New Brunswick Board of Commissioners of Public Utilities

In the Matter of a complaint against the New Brunswick System Operator (NBSO) in connection with Energy Imbalance and Over Collection

PUB Premises, Saint John, N.B.
September 22nd 2005

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CHAIRMAN:	David S. Nelson
COMMISSIONERS:	Ken F. Sollows Diana Ferguson Sonier
BOARD COUNSEL:	Peter MacNutt, Q.C.
BOARD SECRETARY	Lorraine Légère

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CHAIRMAN: Good day, ladies and gentlemen. This is a hearing in the matter of a complaint against New Brunswick System Operator and a connection with the Energy Imbalance and Over Collection.

Could I have appearances please, the applicant?

MR. MACDOUGALL: Yes, Mr. Chair. Good morning. David MacDougall on behalf of the applicants WPS Energy Services Inc. and the Northern Maine Independent System Administrator. I'm joined today with my partner Matt Hayes.

And also with us today directly behind me is Mr. Ed Howard who is an energy marketing executive with WPS. And next to him is Mr. Ken Belcher who is President and Chief Executive Officer of the NMISA.

CHAIRMAN: Thank you. Others?

MR. ROHERTY: Good morning, Mr. Chair. Kevin Roherty for New Brunswick System Operator. With me today is Mr. Bill Marshall, President and CEO of New Brunswick System Operator, Mr. George Porter, Director of Market and Development for New Brunswick System Operator.

MR. MORRISON: Good morning, Mr. Chairman. Terry Morrison. And because of the nature of this application and the period of time that it spans, I'm here representing a number of entities that would have formed the pre-existing NB Power integrated utility.

I'm here representing Distribution Corporation, Transmission Corporation, Generation Corporation and Holdco. And with me is Wayne Snowdon from Transmission, Blair Kennedy from Distribution, Arden Trenholme from Generation and Michael Gorman, Vice-president Legal at Holdco.

MR. MACNUTT: For the Board, Mr. Chairman, Peter MacNutt. And I have with me Doug Goss, Senior Advisor, and David Thomas -- David Thorne, I'm sorry, Consultant. Thank you.

CHAIRMAN: Thank you. Is there any preliminary matters?

MR. MACDOUGALL: The applicant does not have any preliminary matters.

MR. MORRISON: No, Mr. Chair.

MR. ROHERTY: None.

CHAIRMAN: I guess we will go on to any opening remarks or comments?

MR. MACDOUGALL: Thank you, Mr. Chair, Commissioners. Good morning. What I would like to do is really just briefly summarize the position that WPS and NMISA have taken and the written materials that have been provided to the Board and all of the Intervenors previously, and during those comments make a few comments with respect to the submissions that were made by both the NBSO and the NB Power group of companies in their reply to the evidence which we had put forward to the Board. And I will do that sort of altogether.

There is two aspects of my opening remarks. The first aspect is actually the merits of the complaint. The second aspect deals with the jurisdictional issues that were raised by my friend Mr. Morrison. And I will deal with those at the end of my comments.

And again, Mr. Chair, Commissioners, the comments we are going to make today are essentially just a brief oral

reiteration of what is in front of you. We think the record is fairly complete and trust that the materials were of value to the Board in understanding the issue that we are going to talk about today.

This is essentially a dispute regarding the redistribution of energy imbalance dollars during a period October 2003 up to the end of April 2005, that being the time period before the effective date of the OATT Revision Hearing decision and revisions to the market rules.

And I think it is useful to start out with a few time periods just so that everybody can be clear on the chronology.

On September 30, 2003 the OATT came into place. And at the time it came into place the market wasn't open and the NBSO wasn't in existence. So from September 30, '03 until October 1, '04 the OATT was governed by the Transmission company, NB Power Transmission.

Then on October 1, '04 the NBSO came into place and the market rules were put into place. And the OATT, the tariff began to be governed from October 1, '04 by the NBSO and operated together with the market rules.

Some of those rules though -- although the market rules themselves came in place on October 1, '04 certain of the rules were noted as being deferred.

And then on May 1, '05 we had the effective date of the Board's decision in the OATT revision hearing in which the market rules were revised. And many of the deferred sections, particularly those in question in this proceeding, then became effective. And I think it is important to have those dates in place.

So prior to May 1, '05 there were no provisions in the OATT or the market rules that allowed redistribution of energy imbalance dollars that had been collected.

Following May 1, '05 various previously deferred market rules came into place. And some of these rules are mentioned in our submissions. The ones of particular relevance to this issue are rule 7 8 2, 7 9 5, 7 6 1 1 and 7 6 1 4. And again these have been referred to in the materials. And I won't go into them in any detail.

Also as of May 1, '05 schedule 10, Residual Uplift of the OATT came into place. And this was a revision to the OATT that was meant to work in conjunction with the revised market rules or the changes to the deferred market rules to make them become effective and schedule 10, Residual Uplift of the OATT was to work in conjunction with those rules, again from May 1, '05 going forward.

It is important to note that the interim market rule, 7 9 5 that was in force prior to May 1, '05, so i.e.

during the relevant period, particularly states that Residual Uplift is zero. So during the relevant period Residual Uplift was indicated as being zero.

So WPS and the NMISA's position is that during the relevant period, October '03 to April '05, neither Transco nor the NBSO was authorized to redistribute energy imbalance dollars to Transmission customers.

Now, Mr. Chair and Commissioners, the NBSO relies primarily on its view that this matter was conclusively dealt with at the OATT hearing. Now our submission is that that simply is not the case. The NBSO essentially relies on two very brief references in the record of that proceeding. One is NB Power's response to the Province of New Brunswick supplemental IR 2 and the other is brief cross-examination of Mr. Porter by Mr. Nettleton on behalf of JDI, I believe at that time in transcript pages 714 to 716.

The NBSO also notes in their view that this was their established policy. However, our opinion is that there was clearly no authorized mechanism which provided for re-distribution of those funds in the manner which was done by NB Power or the NBSO.

NB Power Transmission, the applicant in the OATT hearing, never requested such a mechanism be put in place.

It was nowhere mentioned in its argument. It's nowhere in the Board decision. And I think we allude in a written comments to the fact we would be highly doubtful that this was a matter that was even in the Board's consideration in making its decision, although the Board I'm sure will be more alive to that than we are.

But the question of re-distribution of energy imbalance dollars was not any part of the requested application of NB Power Transco in the OATT, nor did the Board approve it.

It's very interesting in our opinion, in our view, to note that the September 8th submission received by NB Power, this is their submission in this proceeding, which includes Transco, this is the group of companies Mr. Morrison is representing, states that the NB Power OATT did not address the distribution of funds. This is the exact position taken by WPS.

So in our view that comment made by NB Power seems to be in contradistinction to the comment made by the NBSO who says it was in the OATT. We totally agree with the comments made by NB Power and that is our position.

NB Power's submission, however, then goes on to say -- because they felt this wasn't dealt with in the OATT, they say, therefore the disbursement of any imbalance -- any

energy imbalance funds was left to the Market Rules.

So we have the NBSO saying, oh, no, it was part of the tariff because of these couple of references in the record at the proceeding. Then we have NB Power saying it wasn't part of the tariff but it was dealt with and left to the Market Rules.

However, NB Power then goes on to say this was based on draft Market Rules. Well you can't base a re-distribution of significant dollars on draft Market Rules that had no force and never came into effect. And in fact when the Market Rules did come into effect those Market Rules specifically deferred the provisions that my friends are referring to as the provisions that would have allowed the redistribution.

So it's very clear when you go through the scheme here the Market Rules until May 1, '05, did not allow for this re-distribution. And in fact for the first year of the Market Rules it specifically indicated that that was going to be deferred and wasn't going to be effective until the OATT Revision Hearing. That is exactly how the scheme of the deferred Market Rules worked.

So it's our respectful submission that you cannot re-distribute funds on the basis of draft rules that have no force of law or any regulatory force. No one in the

market was operating under those draft rules. They weren't -- they were not the rules, they were just drafts that were out there that people may or may not have been commenting on. It's also important to point out that when the NBSO sought to align the OATT in the Market Rules during the OATT revision hearing, it made a proposal to the Board with respect to the distribution of the RMC going forward. However, at this time the NBSO also proposed that there would be no penalty mechanism associated with energy imbalance going forward. So although it was saying we should re-distribute dollars in the RMC going forward to transmission customers, at the same time they were saying, however, we don't think there should be no more energy imbalance penalties. So therefore their position really would have been that those energy imbalance penalties wouldn't be re-distributed to Transmission customers from that period going forward because there essentially wouldn't be any -- there might have been a few dollars but truly insignificant when you use final hourly marginal cost as the clearing price as opposed to the previous energy imbalance penalty. And this of course was one of the reasons why parties like WPS weren't as concerned with the change going forward because the energy imbalance

penalty wasn't going to be significant.

Now as we know the Board did not 100 percent accept the energy imbalance ruling, but that was clearly the position of the NBSO, the party who is here before us today, arguing that the re-distribution that did occur was allowed.

The NBSO then goes on to argue that to have the funds flow back to WPS and the NMISA would negate the intent of imposing an energy imbalance penalty in the first place.

With respect, this fundamentally ignores the point that I just discussed, that for funds collected during the relevant period, there was certainly no authority to distribute it in the manner that it was distributed.

Furthermore, WPS and the NMISA was aware of a penalty at the time. There is no doubt that the energy imbalance provisions were in place. There was just no provisions in place to deal with any re-distribution. And they borrowed the payment of the penalty in those instances where it was applicable. Both logic and equity in our respectful submission would suggest that the money should be re-distributed to WPS and NMISA in the manner in which they paid such funds in. To do otherwise provides a significant windfall, primarily to the NB Power group of companies, a windfall that was not authorized.

Furthermore, if NB Power or Genco as the Transmission customer was charged for energy imbalance during the same period -- so we have NB Power, Genco -- and if they are charged for energy imbalance during that period related to other transactions, they would have received a significant return of those energy imbalance dollars in the same way that we are asking for that return due to the fact that they hold the vast majority of the Transmission reservation. So if they paid energy imbalance they get -- you know, we don't know the number but it's -- the vast, the vast majority of it returned back to them because they hold the transmission reservation. In effect they pay very little if any penalty. And in our case Genco was paid both the marginal costs for the energy and subsequently had redistributed to it penalty dollars in relation to the same energy imbalance.

And finally on this point we would like to note that the approach being put forward is completely consistent with the approach advocated by the NBSO and supported by all members of the Market Advisory Committee of which WPS as well as Genco, Disco and Transco is part of. That the energy imbalance provision be revised to remove the penalty on the go forward basis and be based on final hourly marginal costs with essentially the same result.

What is also very important is to understand the relationship between WPS, the NMISA, Genco and Transco. The arrangements between those parties provide that Genco is the transmission customer. However, Genco provides a fully bundled service to the border, although NMISA and WPS are responsible for the energy imbalance charges.

So in this case the transmission customer isn't responsible for the energy imbalance charges. WPS is responsible for the energy imbalance charges, although Genco is the transmission customer holding the reservation.

NB Power and Genco, after the restructuring, have never previously suggested that WPS or the NMISA should hold the relevant transmission reservation, and in fact the current market structure does not allow for unbundled energy supply service to be provided by Genco.

It is WPS and the NMISA's position that it is very important for the Board to note that they paid the requisite transmission charges as part of the bundled service provided to them, but were merely not the transmission customer in question. But they still paid the transmission charges. They just paid it as part of the bundled cost that was being provided to them by Genco. Genco didn't give them free transmission.

So in essence our view is that the position taken by the NBSO and NB Power, or the NB Power group of companies as it now is, is to have this now retroactively approved, a position that essentially discriminates in favour of NB Power as against other parties, as it does not recognize that the imbalance payment is energy related. It's not reservation based and their approach is completely divorced from cost causation.

In a final comment and with -- on the merits portion of it, and with the greatest of respect, it is our position that both the NBSO and NB Power are really grasping at straws here. The NBSO's position is essentially based on two small references in the transcript of the OATT Hearing for an item that was never asked to be approved and was never authorized. And NB Power's position is that it was based on draft Market Rules again, which were never authorized or never approved.

That concludes my comments on essentially the merits of the application as put forward by WPS and the NMISA.

I would like to briefly now just deal with the jurisdictional issue. I have to admit on this part we were taken a bit by surprise that NB Power would suggest that this Board does not have the authority to hear this

complaint.

First off, NB Power takes the position that section 128 of the Electricity Act does not apply. Now we do want to point out that we don't see anywhere in the materials that the NBSO disputes your jurisdiction in this regard. They certainly haven't mentioned that to date. But NB Power is disputing your jurisdiction.

With the greatest of respect, we believe that NB Power is taking an extremely narrow view of section 128 and the provisions of the Electricity Act as a whole.

Furthermore, we would note that we believe there is already existing Board jurisprudence on a similar legislative provision in the Gas Distribution Act, which should be determinative of the matter.

And third, we will talk about the fact that we probably do have rights to access the OATT dispute resolution procedure which essentially has been complied with today and I will deal with that briefly at the end as we did in our written materials.

Section 128 of the Electricity Act provides in part that the Board may on its own motion or on a complaint made by any person, inquire into, hear, and determine any matter where it appears to the Board that, and then the that are three items. And let's focus primarily on

128(b), although we certainly believe 128(a) could also have applicability here. And the section is set out in our materials and the Board certainly has access to the legislation.

(b) says may determine any matter where it appears to the Board that any circumstances may require it in the public interest to make an order or give any direction, leave, or approval that by law it is authorized to make or give or concerning any matter, act or thing that by this part of the Act where a rule, order or direction is prohibited or required to be done.

In this regard it is clear that the Electricity Act governs the approval of any tariff of either the NBSO or any transmitter, including Transco. We just assume no one has any argument with that, that the Act governs the tariffs of the NBSO and Transco. And we refer you to sections 110 and 111 of the Electricity Act.

Furthermore, NB Power Transmission applied for approval of its OATT and its associated revenue requirement as part of the original OATT hearing. Following that, the NBSO applied for approval of its revenue requirement as part of the OATT revision hearing.

And in the OATT revision hearing, the NBSO specifically requested rates for various services provided

under the OATT be modified in order to address certain issues including recovery of the NBSO budget.

And one of the very specific items set out in the OATT revision hearing, which was brought to this Board for its adjudication and determination, was item 4 which specifically sought the Board's authorization to initiate the residual monthly cost recovery mechanism and to put in place schedule 10 of the OATT residual uplift, all dealing with future redistribution of energy imbalance after May 2005.

So in our respectful submission, clearly the treatment of residual monthly cost recovery, which includes energy imbalance dollars, has been subject to approval by this Board and is within the Authority of this Board.

It is certainly within the terms of the Act, approval that by law this Board is allowed to make and has made. And clearly the Board has jurisdiction about issues involving complaints around that.

For NB Power at this time to claim that the Board does not have jurisdiction with respect to complaints related to the exact same issues on which it has sought approval in the past is, in our respectful submission, clearly incorrect.

Finally with respect to section 128 of the Electricity

Act, we referred in our materials to a proceeding involving the Gas Distribution Act from a couple of years ago, a very similar provision, section 71 of the Gas Distribution Act. I won't go in any detail through that. We set out what we believed were the relevant comments and references in our materials except to just read from the Board's decision in that case on the point in question that was essentially again dealing with provisions extremely similar to section 128(b) of the Electricity Act.

And the Board's view dealing with the specific question in that case was that the Board is of the view that the provisions of the Act, the Gas Distribution Act, in that case, requiring it to protect the public interest, would be sufficient to allow the Board to require EGNB to follow certain rules in its role as a seller of gas.

And again, if you look at the build-up to that and references in the case, you will see why that is relevant. The Board clearly looked at the same sort of issue and said that they felt in the public interest, they had the authority to adjudicate on a matter in the same way that we are asking that the Board do so in this case.

Furthermore, and on I guess the final point related to jurisdiction, is that NB Power went on to state that the

OATT provides a dispute resolution mechanism.

Well, in fact we were fully aware of that and as the Board can tell from some of the correspondence with it, there is a dispute resolution mechanism which calls for escalating the matter to the NBSO to see if senior representatives of the NBSO can deal with the matter with the complainant. And if not then the matter either goes to arbitration or the Board and it's at the election of the complainant.

So in fact the parties did do that at the request of the Board, the materials have the response from the NBSO. It was clear the matter was not going to be agreed to or resolved between senior executives and the complainants therefore elected to take the matter to the Board.

So the process of the OATT has actually been followed, I think there was a little bit of confusion in that some of our correspondence indicated that in that we were not transmission customers under the OATT we should probably proceed under the complaint's procedure in the Act rather than the complaint's procedure in the OATT.

What we meant to say is that we were not transmission customers for the relevant reservation, which we are not. But on rereading the OATT, one does not have to be a transmission customer with respect to a specific

reservation. The provisions allow transmission customers who have an issue to make a complaint. It is our submission that in fact WPS and the NMISA are both transmission customers.

I have made reference in the materials to the fact that the NMISA has a service agreement for transmission service between it and NB Power dated February 23rd 2000. And as well there is a products and services agreement which this Board will remember was discussed at the original OATT hearing.

And in that hearing the Board, in its decision at page 3125 of the transcript, found that the Board believes it appropriate that the tariff apply to the rates for the existing services under the agreement.

We believe those provisions and the service agreement which makes the NMISA a transmission customer per se have been grandfathered and continue to exist to this date. We don't know that the NBSO or any other parties dispute that.

So our position is that in any event the NMISA is a transmission customer under the OATT and has followed the appropriate procedure which would bring us to the exact same place as we are today, a complaint before this Board.

Similarly, WPS is in a very similar position. WPS has

provided the appropriate credit support to the NBSO or NB Power Transco to entitle it to be a Transmission customer. It does transact short-term transactions.

It does not have a long-term reservation. But it does transact short-term transactions with the NBSO in Transco. And it is sent bills by the NBSO as a Transmission customer for the services that are provided to it, both short-term transmission and ancillary services.

And again we doubt that the NBSO disputes the fact that we are a Transmission customer for those limited purposes which again makes us a Transmission customer under the OATT.

So for those various reasons we believe there is a host of arguments why this Board has jurisdiction and why the process to date has been the appropriately filed process. And we will leave it at that for the Board's determination and my friend's comments.

The only final comment I would like to make is we had provided some calculations of a figure, somewhat over a million dollars, which we think from our calculations and numerous spreadsheets and CT's that Mr. Belcher has, he believes are appropriate. There were questions raised in the submissions of my friends as to, you know, how do we figure out if these numbers are correct? We have in our

reply submission set out the methodology that we followed in calculating these numbers.

The numbers we are using are the numbers that we have from NB Power and the NBSO. So we believe they are consistent. However, if there is any issues on the calculation after the Board has ruled on the merits of the complaint, it would be our view that the parties should get together to try and resolve them amongst themselves, to look at the numbers to see if the numbers are as Mr. Belcher indicates, and only to bring that matter back to the Board if the parties couldn't resolve it amongst themselves. And with the help maybe of Board staff if necessary before having you all go through 8,760 hours of data for the past three years. I know some of you might enjoy it. I don't know that you all would. I know that I won't. I won't be involved in that part of it unless it comes back before you which I hope it doesn't have to.

And that concludes my comments. Certainly we are available for questions. Some of the items are somewhat technical in nature. Mr. Belcher and Mr. Howard did put forward the initial submission as evidence. So it is their evidence in this proceeding.

And if the Commissioners do have any questions, Mr. Belcher and Mr. Howard are here. And I'm here. And one

of the three of us would be pleased to answer those questions if you have them.

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

MR. ROHERTY: NBSO agrees with my friend's submission in respect to the calculation of the numbers. If it becomes necessary that that can be deferred. I suggest that hopefully we won't get to that.

My submission will be brief. And I -- NBSO obviously stands by the submission it made in response to the complaint. And I commend that document to you.

I do want to touch on a couple of things that were raised in the complaint and have been touched upon again here this morning.

The notion that there is no approved authority to distribute the funds seems to be at the heart of the issue. And that suggests that there has been a void that has existed since September the 30th 2003 up to May the 1st 2005. And that if in fact there had been no tariff revision submission made, that void would still be there.

And with respect, the NBSO submits that the facts and the record just don't support that. It suggests that not dealing with this matter in the Board's decision means that that point was missed I guess at the original hearing by everybody including the Board. And the facts and the

record simply don't bear that out.

Everyone including WPS and Northern Maine ISA knew that there was a penalty aspect to the energy imbalance charges. Specific questions were asked about that. And on cross-examination specific questions were asked. So both in the IR process and under cross-examination the question of what will happen to these funds was addressed.

In their submission the applicant suggests I guess at the bottom of page 2 that it couldn't be anticipated -- all the issues couldn't be anticipated at a large and comprehensive hearing.

Again with respect the NBSO submits that this question was anticipated. There was an IR on it. There was a cross-examination on that very point. And it was addressed.

And even if it wasn't, you can't come back 18 months later when -- after funds have been distributed in accordance with what the NBSO, or at that time NB Power witnesses indicated would happen to those funds, and come back 18 months later and say well, we really didn't understand how it was going to work that way. It seems totally inappropriate. And goes against any concept of regulatory certainty.

So the principal points I would like to make this

morning is that this particular issue was addressed at the hearing. And we have been over that several times. And no one is disputing that NB Power, and later the NBSO didn't do what it said it was going to do.

This isn't a matter of saying that you are on the record as saying you are going to distribute funds in one way and you turned around and did it in another way. That isn't the case here.

The submission of the NBSO is that NB Power Transco and the NBSO said what it was going to do with these excess funds and did exactly what it said it was going to do.

And this goes to one of the points made by my friend in his submission at page 8 about encouraging a New Brunswick Energy market, and that regulatory certainty is an important part of that. That is a point that all parties can agree with. And we are all interested in encouraging the growth and expansion in the New Brunswick electricity market.

One of the key elements of that would be some element of regulatory certainty. And it does little to encourage the growth of that market if some 18 months after the initial tariff hearing and 18 months after monies have been distributed in accordance with what was stated at the

Board hearing, done exactly in that manner, 18 months later to come back and say, let's change the rules and go back and recollect that money and then redistribute it. It does very little to encourage anyone to enter a market.

If there is an issue then certainly it can come to the Board and should be dealt with on a go-forward basis. But to go back 18 months and redistribute funds does little to encourage a market.

It is the submission of the applicants that these excess funds should be distributed back to the people who essentially paid them in. And again in our submission we say that makes little sense. It defeats the purpose of the penalty aspect which again everybody well understood was part of the tariff at that time.

There were penalties. Everyone knew that. So now again 18 months later to come back and say well, give that money back to the people who caused the energy imbalance really makes little sense.

And there is no relationship, and we made that point in our submission, between how the money is collected and who the money is collected from and how it should be distributed. There is no link there nor should there be.

The concept throughout here is that excess funds should be returned to the people who pay the freight for

Transmission. That is the concept followed in the answer to the Interrogatory given, in the answer to the question on cross-examination given by the witnesses at the time.

That concept prevails. Excess funds will be redistributed to the people, the Transmission customers, the people paying the freight for Transmission. That concept continues in respect to the current situation of residual monthly costs and how those are distributed.

There is no -- there is no process there, if we go back and say well, who put the money in or how did the money get in there? It simply comes in into a fund and gets redistributed to the people who pay the freight. And those are the people who have Transmission reservations.

And so, Mr. Chairman and members of the Board, I do want to leave you with those two or three brief thoughts. The issue was discussed at the earlier tariff hearing, NB Power Transmission.

And after that New Brunswick System Operator did precisely what it said it was going to do, it returned the funds to the people, to the participants, the people who paid the freight for Transmission. That is the concept that pertains throughout. And we suggest it is the appropriate concept.

And again the matter of regulatory certainty and the

matter of encouraging electricity market in New Brunswick is not served well by going back 18 months after the fact and asking people to give back the money that was distributed in good faith and in accordance with the tariff.

Subject to any questions the Board has of myself or Mr. Porter or Mr. Marshall, that is the submission of the New Brunswick System Operator.

CHAIRMAN: Thank you, Mr. Roherty. Mr. Morrison?

MR. MORRISON: Mr. Chairman, I will deal with the merits first, and the jurisdictional issue second, and I will also go on the record as endorsing Mr. MacDougall's proposal with respect to the calculations, that is best worked out among the parties, and if there is a failure to agree, then we can come back before the Board and deal with it at that point.

To understand this issue I think it's important to understand a little bit of history. In 1998 NB Power implemented an out and through tariff, and that was in place until the Board approved the open access transmission tariff which I will just refer to as the tariff.

During that time NB Power of course was an integrated utility. Energy imbalance funds that were collected were

simply retained by the integrated utility and went to the bottom line.

On October 1st 2003, the transmission tariff was approved by this Board and came into force on that date. From October 1st 2003, until September 30th 2004, NB Power collected energy imbalance charges that were authorized by the tariff and they were placed in an account. On October 1st 2004, NB Power was restructured and the system operator came into existence.

As pointed out by Mr. MacDougall in his submission, the system operator is a non-profit organization. And funds that were accumulated in the account by NB Power could not just be handed over to the SO. So the question is what do you do with the money.

As an integrated utility NB Power was perfectly entitled to retain the energy imbalance charges. And that's authorized or at least it's in compliance with the FERC pro forma transmission tariff. And that was the practice that it had been doing.

However, after the tariff was put in place and approved by the Board, NB Power was looking to -- basically to the future, and decided that those funds would be paid out to transmission customers on a pro rata basis based on their usage of the transmission system.

And that is exactly what Mr. Porter said would happen during the OATT hearing.

So on September 30th 2004, the funds were distributed to transmission customers just the way that Mr. Porter said they would be.

Now WPS and Northern Maine System Administrator say that NB Power had no authority to distribute the imbalance funds to transmission customers. They say that the funds should have been distributed to the parties that paid the imbalance charges. So I am going to deal with that issue first.

It is correct that the transmission tariff approved by this Board did not specifically address the disbursement of energy imbalance funds. I agree with that. And there is a reason for that. Many of the parties will recall and some of the Commissioners will recall that NB Power was putting forward a FERC compliant pro forma transmission tariff. Distribution provisions are not part of the pro forma and NB Power was attempting to stay as close to the pro forma FERC document as possible.

It is also correct that the Market Rules dealing with the distribution of energy imbalance funds were deferred. So they weren't in place. I will agree with Mr. MacDougall on both those points. But there were draft

Market Rules. And these draft Market Rules set out what I would consider a direction as to how these energy imbalance funds would be dealt with. These were vetted by the Market Advisory Committee and it is my understanding that WPS was a member of that committee.

So what do you do with the money? Several options. Two options really. NB Power could have kept the funds, as was the practice. They could distribute the funds to the transmission customers on a pro rata basis as it said it would do in the OATT and which is in general accordance with the directions found in the draft Market Rules. Those are the options which were available to it.

WPS is suggesting another option. And there could have been many other options for the distribution of those funds. WPS is saying that the funds should be paid by those who caused the energy imbalance. We contend that this option flies in the face of the principles underpinning the open access transmission tariff, and if you use WPS' logic that there was some void of authority, that option was no more authorized than by their logic the option that NB Power chose to pursue.

So given those options NB Power I suggest chose the one that was consistent with the philosophy of the transmission tariff and was consistent with the directions

that were set out in the draft market rules. More importantly, it was consistent with what Mr. Porter said NB Power would do during the open access transmission hearing. And as pointed out, both WPS and Northern Maine were Intervenors at that hearing.

I am going to look at the option that WPS is putting forward. In their submission they say that using the transmission billing determinants is not the proper method to pay back energy imbalance costs. If I understand their submission, they are saying that using transmission billing determinants is not the proper method to pay back energy imbalance costs because they are market related costs rather than transmission costs.

To understand this you have to understand how the transmission reservation system works. The transmission customer, or the reserver, reserves the transmission from the transmission provider. That party may or may -- the transmission customer -- may or may not also be scheduling energy. Now I will agree that it is the party who schedules the energy who ultimately causes the imbalances. But it is the transmission customer who is responsible to the transmission provider. The transmission provider must be able to look to the transmission customer for responsibility. It is a contract between the transmission

provider, in this case the SO, previously NB Power, and the transmission customer.

Now the transmission customer may have its own arrangements with third parties and these third parties may ultimately be the cause of energy imbalance. But they are strangers to the contract between the transmission provider and the transmission customer. They are strangers to that contract. Now the open access transmission tariff, as any other non-discriminatory tariff, is based on the principle that the interface is between the transmission provider and the transmission customer. WPS is asking this Board to ignore this fundamental principle and reach behind that relationship. Reach behind the transmission customer and pay the funds to third parties. I would suggest this is completely inconsistent with the regulatory scheme that underpins the open access transmission tariff.

Dealing with the billing determinants issue. That was raised and dealt with in the OATT revision hearing in the spring. And this Board has determined that the transmission billing determinants is the proper method -- proper basis for redistribution.

Now although it isn't clear, it's my understanding that WPS does not explicitly state that it should not have

paid what is an essential penalty rate for energy imbalances, only that this Board should retroactively give those penalty charges back.

Now on the other hand if I understand WPS' argument, it argues that the Board's decision in the spring which basically approved the methodology should not apply retroactively. I suggest that there is a logical inconsistency there, Mr. Chairman.

Now I would like to focus for a moment on the penalty aspect of the energy imbalance charges. Clearly that was something that was clearly before the Board in the OATT hearing, and the Board came down in its decision and endorsed in my submission the notion that energy imbalance charges should influence behaviour. And the way you influence behaviour is to apply a penalty -- what is in effect a penalty mechanism. That's what the Board said.

If you return those penalty charges, in effect WPS would only be paying the marginal cost of the energy imbalance. It would in my submission fly in the face of what was approved by the Board during the OATT.

And I think it's fair to say, and I'm sure Mr. MacDougall will correct me if I am wrong, that WPS and Northern Maine oppose the concept that energy imbalance should be charged on a penalty basis. However, as I just

mentioned, the Board approved that policy direction, if you will. And to do otherwise I would submit is inconsistent with the OATT decision.

It is also a case I suggest of the applicant attempting to get through the back door what it didn't get through the front door. In other words, if this redistribution mechanism is adopted, in effect the penalty aspect of the energy imbalance charges that was approved during the OATT will be eliminated.

I just have a couple -- one more point to make before I speak briefly to jurisdiction.

I think it's important for the Board to realize the financial impact that its decision will have on those transmission customers who are the recipients of the energy imbalance redistribution. It has been quite some time. Those funds were accepted by the transmission customers in good faith. They relied upon them in making their financial plans and their normal business commitments. I would suggest that the return of those funds several years after the fact would have a serious financial impact. And I don't think we should be naive enough to think that if there is a financial impact on for example Disco, that that will not translate into a financial impact on the ratepayers of New Brunswick.

I have one specific reference to make and that's in respect to the submission -- rebuttal submission that was filed by Mr. MacDougall on behalf of his clients. And it's at page 5. It is in the second paragraph. I will just give you a moment to find that. In that paragraph there is a statement, an alleged statement of fact. It says "In fact the current market structure does not allow for unbundled energy supply service to be provided by Genco."

Mr. Chairman and Commissioners, we take exception to that statement. We simply believe that that is not correct. If WPS met the requirements of the SO, credit requirements and so on, to be a Transmission customer under the OAT, they had the option to request and take Transmission service, using the OASIS system as anybody else.

Their contract with Genco, they would pay the Transmission. There would be -- if there was an energy charge component that would be a separate charge in the Genco contract. The contractual delivery point would then be at the generator. So it is our submission that there is nothing in the OATT that prevents WPS from taking unbundled service.

I would like to speak very briefly about the

jurisdictional issue, Mr. Chairman. And I would like to be clear that I do not disagree with Mr. MacDougall's proposition that the Board has jurisdiction over tariff matters and in particular -- and which would include the energy imbalance issue.

Where I take issue with it is does it have jurisdiction under section 128? I say it has jurisdiction under the complaint procedure set out in the OAT. Section 128, as I set out in my submission, does not address -- none of the three criteria that are set out in section 128 are met by the facts of this case.

In his rebuttal submission Mr. MacDougall referred to the EGNB case which has, as I will concede, almost identical language. And the Board assumed jurisdiction. And that was a case dealing with whether Enbridge should be subject to a code of conduct.

If you look at the decision, the Board assumed jurisdiction primarily on the basis that it was in the public interest to do so.

And the question that I have is where is the public interest issue in this case? I agree that there are private economic interests at stake. But I don't see a public interest issue.

So in that regard I would say that section 128(b)does

not apply. And for the reasons set out in my written submission, I don't believe 128(a) or (c) apply either. Those are all my submissions, Mr. Chairman. Thank you.

CHAIRMAN: Thank you, Mr. Morrison. Would you like to reply, Mr. MacDougall?

MR. MACDOUGALL: I would, Mr. Chair, if you can. I shouldn't be too long. And there may be one point which I will leave till the end. But I may ask either Mr. Howard or Mr. Belcher to enliven upon. I think I will be able to respond. But I may call on their assistance.

The first issue I would like to deal with is just quickly on the jurisdictional point raised by Mr. Morrison at the end. And he states that there is no public interest. The public interest here is getting the market correct. We are trying to open a market.

WPS is one of the very, very few players in a market that is opening exceedingly slowly, if at all. It is one of the only marketers in this marketplace. The relation -- WPS and NMISA are two of the very few players in the marketplace.

The idea is to try and create a situation where people understand that there is a market and that there will be proper rules that are followed in the market, that people

won't be doing things by adhering to policies of the incumbent utility that were never approved by the Board.

So I would say that there is fundamental issues here of authorization and authority where NB Power and the SO appear to be acting without that authority. We believe it is very important that the market understand clearly on that that is not going to be allowed and that that is not going to happen.

So we would say that there is very serious issues of public interest. We are not here only because of the money. These are very important issues for this market.

Number two, as Mr. Morrison says, he believes this should be under the OATT. As I said, we have followed procedures under the OATT. And for the reasons set out we are here before you, exactly where we would be following the OATT. Because both end up with a complaint to the Board.

And that is what the OATT does. It allows the Transmission customer, who I have explained to you why in the circumstances we are, for the purpose of dispute resolution mechanism a Transmission customer.

Just briefly I would like to go through a couple of points raised on the merit issues both by Mr. Roherty and by Mr. Morrison.

I should start by saying that Mr. Howard is a Canadian. He works on the U.S. side but lives in Canada. And that's why I think last night his cell phone had the Hockey Night In Canada theme on it. And we spent most of the night even talking with Mr. Belcher about -- I believe it is -- is it the Bear Cats, the Maine team?

MR. BELCHER: The Black Bears.

MR. MACDOUGALL: The Black Bears, the Maine hockey team. So people in Maine are just like Canadians, almost as Canadians are themselves, particularly northern Maine.

So just in response to Mr. Roherty, he made some comments about the return of the RMC to the parties who paid the freight for the transmission. We pay the freight for the transmission, as I explained in an earlier submission. We do not get a free ride on the transmission.

With respect to the issue of the references made in the transcript from the OATT here in the IR response, I just leave this to the Board, to go back and see if anywhere in those references there was any comment made that funds would be returned based on transmission reservations.

You will not find references to the return of anything based on transmission reservations. And again you can

look at those two comments in the context of that overall hearing. And I commend you to do that.

On the issue of 18 months later -- but there was nothing approved 18 months ago. We only fully understood the ramifications of this at the OATT Revision Hearing, when I believe it was Mr. Marshall made some further comments on the stand about the issues.

Mr. Belcher then raised some issues about them. And then WPS and Mr. Belcher discussed the issue to realize what had occurred. Energy imbalance charges were to be collected. But there was no redistribution mechanism in this manner that had been approved.

So we didn't wait. We haven't been sitting around to wait, or in Mr. Morrison's words, to come back and take a second kick at anything. When we understood what had occurred here, we acted quickly.

And what is important to understand here is we are not asking for anything different than what is the actual situation with the incumbent utility Genco and Disco. Because they hold almost all the transmission reservations they get all the penalty dollars back that they incur.

But not only do they get those back. They get ours as well. That is fundamentally discriminatory any way you look at it. They are getting all their penalty dollars

back. They are getting all their marginal costs. They are getting all our penalty dollars.

Yet both the SO and Genco say why should we get the penalty dollars back? Well, because they were caused in that manner. And to be nondiscriminatory and to show market participants that you are treating people fairly is the correct thing to do. And it is the proper regulatory practice.

On the issue of regulatory certainty, that is a huge issue, as I stated with respect to the section 128 issue. This market has to understand that it is being encouraged, that parties other than NB Power are being encouraged.

We won't have a market if we just keep the incumbent utility. And if we have rules that allow the incumbent utility to enforce unapproved policies, we won't have a market. We certainly won't have one in a hurry.

To speak just briefly on Mr. Morrison's comments, he notes that with respect to the draft rules, these were vetted by the MAC. WPS does sit on the MAC.

My understanding from WPS is though the Market Rules were essentially promulgated and put in force by the Minister. There was a few discussions about some of the Market Rules at the MAC.

Certainly no one signed off on the draft Market Rules.

That is all they are. I don't know how many drafts there were. I know the SO or NB Power has put forward this draft as meaning something. But it was a draft. Certainly we couldn't have signed off on a draft.

Again Mr. Morrison talked about looking at the transmission customer. Well, for all intents and purposes, as I have explained earlier, we are the transmission customer. But I will get to the issue briefly that he raised with respect to point 5 of our submission which ties into that and which actually is quite important I think for the Board to understand.

We don't believe there is any logical inconsistency vis-a-vis the return of the penalty dollars either. Because as we noted, the move has been in that direction. And in fact it is not just WPS and the NMISA who have asked that the energy imbalance penalty be removed. It is Genco.

The exact clients that Mr. Morrison represents have vigorously been fighting to have the energy imbalance penalty removed, both through the MAC and then through submissions to this Board. We are not alone. The market as a whole believes that is the correct thing to be doing.

And we took it from the Board's decision where it moved from the penalty mechanism to the greater of Keswick

node pricing or final hourly marginal cost that the Board itself is moving in that direction, albeit maybe a little slower than some of the market participants would have liked.

And we also understand that the Board may be even open to reconsidering that. So we don't see any inconsistency with our position and that position of the market players. Nor do we see an inconsistency with the Board. And I think parties are continuing to be before the Board to develop a structure that can lead to a better market, not a better NB Power.

Two final points, one on the financial impact. As Mr. Belcher indicated on behalf of the NMISA in the materials, in large electricity markets resettlements occur all the time. We can show the Board, as I'm sure -- reams of bills that show all sorts of amounts that get resettled.

There is monthly resettlements all the time on billing procedures like that. The NMISA in fact resettles and makes WPS, who is ultimately responsible, pay the energy imbalance charges for the amount that it gets from NB Genco or from the NBSO.

We don't believe the financial impact here is something that would cause any problems for the market. We believe that the dollars can be returned. They weren't

distributed in an authorized manner. And we believe that that was something that was done inappropriate. We think the much more egregious issue is for the market to think that those sort of things can happen and that you can have no recourse.

Now finally on the issue on page 5 -- and I think it is useful for the Board and all parties to look at it. This was the statement that we made. "In fact the current market structure does not allow for unbundled energy supply service to be provided by Genco."

Well, what Mr. Morrison said was there is nothing in the OATT that prevents this from occurring. We totally agree with that. We didn't say that. We said the current market structure does not allow it. And that I think the Board has to really, really understand.

What is happening here is Genco will not allow WPS to schedule their generation. In New Brunswick there is no system supply. So WPS can't go and get a reservation and say to the SO, we want to take from NB Power system supply. They have to be able to match the schedule that is set by Genco.

So if WPS goes and gets a transmission reservation, then they go to the SO to schedule it, okay, the SO won't let them. Because Genco won't give them access to their

schedule. That is a very important thing for this Board to understand.

This market does not allow for unbundled energy supply service to be provided by Genco to Northern Maine. It does not. Because Genco won't provide the schedule, the SO won't accept from us because we don't have the schedule, we can't schedule their generators. And their generators are generation facility specific. So that is my understanding of that comment.

So Mr. Chair and Commissioners, that is the end of our submissions. And we certainly are able to take questions if you feel that is appropriate.

CHAIRMAN: Thank you. Mr. MacNutt?

MR. MACNUTT: I have no submission, Mr. Chairman.

CHAIRMAN: I think we will take a ten minute recess. We will see you back in ten minutes.

(Recess 11:10 a.m. - 11:25 a.m.)

CHAIRMAN: Board counsel, Mr. MacNutt, has said that there has been some who would like to address some remarks to Mr. MacDougall's comments about unbundled service for Northern Maine. Mr. Roherty, please.

MR. ROHERTY: Thank you, Mr. Chairman. Very briefly, just on the last point concerning the statement on page 5 of the applicant's rebuttal submission. We don't want the

Board left with the impression that it is the market structure that is the issue. It's not a matter of market structure. It's a matter of the relationship that exists or doesn't exist between the market participants. So there is no rule anywhere that says that this can't happen. It's not a matter of market structure. That's the point we wanted to clarify to the Board.

CHAIRMAN: Mr. Morrison, have you anything else?

MR. MORRISON: I believe also, Mr. Chairman, there was a statement made that the SO won't let -- sorry -- that Genco will not allow WPS to access their schedule. There seems to be some dispute among the parties as to the accuracy of that statement. I think -- and I will ask Mr. MacDougall to concur -- that we all agree that it's not germane to the period in question. So it has no relevance to the period that we are talking about for purposes of this hearing.

CHAIRMAN: Mr. MacDougall?

MR. MACDOUGALL: Yes, Mr. Chair. I concur with both of my colleagues. The term market structure was meant not in the sense of the actual Market Rules or OATT but the relationship between the market participants and what was actually occurring in the market. We concur with that comment and we don't want to leave any misapprehension in

that regard. But there does still appear to be a dispute between NB Power and WPS as to what access they can or cannot have specific generation facility schedules. But again that point was meant just to show that there was ongoing issues in the market and it's not germane to the decision before you today nor do you have to take it into account in any other way than the general comments that were made.

CHAIRMAN: Thank you. And to NB Generation versus NB Power.

MR. MACDOUGALL: Currently it's NB Generation. We don't I guess on our side make the distinction as often, but it is NB Genco that we are talking about.

MS. FERGUSON SONIER: I have a question for Mr. MacDougall. For the period October 1st 2004, to April 30th 2005, please explain how sections 7.9.5 could have any effect since section 7.8.2 was deferred during this period of time?

MR. MACDOUGALL: Certainly, Madam Chair, and maybe if I can pull out the actual sections I could have them in front of me. But I believe before I even get them in front of me that the short answer is it couldn't, and that is the whole point. I believe 7.9.5 indicates that residual uplift is zero. I think if we look at the Market Rules we have to understand that 7.8.2 was deferred and 7.9.5 had

two parts, interim and deferred. So the deferred portion of 7.9.5 is related to the deferred portion of 7.8.2. So once May 1, '05, came 702 -- 782 and 795 came into place and would work together going forward. Prior to that time there was no need for the 782 because the interim 7.9.5 the residual uplift was zero. So there was no amount to be redistributed. And that's the whole point, residual uplift. There is no residual uplift. Yet residual uplift which includes some of the RMC dollars which refer back to 7.8.1 K are the dollars that were redistributed. In our view that wasn't allowed and in fact there was no residual uplift. And there was no schedule net.

So 7.8.2 only comes into play once deferred 7.9.5 comes into play. Prior to that we don't have any mechanism. That's exactly our point.

MS. FERGUSON SONIER: Thank you.

MR. SOLLOWS: Just a few questions to clarify the record and just to clarify my own notes. I just want to be sure that we have the references correct, and if this is repetitive I apologize but just for clarity. We aren't -- are we or are we not able to point to specific provisions in the OATT that would authorize the distribution of the net? You just said no.

MR. MACDOUGALL: We cannot until May 1, '05, at which time

schedule 10 was added to the OATT. Schedule 10 is residual uplift. The third paragraph of schedule 10 then allows this to occur. But it does not prior to May 1, '05 because schedule 10 didn't exist and the Market Rules that existed dealing with it were deferred and were not in place.

MR. SOLLOWS: And for the same period -- and I will address this to -- I will give everyone a chance to respond. For the same period, this would be October 1st 2004, April 30th 2005, seems to be the critical dates here, is there any specific prohibition on distribution of funds by the System Operator?

MR. MACDOUGALL: Well there is a Market Rule that says residual uplift is zero. So you could distribute zero. But absent that there is no -- there is no specific prohibition that says in there these dollars can't be redistributed to someone else. There is however during that time period the fact that the NBSO is a non-profit who is in place, but there is nothing that authorized them to redistribute these dollars in the manner in which they were distributed.

MR. SOLLOWS: Okay. So I would direct this question to Mr. Roherty. Was there -- and if there was, would you describe any specific approval process that your Board of

Directors might have made to authorize the distribution?

MR. ROHERTY: There is no specific resolution of the Board of Directors. It's simply a matter of the New Brunswick System Operator under the direction of the president administering the tariff.

MR. SOLLOWS: And the disbursements were not made in one lump sum of a million dollars which definitely would have come before your Board of Directors. It was a monthly disbursement within the normal operating practice?

MR. ROHERTY: Prior to our existence I believe it went out as a lump sum, but subsequent to our existence it went out monthly.

MR. SOLLOWS: From October 1st on.

MR. ROHERTY: Right.

MR. SOLLOWS: Now I would just like to go to my notes. And I have noted here I think, Mr. MacDougall, you summarized something as Genco providing a fully bundled service to the border.

MR. MACDOUGALL: Yes.

MR. SOLLOWS: Is fully bundled a defined term anywhere?

MR. MACDOUGALL: No, Mr. Sollows. It's using the vernacular so --

MR. SOLLOWS: So it may or may not include energy imbalance.

MR. MACDOUGALL: I can tell you it doesn't included energy

imbalance, because WPS is responsible for energy imbalance. I should have made that clear. The bundled service it was providing is transmission and energy. It's not providing -- it's not providing distribution costs because it's not -- it's a transmission. But it does not provide ancillary service. WPS is responsible separately for ancillary services which includes energy imbalance. I apologize if that was not clear.

MR. SOLLOWS: This issue of jurisdiction, Mr. MacDougall said we would get to the same place no matter which way we arrive here, whether through the Market Rule appeal procedure or through section 128. Mr. Morrison, I think you indicated that you have no problem with jurisdiction under the Market Rule appeal procedure but you do have a problem with respect to jurisdiction under 128. Do we have -- are there any differences in the Board's -- or the remedies that may be available to the Board depending upon which section authorizes our action?

MR. MORRISON: I don't believe there is, Commissioner. However -- and perhaps I should have addressed the point when I was speaking. However, there is the question of whether WPS and Northern Maine can even access -- which is set out in my written submission -- access the dispute resolution provisions of the OATT. I was rather surprised

when Mr. MacDougall said that, whoops, we really are a transmission customer for purposes of the dispute resolution procedure when in his submission he says they aren't.

If I understand his position in that I would certainly give him the opportunity to respond, they are saying that WPS and/or Northern Maine is a transmission customer because of the PSA which is referred to in their submission. It's my understanding that they do not take transmission service under that PSA. But again I will allow Mr. MacDougall to respond to that.

MR. MACDOUGALL: Yes, Commissioner Sollows, if I could. There is also a services agreement and a PSA which we understand were grandfathered and that the Northern Maine ISA is considered a transmission customer by the SO. Possibly they can confirm that. But clearly -- and I have here copies of them if they are useful -- there are bills sent by the NBSO to WPS as a transmission customer for short-term reservations and ancillary services. And there is a credit support document as well.

I don't think we have to get into the debate. I'm sure the NBSO will acknowledge we are a transmission customer. If they don't then I will put the documents in the record. But on your issue of the Board's remedies, I

think at the same time once the complaint is before you, you have your general authority under both their -- my recollection is that there is no specific provisions in the OATT that state these are the remedies available because the complaints could always be very different.

MR. MORRISON: I concur with that. I agree with that position in terms of the remedies.

MR. SOLLOWS: Mr. Roherty, did you have -- were you able to confirm what Mr. MacDougall just said?

MR. ROHERTY: WPS is a transmission customer for other purposes but not in respect to these particular transactions.

MR. SOLLOWS: I see.

MR. MACDOUGALL: But the OATT doesn't call that you have to be specific to the reservation. It just says a transmission customer. And I certainly apologize for the inadvertence in the way it was phrased, and in my submission we have now stated that we do no believe that it's the actual position.

MR. SOLLOWS: Now I'm going to move on to sort of a What If. If we were to decide that in favour of WPS and direct the return of the monies to the SO, my sense of the room is that there still the ultimate remedy would still not -- it doesn't sound like there would be much solace for your

client, because I don't seem to sense from the SO that they would be then having had those monies returned to them would redistribute them to you.

MR. MACDOUGALL: And I could go on to indicate what our position is on that.

MR. SOLLOWS: Would you.

MR. MACDOUGALL: Certainly. We are asking that the Board do two things. The first one the hypothetical put forward, we encourage you to stay with that hypothetical as long as may be necessary, and if we do stay with and get to that point clearly our submission is not only that the monies were not properly authorized to be returned but that they should be returned to WPS, or to the NMISA who will redistribute them to WPS, as stated in our testimony. And that to do anything else would be clearly discriminatory in these circumstances, because in the current market as we see it, to distribute them to the holders of the transmission reservations, when there was an energy imbalance penalty that is -- you have to understand these dollars are quite significant -- would then be giving it back to NB Power, be it Genco or Disco, who hold the vast majority of these reservations. So when they have energy imbalance they get it all back.

So we would be in no different position. And all the

market participants have agreed that going forward they would like to see final hourly marginal costs. Now the Board has indicated it would be greater of Keswick node, or FHMC. But the Board should be alive to the fact that for the months prior to May 1, '05, the RMC was very big. In some months a million dollars, in some months a million and a half. Almost all of it made up of energy imbalance dollars. It's now very small. So to put us on the same footing as everyone else and to ensure that there isn't discrimination against the parties we would get no windfall. We would get the monies back. Just the same way that Genco and Disco would get almost all the monies back. And then they wouldn't get a windfall. To do anything else -- to give it to anyone else is clearly a windfall. To give it back to us is a nondiscriminatory approach. If follows cost causation. It indicates -- or it's consistent with the fact that ancillary services are market and energy orientated, not based on transmission reservations. As we put in our submission, following -- having generation and load following each other in the schedule isn't dependent in any way on transmission reservations. So because we would be put in the same position that NB Power Genco is we think it's the

absolutely appropriate thing to do and anything else would create a windfall for someone, and discrimination against us. We did pay the penalties in good faith at the time. It's only once we found out what happened to them that we realized, hey, there is something amiss here. Thank you.

CHAIRMAN: I guess I would like to thank everybody.

MR. MACNUTT: Mr. Chairman, the various questions were put to various participants. You may wish to ask for comments from the other participants other than those who answered the question put by the Board.

CHAIRMAN: Mr. Roherty?

MR. ROHERTY: Thank you, Mr. Chair. A couple of points. There is -- an earlier point was made about deferrals and their impact. There is no need -- there was no need for a deferral in respect to the distribution of these funds, the penalty portion of the energy imbalance. That was in place under the Tariff. And the notion that it couldn't be dealt with until this deferred rule come into account or into effect just doesn't hold.

And if there is any kind of a conflict, then the Tariff has precedence over the Market Rules. So this was in place and there was -- the deferral aspect of it really doesn't pertain.

And the last point about the -- that my friend made

concerning redistribution of these funds back to the people who caused the problem to start with, I guess the energy imbalance follows cost causation, we disagree with that statement. That's not a matter of cost causation. That regime or that scheme is in there to encourage good behaviour or discourage bad behaviour. And again I go back to the fundamental point I made earlier that the same logic applies throughout here that these excess funds that are with the NBSO or the transmission provider should be returned to the people who pay the freight for the transmission service. And those are the people with the transmission reservations. And that's again the same point I made earlier.

MR. SOLLOWS: On that line then, sort of following up on Mr. MacDougall's point, if this is intended to be a penalty, and the redistribution or the now -- the determinants for the distribution of funds are in fact returning them largely to the people who paid the penalty, how is it a penalty?

MR. ROHERTY: It wouldn't be.

MR. SOLLOWS: So the point being here that the large amount of money that has been transferred back to the NB Power group of companies did they not pay penalties? Did they not pay any of these such penalties?

MR. ROHERTY: Of course, they did.

MR. SOLLOWS: I mean, I understand your point that it is being redistributed based on the billing determinants for transmission service, but I think sort of the overriding issue here is whether that is fair and equitable in the circumstances as I am hearing this. And I just want you to address that point. And maybe this is the wrong forum. Maybe this is something that goes back to the Market Design Committee or Market Advisory Committee.

MR. ROHERTY: Well, nobody earned these surplus funds.

MR. SOLLOWS: They are like a tax or a penalty or a windfall?

MR. ROHERTY: Windfall. Call it what you will. It's excess funds that come into the transmission provider, the System Operator.

MR. SOLLOWS: Right.

MR. ROHERTY: And so again the way to redistribute those funds is among the market participants. They are the people with transmission reservations. And those are the only people that the System Operator should be dealing with. Those are the people who put the transmission -- and we can't go behind that relationship and say well, who really paid the penalty. That's a matter for other parties to sort out among themselves.

Our notion is to redistribute excess funds to the people. Again, I hate using the phrase, pay the freight, who booked the transmission and paid -- pay the tolls.

MR. MORRISON: Commissioner, on that point, when we talk about cost causation and equity, first of all, this mixing apples and oranges to use cost causation with respect to these energy imbalance payments, because they are not based -- they were never intended to be based on cost causation. If that was the case, the OATT instead of having a penalty charge -- and this was debated at the OATT -- it would have been on the marginal cost of the energy. So I think that's --

MR. SOLLOWS: I recall.

MR. MORRISON: -- I think that's a red herring. On the equitable side of it, in this circumstance, if you take WPS, for example, the transmission customer is Genco. Genco and WPS have a contractual relationship. How that flows is a matter of contract between those parties, the SO should not go behind that contract. It's open to WPS to negotiate with Genco, or whomever their transmission customer is for the redistribution of those penalties. They can do that. But it shouldn't be -- it puts the transmission provider in an impossible position in my submission to go beyond and start delving into strangers

to the contract.

MR. SOLLOWS: Okay.

MR. MACDOUGALL: Commissioner Sollows, if I could just comment on that one last point. That is just --

MR. SOLLOWS: I think your client has something to say as well.

MR. BELCHER: Almost all the parties in this room are well aware of the Northern Maine Market Rules and how they work. In fact they helped develop them. The SO has two Board members. They are fully well aware that our market is based on the imbalance charges that come from either the SO or Genco. And to say that they are not parties to that contract or not aware of it is not true. They are well aware of it. Thank you.

MR. MACDOUGALL: And, Mr. Sollows, that was the point I wanted to make with the follow-up that these contracts have nothing to do with the redistribution of these dollars. These dollars were redistributed by the SO to parties without authority.

All we are saying is to put all the parties on an equal footing and to ensure that no one is being discriminated against, if they are returned to WPS, it's the same situation that Genco is facing because they are getting them all returned to them and this distinction

that they are the transmission customer really doesn't hold water. I mean, they are all coming to them, plus all the windfall dollars. That's the case.

So if this Board wants to do -- wants to create a level playing field in which there isn't discrimination and there isn't excess funds all flowing to one party in the marketplace, the appropriate thing is to return them to WPS and the NMISA, in the same way that that's occurring with respect to the other.

MR. SOLLOWS: Wouldn't an alternative to that be -- have -- direct them to go to some party that was not part -- did not participate in the actual generation of those imbalance charges, the way a court might?

MR. MACDOUGALL: No, but -- I actually in this case though don't think there is any other party who you could that to without then creating a discriminatory situation. So Genco is still getting theirs back in virtual totality. And then you are saying we have got this other money, we are just going to give it to someone else. I really think that that's a stretch to suggest that --

MR. SOLLOWS: I know it happens in terms of environmental awards often the courts will simply take a fine and direct it that it be paid to some organization that's at arm's length and will see that the money goes to -- in this case

it would be to develop or promote the market or something. But independent of the people. Your point seems to be that this money is flowing back to people, back and forth, you know, the penalty is just flowing around in a circle here except where you are not in the loop. And if that's the broader point, maybe the right way to deal with that is to distribute it to someone who is -- not back to Genco or Transco or anyone else, but someone out of the loop for all of those penalty dollars.

MR. MACDOUGALL: Again my view on that, Commissioner, is that, you know, that would probably be stretching the bounds of any reasonable basis on which to send the dollars back. I mean, I think the Board would be hard pressed to find the proper way to deal with the dollars in that manner.

MR. SOLLOWS: Fair.

MR. MACDOUGALL: It would certainly be inconsistent with any market that I am aware of and I am sure my colleagues are aware of. That would be very, very novel indeed.

MR. SOLLOWS: I take that as a compliment.

MR. ROHERTY: The money could be left with the System Operator and we would work towards a major development, use it towards that.

MR. SOLLOWS: I think we all know the implications of that.

Thank you.

CHAIRMAN: Anybody like to make any other comments? Mr. MacNutt?

MR. MACNUTT: The Board Staff feel there is perhaps one additional question that perhaps would benefit the panel if Mr. Roherty were to advise where exactly does the OATT address the redistribution of any energy imbalance charges during the period October 1, 2004 and April 30th 2004 -- '5, excuse me, yes.

MR. ROHERTY: I will allow Mr. Porter to respond to that.

MR. PORTER: I just want to say that during that time period that version of the Tariff Schedule 4 did not address redistribution of those funds. As was stated earlier, that Tariff was put together as a FERC Order 8 type tariff, with as close -- we adhered to that standard, industry standard wording as closely we could. We also examined what was done on other utilities, such as B.C. Hydro, Saskatchewan, Manitoba, in other areas and nowhere in any of those tariffs is the issue of redistribution of those funds addressed. And my assumption in most of those cases was that those funds were kept by the utility. But I can for certain say that in those other schedules, Schedule 4's, there is no discussion or indication as to any

redistribution of the funds. Our tariff is silent, as are the tariffs of a variety of other transmission providers.

Yes, I would add. During the Tariff hearing, it was raised as a question as to what we would do with those funds. We answered the question. No one said this is the time we would like to see that written into the tariff for greater certainty for whatever other purposes. And this is not the only such issue. There are other issues that come up during the interrogatory process or at the hearing about how we would do things.

In some cases where the Board or other parties feel that it is critical and important and needs to be put in the Tariff for whatever purposes that is done. Particularly, if it's written in the Board's decision, that's what we would do. In this particular case, it was not raised to that level or deemed to be appropriate for that wording to be part of the Tariff. So the wording stayed as per the industry standard wording.

CHAIRMAN: Thank you. Any other comments or --

MR. MACDOUGALL: Commissioner, just as a final point. I understand this might be your maiden voyage as Chair --

CHAIRMAN: Yes.

MR. MACDOUGALL: -- and that you were thrown in at the last moment and I would say that you did an admirable job.

Thank you very much.

CHAIRMAN: Thank you for everybody bearing with me, you know. So I guess I would like to thank everybody. And the Board will reserve its decision for -- at some point. Thank you very much.

(Adjourned)

Certified to be a true transcript of

of the proceedings of this hearing as recorded by me, to the best of my ability.

Reporter