

New Brunswick Board of Commissioners of Public Utilities

Confidentiality Hearing

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.
July 12th 2005, 9:30 a.m.

Henneberry Reporting Service

INDEX

A-9 - Technical audit, Phase II, Review of Increase in Fuel
Component of Power Budget - page 595

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July 12th 2005, 9:30 a.m.

CHAIRMAN: David C. Nicholson, Q.C.

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Randy Bell
Jacques A. Dumont
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Randy Bell

BOARD COUNSEL: Peter MacNutt, Q.C.

BOARD STAFF: Doug Goss
Izabell Fagan
John Lawton

BOARD SECRETARY: Lorraine Légère

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CHAIRMAN: Good morning, ladies and gentlemen. Could we have appearances for the record, please? For the applicant?

MR. HASHEY: Thank you, Mr. Chairman. David Hashey again with Mr. Thomas, Mr. Gardner and my partner Ms. Bowlen.

CHAIRMAN: Thank you. Canadian Manufacturers & Exporters? Not here today. Conservation Council of New Brunswick?

Not here. Eastern Windpower Inc.? Enbridge Gas New

Brunswick? Energy Probe? The Irving Group of Companies?

MR. DEVER: Yes, Mr. Chairman. Bill Dever and Kevin
McCarthy.

CHAIRMAN: Are you trying to mix me up, Mr. Dever? You keep
switching sides.

MR. DEVER: No, Mr. Chairman. We needed energy, so we came
over to this side of the room. But it's from Saint John
Energy, not from NB Power.

CHAIRMAN: And is there anybody taking Energy with you, Mr.
Dever?

MR. DEVER: Mr. McCarthy.

CHAIRMAN: Thank you. Jolly Farmer Products? The System
Operator? Rogers Cable?

MS. VAILLANCOURT: Christianne Vaillancourt for Rogers
Cable, Mr. Chairman.

CHAIRMAN: Thank you. The self-represented individuals? I
guess the house has adjourned, hasn't it? Municipal
Utilities?

MR. GORMAN: Good morning, Mr. Chairman and members of the
Board. Raymond Gorman appearing on behalf of the
Municipal Utilities. With me again today is Dana Young,
Eric Marr and Jeff Garrett.

CHAIRMAN: Thanks, Mr. Gorman. Vibrant Community Saint

John?

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

CHAIRMAN: Good. Thank you, Mr. Peacock. And so it's on the record, you came in a bit late yesterday?

MR. PEACOCK: I apologize for being tardy.

CHAIRMAN: That's fine. Mr. Hayes has appeared for Enbridge. Okay. The Public Intervenor?

MR. HYSLOP: Peter Hyslop with Mr. O'Rourke, Mr. Barnett, Mr. Hegler and Ms. Power, Mr. Chairman.

CHAIRMAN: Thanks, Mr. Hyslop. Just down the list of Informal Intervenors, to see if any of them are present today. Agriculture Producers Association of New Brunswick? Canadian Council of Grocery Distributors? City of Miramichi? Flakeboard Company Limited? Genco? Noranda Inc.? Potash Corporation of Saskatchewan? UPM-Kymmene Miramichi Inc.? And, Mr. MacNutt, whom do you have with you today?

MR. MACNUTT: Mr. Chairman, I have with me Doug Goss, senior advisor, John Lawton, advisor, and Isabel Fagan, principal administrative officer. Before we go on I believe you should add CBC and Telegraph-Journal, ask if they are present.

CHAIRMAN: I added them in a special place, Mr. MacNutt.

MR. MACNUTT: Thank you, Mr. Chairman.

CHAIRMAN: So we have two special additions to the roster and the first, CBC/Telegraph-Journal?

MR. COLES: It's nice to be special, Mr. Chairman. It's David Coles and we are present.

CHAIRMAN: Thank you, Mr. Coles. And in addition we have the four non-utility generators, Bayside Power LP and Grandview Cogeneration Corporation?

MR. STEWART: Christopher Stewart, Mr. Chairman.

CHAIRMAN: Good morning, Mr. Stewart.

MR. STEWART: Good morning.

CHAIRMAN: Frasers Edmundston?

MR. MACNUTT: Mr. Chairman, Mr. Thibodeau spoke to me as we broke from the hearing yesterday and said he would not be in attendance today.

CHAIRMAN: Thank you, Mr. MacNutt. Again Musquash is not appearing. And St. George Power, Mr. Dever. Thank you. Any preliminary matters this morning?

Well we had concluded yesterday afternoon in hearing from the witness for Genco and then presentations by those representing the non-utility generators here.

I would like us for purposes of simplicity to have -- go around the Intervenors with any remarks that they may have, but let's keep our remarks only on -- keep them relevant only to the topic of non-utility generator

contracts at this time, and we will go on and deal with the PPA's later, if that's acceptable to all of you.

Now Mr. Coon is not here, so -- nor is Mr. MacPhail. Any questions or presentation from Enbridge Gas New Brunswick Inc.?

MR. HAYES: Good morning, Mr. Chair. No comments this morning.

CHAIRMAN: Energy Probe is not here. Does Rogers Cable have any presentation at all?

MS. VAILLANCOURT: No comments this morning, Mr. Chair.

CHAIRMAN: Fine. Thank you. So Mr. Gorman?

MR. GORMAN: The Municipal Utilities have no submission to make on this issue, Mr. Chairman.

CHAIRMAN: Good. Thanks, Mr. Gorman. Mr. Hyslop, would you like to come up to the chair in the front, sir?

MR. HYSLOP: Yes. If it's the preference of the Board, I don't mind arguing now. I was just wondering if there was a preference between the CBC and the Public Intervenor? I am prepared to argue at this point.

CHAIRMAN: I would suggest you gentlemen sort that out. If -- does CBC wish to go first? All right. In keeping with alphabetical order, would you proceed, Mr. Coles?

MR. COLES: Thank you, Mr. Chairman. I just require some clarification on your last direction. You do not want to

hear us with respect to the five power purchase agreements?

CHAIRMAN: We will, but later. Looking at them, sir, there are some very marked differences between them, in particular in reference to the contracting parties. And I would like to deal -- the Board -- the Panel would like to have you deal with just the NUGS now and then we will pass on to the PPA -- consideration of the PPA's later.

MR. COLES: All right.

CHAIRMAN: It may be -- simply be a repetition of your argument, I don't know.

MR. COLES: Well yes, there is going to be an awful lot of redundancy and I guess I -- is the intention today to deal with both?

CHAIRMAN: Well if people are succinct in their comments, probably.

MR. COLES: Well I guess, Mr. Chairman, my comment would be my understanding, subject to being corrected, is really you are going to hear from myself and Mr. Hyslop. I don't know if Mr. Gorman will make any presentation or not, but presumably Mr. Gorman would speak in reply as would Mr. Hashey.

I mean, I think there is four of us to be heard and I guess I'm certainly prepared to address it globally. I

believe my friend Mr. Hyslop's presentation was global as well and I think it may save the Board an awful lot of time if you -- if we could address them simultaneously would be my request.

CHAIRMAN: We appreciate your comments, Mr. Coles. The Board would like to proceed with the NUGS and the PPA's later.

MR. COLES: Very good, Mr. Chairman.

MR. MACNUTT: Mr. Chairman, perhaps there might be a little bit of miscommunication --

CHAIRMAN: I can't hear you, Mr. MacNutt. Sorry.

MR. MACNUTT: Perhaps there might be a little bit of miscommunication. You have been referring to the PPA's, but if you go to exhibit 18 and look at Disco, Public Intervenor, IR 17 under Tab --

CHAIRMAN: Mr. MacNutt, would it be fairer to characterize the non-utility generator contracts and the others, rather than calling them PPA's?

MR. MACNUTT: Yes. Because --

CHAIRMAN: That's fine.

MR. MACNUTT: -- the NUGS are in fact PPA's as well.

CHAIRMAN: Yes. True.

MR. MACNUTT: That's where I was going.

CHAIRMAN: We want to deal with the NUG contracts now. We

will deal with all others later. Go ahead, Mr. Coles.

MR. COLES: Thank you. And I don't mean to dwell. When you say the NUG contracts and this may well be my ignorance. If I'm speaking in that manner I apologize. Just to make sure I'm addressing the right thing, what do you mean, Mr. Chairman, by the NUG contracts as opposed --

CHAIRMAN: The ones that have parties that are nonutility generators.

MR. MACNUTT: Perhaps, Mr. Chairman, I can show the reference -- Mr. Coles the reference I was going to make to the IR.

MR. COLES: Thank you, Mr. Chairman. I'm obliged to my -- to Mr. MacNutt. My confusion originated from the second paragraph of exhibit 8-A, Mr. Bishop's letter where he refers to PPA's generally. And this would include this group. And I'm now sufficiently clarified. So having said that let me begin by in fact replying to the comments of my friend Mr. Stewart yesterday. And you will recall that Mr. Stewart really put two propositions to you, Commissioners. One is that look, you shouldn't be requesting this information in the first place. You have no authority to request that information. And then secondarily he moved on to confidential.

With respect, I think it important that the Board begin its examination of this question on confidentiality by in fact referring to the new Electricity Act and referring to your powers. And I specifically would direct you in your leisure to look at 128(2)(b) and 129(a).

128(2)(b) I submit governs your authority in this proceeding. And it provides when inquiring into hearing or determining any matter, the Board (b) may request from anyone and may require anyone to gather evidence or prepare studies relevant and incidental to the matters over which it has jurisdiction under this Act.

I clearly think it was within your power to ask Disco, as part of the IR process, get us copies of this contract. I think you could do that to Disco. I think you could do it -- you could do it to NB Power Generation Corporation.

And I think you could do it directly to any one of these PPA's.

I mean, I think you have the capacity and the power under the Public Inquiries Act and under the Electricity Act to require these documents.

So I think the argument that somehow it is beyond your purview or your power just falls dead right in the face of the Act. You are specifically in power to do that.

CHAIRMAN: Could I ask a question, Mr. Coles? I certainly

would welcome confirmation of the interpretation that you just gave. But I look to 128(1). And to me -- well, what do you have to say about the 128(2) being restricted in its application to deal with matters that are only set forth in 128(1)?

MR. COLES: I suggest to you that the subsections are discordant. 128(1) deals with where you are dealing with a complaint or your own motion. In other words you are making an inquiry or there has been a complaint. Then here is your powers under that context. Because of course you can do independent inquiries as to wrongdoings or people can complaint about things.

Here that is not what we are doing. There is a rate increase being sought by Disco. So you are under Division B distribution services and everything that flows from that.

So I suggest to you that 128(2) covers any -- is broader.

It covers inquiries for hearings. This is a hearing that pursuant to the legislation gets kicked off under 123 which is a hearing respecting changes in rates.

And in that respect, Mr. Chairman, if you go back to section 97 and 98 which deal with applications dealing with changes in rates, you will see that under 97 that this division dealing with distribution services applies

to the Distribution Corporation respect of services provided by it to customers through its distribution system and in respect of electricity provided to distribution electric utilities and industrial customers in its capacity as standard service supplier, but does not -- and then there is the limitation it doesn't apply with respect to these PPA contracts.

But this distribution service section does apply in respect of electricity provided to distribution service, distribution electric utilities as well. So that gives you the scope. I suggest to you 128(2) governs this proceeding. And clearly it is broad enough to require this information.

And if you had any doubt all you need do is look to the general provisions of section 129(a) which speaks of your powers of order. And the Board may order and require any person to do forthwith or within and so on. So, you know, you can issue an order, in my opinion, to any of these organizations saying, give me the information.

So I just make that as a brief observation in reference to my friend's first suggestion that somehow he is immune from your touch. And I suggest to you he is not, either directly or indirectly.

Now moving on to the substantive argument where he

says look, if you are going to have this information keep it confidential. My friend used the analogy of the Taurus automobile and says look, don't make me reveal because I'm in a competitive world, and if somebody knows what I sell my car for, then the next time I'm out in the marketplace trying to flog vehicles, this is going to hurt me somehow. I suggest to you that on the surface that is a charming and appealing analogy. But if you look at it a little closer, it doesn't meet the situation. And it really doesn't offer any instruction whatsoever.

First of all we have heard from the witness under oath, who must be taken to be a man who had some understanding of this marketplace and industry, that the power business and in particular the supply of all forms of energy, the market for coal, the market for electricity, the market for oil, are all market-driven, as he says. Look, it is supply and it is demand. That is what is going to determine the price.

The capacity of the former New Brunswick Crown Corporation which is now busted up into Genco and Disco and all these organizations, they represent such a small part of the world market that they can have no real influence on market price. You heard that testimony. It has not been contradicted.

I suggest to you by implication that these smaller power generators can have even less influence on world price that their purchasing of input fuels, input whatever, there is just no influence. This is a supply and demand market. That may not have been the case under regulations.

We see in the letter that is part of exhibit 8-A at the top of the second page where Mr. Bishop has stated "The industry has evolved over the last 15 years from one of sharing production cost information with neighboring utilities when completing transactions to a system of market-driven forces."

Now that is important. Now why that is important is, I suggest to you the Taurus car-selling analogy really makes no sense. Because what one of these companies agreed to a year ago, five years ago, seven years ago, with a buyer that doesn't exist anymore, this provincial corporation, operating under a regime, a regulatory set of legislation which doesn't exist anymore, in a world environment that doesn't exist anymore, really bears -- really means that the analogy has no reference.

The fact that an agreement was made to sell fuel -- sell power, rather, at a premium, sell power at a discount

- I mean, we don't know. Until we see these deals we

don't know whether the people of New Brunswick directly and now indirectly are getting a good buy. We don't know whether they are getting a bad buy.

But the fact is whatever kind of buy they are getting, what difference does that make really to these individual companies' ability to go out and compete and find new customers?

I mean, if they can sell power into the marketplace and attract a customer, they can. If they can't, they can't.

But it has got nothing to do with people knowing the rate at which they are selling power into the system.

So I find the argument that somehow this commercial relationship, this confidentiality must be protected over the public interest to make no sense to me. There is just no evidence that somehow they are going to lose customer number one or they won't be able to carry on business.

All there are is bald statements that gee, we negotiated this in confidence.

Well, they negotiated this in confidence with, as the Chairman says, a publicly-regulated entity. Nobody could expect that under the old regime these contracts wouldn't have been disclosable.

How could you possibly regulate if the corporation could blindly contact with people and keep them

confidential? I mean, it makes no sense to me. And I urge Commissioners that you find that it makes no sense to you.

The Supreme Court of Canada in the Sierra Club case -- and I commend to you that obviously you will have to read the Sierra Club case, and I'm sure you will in detail, has addressed in detail the test that should be applied when somebody seeks to keep information confidential in the hands of the judge-makers on the specific basis that it represents commercial interests which should be protected. The Supreme Court of Canada in Sierra Club deals beginning at paragraph 55 and going on for several pages, what is an important commercial interest? If you are going to protect that, what must it be?

Because again I urge upon you that whenever you decide to take anything on a confidential basis, that means that as you move to the next part of this hearing process, which is the cut and thrust of cross examination and the discussions of that material, you will no doubt be urged that that has to be held in-camera.

Because if you have decided that these contracts for example in their entirety are to be received by you in confidence, then as the lawyers discuss the impact of those contracts, no doubt you will hear well, you got to

do that behind closed doors.

As soon as you do that you are -- it is not a question of if -- you are interfering with freedom of communication rights under section 2(b) of the Charter. You will find yourself sitting as a public utility banning the public from hearing deliberations over those contracts.

And the real challenge you have, Commissioners, is by asking the question and by saying, we want to see the contracts, necessarily you yourselves realize the contracts are relevant to your task of setting and fixing a fair rate.

And of course they are relevant. Because as I understand from reading The Telegraph Journal today, approximately 20 percent of the power generation in this province comes from these companies feeding up into the system.

Well, you can't ignore the cost, the specific cost at 20 percent, whether it is 16 percent, 20 percent, whatever.

You can't turn a blind eye to that and for a moment think that you are going to be able to fix an equitable fair rate system.

And I proffer to you, I say to you that if what I have just said is true, if you requested this information because you realize its critical importance in the system,

well then how can you expect the public to understand or relate to your decision and the work that you have had to do unless they are privy to understanding this important dynamic in your system?

Now my friend Mr. Stewart says to you well, you don't have to because of course you have got Genco's costing to Disco, so what do you care about an input cost going to Genco?

Well, I will tell you, I was fascinated by one of the answers that the witness gave yesterday to my friend

Mr. Hyslop's question. And I didn't write it down word for word. And you have a transcript.

And, Mr. Chairman, I'm going to defer to your notes in any event. But I took part of his testimony to be that there are situations where power can be generated cheaper by Genco facilities, but yet under certain contracts, at least with one of these people, they are obliged to purchase higher-priced power from the generator.

Now let's just stop for a minute. I mean, if that is true, one of the challenges I think for the group of individuals that I'm looking at is you are going to have to come to grips with what may be a systemic problem that inflates the cost of power to the people of New Brunswick.

You may be caught in a war and of contractual provisions

that in fact escalates the price of power.

Now maybe I'm wrong. Maybe what I just said is reactionary and alarmist. Well, I don't know. The only way for me to know that is let me have a look at the contracts.

I mean, they are probably critical, I suggest to you, to you doing your duty. And for you to discharge your duties in the back room without the public understanding what you are considering, I think is ridiculous.

I urge you again to go back to the Act and to go back to your powers. I suggest to you that the provisions of section 125 may come into play. 125 deals with just and reasonable rates.

125(1) says "In approving or fixing just and reasonable charges, rates, tolls or tariffs, the Board may adopt any method or technique that it considers appropriate including alternate form of regulation."

As you get into the implications of these contracts or the implications of the split between Disco and Genco and how all of that is going to affect you, you may find your imagination is called upon to exercise the powers you have under section 125.

And that may impact on the operation of these contracts and whether or not you recommend the imposition

of surcharges or certain other controls to address what may be systemic problems in the system.

I don't know. I'm forced to speculate because I'm in the dark. Because I don't have the contracts. And I speak for the media. And I speak for their clients and their audiences.

And I suggest to you that there is important public work being done here about an important public issue, and that to suggest that somehow this Board should be a party to keeping these contracts that were negotiated with a public utility and then transferred pursuant to the provisions in the Electricity Act to Genco, that somehow that route enables a shielding, I suggest you should not be a party to.

My friend, and he is good counsel, a good lawyer, he goes to 133 and says now wait a minute now, 133 properly read enables -- because this information is cost information of Disco's, and you want that cost information, therefore you should receive it by virtue of this section confidentially, and the burden is on us guys who would want it revealed, to satisfy you that it is in the public interest. Well, that is a good prima facie reading of the section.

I suggest to you, and I harken back to your Chairman's

words in his discussion with the individual, the Chairman

indicated that it was -- and I'm paraphrasing. This is not a quote.

But the Chairman indicated that they wanted Disco to get the contracts and have them available for the Board, because the information was necessary in order to establish or carry out your mandate to fix a cost and allocation rate design on a go-forward basis.

Paraphrased, that is what the Chairman said. It is necessary in order to do that.

Well, I suggest to you that if it is necessary in order to do that, then the public interest test here has been satisfied. Because if it is necessary to address your core mandate then it is clearly in the public interest that this information be released. I have already said to you, what is the established or proved harm? I suggest there isn't any.

The Supreme Court of Canada in Sierra Club has made it clear that the commercial interest that is to be protected is not be a speculative interest. The burden is on he who would assert a commercial interest to come in and establish definitively damage, not speculation.

And the public -- there must be a public interest in the commercial interest that outweighs the public interest

in openness of this institution and in the Charter rights of freedom of expression. And I suggest to you that that burden simply cannot be met here.

In order to have faith in this institution's work the people have to understand and have to be privy to the evidence that you are dealing with. This request for confidentiality in reference to these contracts has a number of important components. We now learn these contracts don't just have a rate.

They don't just say, this is what you are going to buy the power for. But we realize they contain purchase obligations under various scenarios that this Board or the people of New Brunswick may find quite distasteful.

What is to be done about that? I don't know. Maybe that is a matter for the legislature. Maybe there is nothing to be done about that. Maybe these contracts have to be honored and all that comes out of them is a lesson for next time. I don't know.

But until we see what they say and we have an opportunity to have you pass some verdict on their implication for the system, until we have the benefit of your thoughts and the ability to look at the contracts and understand what the heck you are talking about, I don't know how we move forward.

I understand from the Chairman's comments yesterday that it has been 13 years since there has been some kind of broad revisiting of all of this. Well, surely now it is the time to cast light on these kinds of practices and to let people understand what is going on.

I will make two brief comments about the case law. In the Toronto Star case, which I have provided you copies, at paragraph 29 -- sorry, paragraph 27 -- and again this is when a court -- and you will recall that I took you yesterday through Travers, where a judicial proceeding test was set up.

And I suggested that this hearing meets the judicial proceeding test, the large judicial proceeding. You do attract the Charter. All of that was part of my discussion yesterday.

Paragraphs 26 and 27 in this decision talk about the standard of the test, when you are going to move to publication bans, which the Supreme Court of Canada has said are analogous to receiving confidential material in the Sierra case.

Justice Iacobucci, writing for the court, noted that "The risk in the first prong of the analysis must be real, substantial and well-grounded in evidence. It is a serious danger sought to be avoided that is required, not

a substantial benefit or advantage to the administration of justice sought to be obtained."

I also commend to you, and I have left with you, the CBC City of Summerside decision. That was the case where the court quashed legislation that required that hearings be held in-camera.

And I commend to you the last two paragraphs of that decision where the Supreme Court in P.E.I. noted that where you have a discretion as adjudicators or as judges, that discretion, your decision should be exercised in accord with Charter principles.

And I suggest to you that as you look at section 133, that if you agree with my friend Mr. Stewart that look, the burden is on us to say that it should be public, I remind you that the law is the prima facie. Everything that you should be doing should be public.

You should by law, by the Supreme Court of Canada's decisions in Dagenais and Sierra Club only move to consider things in-camera and to receive evidence in confidence if it is really essential. And I suggest to you that the evidence that you have heard does not satisfy that test.

And as Mr. Chairman says, you are entitled to work on the knowledge that you have as Commissioners of both your

task and the industry. And when you apply that common sense, I suggest to you you will realize that it is not necessary to receive that evidence in-camera -- or in confidence rather.

And that in looking at section 133, I suggest to you that you should realize that the burden is discharged, that it is in the public interest that the public know what the cost of 20 percent of its electrical system is.

And I don't know how you control or fix rates fairly for the applicant if the applicant directly or indirectly is saddled with certain provisions dealing with 20 percent of his system.

I will conclude with this, Mr. Chairman. If you disagree and you say no, we are going to let this stuff in but we are going to let it in on a confidential basis, what you will have condemned the rest of this process to is there will always be a significant portion of the evidence that leads to your decision which nobody can understand. And I suggest to you that when you weigh competing interests, which is what we do in this country, we try to balance the competing interests as opposed to the American conflict system, how reasonably can you expect the people of New Brunswick to have faith in your decision, to understand your decision, if you have denied

them because of your decision. It's not Mr. Stewart's decision, it's not Mr. Hashey's decision. It's your decision. You will have denied them the opportunity of understanding a significant component of costing and potentially a significant component of the problem. And you will have tied your hands in that regard right now up front long before you get into the actual hearing, and I don't know how you get out of that.

I mean, once you have done that it seems to me you have put the anvil around your neck. And I commend to you that the implications of that are very serious for public faith in the process.

Subject to your questions those are my submissions other than one other observation, Mr. Chairman, if I may. And that is should you determine that some of these materials you are going to receive in confidence, I don't think the decision is as simple as fine, give me the contract, because I think you are in confidence. I think you are called upon to go to the next important stage which is, well okay, of this contract what portions can we make public?

In other words, I think you can't use a broad sword. If you are going to agree with my friends and withhold it you have to use a scalpel. You have to look at, well what

was their specific concern and what portions of the contract absolutely must we restrict, and the rest of it should be open? They don't get to point to one concern and cover everything in it.

So I say to you, that's a job you would have to do, and again my friends have offered you no evidence or assistance in that regard. And of course because I haven't seen the contract, I can't even speculate what is in there. It would have been incumbent upon them I suggest to you to point to every single thing they want to keep confidential, and give you a basis for every single one of them. And if they haven't it's in I say to you.

Having said that, let's assume that despite Mr. Hyslop's able arguments that you are going to hear, you decide to allow some of this stuff to come in to you confidentially.

My understanding based upon the status of Intervenor that has been granted my clients, the Telegraph and the Canadian Broadcasting Corporation, that if they are prepared to sign the confidentiality undertaking, that then if you then move to an in-camera hearing respecting some of this matter, that as Intervenors they will be entitled to attend.

I am advising the Board that because of the difference

between them and the commercial Intervenors that you have around the table, their intention would be a reporter or the local manager of my client's that would sign the undertaking, they would obviously be bound by the undertaking but it would be a staff person with CBC or the journalist that would attend and view the system -- view the evidence, not counsel. And if there is a problem with that we are happy to discuss it, but I am assuming that the undertaking binds and there shouldn't be any difficulty.

Subject to your questions or directions, Mr. Chair, those would be my comments.

CHAIRMAN: The last thing that you touched upon, if in fact we do rule, then we will cover that at that time.

MR. COLES: Thank you.

CHAIRMAN: In other words you should not take anything for granted. Thank you, Mr. Coles. Mr. Hyslop, how long will your presentation be?

MR. HYSLOP: I haven't timed it, Mr. Chair, but I wouldn't think more than half an hour.

CHAIRMAN: Well I will just double that and say it's an hour. So we will take a 10 minute break now.

MR. HYSLOP: If I had said 10 minutes would you have made it by a sextuple?

(Recess - 10:15 a.m. to 10:25 a.m.)

CHAIRMAN: Any preliminary matters? If not go ahead, Mr. Hyslop?

MR. HYSLOP: Thank you, Mr. Chair. In keeping with your request of order of argument, we will address the NUG's issue principally. Some of what I will say will overlap with the other arguments but I will try not to repeat myself when we reach that stage of the proceedings. The issue with regard to the NUG's contract is more complex than the other issues that are raised, the confidentiality, because the NUG's are requesting that the contracts not be disclosed at all. In the alternative they say, if they are disclosed, they are to held in confidence. And we are of the position that first of all, that they should be made part of the public record. And alternatively, in confidence. And I will speak a little bit more to the options at the end of my summation. However, the principal opposition that the NUG's have from Mr. Stewart and other remarks yesterday seems to be that they are confidential and that they are commercially sensitive.

And in this regard dealing, first of all, with the issue of confidentiality. A couple of quick points. It appears that nobody had thoroughly reviewed these. Mr.

Bishop had indicated he reviewed them some period of time, but he did seem to agree that notwithstanding the confidentiality clauses that were in them, it probably would have been understood or agreed that subject to any type of judicial or a quasi-judicial proceeding or authoritative order, that clauses likely would have provided that in that case, the contracts could be disclosed. And this is not an uncommon term in this type of a contract. Parties always recognize that any contracts may become part of the public record at some point in time if it's necessary by requirement of law. In the absence of something stricter, I think the Board should lean as far as possible to the most liberal interpretation of any confidentiality clauses that exist. Certainly without disclosing the meat of the contract, the confidential clauses could have been extracted and put before the Board if they had meant more. So that's that. The important issue -- and I think we have to start -- because there is a balancing act we have to start with the issue of why are these contracts important and they are necessary? And some of what we are going to say is that - - it has been repeated at earlier hearings, but it is worth repeating again. These contracts are important for the purpose of this

hearing because the Board has the responsibility under the Act to set just and reasonable rates. They must approve the charges, rates and tolls after hearing the evidence that come before them. That's what this hearing is all about. And that's the whole *raison d'etre* of being here.

Now that's fine. That's your job. And how does this fit in?

So what we really want to know are the costs on a plant-by-plant basis of -- to Genco that they are charging the costs opted to Disco. We want to know these costs. We want to know what the fuel costs of each and every plant are. That's part of the other argument that wants to be held in confidence. And we want to know the costs associated with these five facilities. But I won't belabour the point too much, Mr. Chairman. There is no secret. The big two are the two gas generation units at Bayside and Grandview.

Now these heat costs as a whole are 75 percent of Disco's cost of service. If there is going to be any meaningful classification of generation costs and the costs -- and the classification of generation costs between demand and energy, they must be analyzed on a plant-by-plant basis. Lumping the total costs together won't do.

What is each of the generation plants used for? Which class of customers caused that plant to be turned on and ramped up? How are the decisions made as to which plant to ramp up when dispatch is needed? Is it strictly on the basis of lowest marginal costs or do contractual obligations with the NUG's take precedent? Is there some time of the year when this takes place? I don't know. Who should bear the cost if the lowest marginal cost is not used? If there is a cost incurred because we used more expensive electricity, which customer class are we going to allocate that and why? Or can it even be recovered?

The NUG's represent 16.5 percent of the 2,445 megawatt base assets. They are a significant part of the costs that is being passed onto Disco by Genco.

Further, Mr. Chair, the Bayside contract and the Grandview contract represented generated capacity uses natural gas as a fuel. Genco does not have a natural gas facility.

It is proposed and the status of this remains in limbo and someday we will find out where they are going with it, but they proposed a fuel adjustment clause, which is tied to the change in price in natural gas.

The question is under these contracts is NB Genco obligated to pay for electricity on an escalated basis? I

think there was a hint of that from some of the questions from the Board yesterday, but we don't know. How does the price adjustment work? Is all the price adjustment passed on? Part of it? 10 percent of it? Only in winter months? Only in summer months? I don't know. But somebody wants to adjust power rates in this province based on increases in natural gas. How does it work? How does it affect the cost of energy?

And my colleague, Mr. MacDougall on the last hearing spoke to this issue as to why it was important. And dealing both with fuel costs, but also with some of this stuff relating to the Genco costs. And he said -- and I took this out of page 33 -- 333 of the transcript. But from our expert's perspective this information is ultimately tied to be able to do a proper analysis both of examining the class cost of service methodology and determining whether there was a more appropriate cost of service methodology for Disco in its current circumstance as opposed to 15 years ago.

I look at the evidence filed. There seems to be an assumption that the classification between energy and demand 15 years ago is what we got to live by today. It's been 15 years since there has been a critical examination of this issue.

In fact, when I read the decision, there was supposed to be further reports filed in relation to the cost allocation and the classification of costs for this Board, because there was some uncertainty at this time. It's been 15 years. It's time for this critical examination to take place.

Simply put, the cost of service allocation is meaningless without the NUG contracts and with the plant of heating costs, so I don't have to go through this again. Without it, the Board cannot set just and equitable rates. And without it, the whole function of this Board under the Act in relation to electricity rates become meaningless.

Now this isn't the first time I have made these arguments to this Board. And I must say that perhaps I am getting a little bit frustrated by having to drive the point home again. And this is especially in view of the Board's ruling on June 9th. And so just -- we can all be reminded again, the Board said in part, However, the Board must also set specific rates for various services provided by Disco. The Board believes it is in the public interest to set specific rates that are fair and equitable. And further, the Board must ensure fairness in the allocation of all costs between customer classes. Fair cost

allocation will provide proper price signals. And finally,

the Board believes that the evidence must be tested in the most thorough fashion to ensure that we are setting fair and equitable rates.

Now yesterday Mr. Stewart made a point, and in fairness to Mr. Stewart, he wasn't here on June 9th and he wasn't here on June 24th. And I really don't feel he probably had the time to get up to par with what has taken place. But he indicated that I had not established that the plant costs and the NUG's were material and relevant to this exercise.

And he is right. I didn't call any evidence or put anybody on saying how this was important. But I didn't think I really had to establish the relevance and materiality of these NUG contracts. I was relying on the fact that the Board had already ruled that this information was probably critical to its allocation of cost study. It is very important information.

So the starting point on the NUG's is that the information that they are trying to deny out of these contracts goes to the very root of setting just and equitable rates and the allocation of costs. And I don't think anybody is seriously disputing that point.

Now yesterday talking about establishing facts, there was an issue raised by my colleague, Mr. Stewart as to who

carries the burden. Now with the greatest respect to my colleague, Mr. Stewart, the Sierra Club case was a judicial review of a claim of confidentiality. It applied the tests -- Sierra Club took tests arose in criminal matters and applied them to civil proceedings.

Well these proceedings are a quasi-judicial administrative proceeding. We submit respectfully that the Sierra Club case provides this Board with ample direction in how to direct itself on issues of confidentiality. And it's my view having read the policy this Board has set that somebody along the line must have read Sierra Club into this policy, because many of the provisions there are extracted.

Now my way of thinking on this is pretty simple. Mr. Stewart -- and I don't agree with his interpretation under 133. I think there is an onus on him to establish the confidential nature first before we go anywhere. He has that onus first. But even if he is right, he says the statute overrode the common law.

I must also suggest respectfully that the Charter of Rights and Freedoms can be used to rewrite the statutory law. And the Charter of Rights and Freedoms, the freedom of expression and the Sierra case should certainly set who has the onus in this matter to establish the

confidentiality of the documents.

Now the Sierra case makes a couple points. They say that the confidential order is necessary to import -- prevent a serious risk to an important interest including a commercial interest. And further in the judgment, the risk in question must be real and substantial in that the risk is well grounded in the evidence and poses a serious threat to a commercial interest or question.

In another case, Swan and Manitoba Health Authority, the Manitoba court stated there is no direct evidence in these proceedings that would have any prejudice or direct effect if the information was disclosed. The relevance to be placed on prejudice or detrimental to third parties then sets prejudice or detriment and must be established.

And here is what I think is important. Speculation only as to future loss or gain or to prejudice or detriment cannot be relied upon. It is our submission that Mr. Stewart's arguments of confidentiality and commercial interests are based on speculation. He argues that his clients will be prejudiced in negotiations for the future sale because of competition that exists. He argues that there are other buyers and the prices have to be secret or confidential.

First of all, no one has provided me any evidence as

to who else his client intends to sell its electricity to. He argues that the competition out there could use his information regarding pricing and costs. And he said my competition is in this room.

Well the only competition he has got in this room right now, until somebody else starts building power plants is Genco. And Genco probably knows the price that they are having to pay for the electricity from Grandview and Bayside.

Speculative sales and speculative competition just don't cut it. They have to show the real and serious risk.

Then Mr. Stewart makes quite amazing argument that on October 1st 2004 we entered into a brave new world. Just like electricity, you turn on the light -- turn the switch and the light comes on, on October 1st we put this new Electricity Act in place and we had a competitive environment. Well I don't think it's that way in the business world and in the electricity world, except for turning on the lights perhaps.

More and more times we have heard we are going to go slow with getting into a competitive environment. We don't want to repeat the mistakes that are made in Ontario. We want the competitive market to evolve. Quite

frankly, there isn't a competitive market yet. Mr. Bishop, when under cross examination, there has been no bidding process take place out there yet. They are not even anticipating bidding processes to take place in the near future.

Well I guess my answer is simple. I don't think the competitive market exists and maybe it will exist some day. That is the government policy. But de facto it doesn't happen right now.

Now one of the points on a competitive market. When you have an open, competitive market that isn't formed by everybody having confidential information with regard to the pricing and the price that you sell electricity at and you buy it at. You have got something like ISO New England, where you can go on a website and you can find out who wants to buy electricity and the price that is being offered to do it. And if you want to sell electricity you put your bid in and you can do that on real time basis. An open market, Mr. Chair, supposes the exchange of information not the confidentiality of it. I don't think there is any magic at all to the open market argument that my colleague made yesterday. And I say that with respect.

Mr. Stewart takes the view that this Board can't go

back to contracts between parties who are not parties to these proceedings. And my colleague, Mr. Coles, has addressed that by referring to several provisions of the Act. And again I don't -- this sounds threatening. It doesn't mean to be a threat but it helps interpret the powers of the Act and I again would reiterate the rights of this Board under section 116. If there is important information, you have the powers that would be extended to a commissioner under the Inquiries Act.

If this stuff was critical and important --

CHAIRMAN: But don't -- I'm sorry to interrupt, Mr. Hyslop.

But don't you, in order to justify operating under a power under the Inquiries Act, need to have a legal authority or power to begin with? I mean, for instance, if I am sitting here on this panel and we say we would like to have the Mayor of Saint John as a witness --

MR. HYSLOP: Yes.

CHAIRMAN: -- you know, to talk about what happened at counsel last night. If we don't have a legal authority upon which to base those powers, then we can't operate those.

MR. HYSLOP: That's correct.

CHAIRMAN: So what I want you to come to before you are through, and I am sure you will, is go back to 128 and

talk to me about that as well. I don't want to interrupt you
but I just --

MR. HYSLOP: No, no, it's a good time for the argument, Mr.
Chair. Yes, we would concur in the comments of Mr. Coles
that 128(2) and in particular 128(2)(b) would appear to
provide this Board with jurisdiction to require anyone to
gather evidence, prepare studies, relevant and incidental
to matters which it has jurisdiction over this Act. And
our view is that 128 is not married to 121 in its
interpretation.

121 deals with issues of complaints that may be brought or
on its own motion you could bring it before it. But in
determining any matter, well, I would suggest that the
phrase in determining any matter goes to its powers to set
just and equitable rates.

CHAIRMAN: Are you maintaining as counsel for CBC and The
Telegraph Journal attempted to do so, that you read 128(1)
and 128(2) disjunctively?

MR. HYSLOP: Yes, I do, Mr. Chair. I don't see where there
is the tie-in in the interpretation between the two
sections.

CHAIRMAN: Well I don't have the text on interpretation of
Statutes with me.

MR. HYSLOP: Right.

- 566 -

CHAIRMAN: But I find --

MR. HYSLOP: You have to read the Act as a whole.

CHAIRMAN: -- I find it extremely difficult to appreciate that if you have got two sub-sections of the same section, that they are not to be read conjunctively.

MR. HYSLOP: Well then perhaps looking at (a) first, 128(1)(a). You can inquire into, hear and determine any matter where it appears a person has failed to do any act, matter or thing required to be done under this part of a rule.

And again the issue would be is if there is something that needed to be filed with this Board or required to be filed with this Board at some point in time, then certainly that is something you have the right to go ahead and do. It may well be. And I am just thinking it through.

If we had contracts that were entered into by a regulated authority, why weren't they filed with the Board? I don't know.

CHAIRMAN: Because we didn't have any power under the legislation at that time.

MR. HYSLOP: Yes.

CHAIRMAN: To require anything, including NB Power's attendance before this Board.

MR. HYSLOP: Yes.

CHAIRMAN: We were totally application driven.

MR. HYSLOP: Yes.

CHAIRMAN: We had no authority or jurisdiction until old NB Power applied to us for a rate change.

MR. HYSLOP: Yes. And that is a fair comment. I suggest that in that extent that section 121 -- 128(1) is remedial in its scope and provides this Board with greater powers to deal with issues where there may not have been compliance or matters that the Board wishes to have brought before it.

Again, section 128(2), when inquiring into, hearing, or determining any matter. Again I look into that phrase and I see 128(2) as being the stronger provision in relation to an ongoing hearing for the Board because it is inquiring into, hearing, or determining any matter. Presumably that is a matter over which the Board might have some jurisdiction. In this case we would suggest the Board has jurisdiction over the question of rate cases.

CHAIRMAN: Let me again interrupt you, Mr. Hyslop. What if we were not in this particular hearing and we were familiar with the contracts to the extent that we are? We know that there is I think you said 16.5 percent of the cost of Disco are in fact attributable to the NUG's. And

approximately 20 percent of the power generated in the province comes from them. And the other 80 percent is produced by Genco. Then could this Board, pursuant to 128(1)(c) get at the same information?

In other words, Genco has, from where I sit, and I don't speak for my fellow Commissioners, Genco has tied up the entire market through presumably long-term contracts and has Disco having to purchase unless Disco says no, we are going to go somewhere else.

MR. HYSLOP: Well I see the point you are making, Mr. Chair.

It certainly puts Genco in the driver's seat vis-a-vis Disco because it does control all the power, including the power that would be available from the NUG's and it removes Disco from the opportunity to go to the NUG's directly and negotiate pricing and terms of pricing. So in that -- to that extent, the relationship between the two companies is what creates the problem.

Even though we are supposed to have this brave new world by creating Genco and creating Disco, if you are not going to let them act at arm's length and you are not going to let them have their independence from one another, then this potential for abuse does exist. And Genco certainly has taken over the power.

The other part of it is is it may prohibit -- and I

want to be careful here because some of this came out of the answers on some of the terms of the contracts by Commissioner Nelson and Commissioner Dumont yesterday. But there is also a public record and some press releases over the terms of these contracts, which appear to be, you know, fixed contracts where all the power is taken for during winter months and stuff.

But the point is these companies can be selling electricity to Genco for certain months of the year where for whatever reason Genco has obligated itself to take all the power and then dispatch the power back out on its system even though they may have electricity in their own system that they could have dispatched cheaper.

And that to me is an abuse of your position of power. Now why they would want to do that remains to be seen. I would like to ask questions about it before these hearings are done.

Also, you know, go back to the change in natural gas prices. You know, why would Genco want to have a price adjustment clause where they take all the risk in negotiating with Grandview or Bayside, all their risk of the change in the price to lock up the electricity from those, you know, and prohibit somebody from coming along and saying, I will buy so much electricity at a fixed

price, they can't do it.

So yes, I do see where there is a potential of abuse in the way these contracts would work. So our view is, as I would say, is -- I am going to get back -- although I see the sections as independent and I -- maybe how much you read the interpretation of one or the other, but I think both sections provide the Board with some opportunity if it wishes or if it wanted to, to look at these contracts, they would have the right to do so.

And your question was could we have done that independently? And we would submit that the answer to that is yes, you could have, Mr. Chair.

Now I mentioned a couple of specific points that are relating to things we would want to know about these contracts. You know, quite interestingly too, these contracts, they buy all the output -- you know, are the plants -- do they -- how much of the output do they buy or do they just buy net of what these companies may use for other companies that are associated with them. I don't know. There is a whole bunch of questions relating to them. And my concern is if there are costs there are costs that are being incurred that don't have to be incurred if you are working on a lowest price basis, and these costs are being passed on to somebody.

And my position is maybe they shouldn't be passed on to my clients. I don't know. We would have to wait and see. So I have gone there. I will pass on this and go to the next. I want to talk about the Ford Taurus. It is just too much fun to leave alone. And I also want to mention in preface of my remarks that my friend Raymond also owns a car dealership. So I have learned a little bit about buying and selling cars from him.

So I go to Downey. And I say Mr. Stewart, he just told me about the great deal he got from buying a Taurus for \$29,900. And I want you to do the same deal or better. So I want that Taurus right there for 29, 9'.

Now a good salesman, a good car salesman might say to me well, the car we sold Mr. Stewart was reaching the 90-day stock. And we are going to have to start paying financing on our floor planning. So we had to do something for him on that. But I have got a deal for you.

CHAIRMAN: You missed your calling, Mr. Hyslop.

MR. HYSLOP: Pardon me?

CHAIRMAN: You missed your calling.

MR. HYSLOP: I know. I have hung around a lot with Raymond, Mr. Chair.

And anyhow -- or he can say look, Mr. Stewart's car

was off-color. And we had to cut him a little slack. Or my all-time favorite of course is it was near the end of the month and we had to sell a few cars to keep the banker happy.

But, you know, the next thing Mr. Downey is going to say to me is look, I'm sure we can work something out, I'm sure we can look after you.

My point is this. It is just not the fact that this pricing is out there. I would suggest Mr. Downey would love Mr. Stewart to tell me that 29,9' is a great deal. Because he can get me in the door. And he is going to use his negotiation skills to sell me a car.

Maybe the problem here isn't the confidentiality aspect or the business interest aspect. Maybe just his clients have to be more creative negotiators. I don't know.

But I will leave that. And perhaps some of it is a little bit in jest and in fun. But the point I'm making is negotiations are negotiations. And I think sometimes we attach just a little too much importance to the way we run our business in the real world. I don't know.

I'm going to talk a little bit about heat costs of plants.

But I will leave that. So dealing with the NUG contracts. Their importance to this proceeding does not

have to be repeated. And in that point there is a tradeoff that has to be made between the importance and the commercial interests that are protected.

The commercial interests that have to be protected here, I suggest that the case has not been met that they are real and immediate and important. They are speculative. They are down the road someday when there is an open market. But this isn't the type of stuff that is going to have much long-term effect or impact on either of the -- any of the NUGS that are before it. Speculation doesn't cut the issue here.

Our submission is that the NUG's should form part of the public record. If they are not going to form part of the record they should be disclosed in confidence in redacted form with sensitive pricing laid out, but made subject to review either by way that the Board handled it before with Mr. Easson.

And I would add a caveat. As the Public Intervenor I would request the right to have my experts also review and make the same determination as to accuracy as to the conclusions that are drawn.

My point is here that there seems to be a very strong requirement on this Board in weighing the two sides to reflect on the importance of how this ties into a proper

cost allocation study.

So those would be our submissions on the NUG's. I appreciate the Board's desire to keep the issue separate.

My comments this afternoon will be very brief. Because they just fit in certain sections in here.

CHAIRMAN: Thanks, Mr. Hyslop. I will pose this same question and give Mr. Coles the opportunity to answer it as well.

What would the Public Intervenor's approach be if the NUG's were filed in confidence pursuant to the Board's rules on how we deal with them and we then -- for instance, as you have suggested, allow your experts, et cetera to review those?

And then the Board, in that hearing process, combine the information in such a fashion so that what we would then put on the public record would not be identifiable to any individual commercial contract.

In other words you put it all together. You amalgamate the figures. And any comments that do go out on the public record are of a general form that will inform the public as to the nature of the contracts, et cetera. But nothing in particular detail which would allow anybody to identify the terms of any individual contract. Go ahead, Mr. Hyslop.

MR. HYSLOP: Part of the real issue is that -- and notwithstanding the Fraser's contract and the other two minor hydro contracts, the NUG's are two NUG's that are going to be the big part of the wheel. And it is not -- it is going to be difficult dealing with natural gas issues not to be able to determine who the parties are. Having said that, they are two separate companies. We are not going to be able to say which company is which, but -- you know. And they may -- the ownership of them may or may not -- it isn't relevant. They have two separate companies.

Being able to tie it to a specific contract will be difficult. But the information lumped together, you are going to know which two they are. I think the key would be is in dealing with the question of the natural gas issues on the record and on the public record.

The parties are going to have to be very, very cautious not to get into specific numbers, specific tolls. But the results that flow from them, in the general sense, should be part of the record, is where we would come from. And you won't be able to tie it into one of the specific contracts. But where there is only two, you will know who the two are that are involved.

I'm not sure I answered your question.

CHAIRMAN: I'm sorry. I don't think you did.

MR. HYSLOP: Okay.

CHAIRMAN: But that is all right. I think it is a negative.

MR. HYSLOP: It is a difficult -- it is going to be difficult. That is the short stroke to it, Mr. Chair.

CHAIRMAN: Thanks, Mr. Hyslop.

MR. COLES: Mr. Chairman, I think you invited me to answer the question as well?

CHAIRMAN: Just a sec. I wanted to give the panel the opportunity to ask any questions of Mr. Hyslop on any of the things. And we will go back to you, sir.

MR. COLES: Thank you.

CHAIRMAN: Go ahead, Mr. Coles.

MR. COLES: Thank you, Mr. Chairman. I commend to you that asking that question is in keeping with the direction that the Supreme Court of Canada has given. Whenever you are considering infringing Charter rights you should do so to the smallest amount.

So that I think the process that you would embark upon is you first have to confront that threshold of is there a sufficient basis to protect this information so as to interfere with the Charter rights at all and to create an element of confidentiality so that your transparency as a Board is going to be impeded?

If you answer that question no, there isn't a sufficient reason, then we don't get into this. If you say, on the other hand, yes, we think we are going to grant some confidentiality then, as you have said, the question really becomes, you know, how much is it necessary to conceal?

And your solution, which is to effectively blend them all, so that what you are really going to keep private is the specific identities and the specific numbers, that is an approach.

But the difficulty with going down that road,

Mr. Chairman, is what is it that you release? Well, do you release the average cost to Genco? Do you release the mean cost to Genco?

Do you release all of the specific different provisions as to -- you know, in some contracts you have to buy regardless of the output, are there seasonal variations, all of those things my friend Mr. Hyslop mentioned that may be in each of these contracts can end you up having to release quite a compendium of information.

Now that may be the way to go. I mean, ultimately you have to make the decision as to how much can you get out there? And the way you should do that is by asking what

is the minimum we should impair freedom of expression and openness? I mean, you are going to try to impair that the least.

One of the challenges you will have is -- let's say you have gone through this exercise. And you now say okay, we have released the mean cost, the average cost, we have released all of the variable contractual provisions that could affect obligations to buy and so on. But you have not reduced identity. And you have not linked the particular provisions to any particular player.

The difficulty I then have is -- let me proffer this problem to you. Let's assume you have looked at all these contracts and you conclude, in response to my comment, that maybe there is a systemic problem that you have got to overcome, that you are confronted with possibly exercising your authority under section 125 to come up with a creative new solution to make this thing fair and equitable, which is your job.

And of the five you conclude one of them is a rotten apple, you know. Maybe four of these contracts you can live with. But contract number 5 you think is just plain a stinker.

How do you deal with that in your report? How do you explain to the public that you can't get around this one?

Or maybe you recommend that there be some legislative initiative or you recommend certain controls or levers or surcharges?

I don't know what mechanisms you want to put in place. I'm not going to speculate. But if you find yourself having to come to grips with one or more of these contracts, you are still going to have the problem of public faith in explaining, if you have kept confidential, who they are.

But certainly, Mr. Chairman, I recognize that that approach would be an option if you get to that part of the equation.

CHAIRMAN: Thanks, Mr. Coles. I guess maybe it's an opportunity for Mr. Hashey and/or Mr. Stewart to address anything that the parties have brought up to this point concerning this. Mr. Hashey, do you want to go first?

MR. HASHEY: Certainly. Thank you, Mr. Chairman. First of all, let's put it very clear that it's the interest of Disco in being open and providing as much information as we can.

On these NUG's we have stated very clearly that it's a contract between Genco and a third party. We don't control Genco. We have made requests for Genco and we have obtained from them certain information, and that's

there. We cannot be put in the position that we are consenting to something that will amount to a breach of contract which would result in a suit coming back on Disco. It simply just cannot be done. And that risk is still there for us at this moment.

Now are we trying to find a workable solution so the information can be available that's required? The answer is very clearly yes. And we would like to see that. We know that you have come up with a suggestion that might be workable that we would like to put to people. It seems to be a reasonable solution.

The other matter that we can't lose sight of is that there has been an auditor who has been involved on the request of the Board that we have an auditor independent of say Mr. Easson, and that is La Capra. A lot of the general information is there. It's in the La Capra report, everybody has it. It deals with the overall natural gas costs, and there are some other issues.

Are there other possible solutions? Yes, I think there are. One suggestion might be that my friend -- and my friend Mr. Hyslop I know has made some effort in this regard -- is to pose us some interrogatory questions that get to the answers that he may want, in specifics, not just give me the overall contracts, and see if we can't

answer those questions by going to Genco and going to these parties and encouraging them to supply the information so that it can come forward that would give this back-up information. You know, we can't forget 156. I know the ruling and I know the information you want in very general and broad terms for the purpose of this cost of service study and rate allocation and I do appreciate and understand some of the things that my friend is saying, although probably I don't pretend yet to be an expert on cost of service studies and how they work.

But there seems to be -- that would be another option to actually putting these contracts on the record, which I think my friend has indicated are commercially sensitive and that will come to the same argument later when we deal with the other PPA's that we are concerned with and how commercial sensitivity works. And the Board in the past have done that. It has worked. We have had auditors. There has been no public complaint. It has been openness in the decision. This is merely a little part of the decision and frankly I can't see when you get into cost of service -- you know, when you get into the detail of this, that certainly that is of interest to some experts, but to the average fellow on the street, so long as he is satisfied that Mr. Hyslop is doing his job and that many

other people here are, and the Board itself, I can't see where there should be any problems.

There is probably a lot of little answers I would like to give to my friend, Mr. Coles, on the CBC issue. I can address some of the issues which aren't as important as that one. The 128 -- I have looked at that and I do believe that 128 does relate, you know, as sub clauses would deal to the powers of inquiry and the Board's powers would be set up if they consider there is abuse of potential share of market power. Truly this isn't I don't believe a concern at this hearing. I mean, that would be something the Board might do and it would be in relation to Generation and how far you could go when you don't have power over Generation. I don't know. But I don't think there has been any exercise of unnatural market power. Disco has the PPA's. It was told that these are the PPA's effectively. This is the legislation. The whole new legislation here is for the purpose of being able to market some of the plans. They are not the whole purpose but certainly a significant purpose. Presumably, that as Mr. Bishop says, it's an ongoing matter. It's not something that may be on the tables today. We all understand that there is a nuclear issue out there that is unresolved. It's in the press. We see it from day to

day. And that's not Genco, that's a different company. But it all comes into the -- I would suggest in the overall mix of what may be happening within this organization now and in the future.

Not terribly relevant to what we are doing here, possibly will be a bit more relevant when we get to the actual rate requests here. But that would be my comment on that.

On the contracts, I will try to come back to that later, just strictly looking at my notes. I would remind the Board that there has been a confidentiality clause in the past. It has been used. We have been involved in redaction of contracts. But I sometimes find, and I remember back to a couple of the last ones, that by redacting the information -- you might as well ask the questions and get the confidential information, and then say to Mr. Easson or somebody as competent as he is, or La Capra or anyone else that you might suggest, to say, just confirm to us that these are the actual numbers that -- the numbers that have been inputted, which was the case with La Capra, are accurate, they were the numbers that were posed to Genco.

I recognize that it may go a little further because that was done specifically in relation to the fuel itself

in the fuel comparison to show that what we were intending to do in the first part of the application was to go for a change that would relate to the fuel cost.

CHAIRMAN: Mr. Hashey, I interrupt just for a second, but my recollection of the La Capra report and why it came into - - why NB Power and Disco engaged La Capra was to check and ensure that whatever the inputs were into the computer program in fact they checked them to see that those are -- they know what is going in and that mathematically what comes out at the other end and is therefore filed with this Board is accurate from -- they have tested it in a mathematical sense. I didn't think that they went back any further than that and actually took a look at the price of natural gas or anything else and whether or not that's appropriate in the world markets. They are doing a -- as I understand it a mathematical analysis of the inputs and resultant figures -- combined figures in reference. I'm just trying to remember the name of the -- PROMOD.

MR. HASHEY: I think in fact, Mr. Chair, that they did go back further and make sure that these were accurately stated, not just here is the numbers from Disco, this is what we are giving you, but they asked and did receive in confidence considerable information about these various

contracts we are speaking of and others, and to absolutely confirm to themselves that these things were in fact accurately stated from the fuel cost basis, that's what they were looking at.

CHAIRMAN: Okay. I will look at it again, but then I will go back to the original letter which you gave to the Board to approve prior to engaging La Capra, and I didn't think that went back that far. Anyway, we are all speaking from dim memory here and --

MR. HASHEY: I think they do have a vast amount of information and background which could be helpful to the Board and may be useful as to the way we work our way through this.

CHAIRMAN: Okay. I appreciate that.

MR. HASHEY: That's a bit off issue maybe. Now we have a great number of questions that are out there and there are going to be many questions arising in the next two sets of Interrogatories. I believe that a lot can be answered, a lot is being answered and every attempt is being made to provide answers, we are down to a very few questions when we are dealing with this NUG one which is frankly the one that Disco hasn't got control over.

We have been trying to get permission, we have been trying to work through this, and I think and I would

suggest that we maybe consider your suggestion in that we might also consider an audit approach, but possibly we should go through the next round of interrogatories and have the follow-up questions that might identify the actual information that is being required. And then possibly even have that confirmed by audit if you like, which wouldn't be I don't think a very big issue or a big job for anybody to do that.

As I say, we are interested in making a full and transparent disclosure of all information that is required for this Board to do its job, which in this case we are dealing with cost of service and rate realignment. Keep it separate I think for the moment from the actual rates which haven't been really decided upon at this point and will be filed in accordance with our understanding the 1st of October, in that area, after there has been the appropriate consideration by the corporate officials.

I don't know that I need to go a lot further. I have got a lot of notes. As I say I could go into the -- I mean, I know and I have made a number of notes on the Sierra Club case which frankly, forget the book of other things, it's the Sierra Club case that is really the relevant case to this Board in all of the materials. And the tests are there, what the judge must look at in

confidentiality issues, and I don't know if you want me to deal with those this morning or to deal with those when I'm trying to talk about our own PPA's that are -- or the PPA's that we have referenced here and have asked for confidentiality, simply. It will be all made available -- it's all made to all the to all of the Intervenors. No problem on those, so long as it's confidential, and we will argue the Bishop side of it maybe later, if that's the desire.

The CBC arguments or my Sierra Club arguments really relate more to those than this bigger issue that I'm dealing with here.

CHAIRMAN: Okay. Well whatever you want to put on the record, Mr. Hashey, in reference to what I term the NUG contracts this is the time to do it.

MR. HASHEY: Well obviously if the Board decides that they are something that the Board wants to see -- frankly I don't where this goes, because I have not got authority from Genco at this point. My authority is strictly that if we have an understanding or agreement with the other parties to the contracts -- and I might say that I did have that opportunity and I requested only -- I have not read these contracts but I did ask to see a confidentiality clause, and that confidentiality clause is

not the one that we have seen on many occasions. It's a very strong -- it doesn't say subject to an order of a court or a board. It's a strict solid confidentiality clause. And I would see no reason why copies of those couldn't be made available. That does concern me and it does put Genco at risk seriously and if we voluntarily release anything I would think that -- well I can't tell my client to do that because I think I'm putting them very seriously at legal risk of a lawsuit, until I hear or have some understanding from the owners or those two companies, and it's principally two companies we are talking about here.

As my friend Mr. Hyslop has said it's the natural gas thing I think that really is an issue of the Board, and the others are of a more minor nature, and no, there isn't any confidentiality clause on the Fraser matter, and on the St. George I think the hydro part is really quite minor to this overall consideration.

I think I have really summarized our position on this as succinctly as I can, you know, without getting into the others.

And obviously if there is some way that we can work with the Board to get all the information that the Board wants, we are here to do that. We want to make that

clearly understood.

CHAIRMAN: Thank you, Mr. Hashey. Mr. Stewart? Mr. Hyslop, could you retire to your secondary table, sir? Thank you.

And Mr. Stewart, come on up.

MR. STEWART: Just very briefly, Mr. Chairman, just to reiterate a couple of small points, and really just to address one that didn't come up in our conversation or in my to you presentation yesterday. And that was the reference to the various provisions of the Electricity Act under which we are sort of -- the jurisdiction of which we are all operating under here today.

Quite frankly I was back there biting my tongue with respect to the discussion concerning section 128 of the Act. But you stole my thunder when you raised the issue of how that section should be interpreted.

CHAIRMAN: Please don't characterize it that way,

Mr. Stewart.

MR. STEWART: But my submission is clearly that section 128 deals with the jurisdiction of this Board when it sits in the context of in response to a complaint or on its own motion as a board of inquiry. It is not the situation here.

This is a hearing, I would submit, which is authorized or exists as a result of an operation of section 123. And

I agree that 128(2) needs to be read conjunctively with

128(1). And indeed 128(3) speaks specifically of -- you know, we have a complaint in posting the security for costs.

And clearly that is the context in which that section -- and the authority granted to that Board under that section exists, which is not this context. This is not a board of inquiry concerning the propriety of these contracts.

As Mr. Coles points out, you know, I think he said if one was a rotten apple or something. That is not what this is all about.

And with respect -- and I do agree with Mr. Hyslop that clearly the Board's policy on confidentiality is clearly designed or made in light of the Sierra Club case.

But I think when it is applied to these circumstances it is clear that -- and the Sierra Club case provides that when a contract contains a commercial confidentiality provision, that that is a public interest worthy of protecting.

My final submission, Mr. Chairman, is -- I think in my presentation yesterday I asked sort of the rhetorical question or made the statement that I don't know how you are going to wrestle with this issue. And you have

proposed a bit of a way to perhaps wrestle with it. Mr. Hashey has proposed maybe a variation of that theme. I want to be clear that I don't have any particular instructions here. But I know that generally my instructions from my clients is that we are not here to be obstructionist, you know.

The question was raised or the e-mail we received from the Secretary of the Board was, your contracts may be put on the public record, if you want to speak to that show up at the hearing.

And so here we are. And we have explained the reasons why we think that that is not appropriate and furthermore not necessary. And in our view the Board does not have jurisdiction to require us or Genco to do so.

But Mr. Hashey makes a good point. And I think Mr. Hyslop made some good points in terms of some questions that he may have, all of which may be legitimate concerns for both the element that he represents and for the Board to consider.

And I wrote on my page what are we trying to accomplish here? And then I wrote Mr. Hyslop's name. And then I put well, what exactly do you want to know to answer those questions? And let me be clear again. I'm making these comments. I don't have any specific

instructions.

But my suggestion would be, ask me the question, you know.

Maybe we can help. Maybe we can't help. Maybe we could help with six of seven questions. I don't know. Maybe we can help with zero of seven questions.

But suggesting that these commercially sensitive contracts be plunked on the table carte blanche I don't think is, as I said, necessary or warranted.

So if there is a proposal from the Board as to how this might be handled, if there is a proposal from Mr. Hyslop or if there is some Interrogatories that are directed to Disco that we can assist them with and still protect our interest, fine.

And I say that making no particular proposal other than suggesting that I would expect that my client would be prepared to assist, to the extent they can, and still protect their commercial interest.

CHAIRMAN: Thanks, Mr. Hyslop. Sorry. Thank you, Mr. Stewart. Mr. Dever, do you have any comments?

MR. DEVER: I just have one comment to make, Mr. Chairman. I can do it from here if you like.

CHAIRMAN: Your choice. The chair is open.

MR. DEVER: No. It won't take us very long. I guess I just want to address one point raised by both Mr. Hyslop and

Mr. Coles concerning the nature of the commercial sensitivity or the risk to competitiveness or that they feel is lacking in this particular situation with the release of these contract.

Mr. Stewart touched on it briefly. But in the Sierra Club case, which is what I consider the most important case that has been referenced here, the Supreme Court of Canada in that case, and I'm quoting from paragraph 59, indicates -- and I will just read the sentence. In my view the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test, as long as there are certain criteria relating to that -- to the information are met. So basically the decision there was that protection of confidential information was sufficient commercial interest to protect.

And I think that is an important thing that the Board recognized when they make their determination as to whether these contracts, if they are required to be disclosed, will be disclosed in the public record or confidentially. Thank you.

CHAIRMAN: Good. Thank you, sir.

We will break until 1:30 at which time, subject to

what all the parties have to say, we will approach the PPA question -- but, sorry, everything other than the NUG contract argument. Thanks.

(Recess - 11:55 a.m. - 1:30 p.m.)

CHAIRMAN: Any preliminary matters? Mr. Hyslop?

MR. HYSLOP: Thank you, Mr. Chair. I know argument is closed off on the NUG's. But I did have the opportunity over lunch hour to have a quick look at the technical audit, Phase II of the La Capra Associates report. And a couple of things jumped out at me that I would like to bring to the attention of the Board with regard to the issue of the NUG's and the disclosure, if it may please the Board?

CHAIRMAN: And which report are you referring to?

MR. HYSLOP: I'm referring to the technical audit, Phase II, Review of Increase in Fuel Component of Power Budget.

CHAIRMAN: Okay. That --

MR. HYSLOP: That is the one that was distributed this morning, Mr. Chair. I don't believe it is part of the record yet.

CHAIRMAN: Well, we better make it part of the record.

MR. HYSLOP: Yes.

CHAIRMAN: However, you said this is irrelevant, Mr. Hashey?

MR. HASHEY: You never know when to press the button.

I think I said, Mr. Chair, was that there would be new evidence that this report specifically related to the request to compare the 2004, '05 to 2005, '06.

And I think there would be new evidence when it comes down to the final information. I mean, we don't mind the Board having it for what it is worth and for what it shows. Nor mark it. No problem.

CHAIRMAN: Okay. And it would be A-9.

MRS. LEGERE: A-9.

CHAIRMAN: All right. A-9. Carry on, Mr. Hyslop.

MR. HYSLOP: Thank you, Mr. Chair. And with respect to Mr. Hashey's comment my comments have nothing to do with the results as reported in the report, it has to do with a couple of issues of commentary, and with regard to what I see as these NUG contracts, the role that they are playing to date.

Now the first piece of commentary is on page 2 of the report. And you will see a number of items starting at the bottom of the page. The second one is Grandview Cogeneration Purchase Power Agreement.

And the sentence that leads into it says, LaCapra Associates identified the following factors that contributed to cost increase in the fuel component for the fiscal year 2006 budget listed in approximate order of

significance.

Now they have listed seven items, the second most important of which is the Grandview Cogeneration Purchase Power Agreement. And it goes on in the body to describe how this contract has worked and how it has resulted in the increase in the fuel cost for Disco.

And it appears to me that this information has been generated by Disco or the contracts have been provided to La Capra and have been used to support the applicant's case.

If I go over to page -- I believe it is page 14, the second item, under the heading 4.3.1, Fuel Prices. And starting at paragraph 2 it says, natural gas price inputs --

CHAIRMAN: Whoa. Hold on.

MR. HYSLOP: I'm sorry. A little too fast.

CHAIRMAN: I got to catch up with you here.

MR. HYSLOP: Not a problem.

CHAIRMAN: 14?

MR. HYSLOP: Page 14, Mr. Chair, under the heading 4.3.1, Fuel Prices. And the second paragraph. The natural gas inputs associated with PPA's with gas pricing provisions were established based on natural gas market indices obtained on the close of business March 8th 2004.

And this next sentence I think is important. It says, Disco and Genco personnel represented the fuel pricing arrangements associated with these PPA's are tied to fuel supply contracts which incorporate these indices. La Capra verified the natural gas prices used, et cetera. Now my point is this, that information out of these contracts that we want to become on the public record are being selectively exhumed from these contracts put into reports in support of the applicant's case.

And I don't know if there is an analogy to the law of privilege on evidence. But once you start letting some of it out of the bag, Mr. Chair, it would be our position that the whole cat has to get out of the bag.

You just can't let the tail out. You can't cherry-pick what you want to use and make it part of the record through these reports without the whole contract being there.

And then I'm surprised if these contracts are so confidential, how the information in them is working its way through to La Capra.

So I don't know if it means anything. And I really probably -- sometimes you regret whether you should raise a point until you have fully thought it through. But when I was flipping through this at noon, it seems to me an

awful lot of information or parts of these contracts are starting to be used into the record where it is convenient for the applicant.

That is my only point, Mr. Chair. Thank you.

CHAIRMAN: Thanks, Mr. Hyslop. I'm sorry you moved from the Taurus example and now tried cats. This is getting ridiculous. Any comments, Mr. Hashey?

MR. HASHEY: Yes. I would like to speak to that. Clearly when La Capra were doing their audit they requested information. Very detailed confidentiality agreements were entered into.

And consultation was made with the other parties to get any information at all that was -- as I understand it, it was agreed that this natural gas fuel price would have to be part of this if it was a meaningful report by La Capra.

And that is the purpose it was done. And that fuel price was given.

And as I say, you know, that even flows within my suggestion that we follow an Interrogatory process on this to see just how much of this we can generate. This is not a full contract review, as my friend might have suggested here. Although -- and I'm not sure just what La Capra did see. But it was strictly talking to the Genco people on that, that were dealing with the PROMOD issue.

CHAIRMAN: Thanks, Mr. Hashey. Mr. Stewart?

MR. STEWART: Well, Mr. Chairman, I like everyone else saw this report for the first time this morning. And I have not seen the actual confidentiality agreements that were entered into.

My understanding is that just as Mr. Hashey suggests. And quite frankly, in keeping with my closing comments to the Board, there was a request for information to enable this independent audit to be done. It was provided on certain specific written terms. And from what I understand our client was cooperative to provide that information.

And as Mr. Hashey suggested, perhaps a variation on this theme or the process that was used here could be an appropriate way to handle or help us through the rock and a hard place that we seem to find ourselves in today.

So quite frankly I think it is a good example of how this could and should be done as opposed to any suggestion that there is partial disclosure or letting cats out of bags anyway.

CHAIRMAN: Thank you, Mr. Stewart. Anybody else? Okay.

Mr. Hashey, I don't know if we have discussed this before or not. But it seems to me to be an appropriate fashion to proceed forthwith, is that we take the binder that is

now marked I believe A-8, and you lead us through the various confidential requests that are contained therein exclusive of the NUG ones.

MR. HASHEY: That would be fine, Mr. Chairman. At some point I wanted to address the -- and I haven't at this point. And I haven't very much to say about it other than to -- on the CBC, Telegraph request and how the case is interpreted or what it means.

But I can leave that and maybe go on with your request and just deal with these, try to get the rest of these out of the way as they currently stand. And that would be fine.

I positioned myself to do that.

The one thing that we did do -- and I apologize -- in the haste of doing this last week we -- I was of the initial impression, when I read the confidentiality policy, which was wrong -- when I spoke to Mr. MacNutt I realized I was wrong.

And I -- we had adopted that so that we would put a redacted copy of a document attached rather than -- my original thought was we would file the full document in confidence with the Board. But then I realized that is not the practice.

Now we can still do that if that is requested or required at any point in time.

CHAIRMAN: All right. I want to ask you something. Would the Secretary mind getting my A-8 which -- no, I think it is probably over there. Either that or Commissioner Sollows may have it.

MRS. LEGERE: It is in the back room.

CHAIRMAN: Don't worry about it. I will share with Commissioner Sollows.

Okay. Now, Mr. Hashey, would you repeat that for me, what you just said? Because I was desperately looking for my binder. So I apologize, sir.

MR. HASHEY: All I was saying was that in my -- the reason that you have a letter on Friday evening I believe that we drafted is that there was a bit of a technical error in our documents called "Request Regarding Confidentiality." And we have no objection to the release of the redacted document. And all I'm saying, that initially we thought that we were to file the full document in confidence with the Board and no redaction. And then we realized that no, the policy really does call for a redacted document. So therefore we have filed the redacted document and did not -- but obviously have the other documents available if and when and how requested and how ordered. That is all I was saying. Nothing terribly

significant to that.

CHAIRMAN: Well, the redacted documents have been filed?

MR. HASHEY: They are attached to each one of the requests regarding confidentiality, albeit it one that we say that we think that the total summaries aren't really what the Board was looking for.

If we are wrong the Board can correct me. And we can do the same.

CHAIRMAN: Let me be perfectly clear on this. What about the entire agreements? They were filed in redacted form previously? I'm just trying to remember.

MR. HASHEY: Oh, the PPA's have been filed with the Board, I believe a full set in confidence without redaction. And this is the PPA's, the big documents, the major PPA's, right --

CHAIRMAN: Yes.

MR. HASHEY: -- with Genco, Colesonco, Nuclearco?

CHAIRMAN: I thought --

MR. HASHEY: And there was two small redactions that I will deal with in those.

CHAIRMAN: Okay. My recollection was there was a separate binder which said "Public Version" on them?

MR. HASHEY: That is right. And that has two small redactions in it, one being Nuclearco --

CHAIRMAN: Yes.

MR. HASHEY: -- as we have set it out, which is a plan of the plant, which has zip to do with anything we are doing here.

And the second one was in the Colesonco one. There was a sheet on Orimulsion that we have deleted for the reasons that Mr. Bishop has set out and that we have specified. Now mind you, it can be made -- there is nothing in any of the things that we are talking about this afternoon that we are not prepared to provide in confidence.

CHAIRMAN: All right. But you are not prepared to put the redacted version of the PPA's on the public record?

MR. HASHEY: They are on the public record I believe.

CHAIRMAN: Okay. Where are they on the public record? Help me out.

MR. HASHEY: I need Marg Tracy. I don't remember the exhibit numbers. But which number is it? A-4.

CHAIRMAN: I finally straightened it out, Mr. Hashey, in Marg Tracy's absence. Okay. Go ahead, sir.

MR. HASHEY: Maybe we should start off -- it struck me that I have sent -- or a letter was drafted and sent under the signature of Ms. Gilbert to Ms. Legere that sort of sets out an outline, it's dated 2005-07-06, and we have

attached I believe as part of the binder, and it does go through the various numbers.

CHAIRMAN: Where is it in A-8, Mr. Hashey?

MR. HASHEY: It may not be in A-8. I'm not sure. It should be.

CHAIRMAN: Now that was -- we do have that letter and transferred them over to A-8 just so we had it at hand. So we have got that up here now. Okay.

MR. HASHEY: Apparently that didn't find its way into A-8. I apologize.

CHAIRMAN: No, but we have it because it was simply what accompanied A-8 when it was filed with us. So --

MR. HASHEY: It doesn't add anything other than just to give a little summary sheet.

CHAIRMAN: Yes.

MR. HASHEY: That's all.

CHAIRMAN: Carry on, sir.

MR. HASHEY: Maybe we could almost go from front to back if you like. Do it the easy way, you know.

CHAIRMAN: Yes. Don't do it alphabetically, go front to back.

MR. HASHEY: Front to back and skip around a little as we are going. The easy ones -- and maybe to get them out of the way, because these are fairly easily classified.

We have got first of all the list, which isn't that large, is really the fuel and the issues involving Genco that Mr. Bishop spoke to yesterday and that the letter addresses. There is a group of those which are numbers 37 -- sorry -- EGNB 37, 38, 39 and the PI 17 and the Board's 10, 31 and 75 (a). If I could come back to those I could -- I would like to maybe jump to the ones that we could dispose of fairly easy in a shorter fashion, one being the PPA's that we were just speaking about and secondly the request that we have in the EGNB IR 1 which is asking us for two Disco agreements, which are the two agreements that they have -- that if I could refer to it -- it's really the Saint John Energy and the electrical department of the City of Edmundston. Those two agreements.

CHAIRMAN: Sorry. You have lost me again, Mr. Hashey. I'm sorry. You have been jumping back and forth.

MR. HASHEY: Yes.

CHAIRMAN: What one are you referring to now? What interrogatory are you referring to?

MR. HASHEY: I'm referring to EGNB IR 1, which is near the back of the book. It's third in from the back of the Confidentiality Book that we have filed A.

MR. MACNUTT: I believe it's the first one.

CHAIRMAN: That's right in front of the book that I have, Mr. Hashey.

MR. HASHEY: Oh, sorry. Then I'm looking at my own copy. I am going to refer to the book.

MR. MACNUTT: Mr. Chairman, while we are dealing with this, while Mr. Hashey is referencing that, reference has been made to the July 6th letter enclosing the statements which are now have been combined into exhibit A-8. Mr. Hashey has just identified and you have identified that exhibit A-8 does not have that July 6th letter. I think for clarity on the record it would be appropriate to have the July 6th letter marked as perhaps exhibit A-9 so that it can be incorporated with exhibit A-8.

CHAIRMAN: Your voice dropped at the last, Mr. MacNutt. You want to have it incorporated in A-8 or you want to have it a separate exhibit number?

MR. MACNUTT: That would be totally in your discretion, but I think it should be one or the other, Mr. Chairman.

CHAIRMAN: We will take our afternoon break. I'm sorry. I will make an executive decision. This is A-10. Thank you, Mr. MacNutt. Go ahead, Mr. Hashey.

MR. HASHEY: Thank you. And now referring to the book. The first one was the request for the -- which is EGNB IR 1, and it was requesting a copy of the contracts between

Disco and each of Saint John Energy and the electrical department of the City of Edmundston. And what we have indicated -- Disco has indicated -- that there has been a request by the contracting parties to hold the documents in confidence until today, or yesterday, when we could address it. We have no objection to putting those documents on the record from Disco's standpoint but I thought it was only fair that we hear it from the other parties in case there were issues, and maybe it would be appropriate to ask Mr. Gorman. He has indicated to me that there won't be truly any problem, but we should have that confirmed by City of Edmundston. I don't know. I haven't heard from them.

CHAIRMAN: Mr. Gorman.

MR. GORMAN: Thank you, Mr. Chairman. I promise no Taurus analogies. The Municipal Utilities accept the concept of an open, public and transparent hearing but wish to have the documents reviewed prior to agreeing to disclosure of these documents. That review has taken place and Saint John Energy and the City of Edmundston are -- no longer require that those documents be held in confidence. So as far as we concerned the documents can be put in the public record.

CHAIRMAN: Thank you, Mr. Gorman.

MR. HASHEY: They will so be included. We will try to get them out with the answers to interrogatories.

CHAIRMAN: I don't know why I thought you might have them here today.

MR. HASHEY: I don't think we have them here today, but they will be supplied. There is not a problem. I am informed we might have one copy, but I think we probably should do it in a larger scale.

CHAIRMAN: That's fine. When are the answers due on that set of interogs'?

MR. HASHEY: Thursday.

CHAIRMAN: You can have until Thursday, Mr. Hashey.

MR. HASHEY: We will make every effort.

CHAIRMAN: Thank you. Go ahead.

MR. HASHEY: I thought about starting with the good news, we will be fine. The question then is would you like me to move through the book in the order that it's at and end up -- maybe that's the easiest way frankly for everybody. I will do that.

The next interrogatories have similar commentary which is as you will see in the book EGNB IR 37, that's where we are getting into the marginal fuel cost issue here and -- or system lambda fiscal year ending March 31st, 2005.

Now in this one again this relates to the issues as

raised by Mr. Bishop yesterday and we have Mr. Bishop's letter of response. Now what as I indicated yesterday we have attached is a sheet that shows one of these as it would come out. This is one of the ones that we are quite happy to supply in electronic form, but with people signing onto the confidentiality for the reasons as specified by Mr. Bishop, and I can go over those and maybe deal with those in general later on.

CHAIRMAN: Look, it's hard enough for those of us up here to keep track of things as we go, and if I were to suggest that we should really deal with each one individually, have the argument, go around the room, be done with it and then get on with the next one, would that be terribly onerous, Mr. Hashey?

MR. HASHEY: No. Maybe a little bit repetitious but not onerous.

CHAIRMAN: I appreciate that, but -- let me -- there are two parts to this, one is electronic form sufficient if the information is required and the second thing is should it be filed in confidence, is that correct?

MR. HASHEY: Correct.

CHAIRMAN: Now does anybody have any problem with electronic version, being filed that way?

MR. HASHEY: No

CHAIRMAN: Certainly the Board doesn't, so that's fine. Now you can deal with the confidentiality of it.

MR. HASHEY: Mr. Bishop has set out in his letter, and I think it has been driven home fairly well by his evidence yesterday, that he gave at the request of my friend, the Public Intervenor, who cross-examined him, to say that supplying the information that is sought on individual and detailed prices can have a significant effect on his ability to negotiate contracts. I thought Mr. Bishop was very specific and drove home some points very well yesterday, indicating the significance and the importance of confidentiality.

Again no problem with having it on the record for everybody to use, but not out there on the marketplace where people can gain information that would benefit them in negotiating prices. These are not simple prices as someone -- as has been suggested I believe. We are not dealing with a 50- barrel purchase. There are very substantial purchases. And there are some very significant negotiation that carry on on fuel purchases. And in that regard there can be some very significant benefits.

Mr. Hyslop this morning says you can't prove that you are going to have this. Well my heavens this is basic

commercial negotiation and documentation. Nobody can really say how a negotiation is going to come out until it happens. But nobody has negotiated more and harder than Mr. Bishop. That has been his job for years. And he does negotiate the contracts. He knows the complexities. And he knows where confidence is necessary.

I felt it rather unusual yesterday for the Public Intervenor to say that this has only a minor effect when we are putting the very customers that he represents at risk. A few million dollars is pretty significant to the number of customers that exist in New Brunswick. It's clear from what Mr. Bishop says. And nobody has rebutted that evidence, that what the Public Intervenor is suggesting will put the people that he represents, the very people that he represents at risk, and a 1, 2 or 5 percent increase in rates as the numbers would show would be the case are pretty darned significant. There is a very significant potential effect there, which -- the potential for which we want to avoid, and we think we can do it through the very policy that this Board set up, the very policy that the Act encompasses using in Section 133 on sensitive commercial information.

Truly there has been -- I think by count the questions that people are working on in Disco right now,

there is about 379 questions. And I think there is about six or seven that we are asking that might be kept confidential, whittled it down very significantly, trying to give everything that we possibly can, but where there is this commercial sensitivity the problem exists, as Mr. Bishop says, there is the fuel price negotiations, there is the price in the sale to the States and it's the ISO I think has been a little misrepresented. It's not the bid prices that we are looking at. That can vary as well. There is also the sales to the other groups. And as Mr. Bishop has pointed out, there is a big difference from 1991.

In those days there was a sharing of information amongst generators in the various provinces. Now it's very highly competitive. In other words if Quebec knows that we have got something down and they have the detail on it, you can be sure we are going to get hit with a higher price. And that's what Mr. Bishop is saying. That's all he is saying.

So for those reasons, I am requesting that this information be disclosed but be disclosed in a confidential manner, so that everybody has it, everybody knows what it is. And truly what we are looking for here, as I see it, as I understand it, and maybe I'm wrong, but

as I understand it effectively is an audit of what is passing through the PPA's. We know that we have to pay what the PPA's say that we have to pay, and we know that it's relevant also to the very issue that we are in now that people want to investigate, and we are not holding anything back from that purpose or that investigation. It's just a matter of not having it out on the open market, that's all. Let it be used, let it be disclosed in confidence in accordance with the policy.

CHAIRMAN: It certainly is the Board's understanding that that type of information is very useful in reference to a cost allocation and rate design study. You didn't mention that and I wanted to emphasize that that certainly is our appreciation of it.

MR. HASHEY: No, I understand that, and that's why if it wasn't useful for that we would be saying it wasn't relevant and wouldn't be putting it out. But for that purpose we are quite willing to put that out.

CHAIRMAN: Good. Thank you, Mr. Hashey.

CHAIRMAN: Enbridge Gas New Brunswick have any comments on this particular Interrogatory?

MR. HAYES: Yes, Mr. Chair. And as this is the Enbridge Gas New Brunswick, I am going to take just a couple of moments. This is our interrogatory request and so I

wanted to take a couple of minutes to clarify our position on it. First, we agree that the information is commercially sensitive and pursuant to section 133 of the ELelectricity Act, the Board is provided with the appropriate tools and the appropriate test to look at material received in confidence.

When we asked for this information, we expected it and anticipated that there would be confidentiality issues and we agree that the matter is appropriately handled through receiving the material in confidence and subject to the confidentiality policy. Ultimately if the material is released, it is or could be injurious to the ratepayers of New Brunswick and ultimately the shareholder of the utility which is of course the public. And so we have no problem with receiving the information in confidence and would encourage the Board to do so.

Thank you.

CHAIRMAN: Thank you. I guess, Mr. Dever, you are next.

MR. DEVER: No comments, Mr. Chairman.

CHAIRMAN: No comment. For Rogers?

MS. VAILLANCOURT: No comments, Mr. Chairman.

CHAIRMAN: Mr. Gorman?

MR. GORMAN: No comments on this issue, Mr. Chair.

CHAIRMAN: Thank you. Mr. Peacock?

MR. PEACOCK: No comments, Mr. Chair.

CHAIRMAN: Thank you. Mr. Hyslop, do you want to switch off again with Mr. Coles?

MR. HYSLOP: My comments are very brief because I am not going to repeat everything I said this morning on the importance. I will go. I will be very brief and then Mr. Coles may have longer arguments.

Our main position is -- and we heard Mr. Bishop's evidence yesterday dealing with the four bullets in the letter that is part of exhibit A-8 and has been much discussed. I am going to deal briefly with the four bullets. I think that is the quickest way to dispose of it.

Bid prices in the New Brunswick market or evaluating Genco's strategy in setting bid prices. The evidence of Mr. Bishop on this point is since October 1st 2004 there has been no situation where there has been bids placed. And from what I gather none is anticipated in the immediate future. It would seem to me that there is not much to the fourth bullet.

With regard to the second and third bullets on the negotiations for the purchase and sale of electricity, he indicated there is negotiations from time to time with utilities in the area. My understanding is sales of

the -- of electricity in the area go through the New Brunswick System Operator. And the sales of electricity in and out of New England go through New England ISO.

These are very, very much market driven issues with regard to the purchase and sale price of electricity. The relationship to the plant costs and the fuel costs does not seem to me to be related at all to 2 and three.

With respect to the supply of fuel prices and Mr. Bishop, he got a bit of the upper hand on me on that one. He certainly, with regard to coal, he indicated there can be some variances from the indices. And I appreciate that. But generally we are dealing with small variances from time to time with regards to the indices for oil and for natural gas.

New Brunswick is not a big enough consumer of these fossil fuels to drive the market. And I think his evidence was they buy 7 million barrels a year out of 80 billion per day produced. I haven't done the math but it is obviously probably less than one-tenth of 1 percent. It is a very small portion.

I appreciate my colleague, Mr. Hashey's remarks, maybe I'm driving up the price. But it seems to me that the second part of the test in the Sierra case is a weighing of how important is this to an open and full and

transparent hearing that we keep talking about versus the commercial sensitivity to Genco. And I also suggest that while you may know these today, it won't be very long before they are irrelevant or enough time goes by that they are gone.

It is not my intention to push prices up but boy, it is my intention if possible that the public at the end of the day will know why the rates are what they are. And if this is a major part of what is going to go into the analysis of the cost allocation study, if we have to spend half of the hearing in-camera because we can't go into the fuel prices on a plant by plant basis, I think it gets very clouded. It is a judgment call. I elect to use my judgment for the benefit of New Brunswickers knowing what the deal is.

And if it does have a minor cost increase, I will apologize for that. I will take the hit for it. But I think New Brunswickers want to know why and they want to know what it is all about. So there is a trade off there.

I think the importance of the material outweighs the commercial sensitivity.

Thank you, Mr. Chair. That is my comments. I would also add those are my exclusive comments on IR-39, IR-38 and I believe on PI-10 as well are so I won't even have to

comment on those. They are already on the record. Thank you.

CHAIRMAN: Thank you. And when we get to those, you can just say ditto and that will cover it. Mr. Coles?

MR. COLES: Thank you, Mr. Chairman. The position of my clients is clear. All of this should be on the public record. I had the benefit of listening to the testimony yesterday. I had the benefit of my friend, Mr. Hashey's comments this afternoon.

With respect, I agree with Mr. Hyslop that the points in the letter that supposedly justify your receiving this information, that point number 4 isn't in play at all. Point number 2 and 3 or bullets number 2 and 3 are not significant. And what you are left with is simply the bold faced assertion -- that is all it is -- bold faced assertion that somehow if people know plant costing, that this is going to give a competitive advantage to somebody else in the marketplace.

Well all of the evidence -- all the evidence you have heard, everything, is that this is a supply demand price driven marketplace, period. What a particular plant has in the way of requirements or efficiency, with the greatest of respect, I do not understand how that affects the capacity of Disco to operate in the marketplace.

On the other hand, I very much understand the repercussions of this Board or anybody else saying we are going to consider the evidence in private. We are going to receive it in confidence. That is a limitation on freedom of expression rights under the charter. That is a certainty. The other speculation, there is no question if you do this in-camera in confidence, you are violating charter rights.

So I don't see it as much of a contest at all in the absence of something more specific. I, quite frankly, have an apprehension that the real reason that this information is wanting to be kept confidential has nothing to do with the arguments that have been raised and I submit that that apprehension applies to keeping confidential the contracts that we referred to this morning.

I want to remind the Board and direct the Board to -- again back to the Electricity Act, because when you are dealing with this question, it abuts the question that we were talking about this morning. And I appreciate the Chairman's reasons for analytically dividing the two arguments but there is an overlap and I do have to talk about it.

If you go to division (d) in the new Electricity Act

which is the section that sets up your powers, very first section. In any application or proceeding before the Board under this Act, the Board has all the powers and privileges of commissioners under the Inquiries Act and regulations under that Act, except that as a witness shall be paid the amount of money allowed in the Queen's Bench of New Brunswick as a witness for travel. So there is a variation on how you pay a witness. But other than that, you act as you act under the Inquiries Act.

And what is it that you are to do? I mean, you know, we have talked generally about this. But your task is very specifically set out in this Act. If you go to section 101, that is what we are dealing with, section 101(1) of the Act deals with applications for change in charges, rates and tolls. And it says, if a change in the charges, rates or tolls for its services would exceed the amount authorized under 99 -- and that is a 3 percent increase -- the Distribution Corporation shall, it's mandatory, make an application to you for approval. Okay.

Now it then says the Board shall, on receipt of such an application, proceed under 123. That is how we -- that is what you are doing. But when you -- when you are doing your good work here, the Act goes on and it says, 101(4), the Board may, when considering an application under this

section, take into consideration. And the legislation sets out a list. Not exclusive. It's may take into consideration. You can take other things too, but this is what the legislation sets forth.

And number (c) is rate design matters. The legislation even contemplates that you are going to get into rate design matters as part of your job to set reasonable rates. Well I don't quite frankly understand how you can properly consider rate design matters, customer service policies and charges and proposed allocation of costs among consumers -- in other words, (b), (c) and (d) of this list -- unless you consider the contracts that we talked about this morning and the information that is being dealt with this afternoon that is being, Mr. Hashey says, clearly understood to be relevant, clearly offered to you, but offered to you on the basis that you keep it confidential.

And again the challenge I put to you is well, if it is relevant and necessary for you to do your job, then presumably this is going to have a real impact, this information, on whatever the heck it is you decide. And I don't know how you can -- I don't know how you can make an informed decision and put it out there to the public as this is righteous, if you hold back the evidentiary basis

upon which you do that.

And as a public institution, I just -- my objection is a broad stroke one. My objection is you should not be acting like the Star Chamber of England of Old, where you received evidence in confidence and passed decisions. I mean, that is the principle and it is a long-standing principle. And if my friend, Mr. Hashey, wants to come in and say depart from it, hold this in confidence, deal with it behind closed doors, I think he has got to come in here with a whole lot better than a letter that puts out one individual's possible prognostications on what may happen in a marketplace that he admits is changed and changes every day. So I make that -- I make that general comment. Number 2 is -- and Mr. Chairman, you will recall this morning that I proffered to you an interpretation of section 128. You asked my friend, Mr. Hyslop, or you challenged him, you put to him does he agree with my proposition that they are disjunctive. You did not ask me that question.

CHAIRMAN: You proffered it, Mr. Coles.

MR. COLES: I proffered it and you asked him if he agreed with it.

CHAIRMAN: Yes.

MR. COLES: I took by implication by your remarks that you

made to Mr. Hyslop, that look, you thought, no, look, really, they may well be conjunctive and therefore, my interpretation fails. What I would say to you and I say to you both in the context of the question this morning and the question this afternoon, that when you look at 128(2), it begins with, when inquiring into and then it adds hearing or determining any matter. And I say to you that in fact what it does do is it modifies one but then it carries on to other situations.

If I am wrong, Mr. Chairman, and you are right and your interpretation is this stuff only applies when you are in the inquiry mode, then I put to you that 129(a) has to prevail in any event. That has no limitation and it is reflective of your rights of powers of inquiry. Because if you act under those general powers, again you can compel anybody to produce anything that you think as commissioners under the Public Inquiries Act that you deem necessary. And that is reflective in 129.

I would conclude by saying the work of this Commission, now taking on a task that hasn't been done in 13 years, this is a big job. And it is a tough job.

And I think that in order for your work to be accepted and endorsed, it must be understood. And I think that is the preeminent value and the preeminent obligation of a

public institution.

I, like Mr. Hyslop -- no, those are my comments on this issue. Thank you, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Coles. Mr. Stewart, you are -- no, he is gone. No, there he is. You are still in the room. Do you have anything to add to this?

MR. STEWART: No, Mr. Chairman.

CHAIRMAN: Okay. All right. Mr. Hashey, next one?

MR. HASHEY: Effectively, Mr. Chairman, the next one is of the same ilk. But I guess I should make my point on the Sierra Club case at this point in time, which again applies to all. It will be very brief. But that case clearly calls for what we are doing here.

My friend -- CBC ignores section 133 of the Act. And he has certainly commented enough on other sections. May doesn't mean shall. There is various comments I could make. But I don't think it is terribly relevant. There is a provision for confidentiality. It is intended.

But referring to the Sierra Club case, I think the tests are clear. And I believe the Board knows the tests that -- you know, that it does call for expungement of the commercially sensitive information, you know, in a limited manner, exactly what we are asking to do.

It wants summaries of the confidential documents,

could go a long way in the absence of the original. I think that can be accomplished, as we get into that this morning. Those summaries have really already been made public. And it is a check and balance against the individuals that can be done.

You know, in the case, I think the interesting paragraphs are paragraphs 77, 78 and 79 which specifically deal with -- and I won't take the time to try to read those. But it does, I would suggest, confirm exactly what we are suggesting here as the leaning of the Board -- or of a court.

And particularly paragraph 82 which reads "In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in particular cases" -- and we agree with that -- "the level of media interest should not be taken into account as an independent consideration." That is why we have a Public Intervenor.

And I see -- I won't go beyond that. I just ask the Board maybe to refer to those paragraphs in that. And again in -- then I would go to 38. The same reason. Would further add that I think Mr. Hyslop's evidence helped me, supported me. He brought Mr. Bishop here, requested -- he did call him. It is his evidence.

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626 -

And I think he drove it home, the various points that are made in this letter, that he has rebutted. And I would suggest that all of the points are very relevant when taken as a whole. But would add no more.

I would say that is -- and I would repeat the comment that I have made, as Mr. Hyslop has suggested that he would do in relation to, you know, 38, 39 and I think the 75. But we will go individually on them. And I will just say again I make the same point.

CHAIRMAN: All right. That is, sorry, 38, 39. And what other one, Mr. Hashey, do these remarks all apply to?

MR. HASHEY: I believe the --

MR. SOLLOWS: PUB IR 10 (c).

MR. HASHEY: IR 10 (c). Thank you very much. And I believe 75(a) as well.

CHAIRMAN: Is that PUB?

MR. SOLLOWS: Yes.

MR. HASHEY: Yes.

CHAIRMAN: Mr. Hyslop, are those part of your dittos?

MR. HYSLOP: My dittos would apply to 37, 38, 39. 10(c) I said there doesn't seem to be the basis of confidentiality. But there is the same type of issue, going to heat rates. And to 75 which would only leave IR 31.

CHAIRMAN: Sorry. What was the last comment?

MR. HYSLOP: I believe IR 31 may still be in play.

CHAIRMAN: Now, Mr. Coles, do you -- the other counsel are dittoing here. Are you on side in that method or --

MR. COLES: I'm dittoing subject to one comment. My friend Mr. Hashey directed you back into the Sierra decision. And he made two comments. He referred you to a number of paragraphs and stopped at 82.

With the greatest of respect to my friend, when he read the comment, "The importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration", that is a correct quote from the case.

But the context in which the Supreme Court of Canada is making that statement is in reference to the remarks of the Ontario Court of Appeal. And you have to read the case to understand that what they are saying is look, that is not the test.

But they go on in the very next paragraph to say the following. "Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into account when assessing the merits of a confidentiality order."

Remember in the Sierra case what you have is you have a private litigant who is looking for information in reference to civil litigation as between the two, all right, in a courtroom.

Here you are a public institution. The media is looking for access pursuant to its section 2(b) rights. And I suggest to you that the threshold that has to be met by Mr. Hashey is even higher than the litigant in the Sierra case that was granted some protection under confidentiality.

The second point is while the applicant can point to and say look, commercial confidentiality was recognized by the Supreme Court of Canada as a basis, absolutely. But you don't stop there.

As the case says, you have to look at what that confidentiality is all about and the evidence supporting it and weighing it against the competing interest before you can go there.

It is not simply a matter of somebody raising their hands and saying, we said the contract would be confidential, and that is the end of it. Obviously it is much more sophisticated.

Mr. Chairman, again those are my comments carte blanche for the whole thing. So I now line up with the

ditto crowd.

CHAIRMAN: Okay. Thank you. Yes, Mr. Public Intervenor?

Look, let's try and -- you know, if you ditto you ditto.

And let's get on with the rest of it. And then you can

toss it in when you come to the next one if you want to.

I'm just trying to get through this as best we are able to
this afternoon in good order here.

Now, Mr. Dever, do you have any comments in reference to
those IR's?

MR. DEVER: No, Mr. Chairman. I don't.

CHAIRMAN: Good. Thank you, sir. Sorry about the
pronunciation of your name. I keep -- I think I made the
mistake the first day of saying Dever. And nobody
corrected me. And now I keep slipping back to it,
Mr. Dever.

MR. DEVER: I hear all sorts of variations.

CHAIRMAN: Yes. Okay. Thank you, sir. Mr. Gorman?

MR. GORMAN: No comments.

CHAIRMAN: No comments. Can I ignore you on this?

MR. GORMAN: I'm not sure I would want to be ignored.

CHAIRMAN: Anyway, look, why don't I leave it this way, that
you will raise your hand if you have a comment on it. I
think that is the easy way to go.

Mr. Stewart, do you mind fitting in that category as

well?

MR. STEWART: Yes, Mr. Chairman. Or no, I don't mind. You can treat me that way.

CHAIRMAN: Thank you. Now Commissioner Sollows and I were just looking at A-10, Mr. Hashey. From our scorekeeping here we are down to top of page 2, Disco, PUB IR 31(a) and (b) needs to be covered. And is there anything else?

MR. HASHEY: We would then jump to the last two PPA's I believe. Do you want me to address 31?

CHAIRMAN: Yes. Might as well do 31(a) and (b) now, sir.

MR. HASHEY: Okay.

CHAIRMAN: Yes.

MR. HASHEY: What I would suggest in this in fairness -- and I recognize that this isn't the end of potential discussion on confidentiality issues. This is a preliminary attempt to get things defined, give us direction, et cetera.

In this one we are suggesting that we will be providing significant information, as you can see. And personally I'm wondering if it wouldn't be better to have that answer and to see if it isn't satisfactory before we go on to other issues.

I mean, this is an undertaking -- or sorry, an Interrogatory that is to be answered later this week.

Certainly, as you can see, we are going to put out

information that my client typed, et cetera, a lot of information on the expenses and things that are being asked for.

And I think it is just the fuel aspect of it that we are probably asking to be protected and that we could fill in.

Probably when you subtract and multiply it, a lot of things would be obvious. But we are trying to give a pretty thorough answer to that one.

And I would suggest and respectfully say that maybe we could adjourn this one until you see the answer that you get. And then if need be we could deal with this and others that may arise in the next round.

CHAIRMAN: Yes. Could I ask Mr. MacNutt to confer with Board staff and see what staff's approach might be? Take your time, Mr. MacNutt.

MR. MACNUTT: The indication from staff -- from staff -- is that Mr. Hashey's suggestion is fine.

CHAIRMAN: Is okay?

MR. MACNUTT: Is okay.

CHAIRMAN: All right. Anybody else have any comment on that? If not, then Mr. Hashey, we will wait until you have answered that interrogatory on Thursday and we will go from there.

So we are now down to the very last, number 3, schedule 1.1.55 page ii of the Colesonco PPA and 2.17 of Nuclearco PPA.

MR. HASHEY: On the Nuclearco one I mean, I have no problem with showing anybody probably in this room this diagram. It's obviously not relevant. It's a plant diagram and there is very serious security concerns about having that public that has been brought to my attention. And I really don't think that there is anything in that diagram that would have any relevance to any matter that would be here.

CHAIRMAN: Refresh my memory. Where did that question arise? How did that arise?

MR. HASHEY: This arose because of our redaction of two pages in all of the PPA's exhibit 4. This was one of the redacted pages. This was the only redacted page from the Nuclearco one. And it's strictly a plant diagram as is specified therein.

CHAIRMAN: Thank you, Mr. Hashey, on that one. Any parties any comments on that?

MR. COLES: Mr. Chairman, as I understand the basis for the request to provide it confidentially is that it's not relevant. It seems to me if it's not relevant then it doesn't go to the Board and then my concerns about the

Board having considered matters in confidence that may lead to the decision disappears.

So I guess I'm not sure who posed the IR request. I suspect listening to this discussion what happened is a document which may well be relevant was requested that had this as part of it. Now it appears this is part of it, it raised the security concerns. I mean my comment would be if it's not relevant withdraw the request and don't make it be produced. I mean I think that --

CHAIRMAN: I think this resulted, Mr. Coles, as a result of the blanket request for all these PPA's and I couldn't agree with you more. Anybody have any problem with that?

If not, then that request -- well the Board -- I don't know whose request it was, but whoever it was will either withdraw it or we will withdraw it.

MR. HASHEY: It really wasn't anyone's request. This arose I believe from the fact that I believe I spoke to yourself or Mr. MacNutt, Mr. Chairman, in saying that I thought we should deal with the two PPA's today, so that we get those issues out of the way while we are dealing with the confidentiality policy. That's all.

CHAIRMAN: And that's great. And as we -- at the time of the adjourned hearing as soon as the Board heard of the concerns that you did have they appeared to be very

reasonable and the request for that information was withdrawn.

Along to the next one then.

MR. HASHEY: The Colesonco PPA deals with Orimulsion issues -- Orimulsion pricing issues, that's all. And as we know at the moment Colesonco itself is not using Orimulsion. But we also know that there is a contract with Dalhousie and there are some very sensitive negotiations going on with the Venezuelan people. There is a confidentiality agreement in the Colesonco contract as I remember seeing it, and we have seen these before here, and we have redacted portions of them before -- is that that does allow the Board to say that we want to see things in confidence and this is one that I believe we would be willing to put out along the confidential policy issue. I mean it would have limited relevance. It's Colesonco information I believe, but -- and it is just the fuel specification issue, for whatever relevance that has.

CHAIRMAN: That's not a price then, it's fuel specification.

MR. HASHEY: Right. That's all.

MR. SOLLOWS: Heating value.

CHAIRMAN: Heating value.

MR. SOLLOWS: Sulphur content and that sort of thing.

CHAIRMAN: Sulphur content and that sort of thing.

MR. HASHEY: That's correct.

CHAIRMAN: Now that we understand the nature of it let's go around the room on this one as well. Why don't we start with you, Mr. Coles.

MR. COLES: Thank you. Our position again is that if it's relevant -- I mean you are not going to receive it and shouldn't request it unless it's relevant. And if it's relevant then presumably it goes into the mix and it should be revealed. My instructions and understanding is the issue surrounding this particular fuel source, if I could describe it that way, are much broader than as my friend has described and that there are other implications surrounding this and its contracts and costing implication and so on. But whether you get into that is not for me to say.

CHAIRMAN: No, no.

MR. COLES: But if this document leads you down the path of inquiry then we say again it should be open. And I'm just repeating myself. So those are my comments.

CHAIRMAN: Thanks, Mr. Coles. We have difficulty in pushing buttons, that's a real button, but not really because that's just the quality of the fuel, not the price involved, or lack of same. Any other comments in the room on that one? All right. The request for that particular information then is withdrawn.

MR. HYSLOP: Mr. Chair, I have missed something in the translation. Is it just the make-up of the fuel that they are requesting confidentiality of? Did I hear that correctly?

MR. HASHEY: Yes, that's all that's in that document. I don't have any problem with showing that in confidence to Mr. Hyslop or to anybody on the Board if there is any question on what I'm saying.

CHAIRMAN: My understanding is there is no price involved there.

MR. HASHEY: There is no price involved.

MR. SOLLOWS: But there is energy content. So, you know, if ultimately we are looking at fuel costs and heat rates and those sorts of things, we need to know if we are buying it for so much a barrel, we need not know how many btu's there are in the barrel. So as long as we are going to get that information somewhere, that's fine.

MR. HASHEY: I believe we have offered the actual information in confidence in relation to the Dalhousie and the plants where it's used.

CHAIRMAN: Thanks. We are going to take a break now and be back in 15.

(Recess - 2:40 p.m. to 3:00 p.m.)

CHAIRMAN: Mr. Hashey?

MR. HASHEY: Thank you, Mr. Chairman. I have a preliminary point here if I might. And I apologize to the Board, because it was only the review at the break we realized that there was something missing here.

On the 37 and 38, that information would be supplied in confidence without any further issue if that would be the order of the Board.

On 39 and 75(a), I realized that there were the purchase power numbers specific to Bayside and Grandview. We will request the permission to give you that, but at this moment as you have heard, we don't have that permission. So I couldn't supply that even in confidence in our current situation.

On the Orimulsion issue, as I indicated, there is a confidentiality agreement. I can't agree to supply Orimulsion. Obviously I would respect an order to supply it in confidence, the Orimulsion prices. But there definitely is a confidentiality agreement there, but it does I believe allow for us to deal with matters if so ordered by the Board. And that applies specifically to both 39 and 75(a), which has specific information to the two independent companies, Bayside and Grandview. The others are general fuel, but those are the ones obviously that relate to the natural gas issue.

I apologize for that omission earlier, Mr. Chairman.

CHAIRMAN: Thanks, Mr. Hashey. The Board during the break discussed where we went from here. And what we are tentatively looking at is delivering a decision in reference to all of these matters a week Friday, which would be the 22nd of July in the morning. And I presume Madame Secretary this room?

MS. LEGERE: Trinity Room.

CHAIRMAN: In Trinity. In Trinity Room in this hotel.

Anybody any comments in reference to that?

MR. HASHEY: I won't comment other than to say that my sole day of fishing will be changed from the 22nd to July -- to either the 20th or the 21st.

CHAIRMAN: Did he say he had fishing?

MR. SOLLOWS: Yes.

CHAIRMAN: You have a partner, Mr. Hashey. He can come.

MR. HASHEY: Yes.

CHAIRMAN: Good.

MR. COLES: Mr. Chairman, just by way of clarification, I was a little lost at just before the end of the break.

CHAIRMAN: Is that when you first got lost, because believe me, I have been lost for sometime. Go ahead, Mr. Coles.

MR. COLES: Sure. Commissioner Sollows brought up an important point in reference to the btu's --

CHAIRMAN: Please don't tell him that. Go ahead, sir.

MR. COLES: Well, we were discussing the relevance, you will recall, of the particular fuel document. And Commissioner Sollows pointed out that, of course, it may remain relevant when you get into comparative btu values. And I am just trying to understand the status of that particular IR request to the extent that Commissioner Sollow's observations are relevant, then I assume it's back on the requirement to produce and that will be part of your decision as to whether that's done in confidence or publicly? Am I right in my understanding?

CHAIRMAN: Let me just move over here. That same information would be involved with the information that we have just been talking about in reference to Dalhousie, would it not? I.e., the Orimulsion and btu's per barrel, et cetera, all of that sort of thing?

MR. HASHEY: It could be. And if there are specific questions we will try to address them.

CHAIRMAN: Where it stood, Mr. Coles, is that we had withdrawn that in that the plant that we had requested in that blanket form, i.e., Colesonco, is not now burning Orimulsion, it's gone to heavy fuel oil.

So I think -- and I will ask Commissioner Sollows to address this, he knowing better than I -- and Mr. Thomas

perhaps, but that kind of similar information is involved with the information that you are requesting a confidential filing on in reference to Dalhousie, would it not?

MR. HASHEY: That's correct. And should I think further point out that in the Colesonco PPA, there really isn't any Orimulsion issue that would be relevant to this hearing. It's not obviously being used. I think it might become relevant in Dalhousie. And this was strictly the Colesonco we were speaking of here.

CHAIRMAN: Yes. And that was my layman's appreciation of it, Mr. Coles.

MR. COLES: I am now informed. I understand. Thank you very much.

CHAIRMAN: Thank you. Anyway, any other matters before we adjourn?

MR. STEWART: Mr. Chairman, I just didn't catch the time on the 22nd for the decision?

CHAIRMAN: On the 22nd?

MR. STEWART: Yes.

CHAIRMAN: 10:00 a.m.

MR. STEWART: 10:00 a.m.?

CHAIRMAN: Yes. In the Trinity Room, as I understand it.

Oh, it's been an interesting and rugged two days. But I

do want to thank all of you for your courtesy and all of us attempting to get through what is a rather complex -- this is a pre-hearing conference from you know where. It goes on and on. But anyway, appreciate your attendance and your participation. And if you can't be here next Friday -- or a week Friday, why your partner or someone else. Thank you.

(Adjourned)

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

Reporter