will is the assets, the

liabilities, the employees. I generally refer to that as the asset part of the equation. Those were dealt with by the transfer orders.

The second key factor which drives the PPA prices are the policy decisions with respect to the allocation of risk and capital structures.

Now Ms. MacFarlane in her evidence explains that the financial models were developed to determine the prices to reflect the asset values, capital structures and returns and other components of the price.

It was government that established the capital structures and returns and which provided the basis for the pricing. As mentioned earlier the transfer of the assets, liabilities, et cetera was done pursuant to the transfer orders. The establishment of risk allocation and capital structures was determined by government. Those are reflected in the PPAs. I would submit that both are public policy decisions which ought not to be reviewed by this Board.

So those were the pricing parameters. Out of those pricing parameters are two basic components of the PPA pricing. We generally refer to these, or they can be characterized as the non fuel-related costs and the fuel

and purchase power costs. Now the non fuel piece essentially consists of the capital cost of the generators in the forecasted OM&A costs.

It is important to realize and to note that the non fuel price in the PPAs has been established and is defined for the entire term of the PPAs.

As I mentioned earlier, the capital or asset portion was set by the transfer orders. The OM&A piece and the ongoing capital expenditure component is a forecast.

If this Board decides that it can and should examine the cost elements of the generating companies, then it would require this Board to conduct an in-depth examination of the models used to establish that pricing.

As indicated earlier, these were public policy decisions which I submit are outside the purview of this Board.

Furthermore, you must question the relevance of examining the cost elements of the generating companies when these prices have been defined for the entire terms of the PPAs.

Now unlike the non fuel price component, the fuel price component of the PPAs is set annually. Now the evidence of Lori Clarke that has been filed does contain detailed evidence of how Disco's power costs were derived from the PPAs.

We have already filed -- Disco has already filed the PPAs in a virtually unredacted form. As Mr. Hashey indicated, phase 1 of the PPA audit has been filed. And phase 2 of the PROMOD piece will be filed within the next couple of weeks.

Disco intends to provide all evidence relevant to the fuel cost component subject to issues of confidentiality and practicality. And I will deal with the practicality in a moment.

So of the piece that is set annually of the PPAs, Disco has absolutely no objection to filing all that evidence before the Board.

So what does section 156 say? Again in the backdrop of restructuring, in the public policy decisions that form the backdrop of the passage of that section, I would submit that the purpose of section 156 -- well, let me back up a bit.

Even without section 156, I would submit there is good reason why this Board ought not to question the PPAs. The costs were generated -- the costs generated by the PPAs are mainly derived from the transfer of the assets and therefore are fundamentally driven by public policy decisions.

PPAs are a result of restructuring. The

restructuring and the development of the PPAs was the result of a long, very complex process.

I know you have heard analogies to soup before. I'm going to make an analogy to a cake. Restructuring really is very analogous to a cake. There were many chefs who contributed to the recipe, the studies, financial advisers, government, et cetera. If you had a different recipe you would have a different cake. But this recipe was one that was given to us. So you can't un-bake this cake.

Given this backdrop I submit that section 156 is the natural extension of the restructuring process and the public policy decisions which led to the creation of the PPAs.

The clear intention of the Legislature in enacting section 156 is to reinforce that it is inappropriate for the public policy decisions which are at the core of the PPAs to be the subject of scrutiny by this Board.

Section 156 is also consistent with the clear legislative intent that the generating companies not be subject to this Board's jurisdiction.

If this Board were to launch into an examination of the cost elements of the generating companies it would essentially turn this hearing into a Genco application. I

would submit this Board cannot do that. And I think the Board itself has recognized that it does not have any jurisdiction whatsoever over Genco.

It is also important to note that this application was brought pursuant to part 5, Division B of the Act. And section 95 states that this division applies to the distribution corporation, not to any other entity but Disco.

So with that background I will delve into the specifics of section 156. What is it that section 156 provides?

There are two key elements to section 156. The first is that the assets acquired by Disco by transfer order or otherwise are deemed to be prudently acquired and useful for the operation of a distribution system.

Secondly, any expenditures arising from power purchase contracts are deemed to be necessary for the provision of the service. This is consistent with the nature of the transfer orders as instruments of public policy as I discussed earlier.

Normally in a rate case dealing with an integrated utility, a regulator in scrutinizing the revenue requirement would normally examine the assets of a utility to determine that those assets were used and useful and

prudently acquired.

I submit that section 156 renders that examination unnecessary. Consequently any evidence or information regarding those assets is not of any assistance to this Board in setting rates. In short that information is irrelevant to the Board's deliberations.

The second component of section 156 I submit essentially dictates that expenditures arising from the PPAs are deemed necessary for the provision of the service.

The purchase power prices in the PPAs are an expenditure arising from a power purchase agreement and are therefore deemed necessary.

Now you can read cases. And believe me we have done some research. But there is almost no case law that is going to define necessary, particularly in a regulatory context. So you are back to using a normal dictionary definition of necessary.

And Meriam-Webster defines necessary as indispensable, inevitable, inescapable, predetermined, compulsory, positively needed, indispensable, essential.

It is my submission that if an expense is predetermined or indispensable, in other words necessary, examination of that expense by the Board would be

fruitless.

Even if the expense was scrutinized by you, and for some reason this Board was of the opinion that it should be different, it is submitted that this Board could do nothing about it. Because it is necessary, indispensable, inevitable, predetermined.

Again if this Board cannot question the evidence in support of the expense, then the evidence is irrelevant.

So the key question really comes down to this. Is this Board able to disallow costs resulting from the PPAs? It is our submission that, for the reasons that I just stated, this Board cannot allow the PPA costs.

It is trite law that only evidence that is relevant can be considered. Accordingly, all evidence that is to be filed in the course of this application must be relevant.

Therefore, unless this Board can rely on the evidence in setting just and reasonable rates for Disco, such evidence is not relevant and should not be required to be produced.

Now I do wish to be very clear that this is not a case of attempting to limit disclosure of information that is relevant and useful to this Board in its deliberations. Disco is not seeking to shelter information. It is purely a question of relevance.

There is some information which is commercially sensitive, no question. And Disco will ask the Board to deal with that in accordance with the confidentiality policy that we will be dealing with later.

But subject to confidentiality and some practical issues, Disco is fully prepared to provide all relevant information to this Board.

And on the issue of practicality, I urge you to take in the sheer volume of information that we are talking about here.

For example the backup information to the PROMOD run itself is massive. And it would be very difficult. And it is not the type of information that lends itself easily to a review in a public forum.

Also the closing agenda for example -- and I have seen a lot of closing agendas. But the closing agenda on restructuring had 358 items. Of those 358 items only two of them are transfer orders to Disco. And those themselves are tens of thousands of pages.

So if production of all of these documents is required this hearing will become completely bogged down with information and documentation which I submit is at best of questionable relevance.

So in conclusion, Mr. Chairman and Commissioners, I

would just like to highlight again the restructuring of NB Power was a complex process, involved many players. Public policy decisions drive the creation of restructuring and the allocation of the assets. They were carried out using two vehicles, the transfer orders which are, according to the Act, not something that was negotiated or negotiable by Disco, and the PPAs. The spirit and intent of section 156, in my submission, is to reinforce the inappropriateness and indeed the impossibility of revisiting the public policy decisions which drove the transfer orders and the PPAs. Again -- and I would just like to reiterate this point so that Disco is not misconstrued in this hearing room or outside. This is not a question of limiting disclosure or attempting to shelter information. It is simply a question of relevance.

Those are all my submissions, Mr. Chairman. Thank you.

CHAIRMAN: Mr. Morrison, I would like you to talk to the Board about the general law of statutory interpretation. Because I think that is very relevant. You have dealt only with 156. But there is also section 136 in the Electricity Act.

MR. MORRISON: I would be happy to do that after lunch, Mr.

Chairman. I haven't looked at section 136 in relation to section 156, to be quite honest with you.

CHAIRMAN: Well, I will go so far as to say my understanding of the law of statutory interpretation is the general thrust or obvious purpose of the legislation it must be followed. And the legislation must be interpreted in -- with taking that into regard. And if there are to be any exceptions to that general thrust, then they must be extremely particular.

I grant you there is absolutely no question that 156 does in fact fall into a particular restriction on 136. 136 basically says everything, all of the information that Disco, the SO and Transco have the Board can call for and it must be put on the table.

MR. MORRISON: I have no objection to that, Mr. Chairman. Other than I think the thrust of my argument has been relevance.

CHAIRMAN: I am not saying the thrust of your argument isn't relevant. But I am just simply saying I want to make it very clear that that is the way in which we have, since we read the Electricity Act, been approaching this matter, is that there is the general we can ask for whatever we want.

Now you are trying to make the -- as I hear you, trying to make the connection between public policy decisions,

which again are totally beyond the jurisdiction of this Board and we have always said that.

To bring it down to a practical level, to where the tools that have been used to bring into force the public policy decision cannot in any way be looked at or the information backing them up. That is where I see you are going.

MR. MORRISON: That is where I am going, Mr. Chairman. And I am happy to explain why I am going there.

CHAIRMAN: You have already done that. You have already done that.

MR. MORRISON: Well if you ask me --

CHAIRMAN: Quite effectively.

MR. MORRISON: You asked me to address statutory interpretation.

CHAIRMAN: Yes.

MR. MORRISON: As I understand the most recent case law, and I think there was some reference in my previous brief on that -- generally what I think the most recent Supreme Court of Canada decisions have said, you get rid of the old cans of construction and the very technical rules and you look at the legislation as a whole and you try to make sense of it.

So if you look at section 136, yes, that gives the

Board the broad power to request just about anything.

However, you can't ignore section 156, which was clearly enacted to deal with the PPAs. There is absolutely no question, I would submit, Mr. Chairman, that the legislature has said, yes, under section 136 you can request everything. And I will put a caveat on there. The common law, I think, says anything that is relevant to your deliberations.

What section 156 says is take that -- what is relevant has now been shrunk. There are aspects of information which are no longer relevant to this Board. So therefore, while you can request all information that is relevant under section 136, what section 156 says yes, but there is some stuff that isn't relevant anymore. Because it is deemed to be prudently acquired, used --

CHAIRMAN: If I were to accept all that, that is fine. But take and deal with for the purposes of the first hearing which you have not covered.

MR. MORRISON: Mr. Hashey will be dealing with that for the purpose of the first hearing. And I don't know -- we had a bit of a discussion about that before I started my rather lengthy argument. We are not entirely sure, Mr. Chairman, what the issue is in the Commission's mind with respect to the first hearing, but Mr. Hashey is prepared

to deal with that. He can deal with that now or after lunch, as you prefer it.

CHAIRMAN: What do you think, Mr. Hashey? Will you deal with that now?

MR. HASHEY: I would be pleased to, Mr. Chairman. The first hearing has been defined by a regulation. Now first of all, there are aspects of this as I say, and I will speak to this generally, it is our understanding that we have filed an application and we have amended an application. We haven't abandoned anything. We have amended an application. And we have had preliminary matters going on, as we still are, frankly.

I believe that until the Board makes its ruling, and I think if you look at section 101(5), that is where there is reference to the word, hearing. Well hearing is defined in a very generic manner, of course, in the Act as being a public hearing which may be an electronic hearing, an oral or a written hearing. And then it defines the three of those and I don't think that really comes in to the play here a whole lot.

Then, of course, we have the first hearing regulation that was filed on May 9th 2005 which states for the purposes of section 156 of the Electricity Act, first hearing means the public hearing, whether an electronic,

oral or written hearing, that is first held before the Board after all pre-hearing conferences and other preliminary procedural matters have been completed.

I think that combined with Section 101(5), which effectively states that at the conclusion of the hearing, the Board shall approve the charges, rates and tolls if satisfied they are just and reasonable.

And what we are saying is that what we are requesting the Board to do is to stage this hearing, if you like. And finally there would be the final aspect of the hearing, which is the revenue requirements and everything else that comes in to play at the last that leads to your decision. So really that is effectively my submission on first hearing. I know that if we were going in the phase manner, I would be addressing that a little differently. But. of course, that is not there now. Not differently, but I would be expanding upon that.

CHAIRMAN: Just so that everybody in the room knows, Mr. Hashey, as far as I personally am concerned -- I am not speaking for my fellow Commissioners -- but things are as you have outlined them that this is in fact the first hearing. And if we were to do the generic portions, as I term them, et cetera, it is all part of one hearing. So

what we are launching ourselves into now is the first hearing for the purposes of section 156.

I guess where I was going with Mr. Morrison, was that it is only for the purpose of the first hearing that there is a prohibition or a requirement that this Board accept as prudent the costs that are there. So the scenario can well be is that the second time around we look at the PPAs and we say oh, sorry, but the fuel costs that are reflected there do not reflect what we see in the marketplace. And we therefore don't think that is appropriate.

So I would just like you to address that kind of thought process. Go ahead, Mr. Morrison.

MR. MORRISON: Well, I am certainly not going to argue that section 156 is a masterpiece of drafting, Mr. Chairman. But after -- I guess you have to look at it from a practical point of view. If this Board at the conclusion of the hearing basically establishes a rate base for Disco, it's pretty -- I am going to make the suggestion, it's going to be pretty difficult to revisit that on a go forward basis. You know, I mean the assets' values are set. I mean they are set in the PPAs, in the transfer orders.

It seems to me that it wouldn't be necessary to go

back and revisit those issues again on a hearing three or four years from now.

CHAIRMAN: Well, I am trying to theoretical argument here, Mr. Morrison, not whether or not it will be appropriate in the second hearing or the third hearing or anything else.

MR. MORRISON: Certainly, Mr. Chairman, the section itself gives no guidance on that point. I will concede that point.

CHAIRMAN: All right. Thank you. Anything else? We will break for lunch and come back at 1:30 p.m.

(Recess - 12:15 p.m. to 1:30 p.m.)

CHAIRMAN: Mr. Plante, do you have anything you wish to contribute in reference to the discussion of 156 in the first hearing?

MR. PLANTE: No, Mr. Chairman.

CHAIRMAN: Mr. Coon?

MR. COON: Thank you, Mr. Chairman. I do have some comments on 156. The purpose of the Electricity Act, according to the business plan that Disco has submitted is A-7, an exhibit, is in part to facilitate the creation of a competitive market within New Brunswick and separated the integrated -- and separate the integrated utility into functional units.

Section 80 when proclaimed and when the Public

Utilities Board approves the processes and procedures for doing so, will allow Disco to go to the market. But it has not yet been proclaimed.

The Electricity Act created Disco and describes its purpose as to provide customer services in relation to the provision of electricity. And as we have already been reminded it's not an agent of the Crown. And we are being asked to treat it as a separate corporate entity.

The Electricity Act also created Genco. And its purpose is described in part in the Act as to own and operate generating stations, other than nuclear power plants, not as an agent of the Crown. And presumably we are also asked to treat it as a separate corporate entity.

So if Disco is a separate corporate entity for arguments purposes here, it presumably negotiated this contract, what we call the PPA with Genco, to provide its customers with the services in relation to the provision of electricity.

So it's a contract to achieve its purpose, not a policy, a matter of policy. Presumably it represents an allocation of risks and benefits between the two separate corporate entities, Genco and Disco.

So I am all right to there with the argument that the applicant is making. But when we examine this contract,

it's signed by Mr. Leon Furlong with himself on behalf of Disco and Genco. And we are being asked to assume these are two separate corporate entities.

What this seems to me to represent really is an agreement between different functional entities of the NB Power Holding Company, whose terms and conditions of this contract are the biggest -- are among the biggest factors in determining the rates that Disco will charge.

Furthermore, as section 80 has not been proclaimed, Disco cannot go to the market, except for electricity from renewable sources. And therefore are required to buy all the electricity they sell and related services, other than that from renewable sources from the subsidiaries of NB Power Holding Company.

In other words, the monopoly situation that occurred before the market was opened persists for the distribution company in terms of where it can acquire its electricity at this moment.

So it seems to me, therefore, that the power purchase agreement should be in fact fair game for this hearing. We are not in fact dealing with two separate corporate entities, but functional entities within NB Holding Company.

That ends my submission.

CHAIRMAN: Thank you, Mr. Coon. Mr. MacPhail?

MR. MACPHAIL: Thank you, Mr. Chairman. Eastern Wind Power agrees with the submissions made by the applicant and makes no further submissions.

CHAIRMAN: Thank you. Mr. MacDougall?

MR. MACDOUGALL: Yes, Mr. Chair. Good afternoon. Good afternoon, Commissioners. We just have some very brief comments on the section 156 issue.

To begin with, as you recently ruled in the fuel variance account hearing, this Board derives its power to regulate Disco through the Electricity Act. And in the words of that recent ruling, what you said was what the Board can and cannot do and what it should do, must ultimately be decided by reference to its governing legislation. In this case, the Electricity Act.

With that statement in mind, section 156 has a clear legislative intent that certain expenditures for the purpose of the first hearing before you are deemed to have been either prudent or are deemed to be necessary for the provision of service.

And it's EGNB's submission that prudently incurred costs or costs that are related to contract that are necessary for the provision of service are by their very nature costs that Disco are entitled to recover and should

recover from rates.

This is what the Legislature has clearly intended by section 156 in our submission. And any other interpretation would appear to strip section 156 of its primary purpose.

With respect to the first hearing issue as it relates to Disco, reference is made in section 156 to the first hearing before the Board under division B of part 5. And division B of part 5 generally relates to schedules, applications, charges, review or collection of Disco's charges, rates and tolls.

This is in our view the 2006, 2007 rates application, after all pre-hearing conferences and other procedural matters have been completed as per the recent regulation 2005-23.

We do not believe that section 156 would have any validity if it were referrable only to the generic portion of the proceeding on cost of service and rate design methodology, that is the first portion of the actual rates hearing.

Mr. Chair, before the break you had asked Mr. Morrison a couple of questions with respect to the interplay with section 136 and concepts of statutory interpretation. And we would like to briefly provide you our views on the same

question you posed to Mr. Morrison.

The first canon of construction which is very important, is that specific provisions in legislation override general provisions. And which is a common canon of statutory construction.

The other important point to take into account is that legislative provisions must have an intention. And they must be presumed to achieve their intent.

And in that regard we would like to refer you to section 17 of the New Brunswick Interpretation Act. And I will just read section 17 of the Interpretation Act. It was actually referenced in part of our submission on the fuel variance account process.

Every act and regulation and every provision thereof, shall be deemed remedial and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the act, regulation or provision.

So we believe that the proper intention of this provision has to be looked at in the light of section 17 of the Interpretation Act to assure the attainment of the intent of that provision is achieved and that specific provisions override the general.

The other issue with respect to section 136 is that we

believe that although you may be able to ask for documentation, the intention of section 156 is that that documentation not be used for purposes of determining prudent costs or costs necessary for the provision of service within the intention of section 156.

So we don't believe that section 156 in fact precludes you from possibly asking for that. You may have it and you may have it for other purposes. But section 156 has a clear intent of those purposes for which it is not to be used by the Board, because the Legislature has deemed specifically that those costs are to be considered prudent or necessary for the provision of services.

On the last issue that you raised with Mr. Morrison with respect to the first hearing versus future proceedings, I think what is important to note if one looks at section 156, is that many of the contracts discussed are power purchase contracts, standard service, transmission service contracts. Many of these are long term in nature. Particularly the power purchase agreements.

And it's our submission that what the Legislature intended is that the contracts that were entered into, if they were deemed to be prudent or necessary for the provision of services, it's the entering into of those

contracts that is appropriate and has been sanctioned as being prudent or necessary by section 156.

So to then in a subsequent proceeding say that they were necessary for Disco for this hearing but now we can look into the costs that underlie those, we believe would really cause quite a bit of problem for the intention of the section which was to say one can enter into those contracts. And if one had to enter into a long term contract which was necessary, then that long-term contract was necessary at that time and it would -- for it to become unnecessary later or to then be able to challenge the costs pursuant to a long-term contract that was deemed necessary we believe would be again in violation of the intention of section 156.

CHAIRMAN: Mr. MacDougall, correct me if I am wrong here, but the PPAs that occur between two NB Power former divisions now separate corporations and not outside or not Nuclearco, those are amendable, are they not? You can amend those at any time, the government can?

MR. MACDOUGALL: I would assume, Mr. Chair, and again just off the cuff, if the contract was amended one would then have to look at this section and say, did that occur before the date of this section. So when you read section 156 it says agreements entered into before the date of

coming into force of this section.

So there might be -- if the parties to those agreements subsequently amended them, possibly there would be an argument that the Board would have a right to review the amendment, but I don't think there would be a concept here that the Board could tell the parties to amend the contract.

CHAIRMAN: Oh no, I'm not for one minute suggesting that. But I'm simply saying that if you have a long-term contract that can be amended at the will of one party at any time, then all of a sudden it isn't a long-term contract as we would normally know them because it is amendable.

MR. MACDOUGALL: It may be, but until such time as it is amended if it was necessary to enter into it for the purposes of providing this service, Mr. Chair, I think it would be problematic to then at a subsequent hearing say yes, it was necessary for you for the purpose of the first hearing but now it's -- we can look into whether or not it's appropriate for you to continue. Because if the parties haven't amended it what can you do? They have entered into the contract which the Legislature has said was necessary for the purposes of the service. Had they not entered into the contract they would not be able to

provide the service.

CHAIRMAN: Good. Thanks, Mr. MacDougall. Anything further?

MR. MACDOUGALL: The only other comment on that, Mr. Chair, is we think the germane point is that for this hearing it's very clear what the Legislature intended. On the latter point that we have just been discussing we actually don't know that the Board has to make a determination on that for this hearing. It is a good point for us to debate it, but if you wished you could make a determination for this hearing with this issue to be dealt with at a later date in that it is the first hearing we are talking about today.

Thank you, Mr. Chair. Thank you, Commissioners.

CHAIRMAN: Thank you, Mr. MacDougall. Mr. Storring?

MR. STORRING: Thank you, Mr. Chairman. We have no comment.

CHAIRMAN: Thank you. Ms. Milton?

MS. MILTON: Rogers has no comments on this issue, Mr. Chair.

CHAIRMAN: Thank you. Mr. Denis?

MR. DENIS: Thank you, Mr. Chair. Let's say for arguments sake that we do accept Mr. Morrison's argument that 156 precludes this Board from scrutinizing the documents related to 156. It is our position that we disagree with Mr. Morrison's argument that those documents become

irrelevant. The reason I say that is that those documents -- I will call them 156 documents -- is that they have consequences and effects on the rates and on fuel costs, which is exactly why we are here.

Moreover if -- it is not incumbent upon NB Power or NB Disco or any other intervenor here to determine what is relevant and irrelevant. That determination is to be made by this Board and not the parties. So just indulge me for a second. I would like to make a cake analogy.

If a chef gives me a cake and he said, this cake is safe, sure, I will take his word for it. However, if there is someone on a special diet or a diabetic like myself, I need to know what is in that cake. Because if I don't know what is in that cake, that can affect the amount of insulin or the amount of exercise I do. So that has a direct effect on me.

The same thing for NB Power. These documents, they exist. We are not asking them to change the documents, we just want to know what is in the documents. If parties here are -- like a chef, is afraid of giving away his recipe to other parties well then so be it. The Board has enough discretion here to make sure that those confidentiality issues are voiced and fixed.

The Board has a great deal of power here on this issue

and I think that if the main concern is confidentiality, the Board can easily remedy those concerns with the amount of power they have with respect to this issue.

Thank you, Mr. Chair.

CHAIRMAN: Thank you, Mr. Denis. Mr. Morrison, you have got to stop using these analogies.

MR. MORRISON: I take your point.

CHAIRMAN: Mr. Gorman?

MR. GORMAN: Thank you, Mr. Chairman. The trouble with these analogies is they invite some kind of a humorous comeback like let them eat cake. Because if I didn't say that somebody else would.

We -- first of all on the issue with respect to whether or not this is a first hearing and whether or not if it is segmented, the entire process would be the first hearing, we take no issue with respect to the fact that this is a first hearing.

However, we do think that there is an issue here with respect to disclosure of documents. Mr. Morrison says that section 156 renders evidence concerning assets transferred by transfer order or evidence of expenditures arising from power purchase contracts is irrelevant and are matters that the applicant should not have to disclose.

Our simple argument is that section 156 does not use the word evidence, does not use the word document. And section 136 does use the word, I believe, documents. And we think that using the normal canons of construction that section 136 in this case is instructive and that the Board should in fact consider any and all documents that may be relevant to this hearing.

Therefore the interpretation that the applicant urges on the Board we think would be to provide for more than what the legislation says. Mr. Morrison says that the applicant is not seeking to shelter information and that it is fully prepared to provide all relevant information to the Board. And in a sense what he is looking to do, or what the applicant is looking to do is to determine in my view what is relevant. And I think that is the function of the Board, is to determine relevance.

And on that basis it is our belief that documentation that may arise out of the items mentioned in section 156 should be disclosable. If section 156 is used as a shield, if you will, it is a matter which the Board should retain jurisdiction on perhaps to deal with if in fact there are any particular instances where section 156 is raised as a defence.

Mr. Morrison, in his comments, says it is not a

masterpiece of drafting or concedes that, if you will. I guess the applicant should not be given a very broad and liberal interpretation just because it is not a masterpiece of drafting and one which would require the Board really in a sense to imply a meaning to the section which the words don't reasonably bear.

As I said, there is nothing in the section to talk about restriction of access to documentation. And that is the interpretation that the Board is being asked to place on the section. So we think in as far as the applicant argues that the documentation should be restricted, really what they come back to is the test of relevance which I think is the test that you would have in each and every case, in any event. And in considering relevance, I will concede that the Board could consider the aspects of section 156 but should not give some broad directive at the outset of the hearing that documentation relating to the items under section 156 cannot be disclosed. I would be afraid of what might not be accessible to the parties. That essentially is our submission.

CHAIRMAN: Thank you, Mr. Gorman. Mr. Hyslop? I'm sorry, Mr. Peacock?

MR. PEACOCK: Mr. Chair, Vibrant Communities offers no analogies or no comment.

CHAIRMAN: Mr. Hyslop?

MR. HYSLOP: Thank you, Mr. Chair, Commissioners. I will get to my cake analogy early. Mr. Morrison indicated that you can't unbake the cake. Our suggestion is you don't have to eat it. Further he said there were many people involved with baking that cake and to use another analogy many cooks may spoil the cake. So I will leave it at that.

The issues of 156, although being dealt with perhaps in the abstract, are most particularly related to the purchase power agreements. And in this regard Mr. Morrison did make some comments that* expects that there is thousands and thousands and thousands of documents. And I want to make it fairly clear in the simplest sense what we are looking for. We think where 75 percent of Disco's costs come from the Genco and Nuclearco companies, that it's fair to ask what are the OMA costs of Genco and Nuclearco, what are the depreciation costs and what is the rate of return that is expected on the standard rate base. And to those I guess who are experienced in rate matters and rate making matters what are the revenue requirements of Genco and Nuclearco and are they justifiable. So that -- I just want to spoil any kind of misconception that we want every contract, every document, but we do

want to know what those costs are and how they affect the price that is being charged down to the distribution company.

There has been a lot of talk about what is in 156 and we agree that it says in 156 the assets shall be deemed to have been prudently acquired and useful. And expenditures are deemed to be necessary. And to that we say that is what it says. However, it's also important to realize what the section doesn't say. There is nothing in section 156 that says the value with the assets are acquired by the different companies shall be deemed to have been approved by this Board. There is nothing in section 156 that says that the prices that are paid for electricity under the PPAs is fair and reasonable and must be accepted by this Board. There is nothing in section 156 that would be similar to section 19(4) of the Ontario Electricity Act, which reads, and I quote, "The OPA's recovery of its costs and payments related to procurement contracts shall be deemed to be approved by this Board." The legislation could have said the prices and agreements are to be accepted by this Board, but it doesn't.

Now we agree -- we fully agree that it's very necessary distribution company buy electricity. We think it's useful and prudent that they acquire the telephone

poles to distribute the electricity. And I think the purpose for this probably ties in in some ways to what I'm going to say shortly with regard to what I see is the purposes of the PPAs.

My friend spent a lot of time on policy. And public policy, Mr. Chair and Commissioners, is to be found throughout the Electricity Act, and part of that policy is found in section 101(5), which maintains it's the responsibility of this Board to approve the charges, rates and tolls if satisfied they are just and reasonable, or if not so satisfied fix such other charges, rates and tolls as it finds to be just and equitable.

Now our position is pretty simple. 75 percent of Disco's costs are the costs that they incur under the Purchase Power agreements. The applicant wants this Board to rule that the prices and terms of those contracts are binding on you. We can't look behind them. We can't tell the OM&A costs are reasonable. We can't tell if the depreciation costs are reasonable. We can't tell if the expected rate of return is reasonable. We think it's very, very difficult for this Board to determine that the rats are just and equitable without an examination of Genco's cost of producing electricity.

Quite frankly, my friend talks about relevance. How

can an investigation of 75 percent of Disco's costs not be relevant? Anyhow, my colleague Mr. Coon's point that without section 80 being put in force and effect means we still have a de facto monopoly. De facto monopolies are why there is regulation.

I want to go on a little bit here and talk about what I see as being the real purpose of the PPAs. And one of the most important lessons I learned in law was a couple of years after I was out of law school. I had a client. He was in the equipment business. Freighliner trucks, John Deere tractors, skidders, you name it. And we were out driving around and there was a new skidder on a front lawn out back of Hartland, New Brunswick. And I said, Raymond, what is that skidder worth? He says, I don't know. It depends. Am I buying or selling? And, you know, that's important. I think we should be asking what is being bought and sold in these PPA agreements.

Sharon MacFarlane in her evidence, exhibit 3, page 17, states, the power purchase agreement provide the prices for capacity electricity supplied by generation companies based on capital structures and returns that reflect market expectations for businesses with similar risk.

What is being bought and sold here are assets -- capital assets of the generation companies. That's why you bring

in experts from big large capital investment firms. They provide you advice on what your balance sheets have to look like, what your return investment needs to be, in order that if you wanted to sell some of your assets to private industry and private investors you would be able to so. It's our suggestion that the purchase power agreements have been drafted more from the point of view of seeking out private investment. And this is a policy and I concur with Mr. Morrison that this is a laudable policy. It's one that as a Public Intervenor I support. But these purchase power agreements at this stage of the game, they are not arms length agreements. They are agreements -- and my friend stole my thunder by pointing out they are all signed by the same executive, and I won't go through all that.

The point I'm making is a very simple one. These purchase power agreements were not negotiated between Disco and Genco and Disco and Nuclearco. They were devised as a means of putting to market some of the capital assets of the old New Brunswick Power Corporation.

Now I want you to think about that a second and how that affects ratepayers. Now if you own a distribution company which Mr. Burpee and Mr. Dionne and my friends from Edmundston do, you know, their purpose is to buy

electricity at the cheapest possible price. You know, in this case we have to ask who negotiated the price in these agreements on behalf of Disco. Well they are the same people who are trying to create capital structures and returns that reflect market expectations. If you own a generation company you would probably want to sell your electricity for the highest price, and we find that these are the same people who are buying electricity on behalf of Disco. There is no hard negotiations there. And given what I see is the purpose of the PPAs, I trust I will be forgiven if I suggest that maybe at all times the ratepayer didn't get the edges in these agreements that he might have had that hard negotiation taken place.

You know, that's why I find it surprising, and I'm just going to pull an example or two out, that so many of the upstream risks -- in this case take the cost. If you were a generation company having to buy your fuel, what they have done in the PPA is move this risk down to the distribution company.

You know, I don't want to get ahead of myself, but at some point in time -- at some point in time I hear the Irving interests are talking about building an LNG plant. I just would really be surprised if distribution company offers the Irvings a price adjustment clause for the

increases in the price of LNG. I don't know.

You know, my friend Raymond was negotiating for Disco he would say, you get your best price and you had better figure out what your costs are, you come to me and then I will start really negotiating with you.

I have no problem with the purposes and the policy behind the PPAs. The idea of removing some of the debt from our electrical system here in New Brunswick and creating equity by private investment is laudable. However, this Board has a responsibility to see that the rates that are charged to the ratepayers are just and equitable. It should not -- the laudable objective shouldn't be accomplished on the backs of the ratepayers. The terms have to be just and equitable for the ratepayer and the Board has this obligation to do so. There is nothing in this Board -- nothing in section 156 that says the Board is limited to the PPAs in its investigation of what is fair and reasonable.

We submit that it is quite proper for this Board to go behind the PPAs in its determine of what just, equitable charges, rates and tolls are.

Now just a couple of other very brief points that I wanted to make, if I could. And this is more by way of comment on my friend, Mr. Morrison. He did talk about

what is relevant and, you know, obviously the definition of what is relevant and at the heart of the matter. 75 percent of where the costs come from I suggest has to be relevant, and the issues going back to what we are looking for I don't think are anywhere near as the difficulties that Mr. Morrison might have been making them out to procedurally be. This was still a vertically integrated company. All the things I have talked about about what we are looking at would be part of this rate hearing.

With respect very briefly to the question of the first hearing. I'm not sure what technical arguments can be made but this is an important matter that is before the Board. Our view is that we are in the process of the first hearing. Whatever generic hearings take place between now and the conclusion are part of the first hearing. We want to get on with having the rate hearings completed, dealt with and finished.

As to the Board's question to Mr. Morrison, what happens in the second hearing, do all these things come on the table? I can only hope that this wasn't drafted this way in expectation there never be a second hearing, but that is moot right now. I think we are in the first hearing and we would like to get on with it on that point, Mr. Chairman.

I also very briefly wanted to mention one other section of the act and it's section 136 which provides that you have the powers of the - under the Inquiries Act. Under the Inquiries Act section 4, the Commissioner may by summons require the attendance before them of any person whose evidence may be material to the subject of the inquiry. It may order any person to produce such books, papers and documents as appear necessary.

I think that - I expect that NB Power or NB Disco and their officials would certainly respect the power of the Board. But that section is there. If Genco has to be brought in as a party necessary or their officials have to brought to bring such records, I think that's why section 136 is there.

Those are my submissions, Mr. Chairman. Thank you.

CHAIRMAN: Thank you, Mr. Hyslop. Messrs. Morrison and Hashey will welcome your comments on what the intervenors have said on the way around. We will take a brief recess. And we may have some further comments that we will put out to all the parties.

So if you have comments on the positions of the intervenors, Mr. Morrison?

MR. MORRISON: If we could have a few minutes, Mr. Chairman –

CHAIRMAN: All right.

MR. MORRISON: -- to put our thoughts together.

CHAIRMAN: All right. We will do it that way. We will take a 10-minute recess.

(Recess - 2:20 p.m. - 2:40 p.m.)

CHAIRMAN: The Board only has one very minor question, Mr. Morrison. I might as well put it to you right now.

There are certainly costs of Disco other than those that would be covered by the agreements that are recited in 156, like this Board's assessment, you know, your costs to the company. So there are others, yes. And that is what we wanted to confirm.

Okay. Go ahead, sir.

MR. MORRISON: Thank you, Mr. Chairman. My comments will be brief. Dealing first with Mr. Hyslop's argument, it is my submission that in fact Mr. Hyslop's argument supports our position. And he makes a great deal of the fact that the PPAs were not negotiated between Disco and Genco. Well, that was a government policy. It was dictated by government.

He makes issue that upstream risks were passed to Disco. Well, you can like it or not. But that was government policy.

His entire argument, I submit, Mr. Chairman, is that

this Board should ignore government policy. He made the statement, and I think I'm quoting correctly -- I'm paraphrasing -- if NB Power was still a vertically integrated utility, he would get the revenue requirements of Genco and Nuclearco.

Well, the fact is it is not a vertically integrated utility. And that is government policy.

Essentially, if I understand Mr. Hyslop's argument, he wants to turn this hearing into a rate case for Genco and Nuclearco. He wants the revenue requirements of Genco and Nuclearco, the generating companies tested.

This is something that Disco vehemently and rigorously opposes. Clearly this flies in the face of the legislation. And again that is government policy.

Just imagine what road we will be on if this turns into a Genco application. I don't think I will have to worry about getting a golf game this summer, next summer or the summer after that.

Finally I would like to make reference to section 136. Because again Mr. Hyslop raised section 136. What section 136 says is that this Board can get information from Disco. Not Genco, not Nuclearco. Disco.

Even if you got that information, and this turned into a Genco application, what would you do with it? Because

the prices that are recovered by the generating companies, they are established in the PPAs. And they aren't changed on an annual basis.

I would submit, Mr. Chairman and Commissioners, that Mr. Hyslop's entire argument rests on the premise again that this Board should not accept government policy.

I would like to move on and just raise a couple of other points that were raised by other intervenors. First Mr. Gorman says or suggests that it is not for Disco to determine relevance. And he suggests that we are trying to determine the relevance of what information is relevant to be put before this Board.

I would like to clear that up right away. Disco has not and does not seek to determine relevance. The Legislature has determined what is relevant by statute. If costs are prudently acquired, as Mr. MacDougall said, and are necessary, they are recoverable period. There is no reason to go beyond that.

So any information that relates to that, in my submission and the earlier submission, is just not relevant. But that is not a determination that Disco made. That is what section 156 says, in my submission.

Finally just one point that I believe Mr. Coon raised. He raised the issue that Disco is required to buy energy

from Genco. And because of that he believes that it is no longer -- because of that it is an integrated utility. Well, that may or may not be the case. But the fact is that the government in the legislation said that Disco must buy from Genco, again a government policy issue. Those are all my submissions. Thank you.

MR. SOLLOWS: It is with some trepidation that I turn the microphone on after the advice of Chairman. But I just want to clarify. You referred -- and I found it confusing at the time. Mr. Hyslop referred to 136.

But then following his comments, it seemed to me that his comments really applied to section 116. Is that your understanding that really --

MR. MORRISON: Yes.

MR. SOLLOWS: -- we do have those powers under 116 not 136?

MR. MORRISON: Well, you have powers under section 136. But the powers under section 116 are somewhat different. It is the powers under the Inquiries Act as I understand it.

MR. SOLLOWS: Right. And that is what his comments specifically referred to?

MR. MORRISON: But he also referred to section 136 as well, Commissioner Sollows.

MR. SOLLOWS: And you talked I guess just towards the end there about the issue of whether this material is relevant

to the rate-setting process.

You are then arguing that it really isn't relevant, it is more incidental?

MR. MORRISON: Well, if a cost -- basically I guess the point is this. Assume this is a generic rate case. It doesn't have the complications that this one does. And there was a particular cost that was put before this Board.

And the Board determined whether that -- in determining whether that cost is going to be recovered in rates, you would have to determine whether it was prudently incurred. So that is the issue before you.

MR. SOLLOWS: Well, it is prudently incurred by definition in 156.

MR. MORRISON: So if that issue is already -- in this case, already predetermined if you will that a particular cost is prudently incurred, then there is nothing for you to examine.

MR. SOLLOWS: Thank you.

CHAIRMAN: Any of the intervenors have any comments they want to make as a result of either my initial question and Dr. Sollows' follow-ups? I knew it. Mr. Hyslop?

MR. HYSLOP: Very briefly, in answer to Mr. Sollows' comment, I was referring to section 116 when I argued 136.

I did use the wrong section number. I was referring to the Inquiries section in my argument, Mr. Chair.

CHAIRMAN: Thank you, Mr. Hyslop. The Board will reserve decision on that until tomorrow.

We will change gears now. And perhaps I could -- we could just all take a minute and dig out the confidentiality pamphlet that was handed out before we got going here.

And perhaps the intervenors -- I know Mr. MacDougall has a lengthy thing that he put in which is appreciated. And I believe Wind Power did as well.

Was there anybody else who made comments on the confidentiality document? So it is just those two -- three rather.

Mr. Hashey, do you agree that there were the EGNB comments and Wind, and that was it?

MR. HASHEY: No, I would like to make a comment or two, please?

CHAIRMAN: Oh, that is fair enough. But I am just saying that is what we received in writing?

MR. HASHEY: Yes.

CHAIRMAN: That is my recollection and that is all I can find here. So I have got it all.

MR. HASHEY: That's right.

CHAIRMAN: You go ahead and comment. I was going to ask you to comment on both of those as well as any other comments you might have.

MR. HASHEY: I am not sure I have the Wind one. Number one, number two I have reviewed Mr. MacDougall's. And I don't have a great deal of difficulty with that. But that is within the context of what I would like to say which is very brief.

CHAIRMAN: Go ahead, sir.

MR. HASHEY: We are dealing under a right that the Board has in a specific legislative right which is under section 133 of the Electricity Act that deals with confidentiality of information. And it would seem to me -- and my only comment on the procedure and I don't find it that objectionable, I believe it is more or less modelled under Nova Scotia. I have talked to Mr. MacDougall. He indicates that there have been changes that he wanted to clarify and they seem to be pretty reasonable, what he is saying.

The only thing it seems to me that there should be an initial review by the PUB and if something is clearly not relevant to your deliberations or has no probative effect, that there could be an assumption made without the necessity of going through the whole process in some

instances. I can't cite you one for the moment, but one might be the Nuclearco request that we have made. We have made very little at this point in relation to the PPAs. As you know, there are two issues. One is Nuclearco stuff that is really pretty highly confidential. And probably when we get down to this hearing point, it is not something that would want to be disclosed even under confidentiality. This is there could be an issue there that goes a little bit beyond and our concern it is not maybe something of a competitive nature, but we have to address that at the time. And I think we can address it under the process.

And, of course, we assume we have the right to the -- to speak to the appointments of people under this process who might be going to review it. And to make sure that there is no competitive leak. There definitely is information that will come up and I am sure it will come up under the fuel issue as well where there could be some significant competitive advantages. And who should see it and you know, exactly from the parties, I would want to address that as well.

But those are minor points that we can raise at the time.

CHAIRMAN: Yes. Frankly, Mr. Hashey, you and anybody else

in the room at any time can argue whether or not something is irrelevant to our proceeding. There is no holds barred there. And if there are production requests, then you might choose to have something subject to the confidentiality rules but still provide it in redacted form or otherwise.

But if there is something that you just don't believe is relevant at all, I would expect at that time you -- whenever it was asked for, you would make that argument and we would deal with that.

MR. HASHEY: As long as that is clear. And again, the -- I think that we shouldn't abandon the process that we have used in the past with Mr. Easson reviewing information, yet it could be a matter -- or someone else, whoever -- and that even goes to the audit that we are doing -- to suggest that that will quite accomplish what we are looking for. That is probably an aside, but it is a little addendum to what we are saying here. I don't think everything needs to go through this. And we would be making those arguments as well. We are not abandoning that opportunity to --

CHAIRMAN: I don't think by the Board promulgating this that we are abandoning any method that you might suggest that we use in particular circumstance or we have used before.

All we felt was that there would be a lot of question of confidentiality raised and we might as well look around. And we did at a number of different jurisdictions and the one in Nova Scotia seemed to fit the bill. And some of the parties in the room have had experience with that. And from their perspective it seemed to work okay. So I don't believe in reinventing the wheel. And that is where we are, sir.

Now anybody else in the room who wants to have a comment on anything that I have just said, by all means do so. But that certainly is the way the Board has approached it. Anybody have any comments on what Mr. Hashey and I have just been discussing?

If not, then let's look at, if we could sir, the suggestions that Mr. MacDougall has made. And just speaking on behalf of the Board, we have gone through those and I believe I am correct in saying that neither the panel nor staff have any problem with amending our proposed draft policy to incorporate what Mr. MacDougall has brought forth. Is that your best take on it too, Mr. MacNutt?

MR. MACNUTT: Yes, Mr. Chairman. There might be one or two details, but the general concept there is no overt objection.

CHAIRMAN: And I gather that is the applicant's approach as well, Mr. Hashey?

MR. HASHEY: That is correct.

CHAIRMAN: Good. And nothing is set in stone either. If something appears not to -- when we get into it not to be working we can -- it is a matter of procedure and we can always change that.

So then we will deal with Eastern Wind's requests of us.

MR. HASHEY: Mr. Chairman, actually I had read that. It has come back. I know exactly what that says. I had indicated some surprise at that one, but I am familiar with it, the Eastern Wind. And our position on that is that you know, we take no position on that. That is up to the Board to decide.

CHAIRMAN: Yes. Well with frankness, the second part of it deals with whether or not the PPA with Wind Power purchase agreement would be kept confidential or not required to be tabled, et cetera, et cetera. That is something that if it is asked for in the process, we will have a discussion on it at that time. But we can't be making decisions what if down the line.

And the second part, would you like to indicate to us what it is the other portion of what Wind Power had that

they want to see changed?

MR. MACPHAIL: Certainly, Mr. Chairman. The only issue that Eastern Wind Power has -- and they generally very agreeable with respect to the draft Board policy. However, I guess what is omitted is the availability of Eastern Wind Power to make a claim of confidentiality without filing the document with the Board.

Section 1(3) of the draft policy set up a situation where a party could file a document to be marked as an exhibit in a redacted form. And also file with it a summary of the confidential information. And what Eastern Wind Power is requesting is an amendment to this draft policy that would allow it to file a summary of its PPA if -- like you state, if it is requested by someone without filing even a redacted form.

CHAIRMAN: I misinterpreted what you were asking for and therefore, I am glad I asked you to tell us what it was again. That is something that we will -- that is a bridge that we will come to if we do.

I thought you had ascertained that there were section -- as I read it section 1(3), permits the filing of a redacted document accompanied by a summary of the redacted information. It's our view that a participant claiming confidentiality pursuant to subsections 1 and

1(5) be given the same opportunity to provide a summary of the confidential information.

In other words that the intervenors were not getting a similar treatment to what some other party, be it the applicant or whatever else, but that's not what you are saying.

MR. MACPHAIL: No, that's not our submission. Eastern Wind Power joined as a formal intervenor solely for the purpose of protecting the confidentiality of its PPA. And the concern is it doesn't want to be present during the entire hearing just in case that issue comes up. We would like to bring it to the forefront by the way of motion or whatever immediately after this pre-hearing conference, particularly after the determination of the 156 issue, and be able to bring that to the forefront, immediately deal with it, and have no further submissions.

CHAIRMAN: Well that's getting around to the point which I was just saying we are not prepared to do is start making rulings in advance. I do think, however, if that's your sole purpose for being here is that I would request any intervenor or applicant or whatever that wanted to review your PPA, give the Board secretary notice of that intention and we will communicate that with you so that you can then come and we will schedule the time for

argument concerning that on a day that you can be here.

MR. MACPHAIL: That would work too.

CHAIRMAN: So why don't we do it that way. All right. Well what I will -- any of the parties have anything else to say about the confidentiality procedure we have set for here? If not, then what I am going to suggest is ask Mr. MacNutt to see if he can combine the Board's draft policy with the changes that Mr. MacDougall has suggested. And I am sure that he will then share it with Mr. MacDougall and they will thrash it out. So that's good, we will have that done.

I would suggest that the Board break now and you can have your informal session, Mr. Hashey, and we will reconvene tomorrow morning.

MR. HASHEY: Mr. Chairman, we prefer not to have an informal session at this time. If the Board is going to go with an interrogatory process, we will follow that if that's what the ruling is going to be tomorrow. And I have talked to Mr. Hyslop and certainly there will be co-operation amongst all of us to work through this, but to have a meeting today would not accomplish very much I don't think.

There is one issue that we had discussed this morning that we are still working on to try to find a way to meet

it one way or another. So I don't see a lot of purpose in that if that's the way we are going. But I would like to say that it would do a lot of good to a lot of us if we could start seriously talking about schedules. And I don't know when the right time might be for that, but it's --

CHAIRMAN: Tomorrow, Mr. Hashey.

MR. HASHEY: That's a great day.

CHAIRMAN: The Board's ruling on that is crystal clear. We are going to set the first date for interrogatories. We are going to have a Motions Day. And at the conclusion of that Motions Day and we have dealt with them and we find out where we are going and the applicant will know whether or not they have to provide certain details or not, and they would know how long it would take them to get that information, then and only then in our opinion can you accurately start to schedule interrogatories and hearings in reference to the CARD hearing or whatever else. So that's the way we are going to proceed on that.

MR. HASHEY: Thank you, Mr. Chairman. Can I raise one other?

CHAIRMAN: Certainly.

MR. HASHEY: One of the items that we have written about was the possibility of having an informal session on the CARD

issues. Was that something that the Board desires? I don't think we ever really dealt with that.

CHAIRMAN: I don't think the Board wants it. I think we are premature. Now it may be that the intervenors will say, well we would like the applicant to do that for us. And we will not stand in your way on that for sure.

MR. HASHEY: Thank you. That's what I was trying to clarify.

CHAIRMAN: Okay. Well then we will adjourn then till 10:00 tomorrow morning at which time the Board will have arrived at and deliver its decision in reference to 156. And then we will do the tidy-ups.

(Adjourned)

Certified to be a true transcript of the proceedings of this hearing as recorded by me, to the best of my ability.

Reporter