New Brunswick Board of Commissioners of Public Utilities

Pre-Hearing Conference

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

Delta Hotel, Saint John, N.B.
Nay 17th 2005, 10:00 a.m.

CHAIRMAN: David C. Nicholson, Q.C.

VICE-CHAIRMAN: David S. Nelson

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Randy Bell
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Diana Ferguson Sonier
H. Brian Tingley

BOARD COUNSEL: Peter MacNutt, Q.C.

BOARD SECRETARY: Lorraine L,gŠre

....

CHAIRMAN: Good morning, ladies and gentlemen. We are going to rename this room the Fairhaven Room in memory of one of the best sardine plants in southern New Brunswick. We are a large crowd here today. I have a number of housekeeping things to start with. First of all, as those of you who have been involved in this process before know, before you speak you have to push the button so you have got a red light, so that the translators can hear you, and the shorthand reporter.

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Secondly, we do have a few blind spots, particularly from the point of view of the shorthand reporter. So I would ask that when you do use your microphone, please

identify yourself and who you represent so that the
shorthand reporter can get it down.

In the back of the room, which is actually I guess out
in the hall, there is my effort at a tentative agenda for
today, which as I have told my Commissioners, as soon as
we get in here it will be all torn apart. So I
acknowledge that.

In addition to that, however, out there there is a
parties list. There is a procedures policy. There are
guidelines for making submissions. There is our language
policy. There is a draft document on confidentiality
procedure. And there may be some other things that I
haven't got listed here.

But turning to the tentative agenda, we will go
through the first three right off the bat, which is the
normal procedure. In other words, we will get
appearances. And then we will see who is to be an
Intervenor and who is not.

And the language of the hearing will be English.
Because each and every party has indicated that that is
their preference with the exception of the official

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opposition who have indicated either language is fine with
them. So the language will be English.

And then the marking of exhibits, there are certain
documents that have already been produced in reference to
this hearing. And we will go through those and give you
the markings on them which we will simply add to as we go
on further.

Now the applicant is NB Power Distribution Customer
Service Corporation. Appearances please?

MR. HASHEY: Thank you, Mr. Chairman. Before introducing
the gentlemen and ladies with me, would it be possible to
close the blinds behind you. It is very, very difficult
for us to see. We are looking straight into the sun from
here.

CHAIRMAN: You don't want to see what is here anyway. I
will tell you what, put up with it for a few minutes. And
I will ask the Secretary if she would go and see if she
can find somebody from the staff who might be able to do
that. Right now, yes.

MR. HASHEY: Thank you. We will proceed then with who is
with me here today.

CHAIRMAN: Might as well. And we will see what can be done.
MR. HASHEY: Sure.
CHAIRMAN: I don't know if they are just colored panels or
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if they are --
MR. DUMONT: We can see you.
MR. HASHEY: I'm David Hashey. With me as co-counsel is Terry Morrison to my left. Next to Mr. Morrison is Rock Marois. And next to Mr. Marois is Sharon MacFarlane. And at the far end of our front table is Lynn Walsworth. Behind me are two support staff, Marg Tracy and Lillian Gilbert.

And I thought at that table would be useful for you to see the additional witnesses so that you can identify faces to who it really is on the evidence. There is Gaetan Thomas. There is next Lori Clark. And next to Lori is Neil Larlee. And that would be the group that I would introduce as being part of the applicant's team here today.

CHAIRMAN: Thank you, Mr. Hashey. Attorney General of New Brunswick, Mr. Anderson. Where are you, sir?
MR. ANDERSON: Yes, Mr. Chairman.
CHAIRMAN: We are now talking about whether or not you should be granted Intervenor status. I have already talked to you outside. And I would like you to address a number of things, first of all that there is a second agent of the Attorney General. And that is Mr. Hyslop. There is in our office, an official letter from the
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Attorney General's Department appointing Mr. Hyslop. Do you have one, sir?

And this is extremely difficult. Because as you know, both you and Mr. Hyslop may argue on certain points and have different points of view. And we don't know what we will do. Go ahead, Mr. Anderson.

MR. ANDERSON: Thank you for the opportunity, Mr. Chairman. I can certainly file with the Board my letter of retention. And I will do so at the appropriate time, if the Board wishes, after I have given my remark.

The position of the Attorney General of the Province of New Brunswick and other Attorneys General is a multipurpose role. And I would refer -- and if it pleases you, I can provide you a copy of an article published in

the University of New Brunswick Law Journal in 1987, I
believe, and authored by Gordon Gregory, the then Deputy
Attorney General of the Province, who had been Attorney
General I believe for over a dozen years at the time. The
purpose of the article in part is to describe the role of
the Attorney General.

And his submission or point is that the Attorney
General has several roles, the first of which is as the
legal advisor to the Province or to Government. And in
that role, the Attorney General provides not only advice

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but appears as a representative of the Province before
courts and tribunals within the province and outside the
province.

There is a second role of the Attorney General. And
that is one established by long history of common law.
And that is to make interventions either as amicus curiae
or to make representations before courts or tribunals, to
make representations in the public interest.

In this circumstance I can speak to a limited degree
with respect to the terms of retention of Mr. Hyslop. But
I can say I think with confidence that Mr. Hyslop is
representing the Attorney General. He has been retained
by the Attorney General to represent the public interest
in this matter.

My terms of retention are to represent the Province of
New Brunswick before this tribunal in the context of the
application which we made for limited participation in
this hearing.

I have no knowledge as to what Mr. Hyslop in his role
of consumer advocate or public -- or representations of
the public interest. I have no knowledge as to what he
may say. And he certainly does not receive instructions
with respect to the manner of representations, the points
of view which he wishes to present. I do. I take my

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instructions from the Province of New Brunswick.

And so on the first issue I believe -- I'm sure you
have others. But on that first issue, the Attorney
General has appointed me to act on its behalf to represent
the Province of New Brunswick.

The Attorney General has appointed Mr. Hyslop who is
not certainly an employee of the Attorney General, has

appointed Mr. Hyslop to represent the public interest
before the Board.
CHAIRMAN: Mr. Anderson, there is no question in my mind
that the way you enumerate the Attorney General's
functions in our parliamentary democracy are absolutely
correct.

And there is that common law right, even if the
statute is silent on it, for the Attorney General to
intervene in the courts or before a tribunal like this, if
he or she believes there is something in the broad general
public interest that should be represented by the Attorney
General. I guess our concern is that there are two who
claim to be the agents of the Attorney General.

Now you are the agent of the Attorney General. But
you are representing the Province of New Brunswick. And I
think that it is a pretty nice differentiation, frankly.

I would expect that the Chief Law Officer of the

Province is in fact representing what he or she believes
in the interest of the Province and the people in the
Province appear before a tribunal.

Anyway, those are -- the Board will take it under
consideration and make a ruling before we proceed further.
Thank you.

MR. ANDERSON: Thank you, Mr. Chairman.

CHAIRMAN: Anyone here representing the City of Miramichi?
The Commissioners, when looking at the list of
Intervenors, perhaps people who are not familiar with our
process don't realize that if they were simply an Informal
Intervenor, they would be copied with all documents that
are exchanged in electronic form.

There would be a few documents that might during the
hearing itself be only in paper form. And they would see
that from the transcript. And they could ask the Board
Secretary for that copy. But I just wonder if the City of
Miramichi intends to participate as a Formal Intervenor.

And there are a number of other parties here that if
their interest is to simply be able to address the Board,
we will provide that opportunity during the hearing
process for each Informal Intervenor to address the Board
with their particular position on whatever they want to
address us. Secondly they will be copied with all of the

information that flows electronically. And that may be
sufficient for them.
If you are a Formal Intervenor then the Board expects
that you will attend on if not all, then certainly most of
the days of hearing and participate in the various
discussions and arguments that we have and have the right
to cross examine. So when I'm going through, if your
participation is more akin to Informal then this is the
time to let us know.
So there is no one here from the City of Miramichi.
Madam Secretary, do we -- have we heard from Mr. McKay?
Was he here at the Informal day, the Mayor? Does anybody
remember?
MS. LEGERE: No, he wasn't.
CHAIRMAN: Okay. Canadian Manufacturing Exporters, Mr.
Plante.
MR. PLANTE: Yes, indeed, Mr. Chairman. Dave Plante
appearing on behalf of Canadian Manufacturing and
Exporters.
CHAIRMAN: Conservation Council of New Brunswick? I know
from the notes that I have read Mr. Coon was here at the
informal day and he presumably wishes to -- all right.
And then we have Eastern Windpower Inc., Mr. Woodhouse.
MR. MACPHAIL: Peter MacPhail representing Eastern

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Windpower, Mr. Chairman.
CHAIRMAN: Enbridge Gas New Brunswick Inc.?
MR. MACDOUGALL: Good morning, Mr Chair, Commissioners.
David MacDougall representing Enbridge Gas New Brunswick
and I am joined today with my colleague, Matt Hayes, and
from Enbridge Gas New Brunswick Ms. Shelly Black, Manager
Regulatory Affairs, and Ms. Ruth York, Regulatory Analyst.
CHAIRMAN: Thanks, Mr. MacDougall. Energy Probe Research?
Now we have the Irving Group of companies, that is, Irving
Paper Limited, Irving Pulp & Paper Limited and J.D. Irving
Limited.
MR. DEVER: Good morning. Bill Dever here appearing on
behalf of Irving Paper, Irving Pulp & Paper and J.D.
Irving Limited. I am joined this morning by Andrew Booker
and Thomas Storring. And, Mr. Chairman, I noted in the
procedures policy that you are interested in being advised
whether we had intentions to present evidence during the
hearing.

CHAIRMAN: Yes, that's correct.
MR. DEVER: At this point in time we haven't made a final
determination. I guess we would like to leave that
possibility open, with the Board's permission.
CHAIRMAN: Certainly there are a number of things that have
to be settled before we know where it is precisely we are
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going and how we are getting there. So that's certainly
understood, Mr. Dever.
MR. DEVER: Thank you.
CHAIRMAN: And those three companies will be copied with the
documentation, but as in previous hearings, as they will
as they say only get one kick at the cat when it comes to
cross examination.
MR. DEVER: We understand that. Thank you.
CHAIRMAN: Thank you, sir. And then Mr. English who is
Jolly Farmer Products.
MR. ENGLISH: Thank you, Mr. Chairman. Jonathan English
from Jolly Farmer.
CHAIRMAN: You are also representing the -- what is it --
Agricultural Association of the province.
MR. ENGLISH: The New Brunswick Agricultural Producers
Association.
CHAIRMAN: Okay. Do you know, sir, they came in as a --
their original letter was to be an Informal Intervenor.
Do you know if they still want to retain that status and
you be a Formal Intervenor, is that correct?
MR. ENGLISH: Yes, that is correct. We realize they came in
late but that's the request.
CHAIRMAN: Well there is no great problem there. We are all
here, and we will go from there. The New Brunswick System
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Operator?
MR. ROHERTY: Thank you, Mr. Chairman. Kevin Roherty
representing New Brunswick System Operator.
CHAIRMAN: Which hat are you wearing today, Mr. Roherty?
MR. ROHERTY: Solely the New Brunswick System Operator, Mr.
Chairman.
CHAIRMAN: Thank you. Noranda Inc.?
MR. MACNUTT: Mr. Chairman --
CHAIRMAN: Mr. MacNutt.
MR. MACNUTT: Apparently Noranda would like to speak. They
have chatted with the staff and through the staff have

requested informal status.
CHAIRMAN: Okay. Then the next is the Office of the
Official Opposition. I spoke with Mr. MacIntyre in the
hall before the gathering, and the Office of the Official
Opposition is not a person at law and we are acutely aware
we don't want to bring the floor of the house into our
hearing room. But as I indicated to Mr. MacIntyre that
for instance, he could be an intervenor and if he were
unable to attend on any day, then whoever he designated
could, and he would be copied with all of the
documentation. Is that acceptable, Mr. MacIntyre?
MR. MACINTYRE: Thank you, Mr. Chair. That would be
acceptable to us but I would change the name from myself
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to Jan Rowinski. I will spell that for you.
CHAIRMAN: I have got it here. Well that's too bad. I
thought I could corner you on that, Mr. MacIntyre.
MR. MACINTYRE: No. I think I will play a different role.
Thank you, Mr. Chair.
CHAIRMAN: Thanks, Mr. MacIntyre. Potash Corporation?
Again I wouldn't be surprised if Potash actually wanted
informal status, but has any staff, Mr. MacNutt, heard
from Potash?
MR. MACNUTT: No, Mr. Chairman.
CHAIRMAN: All right. Rogers Cable Communications Inc.
MS. MILTON: Ms. Leslie Milton for Rogers Cable
Communications Inc. I am with John Armstrong, who is
Director Municipal and Industry Relations for Rogers, and
with Christiane Vaillancourt who is Manager Government and
Industry Affairs for Rogers. We are seeking formal
Intervenor status.
CHAIRMAN: Okay. I again gather from the notes of the
informal hearing that I have read just to try to give me a
heads-up is that the applicant does not agree with Rogers
being given Intervenor status.
MR. HASHEY: That is correct and we are prepared to argue
that today if you wish.
CHAIRMAN: Well now is the time, sir.
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MS. WALSWORTH: With leave, Mr. Chairman, I am Lynn
Walsworth and I will be arguing on behalf of the applicant
on this matter.
CHAIRMAN: Okay. And then once the applicant makes his

argument we will go back to you. I had some difficulty
hearing you, madam, when you were speaking, so I think you
have to draw the mike over a little closer, okay, when you
do speak.

MS. WALSWORTH: I will do so, Mr. Chairman.

CHAIRMAN: Have you shared that with the applicant to be an
Intervenor?

MS. MILTON: We haven't seen anything.

CHAIRMAN: Are we getting back into the NBTel case that went
to the Supreme Court of Canada and we ruled correctly and
Newfoundland ruled incorrectly?

MS. WALSWORTH: No, sir.

CHAIRMAN: Darn. Mr. Hashey, do you know if Rogers has had
an opportunity to review this in advance?

MS. MILTON: We have not, sir.

CHAIRMAN: All right. What I am going to suggest then is
that as to the participation of Rogers that we wait until
after lunch and then have that argument in order to give
Rogers the opportunity to read it and assemble their
counter-arguments.

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MS. MILTON: Thank you very much.

MS. WALSWORTH: Mr. Chairman, what I have distributed is not
a written submission but simply statutory provisions that
will go with my oral argument.

CHAIRMAN: Yes. Thank you. UPM-Kymmene? Again when we
looked at them we felt that this Intervenor probably
wanted to be an informal, but we will check on that. And
Mr. Gorman for Municipal Utilities.

MR. GORMAN: Yes, Mr. Chairman. Patrick Gorman appearing on
behalf of Raymond Gorman for Municipal Utilities, and this
morning I am joined at the table with Dana Young, Tony
Furness and Eric Marr from Saint John Energy, and Pierre
Roy from Energy Edmundston.

CHAIRMAN: Thanks, Mr. Gorman. Vibrant Community Saint
John, Mr. Gibbons.

MR. PEACOCK: Good morning, Mr. Chair. My name is Kurt
Peacock. I am the Research Co-ordinator with Vibrant
Community Saint John and in all likelihood I will be the
representative for the majority of this process.

CHAIRMAN: Okay. It's my understanding that at the time of
the informal gathering, why there was a desire on the part
of yourself and Mr. Dalzell who has withdrawn his

application to be an Intervenor in this hearing. You were
the two folks who said you would like to have an

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opportunity to sit down with Mr. MacNutt, Board counsel,
and talk about procedure and how things work here, is that
correct?

MR. PEACOCK: Yes. I am a rookie to this process, so any
assistance would be greatly appreciated.

CHAIRMAN: There are a lot of people in the room who are and
I would suggest that if there is anyone else who wants to
tap into Mr. MacNutt's wisdom, that they approach him in
the break or at lunch time and he will set up a time and
place to do that. Thanks, Mr. Peacock.

The other agent of the Attorney General.

MR. HYSLOP: Thank you, Mr. Chair. My name is Peter Hyslop.
I will introduce the people that will be helping me
through these proceedings. I have got Mr. Donald Barnett
and Mr. Robert O'Rourke, Ms. Carol Ann Power and Greg
Hegler, a student at law.

We are appointed under Section 123(5) of the
Electricity Act to appear in the public interest. I don't
have my exact wording of my retainer letter from the
Attorney General in front of me but I will speak from
memory. My purpose is to represent the public interest in
these proceedings in such manner as I see fit. It's
clearly stated in my retention letter I do not act for the
Government of New Brunswick, nor any department of the

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Government of New Brunswick. I have a responsibility, if
necessary, to consult with the Attorney General but it
specifically states that I'm under no obligation to take
instruction from him.

The historical role of the Public Intervenor from what
I have been able to determine since my appointment is to
represent the interests of those parties or persons who,
because of circumstances of the time and the cost and
expense of appearing at these type of proceedings, would
not be able to participate. And historically that usually
falls back to apparently somewhere around 320,000
residential consumers of the province, and I also am I
guess aware of the interest of the service customers.

Those are the interests that I will be doing my best
to look out for. I will do so, I have been told, without

any influence from the government and the government in
fact has indicated to me it is up to me how I proceed.
That's the nature of my retainer and Mr. Anderson I
believe has described adequately the nature of his
retainer.
That's all I will say on that.
CHAIRMAN: Thank you, Mr. Hyslop. And we have four informal
Intervenors, they have requested to be recognized, and
that's the Canadian Council of Grocery Distributors. Is

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there anyone representing them here today? Okay.
Flakeboard Company Limited?
MR. GALLANT: Good morning, Mr. Chairman. It's Barry Gallant
representing Flakeboard.
CHAIRMAN: Thanks, Mr. Gallant. NB Power Generation
Corporation better known as Genco?
MR. MCGIVNEY: Good morning, Mr. Chairman. Rick McGivney on
behalf of NB Power Generation.
CHAIRMAN: And as I indicated, Mr. Dalzell on behalf of
Saint John Citizen's Coalition for Clean Air has withdrawn
their request to be an informal Intervenor. Mr. MacNutt,
who is here for Board staff?
MR. MACNUTT: I have with me here today, Mr. Chairman,
Douglas Goss, Gay Drescher, John Lawton and John Murphy.
CHAIRMAN: Okay. I think before we take a recess to
consider the Intervenors that we have gone through now
with the exception of Rogers Cable, perhaps the best thing
to do is that we get on with the marking of exhibits.
Madam Secretary, help, great. Thank you, Madam Secretary.
And we will -- I will actually physically mark them during
a break, but exhibit A-1 is the Proof of Publication of
the Notice of Hearing. A-2 is Disco's binder marked
Evidence (Phase 1), 31st March 2005. A-3 is Disco's
binder marked Evidence (Phase 2), 18th April 2005. A-4 is

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again a Disco binder containing the redacted PPA's and
other named agreements which was distributed at the
informal session. A-5 we have reserved for the Disco load
forecast which I understand is ready, is that correct, Mr.
Hashey?
MR. HASHEY: I don't believe so.
CHAIRMAN: You don't believe so?
MR. HASHEY: No. I think that was a matter that might have

come under discussion but hasn't been determined or
decided.

CHAIRMAN: Well then A-5 would be the auditor's report of
the PROMOD input which I understand is prepared and ready.

MR. HASHEY: Not quite, no. The PROMOD -- let me speak to
that, if I might. First of all we have asked for one
phase of a PROMOD audit to be one. Now that will be
completed within a day or two. We have not received that.
It's with an organization, as you are aware, Mr. Chairman,
in the United States. We have asked for a second phase on
the PROMOD which I thought would be -- which we thought
would be helpful, and the question is should we file both
together.

The second phase -- the first phase was for them to
determine if the Disco payments for fuel and purchase
power was as per the contracts to PPA. So they were

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reviewing the PROMOD runs, that has all been done. There
were issues of confidentiality there of course they were
dealing with. It's nearly complete. I'm told that it
would be a day or two we would have that, the PROMOD, the
first phase. Now if I could go on to the second phase --

CHAIRMAN: Yes. Go ahead.

MR. HASHEY: -- and see if you would prefer to have one
document. It was decided that their scope should be
extended to look at 2004, 2005 fuel issues, so that they
can confirm and verify that the fuel cost component has
gone up, as we are suggesting. That wasn't done by them
in the first phase and we have asked and requested that be
done. I am told that that would be at least a couple of
weeks before that could be completed. Then the question
arose as to whether we should -- and we will file with the
Board, if they like, the first phase when we get it.

CHAIRMAN: Frankly, I haven't talked to my fellow
Commissioners about it, nor asked anybody here, but I
think that our approach has been as soon as you have
information that is useful for the hearing process that
you share it with everyone.

I mean, we are going to have a massive amount of
information that we are going to have to digest and the
sooner we get something the sooner we can digest it and we

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get on to the next thing. So subject to what the

Intervenors have to say, I think that we should have it
filed as soon as it is available to you, sir.
MR. HASHEY: In its respective phases.
CHAIRMAN: Yes.
MR. HASHEY: I apologize. We really had anticipated that we
would have phase 1 today. Unfortunately publications,
professional time required, et cetera, it is not produced
and I'm told it's just a day or two away. And we will
follow your directions and wishes.
CHAIRMAN: Mr. Hashey, do you have any documents that you
would like to have filed as A-5?
MR. HASHEY: No. Mind you, I do have the proofs of
publication but I believe you put those on as A-1 and I
will just deliver those to the Secretary.
CHAIRMAN: Yes. That's fine.
MR. HASHEY: Yes, I have those here. But additional
documents, no, I think that was all -- it was my belief
that that was probably a matter of some discussion here as
to what wold be requested or required.
CHAIRMAN: Unquestionably what is to be filed is going to be
over the hearing and then the proposed adjourn date is
going to be a matter of discussion, there is no question
about that. I mean, we have had indications from
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Intervenors requiring further evidence and better evidence
and all that. So we will be talking about that later.
MR. HASHEY: You see, Mr Chairman, if I might speak right
off the top of it here. We believe decisions on the phase
1 and phase 2 aspect of this matter and how the Board is
proceeding is necessary before we really establish a
schedule. And together with our accounting order that we
have requested here, we are prepared to argue in relation
to that today because we believe the more of those things
we can get out of the way and then we can get your
determination, then we can set pretty quickly as to where
we are going and how we have to proceed here.
CHAIRMAN: Yes. Mr Hashey, on my tentative agenda there is
number 7, the fuel variance account, which if one were to
characterize it they probably would have called -- that's
the question of retroactivity would be dealt with in that
I presume. And we require greater detail to be filed so
that we can truly appreciate how it would work.
The second thing is the fuel surcharge which again

various parties have indicated that's akin to setting
interim rates. And that -- so what we were proposing to
do, subject to what you have to say and the Intervenors
here, is that we do an oral argument on those two things
today, we believe that there will be some legal precedents

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that will be put forward by some of the parties if not
all, that -- and as well that there be a brief filed with
us having a brief first filed with us on the Tuesday of
next week because Monday is a holiday. And then the
rebuttal filed with us on Thursday at noon two days later,
which I don't think would be very voluminous.

I mean once you hear the oral presentations today, you
are going to know pretty much what everybody -- what their
position is, and then they file that small written brief
on that Thursday. The Board would then consider the
briefs and when we reconvene on the 31st of May that we
would issue our decision in reference to both of those
matters.

And of course as we appreciate, depending on the
decisions that the Board does make, then we go into a
number of different things, i.e, stage 1, stage 2, and the
actual scheduling of the various things, IRs, et cetera.
But I think it's premature.

Likewise on the 31st we can deal with 156 if it's the
applicant or any of the Intervenor's pleasure to do that.

MR. HASHEY: Thank you very much. We like the direction you
are giving us.

CHAIRMAN: What I am going to do is we are going to take a
15 minute break now and I will just -- what I have done is

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-- what I have indicated and what I roll through right now
is sort of a tentative thing. And if any of you after the
break want to have an input into the way we are
tentatively looking at proceeding, why by all means when
we come back in and rule on Intervenor status why you can
certainly do that. Mr. MacIntyre?

MR. DENIS: Mr. Chair, if I may. Erik Denis on behalf of
the Official Opposition. We would like to -- despite the
fact that we are not -- that the Opposition is not
constituted as a corporation we still believe that we have
a legal status. We are recognized in the legislative
assembly and their standing orders. We have staff, we

have all the necessaries as the corporation has. And as
such before you make a decision, you and your Board, that
we would like to present our case before you do, possibly
tomorrow or next time that's convenient to give our
position, with all due respect and at your leisure, lease.
CHAIRMAN: Just so I understand, Mr. Rowinsky, you are
saying as you want to be known as the Office of the
Official Opposition?
MR. DENIS: It's Erik Denis.
CHAIRMAN: Pardon me?
MR. DENIS: Erik Denis.
CHAIRMAN: Sorry. You are all hidden back there

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MR. DENIS: Yes, we are. Yes, we do want to have official
Intervenor status, not the Opposition's employees but the
Opposition itself.
CHAIRMAN: Well then I would suggest -- can't you make your
argument now?
MR. DENIS: Well that would take a bit of research and we
don't have the resources right here, right now. But other
than that, Mr. Chairman, we are recognized by the
Legislative Assembly. We are not a corporation per se,
but we are still a legal entity recognized in the
constitution, in the standing orders, in various Acts,
various statutes. And we believe that -- it's our
position that despite the fact that we are not
incorporated, that we are still a legal identity and that
we should get that formal intervenor status and not the
employees or staff of the Opposition.
CHAIRMAN: All right. Mr. Denis, the Board will consider
your request when we take our break. Again I say what I
said at first, I want to keep the floor of the house out
of this room.
MR. DENIS: I understand that.
CHAIRMAN: I don't mind and I can't control what happens
outside this room, but in this room then I want to have it
a straight ahead application and try to keep the politics

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at a bare minimum.
We will take our break now. Thank you.
MR. DENIS: Mr. Chairman, if I may.
CHAIRMAN: Yes.
MR. DENIS: I understand that position and agree with it

However, I believe that as Official Opposition, our role
is to have government accountable and it is crown
corporations, some might argue that NB Power isn't a Crown
corporation. But the province is a major shareholder of
the holding company. So we are just here to make sure
that the process is followed. We are not to politicize
anything. Outside the chamber I can't make that promise
but in here I can assure that for you. Thank you.

CHAIRMAN: Thank you.

(Recess - 10:50 a.m. - 11:15 a.m.)

CHAIRMAN: The Board has had an opportunity to deal with
granting Intervenor status to various individuals and
organizations.

And there are a number of Formal Intervenors are not
represented today. And the Board staff will get back to
them or their representatives between now and the 31st and
see if in fact they wish to be Formal Intervenors or not.

And again, I just reemphasize what I said previously,
is that I think that some of them probably really prefer

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to be an Informal Intervenor.

Turning to Mr. Anderson and the Attorney General of
New Brunswick, the Board has considered it. And
Mr. Anderson, nothing personal at all, but there is in the
room Mr. Hyslop who is an agent of the Attorney General of
New Brunswick.

If the Attorney General wishes Mr. Hyslop to address
the interpretation of 156, which as we understand it is
your main responsibility if you were given status before
the Board, then the Attorney General can do that. We feel
that having two agents of the Attorney General is nothing
short of confusing and could really cloud the process.

So I'm sorry, Mr. Anderson. But the Board will not
extend Intervenor status, even though we would love to
have your company.

MR. ANDERSON: Thank you, Mr. Chairman.

CHAIRMAN: Thank you, sir. The Office of the Official
Opposition, the Board has considered the request of
Mr. Denis at the very end. In our parliamentary
democracy, the Opposition plays a crucial role. And that
role is in the Legislative Assembly.

The Official Opposition, as an organ of government or
however you would signify it, certainly has the

opportunity to ensure that Crown Corporations, be they
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Disco, Genco or otherwise, do a proper job through a
Committee of the House which is the Crown Corporations
Committee.

This Board in fact has to report through the House to
that body. Therefore, we are not prepared to extend the
terminology or functions or roles of the legislative
branch to government to come in to what is part of the
judicial branch of government albeit it administrative
law.

However the approach that we had enunciated to begin
with still stands. So that from a practical purpose you
will be allowed to speak. You will get all of the
information. The Board will recognize you and any of the
individuals who may have to replace you on occasion.

So it will be Mr. Rowinski is the Intervenor. And we
understand from whence you cometh, Mr. Rowinski. Thank
you.

MR. ROWINSKI: Thank you, Mr. Chair.

CHAIRMAN: Okay. And we have put off the question of Rogers
Cable until after lunchtime.

Mr. Hashey, when Disco proceeds with its panels in
whatever order and however, is it Disco's intention to
have a slide presentation at the commencement?

MR. HASHEY: Yes, it would be.
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CHAIRMAN: And you are prepared as previously to provide the
Intervenors with a copy of the slides in advance of that
presentation, sir?

MR. HASHEY: Oh, absolutely, yes.

CHAIRMAN: Okay. That is fine then. We just wanted to --
for those of you not familiar with the process, that is a
way in which we have handled it in the past, so that there
would not be new evidence being brought in.

I'm sorry. But it is a public hearing. And we have
to leave the door open at least a crack, okay. Sorry
about that.

Where am I here? Number 14 on page 9. The next
discussion point is Intervenor witness panels. If an
Intervenor intends to call more than one witness, the
Intervenor should identify the number of witnesses on a
panel and the number of panels that Intervenor wishes to

bring forth.
So that is when you have to make your decision as to whether or not you are going to provide evidence. You should indicate that it is going to be a panel or two panels or just one single witness or two separate single witnesses.
We have also chatted about the PROMOD audit report. And hopefully, Mr. Hashey, that will be -- the first phase

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of that will be available the end of this week.
As I indicated off the top, there is a draft of a confidential procedure that is outside. We would ask if you could review it between now and the adjourned date. If you in fact have a few points that you want to make in reference to it, I suggest that you forward it to the Board in writing between now and then. Whatever we can do in the interim, why so much the better for that particular day.
Again the segmented hearing from the Informal day, I gather staff has reported back that it is no one's intention to spin off a generic hearing in the old sense of doing that.
But rather you simply want to have certain subject matter covered in a particular week or two weeks, whatever it may be. If anybody actually wants to try to have something spun off into a separate hearing why, let me know now.
Frankly all of the Board members save one is here today. And I had initially done that on the basis that we would strike separate panels and try and spread the workload between our part-time Commissioners.
But if that can't be that can't be. We will have to proceed with one hearing and do it straight ahead. He who

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hears the evidence makes the decision. That is the rule.
Anybody any point or anything they want to say on that? Guess, Jolly Farmer?

MR. ENGLISH: Jonathan English and Jolly Farmer. Can we go back to the confidential agreements? Is there someone that can make more copies? Because they were out -- we were out at the table.

CHAIRMAN: Oh, is that right?

MR. ENGLISH: Yes.

CHAIRMAN: Yes. We will see about that, Madam Secretary, at
lunchtime. Okay. Yes. Fine.
MS. MILTON: Mr. Chair, Leslie Milton for Rogers Cable.
CHAIRMAN: Yes.
MS. MILTON: In the event that Rogers Cable is granted
Formal Intervenor status, we would be prepared to consider
having the pole rate issue dealt with in a separate
hearing, if that is of interest to the Board. We haven't
discussed this with the applicant.
CHAIRMAN: I suggest that you investigate that with counsel
for Disco during a break or at lunchtime or something like
that.
I talked about additional evidence. And Mr. Gorman on
behalf of the municipal utilities, and I believe
Mr. Hyslop at the time of the Informal meeting, provided
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us with a list of issues together with information on
additional evidence that those two Intervenors would be
requesting.
I would ask the parties between now and the adjourn
date that they specifically put a list in to the Board so
that we can handle it on the 31st as to -- once we have
made our various rulings, as to what evidence should be
heard -- sorry, what additional evidence should be
provided by Disco. I don't think there is any real
advantage of carrying on with that today.
MR. HASHEY: I agree. Could we -- obviously as that is
supplied, that we get copies of that so we can respond to
it? I think it will somewhat depend on the phase 1, phase
2 and how the hearings proceed --
CHAIRMAN: Yes.
MR. HASHEY: -- as to what we agree to.
CHAIRMAN: Now Mr. Hashey, as I indicated I think off the
top, if someone produces something dealing -- information
or a document or whatever in this hearing, that it is
their responsibility to share it with all of the other
parties including the applicant and the Board in
electronic form.
And there are some paper copies required as well. And
that is set forth in the procedure documentation that you
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will find on that table out there.
So if somebody does say provide Disco with it they

provide the Board and all the other parties. So at the
same time a list of issues, which again Mr. Gorman on
behalf of municipal utilities, and I believe Mr. Hyslop
has provided, up until now. If anybody else could do so
why please do and provided it before the 31st.
The next thing I have on my agenda is the order of
cross examination and arguments. The normal way is that
we would proceed in alphabetical order with two
exceptions. And the first exception is that the Public
Intervenor will go normally second to last.
And then Mr. MacNutt becomes the cleanup hitter. And
he closes the questioning on behalf of Board. And
Mr. MacNutt, in case you aren't aware, his responsibility
is to complete the record.
In other words, it sounds easy, but it is rather
difficult to ensure that all the matters that Board staff
think that this panel might need in arriving at a decision
have been covered in cross examination. So Mr. MacNutt
will go last.
Board counsel does not take part in legal arguments in
front of the Board. Because we look to him to provide
legal assistance in reference to decisions that we have to

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make. And he does not take part in summation. Just here
to complete that record.
Any comments on that at all?

MR. HYSLOP: Mr. Chair, just dealing with the order of cross
examination with respect to Intervenor evidence, I would
expect -- maybe I'm wrong, but -- they may be in
alphabetical order.
But I would think the applicant would have -- may want
to place at the front or the back. I don't know how that
would be handled with regard to the cross examination on
Intervenor evidence.

CHAIRMAN: Yes. I think again it depends upon which
Intervenor and perhaps the position that they are taking,
Mr. Hyslop. But I think as a general rule that would be
correct.
If it is a witness or a witness panel called by an
Intervenor contrary to the position that Disco has taken
in the proceeding then they should be given the last
opportunity to cross the panel. I don't think there is
any question about that. Good. Thank you, sir. Anything

else?
The Board will require Disco to do the following,
provide a draft order which they might seek at the end of
the first phase. We believe that will assist in the
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second thing which is a detailed description of the
variance account, how it will operate in practice
including the commencement date, the ending date, what
makes it a variable account and how the amounts for
inclusion in it are to be determined and its relationship
to the fuel surcharge. And thirdly, a draft of the method
whereby Disco will recover the amounts accumulated in the
variance account.
There is a dearth of detail when it comes to those
matters. And I think -- can you, Mr. Hashey, talk to your
client for a moment and see if that can be provided to us
before the 31st?
MR. HASHEY: Yes.
CHAIRMAN: Good. Thanks. Hopefully not on the 30th.
Anyway, no, appreciate that, Mr. Hashey.
Commissioner Dumont just wanted me to set a date. I
think I would rather give you the opportunity to produce
those documents as quickly as you can and file them as
quickly as you can, rather than burdening you with a date,
Mr. Hashey.
MR. HASHEY: Maybe we could come back after the lunch break,
after I have had a chance to convene with people to see
just what would be reasonable on that matter.
CHAIRMAN: Now it is 11:30. And I want to give an
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opportunity to the cable company to read through briefly
the legislation, et cetera.
So are there any other matters that any party wants to
bring up that we haven't tentatively covered here this
morning?
This afternoon we will do the argument in reference to
both of those matters that I have discussed. But anything
else? Does anybody want to take a minute and just check
it at your table and what not?
MS. MILTON: Mr. Chairman, Leslie Milton for Rogers Cable.
I'm not sure how the applicant feels about this. But we
would be pleased to hear their argument before lunch. And
then we could proceed with responding after lunch.

CHAIRMAN: Okay. Let me just go around the room though and
see if there is anything else before we do that. Okay.
And this doesn't preclude any party bringing up something
after lunch, after they have had an opportunity of talking
with the folks at their table and whatever else too.
Okay. Mr. Hyslop?
MR. HYSLOP: Thank you, Mr. Chairman. Two very I hope minor
items. But you mentioned the need for greater detail with
regard to the fuel variance account and the fuel
surcharge.
Could I suggest an elaboration on that, that they
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produce the descriptions of those two items in the form
that they would see them being approved and put into the
tariff?
That is kind of the format I would like to see.
Because that is what is going to apply at the end of the
day. And we may have been asking for the same thing
there.
The second item that was raised, I think it is very
useful to parties when they are doing their
interrogatories, if they have or are able to access the
evidence, the written evidence that has been filed in
exhibits A-2 and A-3 electronically.
And I'm wondering if that is something that the
applicant might be able to provide, either a CD or
something with that evidence on it, so that it eases the
flow of the interrogatory process later on. Thank you.
CHAIRMAN: Mr. Morrison?
MR. MORRISON: I understand that providing the evidence in
electronic form, CD ROM, is not an issue that can be done.
CHAIRMAN: Certainly the Board had asked for a draft order,
Mr. Hyslop. And I -- Mr. Hashey, Mr. Morrison, do you
want it crafted in the way in which it would appear in the
tariff? Or do you have any comments on that?
MR. MORRISON: I believe the fuel surcharge is already in
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the draft tariff that we provided, Mr. Chairman. But we
can take a look at that over the lunch hour and just
confirm that.
CHAIRMAN: Okay. That is satisfactory, Mr. Hyslop? We will
give an opportunity over lunch to check it out.
MR. HYSLOP: Yes.

CHAIRMAN: You remind me if I forget after lunch, all right?
MR. HYSLOP: We will do that. Thank you, Mr. Chairman.
CHAIRMAN: Thank you. All right, Ms. Walsworth. Would you like to address the question of whether or not the cable company should be -- Rogers Cable Communications Inc. should be granted Intervenor status?
MS. WALSWORTH: Thank you, Mr. Chairman. In brief my argument is that Rogers Cable Communications has requested to intervene for the sole purpose of having this Board determine what the applicant Disco should charge for space for Rogers Cable wires on power poles that belong to Disco. That is their sole purpose.

And my submission will be that jurisdiction is not to be found in this Board, and that if that is their sole reason for intervening, this Board should decline their intervention.

Really I'm going to do two things in my submission. I'm going to take you on a cross-Canada tour which is the

legislation I handed out. And then I'm going to look at the New Brunswick Electricity Act in detail in support of my arguments as to why jurisdiction is not to be found.
CHAIRMAN: All right. But Ms. Walsworth, can I toss out to you for your comment, is this not premature in that Rogers Cable is a company that does business in this province, and presumably it is registered to do business. It consumes electric power. Therefore, normally this Board would grant status to it.

What you are talking about is a matter for argument within the hearing normally. Because Rogers may in fact be in addition to that, may be talking about the electricity bill that they get at their various premises around the province.
MS. WALSWORTH: If that is what they intend, Mr. Chairman, they certainly haven't said so with respect in their letter dated May 9th where they say "Rogers Cable hereby requests to have Formal Intervenor status in the proceeding. Rogers Cable will be requesting that as part of the proceeding the Board establish a rate for cable attachments to the hydro poles of New Brunswick Power Disco. Rogers Cable wishes to appear before the Board in the hearing to address this issue."

That being the only issue, Mr. Chairman, it could be

dealt with at this juncture. That is my submission. If you would prefer it to be dealt with when the matter comes up, we will be continuing our objection at that time.

CHAIRMAN: Don't make me have you give up on your argument.

MS. WALSWORTH: I'm never going to give up on my argument, Mr. Chairman, until you tell me to go --

CHAIRMAN: Well, I simply tossed it out as something that crossed my mind. I'm willing to do that.

MS. WALSWORTH: And as part of the background to this, Mr. Chairman, Disco is continuing its negotiations with Rogers Cable on the matter of what the charge should be for those pole attachments. And that is the way Disco wanted to keep proceeding. And it was Rogers that put this application in for Intervenor status.

And so perhaps you might want to address that question at this point to counsel for Rogers as to -- I mean, they are the ones who want to be here.

And if they want to send a lawyer here day after day, week after week waiting for their time to make their submission on the jurisdictional issue, I will be here.

CHAIRMAN: I'm going to do something here. I'm going to suggest that we not hear anything further on this, but rather you approach Disco over the lunchtime break and pursue the offer that you evidenced about having a

separate hearing to deal with this matter specifically and see what sort of results you get.

And then if after lunch that doesn't arrive at any solution, why then we will go ahead to hear your full argument and hear Rogers' full argument.

MS. WALSWORTH: With respect, Mr. Chairman, if the Board were to concur with that offer of Rogers, we would begin that separate hearing by arguing that this Board has no jurisdiction.

CHAIRMAN: Yes. But we wouldn't be dealing with all the other parties in the room, that is all. Anyway I -- if you don't mind, I would like you to pursue that, see if that might be an avenue, to proceed in that fashion.

We will adjourn now and come back at quarter after 1:00. Thank you.

(Recess - 11:45 a.m. - 1:15 p.m.)

CHAIRMAN: Good afternoon, ladies and gentlemen. Any

parties want to bring anything up right now? I guess not.
How did you make out, Mr. Hashey, in talking with the
Rogers Cable people?
MR. HASHEY: It's my understanding, Mr. Chair, that the
Rogers chairpeople would be prepared to proceed with that
argument this afternoon. I think it's a matter of
obviously your discretion. We are similarly prepared to

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proceed with the variance account issue, but I doubt if
both could be completed this afternoon. I think one or
the other could.

We are prepared to -- I mean, our interest is to
proceed with the variance account issue, frankly, and as
you said this morning probably in the smaller group I
believe that the Rogers intervention issue could be dealt
with because it's really a one on one, it doesn't affect
any other Intervenor in the room at all.
CHAIRMAN: Mr. Gorman?
MR. GORMAN: Yes. We would have an issue with their
presence here representing the municipal utilities, Mr.
Chairman. We would adopt the same arguments as Disco in
this same matter.
CHAIRMAN: How can you possibly do that, Mr. Gorman? You
don't know what they are yet. Sorry. I'm making light.
Anyway, Ms. Milton, would you mind if we did postpone it
for let's say maybe on the 31st in the afternoon or
something or other? We would like -- the Board would like
to get through the two items that we put on the agenda for
today so that we can be prepared to rule on that when we
reconvene.
MS. MILTON: We are in your hands, Mr. Chair. We are
prepared to proceed. We will also come back on the 31st

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if you would like to do it then. We could also deal with
this in writing. I am open to any of those options.
CHAIRMAN: Okay. Thank you very much. I think we would
like to go ahead with those two arguments this afternoon
dealing with the two that I mentioned this morning.

At lunch time we checked on the availability of a room
here in the hotel and also the convention centre, and if
we reconvene on the 31st we would have to be out of
ballroom C at 2:00 o'clock. So my suggestion is that when
we do adjourn, we reconvene at 1:30 on the 30th, and then

if necessary go over to the morning of the 31st.
I would then suggest for the municipals and Rogers and Disco in the afternoon if nobody else is interested there is plenty of room in our hearing room on our premises next door, and we could go over and have that argument there then, and that would hopefully allow us to get through the agenda that we have got set out here.
Okay. So the order of business now will be -- what is your preference, Mr. Hashey? Do you want to deliver argument on both the fuel variance account and the fuel surcharge at the same time or do you want to split them into two parts or what?
MR. MORRISON: Mr. Chairman, I would prefer to deal with them as distinct issues, the variance account first and

then the issue of the fuel surcharge and I guess that really relates to the phasing of this hearing. Either is fine with me but I see them as two distinct issues albeit interrelated.
CHAIRMAN: So what you would do is you would deal with say the fuel variance account to begin with that and your arguments on that. We would then go around the room, you would have your opportunity for a final rebuttal and then we would pass on to dealing with the fuel surcharge in the same fashion.
MR. MORRISON: And the reason I say that is that the variance account issue I think is a much more lengthy discussion than the latter, at least in my submission I am going to be taking some time with the variance account. My argument with respect to the second issue is considerably shorter.
CHAIRMAN: Okay. Any Intervenors any comments on proceeding in that fashion?
MR. HYSLOP: Mr. Chair, my own preference would be to deal with both issues at the same time. Essentially my arguments apply one as to the other for the most part. Having said that, if Mr. Morrison wants to make two separate arguments, I can come back up and say I just repeat the arguments I made the first time and go from

there.
MR. MORRISON: Mr. Chairman, that's fine. I can run them together. It's not an issue.

CHAIRMAN: We have heard from two. Anybody else got any preference? All right. Then we will try both together.

MR. MORRISON: Thank you, Mr. Chairman, Commissioners. I would ask your indulgence and your attention. I am going to take some time with this argument because it is a very important argument to discuss and it is one that does require reference to a number of legal authorities and especially with respect to the question of retroactivity.

At the outset I would like to summarize some key facts that I would like you to keep in mind as I go through this submission.

First, Disco's application was filed on March 21st, 2005. That's prior to April 1st, 2005, which means it's prior to this fiscal year for which we are seeking this application relates to. The test year for purposes of this application is fiscal 2005/2006. The proposed variance account seeks to account for costs only incurred in the test year and not for any costs incurred prior to the test year.

And like any good argument, I'm going to give you my conclusions first and then I will argue in support of

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them.

The conclusions I would like this Board to reach are as follows: First, this Board has full power and authority to approve the variance account. Secondly, the variance account does not constitute an interim rate. Third, establishment of the variance account does not constitute retroactive ratemaking. Fourth, a variance account is a widely accepted technique available to this Board to enable it to fulfil its mandate of ensuring that Disco has an opportunity to recover its costs for providing service to its customers. And finally, the establishment of the variance account is fair to both the customer and to Disco.

Now Disco is asking this Board to approve a variance account to allow Disco to recover at a later date the amount by which the 2005/06 fuel costs are not recovered in existing rates up to the time that the variable fuel surcharge is implemented. And that essentially is 30 days after this Board files its decision with respect to the variable fuel surcharge.

In short, Disco is seeking an accounting order to

record fuel cost increases from April 1st, 2005, that
cannot be recovered until the Board makes its decision
with respect to the fuel surcharge.

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So why is Disco seeking this variance account?
Disco's fuel cost for purchase power in '05/'06 are
projected to be $66 million higher than 2004/05. Of this
amount 46 million will not be recovered in existing rates.
Disco is, therefore, facing serious and significant
revenue shortfalls that cannot be recovered in existing
rates.

As the Board is well aware, fuel costs are dictated by
world markets, have been subject to great volatility and
are beyond the control of Disco. Each month that goes by
without regulatory relief, Disco loses approximately $4
million. In short, and not to put too fine a point on it,
Disco is bleeding and the financial impact on the utility
is very serious indeed.

Now pursuant to sections 101.5 and 125.1 of the
Electricity Act this Board has an obligation to approve
rates that are "just and reasonable". In doing so the
Board has an obligation to consider and equitably balance
the interests of not only the ratepayer but the utility as
well.

And this principle has been outlined in a number of
cases, the most significant of course being the Bell
Canada case, Supreme Court of Canada in 1989, where the
Court said the fixing of tolls and tariffs that are just

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and reasonable necessarily involves the regulation of the
revenues of the regulated entity. This has been
recognized by this Court in interpreting provisions
similar to section 340 of the Railway Act which prescribed
that all tolls shall be just and reasonable.

This is the important part. Such provisions require
the administrative tribunal to balance the interests of
the customers with the necessity of ensuring that the
regulated entity is allowed to make sufficient revenues to
finance the costs of the services it sells to the public.

Now the leading New Brunswick case is a New Brunswick
Court of Appeal decision in re New Brunswick Telephone
Company Limited, often just referred to as the NBTel case,
of course. In that case the Court of Appeal stated,

"While the powers given to the Board are principally given for the purpose of protecting the public interest, the Board is also required to safeguard the financial position of the utility when a complaint is made to the Board that rates are unreasonable, insufficient or unjustly discriminatory."

So this submission will address two fundamental questions. The first is can this Board approve the variance account and the second is should this Board approve the variance account.

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On the first issue, can this Board approve the variance account, I would submit that clearly the Board has the statutory authority to make an accounting order and to approve a variance or deferral account.

Section 125 (1) of the Electricity Act provides -- and it is under the heading "Just and Reasonable Rates" -- "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 an alternative form of regulation."

And further in section 101 (4) it provides "The Board may, when considering an application under this section, take into consideration under subsection (a), accounting and financial policies of the Distribution Corporation."

If the foregoing -- if the specific statutory provisions that I have just mentioned are not sufficient to establish that this Board has the power to approve a variance account, then one must look at what this Board has done in the past.

Now this Board has approved deferral accounts in both 1991 NB Power accounting and financial policies decision and more recently in the June 23rd 2000 Enbridge Gas case.

In the NB Power decision the Board approved two deferral accounts, a generation equalization account and

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an export sales stabilization account. And in the Enbridge Gas case the Board approved a deferral account allowing Enbridge to accrue the differences between the actual revenue received and the calculated revenue requirement for a full cost of service.

Now I understand that the circumstances in those decisions vary somewhat from the case that is before you

now.

However this Board did state, page 31 of the Enbridge Gas case, "In most jurisdictions the regulatory agency approved the use of deferral accounts when changes occur that are outside the control of the utility." And that is in our submission what Disco is facing in this application.

As I just mentioned, the Board has at its disposal any method or technique it considers advisable or appropriate in disposing of this application. One such technique is the variance or deferral account.

Now deferral accounts are widely used, as I mentioned earlier, and are a common tool of regulators. In his text, it is a fairly recent text, "The Process of Ratemaking", by Leonard S. Goodman, and that is published by Public Utility Reports, he states at page 322, "The use of the deferred cost account in a ratemaking context is so

common and so fundamental a regulatory tool that no agency is likely to consider it necessary today to study whether as a matter of policy costs should be deferred."

So that brings us to another issue. And in summary on that section that I have just submitted, Mr. Chairman and Commissioners, clearly the Board has a statutory authority. But there is another issue.

At least I'm aware that issues are going to be raised, that Intervenors would have you believe or would like you to conclude, that because of these issues the technique or tool of the variance or deferral account is not available to you in this case.

And the first is that the variance account constitutes an interim rate. I understand from our discussions last week that one or more of the Intervenors will argue that by approving the variance account, this Board is in effect granting an interim rate. And I believe their argument, as I have gleaned from my sources, can be summarized as follows.

Interim rates are designed to allow a utility to recover for regulatory lag. That is normally what interim rates are used for. The proposed variance account that we are putting forward in this application accrues costs for regulatory lag. Therefore the variance account is the

same as an interim rate.

Now with all due respect, I submit that that argument is fundamentally flawed. A variance account is not a rate. First, Disco's application does not seek to have rates changed as of April 1st 2005.

The approval or non-approval of the variance account will have no impact on rates charged to customers prior to the Board's decision. In short, a variance account is not a rate, interim or otherwise.

If approved, the variance account will become a regulatory asset which will be reviewed by this Board who will then determine how that asset will be realized, in short how the account will be cleared. But the approval of the variance account will have no impact on the rates being charged to customers. It is not a rate.

That raises another issue. And that is the question of retroactivity. I believe that some of my friends here today, some of the Intervenors, will suggest that approving the variance account is tantamount to retroactive ratemaking.

I believe their argument is that recovery of costs prior to the date that this Board renders a decision on the rate application is retroactivity. With respect, I submit that that argument is mistaken.

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The term "retroactivity" is found in numerous regulatory decisions. And believe me, I have had the opportunity to read more than my share in the last few weeks.

There is a great deal of uncertainty about what retroactivity means. It is possible -- sorry, it is impossible, and I have tried, to reconcile the various Board decisions to arrive at a coherent and consistent application of retroactivity.

It appears that in those cases where the regulator is inclined to grant the relief requested, it can find a way around the retroactivity issue. In short it seems to me that retroactivity means different things to different regulators and sometimes to the same regulator at different times.

Given the elasticity of the application of the retroactivity principle by various regulators, I believe that the only course that -- or the most proper course for

this Board to follow is to be guided by the basic
principles as set out in the Supreme Court of Canada
decision in Northwest Utilities Limited versus Edmonton.
And that is in 1979 the Supreme Court rendered that
decision.

And I'm just going to quote from that decision. "It

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is conceded of course that the Act does not prevent the
Board from taking into account past experience in order to
forecast more accurately future revenues and expenses of
the utility. It is quite a different thing to design a
future rate to recover for the utility a loss incurred or
a revenue deficiency suffered in a period preceding the
date of the current application." And I believe that is a
very important point.

Disco's proposal does not seek to recover a loss
suffered in a period preceding the date of this
application, nor does it entail design of a rate to
recover a past loss.

As I mentioned at the outset, it must be remembered
that for regulatory purposes, time frames are defined in
terms of test years. The test year in question in this
case is Disco '05, '06 which commences April 1st '05.

I'm going to refer again to the Goodman text that I
referred to earlier. And he said at page 105 -- he
defines retroactive ratemaking as follows. "Retroactive
ratemaking refers to an improper recovery of costs that
were properly recoverable only in a past period or
periods."

In this case, Mr. Chairman and Commissioners, Disco is
not seeking to recover in the test year commencing April

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1st 2005 costs that were incurred in previous test years.

The leading New Brunswick case, as I mentioned, is the
New Brunswick Telephone Company Limited case. And I'm not
going to read all of the quotes. But I will read a
statement from that case.

And the court said in that case "Stated in another
way, in the absence of clear legislative authority,
consumers cannot be saddled with the burden of paying more
for a service because past customers were charged too
little to give the public utility a reasonable rate of
return upon its investment." The key focus there is "past

customers" relating to a past period.
I think it is important to examine the facts of the NBTel case. I'm sure some of the Commissioners are very familiar with it.
First the PUB, in an order dated March 7th 1977 approved NBTel rates for the calendar year of 1977. Shortly after the PUB fixed the rates, the government announced that it would be enacting legislation which would have the effect of increasing NBTel's tax burden retroactive to the beginning of 1977, and in fact passed that legislation in June and July of that year.
In June NBTel applied to the PUB to increase its rates and charges to offset the additional tax burden going back

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to the beginning of the fiscal year, January 1st.
On July 21st 1977 the PUB approved the additional revenue requirement to account for tax for the entire year. The decision was appealed to the New Brunswick Court of Appeal on the grounds that by authorizing NBTel to recover in rates the additional taxes back to the beginning of the fiscal year, that was retroactive ratemaking.
The Court of Appeal dismissed the appeal and stated the new rates approved by the Board did not therefore impose on future users a burden in respect of past transactions or past debts of the company.
In short, I would submit that the Court of Appeal held that the recovery of the tax liability for the seven months prior to the date of its decision was not retroactive ratemaking.
Although it isn't specifically stated in the case, I suggest that the court came to that conclusion because the costs sought to be recovered were for the fiscal year in question and not a loss for a prior period or a prior fiscal year.
There is an earlier Supreme Court of Canada decision which unfortunately gets confusing because it is Edmonton versus Northwest Utilities. And that goes back to 1961.

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And in that case the court discussed a proposal whereby a utility would submit to the regulator and other parties, not later than November 1st of each year, the cost of purchasing gas during the first nine months of the

year, as well as an estimate for the remaining three
months.

And I understand that this was similar to a variance
account in Ontario for a purchase gas variance account.
And that is just my understanding. And I don't pretend to
know a lot about that particular variance account.

However, getting back to the decision, in this context
the court said -- and I'm going to quote here -- "The
proposed order would be made in an attempt to ensure that
the utility should, from year to year, be enabled to
realize as nearly as may be the fair return mentioned in
that subsection, and to comply with the Board's duty to
permit this to be done."

How this should be accomplished, when the prospective
outlay for gas purchases was impossible to determine in
advance with reasonable certainty, was an administrative
matter for the Board to determine, in my opinion, that is
what the court concluded.

Similarly the variance account requested by Disco in
this application is needed to ensure that the utility is

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able to realize, as nearly as may be, a fair return, or
indeed in this case a fair recovery of its costs.

The Supreme Court decision confirms that in order to
ensure a fair return for the utility, the regulator can
establish a procedure that departs from the usual
prospective determination of costs.

I suggest to you that the court was primarily guided
by its duty to ensure that the utility achieved a fair
recovery of its cost.

Now the task of a regulator in fixing just and
reasonable costs is to ensure that the utility recover the
costs of providing service in the test period. This is a
fundamental regulatory principle.

Again the period in question in this application
begins April 1st 2005. The variance account is required
to ensure that Disco recovers this cost for the test
period irrespective of the timing of this Board's
decision.

I think it is very important that you understand what
this variance account is not. The variance account does
not capture amounts from previous fiscal periods. The
variance account does not purport to reach back in time

before the date of Disco's application.

And I refer again to the Northwest Utility's case.

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Disco's proposal does not require the Board to fix a rate to recover losses from a period that precedes the current application. Again I refer to the Northwest Utility's case.

Finally I'm going to read a quote and quote again from the Goodman text, where it says at page 322 "When an agency allows prior deferred expenses and rates there is no retroactive ratemaking but only a shift in the timing of the collection of the expense from future ratepayers. The agency may lawfully allow the utility to make up for prior deferred costs as an exception to the matching principle, the matching of ratepayer costs and benefits."

Again Disco is seeking neither a rate for the recovery -- sorry, Disco is asking for neither a rate nor the recovery of past losses. It must also be remembered that Disco filed its application prior to the beginning of the test year and clearly identified in its request in the application that it -- sorry, clearly identified the request for the variance account in its application.

Disco is not attempting to account for losses for a period predating the application. As I mentioned earlier, this Board is charged with establishing just and reasonable rates. And in so doing, it has an obligation to ensure, as nearly as possible, that Disco realizes fair

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recovery of the costs it incurs in the 2005, 2006 fiscal year.

In summary, this Board has the statutory power to approve the variance account. Indeed, it is my submission that this Board has the obligation to ensure that Disco achieves fair recovery of its costs, and the variance account accomplishes that objective.

Finally, the proposed variance account does not meet any of the criteria for retroactivity and therefore is not prohibited as retroactive ratemaking. The variance account is not a rate. So it is not an interim rate.

Accordingly, in response to the question, can this Board approve the variance account, the answer I submit must be yes.

So that brings us to the nub of the issue which is

should you approve this variance account?

On October 1st last year, the electricity world in New Brunswick changed completely. The proclamation of the Electricity Act established a new model for the generation, transmission and distribution of electricity in New Brunswick. The previous NB Power integrated utility was restructured into separate operating companies and a very complex re-organization was implemented. The outcome is a new landscape in New Brunswick as it relates

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to electricity.

Since the creation of the new operating companies in October last management was confronted with the complex task of implementing the new Act and establishing the contractual relations between the new corporations. Added to this daunting list of tasks, the Point Lepreau refurbishment issue had to be dealt with and a major cost reduction program implemented and developed for that matter. These concurrent and complex initiatives all added uncertainty to Disco's budget and therefore its rate proposal. On January 17th, 2005, just three months after Disco was created, its Board of Directors approved the budget and proposed rate application. There followed a mandatory 30 day review period by Electric Finance Corporation. Disco then prepared and filed its rate application to this Board.

It's my submission that Disco could not reasonably have filed its rate application to this Board any earlier than it did. Through great effort and in very complex and difficult circumstances, Disco brought this application at the earliest opportunity.

Now often deferral accounts are employed to deal with costs that were not foreseen when rates were set and are outside the control of the company. The Disco proposal

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for the variance account which is before you will defer costs that are not reflected in the rates that were established for '04/'05 and those rates remain today of course. Deferral accounts are used specifically as a stopgap measure to address the inherent problem of regulatory lag, and I will deal with that in a little bit more detail in a few moments.

Deferral accounts are also used to capture anticipated

costs and allow the regulator sufficient time to
investigate and make a determination regarding the
recovery of those costs. And I would suggest to you that
that is precisely what the basis of Disco's proposal is.

Now there were two recent cases that were before the
R‚gie in Quebec, and they are interesting in that they
were happening simultaneously. The facts are somewhat
different from what is before you today but I am going to
review them with you.

The first -- what these do, these two cases, they
demonstrate how regulators employ different regulatory
techniques to achieve a result which is consistent with
regulatory principles.

The first case involves an application by Hydro-Quebec
-- and I can give you the cite but I'll put it in my
written submission -- and it was an application for

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transmission rates. Hydro-Quebec applied in August of
2000 asking that its existing transmission tariff be
declared provisional as of January 1st, 2001, pending a
final decision by the R‚gie, at which time the provisional
rates would be modified retroactively to the beginning of
the test year. The Board -- the R‚gie asked Intervenors
for written arguments and I was able to get my hands on a
copy of the written argument. And in the written argument
submitted to the R‚gie by Hydro-Quebec, Hydro-Quebec
argued -- and I won't go into all of it -- but basically
it said, "In compliance with the aforementioned decisions
by the R‚gie, Hydro-Quebec established the revenues
required by the transmitter for 2001 and proposed
transmission tariffs to recover this required revenue
starting January 1st, 2001. This approach is in
compliance with the regulatory principle under which the
total forecast revenues in a test year are equal to the
forecast required revenues for the same period. It went
on and in its argument it said, "It is in the interest of
both the R‚gie and the transmitter that transmission
tariffs be set according to generally recognized
regulatory principles and following recognized practices
when a regulator -- when a regulatory delay keeps new
tariffs from going into effect at the date planned. "

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Now without much comment on those arguments, the R‚gie

approved the interim rates on the basis that it was a
prudent thing to do.

Now the second case is one filed by GazifŠre and it
was an application for a change in rates in June 2000 to
be effective October of 2000. The test year was October
1st, 2000, to September 30th, 2001. It's interesting.
GazifŠre did not apply for interim rates even though that
remedy was available to it in Quebec, believing that the
rates would be approved before the start of the test year.
In fact, the decision was issued several months after the
beginning of the test year, and again the R‚gie called for
written arguments and GazifŠre submitted an argument and
in its written argument it said in part, "According to the
Act, the R‚gie can make any decision or order needed to
safeguard the rights of the persons concerned." And then
he went on to argue as I had mentioned earlier the
Northwest Utilities Limited decision. The argument went
on, "The Northwest Utilities Limited decision confirms
that in a prospective tariff application, a utility cannot
recover losses suffered before the date of the
application. GazifŠre's tariff application for 2001 does
not in any way contravene this principle."

Again without comment, the R‚gie approved the rates

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effective the start of the test year, October 1st, 2000.

Now the above cases I mentioned deal with different
regulatory regimes and different facts, but they do
underline the fact that regulators will use different
regulatory techniques available to them in order to accord
their decisions with fundamental regulatory principles in
fixing just and reasonable rates. As mentioned earlier
one such principle, is that the regulator should approve
rates that reflect as fairly as possible all of the
utility's costs incurred during the test year. That is
what the R‚gie did using two different techniques in the
cases I just referred to and that is what Disco is asking
this Board to do by the regulatory technique of the
variance account.

There are many examples of regulators approving
deferral accounts to enable the utility to recover costs
that only became known after the rates had been set. And
I'm not going to get into a lot of them but I will mention
a couple. One example is the Ontario Energy Board has

allowed Enersource Hydro Mississauga Inc. to defer pension
costs that utility claimed had not been included in its
revenue requirement when its rates -- existing rates were
set. The utility's pension plan is administered by the
Ontario Municipal Employees Retirement System and OMERS
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had approved it -- had provided a cash contribution
holiday for its members at the time the utility's existing
rates were set.

The OEB in its decision said "The Board finds that for
2004 and future years as applicable it is appropriate to
allow Enersource to track its OMERS cash pension costs. A
Board approves the application to establish a deferral
account to record these amounts. The Board emphasises
that the establishment of the deferral account does not
imply any outcome respecting this position. The ultimate
disposition of these balances and their eligibility for
recovery through rates will be the subject of a future
proceeding. It is for this reason that the Board has
dispensed with the provision for notice", et cetera,
etcetera.

Recently, as I'm sure you are all aware, the Nova
Scotia Utility and Review Board has allowed Nova Scotia
Power Inc. to defer the costs of new taxes that were not
considered in setting its existing rates. As you know, I
believe the facts are pretty straightforward. NSPI had an
ongoing piece of legislation in the federal court with
respect to outstanding taxes. They had reasonable comfort
that they were going to be successful, did not include
those in their rate base. After an unfavourable decision
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at the federal court level, ultimately they were required
to bring those back in -- or they were required to pay
those taxes and they applied to the Board in Nova Scotia
to basically defer those taxes into the future and the
Nova Scotia Utility Review Board allowed that.

So the point of all of this is that the variance
account is a regulatory technique that is widely used. It
is used to enable a regulator to comply with the
fundamental principle that a utility should be given the
opportunity -- the fair opportunity to recover those costs
incurred in providing service in the test period.

The last issue I'm going to deal with is the question

of regulatory lag and I'm sure some people will say
because the variance account deals and tracks regulatory
lag, that that in itself means that it is not an
appropriate mechanism to be used.

The variance account proposed by Disco will accrue
losses from the beginning of this fiscal year, April 1st,
2005, until the Board renders its decision in the fuel
surcharge -- on the fuel surcharge issue -- the
implementation of the fuel surcharge actually, which is 30
days after you file your decision. The variance account
will therefore do nothing more than mitigate the impact of
regulatory lag.

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Now I'm sure some of my friends and the Intervenors
will argue that if Disco was unable to file its
application in a timely manner, then the outcome should
not be visited on the customers by way of a variance
account. As explained earlier, we are in a new landscape
in terms of the electricity world. Disco brought the
application in my submission as soon as it could given the
circumstances exigent at the time, most of them, if not
all of them, beyond its control.

In that application Disco proposed a two phase
approach to address the issue of regulatory lag. So it
knew when it filed its application and it proposed a
mechanism to this Board to deal with regulatory lag.

As a rule -- and this is after reading all of those
cases -- regulators will, when it is fair to do so,
attempt to mitigate the impacts of regulatory lag.
Usually this is done though the mechanism of interim
rates. Now we can argue whether this Board has the
authority to implement interim rates, but assuming that it
does not, then in the absence of interim rate relief, I
submit that the variance account is a perfectly legitimate
vehicle for this Board to ensure that Disco has a
reasonable opportunity to recover its costs. Indeed
variance accounts have been used by other regulators for

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just that purpose.

Even when deferral accounts are not created explicitly
for the purpose of addressing regulatory lag they often
have that result as a byproduct. And I'm going to quote
again from Goodman, his text at 323 he states, "Whether a

deferred cost account should be created can arise in the
context of an ongoing rate case as a commission prescribed
remedy or prior thereto as a stopgap remedy pending
further consideration of whether the expense should be
allowed. The company may be allowed to book carrying
charges on the deferrals while the investigation into the
reasonableness of the expenditure continues." So Goodman
says that variance accounts are used as a stopgap measure
to deal with the regulatory lag issue. And that is
exactly what Disco is proposing in this case.

As pointed out earlier, this Board has the authority
to approve variance accounts and to adopt whatever
technique or method it considers appropriate in setting
just and reasonable rates. The mere fact that the
variance account recovers for regulatory lag is not in
itself offensive. The primary objective of this Board
should be to set just and reasonable rates and in so doing
respect the regulatory principle that the utility should
recover for the test year those costs of providing service

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during the same period. The variance account is a
regulatory technique this Board ought to utilize to
achieve that objective.

And finally -- and I should be wrapped up in a couple
of minutes and I'm sure that is welcome news -- there is
the fairness issue. Inherent in setting just and
reasonable rates is the notion of fairness. The
regulator, you, must balance the interest of the ratepayer
against protecting the financial integrity of the utility.
In addition to the legal arguments that I have set out in
the course of this submission, there are issues of
fundamental fairness which I submit compel the
establishment of the variance account.

First, this new landscape that was created a few
months ago with the proclamation of the Electivity Act,
Disco did not exist as an entity until October 1st, 2004.
The restructuring of NB Power created numerous overlapping
and complex challenges which had to be discussed. Disco
brought this application as quickly as possible. Is it
fair that Disco should be penalized because of these
exigent or unusual circumstances?

Second, restructuring in this new landscape I talked
about was undertaken to carry out policy objectives of the

government with a view to providing long-term benefits for

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the province and the ratepayers. Disco is a key component of that design. Fairness dictates that Disco should not be forced to start out -- basically start out its life with a significant shortfall in its cost recovering which will saddle it going forward.

Third, it is important to remember that the costs that we seek to have accrued in the variance account are not soft costs. The costs are fuel costs which are direct, essential and nondiscriminatory costs necessary to provide service to the customers. In short, these costs are at the heart of providing service to the customers. It is only fair that customers should be expected to pay these costs in full regardless of when the Board renders its decision.

Related to that and finally, Mr. Chairman and Commissioners, there is the question of symmetry. Let's assume for the moment that the situation was reversed. If Disco were over-recovering its fuel costs in the current year, would Intervenors and this Board consider it appropriate for Disco to keep the windfall due to delay -- regulatory delay or delay in the Board making its decision? Or would Intervenors be arguing that Disco should not benefit from a delay in the decision? A policy decision is fair if it is reasonable to apply it

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symmetrically, regardless of who benefits, and I suggest to you that that is what this proposal does.

Finally, just to conclude, Mr. Chairman, Commissioners, to reiterate the points that I wish you to come away with, this Board does have full power and authority to approve the variance account. The variance account does not constitute an interim rate. Indeed it doesn't constitute a rate at all. Establishment of the variance account does not constitute retroactive ratemaking. A variance account is a widely accepted technique available to this Board to enable it to fulfil its mandate of ensuring that Disco has an opportunity to recover its costs for providing service to its customers. The establishment of the variance account is fair to both the customer and to Disco.

I know that was a little long-winded but those are my

submissions with respect to the variance account.
CHAIRPERSON: Thank you, Mr. Morrison. I can't let go
uncomment on your expression that you used that Disco has
made this application as soon as it possibly could.
Technically speaking, yes, because the 1st of October was
when Disco was created. But it effectively is still a
vertically integrated utility and if my memory serves me
correctly, and Ms. MacFarlane can correct me on this, in

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the previous seven fiscal periods there were probably
five, if not a greater number, where the old vertically
integrated utility lost $70 million a year or close to
that.

So this Board has been calling at every opportunity
that it could take to say that the old vertically
integrated utility needed to have rate increases and they
should appear before the Board to do it. The utility
chose not to. But I have to comment on that.

Secondly, Mr. Morrison, is this not a perfect case
where if in fact the statute allowed interim rate
increases, that Disco would be applying for an interim
rate increase?
MR. MORRISON: Mr. Chairman, that is correct. Unfortunately
the Act does specifically or explicitly provide for
interim rate --
CHAIRPERSON: I understand that.
MR. MORRISON: However, Mr. Chairman, there is something
that is very interesting and it's something that I was
going to bring to the Board's attention in due course, but
when I was referring on researching the Hydro-Quebec cases
the R,gie regulatory regime, the legislation, does not --
although they routinely grant interim rates -- does not
have a specific provision dealing with interim rates.

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They rely on section 34 of their legislation and it's
remarkable actually, it struck us as we were doing this --
section 34 of the R,gie legislation says, the R,gie may
decide an application in part only. It goes on to say, it
may make any decision or issue, any order it considers
appropriate to safeguard the rights of the persons
concerned.

When you read that section and you read sections
125(1) and -- sorry -- 124 and 125(1), it's almost

identical to the powers that are in the R‚gie legislation,
yet they routinely grant interim rates. So I think there
is an argument to be made that even though there isn't a
particular section in the Electricity Act that says this
Board can grant interim rates explicitly, certainly even
in the absence of that it hasn't prevented the R‚gie from
granting interim rates. And you would have similar
powers.

But assuming, Mr. Chairman, that this Board does not
have the authority to grant an interim rate -- and I will
grant that for the purposes of argument -- yes, you are
absolutely correct. If interim rate relief were available
that would be the technique that we would be seeking.
Unfortunately it isn't. So we are asking this Board to
use a different technique. And under the Act you have the

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ability to use many techniques and methods to set rates.

CHAIRMAN: Mr. Morrison, I appreciate that. And I
personally, and I'm sure my fellow Commissioners will give
every consideration to the arguments that you have made.
But to me it is stark.

For instance I sat on the interim rate application
which was made in I believe '91. And that was pretty
basically the same as we are facing today where there was
a crunch on oil prices, et cetera and escalation. And
that was the argument that NB Power made at that time.
And that fit perfectly.

The other thing of course is the shareholder is the
Government of New Brunswick. And they have it within
their control to bring through the House changes to the
provision. Whether or not it passes, that is another
thing. But they could certainly do that.

MR. MORRISON: I agree with you, Mr. Chairman. As you know,
with the passage of legislation is something that is way
beyond my control and certainly beyond the control of my
client.

I know that Mr. Hyslop -- do you want me to go in and
deal with the other issue while I'm speaking? And then
Mr. Hyslop can -- I will be very brief on the other issue
which is the two-phase application which I think falls

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into the fuel surcharge issue.

I thought that is how you wanted me to proceed. But

I'm easy either way.
CHAIRMAN: How I wanted you to proceed was to deal with the variance account today and to deal with the fuel surcharge.
MR. MORRISON: Okay. I will deal --
CHAIRMAN: Because depending upon the decisions the Board arrives at in reference to those two, then either -- you know, we should discuss two stages or not. I mean, that certainly flows from our decisions on that, I would think anyway.
MR. MORRISON: No. I agree with you, Mr. Chairman. Look, I will address the fuel surcharge issue. And I will deal with that now. And I promise to be much more brief.
MR. SOLLOWS: Mr. Morrison, I'm wondering if you can help me. I came up with three questions while you were speaking. And the second one you have already answered regarding the R,gie.

The first one -- right at the start you mentioned deferral accounts that this Board had approved in the early '90s. What were they again?
MR. MORRISON: The first dealt with -- I think it was the 1991. There was a generic hearing prior to the big rate

case, NB Power rate case in 1992. And there was a generic hearing with respect to accounting and financial policies.

And in the decision that the Board rendered in connection with that generic hearing, the Board approved a generation equalization account and an export sales stabilization account.
MR. SOLLOWS: What was the function of those accounts?
MR. MORRISON: I have read the decision. I know that the generation equalization account dealt with variances in hydro. And I think there was also some discussion about the capacity factor in Point Lepreau.
MR. SOLLOWS: So they were meant to try and stabilize the uncertainty, the inherent uncertainty in rates?
MR. MORRISON: That is right.
MR. SOLLOWS: To what extent have those accounts been used to stabilize this rate increase?
MR. MORRISON: I believe those accounts were in use for a period of time, I think. But I will -- if you give me a moment to speak with Ms. MacFarlane I might be able to answer that question.

MR. SOLLOWS: Thank you.
MR. MORRISON: I believe it is addressed in the evidence, Commissioner Sollows. Those accounts wee discontinued by the integrated utility of NB Power. But there was no

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flow-through to Disco. The exact date of when they were continued I couldn't tell you. But it is in the evidence.
MR. SOLLOWS: I guess the question would be were they drawn down to zero and then not replenished? Is that the understanding.
MR. MORRISON: I understand from Ms. MacFarlane that that is correct.
MR. SOLLOWS: Given that that was the case would that not have been a good indication that we might be facing a need for a rate adjustment. If these were accounts that were meant to stabilize rates going out in the future, you would expect them on average to have a zero balance.
If you come to the stage where you no longer -- you have spent them and you can no longer replenish them, that would seem to set the time at which you probably should be looking for a substantive rate increase, would it not?
MR. MORRISON: I'm not going to quibble with the point, Commissioner Sollows, other than to say that, whether you are correct or not, I think we have to put this application in the context of what has happened in the province of New Brunswick over the last year, in which -- we have a -- I don't represent the integrated utility. I represent Disco.
MR. SOLLOWS: Then following on with that point, later on in

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your presentation, in terms of equity and fairness, you have argued that it really is only fair that the customers pay the full cost of fuel, given that they are hard costs.
Does that have to be tempered at all with perhaps the lack of input that customers might have had through regulatory oversight in the selection of fuels?
MR. MORRISON: Well, the only thing I can say to that is I think everything this Board does has to be premised, and any regulator -- one can only expect to recover properly incurred costs. And of course that is your job, to determine whether they have been properly incurred.
But if -- assuming that the costs were properly incurred, they are direct costs that relate to providing

service to the customers. And it is only fair that --
even for questions of transparency and price-signaling, if
nothing else, one would expect that you pay for the cost
of the service that is provided.

Now I know there are a number of other principles,
like the intergenerational equity and rate shock. And
those things have to be taken into consideration. But as
a general comment you basically should pay for what you
get.

MR. SOLLOWS: Thank you.

CHAIRMAN: Thanks. Mr. Morrison, I think the Board would

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appreciate if you could, for instance with the -- you
quote from a text, the Goodman text.

I would appreciate receiving a hard copy of the
chapter from which you are lifting the various quotes and
whatnot.

MR. MORRISON: I have a photocopy of it but poor quality. I
will --

CHAIRMAN: Sure. And I believe Mr. MacNutt has copies of
the three Supreme Court of Canada cases that you have
quoted from?

MR. MORRISON: Mr. Chairman, I will make copies of all the
references that I have referred to. When I file my
written brief I will file those documents.

CHAIRMAN: That is great. Thank you, Mr. Morrison.

MR. MORRISON: Do you want me to continue with the brief
argument I have with respect to the fuel surcharge issue?

CHAIRMAN: To the what, Mr. Morrison? I'm sorry.

MR. MORRISON: I believe we were going to -- you asked me to
--

CHAIRMAN: All right. No. Sorry. Go ahead.

MR. MORRISON: I appreciate that you are probably tired of
hearing me droning on. But I will be brief.

CHAIRMAN: No. That is not it at all.

MR. MORRISON: Mr. Chairman, in its application Disco has

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requested a two-phased hearing. And this was done to
minimize the severe financial impact that the utility is
facing, which I have already alluded to.

In the application phase 1 was intended to deal with
the variance account that I just talked about and the fuel
surcharge. Phase 2 will deal with the revenue requirement

and rate size and any other issues that the Board deems
appropriate.
I believe that the Intervenors have suggested that
this Board cannot conduct the hearing in two phases, if I
understand my friend Mr. Hyslop last week. He was -- and
I expect that he will argue that this Board cannot conduct
the hearing in two phases.
As I understand the argument, he will say that section
103(1) of the Act prevents this Board from making a
decision on the fuel surcharge before it -- first of all
it requires the Board to first consider all of the
projected -- if I'm quoting properly, all of the projected
revenue requirements before it can render a decision on
the fuel surcharge. That I believe will be Mr. Hyslop's
argument.
First, all the evidence with respect to the projected
revenue requirements is before this Board. It has been
filed. But more importantly is section 101(3), in my

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submission, must be read in conjunction with section 124.
Now section 124 states, and I will quote, "In any
application the Board may grant the whole or part only of
the application or make a conditional order." And I'm
paraphrasing.
CHAIRMAN: Yes. You left out the part which said "and after
considering the evidence given at a hearing or inquiry."
MR. MORRISON: Yes. And I will get to that, Mr. Chairman.
CHAIRMAN: Okay.
MR. MORRISON: I suggest to you first, Mr. Chairman, that
section 124 gives this Board the authority not only to
make partial orders but conditional orders as well.
Now you have made reference to the fact that after a
hearing or inquiry, I agree with you, the Board would have
to conduct an examination of the fuel surcharge before
rendering a decision in connection thereto. I have no
problem with that whatsoever. But the Board can make, in
my submission, a partial or conditional order.
Furthermore, if you look at section 125(1), which I
have quoted extensively from earlier, it states that in
setting rates this Board may adopt any method or technique
that it considers appropriate and so on. There are many
regulatory techniques available to this Board, deferral
accounts, interim rates and PBR.

Section 124 I would submit provides authority for conditional orders. And section 125(1) allows this Board to employ whatever regulatory technique it wishes. The combined effect of these two sections, in my opinion, gives this Board very great power indeed.

Now a fundamental rule of statutory interpretation is that meaning must be given to statutory provisions. If section 101(3) means that this Board cannot conduct a hearing and render a decision on a fuel surcharge piece, if you will, then section 124, with respect to partial and conditional orders I would suggest would be meaningless. And that cannot be what the legislature intended.

Some will argue -- and I believe I have heard this from Board counsel, at least in less formal settings, that section 124 only applies to procedural matters, in other words that this Board can only grant interim orders on procedural matters.

With respect, the section doesn't say that. The section contains no such restriction. The section says that in any application, not just a procedural application. So I believe it is open to both procedural and substantive matters.

There has been a suggestion from the Public Intervenor that this hearing be staged or phased or a number of

hearings as we go along. It would seem to me that if a strict interpretation of section 101(3) is adopted that that flies -- the idea of a staged hearing flies in the face of that approach.

And from a practical perspective, if there isn't two phases, and I might as well lay it on the table, because that is what this is all about, we are probably looking at a decision, a final decision after you hear the revenue requirement, sometime in late fall, November, December. That is my best crystal ball guess. It might be earlier. But certainly several months out.

If the variance account is not approved, I would say expeditiously, then the financial impact on Disco will be significant and severe. As you know, this Board has a responsibility, as I said, to look out for both the interests of the ratepayer and the utility.

But even if the variance account is approved, the

longer the delay in approving the fuel surcharge will mean
that the -- more will be accumulated in the variance
account. Although this will assist Disco in cost
recovery, it will impact the timing and recovery of those
costs when this Board determines how that account is going
to be cleared.

Certainly early resolution of the fuel surcharge

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issue, as part of this hearing process, perhaps set a few
days aside as part of this hearing, if we can deal with
that fuel surcharge issue, this would reduce the amount in
that variance account. And this would enable the decision
to comport more with the matching principle of matching
when costs are recovered as closely as possible to the
period in which they are incurred.

So what we are asking, and what we have asked, is a
two-phased approach. It is my submission that the Board
has the authority to issue a decision as part of this
hearing with respect to the fuel surcharge.

And it is strictly an interpretation of the statute,
Mr. Chairman. I have no legal precedent to put before
you. And those are my submissions with respect to that
issue.

CHAIRMAN: Mr. Plant for Canadian Manufacturers and
Exporters, do you wish to address these issues?

MR. PLANT: Not at this time, Mr. Chairman.

CHAIRMAN: This is the only time you will get.

MR. PLANT: Then it's a no.

CHAIRMAN: Okay. Mr. Coon is not here. Mr. Woodhouse?

MR. MACPHAIL: Peter MacPhail on behalf of the EWP. No, we
don't want to address these issues at this time.

CHAIRMAN: Thank you. Do you want a break, Mr. MacDougall?

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MR. MACDOUGALL: I am ready to go, Mr. Chair, if other
people are.

CHAIRMAN: All right. Go ahead.

MR. MACDOUGALL: I would suggest though, Mr. Chair, so that
all the Commissioners and everyone one else doesn't have
to strain their head sideways I could go to the front of
the room and speak from the front, if that's convenient.

CHAIRMAN: Okay. Please do.

MR. MACDOUGALL: Good afternoon, Mr. Chair, Commissioners.
This is a very important topic at the outset of the

hearing but it is also a fundamentally dry topic, I
thought I would quickly point out that with the advent of
technology I was told just very recently that Ms. Belinda
Stronnic is now a Liberal, which I thought was quite an
amazing piece of news which I thought I would share with
everybody here because that's quite less dry than the
topic I'm going to talk about.

CHAIRPERSON: It probably raises more questions, Mr.
MacDougall, than your presentation on the legal issues.

MR. MACDOUGALL: It certainly will, Mr. Chair. With that I
would like you to now concentrate on this rather than that
news, but I know that news is fundamentally important to
some.

As the Board is aware Enbridge Gas New Brunswick is

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the general franchisee for the distribution of natural gas
in the province, and its activities are also regulated by
this Board.

In its capacity as the provincial natural gas utility
EGNB has an interest in all regulatory proceedings that
may impact the competitive supply of energy in New
Brunswick and in which issues of provincial energy policy
may be under consideration.

As such EGNB's comments today and in fact througout
this hearing will be based on its perspective as a
regulated energy supplier in the province and a
competitive energy supplier to Disco.

This perspective is premised on ensuring a viable,
competitive energy market in New Brunswick and an
efficient use of New Brunswick's energy sources.

As we understand the issues before the Board today
they are twofold. First, does the Board have the
authority to approve a variable fuel surcharge variance
account covering the period from April 1, 2005, up to the
date of the Board's decision on the substantive matters
regarding the variable fuel surcharge applied for by
Disco?

And 2) related to this is the question of whether in
the circumstances it is appropriate for the Board to hold

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a two phased hearing, the initial phase to deal with
Disco's proposed variable fuel surcharge, and the
subsequent phase to deal with approval of Disco's overall

revenue requirements, cost allocation and rate realignment
proposals and its ultimate rate charges in total.

We understand that the actual need for the variable
fuel surcharge, the magnitude of the surcharge and the
application of the surcharge would be the subject matter
of the phase 1 proceeding, if it is allowed, and that
today's motion is to deal with the process issues
regarding the variance account and the potential approach
to the phasing of the hearing as requested by the
applicant.

With that background EGNB would like to note that
although for the reasons to be discussed shortly, it
believes it appropriate for Disco to be granted the
variance account and that the phase proceeding should be
allowed. This does not mean that EGNB supports all
aspects of Disco's proposed fuel surcharge. EGNB will be
making its position on the fuel surcharge and its
application known at such time as this matter is dealt
with on its merits and today we will only deal with the
procedural issues.

Dealing now with the two issues before us for

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consideration today. First is the issue of Disco's
application for a variable fuel surcharge variance
account. Having had the opportunity of hearing the
applicant's submissions earlier on I will be able to
shorten my presentation by saying that EGNB generally
concurs with the thrust of the applicant's comments. They
are consistent generally with our views on the matter.

So rather than duplicate what has been said today by
Mr. Morrison, I would like to comment particularly on very
recent experience in Nova Scotia which supports the
general regulatory theory on variance accounts and which
we believe is useful precedential illustration for the
Board's consideration in this matter.

With the greatest of respect certain Intervenors have
appeared -- or we believe will appear to come before the
Board and confuse the use of a variance account with an
application for an interim rate. This has apparently led
to the concern that the Board may also somehow lack
jurisdiction to approve the variance account.

However, it is clear in the regulatory setting that a
deferral account is simply not a rate. Rather it is a

mechanism for accruing certain expenses in certain defined
circumstances. These expenses can later be collected by
the applicable utility through its rates, but only once
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the regulator has approved the expenses that have been
placed in the deferral account, has approved the time
period and mechanism through which the deferral account
can be cleared.

In the current situation Disco is proposing that any
under recovery of its forecast fuel costs be allowed to
start to accrue from April 1, 2005, the beginning of the
test year in question, up and until such time as the Board
approves its variable fuel surcharge and allows Disco to
commence applying that charge to its customer bills. In
fact it would be subject to the Board allowing the
variable fuel surcharge in the first place.

The deferral account will therefore accrue the
notional dollars that would have otherwise have been
charged to customers on account of Disco's underrecovery
of fuel costs from the period April 1, 2005, until the
date when Disco first starts charging the variable fuel
surcharge to its customers on a go forward basis.

A very recent example in the regulatory jurisprudence
on this point occurred a few months ago in Nova Scotia,
and I have to just for the Board's clarification -- the
issue Mr. Morrison raised was one deferral account. This
is a different deferral account that was dealt with in the
same application before Nova Scotia Power -- before the
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Nova Scotia Utility Review Board dealing with Nova Scotia
Power, but it is actually a different deferral application
than the one referred to by Mr. Morrison.

We believe the approach taken by the Utility Written
Review Board in Nova Scotia is very indicative of the
approach taken by regulatory commissions to request for
deferral accounts in general, and because it is so recent
can provide useful guidance to this Board.

Following Nova Scotia Power's 2004 filing for its
revisions to its rates, charges and regulations to be
effective January 1, 2005, it became apparent that the
UARB's decision would not be rendered until sometime late
in 2005, certainly later than January 1. Accordingly on
December 14th 2004, NSPI made a specific application for

deferral to the UARB within the ongoing rates proceeding
for an order that 2005 tax expense which was not already
in NSPI's rates be deferred until the Board rendered its
decision on NSPI's rate case, and at that time provide for
the recovery of whatever amount of the 2005 tax expense
the UARB may have approved in the rate case.

NSPI stated in its application that this application
would, and I quote, "Allow NSPI to be kept whole with
regard to new taxes not presently in rates, the liability
for which arises between January 1, 2005, and when the

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rate case decision is rendered". NSPI went on to state
that they wished to make plain that they were -- and again
I quote -- "Requesting the UARB deal with the application
for deferral on a stand-alone basis and render its
decision at its earliest convenience". Ideally such an
accounting deferral should be in place prior to the
commencement of the new year.

And they went on to say, this deferral application
will permit NSPI to preserve its ability to recover those
taxes notwithstanding when the rate case decision is
delivered and without prejudice to any other decision the
Board might make with respect to any aspect of taxes or
other issues raised in the proceeding.

In related materials filed with the UARB on December
13, 2004, NSPI explained the purpose of its application in
greater detail, and again I specifically quote. "Setting
new rates on some date later than January 1, 2005, could
have a significant detrimental financial impact on NSPI in
2005. The increased tax expense not presently
incorporated into rates and faced by the utility this year
without the appropriate revenues from our customers is a
material and immediate concern. NSPI hereby applies to
the Board for an order to defer 2005 tax expense that may
be subsequently approved for recovery by the UARB but

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unfunded due to any delay in the effective date of new
rates beyond January 1, 2005".

EGNB believes this rationale is virtually if not
completely identical to that which is driving Disco's
application with the difference being here its fuel which
is the driver and NSPI's case it was new tax costs that
were not funded through existing rates.

On February 1, 2005, the UARB issued its ruling after having received submissions from other parties to the proceeding that NSPI's application should not be allowed. And its ruling stated, and again I quote directly from the Board's ruling. "Under the circumstances the UARB considers NSPI's request to be reasonable and is prepared to grant an order deferring new taxes not presently in rates, the liability for which arises between January 1, 2005 and the date when the rates allowed by the UARB in the 2005 rate application become effective. The amount of the deferral will be determined after year end when actual 2005 taxes are known and the period over which the deferral will be amortized will be determined at that time. It is understood that the baseline for determining the amount of new taxes is comprised of the amounts included in the 2002 compliance filing for grants in lieu of property taxes, provincial large corporation's tax,

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federal large corporation's tax and corporate income tax".

And in this case the 2002 compliance filing referred to by the UARB in their decision was NSPI's previous filing which had set its rates which were in effect prior to the Board's recent decision on the 2005 rates. In other words it was setting the prior baseline and saying the taxes that are unfunded by your existing rates can start to accrue from January 1 forward, just as the applicant is asking for here, from April 1 forward, notwithstanding that our decision on the other rates issues will not occur until a later date. Identical circumstances.

EGNB believes this ruling to be analogous in all key respects to Disco's current application before this Board. And furthermore and more importantly, that the finding is totally consistent with appropriate regulatory responses in such a circumstance.

In this case, the one before the Board today, the Board can issue the appropriate accounting order, and that's what is being asked for here, an accounting order for a deferral, based on Disco's claim that its current rates will significantly undercollect its fuel costs.

The final amount of the overall accrual will be determined based on the Board's findings on the merits of

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the eventually approved fuel surcharge, both its magnitude and how the Board approves of it being implemented. Disco has also indicated in its application, and I believe has stated further today, that the manner in which the variance account will be recovered will be subject to further Board determination, as will the issue of carrying charges attributable to the variance account.

This is again consistent with the recent Nova Scotia approach and consistent with general regulatory theory and practice.

Furthermore, the applicant's evidence, and again as mentioned today by Mr. Morrison, clearly shows a prima facie case that its fuel costs for 2005 are increasing, and significantly increasing. And in such circumstances the approval of a variance account subject to the Board's ultimate ruling on the fuel surcharge issues is clearly appropriate in the same manner as the issue of increases in taxes for NSPI was in the Nova Scotia case.

The reason I raise the Nova Scotia case is not merely the similarity in the circumstances, but also how the Board can do this in terms of its own legislative regime and some issues which I believe may be raised by some of the Intervenors.

In that regard it is instructive to note that there is

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no consideration of interim rates by the Nova Scotia UARB in this matter. This is presumably for the simple reason, as I discussed earlier, that variance accounts in the circumstances before the UARB and in the situation currently before the Board, this Board, are not applications for rates. They are applications for accounting orders to ensure appropriate cost recovery of actual expenses that will eventually be put into rates, but only once the Board has ruled on the merits of the amounts in question in the deferral account and the subsequent clearing of the deferral account through an adjustment of rates at a future date and by future process.

My next point deals with the similarities with the legislation and I believe, Mr. Chair, will address in part your question to Mr. Morrison earlier of this afternoon dealing with if there were interim rates provisions wouldn't you use those.

Well what is interesting to note from the Nova Scotia experience is that the Nova Scotia Public Utilities Act which grants the UARB the authority to regulate Nova Scotia Power, specifically only provides for the approval of interim rates in two circumstances. 1) where NSPI is proposing a new rate or 2) where they are proposing a

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reduction in rates. Neither of these were the circumstance in Nova Scotia, neither are these the circumstance here. So there is no specific interim rate making power in Nova Scotia with respect to increases in rates.

But that comment didn't even come up because interim rates were not being applied for. A variance account and an accounting order for a variance account in appropriate circumstances identical to those circumstances as far as dates and timing goes as before this Board was what was applied for.

It is also useful to note that the UARB had no problem with issuing its order on February 1, 2005, effective back to January 1, 2005, as this would not be an issue of retroactive ratemaking, another issue which I believe parties may raise. It is an issue of approval of an accounting order covering the period up until the ultimate Board decision.

CHAIRMAN: May I interrupt just for a second, Mr. MacDougall? On -- in the body of the application though that presumably was made in 2004 it was applicable to the 2005 fiscal period of NSPI?

MR. MACDOUGALL: Correct. January 1, 2005, forward.

CHAIRMAN: And if that decision was given in February of

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2005 --

MR. MACDOUGALL: And the decision on the accounting order was given not on the merits of the rates.

CHAIRMAN: All right. When was the merits done?

MR. MACDOUGALL: The end of March.

CHAIRMAN: The end of March. Now there presumably was a change in rates as a result of that application exclusive of the variance account and the taxes?

MR. MACDOUGALL: Correct. There was a significant change.

CHAIRMAN: That was effective when?

MR. MACDOUGALL: As of the date of the Board's order going

forward, not back to January 1, 2005.
CHAIRMAN: Okay. So if the costs that were reflected in that for the previous four months of the year or whatever, those were costs that would not be recovered?
MR. MACDOUGALL: Well the ones where the subject of the accounting order will be allowed to be recovered at a later date. The other ones will not be.
CHAIRMAN: I'm familiar with a situation and I'm trying to remember whether it was NBTel or whether it was in the early '90s with NB Power, where they knew that because of the lateness of their application, i.e., it was say in the last four months of the year prior to the test year, that they knew the decision would not arrive until say mid

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point in the test year itself that they requested a greater rate increase for the last half of the year in order to make up for the shortfall in the first part of the year. But that was not the case here?
MR. MACDOUGALL: No. The case here, Mr. Chair, to be very clear is virtually identical to this situation. NSPI applied for a change in its rates. It became apparent as the process was going on it was not going to get a decision for January 1, 2005. So with respect to a significant increase that it knew was going to incur, i.e., it was going to become taxable to an extent it had not previously been taxable, those taxes would have to come into its rates. Those taxes were not recoverable through their existing rates because NSPI wasn't taxable in the earlier time period.

So they applied for an accounting order to start to accrue the taxes from January 1 forward. The Board then issued its decision on the accounting order on February 1. It then subsequently issued its overall decision later on in March.

Rates became effective March going forward but NSPI was allowed to accrue the taxes subject to the accounting order from the period January 1 up to the date of the Board's decision.

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CHAIRMAN: Okay. One last question and that is when did the Government of Nova Scotia indicate that those taxes would be coming into effect? Was that in 2004?
MR. MACDOUGALL: They started to come in -- I think it was

earlier than 2004 because what happened was Nova Scotia
Power was paying taxes in 2004 and in 2003 just because of
other cost reductions in their rates they didn't have to
come in to recover those taxes. So they had become --
they had started to become taxable throughout the time
period I believe 2003/2004 it was sort of a phasing in and
it was both federal and provincial taxes over a time
period. My recollection is a little shaky on that.

CHAIRMAN: Thank you. Go ahead, sir.

MR. MACDOUGALL: So again there is no issue here of
retroactive ratemaking. And to be very clear I'm just
using this as a recent example.

Mr. Morrison has given you all of the other examples
which are consistent with the regulatory theory and the
regulatory practice. This is a very recent example in a
very similar situation in a neighboring jurisdiction,
which I felt would be helpful to the Board. And it seems
to cover most if not all of the issues.

But certainly Mr. Morrison's comments today are very
consistent with this. This is a current application of

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what I suggest and what EGNB suggests is the regulatory
theory and practice that this Board should be guided by.

So similarly in this case Disco applied prior to April
1, 2005 for its application for deferral. No issue of
retroactive ratemaking would arise if the Board issues an
order approving that deferral to accrue from April 1,
2005.

As Mr. Morrison stated, had they asked for the accrual
to occur before the test year, well that is a different
question. That is retroactive ratemaking. We simply
don't have that situation.

So to suggest that it is retroactive ratemaking
doesn't fall into any of the concept of retroactive
ratemaking. Any amounts in the deferral account will not
be placed into rates until some future period, and only
with subsequent Board approval. And therefore there is
simply no retroactive ratemaking.

EGNB's concern is that as Disco is shown a prima facie
case for a significant increase in fuel costs -- and as
Mr. Morrison has stated, that is $46 million, it is
clearly very significant -- for electricity generated in
the 2005 test year, if the variance account is not

allowed, a significant portion of those fuel costs would
simply not be recovered from ratepayers.

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If the Board subsequently determines that they are
appropriate costs, Disco's rates would be significantly
underrecovering its costs. The New Brunswick taxpayers
will bear these additional fuel costs. And Disco's rates
will continue to deliver inappropriate price signals to
the New Brunswick market.

In this regard we believe it is important for the
Board to always keep in mind that the ultimate
shareholders of Disco are the taxpayers of the province of
New Brunswick. I believe one of the other Intervenors
mentioned that this morning.

And any failure to recover costs appropriately
attributable to electricity ratepayers is ultimately borne
by the taxpayers, as these costs have to be paid for by
somebody.

To ensure an appropriate level playing field for
competitive supplies of energy in the province and to
ensure that taxpayers do not needlessly subsidize
electricity ratepayers, which would in EGNB's view be
contrary to current provincial energy policy, it is
important that Disco, as a mature cost of service based
utility, be given the opportunity to recover its actual
costs from its ratepayers.

Mr. Chair, Commissioners, I would then like to go on

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to the second issue. And like Mr. Morrison I will be very
brief on that.

The second issue being the phasing of the proceeding.
EGNB has a few comments which it hopes will be helpful to
the Board in its deliberations. First off, if the Board
approves the variance account, any delay in implementation
of the fuel surcharge, as ultimately approved by the
Board, will only add to the magnitude of the variance
account, which will have to be subsequently cleared by
Disco.

Therefore to ensure that those ratepayers who are
causing the costs pay for those costs, Mr. Morrison used
the term, the matching principle, the other regulatory
term being intergeneration equity, and to ensure that the
deferral account does not become unnecessarily large, and

therefore require an extended period to clear, EGNB
believes it would appropriate to have the phased hearing.
The fuel surcharge would be dealt with first and its
method of implementation determined and implemented by
Disco in a timely manner.

What is the impact of that? Well, considering that
Disco is applying for a fuel surcharge, and it is
important to see the way Disco has structured it, this
should not subsequently impact the Board's ultimate

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decision on the rates issues that would be determined in
the second phase. All other costs of the utility will be
subject to review, as will be issues of cost of service
study methodology, cost allocation, rate design, et
cetera.

And in the final setting of its rates for Disco the
Board can make its findings, fully cognizant of the impact
of the fuel surcharge which it may have previously
approved. In fact the approach taken by Disco
specifically allows this to occur without creating any
technical issues for the Board's decision-making.

Those are our submissions on these points, Mr. Chair,
Commissioners. Thank you for the opportunity of making
those submissions.

CHAIRMAN: Thank you, Mr. MacDougall. We are going to take
a 15-minute break. And when we come back we will ask the
Irving group if they have any presentation they want to
make.

(Recess - 2:45 p.m. - 3:00 p.m.)

CHAIRMAN: The Irving group of companies?

MR. DEVER: Mr. Chairman, we have no submissions to make on
these points.

CHAIRMAN: Thank you, Mr. Dever. Mr. English?

MR. ENGLISH: Thank you, Mr. Chairman. Jolly Farmer

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Products Incorporated owns and operates a large greenhouse
operation in Carleton County near Woodstock. We currently
employ 387 people from the surrounding area. We use 2
megawatts of power and are looking to expand within the
next two years.

The purpose of intervening at these hearings is to
help prove to the Board that the proposed rate increases
are unacceptable and unnecessary. We have some serious

concerns about this variable fuel surcharge and the
variance account.

Mr. Morrison and Mr. MacDougall were both talking
about runaway fuel costs that they have no control over.
I wholeheartedly disagree. As a fuel buyer for Jolly
Farmer for the last 12 years I know what are fuel costs
are 16 months in advance. They are fixed. We know how to
plan and subsequently how much to charge our customers.

I submit that we look at the root cause of the
applicant's submission and ask the question why doesn't NB
Power know what their fuel costs are? The proposed
variance account and the variable fuel surcharge are both
setting a precedent that will seriously damage the New
Brunswick economy. Thank you.

CHAIRMAN: Thank you, Mr. English. Mr. Roherty for NBSO?

MR. ROHERTY: No submission, Mr. Chair.

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CHAIRMAN: And Noranda is not here. Mr. Rowinski?

MR. DENIS: Erik Denis on his behalf, Mr. Chair. I have no
submissions at this point.

CHAIRMAN: Thank you. And if Rogers, even though it has not
yet been granted or denied status, has a comment they want
to make on these two matters, why please do so.

MS. MILTON: I'm delighted to hear that I have the
opportunity to comment. But we have no submissions.

CHAIRMAN: Thank you. Mr. Gorman?

MR. GORMAN: Mr. Chair, we have no oral submission to make.
But we may file a written brief by the Tuesday deadline.

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

MR. PEACOCK: Mr. Chair, we have no submissions today.

CHAIRMAN: Mr. Hyslop, I'm sorry to, as you so aptly term
it, jam you. But we would like to get out of here today.

MR. HYSLOP: Thank you, Mr. Chairman and Commissioners. My
name is Peter Hyslop. I'm the Public Interest Intervenor.
And with me, for purposes of these submissions, is
Mr. Greg Hegler.

I'm not going to read a lot of law. And I'm going to
dispel the notion right at the first. Because I'm not
going to spend a lot of time discussing whether this is an
interim rate increase or retroactive rate increase or a

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revenue account or an accounting account.

But I'm going to say right off the bat there is
nothing expressed in the Electricity Act that says the
Board can use these devices as part of a rate hearing. So
I'm not going to get tied down in the quibbles of what it
is.

I'm not going to read a lot of law. But I will read
one very short statement. It is from a case. It is
called Giant Grosmont Petroleums Ltd. v. Gulf Canada
Resources Ltd. It is from the Alberta Court of Appeal.
And "It is a fundamental law that all government action
shall be supported by a grant of legal authority.
Although there is no requirement for administrative
tribunals to specify an exact source when purporting to
act pursuant to their jurisdiction, when that jurisdiction
is challenged, the administrative tribunal must not only
point to but also supports its source."

And the issues here are pretty simple. Does the
Electricity Act allow for the fuel surcharge variance
account? And does it allow for the fuel surcharge itself?

And I will be quite point-blank with you. The second
one is a lot tougher to sell for me than the first one.
But I think the first one is a pretty easy sell.

I don't think there is any expressed legislation.

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There is very little legislation in the Electricity Act
for a catch-all provision. And with all respect to the
Supreme Court of Canada or to the way my friends have been
referring to the Bell Canada case, it doesn't necessarily
stand for the proposition that they make.

I just want to spend a second on that last point which
is the Bell Canada case. And the facts are very important
as is the state of the law.

The facts. Bell Canada case came about in 1984. In
1984 under provisions of the National Transportation Act
and the Railway Act, which allowed for interim rate
increases. Those Acts allowed for interim rate increases.

Bell Canada went and got a 2 percent rate increase
interim. And it was subject to final order. It was
subject to a final hearing. By 1986 or 1987, when they
got through the hearing, it was found that poor old Bell
had kind of not needed the interim rate increase because
they had overcharged their customers $204 million.

And the CRTC said look, Bell, you got to give that

back. And Bell Canada went all the say to the Supreme Court of Canada saying, amazingly, there is nothing in the legislation that lets the CRTC make an order to make us give the money back.

Well, what the Supreme Court of Canada said -- and I

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promised not to read too much law, but I will read this. It said in its decision "The statutory scheme established by the Railway Act and the national Transportation Act is such that one of the differences between interim and final order must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and may be remedied in the final order."

That is the res decidendi. I love using a nice Latin phrase once in awhile. That is the reason. And that is the whole crux of Bell Canada. For parties to take that into the legislation itself and say by necessary implication you can try to do something else is obiter.

And I have an Alberta case that will be in my brief where it is indicated that is a very narrow point in Bell Canada.

So to the suggestions that there is a whole new world out there after Bell Canada, I would submit to this Board it might want to be a little cautious going down that road. Anyhow I leave it at that.

The next point I want to get on is with the New Brunswick legislation. And the section, it is part B of

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the Electricity Act we are dealing with. And some of the sections have been highlighted. But I think there is a couple of other sections that might apply.

And my friend Mr. Morrison is right. I'm relying heavily on 101 (3) which says you should base your decision on all the projected revenues for the provision of services referred to in section 97. "All the projected revenue requirements." Just think about that phrase when we start talking about phase 1, phase 2. They want to take the fuel cost out and deal with it separately.

Now section 101 (3) says you have to deal with all the projected revenue requirements. And I suggest that the

only way to do that is to merge the two phases. And that
is the only argument I will make on the two phases.
Because that is the only one I think that really needs to
be made.

But one of the sections, Mr. Chairman and
Commissioners, no one has talked about in determining what
the remedies of this Board are, is section 99(1).

And 99(1) is "The Distribution Corporation may change
the charges, rates and tolls charged by it for any
category of service if the change in the charges, rates
and tolls does not exceed the greater of 3 percent, or the
percentage change in the average consumer price index."

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And I will talk a little bit more about that in a
second. But I think that is a really critical provision,
as you address your minds to what jurisdiction you have.

Now I want to perhaps make mention of another thing.
Mr. MacDougall and Mr. Morrison, both of whom are probably
considerably more experienced in terms of regulatory
affairs than me -- and the phrase used by Mr. Morrison
bothered me. I can't find my note here.

But he says it is a common and acceptable method,
these deferred accounts. And I haven't looked at every
jurisdiction in North America about this. But I think you
are going to find jurisdictions that use this "common and
acceptable method" quite often have some legislation that
permits it.

For example, the Ontario Energy Board Act 1998,
section 6.1 -- and there is a heading for section 6.1. It
says "Deferral or Variance Accounts." And there is a
whole bunch of stuff in here about how the deferral and
variance accounts are going to come about and be used.
Well, we don't have an equivalent section in the New
Brunswick Electricity Act.

Anyhow then it goes on and says this. And one of the
neat little things in the Ontario Act -- and I just passed
this out because it looked interesting. But it says "If

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an order that determines whether and how amounts recorded
in a deferral or variance account shall be reflected in
rates made after the time required by subsection 6(1) or
6(2) and the delay is in whole or in part to the conduct
of the distributor, the Board may reduce the amount that

is reflected in the rates." Anyhow, that is deferral accounts.

By way of passing, knowing it is going to come up under our discussion of section 156, just in case I might forget to say this when we talk about it, but it also has a section in here under 25(20). And it says "OPA's recovery of its costs and payments related to procurement contracts" -- which might be PPA's -- "shall be deemed to be approved by the Board." So I will only leave that with you, that you might wish to have that jurisdiction where this is done.

Electric Utilities Act of Alberta 2003, section 65. "Tribunal will make an interim order if it is of the opinion it is necessary to prevent immediate harm or further harm to the fair, efficient, openly competitive operation of the market." Now that is pretty expressed. We don't have anything in that in our section, I don't think.

Section 120, "Tariff must describe how it may change

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over the period for which it is intended to give effect. Tariff may provide for increases or decreases in rates to correspond increases and decreases in fuel costs, taxes or other costs and expenses." Can't find that in our Electricity Act.

Section 123. And I have been beat up pretty good on interim. I have been beat up pretty good on retroactive. This one is retrospective. So maybe I will hang my hat on that one. But it provides that, amongst other things, that there can be a retrospective tariff in certain circumstances.

So you know, in Alberta they have got some legislation that allows us. And I think that is one of the leading jurisdictions on utility costs in the province.

Only because it has recently been used by this Board, I just remind the Board that in the Gas Distribution Act 1999, section 76 provides that "In special circumstances the Board may make an interim ex parte order or no ex parte for a longer time than it considers necessary in a matter to be determined by means of its normal process." So I don't know. I guess that suggests that maybe some of these remedies might be available.

What I'm saying is there is a lot of jurisdictions

with legislation out there that permit many of the things

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that my colleagues Mr. Morrison and Mr. MacDougall have discussed with you.

Now they are not in the New Brunswick Act. And I want to go back and I want to suggest to you why this is so. Why is it, when we put this new state-of-the-art legislation in effect less than two years ago, why some of these modern methods used by utility regulators in North America didn't put into it the right to make an interim account or the right to use a deferral account or the right to use a retroactive account.

And my answer to that is section 99(1) of our Act. And I think I'm going to bore you a little bit longer. I'm going to talk a little bit about the history of the Act. And it has been an amazing history. It is quite a thing for a little province like us to be unique in the regulatory world with a section like 99(1).

1989, we amended our legislation. And when we amended our legislation we put into it an interim -- a right to apply for an interim rate. And the interim order was dependent apparently under -- and the statute was Statutes of New Brunswick, Chapter 59.

But it says we can request the Board approve on an interim basis a change in the rates, charges and tolls. And the Board had to find there would be special

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circumstances to make the interim order. And that was in 1989.

Now in 1992 we took that out. And maybe the interim order wasn't good enough for NB Power. But we put in a pretty nice piece of legislation in 1992. I'm sure they liked it. And we put into effect section 38. And it said subject to subsection (2), New Brunswick Power Corporation may change the charges, rates and tolls charged by it for services performed in the province.

New Brunswick, after they changed the tolls, subsection (2), and not later than 30 days, then they applied to the Board for approval. In other words, the rate increases happen when you filed the application. And then you had to come in and prove it. And that was what came out.

And interestingly enough we checked Hansard to see

what he might have said about the old provision relating
to the interim order. And that provision was repealed
when this was brought in.

And the Minister responsible for NB Power of the day
stated that the new process replaces the interim order. I
would have thought that would have been obvious. But
whether they addressed their minds to it, it was
interesting.

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So they got this nice piece of legislation in. And
then they walked in and they asked for -- I think it was
6.9. And I do stand to be corrected by members of the
Board that may know the particulars of this better. But
they came in and applied to this Board for a 6.9 percent
rate increase. And when they filed the application the
rates went up. Then they had to come in and prove it.

They didn't do that good a job proving it I guess.
Because they only got 4.5 percent of it. And as a result
of that there was a bit of a kerfuffle. And I have read a
decision of this Board relating to the method by which the
rebate would be paid.

So in 1993, I presume again at the wishes of New
Brunswick Power Corporation, we amended the Public
Utilities Act again. So we took out this filing and prove
process.

And we said under section 38 that subject to
subsection (2) New Brunswick Power Corporation may change
the rates, charges and poll charges for a service
performed in the province of New Brunswick if the change
in their charges, rates and tolls do not exceed the
greater of 3 percent. So that came about in 1993.

And now we had a new Electricity Act a couple of years
ago. According to my colleagues Mr. MacDougall and

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Mr. Morrison, we have had all kinds of opportunity to
think the best way that this Board can deal with problems
of getting jammed for your want of revenue.

And they have said no, well, we are not going to put
any of them in expressly, but we will leave section 99 in.
Now I can't help but think -- and I took the liberty and I
don't want to be seen as giving evidence -- I asked the
question, does anybody else in North America have a right
to take 3 percent increase just by simply passing a

resolution of the Board of Directors? Now I phoned the
Maine Public Advocate's office and I got some hearsay but
he told me he wasn't aware of it, that he thought that
every utility in the United States would be overjoyed to
have such a provision. He thought their stock would go up
very considerably because if they are well run -- just
think about this -- just think about this a little. You
know, you don't have to file any evidence to support your
rate increase of 3 percent.

And I'm not suggesting -- I want to be very clear on
the record -- I'm not suggesting at any time since 1993 a
rate increase was taken except for the purpose of covering
costs, I have no knowledge, but, you know, it's a
potentially abusive -- you could be making money year
after year after year and keep knocking your rates up 3

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percent, 3 percent, 3 percent, 3 percent.

And the point I'm making is that's a pretty good
yardstick to have available if you are a utility company.

Now, you know, just think about this. It's a get out
of jail free card. You get in trouble, 3 percent. That's
what they did on I think it was April 1st 2004, 3 percent.
That's what they did on March 31st 2005, it's two months
ago. 3 percent. You know, why would you need your
interim rate increase when you can get your 3 percent?
You know, why would you need your deferred account if you
can get your 3 percent if you are running a business. And
quite frankly, you know, that's part of the problem here,
is without consistent regulatory approval there is a
tendency on the part of utilities -- maybe not to be quite
as sharp with the pencil as they might be. I'm not sure
that's in this case or not but we are going to find that
out over the next few months.

Since 1993 New Brunswick Power, the predecessor to New
Brunswick Disco, and New Brunswick Disco have lived by the
sword of the 3 percent. And with respect, Mr. Chairman
and Commissioners, I suggest today that the fuel surcharge
variance account should die by the sword of the 3 percent.

We suggest, and we are very quick to the point, and
the arguments of my colleagues Mr. MacDougall and Mr.

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Morrison make are very valid. And in the tough regulatory
world that we are with out there, you know, having

mechanisms, volatility and stuff are probably something that's needed. But why didn't we put it in the Electricity Act? Why didn't we take the 3 percent out and step into the Twenty-First Century of regulatory law? I don't know. I can't answer that.

Anyhow, having said all that, just to say that I'm not concerned whether we treat it as retroactive or interim, that's our position. Section 99(1) of this Act has defined a remedy for these people that means they got their get out of jail card and they should use that but they shouldn't be given a card that says you never have to go back to jail anyhow.

Now I want to talk a little bit about the merits of this thing, and I have got some comments on that, and I do have a hand-out at the end with a whole bunch of calculations on it.

I don't profess to be a CA or anything but I did profess to get through Grade 8 math, so I think most of these are pretty accurate, but I would certainly suggest to my colleagues that they are subject to check and if they point out that I have got some errors I will certainly hear you out on the errors.

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But the first thing I want to do is I kind of want to check to see what -- how much of this fuel surcharge that they are talking about that they want to put into effect as of April 1st. And I mean that's not the way it has been phrased, they want to set up an account and they want to accrue the charge and if it's approved they will charge it out. But effectively it's how much of this rate increase if they get their way goes into effect on April 1st.

So I did the calculations. If my bill was -- if I use 1,500 kilowatt hours of consumption, my fuel -- or my electricity bill would have been $135.79 -- and I will have copies of this for the Board -- but before this rate increase came in, and if they get the full increase in the way they want that bill will go from 135.79 to 145.26. And that represents a 6.83 percent increase for someone that uses 1,500 kilowatt hours.

Now the fuel surcharge part of that is $5.04. So $5.04 over 9.29, that equals 54.3 percent of the increase is in this fuel surcharge that they want to tack onto us.

Now the percentage increase intended to apply April 1st,
out of the 6.6 percent -- and that's why I'm saying these
are subject to check because I could never get anybody
down as ow as 6.6 percent for residential owners but I'm

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sure it must be and I'm sure there is an explanation. But
the percentage increase intended to come into effect if
you have a 54 percent -- or 6.83 percent increase and 54
percent of it is the fuel charge, effectively if they get
the fuel charge and they get their retroactivity, for
someone consuming 1,500 kilowatt hours of consumption it's
a 3.7 percent increase.

If you consume 2,500 kilowatt hours this is a 7.26
percent increase, not 6.6, and 4.2 percent of it comes
into effect on April 1st. And if you have a 5,000
kilowatt hour consumption it's 7.53 percent increase and
4.7 percent comes in on April 1st. And I have summarized
those calculations.

Now I thought about that. Let's -- and I used 4.2 in
these calculations. I kind of want to go through -- March
31st 2004, I had $100 electricity bill. With the 3
percent increase that became $103. With the 3 percent
they took on March 31st 2005, it became $106.09,
compounded there I guess that's what it is. It's compound
interest for that other nine cents. And using 4.2 percent
on April 1st 2005, it's $110.55.

So in one year and one day NB Disco has increased
residential rates 10.55 percent. And then they get
success on the rest of the tariff and you make an order

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that it's approved in December there is a little bit more
to be added onto that.

I'm saying all that to say that they have been using
that sword pretty good. They have been using that sword
pretty good.

Now the next thing I looked at, there is a lot of talk
in here about -- and I got these numbers out of the
financial statements. What do they call it, New Brunswick
Power Corporation 2003/2004 annual report, I guess that's
the most recent one. And I think on -- get the right page
here -- dealing with fuel, fuel costs per barrel. It's on
page 25 of the report, I believe.

It says, average heavy fuel oil price US dollars per

barrel, New York 3 percent. In 2003/2004 the price was 23.23, in 2002/2003 it was 23.49. That didn't look like a big increase that year, but I know since 2004 it has gone a little wiry. But here is the one that got me. 2001/2002 it was $16.72. $16.72. I said, gee, that's quite a bit less. So I subtracted 16.72 from 23.49 and the increase that NB Power paid for its oil between 2001/ 2002 and 2002 to 2003 was $6.77. Then when you divide that by the 16.72, in that one year the price of fuel for the purchases of NB Power it went up 40.5 percent. Why weren't they here? They used their sword. That's why

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they weren't here. They knew they could take 3 percent and maybe next year would be better.

Instead of facing the reality and coming into this Board and saying we have got a big increase in the way we do business, we are not going to do that, we are going to take our little sword out and hope we can get by. And with all respect, you can't have it both ways. I suggest that -- again I go back to my point that at the end of the day if they have got that sword and there is nothing in the Legislation they have got nothing else to go along with.

Interestingly enough when I looked at Mr. Marois' evidence -- which I guess is now in exhibit 2, and it's at page 4 -- the big emergency we got right now and the iteration he refers to is an 18.6 percent increase. Well, you know, I would have to suggest if they can survive 40.5 in 2001 to 2002 -- if that's not such an emergency to put them in between a rock and a hard place I can't see how 18.6 percent is today. But they may be able to explain it to me.

Now the next thing I looked at -- and I think this was kind of interesting. And again I used the numbers out of this Board and I know NB Power will have an opportunity to review them. But I say, well, you know, fuel goes up 20

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percent but that doesn't mean your total cost of producing electricity will go 20 percent, so I ask the question, well what type of number do we get into there? And I looked at it. Again I took 2003/2004 and according to their annual report that was a pretty good year because a lot of water ran through the dam and the nuclear plant ran

pretty good, so I used 2002/2003 which according to the
report wasn't such a good thing. And I looked at the
purchased fuel costs which in 2003/2004 were 364 million
and I looked at the purchase fuel costs for 2002/2003
which was 409 million. And then I sat down and did some
calculations. They always have an interesting thing in
their statements where they take all their expenses out
before finance charges and interest, but my banker makes
me pay my interest and I assume theirs does, so I gave
them the benefit of the doubt and added that back in.
And when I look at the total expenses it was
1,285,000,000 in 2004 and 1,350,000 in 2003. And when I
look at the ratio of purchased fuel I come up with well
28.3 percent for 2003/2004 and 30.3 percent for 2002/
2003. So let's say it runs around 30 percent.
CHAIRMAN: Mr. Hyslop, I'm going to stop you there because
what we were talking about this afternoon was legal
argument, and my appreciation or understanding of the fuel
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variance account is that if the Board were to approve a
fuel variance account then after we have heard the
evidence, depending upon when we hear it, then it has to
be measured against a base --
MR. HYSLOP: Sure.
CHAIRMAN: -- in order that there is an increase. And I
think that's the time, sir, to go through this.
MR. HYSLOP: Look, that's well accepted, Mr. Chairman. And
I will leave it at that except to say that at the end of
the day it looks to me like the increase in fuel costs the
total cost is somewhere around 6 percent, and remarkably
that's pretty close to the 3 percent and 3 percent we have
already used, and I won't go any further than that with
it.
The point I'm making is -- and I will go back to the
decision that this Board made in the Enbridge case in
January. And in January you looked at, you know, what the
test was for making an interim order and you looked at the
emergency type thing and the risk and the delay and all
those type of issues. With all respect -- with all
respect to the applicant and their evidence and it
certainly has not been a full hearing of it, I don't sense
the emergency. I will leave it there.
Now as for us, the timing of this application, I have

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got a couple points. I really don't sense -- I have got a
problem, I don't sense, you know, why it became a brave
new world with Disco and you know, why these couldn't have
been brought before if things are as bad as they are
saying they are. But I will leave it at that.

I sense I might have to deal with some of the
arguments we have on another day. And with respect to
section 156. A couple of points were raised in arguments
that I wanted to briefly address. And I will probably get
myself in trouble with Mr. MacDougall on this because I
really don't have the indepth knowledge that he has with
the Nova Scotia thing.

But, you know, there was an accrual account set up
down there for taxes, apparently new implemented taxes.
Also in Nova Scotia, I understand the applicant applied
some nine months ahead of when they wanted the rate
increase and for whatever reason it went on and on and on
for a longer time than might reasonably have been
expected.

Certainly in this case they haven't applied way ahead.
And I just make that one point. I also want to make the
point -- and I am not a lawyer in Nova Scotia -- but I
don't believe Nova Scotia has the equivalent of our
section 99(1).

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I have got a little question here also in this brave
new world -- keep referring to it -- and I know there is
an answer, but you know, if you are a distribution company
and you want to buy electricity and you want to buy it as
cheap as possible. And in this whole concept of transfer
of risk I am just wondering, I ask this, why would Disco
accept Genco's risk in terms of cost of fuel to produce
the electricity it is going to say. So I just throw that
out too.

At the end of the day, our submission is pretty
simple. I don't want to get tied down whether this is an
interim rate increase or retroactive charge. I am just
sitting here saying none of the measures -- and
interestingly, they conceded the interim rate increase and
I am sure they did that simply because of the history of
the legislation -- but I think the legislation did more
than that. It said instead of these novel -- and I am not

disagreeing with anybody, they may be good things to have.
But instead of these extraordinary measures to keep the
utility in business in hard times, instead of giving them
all those type of remedies, I think the Legislature of the
Province of New Brunswick made a decision when it said --
section 99(1), you have got your choice. You have got
your choice to a full rate increase hearing or you have

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got your choice to use 99(1). And I don't think that in
view of that that there is a basis for the rate fuel
surcharge rate variance account. I am going to be quite
point blank. I am not so sure on the second one. I will
leave that. I think the same arguments may apply. But in
designing tariffs itself, you may want to go down the road
with the fuel variance, but no, don't -- they can't have a
new get out of jail card today.

Those are my submissions, Mr. Chairman and
Commissioners. Thank you for your attention.

CHAIRMAN: Thank you, Mr. Hyslop. Mr. Morrison, do you want
to start there, or give Mr. Hyslop a minute to get back or
do you want to stay there, Mr. Hyslop?

MR. MORRISON: I have just one point in rebuttal, Mr.
Chairman. And I will seek the Board's direction afterward
in terms of what the outcome of this -- your decision will
be on this and what it means to the hearing. But--

CHAIRMAN: No, no, that doesn't come for a couple of weeks.

MR. MORRISON: I understand that. The only point I would
like to make, Mr. Hyslop has made a point that because the
Electricity Act doesn't specifically say you can approve
deferral accounts and variance accounts, then you don't
have the authority to do that. All I can say to that is
that there is nothing in the Gas Distribution Act that

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deals specifically with the Board's authority to approve
deferral accounts and yet you do. There was nothing in
the old Public Utilities Act that dealt with the Board's -
- giving the Board explicit authority to deal with
deferral accounts, yet you did. And I stand to be
corrected by Mr. MacDougall, but it is my understanding
there is nothing in the Nova Scotia legislation that
explicitly authorizes the approval of deferral accounts,
yet they do it. That is frankly my only point, Mr.
Chairman. Thank you.

CHAIRMAN: Thank you, Mr. Morrison. Now on this -- on these
matters we indicated -- or I indicated I think this
morning that we would look for briefs from the parties.
And if you had cases or chapters from texts, et cetera,
that you would supply those to us, coupled with the more
accurate description of the -- I want to call the deferral
account. Which is the variance account is what you call
it.

And hopefully you can have that in by -- the draft
order, the description, that sort of thing, by a week
Thursday so that we will have at least a weekend to be
able to go through it.

MR. MORRISON: Yes.

CHAIRMAN: If you can get it in more quickly than that so be

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it. The original brief of each party that wishes to put
in a brief will be filed with the Board no later than noon
hour on Tuesday next, a week today. And the rebuttal
brief, which I'm sure will be very brief, will be Thursday
at 12:00 noon, with the Board.

MR. MORRISON: Mr. Chairman, just a question so that we are
clear as to how the process unfolds. The Board
ultimately, after you receive the briefs and rebuttal
briefs and so on, is going to make a decision on whether
or not you have the power to, or are inclined to consider
the variance account.

I'm assuming that what will come from that is that
there will be some time set aside in the schedule to argue
the variance account which would be some of the items,
some of the things that Mr. Hyslop raised I'm sure will be
brought up at that time.

I am just trying to get a handle on where the process
goes.

CHAIRMAN: Well that is one reason we want a better
description of the variance on how it is going to work. I
mean, I tried conceptually as I understand it right now,
and I may be incorrect in this, is that you folks are
saying we want you to approve a variance account. And we
will put into that variance account all the increased fuel

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costs that have been incurred in the current fiscal
period.

And when the Board makes its final decision, or

before, the Board will review those and approve them for
collection at a future date.
MR. MORRISON: That is fine, Mr. Chairman, yes.
CHAIRMAN: Okay. So that is -- then back to your
suggestion, I mean, therefore, that date of when we are
going to look at it, that is off somewhere well into the
future.
Okay, it is 5 to 4:00. I wonder if -- how long, Ms.
Walsworth, do you think it will take for your presentation
to the Board in reference to the Intervenor -- and I keep
wanting to say Fundy Cable -- the dinosaur rears his ugly
head again -- the cable company?
MS. WALSWORTH: I am guessing perhaps half an hour, 45
minutes, Mr. Chairman.
CHAIRMAN: And Rogers?
MS. MILTON: I think about 20 minutes.
CHAIRMAN: I would like it, if possible, if you can do it in
a half an hour.
MS. WALSWORTH: Mr. Chairman, I put it back in the breakout
rooms so I would have to go back and get my material.
CHAIRMAN: All right, please do that. And while you are

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going I will indicate to those intervenors that are not
interested in this part of the process need not stay and
we will see all of -- we will adjourn this matter over
after we have heard from both these parties, we will
adjourn it over until the 30th of May at 1:30 in the
afternoon in Ballroom C in this hotel.
Okay. So we will take a bit of a break here and
people who want to leave can.
MR. HYSLOP: Mr. Chair, just quickly, there was a discussion
this morning respecting sending letters with a list of
suggested items that might be evidence. Is that to be
filed with the Board and with the applicant by the 24th as
well?
CHAIRMAN: Yes, certainly let's say by that Friday at noon,
if you wouldn't mind putting those in and then we will
have them at hand to deal with during the hearing on the
30th, 31st. All right, thank you.
(Recess - 4:00 p.m. - 4:10 p.m.)
CHAIRMAN: Ms. Walsworth, would you like to go ahead, ma'am.
MS. WALSWORTH: Thank you, Mr. Chairman and Commissioners.
My argument really is twofold. It's that the specific

wording of the Electricity Act of New Brunswick -- in that
specific wording you will not find the jurisdiction, in my
submission, to investigate and rule on the matter in which
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Rogers has requested you, and secondly that if you take
the cross-Canada tour through the legislation I have
provided, you will see very, very clearly that there are
two types of public utility statutes in Canada with
regards to this issue.

The one type, as in Ontario which is the jurisdiction
from which Rogers has sent their solicitors, and where
their energy board clearly has jurisdiction, because the
topic is specifically mentioned, pole attachments of third
parties or joint use, and the other types of statutes
where there is nothing. It's silent. There are six
provinces that have it and four that don't, and in my
submission New Brunswick is one that doesn't.

And before I take you on the cross-Canada tour I would
just like to give you a quick background of this issue.
The issue of how the charges from a distribution company
to a cable company for use of their poles was once upon a
time regulated by the CRTC. Their statute clearly covers
the regulation of third party attachments for
telecommunications utilities being federally regulated.
But the CRTC purported to apply that jurisdiction to
provincial utilities. That was challenged by the City of
Barrie's Municipal Distribution Company and ruled on by
the Supreme Court of Canada in 2003. The CRTC was found
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to be exercising -- was found to be acting
unconstitutionally and the Supreme Court said this is a
matter for the provinces.

So that leaves you in the provinces questioning, does
a given public utilities board have jurisdiction or not,
which brings us to where we are today. In the meantime
once the matter was remitted by the Supreme Court to the
provinces, the cable companies, the telecommunications
companies and the provincial utilities began negotiating
rates to be applied to the charges for third party pole
attachments, as we call them. Some of these negotiations
have been successful and agreements have been entered
into. Some negotiations, such as ours in New Brunswick,
are ongoing. Some negotiations in provinces where the

Public Utilities Board clearly has jurisdiction, as in
Ontario, has gone before that Board and the Board has
issued a decision. In fact the Ontario Energy Board
issued a decision in mid March this year. And in
another -- in one of the four provinces where there is no
jurisdiction in the Public Utilities Board, the matter has
gone before a third party arbitrator as negotiations were
unsuccessful, and that was in Manitoba.

So with -- at your pleasure I will take you on a very
quick ride through Canada, starting at the top of the pile

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I have given you, which is Newfoundland. In Newfoundland
it's clear that a public utility does include an electric
distribution company. And I have photocopied section 53
of the Public Utilities Act of Newfoundland, use of poles,
et cetera, by another utility. A public utility having
conduits, poles, wires or similar equipment shall for
reasonable compensation permit the use of its conduits and
poles, et cetera, and it goes on, if public convenience
and necessity require that use.

That's very common language. You will find that in
almost all the provinces where the matter is covered in
their Public Utilities or Electricity Act. That's the
test. Public convenience and necessity. And the statute
goes on to say, in case of failure to agree upon use or
the conditions or compensation for the use, and it's the
compensation that's at issue between Rogers and Disco in
this matter, then a person -- a public utility or any
person or corporation interested may apply to the Board
The Board can investigate and rule on what the proper
compensation should be. So it's very absolutely crystal
clear in Newfoundland the Public Utilities Act covers the
matter.

If you then move to Nova Scotia you find that a public
utility again incudes an electric distribution company. I

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have given you a page about service just for a sample
definition of service, we don't have one in New Brunswick.
But then if you look at section 77 on page 3 of the hand-
out, use of equipment by another utility, every public
utility which furnishes telephone, heat, light or power
service, it goes on, and having conduits, poles, wires or
equipment shall for reasonable compensation permit use of

the same by another public utility wherever public
convenience or necessity requires such use. And then the
next paragraph, failure to agree on joint use gives the
Public Utilities Board jurisdiction on the matter, to hear
and make a ruling. That's Nova Scotia.

And on we go to Prince Edward Island. And I think
this is going to sound like a broken record by the time I
get through all ten. Electric energy includes electric
power. In other words, just that a public utility is an
electric distribution company. And then if you go on to
section 8 of the Electric Power Act in PEI, conduits,
poles, et cetera to be shared. Every public utility that
has conduits, poles or wires or other equipment shall for
reasonable compensation permit the use of the same by any
other public utility, da da da da da, wherever public
convenience or necessity requires. Next paragraph,
failure to agree on compensation gives the Board

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jurisdiction to hear and rule on the matter. That's PEI.

And in my trek from east to west I will deal with New
Brunswick last. When you get to Quebec I believe I have
only given you a couple of pages out of the Quebec act
because quite frankly, there is nothing in the Hydro-
Quebec Act and nothing in the acts respecting the R,gie
d'energie of Quebec which talks about joint use at all.
The only thing that maybe comes close is the right to
place wires at section 30 of the Hydro-Quebec Act which I
believe is on the last page of your hand-out, deals with
the placement of wires, and we have similar provisions,
but I didn't want to kill a lot of trees photocopying the
entire act for you but I can assure you I have read the
thing and there is simply nothing there, nothing relating
to joint use or sharing of poles. And when you take a
look at what I have photocopied for you out of the Act
respecting the R,gie it refers to the jurisdiction of the
Public Utilities Board in Quebec and there is nothing
specific to joint use or joint -- or third party
attachments of poles.

So I submit that Quebec is one of those four provinces
besides Manitoba, Saskatchewan and New Brunswick in my
submission, where the Public Utilities Board does not have
jurisdiction over the issue. The issue is left to

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negotiation or third party arbitration.
Next we go to Ontario and I have given you two pieces from Ontario. I have given you the Ontario Energy Board Act excerpts and the recent decision of the Ontario Energy Board. You can see that the Ontario Energy Board decision -- Ontario Energy Board finds it's jurisdiction under section 74(1). That section allows the Board to put conditions into a license. As this Board is well aware, Disco is now a utility with a license with the PUB as are the generating companies and the nuclear company. And our license has no place for such a condition that would import onto us the jurisdiction for the Board to place joint use conditions.
But you can clearly see in the Ontario act section 70(2)(c) examples of conditions that the Board can put into a license in Ontario requiring the licensee to enter into agreements with other persons on specified terms approved by the Board da da da for connection to or use of any lines or plant -- plant is a general industry term that means all your facilities -- owned or operated by the licensee. And then at the end you will see section 74 that the Board can amend the conditions with regard to the objectives of the Board and the purposes of the act.
So that's where the Ontario Board found its

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jurisdiction and that's unique in Canada because all the rest of the provinces where the Board has jurisdiction use that public necessity and convenience language that we saw in the three Atlantic provinces that we looked at.
So that's Ontario. Now moving on to Manitoba, again the Manitoba Hydro Act, Manitoba is regulated by a Public Utilities Board, but there is no language at all in the act regarding -- or in the Public Utilities Act in Manitoba regarding joint use and third party pole attachments.
I talked to the general counsel at Manitoba Power and he referenced me to this arbitration decision which is what they did in Manitoba, and they couldn't reach agreement with their telephone company in Manitoba and they ended up going to third party arbitration. And as you can see they hired the chairman of their Public Utilities Board to be the arbitrator, but acting as an arbitrator, not as a board. And interestingly the general

counsel told me that in Manitoba they all agreed, the
Board had no jurisdiction. And this statute as I said is
silent.

Now if you move on to Saskatchewan you will notice
that in Saskatchewan there is no regulator. There is no
Public Utilities Board having jurisdiction over Sask

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Power. Sask Power gets the right to set its own tariffs.
There is a crown corporations review committee of
government that decides whether those tariffs are just and
reasonable. But Sask Power takes the position that that
crown corp review committee has no jurisdiction over third
party attachments as the statute again is silent.

I think I photocopied you one page of the statute that
-- to the effect that if Sask Power has any equipment
that's not being used for distributing electricity, it can
use that equipment for other money-making purposes. And
one might say that gives them the authority to participate
in joint use agreements and rent their pole space to cable
companies, but that's the only thing in the statute that
remotely speaks to the issue at hand. So Sask Power to
date has not included their joint use charges in any
tariff that gets reviewed by their crown corps committee.
They take the position that they don't have to do that and
they indeed have negotiated agreements signed now with the
cable companies and the telephone company.

So that's Saskatchewan. Then you get to Alberta. In
Alberta -- now we are back to what we saw in those
Atlantic provinces where the Board still has jurisdiction.
In Alberta straight out of the Public Utilities Board Act
at section 96, joint use of equipment. When it's in the

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public interest or when as a meaning of saving expense
it's in the interest of any owners that there be a joint
use of poles, the Board may after notice to all the
parties order the joint use and declare the terms. So
that's how they -- that's how they deal with the issue in
Alberta.

And finally in British Columbia, the Utilities
Commission Act, you can see -- and I have in each of these
statutes given you the definition of public utility just
so that you will satisfy yourselves that indeed
distribution companies are included. We have section 27,

joint use of facilities.

If the Commission, after a hearing, finds that public convenience and necessity require the use by a public utility, of conduit subways, poles, wires or other equipment, and the use won't impede the distribution of electricity, the Commission may, if the utilities fail to agree on the terms and conditions, the Commission may make an order it considers reasonable directing the joint use. And so there you are.

So my submission is that in Saskatchewan, Manitoba, Quebec, and I will get to New Brunswick, the statutes are silent and the interpretations have been that the Board has no jurisdiction and I submit to you that in this case

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the New Brunswick statute is the same.

As Mr. Hyslop eloquently pointed out at the very beginning of his presentation, there has to be a statutory base for asserting jurisdiction. And if this Board were to assert jurisdiction, I can't find any other place than under part 5 of the Electricity Act.

Specifically one would have to go to 97. Section 97, this division applies to the Distribution Corporation in respect of the services provided to it by it to customers.

So you would have to ask yourself, is this a service, is Rogers a customer when it comes to this service? Rogers certainly is a customer when it comes to the receipt of electricity. But is it a customer, is this a service?

The Act, if you take a look in the definition section, you will not find a definition of service and you won't find a definition of customer unfortunately.

I would submit though that you can look by analogy to the definition of standard service because standard, I submit, is merely an adjective modifying service.

If you take a look at the definition in our Electricity Act of standard service, you will find it refers to electricity. Standard service means the electricity service and goes on.

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Therefore, my submission is that the meaning of the word service within section 97 clearly refers to electricity service and the distribution of electricity.

You can also take a look at section 72 which is

helpful in this regard. Section 72 says, subject to
section 69, a distribution electric utility shall extend
its supply of electric service -- and again, my submission
is that when the word service is used in this Act it
refers to electric service and does not encompass such
things as whether you allow -- or on what terms you allow
third parties to make their attachments to your poles.

Why did the drafter, you might ask then, in section 97
omit the word electricity service and just leave the word
service in the first half of that section.

I submit it is simply because the drafters wanted to
make sure that such things as our service charges, that
monthly fee you get dinged with on your bill every month
for us to connect to you, the meter reading charge, those
things clearly under the purview of this Board because
they are related to the provision of electricity.

And so in my submission, section 97 gives the Board
jurisdiction over everything that is related to the
distribution of electricity.

Disco, the new Distribution Corporation, is

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incorporated under the Business Corporations Act and has
all the powers of a natural person. This means that Disco
can engage in any revenue generating activities that it
wants to, any.

Should Disco choose to engage in other revenue
generating activities besides the supply of electricity,
my submission would be that those activities are not
regulated by this Board.

Taking some hypothetical examples, perhaps Disco might
want to sell Louis the Lightning Bug T-shirts on a larger
scale rather than just giving them away, I would submit
that the Board would have no jurisdiction to regulate the
price at which Disco would sell those Lightning Bug T-
shirts. I know that sounds like a silly example.

CHAIRMAN: Let's use a perfect example of a water heater.

MS. WALSWORTH: Yes. It is my submission, Mr. Chairman,
following through from that, that water heater is also not
-- water heater charges are also not within the
jurisdiction of the Board under the Electricity Act.

I realize that they are included in tariffs that we
submit to you. But under section 100(4) we are obliged to
--

CHAIRMAN: Let me interrupt and ask another question.
Somewhere in the back of my mind there was a Supreme Court
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of Canada decision that indicated that if in fact there is
a federally-regulated utility that is unable to gain
access to a utility on a provincial basis that the federal
regulator will take jurisdiction if the provincial
regulator doesn't have it.
Are you familiar with anything in that regard?
MS. WALSWORTH: I'm not -- at this point I'm thinking that
that -- I didn't come armed with my City of Barrie case to
take a look at that on that point. But this is not an
issue of course of failure to gain access.
And we all know Rogers provides cable service to New
Brunswickers. They are up on our poles right now. We are
just trying to negotiate a rate for that.
And so I'm not -- I don't think that that answers the
question to whether this Board has jurisdiction over the
issue.
CHAIRMAN: Okay. Go ahead.
MR. SOLLOWS: In your tour -- I would like you to take us
back to Ontario for a moment. And there you said, if I
understood you correctly, that they were somewhat unique
in that they gained their authority to rule on the matter
through their power of licencing?
MS. WALSWORTH: That is certainly how it appears from the
decision, when you look at that recent OEB decision on the
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pole attachment issue, and then you go back and look at
the statute and find in section 70(2) that examples of
licence conditions could be to require the licencee to
enter into agreements relating to the use of their lines
or plant.
MR. SOLLOWS: And there is no such authority for this Board
in licencing Disco or other members in the market to enter
into such agreements?
MS. WALSWORTH: It is interesting that when you look at the
licencing provisions, section 90 of the Electricity Act,
you see that conditions of licence, the Board when
issuing, amending or renewing a licence may specify the
conditions under which a person may engage in an activity
described in section 86.
So then we go and okay, say let's look at what is

prescribed in section 86. It is very fascinating to me
that the language says owner-operated transmission system.
And that might arguably give the Board some inroads into
the use of transmission tower poles. Direct the operation
of transmission system. But then number (c), provide or
convey or cause to be provided or conveyed electricity.

So again there we go to the distribution of
electricity and not the use of the poles, of distribution
poles. It doesn't refer to owning and operating a

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distribution system. It simply refers to the function of
conveying electricity. So in my submission it is not
there. Then you look at number (d). And then it says
engage in an activity prescribed by regulation.

And you say well, I guess if our Board -- if our
legislature wanted the Board to be able to put a licence
condition on, they could do it under (d). But they
haven't done so.

MR. SOLLOWS: And in section 91 where it says "and may
specify such other conditions as the Board considers
appropriate, having regard to the purposes of this Act",
you feel that the Act in nowhere in its purpose --

MS. WALSWORTH: That is my submission, yes, Mr. Sollows,
that it has to be grounded somewhere in the Act and that
you don't find it there.

And you might say okay, well, where else might we
possibly find it? If you look under section 90(2) you say
well, the PUB has the right to put conditions in a licence
to address the abuse or potential abuse of market power.

And in anticipation of a possible argument by my
learned friend that Disco is abusing its market power in
not reaching an agreement with Rogers, I would first
submit that negotiations are still ongoing.

And I don't -- and I submit that it is simply not an

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abuse of market power to negotiate with someone over a
rate. And I won't get into the entire history of these
negotiations. But I also submit that you have to look at
what the phrase "market power" refers to. And again the
Act contains no definition of market.

However, just as when we looked at service, I
suggested to you that you could by analogy look at
standard service, being an adjective, modifying the noun.

Then for market you need to look at the -- we do have
definitions of market participant and market rules. And
if you look at those definitions you see that they refer
to the conveyance of electricity in and out of the SO
controlled grid.

And so again in my submission we keep coming back to
this conveyance of electricity, conveyance of electricity
and not to those other peripheral businesses that Disco
might want to engage in, such as renting out its poles or
renting water heaters or selling Lightning Bug T-shirts or
whatever it is. So those -- that concludes my submission,
Mr. Chairman and Commissioners.

In summary, I believe it is very clear from the other
legislation in Canada that if our legislature had wanted
to give the Board jurisdiction over this, it had ample
examples and could have done so, and has not. And I

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submit that it can't be found in the statute. Thank you.

CHAIRMAN: Good, Ms. Milton.

MR. GORMAN: Mr. Chairman, could I speak for a moment?

CHAIRMAN: Pardon me?

MR. GORMAN: I have very little to say, but I represent the
Utilities Municipal.

CHAIRMAN: I know. But, Mr. Gorman, with great respect
shouldn't we hear from the applicant before we hear from
you? That is from they who are applying to be an
Intervenor?

MR. GORMAN: What I had to say is quite brief. And I have
already said what I am going to say.

CHAIRMAN: I don't care how long it is going to be, Mr.
Gorman. I just think that would be a protocol at this
this time.

MR. GORMAN: That's fine.

CHAIRMAN: Go ahead.

MS. MILTON: Mr. Chairman, Commissioners, Rogers is a major
consumer of Disco services. Power services, both metered
and unmetered and pole services. There can be no question
in the circumstances that Rogers has a direct interest in
these proceedings and is entitled to be heard.

In our view, therefore, any request for a denial of
Intervenor status is misplaced. But I won't be coy. We

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have been clear in our request for Formal Intervenor

status. Rogers is primarily here to seek Board
consideration and approval of the rate charged by Disco
for cable attachments to its poles.
Disco's position is that this issue is outside the
jurisdiction of the Board. And therefore I presume that
any evidence filed by Rogers on this point and any
interrogatories or submissions would be irrelevant and any
ruling would be outside the jurisdiction of the Board.
Rogers for reasons I will describe in a minute is firmly
of the view that the Board does have jurisdiction in this
proceeding to address this issue.
First though a very brief background. The current
rate for cable pole attachments on both Aliant and Disco
poles is $9.60 a pole per year. The $9.60 rate is a rate
that was set by the CRTC for the telephone company. Until
recently all of Rogers dealings concerning poles in New
Brunswick were handled by Aliant. Aliant granted access
to and billed for NB Power poles on behalf of NB Power
pursuant to an arrangement between the two companies.
In the spring of 2004, NB Power purported to terminate
in part this arrangement with Aliant. Rogers continues to
deal with Aliant to gain access to the poles, but it is
now being billed by Disco.
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Disco is demanding a huge rate increase. The kind of
increase that only a monopoly supplier of an essential
facility could demand. That is why Rogers is here.
Although I am not going to do a cross Canada tour, I
am simply going to say that the CRTC and energy regulators
in some provinces have recognized the poles are a
monopoly-controlled essential facility and regulatory
intervention is required to establish just and reasonable
rates. And I say not just reasonable rates for Rogers,
but for all consumers of cable services in New Brunswick.
Consumers of cable services should not be paying for hydro
on their cable bills.
So with this by way of background, let me turn to the
issue raised by Disco. Does the Board have jurisdiction
to approve the rate charged by Disco for cable pole
attachments in this proceeding? In Rogers' submission,
the answer is unquestionably yes.
And before I move to my detailed submission on that,
let me say that we are not here to discuss whether or not

you could impose a rate as a condition of licence. That's
not what you are doing in this proceeding. It's a general
rate proceeding. And we think you have jurisdiction to
address that issue in this proceeding. I believe that you
probably also have jurisdiction under 90(2). I don't

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accept the very narrow definition of market power that
counsel for Disco has put forward. But I don't think
that's the issue that is before us today, because this
isn't a licensing proceeding, nor can we request in the
context of this proceeding a new licence condition.

Also just one quick comment on the Barrie Public
Utilities case. Just to clarify. It's my understanding
that the Supreme Court expressly refrained from making a
constitutional ruling in that decision. It's a technical
ruling in regards to the definition of transmission
facility in the Telecommunications Act. And the Supreme
Court of Canada ruled that on a proper reading of that
term, it did not include a power utility transmission
facility. So it's my understanding that the
constitutional issue is still an outstanding one, but at
this point it's a non-issue, given that at this point
under the terms of the Telecommunications Act, the Supreme
Court has ruled that the CRTC has no jurisdiction.

Now turning to this proceeding, we are here under the
Division B of Part 5 of the Act. And we start with
section 97. And section 97 reads, "this division applies
to the Distribution Corporation in respect of the services
provided by it to customers through its distribution
system." Not electricity services, not standard services,

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the services provided by it to customers through its
distribution system. That's the limiting factor, through
its distribution system.

Distribution system is a defined term. It's defined
in section 1 of the Act. And that definition reads,
"distribution system means a system for distributing
electricity to consumers at voltages of less than 69
kilovolts, and includes any structures, equipment or other
things used for that purpose". Poles are a structure.
Access to poles is a service provided by Disco through its
distribution service -- excuse me -- distribution system
to a customer, that's Rogers.

I could go through dictionary definitions of the meaning of through, but I don't think I need to go there. It's understood through a distribution system by means of using.

This conclusion is corroborated by Disco's own rate schedule. It includes a section on rental facilities. And Mr. Chairman already referred to water heater rentals. I would add that in addition, that portion of the rate schedule also includes rates for the rental of a full pole. If the rental of a full pole is in that rate schedule, then surely placing attachments on a small portion of that pole should fall equally within that part

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of Disco's rate schedule.

And indeed I note in this proceeding, Disco has sought approval of that part of its rate schedule and it's seeking changes in some of those rates.

Now it's true that there is no pole attachment rate in Disco's current rate schedule. However, Disco is precluded by section 102(1) of the Act from charging rates that are not specified in its schedule. Disco is in breach of this requirement with respect to pole attachment fees.

Rogers in the public interest cannot be penalized for this. And perhaps more importantly, the Board's jurisdiction cannot be circumscribed by this breach.

Now what about Disco's application, does it somehow circumscribe the issues before the Board? In Rogers' submission it does not.

Disco's application for a general rate increase permits the Board to consider and review and approve all of Disco's rates. Indeed, this is exactly what Disco has asked for in its application.

And I can quote from page 2 of its application, and it requests, amongst other things, approval of the schedules of charges, rates and tolls filed by the applicant, including rate realignment proposals and such other

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matters as the Board sees fit.

Section 101(5) of the Electricity Act directs the Board to approve the charges if they are just and reasonable. And if they are not, to fix charges that are just and reasonable.

Section 101(4) provides that the Board may take into consideration issues such as rate design matters and proposed allocations of costs among customers. If the Board cannot consider all rates, or at a minimum all rates in the rate category put in issue by Disco's application, then its ability to address rate realignment or cost allocations would be severely circumscribed.

It is clear that pole costs are something that must be allocated amongst all or virtually all Disco customers. This is evidenced by Disco's evidence in support of its application. There are repeated references to pole costs in the evidence filed by Disco. Ms. Clark's evidence also refers on at least two occasions to increased revenues of one million from pole attachment fees.

Therefore, Disco's application and supporting evidence have clearly put in play in this proceeding pole attachment fees.

In conclusion, Mr. Chairman, Commissioners, Division B of Part 5 of the Electricity Act applies to Disco's pole

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attachment fees. Disco's application for a general rate increase puts in play all of its rates. Although Disco does not currently have a rate in its schedule for pole attachments, Rogers cannot be penalized for that. The pubic interest cannot be penalized. And the Board's jurisdiction cannot be circumscribed because of that.

Moreover, Disco is seeking approval of the rates in the very rate category that pole attachment rates fall in, rental facility rates. It is also seeking a very significant increase.

Mr. Chairman, Commissioners, subject to your questions, that completes my submission.

CHAIRMAN: Thank you, Ms. Milton.

MR. SOLLOWS: I don't know that this is a question directly for you, but I think the Chair originally raised it and then you had addressed it and then you raised it again. This issue of water heater rentals.

My recollection of that matter is the interest of the Board in services offered by the utility that are otherwise available in the competitive market, is we want to ensure that the customers of the distribution company are not subsidizing a service that's available in the competitive market. And that's why -- and that's our

interest in reviewing the cost of water heaters. It seems
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to me that -- and I would ask you both to comment, that
the issue of poles is very, very different from that of
water heaters, in that I am -- maybe I am unclear on this
point, but I would suspect that on any given line there is
only one owner of the poles, and therefore it's by
definition a monopoly service?
MS. MILTON: That's correct, Mr. Sollows.
MS. WALSWORTH: Mr. Sollows, the poles are owned, I believe
it's 52 percent by Disco and 48 percent by Aliant in the
Province of New Brunswick, something around that.
MR. SOLLOWS: Each pole?
MR. WALSWORTH: It's each -- no, no, no.
MS. MILTON: No.
MS. WALSWORTH: Disco owns 52 percent of the poles. So each
pole has a single owner, as you suggested.
MR. SOLLOWS: So presumably on any particular radial line,
there is one owner of poles?
MS. WALSWORTH: That's correct.
MR. SOLLOWS: Yes. Thank you.
CHAIRMAN: Mr. Gorman? Go ahead, sir?
MR. GORMAN: Yes. I represent the Utilities Municipal. And
we have an interest in this issue. All of these utilities
rent their services of their poles through Rogers, as I
understand it, or at least Saint John Energy does. And
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our only position is, or only proposition to make to this
Board is that we support Disco's position that this matter
is not a matter for this Board and the Board has no
jurisdiction.
CHAIRMAN: Thank you, Mr. Gorman. That's what I anticipated
you would say. However, we have no jurisdiction over you.
You are a municipal utility at this time. Except you are
supposed to file your tariff with us, which I don't think
you have done. Have you? Oh, good.
Anyway, I will go back to Ms. Walsworth. Is there any
rebuttal that you would like to put before the Board?
MS. WALSWORTH: Only to suggest to the Board that in my
submission all the comments made by my learned friend
regarding the negotiations between these two parties
really are irrelevant to this Board. But I am going to
take the high road and not regale you with the details of

the other sides' position during negotiations. Suffice to
say simply that I believe that the matter that in good
faith the parties are still negotiating. And that's in my
submission the way it should be. Rogers still has its
attachments up on our poles right now. And we are still
negotiating. We have meetings booked for next week. And
indeed its my submission that all of that is the way it
should be and that the matter will work itself out without

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the need for the Board to take jurisdiction where it
isn't --

CHAIRMAN: Well on that basis, I don't understand why you
would object to them being an Intervenor in this hearing,
which would then allow that process to carry on without
having to go through all these arguments. Why not just
allow them to be accepted as an Intervenor, subject to
your comments which you have just made, and let the
process go on?

MS. WALSWORTH: Mr. Chairman, it really relates to why they
are intervening. My friend started her submission saying
they are primarily here for the reason of pole
attachments. But that's a different -- that's a different
position from their letter, which says that the only
reason they are here is for issues of pole attachments.
And we just couldn't let that go by, if the only issue
they have is pole attachments.

CHAIRMAN: Well, this Board has not been terribly picky
about allowing Intervenors to come in and partake in our
hearings, except if it's a double agent for the Attorney
General or something like that.

Anyway the Board will reserve decision.

MS. WALSWORTH: Thank you, Mr. Chairman.

(Short recess)

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CHAIRMAN: Being acutely aware of a possibility of
regulatory lag, why we caucused outside and came back in
and we will allow Rogers to be an Intervenor in this
proceeding. We are not making any rulings on anything to
do with the legal argument that was put before us.

We encourage both Rogers and Disco to continue
negotiating. And if they can't over the next while, then
we will have to hear the legal arguments again. And if we
do get to that stage, I would appreciate it if you would

bring in copies of the case law that you are referring to.
Now, I know that you brought in the statutes and whatnot. But if there is any case law or the Barrie case or something like that, we would appreciate that.
Anyway, thought we would tear back in. Glad we caught you. Thank you. I will see you in two weeks.
(Adjourned)

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

Reporter