New Brunswick Board of Commissioners of Public Utilities

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

Delta Hotel, Saint John, N.B.

March 24th 2006

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| | John Lawton |
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CHAIRMAN: Good morning, ladies and gentlemen. Could I have appearances please. The Applicant?

MR. MORRISON: Good morning, Chairman and Commissioners. Terry Morrison on behalf of the Applicant. And with me at counsel table today is Rock Marois, Sharon MacFarlane and Mike Gorman.

CHAIRMAN: Thanks, Mr. Morrison. Canadian Manufacturers and Exporters?

MR. LAWSON: Good morning, Mr. Chairman and Commissioners. Gary Lawson. And with me is David Plante.

CHAIRMAN: Good morning, Mr. Lawson. Conservation Council isn't here. Eastern Wind isn't here. Enbridge Gas New Brunswick?

MR. MACDOUGALL: Good morning, Mr. Chair and Commissioners. David MacDougall for Enbridge Gas New Brunswick.

CHAIRMAN: Good morning, Mr. MacDougall. The Irving Group of companies? Mr. Booker?

MR. BOOKER: Good morning, Mr. Chair and Commissioners. Andrew Booker for the Irving mills.

CHAIRMAN: Good morning. Jolly Farmer is not here. Mr. Gillis isn't here. Rogers Cable?

MR. ARMSTRONG: Good morning, Mr. Chairman. John Armstrong with Christiane Vaillancourt. And our legal counsel Leslie Milton will be along very shortly.

CHAIRMAN: Thanks, Mr. Armstrong. The self-represented individuals? Municipal Utilities?

MR. GORMAN: Good morning, Mr. Chairman. Raymond Gorman appearing for the Municipal Utilities. This morning I have Eric Marr, Dana Young, Jeff Garrett, Marta Kelly and Dan Dionne.

I do expect Michael Couturier from Edmundston to join us later. And for the information of the Board, I just

want to advise that Helen Sam from the Canadian Electricity Association is here as an observer.

CHAIRMAN: Thanks, Mr. Gorman. You are pushing a record turnout again, aren't you? Vibrant Communities?

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

CHAIRMAN: Mr. Peacock, good morning. And the Public Intervenor?

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

CHAIRMAN: Thanks, Mr. Hyslop. Mr. MacNutt, whom do you have with you today?

MR. MACNUTT: I have with me today, Mr. Chairman, Doug Goss, Senior Adviser, John Lawton, Adviser, Juliet Savoie, Assistant Secretary to the Board, and John Murphy and Andrew Logan, Consultants.

CHAIRMAN: Good. Thanks, Mr. MacNutt. And I think as you are all aware, the System Operator woke up. And the lights came on. And he realized that there was something going on in this hearing that he might have an interest in. So we have circulated everybody. And nobody seems to have any difficulty with us calling on the System Operator to make a short presentation before we get into rebuttal but after we finish with the preliminaries.

And who is here for the System Operator this morning?

MR. ROHERTY: Good morning, Mr. Chairman, Commissioners. Kevin Roherty for New Brunswick System Operator along with the President and Chief Executive Officer of the System Operator, Mr. William Marshall.

CHAIRMAN: Thanks, Mr. Roherty. Now any -- well, I have got some housekeeping. We might as well go through those. And do you have any undertaking responses? Just one? We will get to that in a minute then.

As I believe we mentioned previously, when we do get to rebuttal it is in reverse order to the original presentation. So Mr. Hyslop commences. Vibrant Communities comes next, et cetera.

When we get to this afternoon it is the Rogers portion of the evidence. Disco would go first, Rogers second and the Municipal Utilities third.

And Mr. MacNutt suggests rather than immediately turning around and have the Municipals do the rebuttal, it is probably better to have Rogers make a rebuttal and then the Municipal. And then finally Disco makes its final rebuttal.

Now the Board has sent out three questions to all of the parties and asked them to make a comment if they would when they are doing their rebuttal on those three. And I seem to have lost my copy of it. But that is all right.

You all have it. So there you have it.

Now, Mr. Morrison, before I call on you to put your exhibit in or whatever, just -- in Mr. Hyslop's closing argument last time we were together, he was speaking in reference to Sections 97 and 106.

And I believe the possibility was raised that there might be an interpretation that even though we have gone through these 56 days of public hearing in reference to a rate increase that the Board is considering, he indicated that he had looked at it from a point of view which might say that on the 1st of April Disco could actually bring in a 3 percent increase.

And he said, however, I don't have to argue that if Mr. Morrison will put it on the public record that in fact he doesn't agree with that interpretation. And that could not happen. Are you prepared to do that, Mr. Morrison?

MR. MORRISON: I am, sir.

CHAIRMAN: Great. Okay.

MR. MORRISON: Would you like me to speak directly to it? I can do it now or in rebuttal. I was going to raise it in rebuttal. Because basically I don't think it is an issue. But I can go into it in more detail in rebuttal.

CHAIRMAN: All right. If you would that would be great.

Okay. And we have got one exhibit.

MR. MORRISON: Well, actually it is a clarification, Mr. Chairman. There is one outstanding undertaking which deals with those organizational charts.

It is taking a little bit longer than we anticipated because of the downsizing and the number of people that have left. So they are getting that. So I would ask that the record stay open for a couple more days until we can file that.

But the Board Secretary did raise something with us. And she would like us, and I believe it is appropriate, to correct something on the record.

Exhibit A-155 was identified as undertaking number 1 from March 13th 2006. It really was undertaking number 2 from March 13th 2006. And we should correct it on the record. Otherwise people will have two undertaking number 1's from the same day, which is incorrect.

CHAIRMAN: Well, that is A-155. One last thing if counsel -- if they wouldn't mind addressing in their rebuttal. Some of the Commissioners have been tossing around -- well I in particular don't like the Board to come forth with something that may be different from what the parties has proposed during the hearing, and let me give you an example.

For instance if we look at a rate and we believe it to

be in the public interest that that rate be structured in a particular fashion which differs from what the parties have brought forward. I would like you to comment -- I can't see any difficulty with it if we were to put that out to the parties between now and our decision day, and get any comments the parties might have in reference to what appears to the Panel to be a good way to go, because that will give Disco the opportunity, Mr. Larlee, to look at it and bring forth any arguments that we may not have seen or dealt with, et cetera, that sort of thing. And I just think it would be helpful to the Board if you folks all addressed that in your final rebuttal, so that we could see whether you see any difficulty doing that sort of thing.

MR. MORRISON: Mr. Chairman, are you -- is this something that will happen subsequent to today for example?

CHAIRMAN: Yes.

MR. MORRISON: Okay. And then we would have an opportunity to provide our comments to the Board?

CHAIRMAN: That's right.

MR. MORRISON: I think that's a splendid idea.

CHAIRMAN: Okay. Well that's great. Any other preliminary matters? If not, Mr. Roherty, go ahead.

MR. ROHERTY: Thank you, Mr. Chairman and members of the

Board. Thank you for this opportunity to address the Board on this very important topic of exit fees. Copies of our presentation have been given to the Secretary and we have copies as well which are available for the parties.

As the Board and the parties are aware the objects of the NBSO are set out at Section 42 of the Electricity Act. And one of these objects at Section 42(j) is to facilitate the operation of a competitive electricity market. So it is from this perspective then that the NBSO obligation to facilitate the operation of a competitive market that the NBSO approaches this matter.

Now in furtherance of this objective, the NBSO has been very active in trying to identify barriers to entry into the market in formulating and implementing solutions to those barriers.

The NBSO has been doing this for the most part in concert with the Market Advisory Committee. The NBSO is a member of the Market Advisory Committee, as are several of the parties in this room. And this process of identifying and dealing with barriers to market entry has resulted in amendments to the Market Rules and was the driving force behind the recent application to this Board respecting the pricing of energy imbalance service.

And so one of the identified barriers to the growth and development of the market is the uncertainty surrounding the matter of exit fees. No solution has as yet been determined and that is what brings us here today.

As the Board is aware, the Market Advisory Committee recognized this issue and submitted a letter to the Board on November 30th 2005, asking that the MAC be permitted to make an application under Section 79 for a determination of exit fees.

The Board has determined, however, that it has no jurisdiction under Section 79 to entertain such an application. And so the issue remains.

And so that brings me then to the provisions of the Electricity Act. Now I have had the opportunity to review the comments of Mr. Morrison and Mr. MacDougall in the transcripts from March the 20th, and I would agree with both of them that Sections 78 and 79 should be read separately.

Section 78 is simply a notice provision to the standard service provider and Section 79 deals with the determination of exit fees.

The NBSO has great concern, however, with Mr. Morrison's submission at pages 5957 to 5959 of the March 20th transcript, that there are basically two scenarios

available to a municipal utility or industrial customer.

Mr. Morrison states, starting at the very bottom of page 5957 and continuing into 5958, that once scenario involves a customer unilaterally giving notice to Disco under Section 78. There would then need to be an application to determine the exit fee and that unknown fee would then have to be paid by the customer.

The second alternative noted by Mr. Morrison, starting at line 7 at page 5958, involves the customer and Disco coming to an agreement as to an exit fee and submitting that agreement to this Board for approval.

Now I'm fine with that approach up to this point. But then Mr. Morrison goes on to say, starting at line 13 of page 5958, if they cannot agree the customer has two options. They can give notice under Section 78 that it is leaving the system -- it's a loose term but I will use it -- it is leaving the system and apply to the Board for an exit fee. In other words, take its chances. Or it can stay on the system.

This view is repeated by Mr. Morrison on the very next page of the transcript.

Mr. Chairman and members of the Board, if that is the state of the law with regard to exit fees, then there is a clear and obvious problem. From the outset, from the

White Paper on energy policy through the final report of the Market Design Committee to the proclamation of the Electricity Act under which the NBSO was created, with a mandate among other things to facilitate a competitive electricity market, and under which the Market Advisory Committee operates, under which this Board fulfils its market monitoring role, through all of this the objective has been to develop a competitive market in New Brunswick. So to be left in a situation where if a municipal or industrial customer cannot secure the agreement of the standard service provider, its only options are to stay on standard service or leave and jump off a cliff in respect to what they will be required to pay as an exit fee, is simply untenable.

As Mr. MacDougall noted last Monday, in Monday's transcript of March 20th, at page 6036 of the transcript, when commenting on Mr. Morrison's submission, he said, "It's doubtful that many customers would want to do it after the fact."

Well for the benefit of the poker players in the room, I will see Mr. MacDougall's "doubtful" and I will raise it to "it just won't happen". It's hard to imagine a poorer or more irresponsible business decision than to commit to a course of action without first knowing what the costs

are. It just won't happen. And for that reason the NBSO supports an interpretation of Section 79 that would permit a customer to make an application to the Board for the determination of an exit fee.

Such an application would not amount to notice under Section 78 by the customer to Disco and thus the customer would not be bound to actually reduce the supply it takes from Disco. Once the fee was determined the customer would then decide whether to give the required notice or not. This is the interpretation proposed by Mr. Booker on behalf of the Irving Group at page 6068 of the March 21st transcript, and the NBSO supports that view.

Mr. Booker cites recommendation 9-93 of the Final Report of the Market Design Committee and he quoted that portion of the recommendation which states that "A customer should have the right to an explicit calculation of its exit fee at its own expense."

I would cite another portion of that same recommendation, that "The exit fee/stranded cost calculation should be transparent so that customers can evaluate their likely costs." Any other interpretation will effectively prevent any customer from seeking supply from a source other than Disco, and the whole notion of creating and encouraging a competitive market just doesn't work.

Now to this point the discussion has centred on the interpretation of Sections 78 and 79 of the Act. The NBSO submits that there is another section of the Electricity Act which can be brought to bear here. Section 128(1)(b) reads as follows: The Board may, on its own motion, or on a complaint made by any person, inquire into, hear and determine any matter where it appears to the Board -- and then in Section (b) -- that the circumstances may require it, in the public interest, to make any order or give any direction, leave or approval that by law it is authorized to make or give, or concerning any matter, act or thing that by this Part or rule, order or direction is prohibited or required to be done.

So this section gives the Board very broad powers as to the matters in respect to which the Board may act. Very clearly, the Board has authority over the matter of exit fees. There can be no dispute about that. However, the relevant sections of the Act which deal specifically with exit fees seem to have created some kind of a vicious circle or debate around the "cart and the horse". And the result of all of this is that nothing has happened or is happening to resolve what all parties seem to agree is a barrier to creating and encouraging a competitive market.

The NBSO therefore urges the Board to invoke Section 128(1)(b) and either order NB Power/Disco to apply to the Board to conduct a hearing to establish a methodology or formula for the determination of exit fees.

Now this was the submission of Mr. Gorman on behalf of the Municipal Utilities at page 6088 from the transcript of March 21st, and the NBSO supports that submission.

The other alternative under this section is that the Board on its own motion and in the public interest order a hearing for the same purpose. Now to the extent that the NBSO can assist the Board in this regard, we are happy and willing to do so. If the Board needs a proxy applicant, the NBSO is prepared to take on that role. If the Board needs a suggested methodology to kick-start the process, the NBSO will make such a submission.

In short, if the NBSO can assist the Board or any applicant in getting this process initiated and resolved, we are prepared to do what we can.

So in summary then, the position of the New Brunswick System Operator is as follows: We agree with Mr. Morrison and Mr. MacDougall and others that Sections 78 and 79 are disjunctive and not interdependent. Section 78 is simply a notice provision once a customer has made a decision to leave standard service in whole or in part. And Section

79 is about the determination of the fee.

We disagree with Mr. Morrison, however, that failing agreement between Disco and a customer respecting an exit fee, that the customer is left only with the alternatives of staying on standard service or leaving without knowing what the exit fee will be. We support an interpretation that a customer may apply to the Board for a determination of an exit fee and then decide whether to leave or not. We agree with the comments of Mr. Gorman at lines 8 to 11 on page 6088 of the transcript of March 21st that there may well be valid business reasons for a customer not wishing to make an application for a determination of exit fees. Now this concern was also raised by the Market Advisory Committee in its letter to the Board. Accordingly, the NBSO supports the submission of Mr. Gorman that the Board order NB Power/Disco to submit an application with respect to exit fees. Such an application is clearly contemplated by Section 79(3) of the Act.

If the Board does not find the authority to order Disco to file an application within the context of this current application, then the Board should issue an order pursuant to its authority under Section 128(1)(b) of the Act. And alternatively, the Board under that same section

should initiate such a hearing on its own motion in the public interest.

Now it's well documented that the current application has resulted in some 55 days of hearings over several months. The Chairman has indicated that the decision may take up to two months and that is understandable. The matter of exit fees, however, is a side issue. It is distinct and has no bearing on, nor is dependent upon, the Board's decision as to the rates that Disco may charge. If we need to wait until a full decision is rendered, and if as part of that decision there is an order for a hearing respecting exit fees, then we are potentially looking again at several months delay in getting this issue resolved.

So for that reason the NBSO urges the Board to segregate exit fees from the balance of this application and deal with it as expeditiously as possible.

This matter is a barrier to establishing a competitive market, it is a hindrance to the NBSO fulfilling one of its objects under the Electricity Act, and it has been identified by the MAC as a critical issue.

And I should note as well that if the Board is of a mind to order the applicant to conduct or to apply for such a hearing, that -- I won't go into all the references

in the transcript, but it's replete with notions from the applicant that a lot of work has already been done to get geared up for exit fees. I guess I would quote from Mr. Marois at page 3676 that -- in response to questions from Mr. Hyslop, Mr. Marois said, the first thing I would like to say is that we have done quite a bit of work on -- preliminary work on establishing an exit fee. And we have never been -- we have not had the opportunity to finalize one and make an application to the Board, but we have done quite a bit of preliminary work. So establishing an exit fee should be a relatively expeditious process.

So again we urge the Board to take advantage of that. It doesn't appear to be an onerous task since much of the work has already been done by the applicant to get this done as quickly as possible. It's in everyone's best interests.

That concludes my remarks.

CHAIRMAN: What I hear you saying is ignore the specific sections of the legislation and proceed under 128-1 to do what we believe would be best for the competitive market?.

MR. ROHERTY: If the interpretation is such that it's ambiguous or uncertain or creates this vicious circle or the cart before the horse, then look to the intent of the legislation and the background of the legislation. And if

we can't find it within those sections then it's open to the Board in the public interest, in our view, to proceed under 128.

CHAIRMAN: We should have had an inquiry in to 156 too. You haven't been around for 156.

MR. ROHERTY: My understanding, sir, is that I am to speak only to exit fees today.

CHAIRMAN: All right. Thank you. And we will ask you to trade places with Mr. Hyslop, if you would --

MR. ROHERTY: Thank you.

CHAIRMAN: -- come forward.

MR. HYSLOP: Good morning, Mr. Chair, Commissioners. It is good to see Mr. Marshall back before the Board. I know he has had some health problems. And I'm sure we all are pleased to see him getting back in fit form for future hearings.

With respect to the last comment about the inquiry into Section 156, I hope I'm not being too audacious to suggest that is what we have just completed. But I will leave that.

CHAIRMAN: It wasn't on the Board's motion though, was it, Mr. Hyslop?

MR. HYSLOP: The question of exit fees, I think it's very -- briefly and as a point of rebuttal, I concur with the

position of the NBSO.

With regard to your comments at the first of the hearing, if something should come up that the Board seeks the views of the parties while you are deliberating, you are in charge of your own process.

And if it is a point of clarification of position, we certainly would concur with the Board's jurisdiction to take charge of its own process in how it comes to a decision. That is not my bailiwick, that is yours.

I have very few points on rebuttal. In fact I have none specific to the comments that were made by the other parties on Monday and Tuesday. I had points of rebuttal with regard to EGNB and their question of moving to the .98. I made those comments on Monday. I will not repeat them at this time.

Where there are points that may be rebutted I think the issue is sufficiently clear to this Board that I not take up a rather limited time.

So with that covered, Mr. Chair, I want to move on to the three issues that the Board raised in the memoranda. And dealing briefly with the three -- I will deal with the second point first only because that is the easiest.

We have reread the arguments of Mr. MacDougall, although -- and we support the position that he is making

with regard to GS I and GS II. Although we think that doing it all at once is perhaps a little draconian.

Disco could have been more aggressive at this hearing. But our suggestion is that the Board order Disco to converge the two rates within the next four years by two more rate adjustments.

And we think this is consistent perhaps with the approach that you are taking on the declining block rate for residential customers. And we would argue -- we would suggest that the two items move along kind of hand in hand. So that deals with the second point.

Dealing with the first point, which was the Board requested any party who in final argument requested the Board to issue a specific ruling, provide legislative authority under which the ruling may be made. I will deal with this in general. And then I will address specific remarks to each of the categories of the order. And I believe there are four categories in the order that I requested the other day.

And then in dealing with the third point, I think when I get through the first point you may see some obvious tie-in between the arguments that I'm suggesting.

I want in answering the question -- and I know the Board did use the phrase "appropriate legislative

authority" under which the ruling may be made. I do think that it is however appropriate and correct if I am to suggest to the Board that in the recent case of the City of Calgary versus Atco Gas and Pipelines Limited which is a judgment of the Supreme Court of Canada which was issued just on February 16th of this year, this is a case that delves into the jurisdictional issues of a regulatory board and particularly a Public Utility Board. And I think this case is of somewhat assistance to us.

And in that regard, Mr. Chair -- I will just find my notes. The -- that court indicated that -- and this is at page -- or paragraph 38 of the judgment. It said, More specifically or in the area of administrative law, tribunals and boards obtain their jurisdiction over two matters. And one are the express grants of jurisdiction under various statutes -- which they call explicit powers -- and the common law by application of the doctrine of jurisdiction by necessary implication or implicit powers. And I think in fairness, in the response to the request to the Board, I think it is appropriate if perhaps I address in some way both those two and how they work together in determining your jurisdiction.

CHAIRMAN: I agree completely, Mr. Hyslop.

MR. HYSLOP: Thank you. And I appreciate that, Mr. Chair. With regard to specific sections of the Act, I believe that all of the following sections might well be considered in determining the following jurisdiction of the Board.

Section 97, Section 98, Section 99. And I'm just listing these. I will go into the particular sections as needed in the argument. Sections 101 including the definition of revenue requirement.

Section 101, subsection (4) including the definition of alternate forms of regulation. That is under Section 125, I'm sorry. Section 117, Section 123, Section 124, Section 125, Sections 127, 128, 129 and 130.

And I appreciate that is quite a splash of legislation. However, the reason I state that is because also in the City of Calgary case the board indicated that in determining your jurisdiction -- and this is at paragraph 48 -- the board has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The board is obliged to consider the total context of the provisions to be interpreted no matter how plain the disposition may seem on initial reading.

And they cite earlier Supreme Court of Canada

decisions in support of that. The time and true tested statement of common law and the interpretation of statutes is again stated in that decision and approved as well. And that that is the statement I think we referred to a couple of times, that you have to look at all of the statute.

So with that little bit of background, I thought I would move on to maybe the specific sections in your inquiry. I'm going to deal with the easiest ones first. Although I think they are all easy. But others may disagree.

But I will deal first with the questions of the jurisdiction of this Board to make the orders under the heading "Revenue Requirement" in the argument that I made the other day.

And in particular, Mr. Chairman, we are arguing revenue requirement. And I think that is very fundamental to the Board's overall jurisdiction to create rates that are just and equitable. And the authority in our view is found in Section 101 subsection (3) and in particular Section 101(4)(a).

And very briefly, Section 101, subsection (3) provides as follows. The Board when -- shall, when considering an application under this section, base its order or decision

respecting the rates, charges and tolls to be charged by the Distribution Corporation on all the projected revenue requirements for the provision of the services referred to in Section 97.

And Section 101, subsection (4) says, the Board may, when considering an application under this section, take into consideration the accounting and financial policies of the Distribution Corporation.

I think quite clearly, together with the definition of revenue requirement, the issues in the second part of my order deal with the whole issue of revenue requirement, what is fair and to some extent the accounting policies of the corporation as it relates in particular to the $25 million from the regulatory reserve account.

And I will talk a little bit more about the authority on the regular reserve account when I come back to number one.

MR. HYSLOP: With regard to Customer Class Allocation Study, this is specifically referred to again in the Act Sections 101, subsection 3, and subsections 101, subsection 4, the latter Section (b) and (c) seem to deal directly with the point. The Board may when considering an application under this section take into consideration (b) proposed allocation of costs among customer classes, and (c) rate

design matters. And I think fairly -- unless the Board has specific questions -- it's clear that under the heading Customer Class Allocation Study, I am dealing specifically with issues of rate design and cost allocation, and the -- and then the structure of that rate design.

So I think those two are pretty straightforward and with those covered and subject to questions may have either now or at the end, I would like to move on to the jurisdiction under the Purchase Power Agreements.

CHAIRMAN: Let's just take a moment. I'm looking under Revenue Requirement at (b) which is assessment of a penalty, where -- you know, the only penalties I am aware of in here are the ones that a provincial court judge would levy and it's like level 5 or something, a provincial offence, which is a $50 fine, I mean, which is pretty useless when you come to fining a utility that has an income of over a billion dollars a year. But anyway, that's neither here nor there.

MR. HYSLOP: Yes. I hear your point, Mr. Chair. Well I think I use the word penalty -- I think I'm coloring it slightly different than perhaps the penalty for offenses that is set out in the Act. What I am referring to is -- and then I can provide perhaps more detail out of the

Goodman text -- or full section -- but the Goodman text indicates that from time to time in the States that when the general directions or specific orders -- I don't say there has ever been a specific order violated -- but when the directions and the principles that the Board sets for the utility aren't properly or adequately filed or shall we say disregarded freely, then in that case the -- in reassessing revenue requirements it has been the occasion that the Boards in the United States have taken something off the return on equity or the revenue requirement that is put forward by the different -- by the utility. And it's in that context that I am referring to the concept of penalty.

CHAIRMAN: Okay. Could you give us the citation for some cases or a text on that? And the second thing is that I certainly am aware of the test of used and useful.

MR. HYSLOP: Yes.

CHAIRMAN: And if it's not used and useful then excluding it from rate base so that the utility cannot earn a return on it. Now that's well accepted administrative law. But this is new to me.

MR. HYSLOP: Well the citation in my written submission -- and by the way, Mr. Chair, I filed with the Secretary this morning a written submission which doesn't reflect word

for word my comments on Tuesday but I think reflects the tenor. And in that dealing with this section on Coleson Cove and the Orimulsion adjustment, I cited the Goodman text at pages 645 and 646, and in that the decision -- or in that text it states, related to the quality of management standards are the occasional penalty factors that an agency may take into account. Penalties in this conduct are reductions to as serve as punishment for company offenses or actions contrary to commission order or rule or policies.

And I would be happy to look further into the text and if the Board would like I would forward further comment if necessary if the Board wanted it. But I think it's in the Goodman text, and if the Board doesn't have it I will ensure that copies of the appropriate pages are forwarded.

CHAIRMAN: All right. Subject to what other counsel and parties have to say, why probably that would be useful.

MR. HYSLOP: Sure. So that's where I was coming from on 1(b) under revenue requirement, Mr. Chair.

CHAIRMAN: Let's look at (a) and the $25 million that goes into your proposed RRA account comes from the current fiscal year. And we are looking at a future fiscal period.

MR. HYSLOP: Yes. And what we are saying is there is an

asset -- if you go into the first part of the order, what I'm suggesting to the Board is that the Board order the establishment of the regulatory reserve account or RRA. And what the reserve account established as an asset on the balance sheet of Disco that the Board further take jurisdiction over the administration and management of that asset with Disco, and direct a payment or an application of that account in the revenue requirement of 2006/2007.

In other words, what we are saying is we apply some of the reserve account against that particular revenue requirement to reduce it, Mr. Chair.

CHAIRMAN: What if after the close of the current fiscal period there is no retained -- there are no retained earnings or no account with a balance in it?

MR. HYSLOP: If -- well look, from the last IR response which I think was 164, it appears that but for the adjustment to the hydro account at the end of February, the balance would have been approximately $71 million. Now I appreciate that may -- could go down in March. If the reserve account is not there then obviously you are not able to apply any of the asset balance to the revenue requirement in the future year. I would agree.

I'm making an assumption that there will be something

there at the end of March.

CHAIRMAN: Okay. Now (c) 14,400,000 being an excessive return on the capital of Disco.

MR. HYSLOP: Yes.

CHAIRMAN: My understanding was that in this particular hearing Disco was not asking for a return on its capital, is that --

MR. HYSLOP: Well they have sure calculated it into the revenue requirement, and I don't have --

CHAIRMAN: All right. Then that's my fault and we will go from there. How about by reducing OM&A you have a sum of 5 million. Anything to justify the 5 million? Why not 4? Why not 6?

MR. HYSLOP: Well that's a good question. I think I indicated in argument the other day, and in particular in answer to Commissioner Dumont's comments, the specific line for line item for the OM&A costs that might normally occur during a hearing such as this did not occur. And what we have done or what we are proposing to the Board, Mr. Chair, is -- and if I can just take a moment here. This is reference to my written brief at page 17. First of all, Mr. Chair, I want to point out that under the Act -- and I believe it was Section 125, subsection 2, the application -- in regarding the application of

charges, rates, tolls and tariffs, the burden of proof is on the applicant.

Now in their evidence the applicant has stated this is the details of the OM&A expense and they block them out, and they -- you know, the question then is is that sufficient proof of that amount. I think we shouldn't misconstrue that it's up to us to disprove those numbers. The onus is still on the applicant to prove them. Now I will be the first to concede that the aggressiveness of the parties with regard to the less than $100 million of OM&A might not have been as diligent and in detail as you might have expected, but you had to pick your grounds.

But dealing with that concept, first of all that the onus is on the applicant to establish to the satisfaction of the Board their OM&A. You know, we suggest the detailed evidence in support of what Ms. Clark may have had there is not as detailed as one might reasonably expect.

Second of all, there is nothing on the record that would suggest that the level or trend of these expenses is going down. And part of that is because of the reorganization. We don't know from the pre-NB Power days to the new days where everything is broken out how certain types of expenses would have trended. And although we

tried in IR responses to develop some of that we had real difficulty because of the break in the line. And that made it difficult. And the same result is that because there is new structures at NB Power, we don't have the information the same as we would like it on the OM&A on a detailed historical basis.

There are clear attempts being made and this gets into the balanced scorecard and cost control measures, and although these have been well detailed by Mr. Marois, and Ms. MacFarlane and Ms. Clark in their evidence, the point is it's also fair to say that the evidence would have shown that the balance scorecard is not fully implemented yet. They are still in the process of bringing it into play and into their decision making.

And the fact that they are going to use this tool to improve the decision making and efficiency would lead me to believe that that very fact is -- would suggest that they know that there are still efficiencies to be gained by using these tools as they go forward.

So -- and finally, you know, we did ask questions of a general nature dealing with analytical tools and techniques that would be used with regard to the management of some of these expenses, and you will recall some of the difficulties that we had with things like --

with the present value of the fleet management program. There were some questions with regard to the control of executive salaries, again not large amounts and not specified in the evidence whether it was a savings of half a million dollars or a million-and-a-half dollars, I can't say that.

But what I'm saying is when you look at all that, you look at who the onus is on, I will leave it to the Board to say, you know, if you want detail you should ask for it, and perhaps we should have asked for more detail. But in the absence of such detail -- you know, I stood back and I kind of made a gut instinct call. It's one of these things you could have said it's 5 million, you could have said it's 10 million, you could have said it was 1 million, and although the Board may have some reluctance without being able to specify a certain amount on a certain line, I do encourage the Board to give a fair amount of thought to look, are you really satisfied that these expenses are as lean and mean as they can be based on the evidence that you have heard, and the evidence presented and the fact that the onus isn't on me necessarily to say that's unreasonable. The onus under Section 125, subsection 2, seems to continuously rest with the applicant to make sure that they have satisfied this

Board that all those OM&A expenses are fair, reasonable and appropriate.

And if there is that little bit of uncertainty in the Board's mind, then I would invite you to indicate that in the determination of the revenue requirement at the end of the day.

If it pleases the Board I will move on to regulatory reserve accounts and try to deal some with those issues.

First of all, we take the position that the establishment of the regulatory reserve account is found generally in the -- not generally -- it's found in the overriding right of this Board to determine just and equitable rates.

And again I want to go on and refer a little bit to the Supreme Court of Canada case in the City of Calgary and Atco. And in that case -- now the issue in that case was a very narrow one but I think it's worth kind of going through a little bit of the history of the case so -- to see how it fits in.

In that case the respondent, ADCO Gas, had a property it was no longer using but it became, as property sometimes does, very valuable because of its location. And they sold the property for six-and-a-half million dollars. And they applied to the Board in Alberta, as

they were required under the Act, for permission to sell the property, and the issue came up what to do with the proceeds of the sale.

And ADCO took the position it was something for distribution to shareholders and the City of Calgary, who was a major ratepayer, took the view, no, it's something that should be distributed between ratepayers and shareholders.

And this case made its way to the Supreme Court on the basis of judicial review using the corrective standard. In other words, the Board and the Supreme Court determined this isn't a case of defining the jurisdiction of the Board, it's more a case of deciding whether the Board is right in its decision and its analysis.

Now in that decision a couple of things happened. They went on to speak in general terms as to what the nature of the jurisdiction of the Public Utilities Board would be in Alberta. And I think this is where it has relevance to this case.

And what they said was that when you look at this whole statue, the whole question of the Alberta Board's jurisdiction goes to the setting of just and equitable rates. And when we are dealing with these just and equitable rates, no longer is whether the decision correct

or not it's -- the question would be whether or not it is reasonable.

But what became important, as I read the decision, is that anything that is related by necessary implication or by application of this overriding concept of what the Board does within the context of the Act is what really at the end of the day gives the Board its power.

And although it certainly would be -- it is not germane to the decision in the Atco case, the clear implication of the Supreme Court would be if this was a decision on accounting policies or this was a question of how to manage impacts such as waterfall, items like that, then at the end of the day the court I think would have seen a great broad jurisdiction to the Board.

Now taking that to where I want to take it, I think when we look at the whole Section of 101 and Section 128 in particular, it is our submission that in designing just and equitable rates, this Board should also have the authority to design rates and manage rates in such a way that, under Section 128, subsection (1) the Board on its own motion or on a complaint made by any person inquire and to hear, determine any matter where it appears to the Board -- and I'm referring specifically to (c) -- that there is an abuse or potential abuse of a market power by

a market participant.

And in that regard, I want to refer to one section of the White Paper. And that is at page 28. And I'm dealing with the Section 3.1.6.1. And in the White Paper the people that framed New Brunswick energy policy stated Most importantly, with respect to the generation business, -- the generation business -- the Province will give the Board authority to monitor the competitiveness of the wholesale market and ensure that the Crown utility is unable to exercise market power.

Now the problem that we have with the PPAs is that they invite abuse. They are affiliate contracts of a loose discretionary nature.

And I'm not suggesting to date there has been any abuse. But I will suggest a couple of things. This utility was last before this Board 12 years ago. And if we are going to allow them to go 12 years with these purchase power agreements before they become before this Board again, there is an opportunity for a great deal of amendment, a great deal of interpretation and the opportunity for a great deal of the application of discretion.

And it is our view, and it would be Mr. Strunk's view and Mr. Meehan's view, that these type of affiliate

contracts have been heavily scrutinized for a specific reason. And that is to prevent, as is suggested in Section 128, subsection (1), subsection (c) the potential abuse of market power by a market participant. And in fact it is the generators who have the ability -- and that has been clearly indicated in the White Paper as something that wants to be dealt with.

So the question is how do you do that within the context of a rate hearing? And the way you do that in the context of the rate hearing, I suggest, Mr. Chair, is that you have to take control of the purchase power agreements. And by taking control is you have to know how Disco is operating under these contracts, what decisions they are making with regard to the interpretation. It is going to affect ratepayers in the future.

If there are amendments made, how are those amendments made and what effects will they have on the ratepayers in the future? If they adjust heat rates at Belledune because of whatever factor, how will that affect the ratepayers to PROMOD inputs? And that is why we come to this Board asking for the remedy we did in part one of the order that we were seeking on the past Tuesday.

And in that part one that is what we are asking this Board to do. We believe your jurisdiction exists under

the general ratemaking power. If it doesn't exist under the general ratemaking power, it certainly exists under the general ratemaking power and when it is colored with the right of the Board to prevent the potential abuse in the marketplace. That in essence is where we find the Board's jurisdiction for the orders requested under the heading "Jurisdiction and the Purchase Power Agreements."

Now we have also suggested in here the Board may wish to give instructions with regard to the management of the establishment of the regulatory reserve account. And again that authority comes not only from the two sections I just mentioned. But I also believe that -- and I know there is generally accepted accounting principles but there is also -- these are modified from time to time by regulators in the course of doing their duties to set fair and equitable rates. That is what this Board did in the early '90s when it authorized the establishment of reserve accounts.

And I would point out, Mr. Chair, that one of the reasons you may want to keep your hands in on the adjustments and changes to these PPAs and the reserve account is -- as you will recall, in the late '90s, without approval from the Board, the applicant did change its accounting policies with regard to reserve accounts by

eliminating them. And whether the Board sees that as something that has contributed to today's problems or not, I will leave with the Board.

But I think the Board has to, in view of the fact we don't know when we are going to see them again, and given the significance and magnitude of the funds that can flow, I would encourage the Board to find the jurisdiction in Sections 101, Sections 128 and 125 with regard to the order sought under part one.

Now that brings me to the third issue that you raised in your memoranda to us on -- yesterday. And that is the issue of whether -- Disco has stated the main driver for the requested increase in the rates is an increase in its fuel costs. And if these were to decrease, Disco could experience a windfall in profits. What authority is available to the Board to protect ratepayers and to order a review of Disco's fuel costs and rates?

Our answer to that, Mr. Chair, is found essentially in the arguments that I have just put with regard to the regulatory reserve account and the ongoing monitoring of the PPA.

The fuel costs of course are important in the Genco PPA because of how they fit into Article 6 (2) which is established of the vested energy price. What those fuel

costs are and the input are directly results in what comes out and how much Genco's bill is to Disco every month.

Mr. Strunk in his evidence referred specifically to the concerns that he might have with regard to truing up actual fuel costs against the fuel cost that is used for the inputting into the Disco purchase power agreement or the Genco purchase power agreement.

Now there was a lot of evidence on this and the way it worked. And I hope I'm not getting soft in my old age. But some of the evidence was convincing with how the hedges worked, the conservatism of them. But still at the end of the day there is no true-up.

I would invite the Board, at least at this stage of the game, to direct that there be a true-up of Genco's actual fuel costs against the fuel costs that are built into the PPA pricing each year.

And let's find out if there are going to be significant differences between the two. And then if there is an issue at that point in time, I think the Board, as part of its ongoing regulatory authority over Disco can give instructions and directions to Disco to deal with potential differences which may or may not be significant in the fuel costs that are used to determine the purchase power price.

So in answer to the specific question the Board posed, where is my authority, we believe that the Board's authority is found in the same argument and logic that I suggest comes out of the sections I mentioned and the discussion of the scope of the authority of a public regulator dealing within the raison d'etre of its enabling statute. And that is to set just and reasonable rates. Those are my -- the best I can do in 24 hours on the points that you have raised, Mr. Chair.

CHAIRMAN: Good. Thank you, Mr. Hyslop. And I want to assure you that I have not noticed you getting soft in your old age.

MR. HYSLOP: Thank you, Mr. Chair.

CHAIRMAN: We will take our 15-minute break now.

(Recess)

CHAIRMAN: Just a second, Mr. Peacock. Mr. MacNutt, you approached me about the Public Intervenor wanting to say a word -- there he is -- about used and useful. I don't know how useful it will be, but go ahead, Mr. Hyslop.

MR. HYSLOP: Well perhaps I should have checked with my consultant, Professor O'Rourke who explained quickly. Briefly, Mr. Chair, the calculation we have done that we call the penalty on the Coleson Cove thing, is a calculation of a disallowance that might be justified on

the basis of the used and useful principle.

Coleson Cove was built for certain purposes which it is now not used for and our calculation Disco's percentage of the interest -- annual interest on that construction. So our view would be that rather than call it a disallowance -- a penalty, we would call it a disallowance on the basis of the used and useful principle, and the calculation that we have done is consistent with the application of that principle.

CHAIRMAN: Just my own personal response to that is it's not very useful. Frankly, I don't want at this late stage for people to get into an argument of how much of the refurbishment is useful today and how much isn't and all that sort of thing. But I hear you, Mr. Hyslop. We will go from there. Mr. Peacock, go ahead, sir.

MR. PEACOCK: Thank you, Mr. Chair. We have some very brief remarks today. We will just go right into the second and third question first and then onto the first.

On the question of merging the GS I and GS II rates, Vibrant Community Saint John has no opinion.

On the question of whether or not the Board has the authority to order future reviews of Disco's fuel costs, Vibrant Communities would certainly feel that this would be a proper and useful regulatory exercise for a public

Board.

We would also expect that this oversight would also be supported by the provincial legislature and we can assure you that it would be welcomed by low income New Brunswickers.

We are also happy to know that distribution utilities in other parts of Canada will in fact reduce energy rates in the name of fairness to ratepayers. We have recently noticed that Saskatchewan Energy has applied to its provincial regulatory Board to put a downward revision on natural gas rates, and we hope that the New Brunswick utility will consider a similar action whenever fuel costs ease.

On to the first question. The Board has requested that any party who has asked the Board to make a specific ruling provide the appropriate legislative authority under which such a ruling may be made. While I am unsure as to whether this question applies to any of the recommendations that we made earlier this week, I spent most of last evening Googling utility websites, all in the rather earnest effort to see if our group could offer some thoughts that may assist the Board in its very important decision.

While legislative authority is something I am not very

familiar with, I would naturally assume that this Board has the regulatory power similar to that found in other Boards across Canada. And if I remember my high school law course correctly, I would argue that legal precedence, even if established in other provinces, likely have some weight in these proceedings. With that in mind, I would briefly like to highlight regulatory decisions taken in other provinces that may offer some precedent to the key recommendations I made the other day.

On the question of maintaining the service charge, I believe there is no need to mention precedent. In its role as the arbiter of the electricity rates that are fair for New Brunswickers, I am confident that the PUB can certainly rule that the currently monthly service charge is sufficient.

On the question of greater regulatory scrutiny over disconnects, I expect that a number of these issues may be discussed in the customer service phase of the hearing. I will encourage Board Commissioners to look at Manitoba's Utility Board regulations regarding natural gas disconnections in the meantime, however, if they want to make some preliminary decisions on the matter. I do believe that both the question of disconnects and the service charge can be ruled upon under Section 101.4 of

the Province's Electricity Act. In fact, I am happy to explain that a mole told me about this section this very morning.

On the question of mandating a demand-side management program that could benefit low income households, the Board can find plenty of recent precedence in Ontario. In fact a quick examination of the Ontario Energy Board's website will show how various municipal utilities have had to submit conservation and demand management plans to the regulators since 2004. What is quite fascinating to a Board novice like me is to see how the Ontario regulator has tied revenue requirements on the part of distribution utilities with mandated new investments in demand-side management.

Clearly when the Ontario scenario is compared with the provincial conservation regime imagined in the New Brunswick White Paper on Energy Efficiency, I think that there presents a real opportunity for the PUB to lead other policymakers in this field by integrating an effective program of DSM with the future revenue requirements of New Brunswick's distribution utilities.

One particular ruling caught my eye in Ontario. On December 10th 2004, the Ontario Energy Board recommended that the Municipal Utilities voluntarily investigate

possible initiatives to assist low income consumers as part of their overall DSM program.

Obviously we would support a similar recommendation here in New Brunswick.

This brings me back to an interesting question posed the other day by the Board Chair, how the regulator could target DSM into low income households. In my opinion, attaching weatherization programs to buildings 50 years old and over may work in this direction. Throughout this Province a great many low income households live in older apartments and single-family homes.

By focusing DSM on those dwellings built before 1960 the regulator could be offering some sound advice to both the applicant and Efficiency NB.

Finally, I would like to offer a possible regulatory precedent concerning the establishment of a charitable endowment for those families who fall into arrears. While I have not been able to find the smoking gun that links such an endowment to utility board rulings across Canada, I see the presence of such an endowment to be in both the interests of the Board and the applicant. I also think that there is a regulatory back door that may help produce such an endowment. I say this because in my late night research I have discovered that there are provincial

precedents where non-profit groups who have intervened in electricity cases have received financial support for the intervention costs.

I should state that Vibrant Communities has no plans to petition for intervention costs. We have been quite satisfied with the free coffee. We would encourage the applicant, however, to consider how utilities in other provinces are indirectly responsible for the intervention costs of non-profit groups. Since they won't be asked for assistance from us, we hope that they would use any of the funds that might have been sent to a similar group in another province to support the establishment of a relief endowment here in New Brunswick. We feel that both the applicant and this Intervenor would win under such a scenario.

We hope that this further clarifies some of our recommendations to this Board. Thank you, Mr. Chair.

It's been quite fun, at least for this applicant.

CHAIRMAN: Thank you, Mr. Peacock. And thank you for your participation on behalf of the whole Panel in the entire hearing process, because we have enjoyed your presentations and the ideas you have brought forward. And I look forward personally, and I know my fellow Commissioners do, to spending some more time with you in

the customer service and policies area in the next hearing.

Unfortunately, I have to tell you that ours is not similar legislation to probably anywhere else in North America. There are only two jurisdictions that I am aware of that -- one of them, and that would be Saskatchewan because they don't have a public utilities board there, but Quebec's Regie is restricted in certain fashions, but ours -- the legislation just isn't there.

For instance, most Boards have the ability to grant intervenor funding. Not that they like having that jurisdiction, because it's a nightmare. However, they do have it. But we simply don't have it. And a lot of your things should be addressed to the legislature, however. Thank you very much again. And next it will be Mr. Gorman.

MR. GORMAN: Thank you, Mr. Chairman. And I won't make any comments on the coffee. First of all, to the suggestion that you raised this morning that the Board may give the parties an opportunity to respond to a scenario that might be contemplated by the Board but was not proposed at this hearing, I guess I agree with Mr. Morrison's comments. I think he said splendid. We would agree.

With respect to the second question which was sent out

by the Board concerning the merging of the GS I and the GS II rates, the Municipal Utilities believe that this should be achieved gradually. And that the timeframe of about five years would be appropriate to attain a full merger of these two rate classes.

And I think in those comments really that is kind of the range and we are not saying exactly five years. You know, it could be four, it could be six, but we think that is kind of an appropriate range.

I am going to go to question 3 before I guess I deal with the legislative authority that was requested. And in question 3 you note that Disco has stated that the main driver for the requested increase in rates is the increase in fuel costs. In future years, if fuel costs were to decrease significantly Disco could experience a windfall in profits. What authority, if any, is available to the Board to protect ratepayers and to order a review of Disco's fuel costs and rates?

I guess I had the opportunity to -- I didn't have to go first so I was going to say the opportunity to listen to Mr. Hyslop. And I would agree with his comments and perhaps in addition to that -- and I believe he did also cite Section 101. 101(4) talks about the Board taking into consideration accounting and financial policies and

this might somehow fit broadly within that category. As well, I think Sections 125 and 130 could be considered.

I guess Mr. Hyslop, when he began his presentation, listed specific sections of the Electricity Act. And quite frankly, I don't think there were very many that he left out and I think that maybe his point was that if you -- taken together we believe that the authority is there. But if you are looking for specific sections, I guess the three I have mentioned might be sections that the Board would look at.

With respect to Panel question number 1, I guess that concerns specific rulings that were asked by each of the parties. And I guess my general comment before I go into the specific rulings that we asked for, would be that I think for most of the remedies that we would have requested or put forward, I think that Section 101 probably covers it. That and the other authority found in other sections of the Act. But I will go through the specific remedies that we have asked for and give you my view on the statutory authority for them.

And the first matter that was mentioned by us -- was perhaps it was the last. I think I have these in reverse order perhaps. The hydro regulatory reserve or deferral account which would be used to equalize the fluctuation in

costs caused by variations from average water flow conditions. It is our view that the authority for this can be found in Section 101(1) and Section 101(4) of the Electricity Act.

Section 101(1) authorizes the Board to approve changes in charges, rates and tolls and 104 states that the Board, when considering an application under this section, can take into consideration accounting and financial policies of the Distribution company. And I guess in my view, that interpreted in a broad sense, I think would give the Board the authority to do so.

I think it has already been stated that that particular account, I think Mr. Hyslop said, was created in '91 -- or I think all that happened in 1991 was the Board approved a practice that had been in existence since the 1950's. So it is something that has been around for a long time and we think would be a good idea to reinstate it.

CHAIRMAN: WHat about the question, Mr. Gorman, about if -- do we have authority to require it to be set up in the current fiscal year we are in? Or would it just be in reference to the test year and going forward?

MR. GORMAN: Well it may be a bit of a stretch perhaps to set it up in the current year except I think if you look

at Section I think it is 130, just give me a moment. Yes, Section 130 says that any order of the Board made under this Act is subject to such terms as the Board considers necessary in the public interest. And I think that there is a lot of -- that is a pretty broad section and the Board might I think take from that that you could look at it as I guess retrospectively with respect to the hydro account. So I would suggest that that is one section that the Board might consider.

CHAIRMAN: Could it be considered retroactive rate setting which of course we can't do?

MR. GORMAN: Obviously I would say no.

CHAIRMAN: All right. Now your legal opinion?

MR. GORMAN: Well I think it could be argued either way, quite frankly. You know, there is a surplus there or potentially a surplus there that may not be taken into account and when one I guess looks at the financial position -- and that is what you have got to do, is look at the financial position of Disco -- you can't just ignore the fact that it exists. I don't think that that is really within the framework of what the drafters of the legislation would have expected. That there is perhaps the possibility of a large amount of money that can kind of hang out there and not necessarily in some ways be

accounted for. Because if you can't take it into consideration, you know, I guess it begs the question, where does it go or, you know, what happens to it? And I think in that sense, the Board, I think, can assume jurisdiction unless somebody -- I think the test here, quite frankly, should be to show otherwise. That you can't do it, not so much that you can. But to look for an argument as to why you can't do it.

CHAIRMAN: Okay.

MR. GORMAN: Now the -- I guess the third issue that I had raised was the issue of exit fees. And I think that was thoroughly canvassed earlier this morning and I don't think I need to add anything to the System Operator's comments this morning.

I guess the fourth thing we asked for was to ensure that rates were done on an appropriate cost basis to allow the municipalities to participate in demand side management initiatives. And again we think that the authority for that is in Section 101(4) of the Act. That it is broad enough to cover that.

Again, we talked about examining the debt repayment plan to consider whether or not it was too aggressive and we believe this falls under Section 101(4)(a) of the Act, which permits the Board to take into consideration again

accounting and financial policies.

The capital structure that we recommended was similar to that put forward by the Applicant, but, you know, I guess it was slightly different but it had a lot of similarities. And we would say your authority there lies in the definition of revenue requirement, which the definition says, means the annual amount of revenue required to cover projected operation maintenance and administrative expenses, amortization expenses, taxes and payments in lieu of taxes, interest and other financing expenses and a reasonable rate of return.

So I think the fact that it is mentioned in the definition section would give you the authority. This is the definition in the Electricity Act.

And I guess finally and most important to the Municipal Utilities, we recommend the revenue to cost ratio be adjusted to unity for the wholesale class or at least to 102 percent this year with Disco being directed to bring it to unity by 2010.

And I guess that is really in a sense was the very nature of the CARD hearing was the Board making comments or rulings with respect to those matters. So we believe that Section 101(4) of the Act allows the Board to take into consideration proposed allocations of costs among

customer classes and rate design matters. I don't think the Board is really looking for the authority on that one. I think the Board would certainly understand that.

And I guess those would be my comments on the questions put by the Board. In terms of rebuttal, I do have one issue. Does the Board wish me to proceed with that now? Thank you.

The only rebuttal evidence that I have rises out of Mr. Lawson's summation. In his final argument Mr. Lawson stated as follows: He said, Now the Municipal Utilities have sort of painted large industrial in a bad light. I think one of the things -- maybe in a bad light might be strong but I think that they are getting mistreated relative to the large industrial. In response to Mr. Lawson's comments the Municipal Utilities would like to go on the record stating that nothing could be further from the truth. In closing argument we stated it should be understood that the municipalities are strong supporters of industry in New Brunswick but subsidization of industry is the responsibility of government and not of the ratepayers.

Everybody at the hearing knows and understands that we serve industrial customers ourselves, therefore, we have to take into consideration their needs and concerns. I

want to assure the Board there is no anti-industry animus on the part of the Municipal Utilities. If so, we probably -- we would have looked for a much larger increase to them. The proposal we made would only have moved them to a revenue to cost ratio slightly above .92.

So I guess since it's understood that we support industrial customers, you should understand however that we can't support them to the detriment of the other customers that we serve and the other customers that are dealt with in the rate design.

We support industry and trust that if subsidies are warranted they will be forthcoming from government and believe, however, that it would be inappropriate to subsidize industry through other ratepayers.

Our position perhaps may be well put out I think in that regard or well expressed by the Public Intervenor in his filed submission today, the filed version where he said we support the position of Saint John Energy that the 105 revenue to cost ratio should not be fixed. And he goes on to say that the Board should state that the revenue to cost ratio for the wholesale customer class is not a floor. And that really was our position, that it shouldn't be considered a floor.

Those would be our submissions on rebuttal.

CHAIRMAN: Thank you, Mr. Gorman.

MR. GORMAN: Thank you, Mr. Chairman.

CHAIRMAN: Mr. Booker, do you have any remarks you want to make at this time?

MR. BOOKER: Just a few brief remarks, Mr. Chair.

CHAIRMAN: Okay. Would you like to come up front then, sir?

MR. BOOKER: Good morning, Mr. Chair and Commissioners. Just a few brief remarks to address some of the issues that have come up.

My first item with regards to the request from the Chair made this Monday past regarding exit fees, a potential reserve account in Section 156. I think we commented on those during our closing comments Tuesday morning.

With regards to the Panel questions sent out by e-mail on Wednesday, the 22nd, item number 1, we do not believe it applies to JD Irving as we didn't request any motions per se. Item number 2 with regard to merging the General Service I and General Service II classes, we really don't have an opinion on that save a concern over any potential rate shock for the customers in those classes.

With regard to Item number 3, the potential future impacts of decreasing fuel costs to Disco, we think this is a very important issue and this is one of the reasons that we

supported elements of the concept of the fuel surcharge as was originally filed by Disco a year ago. Past that though, I regret that I am unable to offer any legal opinions as to that as I'm not a lawyer, other than we support the concept in philosophy.

Just a few general comments. I would like to correct one error that I made in my closing comments. It shows on the transcript on page 6064, line 13. That was when I was quoting the calculation of an effective firm pricing rate for a 20 megawatt customer. I was using a production model that we use within our operations for scenario analysis and production planning. And I should have quoted a 20 megawatt load at 90 percent load factor rather than 80 percent load factor. I just wanted to point that out to the Board that there was a minor error made there, but I don't believe that that really has any impact on the overall point that I was trying to prove in that section. But I just wanted to be thorough and point that error out.

With regard to the question from the Chair this morning regarding the opportunity to respond to comments from the Board as we go forward, we do support the opportunity to offer our input on that and we would be welcome to participate.

I guess, Mr. Chair, I did have a few rebuttal comments



but in order to save the time of the Board and the Intervenors I think that in general I can say that I support the rebuttal comments that Mr. Lawson is going to make through the CME shortly and I think he will probably be able to do a better job summarizing the issues than I could do at this point.

CHAIRMAN: I don't know about that.

MR. LAWSON: And I would agree.

MR. BOOKER: I appreciate your vote of confidence there. That concludes my rebuttal submissions.

CHAIRMAN: Thanks, Mr. Booker. Mr. MacDougall?

MR. MACDOUGALL: Thanks, Mr. Chair. Good morning, Mr. Chair and Commissioners. The comments I'm going to make today, I'm going to break them up into a couple of sections. First I do have some rebuttal comments on remarks made by Mr. Hyslop, since in his argument he did make specific comments with respect to certain of EGNB's and Dr. Rosenberg's proposals. I will then comment on the questions sent around by the Board. And after that we will make some comments on some of the issues that were raised earlier this morning. Also as part of my rebuttal there were a couple of comments made by the Chair to some of the other parties

during questioning on their argument which I will also briefly touch on.

I would also like to start by saying I'm also delighted personally more than anything else to see Mr. Marshall here today. He is not at full fighting weight yet I don't think. But he is clearly back in the game.

With respect to Mr. Hyslop's remarks at the end of his argument regarding EGNB's position, I noted that he started by saying he felt he should respond to our arguments due to their persuasiveness.

EGNB's position is that their proposals are persuasive because they are well-grounded in the facts before the Board. Mr. Hyslop, and I quote, also stated "I said it the other day, I will say it again, that Mr. Harrington's points on policy and what can be done with gas are good ones. I just don't think in doing that that that we should totally skew the true cost of electricity to accomplish it."

This, Mr. Chair, Commissioners is the fundamental problem with Mr. Hyslop's comments. What he is proposing skews the true cost of electricity, not what EGNB is proposing.

EGNB's rate design proposals were specifically meant to attempt to reflect the true cost of electricity in New

Brunswick. There is absolutely nothing on the record that suggests otherwise.

Mr. Hyslop's view reduces residential costs and continues to favor the winter heating customer with prices that do not reflect the true cost of their electricity.

Mr. Hyslop then noted that one of Dr. Rosenberg's suggestions in the first phase of this proceeding -- and he quoted from the summarized recommendations on page 56 of Dr. Rosenberg's testimony -- was that according to the indications of a refined and corrected cost of service study, the residential class should be brought to a revenue cost ratio of 0.95. And then he went on to apparently criticize Dr. Rosenberg for now suggesting a higher RC ratio for this class.

The key point here, however, is that Dr. Rosenberg's recommendations with respect to RC ratios last fall were based upon his proposal regarding the CCAS. Once a different CCAS was prepared in accordance with the Board's December ruling, obviously this had an extremely significant impact on any proposals for rate design and RC ratios.

This, Commissioners, is exactly why one does a cost allocation study first and then deals with revenue allocation, rate design and RC ratios. You, the Board,

specifically acknowledged this yourselves when you stated at page 28 of your ruling, and I will quote that back to you, "The Board considers it appropriate that specific decisions on adjustments to the revenue to cost ratios for individual customer classes be deferred until the revenue requirement review, at which time the current and proposed ratios, using the methodology approved in this ruling, will be available."

This, Commissioners, we agree, is the absolutely correct approach. Mr. Hyslop completely ignored the fact that we are now dealing with a different CCAS, a CCAS that is different from both that which Disco proposed and that which Dr. Rosenberg proposed.

Mr. Hyslop then appeared to suggest that EGNB was somehow trying to get through the back door what it could not get through the front. This is categorically simply not the case.

In fact Dr. Rosenberg was extraordinarily forthright in his testimony when he indicated that information with respect to seasonal cost differentiation was being brought to the Board solely for the purpose of being able to make rational decisions with respect to rate design. And Dr. Rosenberg did not suggest any revisions to the filed CCAS.

To however in this phase now ignore the cost differentiation regarding winter peaking in New Brunswick in rate design would in our view not be appropriate. Winter heating is a primary driver of the most expensive costs on Disco's system. And this is an important factor in determining rate design, RC ratios and ultimately rates, particularly where we still have a declining block and a GS II all-electric rate which is at a discount to the GS I rate.

As I stated in my original argument, these underlying facts regarding costs are undisputed on the record. Since Mr. Hyslop knows they are not disputed, he now appears to seek to have the Board nearly ignore these facts in rate design. That would not be appropriate.

With respect to Dr. Rosenberg's recommendations regarding the large industrial class, and again Mr. Hyslop commented on those, we noted in our argument that it is certainly open to the Board to make what modifications it sees fit to the large industrial class, including for example using some of the revenue offset to the large industrials to instead lower the wholesale class' rates.

EGNB's position remains that the key elements of rate design they put forward and that are important in this proceeding are with respect first to the GS classes and

second with respect to the residential classes.

In this regard we note that the recommendations put forward by EGNB are those most favorable to the GS I class, substantially bringing this class closer to unity. And further EGNB's proposals with respect to removing the penalty aspect of the GS II rate provide a benefit to the GS II class, which is also above unity.

The GS classes are not otherwise represented at this hearing. This is an unfortunate situation in many jurisdictions with respect to the GS class. Yet they constitute major customer classes. And they include such customers as hospitals, nursing homes, schools and small businesses.

What was most surprising to us about Mr. Hyslop's arguments regarding EGNB's proposals is that he spent the entire first portion of his argument making it abundantly clear how concerned he was with the lack of information provided.

But then when it comes to the CCAS he seems to be very content with its outcome and has no hesitation using it as the basis for Disco's costs without any further consideration of fuel drivers in the revenue allocation or rate design process.

EGNB's proposals target these cost drivers for the

benefit of all customers on Disco's system but have the added effect of sending an appropriate price signal which will allow natural gas or other alternative fuel providers and DSM initiatives to be more competitive in the marketplace. We also note in rebuttal to all parties that EGNB is the only party to present specific alternatives to Disco's rate design, alternatives that are better for the GS classes, and send a much more appropriate price signal in the tail block of the residential class. We respectfully submit that the evidence before this Board strongly supports the rate recommendation suggested by EGNB.

If you noted Mr. Hyslop's comments regarding rate design, what they all tend to do is bring down the increase to the residential rate. They do not, however, specifically target the problematic portion of the rate, the declining block. For example Mr. Hyslop did not even argue that Disco's 26 percent reduction in the declining block was inappropriate.

Interestingly Mr. Hyslop's own expert, Mr. Knecht, agreed with the differentiation in fuel costs by Disco. At page 5873 of the transcript Mr. Hyslop's expert stated

Certainly the fuel costs as currently incurred by Genco in the winter are higher than they are in -- they are higher

in the winter than they are in the non-winter period, because there is a higher proportion of the higher cost, oil and gas costs, yes. He then went on to confirm that the current CCAS reflects no seasonal differentiation in the allocation of fuel costs.

Despite this point Mr. Hyslop still argued that the CCAS be modified such that combustion turbine costs, the most expensive costs, should be allocated to all customers on an energy basis rather than only to residential electric heat, GS II and wholesale electric heat customers as was proposed by Disco. EGNB supports Disco's cost-based approached to this issue and not that put forward by the Public Intervenor.

Likewise Mr. Hyslop also argued that the Board should direct Disco to treat the export margin credit as a revenue credit. Although Mr. Knecht acknowledged under cross examination that changing the CCAS but keeping the export credit as 100 percent demand in and of itself assigned a greater proportion of the credit to the residential class than other methodologies. They were already receiving a benefit through the first part of this hearing.

We would point out that Dr. Rosenberg noted in his direct examination that these credits are more

appropriately viewed as an offset to costs otherwise to be incurred by customers. And they are not revenues as they do not belong to any specific class. They are reductions in Disco's costs to Genco.

And the CARD ruling noted how this offset should be classified, mainly as demand. EGNB supports treating these credits as an offset to costs, not as proposed by Mr. Hyslop.

Finally with respect to Mr. Hyslop's arguments regarding capital structure and ROE. He, with the greatest of respect, completely ignores the restructuring. It is his view that this was ill thought out and ill advised, notwithstanding that it was carried out as part of government energy policy and pursuant to government legislation. Mr. Chair, Commissioners, the debt does not simply go away. And interest keeps accruing. Disco's proposal is not only in accordance with the restructuring, but it is one of the few aspects of their proposal that appropriately reflects the move towards a competitive market. Certainly this may be occurring very slowly in the electricity sector, but the evidence is clear that with respect to heating demand there is considerable competition from alternative energy providers as well as DSM initiatives, if they are allowed to compete.

The restructuring is certainly not perfect, but this Board should in our respectful submission be acting to enhance competition in those sectors where it is potentially available. The continuance of artificial barriers to competition in a restructured electricity regime seems simply inappropriate.

In particular on this point, we note that Mr. Hyslop has indicated that if the government wanted to have a capital structure and ROE for Disco he would have expected this to be in the Electricity Act.

Well, Mr. Chair, Commissioners, it is simply common regulatory practice to have deemed capital structures and returns on equity, notwithstanding, as the Chair said earlier, this is not specifically what Disco is requesting, rather, they are requesting a net income that is reflective of that. This is something that need not derive specifically out of legislation. The matter of an appropriate return is best left to the regulator for approval from time to time, and we suggest that Disco's proposal for a net income reflective of a commercial capital structure and return on equity is appropriate at this time.

However, with respect to legislative authority, we would note that Section 101.3 of the Electricity Act and

the definition of revenue requirements mentioned by Mr. Gorman in fact clearly contemplate a reasonable return on equity for Disco.

Mr. Chair, turning to one of the comments you made during argument, in your discussion with Mr. Coon you continued to appear to have a concern that the PPAs stood in the way of certain actions, such as the proper use of time of day rates. We would just like to follow up on that and I think we had tried to do so in argument but due to your ongoing concern, I thought it was useful for us to comment a little further.

We would point out that any demand reduction which lowers Genco's costs is reflected in lower overall costs to Disco. Disco then itself is not precluded from putting in place rates which reflect cost differentials. Elimination of the declining block and removal of the all-electric rate will change behaviour that will reduce the costs to Disco as a whole. This reduction can certainly be spread through Disco's rate design to more appropriately reflect its customers' usage patterns on a seasonal or a daily basis. As Mr. Marois has indicated in this proceeding, we should do as much as possible to eliminate the most problematic issues now --

DR. SOLLOWS: Mr. MacDougall --

MR. MACDOUGALL: Certainly.

DR. SOLLOWS: -- just on that point, I mean, part of this -- again my understanding of the PPAs, and I would ask you to correct me if I'm wrong, is the amount of energy that is available to Disco through the PPAs varies directly with their nominated capacity.

So if we follow your example to the logical conclusion and Disco reduces its demand and therefore reduces its nomination, it may well -- it automatically reduces the amount of energy that it can get under the PPAs. It then has to go to the market for the additional energy. It may end up well paying more. So I'm not sure I see the logic of your argument.

MR. MACDOUGALL: I don't -- I think with respect, Commissioner, I don't think that that is correct, and I'm not as much an expert on the PPAs and this may be something well put to Mr. Morrison or to Ms. MacFarlane as well. But my understanding of the PPAs is that the actual costs per megawatt hour are a flat cost that is charged through. So it's not seasonally differentiated. But that charge through of what the cost will be from Genco to Disco will reduce based on Genco's costs. And you see Genco's costs --

DR. SOLLOWS: But the amount that they can buy varies with

the amount of demand or amount of capacity that they reserve. So if they reduce -- if they have a reduction in demand and therefore want to reduce their nomination, automatically in reducing their nomination, because their energy is calculated as a fraction of their nomination, they end up reducing the amount of energy that they can buy under the PPA, and if as you suggested they improve their load factor, that would seem to put them automatically into the market and at market prices for whatever additional energy they would buy.

MR. MACDOUGALL: I don't think that's correct, Commissioner Sollows, with the greatest of respect.

DR. SOLLOWS: Okay.

MR. MACDOUGALL: And again I could be wrong in this. But the reason being is if the demand is reduced then it is reduced. They wouldn't be in the market for additional demand because in fact what they are trying to do is take the higher cost -- what we are all trying to do here is take the higher cost generation off, but the reason that will come off is because there will be a demand reduction particularly if we can get the demand reduction in the higher cost period.

DR. SOLLOWS: Are you distinguishing between demand and energy? Because I certainly am. A demand reduction is

not necessarily going to lead to a proportionate energy reduction.

MR. MACDOUGALL: But it will lead to a lower cost in energy if the demand reduction is at the peak times of the utility. That is undoubted. So if you --

DR. SOLLOWS: Without a question --

MR. MACDOUGALL: That's right.

DR. SOLLOWS: -- but in order to get the economic advantage of this we would then, if there has been a reduction in demand, the obvious way to get the economic pass through to Disco would be to reduce the nomination for capacity, but in doing so they reduce the amount of energy that they can buy under the PPAs and therefore will put -- will have to go to the market for the margin, as I understand the PPA structure.

MR. MACDOUGALL: Again, Commissioner, I think you are going a step beyond maybe my understanding of the PPAs, but my understanding is that Disco is entitled to the heritage assets to the extent required to service the standard supply load under the PPAs.

DR. SOLLOWS: I think there is a factor of .56 or .57, basically a load factor used in the PPAs to determine the amount of energy that they can buy, and I think it was fairly clearly stated by their witnesses that anything

above that energy had to be priced at the market price which they identified as the ISO Keswick price.

MR. MACDOUGALL: Well I guess, Commissioner, my understanding is that the price they would pay for their energy on a flat kilowatt hour basis would be reduced if we can reduce Genco's costs. And there may be some other aspects of the PPAs that would have to be looked at but it's not my understanding that they would have to pay the same cost for the same energy, and I don't think they would then be pushed to pay a higher market cost because of it. And again you may wish to follow up with Disco on it.

As Mr. Marois has indicated in this proceeding, we should do as much as possible to eliminate the most problematic issues, i.e., the declining block and the all-electric rate, which will regardless for the future and what other issues that may exist, will allow us much more flexibility in future rate design to more appropriately reflect the true nature of Genco's and ultimately Disco's costs.

And there I think, Commissioner Sollows, I hope we could agree if we do start removing the declining block and removing the all-electric rate, then we start to move to a more level playing field on which we have a lot more

flexibility in the future to determine what we really can do within or outside of the PPAs.

In this proceeding it is very important in our view that we not let the perfect be the enemy of the good.

We would also like to point out, Mr. Chair, in rebuttal and remind the Board that to the extent the revenue requirement is reduced through any potential reductions, the impact of all rate designs will be modified and we encourage the Board to adopt the rate designs that most appropriately reflect the realities of the current New Brunswick energy market place.

Finally, Mr. Chair, in rebuttal before I go to some of the questions raised by the Board, most significantly we note that no party has argued against the closing of the GS II rate or the elimination of the penalty aspect of the GS II rate if a GS II customer wishes to switch to alternative fuels. Separate and apart from the actual rate design for the GS classes these two items have attracted no intervenor opposition. I believe Mr. Hyslop said today he supports EGNB's proposals in this regard and we believe they are clearly supported on the evidence and we commend those proposed recommendations to the Board.

Mr. Chair, if I could now go to the questions.

DR. SOLLOWS: Just before you do, Mr. MacDougall. We heard

earlier that the burden of proof was on the applicant for any proposed changes in rates and tolls and charges. Presumably that also extends to Intervenors who make proposals. So how is it relevant that the fact that no one challenged it -- how is that fact relevant to the decision if the burden of proof rests with the proponent?

MR. MACDOUGALL: Oh, I think it's extraordinarily relevant, Commissioner Sollows. First the burden of proof would switch to an Intervenor if an Intervenor made proposals, and the proposal that we are making -- certainly Dr. Rosenberg and EGNB has put considerable evidence on the record, so we believe that we have easily met our burden of proof.

But then what happens is usually a Board, absent its own concerns, unless the burden is shifted by someone raising a concern, generally it's considered that a party has met its burden, you know, absent an actual, you know, lack of evidence or support for its proposal.

DR. SOLLOWS: Okay.

MR. MACDOUGALL: So we believe we have met our burden and the Intervenors certainly have raised no issues with it and I commend that fact to the Board that these points were not challenged and in fact as I state I believe Mr. Hyslop accepted.

But I am delighted to speak to legal issues at anytime. Because on that I'm much better than the PPA's. So more questions like that will be welcome.

DR. SOLLOWS: I can always provide those. I'm just as naive.

MR. MACDOUGALL: So Mr. Chair -- and I will try to go through these fairly quickly. I'm just trying to pull up the questions.

The first question you had raised was you requested any party who had made specific proposals to provide legislative authority. I would like to just briefly reiterate the proposals that EGNB made. And I will do this very quickly.

We had filed our argument with you. And in fact the proposals are laid out on page 19. There were six specific proposals and then two additional proposals regarding potentially moving forward with seasonal rates.

CHAIRMAN: And, Mr. MacDougall, you don't need -- we certainly have all the legal authority to deal with the various rate classes, et cetera. So don't worry about that.

MR. MACDOUGALL: If that wasn't your concern that is terrific, Mr. Chair. I felt these were all fairly self-explanatory. Section 101 in many of its manifestations we

believe covers all of our issues.

So I will skip through that to come to GS II. What would be an acceptable timetable for the merging of the rates? We are delighted that you asked that question. In fact in our argument we had indicated three years. So we are not going to deviate from that. We do believe three years is appropriate. And of course at that time we stated that we felt that it could be staged or otherwise.

Our key comment in this regard, Mr. Chair, is that we believe the first step should occur in this hearing. And that first step would be to close the GS II rate to stop the bleeding, as I believe was referred to by both Mr. Marois and Mr. Harrington and to remove the penalty aspect of the GS II rate if a GS II customer wishes to shift some of its load.

We think those should occur immediately. Because they are the fundamental and important aspects with respect to the competitive market right now. And they would also put us on a much better footing for an eventual merger of the rates.

So we commend those two proposals and continue to commend them to you. We then believe the merging could occur in three-years staged if desired to do so by the Board.

Mr. Chair, with respect to your third question where you had said Disco has -- the main driver is the fuel costs, and in future years if fuel costs were to decrease what could you as the Board do?

This is a little bit of a thorny question. So I will raise a couple of sections that I'm not sure my other colleagues have mentioned yet, at least bring them to the attention of the Board.

Section 127(1) provides that the Board shall have the right to monitor the electricity sector and may report to the Minister on the state of that sector at anytime. We think that that is important, that monitoring role. Certainly if you were noticing that you felt fuel costs were coming down dramatically and Disco had not come in for a rate increase, you could report to the Minister.

And I do note in that regard that if we go to Section 101(5) that the Board, at the conclusion of a hearing shall approve charges, rate and tolls if satisfied that they are just and reasonable, or if not so satisfied to fix such other charges, rates or tolls as it finds to be just and reasonable.

And I think it is very important that if Disco files a rate schedule but then it comes to the Board's attention or the Board is of the view that the rates do not continue

to be just and reasonable, for whatever reason, that the Board would be open to commenting to the Minister.

DR. SOLLOWS: Mr. MacDougall, when you refer to the Section 127, monitoring of the electricity sector, it makes very specific reference to the market. And in this context I understood the only market to be at the transmission level in large industrial and wholesale customers.

So I'm wondering how that filters down through to authority to change or review the residential rates or the standard offer service rates?

MR. MACDOUGALL: Certainly, Commissioner. I think the reference to the market is in the including aspect. The section certainly starts out very broadly.

The title is "Monitoring of Electricity Sector". The first part of the section the Board shall monitor the electricity sector, may report to the Minister on the state of the electricity sector. Very broad. And then it goes on, "including".

So I think the legislature wanted to make sure there were certain items they wanted to ensure the Board it was aware of. But the first part of the section is very inclusive.

I would then go on with respect to the monitoring aspect and particularly note for the Board, there is one

section that talks directly about this issue. However, it talks about it in the context of the Lieutenant-Governor-in-Council. And that is Section 103(1).

And Section 103 says, Review of Rates, Charges and Tolls. And there the Lieutenant-Governor-in-Council may request the Board to review any of the charges. And then the Board shall, on receipt of a request, direct Disco to file an application.

So I would suggest that if the Board responded to the Minister saying that they felt there was an issue, it then may be incumbent on the Minister to respond to Cabinet, who might then ask you to make the request.

It is a little circuitous. And it does require the intervention in the middle of Cabinet. But maybe if you make the request right they will make the request back to you. So I just raise that to indicate that that section is there.

And obviously the concept of just and reasonable rates in other jurisdictions would allow I think people to bring the applicant in. As you say, this Act is new. We are just working around the language. So I just point that out for your benefit.

Finally, the last section that I think we should be aware of -- and these sections were mentioned by Mr.

Hyslop but in a different context. It is the powers of inquiry under Section 128(1).

And this says, The Board may on its own motion or on a complaint inquire into and hear any matter. And then I will just -- I won't go through Sections (a) (b) and (c). But the powers of inquiry section here is quite broad. And if you wanted to on your own motion hear a matter, and if you thought it was in the public interest, I would commend to you again the sections of Section 128. And I'm sure we would all have a bit of a greater debate at that time as to what they really mean. But those are the sections I think that I would like to point out to the Board for its consideration.

Mr. Chair, just before I go to a couple of the comments from this morning, the exit fees and otherwise, there seemed to be a small expression of disappointment from both yourself and later by Commissioner Dumont in the hall that I had not addressed Section 156. I will accordingly address Section 156 to give my thoughts on it.

And again what I'm -- the reason I'm doing that is to maybe bring another perspective to the Board just so that it can keep in mind -- it may be a little different than some of my colleagues. And I have not yet heard Mr. Morrison on this issue. It is very clear that the

commencement of Section 156 says for the purposes of the first hearing.

Let me just read out the pieces that deal with the power purchase contracts. Because there is other language in here. So what I'm going to try and do is segregate it and read it as it would read with respect to the item in issue.

For the purposes of the first hearing before the Board, any expenditures arising from power purchase contracts are deemed to be necessary for the provision of the service.

The issue, as I see it, Mr. Chair, that you have to keep in mind is that the power purchase agreements and the expenditures arising from them are long term in nature. And although we only have the first hearing now, if Disco's costs in the future are disallowed because one believes that the power purchase agreements aren't correct, Disco still has to pay Genco. That is a thorny issue.

They are long-term contracts. So unless they are changed, they have been entered into. Once the costs under them were approved in this hearing, which presumably they will be allowed to be passed through in the terms of Section 156, which we believe is all clear now, in

subsequent hearings any refusal to allow some of those costs could obviously create a serious issue if the power purchase agreement remains and Genco wants to be paid. So I guess in part that is why I had raised last week the issue that one may have to look at it in the context of an application at the time. But I would point that out to you, that the power purchase agreements unfortunately are contractual arrangements which themselves don't appear to go away after the first hearing.

And again I just -- I have no great resolution on that. But again we do not have an issue in front of us today to deal with on that. But I raise it for your consideration.

Mr. Chair, just quickly on the point you raised this morning about if the Board came up with rate structures. Certainly putting them forward to the parties for comment would I think be somewhat of a different process that has occurred.

But if the Board felt that that was useful, if they felt they wanted comments so that they could get feedback from the parties with respect to revisions they may make to certain proposals or hybrids of proposals, absent their accepting proposals exactly put forward, obviously we would welcome the opportunity to make comments on those.

And I think if the Board felt that was useful, clearly we would try to respond.

We would hope in that regard the parties would be given a little bit of time. This stuff, the rate design is complicated. And sometimes one has to do some runs and other analyses, as Commissioner Sollows at least is fully aware. And that might have to be done in order for parties to make responses. So we would request a reasonable amount of time to respond.

With respect to the exit fee issues, in essence our position is pretty much in agreement with what was stated by Mr. Roherty earlier today.

The only point I do make is that one of the sections dealing with the exit fees, Section 79, does specifically contemplate the standard service supplier or a municipal distribution utility or an industrial customer applying to the Board to set a fee.

So it does state the parties who can make the application. Certainly Mr. Roherty stated that a proxy applicant could go forward. I don't think that would be outside the spirit of the legislation. But I would just like to reiterate our views.

We totally agree that Sections 78 and 79 are just disjunctive. The notice only has to be given once a

customer really wants to leave the system.

But I also believe that Section 71(9)(1) and Section 79(2) are disjunctive, i.e. you don't need the customer who has necessarily decided to leave the system to make the applicant.

If you wanted to have a proxy industrial customer or if Disco wanted to bring forward its proposals, you know, I would think we all want to get at least a mechanism in place.

We are not going to set a dollar fee because that changes over time. But what we want is a mechanism or a formula or a methodology. I would commend Disco to do that as soon as it is good. And I would assume they would like to have that in place so the parties can act accordingly.

Mr. Chair, just quickly in relation to some of your questions this morning to Mr. Hyslop. And I had not prepared rebuttal on this. And I'm sure it is an issue more for the applicant.

But considering your questions I do have to admit that I have some sympathy with the applicant however they may respond to certain aspects such as this penalty payment or the OM&A $5 million reduction.

The burden is on the applicant. But it has to be

based on the evidence. And if one challenges something and asks for a significant disallowance either on prudence or by way of penalty or used and useful, it is incumbent on a party to create an evidentiary base on which to make those challenges.

I certainly in my practice have not seen boards lightly make penalty adjustments without serious challenges. If there is there is a lot of jurisprudence put forward on what has to be proved. There is a lot of evidence led. Likewise with respect to OM&A disallowances, usually there are challenges to specific items. There is discussions as to why the utility requires the funds. And other parties try to raise a concern.

Absent that it is very difficult I would suggest for the Board just to be able to say well, we don't think we made your case. Although possibly no one, including the Board, asked questions on it.

However, to the extent some issues have been raised on the OM&A piece, and I haven't been here throughout, it would certainly be open for the Board to make its own determination whether or not Disco has met its burden.

Mr. Chair, finally in regard to comments this morning with respect to the hydro adjustment, and I think in this

context you referenced to Mr. Gorman that you considered that this may be somewhat of retroactive ratemaking.

Again just for the Board's information, I would refer you both to Section 101.3 and to the definition of revenue requirement, and to just briefly go there.

Section 101.3 is the section that says that the Board when considering an application base its order on charges, rates and tolls to be charged by Disco on all of the projected revenue requirements. So you shall base it on the projected revenue requirements. And the definition of revenue requirements refers to annual payments. And I will just quickly flip to that.

Revenue requirements means the annual amount of revenue required to recover projected operation, maintenance and administration expense, amortization expenses, taxes and payments in lieu of taxes, interest and other finance-like expenses and a reasonable return on equity. However, it appears very clear that this is the annual amount requested by the applicant to cover its expenses. Whether or not one can go back into another period I think would be a bit of a stretch under the current language in the Act, although the issue of setting up a deferral account or something like that so that the utility would have that as a mechanism, that's one thing

that actually trying to carry funds from one period into another, I certainly know when utilities do it there is always issues raised. Sometimes it's allowed, sometimes it isn't. But I think one clearly has to look at Section 101.3 and the definition of revenue requirement if you are making a determination on that.

Mr. Chair, in closing I would like to thank the Board and the Commissioners, all of the counsel, Board staff, and all the staff for Disco and the other Intervenors for being very helpful throughout this process. And on behalf of EGNB we believe we have an important perspective to bring. We believe it's very consistent with the energy policy and consistent with energy consumers as a whole in New Brunswick, including electricity consumers, and we hope our evidence throughout has been helpful to the Board.

Thank you very much.

CHAIRMAN: Thank you, Mr. MacDougall. I believe, Mr. Lawson, you are next.

MR. MACDOUGALL: Mr. Chair, before I leave, because you had not required me to go into arguments on proof of our revenue requests, I do want to state at least throughout this process I hadn't brought law. I have in fact brought law on that point. I won't use it now. I had been trying

to use a nice old Supreme Court of Canada case from back in the '60s. The ADCO case is much newer but I thought Mr. Justice Rand was worthy of mentioning in these proceedings. So I will mention him now anyway even though I didn't use it in my argument.

CHAIRMAN: Do you have a copy of it there?

MR. MACDOUGALL: I do.

CHAIRMAN: Being a fan of Mr. Justice Rand far more than some of the present members of the Supreme Court, I would appreciate that being filed with the Secretary.

MR. MACDOUGALL: I will file that and I will commend you to look at page 5 of 5 which I think is a useful comment on tolls and charges. I also note that a Mr. MacDougall was one of the lawyers in that case, deriving out of Moncton working for the CNE, if anyone remembers back that long. Thank you, Mr. Chair.

CHAIRMAN: Thank you.

MR. MACDOUGALL: Mr. Chair, I also had a copy of my prepared comments and I will leave that with Ms. Legere and for parties here as well.

MR. LAWSON: Thank you, Mr. Chairman, Commissioners. I will try to be brief.

With respect to -- I might add in my argument on Monday I did not address the issues of Sections 79 and 156

and the reserves issue. So I will very quickly address those.

With respect to Section 79 and the exit fees, I guess I would just say we would agree with the comments made by the NBSO this morning in all respects. That they had addressed exactly the points that I had intended to address.

With respect to Section 156 and its -- the qualification with respect to the first hearing issue, we would agree with most but not all of the parties. We would not agree with EGNB's interpretation. We do believe that in fact this would apply with respect to only this hearing this limitation. Notwithstanding that view, we would certainly perhaps encourage the Board to consider encouraging the legislature to clarify that point so as not get into a debate next time.

CHAIRMAN: I suggest your client do the same.

MR. LAWSON: I won't disagree, Mr. Chairman, to the extent that we have any influence either.

On the issue of reserves, I guess our only comment would be that we see merit to establishing a deferral account in order to try to smooth out some impact of extraordinary hydro flow issues.

With respect to that or related to that we would of

course comment again there in fact is no competitive market place nor is there currently anticipated to be one. And therefore Genco basically is a monopoly in supplying power to Disco. Yet it is unregulated. And again with sort of encouragement we would suggest the Board consider encouraging government to at least address the issue of bringing Genco back into a regulatory authority of some sort in order to be able to look through the true cost arrangements.

So I would like to then comment on a few comments specifically made by the Public Intervenor in his argument on Monday.

In his argument he wants to allocate any reduction in revenue to be applied -- some of it to be applied, other than on an across the board basis to all classes. In our view this would be wrong, unfair to the affected classes and inconsistent with the principles of cost causation. While we think that a fully embedded cost study must be done to allocate costs based on complete information, until then any revenue requirements need to be allocated in a manner that is both fair and consistent.

Secondly, on the issue of the point raised about interruptible power having to remain in a class if they switch into the interruptible power, that they remain in

that class for five years. First I would comment that there isn't any switching in class if there is in fact interruptible customer is within the class of the large industrial. So there isn't any actual switching of classes.

But in any event, we would question whether or not this is an appropriate action to take. Seriously question it. First we do have some question of whether or not the Board does have authority. Looking I was unable to identify any basis upon which that authority might exist.

But in any event we would certainly say that before a decision was to be made on this issue our mandate as CME here has not been to address that issue so we don't -- can't express the views of the Board -- of the members on this issue, and we think it would be important before any decision would be made that any potentially affected customers would be given an opportunity to be heard on this issue.

These are legally binding contracts that have been entered into between Disco and certain of its customers. As I mentioned in argument, those were in fact agreements reached between two third parties that are operating at arms-length. The only person, the only witness who has addressed this issue at all in this whole hearing is Mr.

Knecht. There wasn't any cross examine of Disco witnesses that I am able to identify on the issue as to whether or not they think this is of grave concern.

Mr. Knecht seemed to have picked it I will say out of the air and chose it as a subject matter to be addressed. And we submit there is no evidence other than his view that this mightn't be a bad idea of the need for this.

In fact there is sort of the intrinsic value of interruptible and surplus power as both its flexibility to its customers and the benefit that it offers to the utility itself not having to have more firm power locked in.

If there is a five year term I would submit that it would be unrealistic especially in today's economic environment to expect that any customers would be willing to make a five year commitment. There is too much unpredictability.

Therefore, we believe it would neither be appropriate nor required, other than Mr. Knecht's indication, no evidence would be required to do that. But if the Board is going to entertain this we would certainly suggest that it be not decided upon but instead at best deferred to Disco to review the issue while it reviews other issues that the Board have asked it to address over the next year

with respect to interruptible power.

Comment with respect to a couple of other points raised by the Public Intervenor. I thought that the eloquence of the Public Intervenor on Monday was very good when he used the term that the large industrial customers felt they were -- and the term he used was whacked by the December 2005 decision allocating costs.

Well I hadn't chosen such an eloquent term but I think it fairly accurately describes what in fact the large industrial customers do in fact feel. And he said he agreed with the CME in that regard and pointed out that he thought that it was probably because of the lack of information that was available to this Board in making its decision on the cost allocation.

And again as a result of that to address that we would encourage the Board to seek a fully embedded cost study in order to get the sense of what in fact should be the proper allocation of costs. As I think it was Mr. Booker pointed out very eloquently in his argument on Monday, there have been significant changes in the Disco operations and the NB Power operations in the last 15 years since that decision.

Also there seems to be a desire by some Intervenors to seek a greater share of the required revenue from the

industrial classes, greater than that sought by Disco that is. The real risk is that there will be a loss of manufacturing customers and a resulting loss of jobs. In other words, this would mean that there would be less industrial customers for the municipalities to strongly support, as they have indicated they do, and we wouldn't want that and I'm sure they wouldn't.

We would also like to just finally emphasize the CME would like to see measures taken to minimize rate shock, not only for our members but for all of the utility's customers.

Just final two comments with respect to the three points that were raised by the Board, asked to be addressed. We don't have any further comment that we have to make with respect to any our points, anything further that we can add with respect to those. We would -- if the Board is looking for authority with respect to requesting a fully embedded cost study, we would believe that Section 130 again would have a broad enough power to enable that, or Section 128 under the Investigation of Powers.

Lastly, with respect to the question of the Board looking for input prior to rendering its decision for any further comments and submitting any further comments if there are going to be any changes, we would say the Board

has the right to make its decision with respect to those matters and we would have no disagreement with doing that as long as there is sufficient time for input.

We would like to very much thank the Board for both its patience in dealing with this matter generally, and more importantly I would like to thank the Board and all those here who have had to suffer with my trying to get up to speed with these issues as the Johnny-come-lately. I haven't caught up with you folks yet but I figure if I stayed here another six months or so I will be up to speed.

CHAIRMAN: But you would be all alone.

MR. LAWSON: That's right. Which is why I would be up to speed.

DR. SOLLOWS: You suggest bringing the issue of rate shock to the fore again. I wonder do you or your client have an opinion as to what constitutes rate shock?

MR. LAWSON: I think -- no. We do have opinions. That's the problem. They vary. Obviously everybody has an opinion. Some believe that rate shock is anything above zero. So I could tell you the range, but I don't think it's going to be of much help to be honest with you, Commissioner.

DR. SOLLOWS: That's fine. Thank you.

CHAIRMAN: Good, thanks very much, Mr. Lawson.

MR. LAWSON: Thank you, Mr. Chairman, members of the Panel.

CHAIRMAN: Go ahead, Mr. Morrison.

MR. MORRISON: Thank you, Mr. Chairman. I'm going to deal first with an issue that came up this morning and it's in relation to the OM&A costs, and actually if my recollection is correct, Mr. Hyslop did not raise the question of the burden of proof in his argument the other day but I am prepared to deal with it.

With respect to OM&A, yes, the applicant does have the burden of proof and we met that burden of proof. We filed evidence, detailed evidence on the OM&A costs. That evidence was under oath. We responded to, by our best estimation, close to 2,000 IR requests, many of them dealt with OM&A questions. And probably most importantly, and it is the point I want to make, we put a panel of witnesses before this Board and the Intervenors to be subject to cross examination. And they were ready, willing and able to answer all questions dealing with OM&A costs.

Both Mr. Lawson and Mr. Hyslop chose not to do that. Now Mr. MacDougall spoke about some legal issues this morning and there is an inference that is to be drawn from that. And the inference is if you don't challenge a

witness on cross examination, then there is an inference to be drawn that you accept that evidence.

I would say right now on the OM&A issue that it's -- the Intervenors can not now complain and challenge the OM&A costs if they didn't take the opportunity to put it to the witness on cross examination. So that is all I am going to say about that other than there was one comment made that there was some questioning on executive salaries and I don't recall that there was any questioning on executive salaries.

Mr. Hyslop raised, in his argument on Monday, the issue of the economic dispatch of the NUGs. And of course this goes to the issue that Commissioner Sollows and I believe, Chairman, you also raised. And while I do have some constraints on how far I can go with respect to dealing with this issue, I believe there is still some misunderstanding of the issue.

I think it is very important that everyone understand that the NUGs are generally not dispatchible. The NUGs consist generally -- well they do consist of run of the river hydro, cogeneration facilities, and one combined cycle gas plant which is Bayside.

The run of the river hydro is not dispatchible for obvious reasons. Similarly, the cogen facilities can't be

dispatched because they are just a byproduct of the process energy. So the only facility that may have some dispatchibility is Bayside. But it is important to remember that that is only available during the peak winter months when the energy is needed to meet in-province load. And it is only in very unusual situations when Bayside would have any significant operational dispatchibility.

I am going to deal with the issue of gradualism because it came up in Mr. Lawson's argument on Monday and it came up in a question from you, Commissioner Sollows, just a moment ago. And it has been suggested that rate increases should be implemented in stages over a period of time in order to blunt impact on ratepayers.

I think we have to be cognizant of Section 101(3) that says that the Board must set rates based on all of the projected revenue requirements for the test year. And Mr. MacDougall and others have alluded to the definition of revenue requirement, which means -- which is defined in the Act as the annual amount of all revenue required. And as I believe the Chairman has pointed out, and I referred to it in my argument on Monday, this Board has an obligation to ensure that the utility recovers its justified revenue requirement.

So it is my submission that fundamentally any decision must enable Disco to recover the revenue requirement for the 06/07 year.

Now a decision by the Board to phase in the recovery of the 06/07 revenue requirement over a number of years, for example, if that was done it would have to allow Disco to recover all of the revenue requirement for 06/07 plus any costs of that deferral, interest costs and so on. In addition, Disco would be permitted to -- would be entitled to recover its full revenue requirement during the phase in period in addition to any other amounts that you may order.

And as you know, I think the witnesses have pointed it out, further cost increases in the way of fuel, increases built into the PPAs, the Lepreau refurbishment, and I think there have been some others have mentioned, can probably be expected over the course of the next few years.

I raise the point only to say that the phasing in will only exacerbate the situation, or could exacerbate the situation. And the other point I would like to make is that anything the Board might do must be done in a way that respects the other provisions of the Electricity Act.

I would refer the Board -- and there is a very good

recent decision from the Federal Court of Appeal on what I would call gradualism, if you will or phase in or whatever you want to call it. And it is TransCanada Pipelines Limited v. The National Energy Board. And it is a 2004 decision. And it is from the Federal Court of Appeal. And I am just going to quote from paragraph 43.

"It may be that an increase is so significant that it would lead to -- what that refer to as "rate shock" -- if implemented all at once and therefore should be phased in over time. It is quite proper for the Board to take such considerations into account provided that there is, over a reasonable period of time, no economic loss to the utility in the process. In other words, the phased in tolls would have to compensate the utility for deferring recovery of its costs of capital. In the end, where a cost of service method is used, the utility must recover its costs over a reasonable period of time regardless of any impact those costs may have on customers or consumers."

So as you deliberate with respect to the issue of gradualism, there are two points that come away from that. One is whether it is done now or done later, the 06/07 revenue requirement must be recovered and it must be recovered over a reasonable period of time.

During Mr. MacDougall's argument, Commissioner Sollows

raised the issue of the possibility of reducing the net income requirement if the Board felt that management made some poor decisions. What I would like to say about that is, generally based on regulatory principles, the Board really can't do that. The appropriate course is to disallow a particular cost if that cost is imprudent. And as I will speak to you shortly dealing with Mr. Hyslop's argument, the onus of proof with respect to imprudence is on the party challenging the costs.

And as Mr. MacDougall outlined, it is a very high onus. And I would say that there is no evidence on the record of imprudent costs and certainly none that would meet the legal standard. And if you can give me a second to get a drink of water.

Actually Mr. Lawson raised it again this morning. And it is an issue that I find troubling.

Both Mr. Lawson and Mr. Hyslop claimed in their final arguments and again this morning, with respect to Mr. Lawson, that there wasn't sufficient generation cost information on the public record to enable the Board to do the appropriate cost analysis. And I believe Mr. Lawson said that they felt like they got whacked during the CARD Decision.

But I would point out -- and not to be too critical --

but Mr. Lawson nor his client was an active participant in the CARD Hearing. But in any event it is my submission that virtually all of the generation cost information has been put before this Board.

I mentioned earlier that this includes over 170 exhibits, close to 2,000 IRs, which we all remember. And importantly detailed generation cost information from Genco on a plant by plant basis. Also all of the PROMOD inputs and outputs which is really the heart of determining the costs that flow through the PPA have been put on the record.

The only detailed cost information -- I will concede this, the only detailed cost information which was not put on the record was the underlying cost information in the NUGs. And we all know why that happened. But it is also important to point out that even the NUG cost information was provided on an aggregated basis.

Now I would like to turn to Mr. Hyslop's argument of Monday. In his argument Mr. Hyslop asked the Board to issue a report card. And he wants a report card on the policy, the legislation and the rate application. And you will recall that the first half of Mr. Hyslop's argument related to the report card on policy and legislation.

Let's be clear here.

I do not speak on behalf of the Legislature of the Province of New Brunswick nor do I have authority to do so. Accordingly, I will not address any of the issues raised by Mr. Hyslop with respect to either the policy or the legislation.

And in the regard, if the Board is looking at commenting, as I'm sure it will on some of the policy implications of restructuring, and given the fact that it is very late in March, if possible I would urge the Board to deal with the revenue requirement now and issue a decision and then turn its attention to any recommendations it may have relating to the report card on the policy and legislation.

I do that for very practical purposes. And that is to possibly alleviate the delay in setting rates. But I won't dwell on that any further.

But I will deal with Mr. Hyslop's argument on doing a report card on the rate application. And essentially what Mr. Hyslop has done, he has asked that the revenue requirement be reduced in four ways.

And the first is the reduction for imprudence with respect to the Coleson Cove refurbishment. And he has referred to it as a penalty. The second is the disallowance of Disco's entire request for net income, all

of it, 14.4 million. Third is a reduction of OM&A expenses of $5 million. And finally a transfer of funds from the 05/06 surplus into a reserve account to be credited against the 06/07 revenue requirement.

Now Mr. Hyslop referred to the Goodman text on this penalty. I have read the Goodman text. And I read it on Monday afternoon. And it is important to note that what the Goodman text deals with is penalties that may be imposed by a board where a party fails to follow a board order.

And as the Chairman quite properly pointed out, Section 146 of the Act already deals with penalties. It may -- it should probably be revisited since the penalty ranges between 50 and $500. I suspect CPI wasn't factored into that when it was drafted probably in 1928.

But I am going to turn to Mr. Hyslop's so-called Coleson Cove penalty. He is asking that the revenue requirement be reduced by $7,144,500 due to imprudence with respect to the Coleson Cove refurbishment.

It is important to note -- and I would suggest that this is probably enough to dispose of the matter -- that there is absolutely no evidence in support of this financial reduction. In fact, and I'm quoting from Mr. Hyslop, I think he said on Monday, there is no

justification for it. And I would suggest that that in and of itself, that is enough to dispose of the matter.

However, I think because of the amount involved that I will go further. The underlying thrust of Mr. Hyslop's Coleson penalty is that the refurbishment of Coleson Cove was imprudent because the utility proceeded with the refurbishment without a binding contract with BITOR.

It is New Brunswick Power's position that there is a binding agreement with BITOR. And it has sued BITOR for breach of that contract. That litigation is ongoing. And it is very complex. Already there has been more than 140,000 pages of evidence filed. And I understand that a truckload more is in the works.

In order to permit Mr. Hyslop's request this Board would have to determine that there is no contract. With respect, with all due respect to the Board, you don't have the jurisdiction to make that determination.

That jurisdiction lies with a court to determine whether there is or is not a valid contract. And it is the subject of ongoing litigation. Even if you had the jurisdiction, there isn't a scintilla of evidence on the record for you to make that determination.

Mr. MacDougall referred to this briefly this morning about onuses and so on. But the law is clear that

investments are deemed to be prudent unless demonstrated to be otherwise.

An allegation of imprudence must be supported by evidence that creates a serious doubt regarding the prudence of the investment. In short the onus of proof is on the party challenging the prudence of an investment to offer compelling evidence as to imprudence. The onus I would submit is very high.

The only evidence, if you can call it that at all, is an excerpt of evidence filed in the OATT Hearing, the transcript of that, and an unsworn statement made in the Public Accounts Committee. The latter isn't evidence at all I would submit.

Mr. Hyslop filed no evidence on the issue and did not offer up any witnesses for cross examination. And I would remind the Board, and I'm sure you are very aware of this, that it is very dangerous for a board to rely in any way on the statements offered up by Mr. Hyslop or to accord them any weight whatsoever.

And I would refer to a very recent, fairly recent case out of the Supreme Court of the Yukon. And it was City Furniture Limited versus Yukon Liquor Corp.

And Mr. Justice Veal at page 26 of that decision said "It is improper to make reference to a previous

hearing on a different issue and rely upon evidence in the earlier hearing as a basis for a decision. It violates the principle that a party must be able to hear the case against it and be afforded an opportunity to respond and challenge the evidence."

In short there is no evidence on the record whatsoever to support Mr. Hyslop's allegation of imprudence and certainly none that would meet the legal standard.

I know I have been a little bit long-winded about this. But it is an issue that I believe should be flushed out fully. Really the matter is already cited by Section 156. And the Coleson Cove refurbishment costs are included in the capacity payment and the vesting energy price in the PPA. These costs under Section 156 are deemed to be imprudent, and not to sound like a broken record, but must be accepted by the Board.

In short if the Board imposed the penalty sought by Mr. Hyslop it would do so in contravention of the Electricity Act and in my submission in contravention of the common law.

Now I'm going to turn to the second reduction which Mr. Hyslop is seeking. And that is for an elimination of the entirely of the net income. I will not review my argument on the justification for Disco's net income. I

did that on Monday.

But I would remind the Board of Ms. McShane's compelling evidence on net income including a rate of return on equity based on the stand-alone principle and that it is a key objective of restructuring and is embodied in the Electricity Act.

But I would note, however, that Mr. Hyslop's proposal does not even accord with the Board's 1991 decision which allowed a return of 1.25 times interest coverage. And again I would remind the Board of the Chairman's comments where you basically said that it is appropriate for you to look at the economics of the utility itself and set those rates at an overall level that will return sufficient income to the utility so that it will be able to operate as a healthy enterprise and when necessary go out to the public markets and raise more money to provide the services for which it has the monopoly franchise.

Mr. Hyslop's third request, he is recommending that the Board reduce the OM&A component of the revenue requirement by 5 million. And I have already talked about the OM&A requirement. On Monday he suggested that this will provide an incentive to Disco to sharpen its pencil.

Now it must be remembered that the revenue requirement for 06/07 already assumes close to $4 million in cost

reductions. And Mr. Marois indicated that it would be a challenge to meet this objective.

So there already is a built-in incentive. And I would just remind the Board that Mr. Hyslop was questioned by Commissioner Dumont on Monday. And Mr. Dumont asked him, Mr. Hyslop, what he based this $5 million estimate on. Ms. Hyslop said, and I quote, "And I will be honest. At the end of the day I just said the $5 million sounds right. I pulled it out of the air." I believe there is enough said on that issue, Mr. Chairman.

Mr. Hyslop is also recommending that the Board establish a deferral account, and I know this is of interest to the Board, and accumulate in it the hydro adjustment and some other adjustments.

Mr. Hyslop is suggesting that the Board then place the hydro and other adjustments from 05/06 fiscal year in this account and then use some 25 million of that money to offset rates in 06/07.

I would like to point out that his calculation is based on what I would call the old methodology of the hydro adjustment as opposed to the new methodology.

But in any event, I would like to point out that Disco does not oppose the establishment of an adjustment or a deferral account.

As indicated in our final argument on Monday, any such account would have to be established prospectively, that is before the start of the fiscal year in which it is to be effective. So it would have to be established for 06/07. So you could order, in my submission, the establishment of a deferral account in 06/07.

But let's assume for a minute that there actually was a deferral or adjustment account that existed now in this current fiscal period. Any surplus in 05/06 could not be used for the purpose of offsetting rates in 06/07. It could be used for offsetting a negative hydro variance next year. But it can't be used to reduce rates.

And there are two reasons why this cannot be done. First, as I mentioned earlier, Section 101(3) says that the rates must be set using Disco's projected revenue requirement. It is prospective.

And it is directly, or perhaps indirectly, but in my argument directly retroactive ratemaking. It would be the same as if there was a loss this year and you were to take that loss and increase rates for next year based on losses that incurred in a previous year. The principle of retroactivity is that a regulator cannot losses or gains from a year that predates the test year.

I'm almost finished with my review of Mr. Hyslop's

argument. I have one more point on that. And then I will get to the questions that the Board has asked us to address.

Mr. Hyslop is asking that the Board reduce Disco's revenue requirement by 3 percent to cover off the possibility that Disco imposes a 3 percent rate increase on top of whatever this Board awards.

First let me be perfectly clear. And I will put it on the record. The Act is clear that Disco cannot do that. A proper reading of Sections 98 and 99 of the Electricity Act make it clear that in any fiscal year Disco can either take an increase that does not exceed 3 percent or to apply to the Board for an increase. It can't do both.

Essentially what the Public Intervenor is asking this Board to do is reduce the revenue requirement now just in case Disco does something in the future that is contrary to the Act. To me that proposal is without any regulatory precedent or principle and is fundamentally unsound.

I am going to turn now, Mr. Chairman, to the specific questions that the Board has asked the parties to address. And the first is, of course, foremost in everybody's mind and that is the survival of Section 156 following the conclusion of this hearing.

The Board has asked the parties to address the issue

of whether Section 156 continues in force after the conclusion of this hearing. The issue is the interpretation of the term "first hearing" as contained in that section.

Disco agrees that Section 156 essentially ceases to exist after the conclusion of this hearing. However, it is Disco's position that the effect and purpose of Section 156 lives on.

If there was no Section 156, then this Board would have reviewed the prudence and reasonableness of the assets transferred by Transfer Order and the costs flowing through to Disco in the PPAs. And the Board would have undertaken that review during the first rate hearing after restructuring. In short, during this hearing. Following that review, the Board would have come to the conclusion -- would have come, sorry, to conclusions regarding the prudence and reasonableness of those costs. Once the Board made those conclusions, it would not revisit those issues in subsequent hearings, unless there was a significant change in circumstances. In short, the Board's conclusions regarding the prudence and reasonableness of those costs, once made in the first hearing, would have had lasting effect.

What Section 156 does is substitute the Legislature's

judgment on the prudence and reasonableness of those costs for that of the Board. Rightly or wrongly, that is what the section does. In short, the Legislature has dictated the findings that the Board would have made in the first hearing. However, once made those findings have lasting effect. And that is consistent with the nature of the costs in issue.

Mr. MacDougall alluded to it this morning. Section 156 deals with the transfer of assets, the value of which once set or by their nature of long term decisions. Section 156 also deals with the PPAs, which are long term contracts. The determination by the Legislature that these costs are prudent, must endure in the long term.

CHAIRMAN: Mr. Morrison, following your logic, what about the service agreements between the corporations? For instance, if Holdco provides legal services on an ongoing basis to the various subs, and they establish an hourly rate for the lawyers in Holdco, which is exorbitant by New Brunswick standards, do you mean to tell me that the next time out we can't look at that and say that's improper and you got to reduce it with the knowledge of the New Brunswick marketplace?

MR. MORRISON: I haven't looked at it with respect to the service agreements specifically, Mr. Chairman. I was

dealing largely with the costs that flow through the PPAs.

CHAIRMAN: Well, the service agreements were easy. And that's why I brought them up. But I can't believe that the Legislature would not want us to be able to look at the reasonableness of inter-corporate transfers and that goes right -- not inter-corporate transfers, but what they pay for inter-corporate services, the shared services.

MR. MORRISON: But those contracts, Mr. Chairman, will change over time. And as they change, of course, they would be subject to review by the Board.

CHAIRMAN: Well, okay.

MR. MORRISON: On an ongoing basis.

CHAIRMAN: All right. Thank you. Carry on.

MR. MORRISON: To conclude that the effect of Section 156 does not endure beyond this hearing is in my submission, to render Section 156 meaningless. Yes, in a subsequent hearing the Board can revisit the reasonableness and prudence of the costs it could not review in this hearing, then the only effect of Section 156 is to delay the review. It is submitted that the intention of the Legislature in enacting Section 156 cannot be merely to buy time until the next hearing.

It is submitted that the clear intention of Section 156 is to deem those costs prudent in the same way the

Board would have done in the first hearing. And once deemed prudent, that issue would not later be reviewed. To conclude otherwise would render, in my respectful submission, Section 156 meaningless.

In his argument, Mr. Gorman referred to the cannon of construction, expressio unius est exclusio alterius and it rolls off my tongue very easily, Mr. Chairman, because my entire moot court in Law School was centred on that one clause, believe it or not.

But basically it means the expression of one thing is the exclusion of the other.

CHAIRMAN: I certainly prefer the reasonable man. That is a better argument.

MR. MORRISON: And I agree. The only reason I raise it, is all of those old canons of construction are really gone now. And the modern rule of statutory interpretation is set out -- and you can find it in a number of texts -- but the most often cited is Driedger on "The Construction of Statutes".

And basically what it says is there is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context.

And it goes on and it says, "An appropriate interpretation is one that can be justified in terms of

(a) its - 6302 - Mr. Morrison -
plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

I submit that the only interpretation which is justified in terms of plausibility and promotion of the legislative purpose is that the effect of Section 156 lives on after the first hearing and that the costs deemed prudent by Section 156 cannot be revisited in a subsequent hearing unless there is a significant change in circumstances.

CHAIRMAN: Mr. Morrison, how about the first words of the section, which say explicitly, for the purposes of the first hearing.

MR. MORRISON: And I agree --

CHAIRMAN: And it goes on to say that.

MR. MORRISON: And I agree with that.

CHAIRMAN: And doesn't say and hereafter shall be.

MR. MORRISON: I understand that. And that is why, Mr. Chairman, I am not here saying that Section 156 continues its -- what I would call its legal effect. In other words, when the Board reconvenes again on a rate application, Section 156, unless it is amended, won't be a matter that you will consider. My argument is that if you

look at what I would consider the intention of the Legislature, and again, whether you like it or not, is to substitute the Legislature's judgment on prudence with respect to these costs for that of the regulator, then from a practical point of view on a go-forward basis, once that benchmark is set, it ought not to be reviewed again in the next hearing.

Otherwise -- quite frankly, otherwise we have wasted a great deal of time.

DR. SOLLOWS: But isn't it equally plausible that the Legislature was really pressing it when it anticipated that this first hearing would be long enough without a prudency review and therefore constructed it in just this way so that we could get this hearing through and the revenue requirements taken care of in some maybe unreasonably long time but not forever and then come back to this issue later?

MR. MORRISON: That is certainly a possibility, Commissioner Sollows. And it is always difficult, of course, to know what is in the minds of legislators when they are passing Legislation.

I offer to the Board what I consider is a very practical interpretation of the Legislation. Because in my view, if it is otherwise, then we have really spent a

lot of time in this hearing that will have to be redone if we're not, quite frankly.

I'm not going to go further with it. Others have raised their arguments in connection with it and I will leave it at that.

I do have to deal with the question of exit fees.

MR. NELSON: Mr. Morrison, as to the judgment of the Legislature, you are taking one slant on 156. Also you used your judgment, or the corporation used their judgment on 37. On Section 37 of the Electricity Act where they disregarded Section 37 of the Electricity Act on the income tax payments.

MR. MORRISON: I am not going to argue with respect to what the intention of Section 37 is, Commissioner Nelson. I believe it is clear. My argument is basically I am making a statutory construction argument. Your issue is an entirely different one and that is a compliance issue.

MR. NELSON: Yes. Well as I say, for the first hearing it is, you know, pretty evident it just says the first hearing.

MR. MORRISON: I don't argue with what the words say, Commissioner Nelson. I am arguing on what I believe the Legislature's intent was in putting those words in place from a practical perspective.

CHAIRMAN: We certainly understand your position, Mr. Morrison.

MR. MORRISON: Thank you, Mr. Chairman. Exit fees was raised this morning. You will recall that my argument with respect to exit fees dealt with a different issue. And that was whether parties can negotiate, come to an agreement and then come before the Board and that is the context in which I made my argument.

Essentially Disco has no fundamental problem with Mr. Roherty's argument. I haven't had a chance to go through the Act to determine whether there are specific Legislative authority, whether Section 128 would give you the authority to order an exit fee application or not or whether it would fall into your general ancillary powers. But I guess what we would say is that if the Board finds that it does have the power to order that -- an exit fee application, Disco is perfectly prepared to proceed with that.

One option may be that because there has been some concern raised at least by one of the Intervenors that it may be difficult to have that type of cost information in a public forum, might be confidentiality issues for the customer and so on. Perhaps it would be appropriate for the Board to have a hearing that set out the principles

upon which an exit fee would be based. In other words, establish a formula, if you will, and then the particular dollars could be plugged in and an exit fee developed as customers choose to reduce their consumption.

CHAIRMAN: That certainly sounds like a generic hearing to me, Mr. Morrison. And the generics that we held in the early '90s, the five of them, there was no specific authority for the Board to call those hearings in the then Legislation governing the old NB Power Corporation. But NB Power Corporation submitted to the Board's jurisdiction and I would suggest to you that if you want to do something like that, then it would be up to Disco to come to the Board and say look, if you are prepared to have a generic hearing to establish this in any way at all and we look at all the aspects of it, then I think that the Board would be seized of jurisdiction and we could proceed.

MR. MORRISON: I would like to remind the Board of Mr. Marois in his evidence I believe in the cross examination said look, we have done some work with respect to the exit fee, but with this rate hearing and some other matters, it just wasn't a top priority because there is only so many bodies to go around.

But we are certainly not opposed to an exit fee application, whether that be done by generic or otherwise.

I just want to make that clear on the record.

The Board has asked the parties to address specific questions. The first is what are the provisions in the Electricity Act which the parties rely upon for the relief requested. I think it is very clear that we are requesting a change in tolls and it is Section 101(1) of the Act.

The second question is what would be an acceptable timetable for merging the GS I and GS II rates? Disco is of the opinion that the GS I and GS II rates should be merged within three to five years. This approach is consistent with Disco's current rate proposal. We believe balances the need to send the right price signal against the principle of gradualism and is in line with the Board's December '05 ruling to eliminate the residential declining block rate structure over a similar time period. In Disco's general service rate proposal, the gap between the two demand rates is reduced by 1/3 and Disco would continue to reduce the gap in future years. Disco would also reiterate its continued support of the original recommendation to close the GS II all electric rate to new customers. So in general a three to five year time period is what Disco is suggesting.

The third question is what authority, if any, is

available to the Board to protect ratepayers and to order a review of Disco's fuel costs and rates if fuel costs were to decrease significantly?

Again, I had a very short period of time to deal with this, Mr. Chairman. However, there may be authority under Section 128. I know that we had some discussion about Section 128 last year and there is a question whether specific provisions override the more general provisions. It is a more general provision. However, it is possible that the Board could assume authority under Section 128. Mr. Hyslop referred to the Atco case I referred to in my argument on Monday. Generally speaking, the Supreme Court of Canada in that case basically said that where there are specific powers for ratemaking, that the Board has a common law ancillary power to further those specific purposes. There may be authority there. So there may be authority under this general ancillary authority to issue for example an ancillary order that should fuel prices drop dramatically, that Disco file evidence as to the extent of such fuel cost decrease.

The only question, and this can become a complicated one, and I have been thinking about it since I got your -- since I received your question the other day. Care must be taken that any such authority not contravene other

provisions of the Act. Obviously the Board cannot by order supersede Legislative provisions. And I am referring specifically to the complications surrounding the application of Section 98 of the Electricity Act and the 3 percent. And quite frankly, this is a complex issue which I haven't had the opportunity to go through all the different permutations in my mind about, but it is one that I think the Board must consider when dealing with this issue. And I simply raise it as one that might require a significant amount of study.

Mr. Chairman, I would like to thank you and each and every member, Commissioners. It has been a very long process, but a challenging one. And from challenge comes joy and I would like to thank all of you. I would like to thank all of the Intervenors and their counsel. It has been a pleasure dealing with them. And again, we look forward to your decision in due course.

CHAIRMAN: Thank you, Mr. Morrison. I have just got a couple of remarks I would like to make because I know that some of you will not be returning for the pole attachment portion of the hearing this afternoon. So this will be the last time you will all be in the room together.

First of all, I want to echo as a number of the lawyers here have done so and say it is good to see Mr.

Marshall back and I was especially pleased that I finally saw him in a hearing room where he said absolutely nothing. Anyhow, no, it is good to see him back.

MR. MARSHALL: Thank you, Mr. Chairman.

MR. MORRISON: He is on the record now.

CHAIRMAN: He is now on the record, yes. Secondly, to the non-lawyers who have appeared before us, I want to congratulate you. And I am thinking of Mr. Booker and Mr. Peacock, because your presentations were very articulate and the Board appreciates them. And so don't worry about the fact that you are not a lawyer. You probably should be pleased.

And to counsel that are present, let me say that one of the reasons I can have fun up here is that you folks have all behaved in a what I consider to be a very professional manner. And apologies to Ms. Milton, but I struggle with a term that can replace it in this day and age, but your gentlemanly conduct towards one another as well. So thank you all and the Panel I know joins with me in that.

DR. SOLLOWS: That would be gentle and personable conduct, Chairman.

CHAIRMAN: There is the academic among us. Good enough. Thank you very much. We will reconvene at quarter to

2:00.

(Recess - 12:45 p.m. - 1:45 p.m.)

CHAIRMAN: Good afternoon, ladies and gentlemen. The cast of characters has changed somewhat. Representing Disco this afternoon?

MR. RUBY: Peter Ruby and Clare Roughneen.

CHAIRMAN: Thanks, Mr. Ruby. And of course Ms. Milton went on the record this morning. That's good. And you weren't here but I'm sure you have been informed, Mr. Ruby, our suggested way of proceeding is that Disco begins with an oral submission and Rogers then makes its oral submission, and the Municipals make theirs. Rogers makes the first rebuttal. So you are a little bit out of order, but it means that the Municipal Utilities have a break, rather than going back to back. And then the Municipals and then Disco has its rebuttal. So whenever you are ready, sir, go ahead.

MR. RUBY: Thank you, Mr. Chairman. By now we all know that Disco is seeking a rate of $30.61 per pole for access to its joint use poles. And in doing that, Disco is acting responsibly and in the public interest. What it is trying to do is get a fair share of the assets paid for by electricity ratepayers, and in the process of being paid for by electricity ratepayers, trying to recover a fair

share from four profit enterprises that use its assets.

And again we should be clear on this. The revenues that come from joint use access offset dollar for dollar Disco's revenue requirement. So when Disco is trying to recover $30.61 just and reasonable rate, that is for the benefit of electricity ratepayers in this province.

In contrast, Rogers is acting only in its own commercial interest, and there is nothing wrong with that, but it is a distinct contrast. Rogers, if it chooses to pass on the full $30.61, which it doesn't have to do, but if it chooses to do that, would result in a 95 cent increase to cable subscribers or Rogers' customers across this province.

Now that would represent a 0.1 percent increase in cable rates, that's on the evidence in this hearing, on a year over year basis since 1995. And the Board will recall that the joint use access rate has not gone up since at least 1995.

Now it is worth noting that during that same ten year period where the rate hasn't gone up, there has actually been quite a large change in the way joint use poles have been regulated in Canada. We started with the CRTC regulating those poles and setting even rates for power poles, having its jurisdiction overturned by the Supreme

Court of Canada, and we have seen the evolution of new ways, new forms of regulation and cost allocation for joint use poles coming out of Alberta and Ontario.

And what Disco is asking this Board to do is to go with the new form of regulation we have seen and not revert back to the old style of regulation that Rogers is proposing and that the CRTC was using before its jurisdiction was overturned.

Now there has been a lot of evidence, I don't propose to review it all. What I would like to take you to, Mr. Chairman, is just a few of the issues that are of the greatest significance, and as well deal with a couple of evidentiary points that I suggest might require a little clarification. And I can do that because in fact on many issues there is in fact no dispute on the evidence with respect to some of the costing numbers and so on. So I propose to focus on a few questions.

And what I commend to the Board, and I won't take you to it, but at Appendix C to Exhibit A-64, that's Dr. Mitchell's report, is his chart laying out his calculation of the joint use rate. It includes all the cost components and the percentage allocation that he has put into his submission. So that's a good summary that may be of use to the Board.

So if I may, let me turn to the first issue which is what cost allocation approach should this Board adopt. And in Disco's submission, the Board should adopt the approach put before you by Dr. Mitchell in preference to the approach advocated by Mr. Ford and Dr. Ware for Rogers. I say that for five reasons.

The first, and I submit the most compelling, is that when you review the record you will find that Dr. Mitchell's Rule 3 -- you will recall that he had three rules for cost allocation he said and all of them were good -- Rule 3 is in fact unchallenged on the record from a cost allocation point of view. None of Rogers' witnesses said that it was the wrong way or an inappropriate theoretical approach, economic approach, to cost allocation. And I would note that the $30.61 rate that Rogers is proposing flows from that Rule 3 cost allocation, not the Rule 1 and 2 allocation.

Now what Rogers did say about Rule 3 is all they could say is, well you don't have the data, because you will remember Rule 3 is a question of looking at the proportion of stand alone cost, and they said, well you don't have data on stand alone costs. Well I submit that we do. And to see that all you need to do is make the same assumption that every witness in this proceeding has made, that is,

that costs vary with the length of a pole. So if a stand alone communications pole is shorter -- and we can tell how big it should be, all you have to do is add up the buried space, clearance space, and only two feet of communication space, and stop there -- we can tell how that compares in proportion to a stand alone power pole that has to have a bigger power space at the top of the pole.

DR. SOLLOWS: But doesn't cost also vary with the load that the pole has to carry and the diameter?

MR. RUBY: First of all -- and that's a very good question, Commissioner Sollows. There is no evidence in this proceeding about if that variance occurs how it occurs. Everybody has assumed that the proxy that we should be using for all those different demands on the pole should be -- the segments -- should be the height on the pole. Now it may be that in another proceeding we could refine those calculations and use the tension, the vectors put on the pole, and I would note there of course that Rogers has said it puts quite a lot of tension on the pole. So it's not clear who puts more demand on the pole, I would say. But in this proceeding the only evidence you have before you -- and you have all of the parties saying, use length or height of the pole as your proxy for cost.

And in fact if you go and look at Dr. Mitchell's report you will see that he in fact does these calculations. So the key point I think here is with respect to Rule 3 from an economic point of view it's unchallenged and it's doable in a practical sense on the record before you.

Now the second point I would like to make is that the Mitchell approach provided you with three rules, that is, some variety. And what that should tell you is that it's a flexible approach which should be preferred over an inflexible approach, which is what Rogers has put forward.

And third, when you apply all three rules, the answers you get are consistent with the negotiated outcomes we have seen in the rest of the country. And that is the case regardless of whether you use the data set that Rogers has proposed or the data set that Disco has put forward. And that is not the case with the Rogers' model that has been put forward.

And I would stop here for a minute. Dr. Mitchell called that science, when you compare theory to empirical evidence, he said that's one of the major propositions of science. Mr. Ford didn't call it science but he called it something else. He called it a sanity check. Now he wasn't talking about this particular application but what

he said is we should be doing a sanity check. Look at the real world and see if your theories are working. And that's exactly what Dr. Mitchell has done and what Dr. Ware could not do and come up with a satisfactory answer.

Four, the Mitchell approach is consistent with the mainstream economic literature, and I will only take you to two examples. Dr. Ware brought up the seminal paper by Alfred Kahn, and he quoted from it in his report. And on cross examination looked at the very next sentence after his quote which provided for a proportional stand alone costing approach, just like Rule 3. And he said, yes, Alfred Kahn has approved of that. So we are in the mainstream of the economic literature.

Now you also had quite a lot of testimony about the Young article. Now Professor Young -- I won't go through it in detail, but he gives the example in his academic type study of an existing power facility having its costs allocated. That is in my submission as close as you are going to come in the academic literature to exactly what this Board is being asked to do.

So you have got the academic literature supporting the Mitchell approach.

Now Rules 1 and 2, you will recall, deal with equal sharing of the costs. And what is important there is Dr.

Ware agreed that if the common portions of the pole were the same, or the cable and telecommunications and power all needed the same common portions, the buried, the clearance, and so on, then equal sharing in those circumstances were appropriate. And I will take you to the evidence on this point in a moment. But the fact is that those clearances are the same and have to be the same, those common portions, whether it's a Disco owned pole or stand alone pole, Rogers or Aliant.

Now I would like to comment just for a moment on the Ford/Ware ex post approach, and point out just a very few flaws.

First of all and probably most importantly the evidence before you, which was not directly challenged on cross examination, is that since 1967 Disco has built joint use poles to accommodate cable attachments and other communications attachments. And this is patently obvious, in my submission, from the fact that there are two feet of communication space on every pole. Aliant uses one. There is no evidence that it ever uses all of it. And in fact Rogers admitted that it has never been refused access to a joint use pole. There is always space for it. And it makes sense, just common sense, that if that's the case since 1967 on 300,000-odd poles, that that must have been

a design criteria for the pole.

MR. NELSON: Mr. Ruby --

MR. RUBY: Yes.

MR. NELSON: -- as Rogers as a tenant, does Rogers ever specify the height, the type of pole that goes in the ground?

MR. RUBY: Not to my knowledge. And I don't think there is any evidence on the record that they make that choice, but -- nor do they participate in the planning of those poles or on standards committees.

MR. NELSON: They don't participate at all then.

MR. RUBY: They have chosen, in my submission, to accept the poles as they are, because they get what they want. They always get access.

DR. SOLLOWS: But I guess the difficulty I'm having, if you are going to base this on Rule number 3 which is sharing in proportion to stand alone costs, very clearly when -- if we were to estimate the costs to Rogers and apply the standards carefully, and we were to estimate the costs to Disco and apply the CSA standard carefully, we might well come up with very different costs and very different configurations. That's my problem with the point you are --

MR. RUBY: That's a very good point, Commissioner Sollows,

and maybe I can help you with this in this way. If we just deal with it in a length basis, the evidence is that the buried portion of all of these, whether it is stand alone communication, telecom cable, Disco is 6 feet. You need to bury the pole so it doesn't fall over.

The evidence is that the CSA standard to measure from the ground to the lowest wire, regardless of whether it is a Disco secondary wire or a communications wire, is exactly the same standard length.

DR. SOLLOWS: Again, that is where -- you are characterizing in a way that is unfamiliar to me. Because I remember going down the list and saw a distinct difference in the pole heights required if it was not immediately adjacent to a roadway or other place where a vehicle would travel.

MR. RUBY: Well, in my submission, the evidence is by far and large Disco poles are located in places along the roadways. So that the appropriate standard to look at is that very standard, is the one that deals with the roadways.

And the other thing -- maybe I can help you with this -- is that if you look at what Aliant and Disco have arranged or agreed to for years, the number they have fixed on is 18 feet. And that is mid span. So you got to -- to bring it up to the pole you got to add another foot

to bring it to the pole.

But if the Board wants again a reality check on what freely negotiated parties, who have the same interests in terms of -- Aliant is the same idea here as a cable company. They have agreed that the way to apply the standard leads you to an 18-foot in span clearance. I'm not sure that helps you. But that is the reality check. You have mentioned tenancy, sir. You will remember there is a whole lot of evidence here about ownership versus tenancy and cost. And let me say only this. Rogers has spent a lot of time, in my submission, fiddling at the margins, dealing with the costs of tenancy and ownership. This is the right way to look at it, in my submission. It is absolutely clear that there is no net benefit to ownership.

When Disco builds about 300,000 joint use poles which are Rogers-ready, but only collects fees for the 100,000 the tenant Rogers actually uses -- so if you are building 200,000 poles to accommodate Rogers, at an extra cost -- because you could try and vary that, then that overwhelms anything else Rogers can point to in terms of added benefits of ownership.

MR. NELSON: Mr. Ruby, but they are built as joint use with Aliant, right?

MR. RUBY: They are.

MR. NELSON: So they are built jointly so they all have the space, the 2-foot space?

MR. RUBY: But Rogers -- or Disco's evidence, and again it is uncontroverted, is that Disco builds that not just to accommodate Aliant but with cable attachment in mind, that it is made that way, that that is part of the design parameter, 2 feet to accommodate cable.

Now there has also been an argument made in Dr. Ware's evidence that you should be using an essential facilities costing analysis.

And I caution you in this respect. Essential facilities is just a label. Something being an essential facility doesn't mean necessarily that you should apply the type of essential facility cost analysis that Dr. Ware has proposed.

Where you do apply an essential facilities cost analysis is when the two companies, the one who has the asset and the other one seeking access, are competitors.

Dr. Ware didn't provide you with a single example where that was not the case. And he could not do so under cross examination. Essential facilities analysis doesn't apply when Disco and Rogers don't compete.

Now if I may turn, Mr. Chairman, to three sort of

isolated elements of the evidence that came out right at the tail end of the testimony, so Disco hasn't had an opportunity to respond to them. I would just like to refer you to some of the previous evidence that might help you with it.

One of the questions came up is are we reading that CSA chart properly? Should we only be in the 750 and less volt column, since Disco has wires that can carry more than 750 volts?

And what I say to you is yes, you should always be in the 750 volt column for figuring out clearance. And the reason is and the evidence is that the lowest wire on a Disco pole is always the secondary. And the secondary is always less than 750 volts. So for figuring out clearance it doesn't matter what is higher up on the pole. Only the lowest wire matters.

And perhaps that can be of assistance. And of course this is important. Because as I said, Dr. Ware admits that if it is the same common cost, the same common elements, you should be dividing the costs equally.

The second little wrinkle in the evidence concerns Rogers' ability to construct its own pole. There was a question at the tail end of the last day about whether there were any legal barriers to that.

And what I would submit is that -- Mr. Armstrong didn't bring this up in his testimony. But this is the law. Under the Federal Telecommunications Act, section 42 and 43, if Rogers cannot get permission from a municipality or other public authority to build its own poles, it has the right to go to the CRTC.

And the CRTC can order the poles built and can allow them to be built over the objections of the local authority. That is under the Federal Telecommunications Act. So that hopefully completes that picture.

And of course the reason that it is important is one of the inherent assumptions in Dr. Ware's work, is that Rogers -- not just that it is not a good idea to build its own poles, which Rogers -- which Disco admits -- but that it cannot build its own poles from a legal point of view. It can with the permission of the CRTC.

The third little wrinkle, Commissioner Sollows, follows from something you asked at the very last day. You will recall that I was cross examining Dr. Ware with respect to whether he had any top 40 ranked publications on these issues.

And although Dr. Ware didn't challenge the methodology in the ranking article I had provided before the hearing, Commissioner Sollows, you pointed out that in fact the

name of the journal in which the article appeared wasn't on the ranking.

I can help you with that, since Dr. Ware apparently wasn't familiar with it. The simple reason is that the name of the journal has changed. In fact that journal, the Journal of the European Economic Association replaced the European Economic Review. It is ranked number 14. And you will find it on that ranking.

Now if I may, I would like to turn to the ground clearance. I don't want to spend a lot of time on this. I think if I say the word "sag" there may be a revolt. Let me say this.

CHAIRMAN: We will all agree with that.

MR. RUBY: Thank you, Mr. Chairman.

The clearance is 19 feet. As I have said, Aliant has agreed it is 18. In span you have to add one more foot. Because you have to lift the attachment points at the pole to accommodate for that.

And let me deal with something else that came up right at the tail end of the last day. All the parties agree that there are three communications attachments points on a joint use pole, one at the top, one at the middle, one at the bottom.

And the question arose well, Rogers is usually at the

top, why can't its wires be accommodated completely within the communication space? And this is the answer.

When you are designing a model, the clearance space is the space to the lowest possible wire. Everyone says that the lowest possible wire is the bottom position. So that when you are setting up the pole model, you don't look at where one particular user happens to put its wires. You need to accommodate.

Because clearance is measured from the ground, the lowest to the ground position, which is the lowest position. And that is why you need to have 18 feet of clearance at mid span going to 19 at the pole. It is to deal with that bottom position.

Now very briefly you will also notice that there is a lot of pictures, photographs in the evidence. Rogers supplied some of them. They all show Rogers wires attached over 19 feet. When it constructed its northern line it attached over 19 feet.

And probably most importantly is this Board is going to have to weigh the evidence that has been put in for it. And what I would suggest is that when you are weighing the evidence of Mr. O'Hara, an expert engineer who deals with this issue, who sat on the committees, who works with the national groups with respect to the CSA standard, in my

submission you should prefer his evidence over the lay evidence of Mr. Ford, who doesn't do this work, and Mr. Lawrence.

I also would like to comment very briefly on the 17 1/4 feet that Rogers says is the right ground clearance requirement. That is not an appropriate figure. And there are a few reasons I would touch on.

One is that Mr. Lawrence admitted to you that 17 1/4 feet was insufficient in New Brunswick for poles that lie along roadways. Now that is largely where Rogers' poles are. And the reason that it turns out that it isn't enough is because snow accumulation in New Brunswick requires that you add .8 meters to the standard clearance that is in the table that we spent so much time on.

And you will remember I asked Mr. Ford well, when you took this 17 1/4 measurement in Ontario and you brought it to New Brunswick, did you ever turn your mind to the fact that it snows more in New Brunswick? And his answer was no.

And in my submission, with such a major omission in bringing that local information, that is an indication to you that his evidence on this point is unreliable and that you should prefer the evidence of Mr. O'Hara.

Let me turn to the separation space. I don't have a lot to say on this. It is 4 feet. It is not 3 1/4. Rogers has not explained to you why it has only taken one of the two standard requirements that applies to separation space. There is one at the pole that is 3 1/4. There is one in span.

Disco has said, and worked it out with Aliant in negotiations that the in span requirement results in 4 feet at the pole. You have to meet both of those standards. And Rogers hasn't given you, in my submission, a compelling reason why you should accept one and not require or design the pole for both.

Let me pass then to the data set. That is -- I have dealt with the cost allocation. Now we have to figure out what information to apply it to. There are really only two key issues on this point. But one is do you use 32 years of data? And how exactly do we take out the pole-only -- the power, excuse me, power-only fixtures?

Let me start with how many years of data do we use?

In my submission you should use the data that is at Appendix C to Exhibit A-63, that is, Mr. O'Hara's data that he says comes out of the records and is 32 years of data, that is the best evidence of Disco's costs -- pole costs and the number of poles it has. That's the best

evidence you have before you. And I say that for three reasons.

One, it is unchallenged that the life expectancy of Disco's poles is 32 years. It's also unchallenged that that is the appropriate depreciation period.

It is also interesting, you heard evidence, that more than 32 years ago Disco used untreated poles, which only lasted 26 to 28 years. So it's quite unlikely -- not impossible, but quite unlikely that any of those poles continue to remain in place.

And finally, Mr. Ford said, well let's do a reality check again. Let's look at Nova Scotia Power's numbers. Now he just compared the raw numbers. But the evidence you heard was that NB Power/Disco uses treated poles, which are more expensive than Nova Scotia Power's untreated poles. And that Mr. O'Hara told you that if you grossed up or you accounted for the fact that there is that major difference in pole costs, you would end up with roughly the same pole costs in New Brunswick as in Nova Scotia. So there once again is a sanity check, to use Mr. Ford's words.

Let me turn to the second data issue. 27 1/2 percent. I don't propose to go through the -- I think it's dozens of pages of calculations between the different witnesses

who dealt with this. But let me say this. The 27 1/2 percent came from Mr. O'Hara. And Mr. Ford admitted that 27 1/2 percent of fixture costs is equal, more or less, to 15 percent of all the pole costs. 15 percent is what Mr. Ford, before this hearing ever began, told Disco it should be using. It's the number that the Federal Communications Commission in the United States uses and it's what Mr. Ford called the rule of thumb. Now that's bolstered by the fact that Mr. O'Hara has put before you four different ways of calculating how much cost to take out of the pole cost to accommodate power only fixtures. He did it four different ways and it came out very close to the same answer each time. That should give you comfort that he has arrived at the right answer.

Now in comparison Mr. Ford did a calculation based on material costs, which he admitted, oh well, it's not the same as installation costs. Of course I would have to recalculate it. But interestingly enough Mr. Ford had an opportunity to ask for the information he needed during the IR process. He didn't. And that should be in my submission telling on this point.

So in summary with respect to the 27 1/2 percent, in my submission you should prefer the evidence once again of Mr. O'Hara over the Rogers evidence. It's more internally

consistent. It has more foundation. And it offers a range of calculations and doesn't just nit-pick at the corners like Rogers' evidence does.

Maintenance costs. I only want to touch on this very briefly because everybody is agreed Rogers -- excuse me -- Disco's maintenance costs are $4.6 million for all its poles. I have already told you you should in my submission use the Appendix C information, that is, the 32 years information. That shows 310,000 poles. To get the per pole cost of the maintenance you should divide 4.6 million by 310,000 roughly, and that's exactly what has been done in Dr. Mitchell's report, the summary that I took you to.

And interestingly enough of course the 310,000 you have heard is consistent with the Aliant count of how many poles there are, Disco owned poles, and it's also consistent with Disco's GIS data which while not complete, when it is complete will be the best indication of how many poles there are.

Mr. Chairman, if I may, I would like to turn to loss of productivity which does take a little bit more time to focus on the problems there, or the issues.

Disco says the loss of productivity costs is $6.80 resulting from communications attachments. While Rogers

doesn't agree with the number, it has accepted that it's responsible for half of whatever the right amount is. And it hasn't contested the methodology that Mr. O'Hara used to compute the $6.80. They have focused on particular elements of the calculation. And you will recall that that calculation involved a Part I and Part II. Part I dealt with the fact that it's harder, more time consuming, more effort to work on a pole that there are communications attachments on. And there was some cross examination of Mr. O'Hara about when he said Disco constructs 9,500 poles, whether those were Disco poles or some were Aliant poles and so on.

But again let's bring this back to a reality check. Mr. Lawrence in cross examination said that he expected and agreed that Disco would do maintenance on roughly five percent of its poles per year. Out of 310,000 poles that's 15,500 poles. Those are the poles that Disco is working on. So no matter how you characterize the 9,500 that Mr. O'Hara used, it's certainly a conservative number and fits well within what Rogers expects would happen.

Now the other element to the Part I calculation that got some attention was whether for each pole that Disco worked on that Rogers was on -- whether that resulted in one hour loss of productivity, loss of time. Mr. O'Hara's

evidence, and he is the person in my submission who is most qualified to talk about this, says it's one hour. And let me tell you what Rogers said in response. First of all, the only Rogers' witness who touched on this point in his evidence was Mr. Ford. Not Mr. Lawrence, the person who builds and has something to do with poles. It's Mr. Ford who doesn't have the experience in this area. And what Mr. Ford said is that he did not believe that one hour was realistic. Now I could believe in the Tooth Fairy but I don't expect the Board to accept it without some kind of reasoned justification in evidence. And the only thing other than his belief Mr. Ford could offer is that there was a CRTC decision that had looked at loss of productivity and in the communications context said that it was something less than an hour. But on cross examination when he was asked, well, you know, why is it less, he said, well I don't really understand what the CRTC did. And in my submission what that really leaves you, the Board, with is Mr. O'Hara's evidence. There is nothing compelling challenging his one hour of loss of productivity. And in my submission that's what you should use.

If I can turn to Part II of the loss of productivity. That's the trouble calls, you will recall, Disco having to

go out to deal with Rogers' downed wires or a tree touching one of their wires. There the issues seem to be around double time, whether double time was the right way to measure that. There was no issue with the number of trouble calls. That was unchallenged.

Double time is appropriate and it is appropriate for a couple of reasons. First of all, 75 percent of the day is not working hours. So we would expect double time to be paid because that's what Disco pays its unionized employees for after-hours work. At least two hours of double time. 75 percent of the time we would expect that's what would happen.

The other 25 percent of the time, you heard of the quite considerable work that has to go on when you are out on a work site and a work crew gets diverted. Roughly speaking you have heard from Mr. O'Hara that that is equivalent to double time. So my submission this -- loss of productivity is a bit more art than science. But that is the number you should use.

And Disco concedes that double time again is an approximation. But it takes into account not just under-billing but also over-billing. That is, for sure vehicles don't work double time. But on the other hand, it doesn't accommodate the fact or deal with the fact that Disco has

to provide for capacity to do this kind of work. It has to pay for it. And for example, Mr. O'Hara told you about how if you go out and do some work on Rogers' facilities in the evening, the employees can ask for extra rest before they go back for their next shift. There is a cost to that. So the double time averages that all out as a reasonable approximation.

My last point deals with service poles. And I cannot say this strongly enough. There is no principle justification for Rogers paying less for service poles than it pays for any other pole. And Rogers has not even attempted a reasoned justification. All it has done is come to this Board and say, in Ontario, one out of ten provinces, for some power utilities in that province, after negotiations, not regulatory action, just negotiations, some utilities give a variety of discounts for service poles.

DR. SOLLOWS: But isn't that, just to follow up, the same point that you were making with respect to the agreements between Disco and Aliant, that these are contracts between freely bargained arrangements between stand alone companies and therefore we should take notice of it.

MR. RUBY: Well I don't think there is anything wrong with taking notice of it. The evidence though should be placed

on this regarding context. Rogers tried to tell you that there was by agreement a service pole discount in three provinces, Ontario, Nova Scotia and Newfoundland. When challenged they said, oh no, sorry, not Newfoundland or Nova Scotia. It's just Ontario. With some utilities, not all. What discounts do they give? Well there are a whole bunch of them. Why do they give them? It was negotiated. We don't really know. In my submission, if you want to bring that unique circumstance in Canada to New Brunswick, Rogers has to provide the Board in good conscience with some reasoned justification for it. There is a difference from providing a reasoned justification and saying, and look, it works in reality, instead of saying, I don't have any reasoned justification but sort of take a look at one province and this is what is going on. Those in my submission are not the same things.

One is science and one is something else.

With respect to service poles the other point I would make is that what Rogers actually is asking you to do is allow them to double-dip. That is, they are saying include service poles in the costs that go into the formula, so these are the shorter, less expensive poles, that has the result of averaging the per pole cost, and then they say, plus give us a discount for the same poles.

So in fact they are trying to get the same benefit twice. That in my submission the Board should not allow that. When you set a rate that rate should be chargeable on all of Disco's joint use poles.

DR. SOLLOWS: And just so that I'm clear, is it Disco's position that we should indeed use the average length of poles or are you letting them single-dip and not double-dip?

MR. RUBY: The way we have done it -- and you will recall from the evidence that before this hearing commenced Disco did a very complicated formula for figuring out the exact averages of the poles. Rogers didn't like that. The evidence that we have put in here aggregates the costs per year. So it mixes it altogether and does take an average. And the appendix C of A-63 I took you to, and Dr. Mitchell's report, do take an average. Now they don't do it by length, they do it by cost, but it is an average. Before I stop I do have one more thing to say, and I don't want to guess at what my friend Ms. Milton is going to argue, because there is a lot to argue here and I'm not sure which she will choose. But my best guess is there is one thing that she will say to you, and that is that she will say, rate shock. She might not use those words but she is going to tell you, big increase if you give $30.61.

And I have really two things to say in response. The first is that the Board's role here as you know is to set a just and reasonable rate. To allocate to Rogers a fair share of the costs that have been previously borne by electricity ratepayers and should be borne by Rogers. The number will fall where it is. Mr. Morrison has already taken you to the law on this point. But let me say this. When the CRTC was setting rates, back when it thought it had jurisdiction, it wasn't worried about what was going on with electricity. Your mandate doesn't take into account worrying about cable television. The CRTC is the regulator to do that. And if they are worried about competition between Aliant and Rogers or satellite, they have the tools to deal with that. That is outside, with respect, this Board's mandate.

The second thing I would like to say is that with respect to Rogers, interestingly enough, there is no shock in rate shock. Rogers' annual report, which is referred to on the record, provides and tells its shareholders, warning, there is a risk here that in New Brunswick rates for joint use poles are going up and that could have a significant impact on us. That was in 2004. Rogers and its shareholders are not going to be shocked here. They have planned for it. The Board should set the fair and

reasonable rate it deems appropriate and not take into account the size of the increase one way or the other.

Mr. Chairman, those are my submissions.

CHAIRMAN: Thanks, Mr. Ruby. We are going to take five minutes right now before we come to you, Ms. Milton.

(Recess)

CHAIRMAN: Whenever you are ready, Ms. Milton.

MS. MILTON: Thank you, Mr. Chairman. Rogers believes that the evidence in this proceeding supports an annual distribution pole rental or attachment rate for communications tenants of $13.62 and a service pole rate that is 25 to 33 percent of the distribution pole rate.

Disco seeks an annual rate of $30.61 per year.

Just to set the record straight and calm down all the excitement, I'm not going to talk about rate shock. I am going to say that this pole rental rate is double the rates in neighbouring provinces and 37 percent higher than the highest regulated rate that we are aware of in North America.

Now Disco and Rogers are agreed that Disco's pole rental rate should be set to recover Disco's incremental costs of renting communication space on its poles, such as the cost of administering the regime, and in addition provide a fair contribution to Disco's fixed pole costs.

This is not contentious.

So what explains the very significant discrepancy between the rates proposed by Disco and Rogers?

First, Rogers and Disco disagree on the share of Disco's fixed pole costs that should be recovered from a communications tenant. This is what I will call the methodological issue.

Second, Rogers and Disco disagree on four of what I will call data or computational issues. The four issues are, first, the allocation of space on a typical Disco pole, second, the calculation of Disco's average pole cost, third, the calculation of Disco's productivity costs resulting from the presence of communications users on its poles, and fourth, the calculation of Disco's maintenance costs.

Now the remainder of my comments are going to focus on these areas of disagreement, but just before doing so a couple of very short comments on what I heard from Mr. Ruby a few minutes ago.

First of all, I'm concerned to hear evidence through Mr. Ruby at this time in the proceeding. Second, Mr. Ruby said a number of times the evidence is uncontroverted or there is no evidence. He didn't provide any cites, so I'm not sure what he is referring to. There was extensive

cross examination by both parties. I think the record is clear. Third, he said something about essential facilities and started talking about what the CRTC has jurisdiction to do. I think this Board got it right in its decision on jurisdiction and I'm not going to recover that ground now. Finally, I just want the emphasize that Mr. O'Hara was not a costing expert and he admitted that. So now let me turn to the methodological issue, and that is what share of Disco's fixed pole costs should be recovered through the rate charged to a third party communications tenant.

Rogers has proposed a proportionate use rule for calculating the share of fixed costs that should be recovered from a pole tenant. Under this approach fixed pole costs are allocated between communication and power users based on their proportionate usage of the useable space on the pole. The useable space is the communications, separation and power space. This is the space on the pole that can be used for aerial facilities. Aerial lines below this space would not satisfy clearance requirements. The communications and separation space represents 31 percent of the usable space on the pole using typical pole space allocations and 40 percent of the usable space on the pole using the space allocations that

Disco has proposed in its evidence in this proceeding.

Under the proportionate use approach if there are two communications users of the pole the pole rental rate is set to recover 15.5 percent of Disco's pole cost using typical space allocations, and 20 percent using Disco's proposed allocations.

Proportionate use of the usable allocated space on the pole serves as a proxy for the demand that a communication tenant places on the pole. In effect, under the proportionate use approach the costs attributed to the usable space on the pole are allocated to users based on their use of that space. These are the allocated costs. The remaining unallocated costs of the common space on the pole are allocated in proportion to the allocated costs. This approach tracks the method adopted by this Board in its CARD ruling in this proceeding for the allocation of some of Disco's other common costs.

The proportionate use methodology is also the methodology that Disco considered to be fair up until at least some time in 2004.

More generally, the proportionate use approach is fair and consistent with the evidence. It is fair because it ensures that the pole rental rate reflects the proportionate use of the pole by a communications tenant

and is consistent with the fact that a communications pole tenant does not cause as much of the common costs of the pole as Disco, does not benefit from the rights of pole ownership and does not receive the same benefits from the space on a joint use pole as Disco.

Now Disco's economic expert argued that the proportionate use methodology is fundamentally flawed because a negligible user would pay a negligible share of common costs.

The negligible user argument is a purely theoretical concern that cannot arise under the model proposed by Rogers, where the communications users are deemed to use all of the communications and separation space. It also cannot arise in practice.

And even with the maximum, that is 6, the space allocated to each of those users is not negligible. In any event, both Disco and Rogers have assumed that there will be only two users on the pole and all of the space is allocated to those two users.

Disco also argued that proportionate use is unfair because it does not compensate Disco for vacancy risk. Now I heard Mr. Ruby say a few minutes ago that the evidence is uncontroverted that since 1967 Disco has included space on its pole for cable. Well frankly, that -

is not what the evidence says. And there was a lot of cross examination on this and I won't take you back through it.

But fundamentally it is Rogers' position that the evidence is clear that those poles are always built with two feet of communication space and the same amount of separation space regardless of whether Rogers is around or not. Because of that, Disco has not made any additional capital investment for pole tenants and there is as a result no capital at risk and no vacancy risk.

Disco also argued in its evidence, but I don't believe that it did so today, that proportionate use somehow interferes with competitive neutrality. And on that we were also at a loss. There is clearly no issue of competitive neutrality as between Rogers and Disco. They don't compete, as Mr. Ruby said today. And as between a communications pole tenant and Aliant, the CRTC has determined that a proportionate use allocation is the most competitively neutral approach since Aliant benefits from rights of ownership.

Now while power issues and power poles, we all admit, are not within the CRTC's expertise, the issue of competitive neutrality as between communications companies clearly is.

Finally and again, Mr. Ruby didn't mention this today, but their expert argued that the proportionate use model was flawed because it didn't satisfy something called the Littlechild-Thompson Rule. My response to that is brief. We have no evidence, no costing data, on which we could possibly calculate this Littlechild Thompson Rule, and in any event, it has no logical foundation in either economics or fairness.

It is therefore Rogers' position that Disco's criticisms of the proportionate use approach have no merit. The approach is fair and supported by the evidence and well established economic and regulatory costing principles. The same cannot be said, in our view, in respect of the methodologies proposed by Disco. Now Dr. Mitchell proposed three rules for calculating the share of fixed costs to be recovered through the pole rental rate. And Dr. Mitchell maintained that his proposed allocation rules were supported by the joint use ownership shares that have been negotiated between the power and telephone companies across Canada as well as principles of economic fairness. With respect, Rogers disagrees. First, two of the rules that Dr. Mitchell has proposed, the equal sharing of cost savings realized through the construction of joint

use poles, that was his rule 2 and the proportionate share of the combined cost of single use poles, which was his rule 3, cannot be calculated without data on the costs of single use communications and power poles. As these data are not in evidence, it is not possible to calculate these rules or draw any conclusions on whether or not the results are consistent with negotiated power telco ownership shares.

It is one thing, in my submission, to assume that the proportionate use of the usable space on the pole is a reasonable proxy for the use made of the pole for the demands placed on the pole by different categories of users. It is quite another thing to maintain, as Dr. Mitchell does, that there is a constant one to one correspondence or linear relationship between pole height and pole cost. And in any event, that assumption is clearly contradicted by the pole cost data that Disco has filed in this proceeding.

There remains Dr. Mitchell's first rule, his equal per capita sharing rule. Rule 1 estimates communications users share of pole costs by allocating to these users the communications space on the pole plus an equal per capita share of the separation clearance and buried space on the pole. Under this approach, each of Disco, Aliant and the

pole tenant is deemed to benefit equally from the separation clearance and buried space on the pole.

Disco is allocated 1/3 of this space, while the two communications users are allocated 2/3 of this space. Dr. Mitchell's rule 1 requires the pole tenant to pay 26.7 percent of Disco's fixed pole costs using Disco's pole space allocations -- or excuse me, using the typical -- using Disco's, sorry -- using Disco's pole space allocations and 24.6 percent of these costs if you use the typical pole space allocations.

So what is wrong with this equal sharing approach? Well let's start with the numbers. I have already told you that the tenant pays 26.7 percent. Aliant effectively pays 43 percent of the fixed pole costs as a result of its joint use arrangements with Disco. Disco is left with the remaining 30.3 percent. So Disco, with all of the rights of ownership and with the requirement for taller, sturdier and more costly poles than either Aliant or the communications tenant, bares a smaller share of the costs than Aliant and only a marginally greater share of these costs than the pole tenant. That is not fair.

The equal sharing approach is not fair because all users of this pole do not place the same demands on, or receive the same benefits from the space on a joint use

pole, including the common space. The heavier, bigger and more dangerous nature of power facilities means the power poles must be taller and sturdier than communications poles. Disco's pole cost data establishes that the additional space required for power facilities alone substantially increases the per foot cost of a pole. Power puts more and heavier equipment on the pole. This further increases the costs of all space on the pole, including the cost of the clearance, the buried, the separation and the communication space.

An equal sharing approach fails to recognize the greater share of costs of a joint use pole that are attributable not simply to the greater amount of power space on the pole than communications space, but also the increased demands and cost that power places on all of the other space on the pole.

The evidence is also clear, and these are not nitpicks, that the communications tenant does not receive the same benefits from a joint use pole as the joint use pole owner.

Disco and Aliant as joint use pole owners benefit from all of the standard rights of ownership, including control over cost, design and use of the pole, priority access to space on the pole and the ability to earn rents from third

party pole users. Clearly these rights have value.

A pole tenant in contrast has no control over the cost, design and use of the pole, is granted access to space only after Disco and Aliant have determined that space is available, after reviewing their current and expected future requirements, and must place its facilities as directed by Disco and Aliant. And finally has no ability to earn revenues from renting space on the poles.

The ability to control the cost, design and use of space on the poles is not merely academic. There is evidence on the record that a cable pole network would, for example, serve residential customers more efficiently since those are the subscribers that Rogers serves, use longer spans, use shorter poles and minimize costs in response to the competitive market for communication services.

The evidence also shows that Rogers has been required to place its facilities on an inferior position on Disco poles, the backside of the pole, increasing Rogers' costs of installing and maintaining its facilities and reducing the benefits that Rogers receives from the poles.l

DR. SOLLOWS: Can I interrupt you for just a second on your immediately previous point. I thought I heard you say

earlier on that we couldn't apply Rule 3 because there was no evidence on the record of what the stand alone costs were, but now you have just said that the stand alone costs for a cable company there is evidence on the record. So it seems contradictory.

MS. MILTON: The evidence relates to -- I'm sorry. I hope I didn't mislead you. There is evidence on our span links. I believe there was discussion both with Mr. O'Hara and perhaps with Mr. Lawrence. Rogers has a very short pole span up in the northern part of the province and there is evidence that the span links on those poles is about 150 meters, whereas Disco's average span length is 40 to 60 meters.

DR. SOLLOWS: So there is some evidence but not sufficient evidence?

MS. MILTON: There is not costing -- yes. The points that I believe there is evidence on is that typically communications requires shorter poles and longer spans. But there is no costing evidence on power only or communications only poles.

I think Disco also may have attempted to suggest that Rogers could gain the benefits of ownership by renting space on all of Disco's poles. As a practical matter, Aliant's joint use rights don't permit this. And Disco's

proposed license agreement precludes it. Rogers must use each permit within a specified period of time. For tenants, unlike joint pole owners, they must use it, meaning the space, or lose it.

In sum, the evidence flatly contradicts the central premise of the equal sharing approach, that all users benefit equally from the common space on the pole. Dr. Mitchell admitted that if this assumption were not correct a different allocation of costs might be appropriate.

Disco also maintains that its equal sharing approach is corroborated by the negotiated power telco ownership splits, as I call them. This too is flawed in our view. This is not a situation where the predictability of a formula can be tested by modifying the input data and comparing the results from the formula with real world negotiated results. Dr. Mitchell's rules yield a single result. While changing the space allocations will yield somewhat different results, Dr. Mitchell has not investigated space allocations in different parts of Canada, recalculated his rules and tested the results against the negotiated ownership shares in those different parts of the country.

Dr. Mitchell's rules are also entirely divorced from and at odds with real world evidence. And just a few

examples of this. For example, they ignore the myriad of commercial factors that likely affect the negotiations between power and telephone companies over joint use poles. Indeed Mr. O'Hara referred to these factors when he was cross examined on, for example, the deal with Saint John -- the City of Saint John, I believe, and also when he was questioned about the formula in the 1967 -- or 1996, excuse me, joint use arrangement with Aliant. They ignore the fact that the power company requires taller, sturdier poles than communications companies, and that the cost per foot of a pole is not constant but instead increases significantly with pole height. Dr. Mitchell assumes that all of the benefits of the communications space accrue to communications users, an assumption that ignores the fact that Disco has, since 1996, earned third party rental revenues from this space. Notwithstanding this new benefit to Disco, it's ownership share decreased. Dr. Mitchell's rules would not have predicted this. Furthermore, a proportionate use space share using Disco's pole space allocations is 40 percent. In other words the proportionate use approach predicts that Aliant would own 40 percent of the joint use poles in New Brunswick, and that is precisely the ownership ratio that

Disco -- or NBTel I should say and NB Power negotiated in 1967.

And I should add that at that time Dr. Mitchell's approach, which allocated all of the communication space to the communications user, being NB Power, was theoretically accurate. Therefore to the extent that the negotiated ownership splits can be used to corroborate cost allocation approaches, which is questionable in our view, but to the extent it can, using Disco's evidence, they provide more support for an allocation factor based on proportionate use than for any of the allocation factors calculated by Dr. Mitchell.

Finally NB Tel agreed in an environment in which it was the sole user and beneficiary of the communications space on NB Power poles to bear 40 percent of the fixed costs of joint use poles. A second beneficiary and user of this same space would not likely agree to pay more than half the amount paid by NB Tel, in other words 20 percent. Clearly therefore it would be unfair to require a pole tenant to pay more than 20 percent of Disco's fixed pole costs. Indeed a tenant should pay considerably less because, as I have just argued, tenants do not receive the same benefits from joint use poles as joint use pole owners.

Finally a very brief comment on Disco's argument that equal sharing is supported by economics. Economics can comment on the efficiency of the results but not the fairness of the resulting solution.

Since Rogers has proposed that the pole rental rate be set to recover incremental cost, the approach is in economic terms efficient. There is no interference with efficient investment in poles. And there is no cross-subsidization.

To the extent that economics does comment on the allocation of common costs, it typically requires that these costs be allocated in proportion to relative use. This is precisely what the proportionate use approach does.

And equal sharing approach in contrast fails to recognize that communications users do not simply cause less of the costs of the usable space on the pole because they use less of this space, but also that communications users cause less of the cost of all of the space on the pole.

In sum Rogers believes that the sharing methodologies proposed by Disco are fundamentally flawed and should not be adopted by this Board.

Let me turn now quickly to the four data areas of

disagreement that I identified at the outset of my comments.

The first area of disagreement is pole space allocations.

Disco is not proposing to change the allocations for buried or communication space on the pole. What it is proposing is to increase both the clearance and the separation space and to reduce the power space by a corresponding amount.

Turning to the clearance space, and I'm going to try to be very brief on this, Disco's 19-foot clearance space takes the highest possible clearance requirement of 14.5 feet, adds to this 3.5 feet for snow and then adds a further foot ostensibly to accommodate sag of communications lines at mid span.

Even if it were established that snowfall in New Brunswick is significantly higher than many parts of Ontario or the rest of Canada, which in Rogers' view is not established by the evidence on the record, it is not appropriate to assume that all poles are built to accommodate the highest standard of 18 feet.

Even the joint use manual shows a range from 10.5 feet to 18 feet. And Disco has admitted that only I believe 20 percent of its joint use poles are built to support facilities over locations where the highest clearance

standard applies.

I would add that if this goes right it just -- Disco's 35-foot poles don't work. Because if there isn't enough space on those poles, if you put in 19 feet for clearance, for even Disco's most compact power facilities, you just run out of space.

It is also not appropriate to increase the clearance space by one foot to accommodate sag of communications lines. Because communications lines are light and typically mounted on tension strand, there is virtually no sag on these lines.

And any sag that there is is easily accommodated in the 2 feet of communication space, particularly if there are only two users of the pole or of the communication space, which is what both Disco and Rogers have proposed in this proceeding. So it is not appropriate in our submission to increase the clearance space.

What about the separation space? The purpose of the separation space is to protect the safety of communications workers working on communications facilities at the pole. It is for this reason that the separation space is specified as a minimum space requirement at the pole, not at mid span. And 3.25 feet is the minimum separation space between communications and

power lines of up to 750 volts.

Now Disco has proposed to increase the separation space to accommodate sag of its power facilities at mid span. Clearly power line sag occurs regardless of whether there are communications facilities present on its poles and would have to be accommodated in the clearance or power space on a single use power pole. It is therefore entirely inappropriate to increase the separation space to accommodate sag of power facilities.

Rogers also notes that Disco can and does use the separation space for its transformers and streetlights. Space that can and is used by Disco for its facilities is power space, not in our submission communications or separation space.

So again it is our submission that there is no evidence to increase the separation space as proposed by Disco above the typical allocations that have been used by other power and communications regulators.

The second area of disagreement on the data is the computation of productivity costs. And productivity costs, as I probably already said, are the costs due to losses in productivity that Disco incurs because of the presence of communications users on its poles.

Productivity losses are direct costs in an incremental

costing approach such as that proposed by Rogers.

Productivity losses are direct costs in an incremental costing approach. Although Disco likely incurs all or virtually all productivity losses because of communications users as a result of Aliant's presence on its poles, in other words there are few additional incremental costs to having a tenant, Rogers has proposed that the pole rental rate be set to recover half of Disco's productivity costs.

In the models proposed by Disco -- or by Dr. Mitchell, there is no recovery of productivity cost. That is because all joint users are assumed to equally cause and equally bear productivity losses associated with joint use.

Under these approaches there should not be any recovery of Disco's productivity losses through the pole rental rate. To allow for any recovery of these costs would mean that, although all users are assumed to be equal, Disco's productivity losses resulting from joint use are subsidized by a tenant. The tenant on the other hand, the supposedly equal tenant, must not only bear all its own productivity costs from joint use, but also a portion of Disco's productivity costs.

Disco's proposal to recover in excess of 30 percent of its productivity cost through the pole rental rate is therefore completely at odds with its own methodologies. Disco's estimate of its productivity costs also needs to be adjusted for two reasons. First the cost estimate needs to be adjusted to reflect a reasonable estimate of the additional time it takes power workers to manoeuvre their bucket trucks around communications facilities on Disco's poles that it works on in a year. A reasonable estimate of this time in our submission is two minutes, not the one hour that Disco has assumed.

And I heard Mr. Ruby refer to Mr. O'Hara and the hand-waving on the two minutes. Quite frankly, I have read this transcript a number of times. And I'm not sure I can understand it.

What I can say is if Mr. O'Hara truly believed the number should be two minutes per joint use pole, then he didn't need to conduct any of that complicated mathematical calculation that he showed in his Interrogatory Response. And that was Disco Rogers IR-17 in exhibit A-68.

Second, Disco's estimate of its productivity costs needs to be adjusted to reflect the facts that not all calls related to communications facilities occur

after-hours and that trucks do not cost more after regular hours.

The third data issue is Disco's calculation of its average annual pole cost. In our view there are two significant problems with Disco's calculation of its average annual pole cost.

The first is that Disco uses a truncated data set which ignores some older fully depreciated poles that remain in use. If you want to calculate an average pole cost based on all the poles on your books, you have got to look at all the poles.

Mr. Ruby suggested that there were no poles. If there were no poles then the data in appendix Q would be identical to the data in appendix C.

Second, Disco's estimate of the portion of its pole costs that are power-specific fixture costs is in our submission hopelessly complex and flawed. To use a common analogy, Disco has used the cost of apples to deflate the cost of oranges.

Based on the evidence on the record, Mr. Ford has proposed that Disco's total installed fixture costs be reduced by 45.4 percent to remove Disco's cost of power-specific fixtures.

The validity of Mr. Ford's approach is corroborated by

the similarity between Mr. Ford's results and the NSUARB calculations based on Nova Scotia Power data.

Disco has not provided a credible explanation for why the ratio of materials cost for power and non-power specific fixtures is not a reasonable proxy for the ratio of the installed costs of power and non-power specific fixtures. The example that Mr. O'Hara provided was a pin. But a pin may require little labour to install. But it also costs little. So it will not have a big impact on the ratio.

Nor has Disco provided a credible explanation for why its ratio of installed costs should be so different from Nova Scotia Power, or why in July of 2004 it came up with such a different number.

Now I heard Mr. Ruby say today well, it all makes sense, it all makes sense. Because Disco has used treated poles. And treated poles cost 15 percent more. So because Nova Scotia Power hasn't used treated poles, their costs should be 15 percent less.

Presumably Disco uses treated poles because they last longer and therefore are more cost-effective. So over time Disco's pole costs should be lower than Nova Scotia Power's pole costs, not higher.

The installed cost of Disco's older treated poles is less than the installed cost of Nova Scotia Power's newer untreated poles.

Furthermore, even if treated poles cost 15 percent more than untreated poles, this increase relates solely to the wooden part of the pole. It does not affect installation, fixture, right-of-way or clearance costs.

In other words the impact on total installed pole cost would be much less than 15 percent. Therefore, in our submission, Disco's rationale for why its poles costs should be higher than Nova Scotia Power makes no sense.

The final data issue is maintenance costs. Disco has proposed that the pole rental rate be set to recover over 30 percent of its annual cost of performing vegetation management around Disco and Aliant joint use poles.

Disco has admitted that 30 percent of these costs are already paid by Aliant and that this 30 percent represents all of the costs associated with clearing vegetation around communications, separation and clearance space on the poles.

In the circumstances any payment to Disco of vegetation management cost will overcompensate Disco for these costs.

At a maximum the pole rental rate should be set to recover half of these costs or 15 percent.

In conclusion, based on Disco's cost data, Rogers submits that an annual pole rental rate of $13.62 per year is fair and reasonable.

The rate covers all of the additional costs that are incurred by Disco as a result of the presence of Rogers' facilities on its pole and also provides a substantial contribution to Disco's fixed pole cost that is fully consistent with the proportionate use of the pole by Rogers and the benefits that Rogers receives from these facilities.

In the case of service poles, Rogers submits that in accordance with negotiated results in other jurisdictions of Canada, a rate of 25 to 33 percent of the full pole rate is appropriate.

The rates proposed by Rogers are consistent with the evidence and the rates in neighboring provinces and represent a significant increase over the current rates.

Mr. Chairman, Commissioners, we have copies of written submissions which we have given to the Secretary. And we will circulate after I have completed my comments today.

Subject to your questions that completes my comments.

CHAIRMAN: Thank you, Ms. Milton. No questions? Mr. Gorman.

MR. GORMAN: Good afternoon, Mr. Chairman and Commissioners.

Thank you for the opportunity to make a short presentation on behalf of Energie Edmundston, Perth Andover Electric Light Commission and Saint John Energy.

The Municipal Utilities, as you know, have been present throughout the pole attachment issue for two reasons. Firstly, we are concerned that the rate to be approved by the Public Utilities Board be fair reasonable as required by Section 101(5) of the Electricity Act, which states: "The Board at the conclusion of the hearing shall: (a) approve the charges, rates and tolls, if satisfied that they are just and reasonable or, if not, so satisfied, fix such other charges, rates or tolls as it finds to be just and reasonable.

Secondly, the Municipal Utilities are interested in the outcome of this issue, because they also own utility poles which are used by Rogers for its communications wires. The decision that the Public Utilities Board will make concerning this issue, although not binding on the Municipal Utilities, will offer significant guidance to the parties in establishing a fair and equitable rate for attachment of Rogers' wires to poles owned by the Municipal Utilities. The Board might recall that Mr. Armstrong, in his evidence, stated that the rate that is established as a result of these hearings will be offered

to the Municipal Utilities.

A significant amount of evidence has been presented to the PUB on this issue. It took up to, I believe it was five full hearing days. The Municipal Utilities do not intend to review all of that evidence with the Board and I am sure you are pleased with that decision. What we do intend to do is to highlight a few elements from the evidence and provide the Board with our views on what outcome would be fair and reasonable.

The following principles would appear to be common ground: (1) a sharing a pole costs is just and reasonable as well as being efficient and appropriate; (2) the typical joint use pole in New Brunswick is 40 feet long; (3) there are two communication attachers to the Disco poles - Aliant and Rogers; and (4) Rogers only pays for poles that they are attached to even though the pole is built to accommodate communications users.

The essential disagreements between Disco and Rogers are the space allocation of the typical 40 foot pole and the methodology to be used in allocating the share of the common portion of the pole that should be paid by Rogers. Disco's calculation yields a 30.6 percent share to their tenant while Rogers calculation yields 15 percent.

Owners have a substantial investment in support

structure, both monetary and administrative.

A tenant avoids the planning, engineering, purchasing, installation, maintenance, liability and ultimate removal of the poles to which it is attached. These are true costs to the owner and naturally should be recoverable from all users.

Consider the situation as if there were an independent pole owner with whom all users contracted for attachments. The dedicated space plus an equal share of the common structure costs would be a fair method of cost recovery.

DR. SOLLOWS: Just for clarity here. You talked about all of the project management costs associated with owning poles, but wouldn't those normally be capitalized and part of the depreciation?

MR. GORMAN: Generally no.

DR. SOLLOWS: Thank you.

MR. GORMAN: Rogers has had the benefit of CRTC protection for sufficient time to establish themselves as a viable commercial entity. It is now time for them to bear the appropriate portion of the true cost of support structures and in effect cease the subsidization by the electricity ratepayer.

The Municipal Utilities support the concept of proportionate cost sharing between all users of support

structure based on a fully allocated pole costing model proposed by Drs. Mitchell and Yatchew for the reasons that were set forth by Mr. Ruby in his presentation.

The resulting rate of $30.61 per pole for access by communications users (other than Aliant) to joint use poles owned by Disco is a just and reasonable rate that would result in recovery of a fair share of the costs of the poles and would result in a just and reasonable contribution by pole attachers to the cost of providing electricity in New Brunswick.

In closing, I am pleased to advise the Board that the Municipal Utilities are in agreement with the comments made on behalf of Disco by Mr. Ruby and we will not repeat those arguments.

Once again, I would like to thank the Chair and each of the Commissioners for their patience and attendance during these lengthy hearings. Thank you.

CHAIRMAN: Thank you, Mr. Gorman. We are going to take five minutes. And when I come back, I know counsel are all aware of the rules of rebuttal, but I am going to make sure we obey them.

Ms. Milton?

MS. MILTON: I believe, Mr. Gorman, had one quick correction to make.

MR. GORMAN: Mr. Chairman, first of all, you will be pleased to know that I have no rebuttal, but I do have a -- so I guess I would have normally followed Ms. Milton, but now you won't have to be concerned about that.

I do have one clarification though. Commissioner Sollows asked a question about capitalization of certain expenses, pole expenses.

DR. SOLLOWS: I thought you handled it very well, very succinctly.

MR. GORMAN: But I found out that some of the clients that I represent handle it in one fashion, some handle it in another fashion. And more to the point, obviously I can't speak for how Disco handles it. So I just wanted to clarify.

DR. SOLLOWS: Thank you.

MS. MILTON: Four very brief points, Mr. Chair. First, Mr. Gorman, suggested that perhaps the Rogers approach wasn't a fully allocated costing approach. It is. Both the Disco and Rogers are.

Second of all, he suggested that we have been benefiting from CRTC protection. I don't believe there is any evidence to suggest that there is any protection in what the CRTC has done.

Third, he suggested --

CHAIRMAN: One could say you have prospered under it.

MS. MILTON: Well, I don't think Rogers ever has a profit, but anyway I don't want to give evidence.

DR. SOLLOWS: Well, you share something in common with the applicant.

MR. MILTON: A third quick point is Mr. Gorman suggested that if they were a total third party owner of poles, the rates would be set based on equal sharing. I don't think there is any evidence to support that. Unfortunately, we don't have that evidence.

The final point is that Mr. Gorman implied that owners are paying more and that tenants are somehow getting a free ride. And I just want to say that Disco had the opportunity to include all of its capital costs in its pole data. It was our understanding that it had.

Second, it's not an answer to say that tenants don't pay. We are going to pay. We are going to pay the contribution that this Board determines is appropriate to be recovered through the rate.

And finally, we believe though it is important to recognize that there are differences between owners and tenants.

In conclusion, I would just like to thank the Chairman and the Commissioners for the time that they have

dedicated to this issue and also very much for this afternoon. I realize that you are sitting very late. And we also realize that this is just one small issue in a much bigger complex proceeding and we very much appreciate the time that has been spent on this issue. Thank you.

CHAIRMAN: Thank you, Ms. Milton. And I know I speak for the Commissioners, for your brevity that you have just showed. Mr. Ruby?

MR. RUBY: Boy does that put the pressure on me.

CHAIRMAN: That's enough.

MR. RUBY: That's right. I am very lucky you don't get to control the light.

But I will be brief and only deal with very specific issues that Ms. Milton raised.

First of all, in my submissions I have been brief today. And obviously I did not cover the waterfront on every element of the evidence. So as you would expect, Commissioners, you shouldn't take my silence today as giving up a point. The evidence obviously speaks for itself.

CHAIRMAN: Oh, I think the record is very complete, Mr. Ruby.

MR. RUBY: Thank you. Well, I will take that as a compliment, whether it was or not. Let me -- it is Friday

afternoon, I suppose.

CHAIRMAN: You are a lot fresher than we are up here, too.

MR. RUBY: Ms. Milton mentioned a percentage of 20 percent with respect to Rogers being on poles along roads. I would caution again that the Board, the question that was put to Mr. O'Hara on this point was with respect to facilities -- Rogers facilities crossing roads, not lying alongside, obviously that would be in addition to the percentage of poles lying -- that where the wires cross the road.

Moving on -- and this is I think an important point to respond to. Ms. Milton said to you, well Aliant is paying 43 percent. If you charge us $30.60, you know, Aliant's percentage becomes completely out of whack. Well, with respect I don't think this Board needs to worry about Aliant. It has a number of choices. One, the contract can be renegotiated. It comes up every year. There are specific provisions dealing with renegotiating the rates. If Aliant feels that Rogers contribution has increased so much that these proportions should be changed, then I would expect them to come to the table. There is no market power issue between Disco and Aliant. And so I don't think you should take too much from that. And as well, Aliant does have another option, which is to go to

the CRTC and say well, please let me raise my rates. $9.60 have been in place for 10 years. It's not fair. Let's readjust the proportion by allowing Aliant to charge Rogers the same thing on its 43 percent of the joint use poles. And not quite, but come close to re-establishing the previous balance. So Aliant has got options here. They had notice of this proceeding. They are not here. I don't think we have to worry about them.

Ms. Milton made a couple of comments about Disco poles being taller and sturdier. Now clearly a Disco pole is taller than a communications-owned pole. But I think you will find that there isn't record on the evidence that it's sturdier or has to be sturdier.

And I made this point earlier, but I will repeat it very briefly. For example, tension -- and it's Rogers or the communications utility that puts the high tension strands on the poles, may have a far bigger effect on how sturdy the pole has to be as opposed to how much weight the wires are at the top of the pole or the equipment.

Now, I say that as an example. The fact is is that there is no evidence on it. Everybody has been talking about height in this proceeding.

Ms. Milton made a number comments about ownership versus tenancy. Let me say only this on this point. If

Rogers wanted to be an owner with Aliant of joint use poles, the easiest thing in the world would have been to say in this hearing, we want to be an owner. We want to be on an equal footing. We will contribute the up front capital when these poles get built. We will build some poles. We will buy some so that we come into an ownership percentage. I would suggest to you that it is very telling that Rogers has not taken that position in this proceeding.

Now, Ms. Milton, also made some comments about using the various costing approaches, the economics theories that have been used to predict what's going on in other provinces and whether it's consistent. I would only point out that Dr. Mitchell's approach, if you plug in the numbers, the 17 1/4 feet and so on that Rogers has proposed, you still end up with prices that are consistent or allocations that are consistent -- sorry, allocations that are consistent with what you see in the other provinces.

So it works for Rogers' numbers. It works for Disco's numbers. That's not true the other way around. And I offered to Dr. Ware to do that calculation, to show me that I was wrong, and he couldn't do it. When you plug in -- his numbers only work in very specific circumstances

unlike the methodology that Dr. Ware proposed -- excuse me -- that Dr. Mitchell proposed.

Separation space. Separation space is a function of joint use. I can't put it more simply than that. Both parties would have to be separated from each other. They have to accept each other facilities as they are and become separated. The fact that one pole -- one wire sags and how much other one does that doesn't matter in that case. All that gets translated to the pole and that's what the standards show when you use a four foot number.

Ms. Milton talked about transformers encroaching into the separation space. It's a minor encroachment and I notice that it's balanced off by the drops that Rogers uses to get to houses and businesses. They come up into the separation space. But in any case under the Mitchell model, one-third of that space is paid for by Aliant, one-third by Rogers and one-third by Disco. So it accommodates for minor encroachments anyways.

Now with respect to the data that is 32 years versus the 41 years --

CHAIRMAN: That's not rebuttal, Mr. Ruby.

MR. RUBY: Well, Ms. Milton --

CHAIRMAN: No, it's an obvious -- it's been discussed at great length. Could you pass on to another subject

matter?

MR. RUBY: Thank you, Mr. Chair. My last point in rebuttal, Mr. Chair, with respect to vegetation management, I think you will find from the record that Mr. Armstrong conceded under cross examination at the end of the day Rogers accepts $8.39 per pole is the right vegetation management cost if Rogers -- if Disco is doing the vegetation management. Rogers hasn't demonstrated an ability in my submission to do it. It would be dangerous to allow it to do that without evidence that it could do the vegetation management. And you should include vegetation management in the cost and the amount that Mr. Armstrong has agreed is the right figure.

The only other thing I would note, Mr. Chair, is a few moments ago, Ms. Milton, handed me what I guess she wants to file with the Board, which is a 60-page written argument. I don't know whether she covered everything that's in here in oral argument today. I have to admit I am a bit surprised since Disco is willing to do written argument today, but Ms. Milton wanted to come do oral argument to be faced with this as well. All I can say is that I am happy to file my speaking notes as well if it's useful to the Board. And you know, we will live with whatever comes out of this. But 60 pages seems to be more

than the material that could have been covered today.

CHAIRMAN: Well, I am certainly thankful she didn't read it. However, in a serious vein, you can go through it and if you find something there that wasn't covered that you would have had something to say about here, why the Board will let you put something in writing and send it into to us provided we get it in 10 days, i.e., a week from Monday.

MR. RUBY: Thank you. I don't anticipate there being anything, but thank you.

CHAIRMAN: Well, thank you very much, Mr. Ruby. Let me conclude the marathon hearing by thanking the ladies who have been housed in that little hut to the rear there the entire time. And I am very thankful that they learn how to hide their treats from the Board. There was one room, the one over here, where they bring in all sorts of things and start eating it at 11:30 or something. It was tough on us up here. However, thank you very much.

And to the shorthand reporter, who has been omnipresent here, but also the ladies back in the office, who performed a great service and turned that transcript around very quickly.

And also to the Board Secretary and to staff. They are going to have to continue to work now that we have to

start our true work.

Again, thanks to counsel for their courtesy, et cetera.

I was just going to say a scurrilous remark about the technician at the back of the room who enjoys the breaks far more than being in here. We will see him again soon.

Anyway, thank you all. And we will adjourn.

(Adjourned)

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

Reporter