

New Brunswick Board of Commissioners of Public Utilities

Confidentiality Hearing

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

Delta Hotel, Saint John, N.B.

July 11th 2005, 10:00 a.m.

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

Delta Hotel, Saint John, N.B.
July 11th 2005, 10:00 a.m.

CHAIRMAN: David C. Nicholson, Q.C.

VICE-CHAIRMAN: David S. Nelson

COMMISSIONERS: Ken F. Sollows
Randy Bell
Jacques A. Dumont
Diana Ferguson Sonier
Randy Bell

BOARD COUNSEL: Peter MacNutt, Q.C.

BOARD STAFF: Doug Goss
Izabell Fagan
John Lawton

BOARD SECRETARY: Lorraine Légère

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CHAIRMAN: Good morning, ladies and gentlemen. A housekeeping matter. If you wish to address the Board you have to push the button. That will engage so the translators can hear. And the shorthand reporter will pick up.

May I have the appearances please? It is a good thing New Brunswick is a paper-producing province. Because we

are sure helping out.

The applicant?

MR. HASHEY: Thank you.

CHAIRMAN: Yes. Go ahead.

MR. HASHEY: Sorry. Thank you, Mr. Chairman. As you would note, our numbers are a bit depleted. There is an awful lot of work being done today to try to complete a huge list of request for information.

But with me I think are the essential people, Mr. Gaetan Thomas. My name of course is David Hashey. Mike Gardiner and my partner Cathy Bowlen behind me assisting. Thank you.

CHAIRMAN: Thank you, Mr. Hashey. Canadian Manufacturers and Exporters, New Brunswick Division. Mr. Plante here this morning? No.

Conservation Council of New Brunswick?

MR. COON: Yes, Mr. Chairman. David Coon for the Conservation Council.

CHAIRMAN: Would you hold up your hand, Mr. Coon, so I -- I was looking over the top of your head. Thank you.

Eastern Wind Power Inc.? Mr. Hashey, has Mr. MacPhail been in touch with you at all?

MR. HASHEY: No, Mr. Chairman. I haven't heard from him. I had the indication he was in a court case today somewhere

and might not be available. But he has not contacted me.

CHAIRMAN: Okay. Thank you. Mr. MacNutt, you were talking to Mr. MacPhail, were you not, sir?

MR. MACNUTT: Yes. He indicated that he had a court case. And he said he intended to speak to Mr. Hashey with respect to -- his concern with respect to the wind power PPA.

CHAIRMAN: Enbridge Gas New Brunswick?

MR. HAYES: Matthew Hayes appearing on behalf of Enbridge Gas New Brunswick.

CHAIRMAN: Thanks, Mr. Hayes. Energy Probe?

Now I will go through the three Irving companies in that there may be need for various individuals to speak today.

Irving Paper Limited?

MR. DEVER: Mr. Chairman, Bill Dever, Irving Paper Limited, along with Wayne Wolfe and Kevin McCarthy. We are also here for J. D. Irving Limited.

CHAIRMAN: So that leaves Irving Pulp and Paper?

MR. DEVER: And Irving Pulp and Paper. Sorry, Mr. Chairman.

CHAIRMAN: Okay. Don't forget Irving Pulp and Paper.

Great. Thank you, Mr. Dever.

Is the Jolly Farmer here today? Mr. Roherty, are you here? Nobody here from the NBSO? Rogers Cable?

MS. VAILLANCOURT: Christianne Vaillancourt for Rogers

Cable, Mr. Chairman.

CHAIRMAN: Thank you, Ms. Vaillancourt. Now self-represented individuals.

MR. ROWINSKI: Yes. Good morning, Mr. Chair. It's Jan Rowinski.

CHAIRMAN: Thank you, Mr. Rowinski. And the Municipal Utilities?

MR. GORMAN: Good morning, Mr. Chairman. Ray Gorman appearing on behalf of the Municipal Utilities. Today I have with me Dana Young, Eric Marr and Jeff Garrett.

CHAIRMAN: Mr. Burpee was seen in the parking lot. He decided not to come?

MR. GORMAN: Don't see him here yet.

CHAIRMAN: Thank you. Vibrant Community Saint John? Public Intervenor?

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

CHAIRMAN: Thanks, Mr. Hyslop. Just for the record, the normal Informal Intervenors, Agricultural Producers Association of New Brunswick, Canadian Council of Grocery Distributors, City of Miramichi, Flakeboard Company Limited, Genco, Noranda Inc., Potash Corp., UPM-Kymmene Miramichi Inc.

Mr. MacNutt, who is with you today?

MR. MACNUTT: Mr. Chairman, I have with me today Doug Goss, Senior Adviser, John Lawton, Adviser and Izabell Fagan, Principal Administrative Officer of the board.

And before we go on, Mr. Chairman, it is my understanding that the nonutility generation electricity suppliers were advised of this hearing today. It might be appropriate to determine which of those are present.

CHAIRMAN: Thank you, Mr. MacNutt. That is my next sheet of paper, right here. We expected service by e-mail on Bayside Power LP and Grandview Cogeneration Corporation. I believe it was on a Mr. Matthews. Mr. Matthews here today or someone representing that company or companies?

MR. STEWART: Mr. Chairman, Christopher Stewart here for Grandview Cogeneration Corporation and Bayside Power.

CHAIRMAN: Thanks, Mr. Stewart.

MR. STEWART: Thank you. Fraser's? Just looking for Fraser Papers?

MR. THIBODEAU: Yes, Mr. Chairman. Gilles Thibodeau and Ron Beaulieu for Fraser Papers Inc.

CHAIRMAN: Okay. Would you raise your hand so I can locate you? There you are. All right. Thank you.

And the Board has heard from the Department of Natural Resources concerning Musquash. And they have decided

there was no need for them to attend today. And St. George Power?

MR. DEVER: Mr. Chairman, Bill Dever for St. George Power.

CHAIRMAN: Thanks, Mr. Dever. Now before I get onto the normal housekeeping matters, everyone in the room is aware that CBC and The Telegraph Journal have requested Intervenor status so that they will be able to join in the questioning of confidential matters and hopefully other matters as well.

And could I ask the Intervenors if any of you have any objection to CBC being given full Intervenor status?

Silence is acquiescence.

And does the applicant have any difficulty with it, Mr. Hashey?

MR. HASHEY: Thank you, Mr. Chairman. From the applicant's standpoint on this matter, I would say that we have always been interested in an open and transparent process. My concern is that we have had a process established that has some very fine time lines that we are interested in obviously maintaining. I think everyone here is. There has been a lot of opportunity for people to be applying as Intervenors. My concern is that if we provide one media outlet or two the opportunity to be an Intervenor, does that mean that continuing during this

process we can have a number of people applying to be an Intervenor?

I believe the rules are pretty clear that there is, under the Inquiries Act I believe being followed by the Board, that an Intervenor has to be a person who has a substantial and direct interest in the subject matter. I don't know. Does this mean that the press outlets will also be participating? I guess if they are Public Intervenor they can participate in cross examination. And you know, truly there is a qualified team appointed that represents the public here.

And I find it difficult to understand how there can be a role of reporting this matter and then in the same light be introducing evidence and cross examining.

But saying all of that, I will leave that to the Board, if they feel that it would be appropriate that CBC be an Intervenor obviously and The Telegraph Journal, then we are going to respect the Board's decision obviously. But I just wanted to bring those points out.

And I might also add that there is a section of the -- that as far as the confidentiality part, I guess I will talk to that at a subsequent time as to what that all means.

CHAIRMAN: Certainly the Board's approach is to deal with

the matter of whether or not CBC and the Telegraph should be given Intervenor status. And then if so, then they will be able to argue in reference to confidential matters.

MR. HASHEY: Sure. Thank you, Mr. Chairman. That concludes my comment.

CHAIRMAN: Thanks, Mr. Hashey. You are just taping I presume there. You are not -- there is no audio involved. Okay.

Any Intervenors have anything they want to put on the record in reference to Mr. Hashey's remarks? Nothing.

Mr. Coles, would you like to put something on the record?

MR. COLES: Thank you, Mr. Chairman. I am representing the Canadian Broadcasting Corporation and the Telegraph-Journal today.

There are -- in this respect there are really two positions being put forward to you, and perhaps the easiest way is to address Mr. Hashey's concerns, because those are the only ones that have been voiced.

He raises the spectre of other media outlets coming in at some other time and asking for Intervenor status. Well I assume you will deal with those applications just as you are dealing with this one on the merits, and you will allow them or disallow them, and you look at what

perspective they bring and where they are in the process. I

fail to see how pointing out that somebody may or may not on some speculative basis at some time in the future seek to intervene has any particular relevance, any more than if some corporation showed up later in the day.

I would point out that it in fact is our position that you have authority to grant this at this stage under 128(2) of the Electricity Act -- 128(2)(a) and (d), and that's where your authority comes at this stage to grant it.

My friend representing the applicant also raised this notion as to, to sort of paraphrase, what is it that we bring? Why are we a unique Intervenor? What particular interest do we have?

Well with the greatest respect, you are the Public Utilities Board. You are charged with seeing that the public interest is done. In that respect you in fact are akin, in our submission, to judges. You are going to hear testimony. You are going to receive documents. You are going to weigh competing arguments. You may have to decide credibility issues. The statute itself empowers you as public -- as if you were conducting a public inquiry. You can subpoena witnesses. You can make findings of fact in law.

So it is our submission that, yes, while you are here to see that the public's interest is represented, you do that in a capacity akin to judges. I mean, that's effectively what you are doing. You are going to hear argument from various competing interests in this process and then somehow your common sense and wisdom is called upon to discern and come out with rates at the end of this process.

Because you are judges, or effectively judges, it is our position that the Supreme Court of Canada decisions in a number of cases, Dagenais leading most recently to the Supreme Court of Canada decision in Sierra Club, have application. That theory of law as to what the particular interest of my client is was adopted by the Supreme Court of Canada in the MacIntyre case long ago, and the most eloquent expression of that was the adoption by the Supreme Court of Canada of the remarks of the philosopher Jeremy Bentham, who said, and I quote, "In the darkness of secrecy sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very sole of justice. It is the keenest spur to exertion and the surest of all guards against

improbability. It keeps the judge himself while trying under" --

CHAIRMAN: Sorry to interrupt, Mr. Coles, but I think we are getting on to another argument here. Those are eloquent words and I have read them. But I think right now we are just asking whether or not you should be granted Intervenor status and I think what we are getting down there to now is the confidentiality issue itself.

MR. COLES: With respect, Mr. Chairman, as I understand, my friend Mr. Hashey made remarks that raised the issue of what particular interest we might have such that we should be an Intervenor. And the interest I am expressing is to in fact contra his query to you about what particular role we play. And I am distinguishing the role of the media from the role of the Commissioners and in turn from the role of the Public Intervenor. I see the three as having very, very distinct interests in this process. And the interests of my clients are limited to the question of should you receive material in confidence, and, if so, on what basis, and should you in turn then have in-camera hearings. So when I ask to be an Intervenor, it's restricted to those issues.

CHAIRMAN: Okay. That clears a lot up, Mr. Coles. So you are just saying that the only time you wish to have

Intervenor status in our proceedings is when we are dealing with matters of confidentiality.

MR. COLES: That's correct. And going in-camera.

CHAIRMAN: All right. That's all part and parcel.

MR. COLES: That's right. And then there are two other matters as Intervenor or if you elect --

CHAIRMAN: I would suggest that what we do is we wait on the decision on that. I understand from your correspondence, which we have all received, what those other two matters are.

MR. COLES: I understand. Just so long as my remarks that it's to talk about confidentiality and talk about in-camera are not taken as to restrict me from talking about those other two matters, because we see those as part --

CHAIRMAN: You will have your opportunity hopefully this morning to address all things that were in your correspondence.

MR. COLES: Thank you, Mr. Chairman.

CHAIRMAN: Okay. Mr. Hashey, anything in closing?

MR. HASHEY: Nothing further to add.

CHAIRMAN: We will take a two minute break.

(Brief Recess)

CHAIRMAN: Surprise. This time I meant two minutes. And we too that full two minutes to make a ruling that we will

give the CBC the status that they have requested, which is somewhat restricted and the transcript will show that. Subject only to one thing, is that, Mr. Coles, with the exception of myself, we are a part-time Board and this is going to be a lengthy hearing -- it already has -- lengthy hearing process and it will continue to be, and the parties have agreed that when we have sort of a side -- I don't want to use side panels, that's American, but we have decisions of this nature, the entire panel that will sit and make a decision in reference to the rates, et cetera, et cetera, doesn't have to sit on each and every one of these. And we have two Commissioners who in fact are not sitting today that will be back for the main body of the hearing, and I have no doubt that your clients would be prepared to go along with that.

MR. COLES: Yes, Mr. Chairman.

CHAIRMAN: Good.

MR. COLES: And I take your ruling about the CBC also includes the Telegraph-Journal?

CHAIRMAN: Yes. Sorry. Absolutely.

MR. COLES: Thank you, Mr. Chairman.

CHAIRMAN: All right. Now I suggest we turn to your letter and subject to what any of the parties have to say, perhaps we can deal with the third one on your letter

which I understood to be taping and audio, et cetera, of the proceedings, is that correct, Mr. Coles?

MR. COLES: Yes, Mr. Chairman. If I could be allowed to address that. I have the benefit, as I believe everyone in the room does this morning, of a handed out policy statement instructions to the press.

CHAIRMAN: Yes. And if I might, just to flesh that out a bit as well, is that since that was written we have expanded -- for instance, we have always allowed the television cameras to come in and get some background footage of the room, et cetera. And secondly, in the last few years we have taken to delivering our decisions orally for two reasons. One to give the video press the opportunity to use that for their broadcasts. And as well it also -- if the -- in this bilingual province, if the hearing is in English then that doesn't necessitate our having to have that particular decision translated in a great rush. So we have done that. So those are in addition to those policies that have been in existence for some time.

Okay. So if you would like to address that issue, my suggestion is that then on your second issue is dealing with the confidentiality matters and you would simply join in with the rest of the Intervenors and have your

participation there.

So go ahead, sir.

MR. COLES: Thank you. Mr. Chairman, before I -- there is one other brief point in my letter and before I address the substantive issue of camera recording and broadcast of these proceedings, I would like to briefly touch upon that because really it's a summary issue but one that I think is important.

I was retained Friday morning and attempted to send out by way of electronic e-mail copies of all of the cases that I would be referring to. I know some of my colleagues in the room have expressed that they did receive them and did download them. Others spoke with some annoyance that all I managed to do was plug their e-mail systems and cause a lot of grief.

I do have as well as a set of authorities which I have left with your Secretary and a set which I provided Mr. MacNutt, I do have another further four sets of hard copies here that I can make available to anyone who wants them. I particularly would like to leave at least a couple for the Board. And if I may, through the Secretary, there is an article that I wish to refer to that is included in this package, and if I could give it to the Board it might expedite matters in reference to

this issue.

CHAIRMAN: All right. And these cases that you have, sir, they deal not only with the camera issue but also of course with confidentiality?

MR. COLES: That's correct. But I'm not going to get into the confidentiality. What I'm going to restrict myself to right now is just two issues. One of them is notice and the other is this issue of the camera. That's all I'm going to speak to.

CHAIRMAN: All right.

MR. COLES: But for that purpose it would be useful if I could just leave say three copies of this article for the Board to share, and in fact I'm not going to trouble you with reading this article. This article you can read at your leisure, but it addresses essentially the history of electronic court access up to 1994 in Canada and various other places.

What I wish to direct you to is if you go to page 23 of 25, you are in the footnote section, and what footnote 52 does is it recites -- and carrying on to the next page -- the various inquiries, commissions, quasi-judicial proceedings, that in fact have been televised up to 1990. And I don't want to take the time, Mr. Chairman, to read them into the record, but they go on and on and on.

And you will notice that many of these, for example, the inquiry into certain deaths at the Hospital of Sick Children and related matters, those of us who saw that on television, you had witnesses there who were compelled to attend who were facing personal jeopardy, this was the kind of situation where you would very definitely have witnesses who were talking about horrendous matters, the intentional death, wrongful deaths of children. We have all experienced the recent Gomery Inquiry. We are familiar with the Somalia Inquiry. This lists a number of these public inquiries where both legal argument and the testimony of witnesses were transmitted for the benefit of Canadians.

Your work is important work. You are charged by the legislature with performing a quasi-judicial function where you are going to discern who among these competing interests has put forward a position that you adopt or that you compromise and come up with your own. It is a process that I submit to you the people of New Brunswick have a right to have confidence in, have faith in, that you are doing your job, seeing that the work is done, so they can understand what the result is.

If at the end of the day you render something that just comes out of the blue, people aren't going to

understand. Well what does that have to do with cameras, you may ask.

CHAIRMAN: Could I just ask you -- I have just been briefly skimming that footnote, Mr. Coles. Are there any economic regulators that are included in that list?

MR. COLES: Certainly the Securities Commission is.

CHAIRMAN: All right. But that is in its disciplinary function, as I would gather.

MR. COLES: Well this particular article, Mr. Chairman, you will note goes only up to 1994. This is ten years old.

CHAIRMAN: Okay. Do you have any?

MR. COLES: Not since Friday --

CHAIRMAN: To the best of my knowledge, you know, be it the OAB, public utilities boards across Canada, to the best of my knowledge, there has been no requirement by the court system that economic regulators have to throw open their doors to the camera. But I'm just -- I'm querying, that's all.

MR. COLES: You see the difficulty I have is in the context of 2005, it's phrasing that question or proposition as you have I suggest backwards. You are a public inquiry. There is no evidence, nothing before you that would suggest that in any way the accuracy which is achieved by audio recording and video recording of your remarks should

not be equal to or perhaps even preferred over the scribe that is trying to write very quickly the evidence that has been given and then subsequently read their own notes. Now you have allowed for electronic recording of what goes on for the purpose of accuracy of note taking, so that's taken care of. But what is missed of course in the print media is you miss -- you miss expression. You miss the ability that you have to see the emotion of the Commissioner when they are asking the question, the manner in which the witness and the solicitor interact.

We all watch television. We all watch television news. This is a medium that I don't think there is any dispute, a great number of New Brunswickers get their news from. Why -- and I put it to you this way -- why in a country where we have section 2(b) which recognizes the freedom of the media and that freedom in law is understood as a freedom of both the broadcaster and the listener. Supreme Court of Canada has recognized that the media has the right to gather news, that that's part of that freedom. What comfort is it to the television CBC broadcaster or CBC radio to say even though your mediums are electronic and your listeners receive their information electronically, we are going to limit your charter right of freedom of expression, of news gathering,

and we are going to limit your audience's ability to understand the workings of this body to that of the print media.

With the greatest of respect, I suggest to you that the way the Charter of Rights works is its nt for me, Mr Chairman, to come in and say there must be some other authority to where this has been granted before or proffer to you that this should be granted. I suggest the question is properly phrased as to why would you deny? On what basis would you discriminate against an electronic media when that electronic media serves so many New Brunswickers.

Hansard in parliament has opened up the ability of Canadians, televised proceedings of the House of Commons, televised proceedings of the Senate, to understand that working of government. You are a public institution. You are the PUB. On what basis should you deny the CBC and its audience the right to understand your workings and the right to judge themselves as to whether you are doing a good job when you weigh the evidence of so-and-so or you weigh this document. What is the harm? What is the problem?

The technology as we saw a few moments ago as the camera recorded the entry of you is not disruptive. There

is no more bright lights that caused you to break out into sweat. The camera is down here. It's not as if he can read your confidential notes before you. It's silent. It doesn't make any noise. He is not going to be intrusive. I say this recognizing that you have the authority to consider certain matters confidentially. You even have the authority to go in-camera under certain circumstances, and you are going to hear those arguments as to whether you should do it and you are going to make whatever decision you feel appropriate. But for that portion of these proceedings that you decide are public, which is what they will be unless you make the extraordinary decision to go in-camera or the extraordinary decision to receive things confidentially, other than that they are public.

Now the remarks of the Supreme Court of Canada briefly, and I appreciate Mr. Chairman's comments that certain of these case you have and you have read them, but I think it appropriate just briefly to put to you some of the words from Justice Cory in the Supreme Court of Canada Edmonton Journal case which the Supreme Court of Canada found so important that Justice La Forest repeated them again in the CBC New Brunswick Attorney General case, and that is as follows: "Cory in Edmonton Journal described

the equally important aspects of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. That is to say as listeners and readers, members of the public -- as listeners and readers, members of the public have a right to information pertaining to public institutions, and particularly the courts. But public institutions. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most people, to attend a court trial. Neither working couples nor mothers or fathers housebound with young children would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings, the nature of the evidence that was called, the arguments presented, the comments made by the trial judge, in order to not only know what rights they may have but how their problems might be dealt with in court. It is only through the press that most individuals can really learn what is transpiring in the courts. They as listeners or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependant upon receipt of the public of

information as to what transpired in court. Practically speaking, this information can only be obtained from newspapers or other media."

Now the Edmonton Journal case talked about a court, but I suggest to you that every single sentiment that is expressed there apply to public institutions like this one when it's discharging the important function of in fact sifting through this myriad of evidence and coming up with an equitable view as to what are rates.

So I say to you that what you are doing when you say you can only use the audio recording to check your notes, is you are preferring the print media over the electronic media, and you are doing so at the expense of a large audience of people who receive their news, their information electronically. I have provided as early as I could a copy --

CHAIRMAN: Mr. Coles, I want to engage you on that comment because you can also, or your clients, one of whom is print media, they can check the accuracy against our audio, but we are not allowing the print media or anyone else to tape a witness' presentation to this Board or the question live. With due deference I would say we are not discriminating because we won't allow them nor you or your reporters to record in the room. That's it. There is o

discrimination as to whether you are print, you're video, what you are.

MR. COLES: Well with respect, Mr. Chairman, I would say two things. Number one, I am disturbed that you say we are not allowing that you would appear to have prejudged the issue before we finish the presentation.

CHAIRMAN: I'm talking about arguments that the CBC has made in front of this tribunal on previous occasions, sir, at which time we made a ruling and as a result the policy document that we have shared with you this morning was there. That doesn't mean that if you have very convincing argument that we won't change our minds. That's all I'm saying.

MR. COLES: Thank you. I am reassured in that respect. The second part may be my problem and deficiency in what I talk about by way of discrimination. The print media dealing in the written word, of course having access to your verbatim transcript, assists them in accurately understanding what was said so they can go off and print their report as they see fit. Where the discrimination comes in is when you are dealing with an electronic medium such as television, that medium works in images. It has an ability to convey, as the old expression goes, a picture is worth a thousand words, information not just

the printed word, but it can portray audio and visually every dynamic of what is going on. Where the discrimination comes in is that you are facilitating or permitting one medium, which is the print medium, to work as it does, but you are prohibiting the other medium to work other than as we saw this morning you are allowing sort of filming of the Commission entering and the general set-up of the room, but not of the hearing per se.

This situation was talked about in a case before the Ontario Court of Appeal. Now in that case which is the Ontario Film and Video Appreciation Society and the Ontario Board of Censors. What was at issue was a filmmaker. And I'm just going to read that.

CHAIRMAN: That is the case that is reported in DLR and nobody can read. Is that the one?

MR. COLES: Well, I mean, I can read it.

CHAIRMAN: No, no. I'm commenting on the quality of the case report that Mr. MacNutt and I got. Is that the one?

MR. COLES: Well, when Mr. MacNutt alerted us to that problem, we retransmitted it. And I had not heard that there continued to be a problem. I have hard copies here, as I indicated to your Secretary.

But let me just read then briefly from the head note, the operative relevant part. "In addition freedom of

expression extends to those who wish to express someone else's ideas or show someone else's films. It also extends to the listener and to the viewer, whose freedoms to receive communications is included in the guaranteed right. The argument that a prohibition can be reasonable if it applies only to film-makers, not to authors of books, publishers of papers, performers on stage, T.V. producers, et cetera cannot be accepted. The Charter, in allowing reasonable limits, does not countenance the total eradication of freedom of expression for those who use a particular form of expression such as film. If film is the medium in which an individual works, he could thereby be denied completely his only means of self-expression. To say that other media are available to him is no comfort at all. This argument involves the question of fair treatment between various forms of communication."

And what I say to the Board -- I mean, it is no big extrapolation, this isn't rocket science here, is surely what the Board wants is it wants any reporting of what transpires to be accurate, to be fair and to be in accord with the Board's rulings on terms of whatever restrictions on reporting you are putting in place.

How does permitting the broadcast of argument testimony and interaction with the Board in any way limit

or restrict its accuracy or its fairness?

When the editor of the newspaper sits down with the journalist and says look, what is your take on what happened today. And the journalist, after hearing the notes and getting it accurate, he nonetheless still decides what he is going to put in the story, what he is going to report.

That is the freedom of the fourth estate. That is why there is a democracy. People can comment on public institutions. All film does is enable that to go in another dynamic to another part of the audience fairly and accurately.

The argument that always comes back is, or I suggest to you the only argument, is well gee, there may be certain witnesses who are intimidated by the camera or wouldn't want to speak if they thought that their image was going to be broadcast.

Well, to that I say several things. The lawyers in this room have no trouble appearing on television. They are not going to be intimidated by the cameras, you know. They are advocates. You are a Public Board. I fail to see how any of you can complain if your image is captured doing your job.

What about the witness? Well, I suggest to you, and

you have seen this lengthy list of inquiries and commissions where we all know they are on television. And boy, those are individuals who are being asked questions that are a heck of a lot more uncomfortable than the questions that are going to be asked experts, employees whose job it is.

No one's liberty is at jeopardy here. What is trying to be rooted out are the facts that will enable you to make a decision on power rates. What objection surely is reasonable for these people to give to say, look, I don't

-- I don't want my remarks broadcast orally or my image broadcast on television.

These aren't people who are hiding from the law or who are going to be mugged. Their words can be recorded verbatim and published in the newspaper. Why can't they be broadcast verbatim on the evening news? I mean, ask yourself what is the logic behind the denial? And I submit to you there is none.

However, if I'm wrong -- if there is a particular witness sometime that is going to be called here who puts forward some argument that you find compelling that look, that person's image should not be broadcast, or we should -- we are going to put some controls on, well, as I read section 128(2)(a) of the Electricity Act, you can

deal with those on a case-by-case basis.

But as a presumption, which is what your policy says, as a presumption that you are going to restrict my client Canadian Broadcasting Corporation's television rights under section 2(b), and you are going to put a blanket denial, with the greatest of respect, I submit to you you are violating my client's Charter of Rights. And you are doing so without any proper legal basis, and that your policy is wrong in law.

My second argument is whether it is wrong or not in law, why, why would you put a blanket ban to prescribe the people of New Brunswick from being able to see the relevant evidence and the relevant matters that you are all engaged in?

Why would you do that? Why would you deny them that when you have the discretion clearly to allow it? If there is an abuse, you deal with that. If there is a particular witness or some particular matter that gee, you think the camera should be turned off, fine. But deal with it based upon the evidence. Deal with it as a factual matter, not as some blanket condemnation.

I think it offends the Canadian Charter of Rights and Freedoms. And I think it offends the common sense reality that most people to know what is going on here, want to

see it on the television news. Because that is how they get their news.

On that point, unless you have any questions, I'm finished my presentation. And I would like to simply address very briefly the other matter that I said I would raise with you. And that is the question of notice.

The Supreme Court of Canada in the Dagenais decision -- and the Dagenais case, for those in the room who are not familiar and have not read it, this is a situation where the National Film Board had done a fictional series called The Boys of St. Vincent which dealt with Catholic priests alleged to have committed sexual indiscretions. This show was going to be broadcast nationally on the Canadian Television Network.

There were lawyers who were representing Catholic priests in fact in the province of Quebec who said look, we are afraid this may influence the jury. They ran off to the court and they got an injunction banning the broadcast of that in a particular region of Canada for which a jury might be selected for a period of time.

The Supreme Court of Canada heard the case and determined that no, the section 2(b) freedom of expression rights of my client were violated by the judge, in particular violated because in part CBC had a right to be

there, to have heard and granted such an injunction without giving notice to the press was a violation.

At paragraph 49 of that decision the case makes it clear, I submit to you, that whenever a court --

CHAIRMAN: Sorry. I'm -- 49? I downloaded off Canlib 2 on the Net. And they don't number the paragraphs. Can you help me a little bit there?

MR. COLES: Yes, Mr. Chairman.

CHAIRMAN: From which Justice is that?

MR. COLES: Well, it is the majority decision as written by Justice -- the Chief Justice Lamer. On my printout it is page 20 of 61. So it would be somewhat shy of halfway through.

CHAIRMAN: What does the paragraph start with, the words?

MR. COLES: "Second, the issue of giving notice to the media of motions " --

CHAIRMAN: Okay. Hang on a second.

MR. COLES: It is -- the way the decision is broken out there is (b) "Charter", and then underneath that (2) "General Guidelines for Practice, (i) Preliminary Comments." And this is where it is to be found, where it talks about notice.

CHAIRMAN: Well, I will ask Mr. MacNutt to locate it in the Canlib.

MR. COLES: Mr. Chairman, if I could just leave my copy with you. It has got the passage highlighted.

Mr. Chairman, the Supreme Court of Canada in that case was dealing with publication bans and they were talking again about courts.

CHAIRMAN: And criminal offences.

MR. COLES: That's right. Now why I come to you and raise this notice of issue is since the Dagenais decision, there have been two other decisions that relate to this point. One is the Sierra Club decision, which I am sure you are familiar with, and which the panel will hear much about over the next two days because it deals with the very issue of receiving documents confidentially.

In that case, what the Supreme Court of Canada does is says look, when you are considering this issue of confidential documents, it is really the Dagenais test that you are going to apply because confidential documents are really much like deciding to grant publication bans. So that why I say Dagenais is applicable is number one, is because the Supreme Court of Canada in the Sierra Club decision said the calculations or the matters that you take into account essentially are the same. Number two is the Federal Court in the Travers versus Canada decision --

CHAIRMAN: If I might, let's go back to the case that you

have just given me. And having now read that through, the paragraph ends with "The judge hearing the application thus has the discretion to direct the third parties, ie. the media, be given notice. Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law."

MR. COLES: That's right.

CHAIRMAN: Okay.

MR. COLES: So where you go from Dagenais, just to let you know, because Dagenais of course, that's the pronouncement what has happened. What has happened is right across Canada there is a recognition that in all criminal proceedings if anybody wants to ban publications, other than under a mandatory statutory ban, if it is a ban that is being enacted under the common law, notice is given to all recognized media outlets so they can come and hear argument because it has been recognized by the courts that they have a legitimate interest. The people of this country have a legitimate interest in the openness of courts.

CHAIRMAN: Just enlighten me a bit on that, not having practiced criminal law for a good number of years. What

is the nature of that notice? For instance, in our case, with this Board, we give notice to the press and the media of the upcoming hearing. We have a gentleman part-time on our staff who will explain to them exactly what may unfold in the hearing that is coming up, et cetera. Is that sufficient to comply with the notice in this case?

MR. COLES: Let me answer that by two comments, Mr.

Chairman. I can explain what happens by way of notice in my province. A computer -- sorry, the judiciary met with the media. It was decided that the Kings College School of Journalism would set up a website. Any lawyer who wants to apply for a publication ban files notice on that website. And media outlets subscribe to the website. If they are interested in getting notice that somebody is going to try to ban publication, this website gives them the notice. And then they decide whether they are going to show up --

CHAIRMAN: Is the UARB part of that?

MR. COLES: No, sir. I am answering your first part of your question which is how does the courts work and then the second part is you indicated that you give notice. As I understand in your statute, the formal notice you give of course is you say we are about to embark on this process that eventually will lead to rates. And that

notice is published in newspapers and anybody who wants to intervene can come along and you establish your craft. My comments are restricted to to the fact that my clients would necessarily have no interest in being intervenors because they don't have a particular axe to grind or particular evidence to give as to the rates. Their interest in intervening only arises when they find out that you are going to hear arguments to take evidence in confidence. Now all of a sudden that triggers the legitimate interests of my client in being heard on that matter. You know, why would the public utilities board now start to take evidence or hear things in confidence.

CHAIRMAN: Well that leaves me again to say the policies document on confidentiality issues is one that the Board circulated and I'm sure representatives of both of your clients were aware of the circulation of a draft of that particular policy. The parties to this proceeding have, over the last couple of months, had an opportunity to have an input into it, et cetera, et cetera, et cetera. But more particularly my question to you is if we decide, or if one of the parties says they want to file something in confidence, and we are going to deal with that, do we have to send a notice to all of the print media in this province, including the weeklies and the

dailies and every radio station and every television station?

That is my question really.

MR. COLES: Well yes, and there is first of all, you know, you practice that by saying well you know, we know about this. With the greatest of respect, what has happened is, as I understand it, you have been -- you have been evolving a policy as to how to deal with the confidentiality question. I saw a draft dated earlier in June, later in June. In other words, you are evolving a policy. That policy talks about a process that, you know, how are you going to handle that in reference to this rate case. But that isn't notice. My clients haven't participated in the construction of that and it is only, as I understand it, today that you are actually going to be hearing argument from people as to whether or not certain things should be received in confidence. So I say to you, Mr. Chairman, it is really only today that my clients have an interest in say well, wait a minute. Before you entertain taking things in confidence, we think there is a whole series of things you must consider.

CHAIRMAN: Okay. But Mr. Coles, my question is rather simple. Is that we come down to is and it is my simple question of you is what is the nature of the notice that

you are arguing should be given by a tribunal like ours.

MR. COLES: I think -- obviously first of all, you are going to set your policy under 128. All I can do today, Mr. Chairman, is make some recommendations or some comments. You heard from the applicant at the beginning of our dialogue this morning saying, well gee, what about Johnny come lately say we want to intervene later on and we want to do this and so on. It is my submission to you that by making a definitive notice protocol, that you in fact clean up the problem that the applicant was saying because you can in fact fix. So that my suggestion to you is when it becomes apparent in any one of your chains of responsibilities that there is going to be some interlocutory or some hearing dealing with either receipt of confidential materials or going in-camera, when that becomes apparent, that is when the notice should go out. And the notice, it can be a notice just like you originally published saying where you said, look, we are going to embark on rate hearings. Only this notice would be there is an application to receive evidence in-camera. Or to receive confidential documents. That could be published in a paper. You could set up a protocol whereby you have a website and when an application like that is to occur, it is published on your website.

It seems to me there are a number of ways it can be done.

And I can tell you from my experience in Nova Scotia, I am sure representatives of the recognized press would be only too happy to meet with the administrators of the Board and work out something that works easily for both people.

CHAIRMAN: If for instance, Mr. Coles, it is a very practical question that I am putting to you. Because if we have to go through an advertising process similar to that which we go through when we call this hearing, we are adding 40 days minimum. Because this jurisdiction, the notice has to be in both official languages. And normally notice pursuant to our statute has to have 20 clear days.

MR. COLES: But this kind of notice with again with respect, I think you could do it under 128(2). You don't have to necessarily have 20 days. I can tell you that the media has ample time to respond to judicial notices of seeking publication bans in a heck of a lot shorter time frame than that. This is not a request intended to delay anybody. This is a request intended to, in fact, eliminate people like me showing up at the eleventh hour with documents that I am trying to get to you, which breaks down. Where people are already scheduled to be here to argue important matters and we are taking several

hours out of that to deal with this issue.

It is to urge upon you a protocol, a dialogue with the media to come up with a cheap, fast way to alert whenever there is this kind of evidentiary concern which would trigger an interest by the media.

CHAIRMAN: Well I am certainly in favor of trying to do that, Mr. Coles.

MR. COLES: And that is all I am leaving by that second bullet.

CHAIRMAN: Okay. Now would you take me through the Sierra Club of Canada and point out in what portion of that decision you believe that the notice is still required in that case it was a civil action.

MR. COLES: Well if we are reading from the same text --

CHAIRMAN: This one has paragraphs.

MR. COLES: Paragraph 37 and following talks about -- paragraph 37 begins, a discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set by this court in Dagenais. Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal context, there are strong similarities between publication bans and confidentiality orders in the context of judicial

proceedings, and so on, Mr. Chairman.

And it goes on for several pages, sets out several tests that no doubt you will hear as my friends get into the argument over confidentiality.

So this decision extends it from the mere criminal and publication ban to the context of judicial proceedings generally, which will raise, Mr. Chairman, I'm sure your next question which is, well are we such a proceeding that would fall within the scope of that?

And that takes me to the final case that I would like to refer you to on this point which is the Federal Court decision in Travers where the court asks itself in paragraph 13, on page 6, and if I may quote this, There is abundant case law that with respect to judicial proceedings freedom of the press encompasses a right of access as in Southam Inc. and so on. As stated by MacKinnon, Associate Chief Justice Ontario, in re Southam, there can be no doubt that openness of the courts was and is a felt necessity, it is a restraint on arbitrary action by those who govern and by the powerful.

Next paragraph, the question may then be asked, what is a judicial proceeding? Mr. Justice Dickson, subsequently Chief Justice as he then was and as he continued to be a master of the analytical method to

resolve such questions, has suggested the following tests in the minister of Natural Revenue versus Coopers Lybrand, which was a 1979 Supreme Court of Canada decision. And I'm just going to quote these four things because this is where we are at.

Number 1) is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached? Well your statute is real clear. Yes, you are going to have hearings before you get to decide the rate case.

Number 2) does the decision or order directly or indirectly affect the rights and obligations of persons? Well of course it does. New Brunswick Power, and I grant you there is Disco and these various entities, but nonetheless at the heart -- at the root of this somewhere is a Crown corporation. You are a public Utilities Board and your decision is going to affect the lives of innumerable New Brunswickers as you fix rates, municipalities, individuals and so on.

3) this is the key, is the adversary process involved? You bet you. This is a room full of lawyers and they are adversarial and they are going against one another as part of this process.

So on the first three bullets there is no question. The answer is yes. You are a quasi-judicial body, or certainly in this role you are quasi-judicial. You are going to take evidence. I'm not telling you anything you don't know. You have the powers under the Public Inquiries Act.

Finally is there an obligation to apply substantive rules to many individual cases rather than for example the obligation to implement social and economic policy in the broad sense? I think it's all four. I think number 4 is passed too, that in fact you take your statute and you apply these rules as to how you do things as opposed to simply a broader implementation of social and economic policy.

If my friends disagree with me and say, no, number 4, it's not so sure, I say it doesn't matter, because the test as set out by the Federal Court isn't all four, it's these are the factors that you consider. So I say you satisfy the test as a quasi-judicial proceeding. That brings you back into the Sierra Club decision which links you back to Dagenais, and I say we should have notice and I say we should be able to record and broadcast your important work. And there is no downside and you

don't begin with the proposition of saying

why should we. I suggest to you this is 2005. Why shouldn't you? Why shouldn't you?

Subject to any further questions from any of the Commissioners that is my presentation on those two points, Mr Chairman.

CHAIRMAN: Thank you, Mr. Coles. We are going to take a break. This will be longer than two minutes. And I'm going to suggest that Mr. MacNutt come back into the room early because we are going to have to consider how we proceed with the continuation of this argument with all those cases that have been quoted by Mr. Coles, et cetera.

MR. COLES: I have a hard copy of this here, Mr. Chairman. Can I leave an extra hard copy for the Panel?

CHAIRMAN: I think they would be better off for the participants at this particular point. We have got a couple of copies, so that will handle us right now.

MR. MACNUTT: Mr. Chairman, just before the break, during this pause, I would just like to note that Mr. Peacock of Vibrant Community Saint John is now in attendance.

CHAIRMAN: Thank you, Mr. MacNutt. We will take a break.

(Short recess)

CHAIRMAN: I had asked Mr. MacNutt to briefly check and see how many parties wanted to address Mr. Coles' remarks. And he came up empty handed. So I will put it on the

record, any of the Intervenors wish to address Mr. Coles' remarks? Mr. Public Intervenor.

MR. HYSLOP: Thank you, Mr. Chairman. I do want to go on the record as indicating that the public Intervenor does support the open transparent policies and -- but having said that our review of the case law, would suggest that the needs for confidentiality do come up in these types of hearings. And we first affirm that the policy and procedures of the Board makes some sense.

As to the application to have cameras in here at all times, I'm not going to say I oppose it, but the other day I said I have got to get educated about cost allocation studies, so I asked Professor O'Rourke to try to explain it. I did find after a few minutes of explanation my eyes slowly started to glaze over. And if a two week hearing on cost allocation study is going to make the news much I will leave that up to the CBC to make their pitch, but it's going to be pretty dry stuff.

I would certainly only submit the following, that the people of New Brunswick may, if they are interested, and I have had a few phone calls -- if they are interested may be quite interested in what goes on perhaps in final arguments, and it may well be at that stage of the game there may be a place to know what the parties are and the

arguments may be around the evidence. And I leave that thought with the Board.

Having said that I take no strong position. Leave it to the Board's discretion and do confirm I think you have a pretty well written and drafted confidentiality procedure that we will be arguing about this afternoon as to how it applies to certain documentation.

Thank you, Mr. Chair.

CHAIRMAN: Thank you, Mr. Hyslop. Aggressively neutral we would say. Mr. Hashey, does the applicant have any comments?

MR. HASHEY: No, Mr. Chairman. We respect the Board in their rulings on procedures and will follow and respect whatever the Board decides in this matter.

MR. COLES: Mr. Chairman, may I have a reply to my friend the public Intervenor's comments?

CHAIRMAN: Yes. Go ahead, sir.

MR. COLES: Thank you. The remarks that I made this morning were directed to when you are operating as you are today in public. When my friend talks about the confidentiality procedures that you have put in place, with respect, that's a red herring to what we are talking about. This room is open. John Smith can come in and sit in the back and watch and make notes and tell anybody whatever he

wants in terms of what he saw transpiring.

My comments about the cameras are directed to when you are in public session. Should you accept the application and decide that some or all of these pieces of evidence will be received in confidence, and/or should you decide you are going to hear witnesses in-camera, well then obviously, you know, it's in-camera. Those forces that are trying to keep it open will have lost, you will have decided it's in-camera and the camera doesn't belong there.

So I just want to say when my friend speaks of your procedures, that's not the issue that I'm talking about with cameras.

Secondarily, he may be right, that the public is only interested in turning on the television set to watch final argument. I submit to you there would have been people in New Brunswick who might have been interested in this argument, in this application, that they might have liked to have had the benefit of watching the dialogue between myself and the Chairman this morning. And that there was nothing that was said that was confidential.

Now you may say, well who in their right mind if they weren't being paid would listen to you Mr. Coles? And you may be absolutely right. But with respect, that's a

decision for the editors and the network. This is a public hearing.

So I make those two comments, Mr. Chairman. Thank you for the opportunity.

CHAIRMAN: Thank you, Mr. Coles. Nor do I know why they would want to listen to you and I exchange ideas. The Board considers this to be a very important matter and there is a good deal of case law which you have presented to us. And therefore the Board believes that we should take time to consider and be able to read the case law and also to check your argument on the transcript, if necessary, and issue a decision which we may do orally at the time of the next reconvening of this hearing. Or if that's too far away, we will probably do it by way of written decision on this motion.

MR. COLES: Mr. Chairman, so that your ruling is not moot, I mean -- I appreciate you have a right to control your own process, I appreciate that the decision is an important one, and I agree it's an important one and that you may want to -- it's perfectly appropriate that you take time.

Everyone sort of runs to this issue in sort of the manner of a fire hall because it sort of just came up on Friday, you just got the cases. Could I proffer this as a suggestion?

Hypothetically let us assume for the sake of this argument that you found in favour of my clients, and said, yes, there really is no reason that the public portion can't be recorded by television camera and broadcast, subject to whatever specific limitations you may impose that you feel are right. If unfortunately you don't make your decision until two weeks time, well then if we win there has been no recording for television purposes of what was done this afternoon.

Could I proffer the following to you? Would you allow the camera to record the proceedings as they are public over the next afternoon and day, on the understanding that that tape is not to be broadcast, that it's simply to be used in accord with your policy as it stands today which is to check accuracy, on the understanding that should you rule in favour of our motion down the road, well then we would have these images that we could broadcast, but that we would live by the same policy that is in force right now only just let us not make your decision moot?

I mean, I would ask that you permit us to record subject to your ruling as to whether or not we can release that. And I submit to you that there should be no real harm in that because you are still controlling the process essentially as per your existing ruling.

CHAIRMAN: Thank you, Mr. Coles. We will caucus. Mr.

Coles, the Board has no difficulty in having this afternoon and tomorrow videotaped. And it will be under the existing rules as you have just described. And then, just depending upon the Board's ultimate decision, it can be used in a broadcast. If not it will do like my own videos, never get seen.

And it is now 10 after 12:00. I think -- Mr. Hashey?

MR. COLES: Mr. Chairman, just on behalf of our clients, I thank you for the consideration you have given me this morning. I appreciate the application just came in Friday. We thank you and we thank you for your ruling.

CHAIRMAN: I don't mind today. It was the weekend that you ruined, Mr. Coles. No. Fine. Thank you very much, sir.

Mr. Hashey?

MR. HASHEY: Thank you, Mr. Chairman. Just to -- I realize you are getting to an adjournment I expect at this moment? Would it be appropriate -- I should inform the Board, and I think the Board probably has received it, is that we did get a letter from Mr. Hyslop yesterday, talking about weekends. But I did speak to Mr. Hyslop and never have a problem with that. And he indicated that before he could really make a position I believe that he would like to have some cross examination.

Now I realize the policy on confidentiality indicates that the section he quotes deals with in-camera sessions.

What I would suggest -- and my friend Mr. Hyslop has indicated to me that he is interested in questioning on the letter that we have attached to our request for confidentiality.

And we have been able to contact Mr. Bishop this morning who wrote that letter. I have no problem. And Mr. Bishop has agreed that he would come.

Now he is not Disco. He is Genco. But they are the ones that have the major concern. Our concern is Disco is that it would be passed -- any detriment is passed on to us.

And I'm just wondering if it would be appropriate to have Mr. Bishop here for cross examination this afternoon at 2:00 o'clock when we suggested he be here, and then proceed with the third party contract arguments, and possibly then have all of the argument on the confidentiality issues tomorrow after we have had a chance, a little more chance to read the cases I suppose. And secondly to have all of the facts before you so that we know what we are arguing from. Frankly, I know from my friends that are here representing third parties to Genco contracts that they are going to oppose the

release of those contracts.

I don't know the ins and outs of it. I have personally never seen a Genco contract. But you have asked us to obtain them. And Genco has expressed concerns, as in the letter over the confidentiality part, which will be answered I would think by my friends.

And all I'm talking about is timetable, though at the moment not really getting into the issues, but just suggesting that if it would be appropriate that we could all prepare on that basis.

CHAIRMAN: It seems reasonable. Just to clear up by lack of appreciation of some things, Mr. Hashey. Mr. Bishop, although now Vice-president of Genco, would be the individual who would have the best knowledge of the matters that have been expunged in those contracts, is that correct?

MR. HASHEY: That is absolutely correct. Now we wouldn't want to get into the details of the expungement. But it would be for the purpose, as I understand from Mr. Hyslop, to query and question the necessity of the expungement, not the specific numbers but the principles that have been offered.

CHAIRMAN: I will ask Mr. Hyslop to comment. And then any other Intervenor who wished to can after that. Mr.

Hyslop?

MR. HYSLOP: Thank you, Mr. Chair. First my friend Mr. Hashey is correct. We have discussed having Mr. Bishop available and have agreed to cross examination this afternoon.

We also thought or believed that perhaps Mr. Thomas might be available. I'm not as certain on that. It would depend on some of the results of the cross examination of Mr. Bishop. But I think Mr. Bishop is the principal witness.

The cross examination is not directed so much as to the five contracts. There will be some part of it. But a lot of it will be dealing with the issues relating to the marginal costs of each of the various plants and the fuel costs in that regard.

So there will be cross examination on both those areas.

It will not go in directly to the numbers. It is going to deal more with methods and processes and why it is important. Thank you.

CHAIRMAN: We will deal with the second witness possibility when that time arises, Mr. Hyslop. Any other Intervenors have any comments to make on that?

Now we will have to have the hotel set up a witness table.

So what we will do is -- Madam Secretary, any idea

how long you will take to be able to scrounge up hotel staff
and get that done?

MRS. LEGERE: Before lunch or --

CHAIRMAN: Well, no. We will take lunch now. I'm just
wondering when to come back?

MRS. LEGERE: I can have it done over lunch.

CHAIRMAN: Well, if we say 1:30. But if we are still
scrambling in here it may be quarter to 2:00. Okay.

Thank you.

(Recess - 12:18 p.m. - 1:30 p.m.)

CHAIRMAN: Good afternoon, gentlemen. I understand that the
witness is not yet available, Mr. Hashey?

MR. HASHEY: The witness I'm told is very close. We had
told him 2:00 o'clock. And I think he too us literally
really.

CHAIRMAN: That is good. Okay. I had a couple of
housekeeping matters that I might as well do right now.
Let me see. LaCapra reports. What about the second and
third? Are they -- you advised us that it be filed with
the Board but not put in evidence because it was no longer
relevant?

MR. HASHEY: The second report has been filed with the
Board.

CHAIRMAN: Okay.

MR. HASHEY: And I believe all the Intervenors have received a copy electronically.

CHAIRMAN: Yes.

MR. HASHEY: We did not have the bound copies for everyone today. But they can be made available. That is the second report. There is no third report yet.

What we were talking about is when we get to the revenue requirements there may be a third LaCapra report that would update it to the right years. Because you were back on 2005, '06. We are now moving to 2006, '07.

CHAIRMAN: Yes. Okay.

MR. HASHEY: But there isn't a third at this point nor has one been commissioned at this moment.

CHAIRMAN: All right. Now Eastern Wind Power, the PPA for them, the Power Purchase Agreement, we had thought, and I had a discussion with you, Mr. Hashey, that since we would be discussing all the rest that we would put that one on the table as well. But Mr. MacPhail has not shown today.

Do you have any remarks you want to make on it?

MR. HASHEY: My only comment on that, Mr. Chairman, is that I question whether that one really has relevance to the proceedings as they currently stand, certainly on this part.

CHAIRMAN: My understanding is they won't be producing power

until --

MR. HASHEY: That is right.

CHAIRMAN: -- the fiscal period we are dealing with is over anyway.

MR. HASHEY: That is my understanding.

CHAIRMAN: Okay. For the sake of the record then we will not require its production unless something that we are not aware of comes up in the future.

Mr. Hyslop, my understanding is that there was, in the letter that you had sent on the 4th of July, that you believed that there were cost allocation studies that had been done by either Genco, Coleson Cove or Nuclearco. And we are just wondering about it. Are there such things in existence or not?

MR. HASHEY: It is my understanding there aren't. But I believe that was one of the questions at undertakings. And I also believe that is why our Vice-president is not here today.

There is an extensive effort, as you can imagine, to finalize the documentation by this Thursday from the mass of inquiries. And I expect that would be one that would be answered. But it is my understanding that there was not. You know, per se any specific cost allocation studies by these people.

CHAIRMAN: Okay. Thank you, Mr. Hashey. Well, that is good. You have answered the question that the Commissioners brought up at lunch. He is not at his cottage in Buctouche. So we feel better about that. Are there any other preliminary matters while we wait for the witness that -- Mr. Hashey, you have got another one?

MR. HASHEY: Yes, Mr. Chair. Possibly -- is it appropriate that we would mark the request regarding confidentiality, the document that has been circulated? Would that be an exhibit? I don't know exactly how you want to handle it.

CHAIRMAN: No. That is fine. We will do just that.

MRS. LEGERE: I don't have an extra copy.

CHAIRMAN: What is the next number?

MRS. LEGERE: A-8.

MR. HASHEY: I have an extra copy here that I would be happy to give to the Secretary.

CHAIRMAN: Thanks, Mr. Hashey. Then that is what we will do. I was just trying to get the next number. I don't have my list right here right now.

MRS. LEGERE: A-8.

CHAIRMAN: So this will be marked as exhibit A-8. Any other matters? Mr. Gorman?

MR. GORMAN: Thank you, Mr. Chairman. On the 30th of June I

circulated a letter suggesting a change to the nondisclosure and use restriction agreement. I believe most of the parties have likely signed the agreement in the form that was circulated.

My concern was in paragraph 5(a) which stipulated that the parties essentially had to provide any scenarios that they may wish to use throughout these hearings in cross examination, et cetera at the time directed by the PUB for the filing of Intervenor evidence.

It was our belief that other scenarios may come to light as a result of reviewing evidence or submissions from the other Intervenors and that in fact that time should be extended. In the letter which was circulated we suggested perhaps an additional seven days.

I have spoken with Mr. Morrison and Mr. Hashey with respect to this matter. I don't think that there is a lot of concern about extending it a short period of time.

I think their concern may well have been trial by ambush if you will. And that by giving some short extension to that time limit it allows the parties to deal with the information.

CHAIRMAN: Mr. Hashey?

MR. HASHEY: Yes, Mr. Chairman. I have no problem with that suggestion of Mr. Gorman. But we have gone a step

further. We have heard from Mr. Hyslop as well on this. And

I have written back to a letter that he had sent me concerning even possible things arising in the future. And I said look, I recognize the Board must have flexibility. And there would be flexibility. We are trying to prevent a long delay in the hearing by having new evidence presented when the hearing is taking place. And having to set aside witnesses, as long as there is no change in the methodology if you like of the reports or the evidence or the philosophy the experts will be giving. I mean, obviously there will be things that will arise during the hearing. And I recognize that this Board would want things to be relatively flexible. What we were trying to do is to avoid the situation where somebody comes up with a whole new set of evidence and throws it at one of our witnesses. And we have to stand down and do extensive -- have an extensive delay while that is being reviewed and studied. That is all. Otherwise -- that is the whole intent of that clause 5.

CHAIRMAN: Mr. Hyslop?

MR. HYSLOP: Thank you, Mr. Chair. Yes. I did write Mr. Hashey. And we essentially concur with both the comments of Mr. Gorman and Mr. Hashey about trial by ambush.

And our view was any alternate cost allocation study that we were to make prior to the record would be presented with evidence or any studies that we knew ahead of time we would be putting to witnesses of the applicants, we would try to provide in sufficient time that they could review them and be familiar.

Our concern was during cross examination if subtleties came about we wouldn't be precluded from having adjustments made, not so much in methodology but in some of the cross examination.

I do understand from Mr. Hashey, and he has responded in writing to me that there would be flexibility on that. So it is -- you know, we don't want to be jammed in a situation where through a fair cross examination some point comes out that we would like to have calculated that we wouldn't be precluded from having that done.

And I don't think there is -- within the working arrangement I don't think we are in a position where we are going to meet with any problems.

CHAIRMAN: Gentlemen, could I suggest that perhaps we allow the amendment that Mr. Gorman has suggested, i.e. seven days, and us having had this discussion, that if something comes up, Mr. Hyslop, that you believe that you should have some more time in that particular circumstance, then

you could request it. And the Board would hear the parties and go from there.

MR. HYSLOP: I think that would be reasonable, Mr. Chair.

CHAIRMAN: Good. Have you and Mr. Gorman agreed on the amendment that would be there, Mr. Hashey? Just add that within seven days I guess.

MR. HASHEY: That is it, Mr. Chair.

CHAIRMAN: Okay. So you will look after that amongst the parties.

MR. GORMAN: Thank you, Mr. Chairman.

CHAIRMAN: Anything else?

MR. HASHEY: The only other issue is that in the document which I believe is now 8, is it, the exhibit that was just marked, there are letters attached to the various responses.

And the letters are all the same as you will note. And it is a letter dated July 6th 2005 from Mr. Bishop, Vice-president of Generation for the Generation Corporation, who has written to Mr. Thomas who is of course the Disco Vice-president.

And at the suggestion of Mr. Hyslop it's that document that he wishes to cross examine on. And I think he has suggested that that should be marked separately. I don't know that it needs to be. It is part of the document.

I have no problem if you want to do that for the purpose of referral. Or we could circulate the document separately, whatever is the wish of the Board.

CHAIRMAN: Well, in an effort to keep the paper down, it is part of A-8.

MR. HASHEY: It is in A-8 I think in four places.

CHAIRMAN: So why not? If it is more convenient perhaps we could just have copies made of that portion of A-8 rather than marking another exhibit.

MR. HASHEY: That would be fine. I don't know if Mr. Hyslop had made copies. I did not make copies. I considered it to be part of the book that could be referred to. I mean, we could go to a specific page and have that document if that would suffice. Everybody has it and has had it as part of our answers.

CHAIRMAN: Mr. Hyslop?

MR. HYSLOP: I don't want to create extra exhibits. Perhaps what I will do during cross examination is refer to the letter as part of the exhibit A-8. And then the reference will be there.

My intention, and perhaps Mr. Hashey can clarify it, if I'm in any way mistaken, was that in support of the claim for confidentiality of these documents, I wanted the evidential record established. And that is why I ask this

document to become part of the record.

But I have no objection, if it is part of the record through A-8, that -- I don't want to create an A-9 if it is already there in A-8. And if anyone would like a copy just to follow along, I do have additional.

CHAIRMAN: Well, let's try it and see how it works out that way.

MR. HASHEY: Mr. Chairman, I do have another preliminary point, I think it would be considered to be preliminary, just so we can clarify something.

On our answers on 37 and 38 in the confidentiality request, we put a couple of pages out which are illustrative of what would be a substantial number of pages.

And what we are prepared to do when we get to that stage in this discussion is to provide electronic documents.

And we can work out a way. I have talked to Mr.

MacDougall about the way they treated that in Nova Scotia.

And it was a matter of having the lawyers or the parties I think sign an affidavit, just saying we haven't used it for any other purposes, we have destroyed whatever we have received.

If we get to that point. I just didn't want you to

think that that is the complete document. It is far from it.

There is a massive number of pages. It would be much easier to do it on an electronic basis, that was all. And we have no problem with doing that at all.

CHAIRMAN: Thanks. Anybody have difficulty using an electronic method to handle that? No? Then we will do it that way, Mr. Hashey.

All right. We will take a break until you are ready to go and proceed with Mr. Bishop.

MR. HASHEY: I will let Mr. MacNutt know I appreciate that.

(Recess - 1:50 p.m. - 2:15 p.m.)

CHAIRMAN: Mr. Hashey, you have a witness?

MR. HASHEY: Thank you, Mr. Chairman. At the request of my friends, Mr. Bishop is here. And I would ask that he take the stand. I take it you would like to have him sworn as a witness?

CHAIRMAN: The Secretary insists.

MR. HASHEY: We know who rules.

CHAIRMAN: Absolutely.

DARRELL BISHOP, having been duly sworn, testified as follows:

CROSS EXAMINATION BY MR. HYSLOP:

MR. HASHEY: Mr. Chairman, Mr. Bishop I would ask to have --
I believe he has a copy of his letter of July 6th 2005

which is the subject matter of this cross examination before him. Otherwise I will turn over to my friend Mr. Hyslop.

CHAIRMAN: And that is part of exhibit A-8?

MR. HASHEY: That is part of exhibit A-8.

CHAIRMAN: Good. Thank you, Mr. Hashey. And welcome, Mr. Bishop. Sorry to draw you away from the waters of the Miramichi or wherever else you were planning on being.

WITNESS: The fuel tanks of Belledune.

MR. HYSLOP: Thank you, Mr. Chair. Before we commence, just to put things in perspective, what I understand has taken place is that there has been a request for information through the Interrogatory process.

And the applicant, the New Brunswick Distribution Company, has objected and wants to provide some of the information in confidence.

Just before I begin my cross examination, I just want to ensure that the evidential record that the applicant is relying on consists solely of the letter of July 6th as found in exhibit A-8?

And then perhaps I would just like to have that confirmed on the record by Mr. Hashey, whether there is other evidence?

MR. HASHEY: What you have is what you see. There is also

of course our documents that we have been specific in accordance with the confidentiality request, which has answered the question.

That obviously is part of the evidence. But it is supported by Mr. Bishop's letter that we rely on in relation to those issues.

MR. HYSLOP: Thank you. And further to that -- I realize I'm the only Intervenor who is taking objections formally to the claim of confidentiality. But as part of this process we allowed the other -- the NUGS, as we are calling them, to be present.

I do note that Mr. Stewart and Mr. Thibodeau are present on behalf of those people. And I don't know officially for the record whether they are claiming or not claiming confidentiality to these documents.

I say that somewhat facetiously. I don't think you have to be -- you know, I expect that they are requesting that they be held in confidence or not distributed.

But before I start testing the case I'm wondering if Mr. Stewart or Mr. Thibodeau are planning on presenting and preparing any evidence before I begin my cross examination in chief of this witness?

CHAIRMAN: As a professor at law school used to say to me, would you run that by again? Surely if they object they

can bring what evidence they wish to bear to substantiate their particular objection.

And don't forget Mr. Devers. Because he is here representing two of the companies that I understand that Mr. Stewart is not et cetera.

MR. HYSLOP: My point -- the point I'm trying to avoid is since I'm the party opposing, I want to know, before I start down my road with my case, what the case of the proponents of the motion to hold this in confidence is. So I'm just wondering what the record is going to look like. And if I do my cross examination and somebody else brings along evidence, I want to ensure that I have a chance to test that evidence as well if necessary. So that is where I'm coming from. I just don't want to be steamrolled after the fact by some of the parties who are new to us today on this specific issue, Mr. Chair.

CHAIRMAN: Mr. Hyslop, if somebody else from a different point of view brings other evidence to say, I mean, that it should not be made public, then you and everybody else in the room will have an opportunity to do cross on it, as far as the Board is concerned. And we would want to hear it as well.

So please proceed with this witness.

MR. HYSLOP: Thank you very much, Mr. Chair.

Q.1 - State your full name for the record please?

MR. BISHOP: I'm Darrell Bishop.

Q.2 - And where do you live, Mr. Bishop?

MR. BISHOP: I live in Fredericton, New Brunswick.

Q.3 - And what is your current position?

MR. BISHOP: I'm Vice-president of the Generation Corporation.

Q.4 - And just a little bit about your background with the Generation Corporation and its predecessor NB Power. I understand you have held a number of senior positions?

MR. BISHOP: That is correct. I have.

Q.5 - And could you briefly list the last two or three for us?

MR. BISHOP: The last two in particular have been Director of Marketing responsible for in fact marketing and fuels, and previous to that marketing -- responsible for marketing electricity in New Brunswick and external markets and purchasing fuel for our generating stations, and then to the Vice-president position that I now hold.

\Q.6 - Thank you very much. And, Mr. Bishop, I understand that on July 6th you wrote a letter to Mr. Thomas, which to identify it formally, is part of the record in exhibit A-8 under the tab entitled Disco EGNB IR 37. I believe that is where it first shows up in the exhibit?

MR. BISHOP: That is correct. I have it before me.

Q.7 - And you are the author of that letter that has been presented and made part of the record here today?

MR. BISHOP: That is correct.

Q.8 - Right. Thank you very much. Now, Mr. Bishop, I would like to talk a little bit about purchasing of fuel.

Because that seems to be one of the issues here.

It is my understanding that there is a marketplace that exists for the purchase of fuel, is that correct?

MR. BISHOP: There is a marketplace, that is correct.

Q.9 - Right. And the market prices for various types of fuels that you purchase can be found out daily with reference to different price indexes that are published or available to you, is that correct?

MR. BISHOP: There are indexes available. But that doesn't necessarily mean it is the very price that we would purchase fuel from a customer.

Q.10 - That is correct. But that is where you would go first to look at your prices. Would that not be to get some idea of what the current prices would be?

MR. BISHOP: That is certainly an indicator, yes.

Q.11 - Yes, it is. And there are several of these. Now my question is -- and I'm not going to -- I don't want to get into exact numbers. But I was reading somewhere where around the world we produce 80 billion barrels of oil a

day for the world market, some number like that. Would that be your understanding as well?

MR. BISHOP: I will accept your number.

Q.12 - Thank you very much. And just so I can put NB Power's -- I will use NB Power, NB Genco interchangeably here. But in terms of a purchase of it you don't control a number like 20 percent of the daily world production of fuel, do you?

MR. BISHOP: No, sir. We do not.

Q.13 - No. And 20 percent would be 16 million barrels. You wouldn't control 2 percent, would that be correct?

MR. BISHOP: No. In fact the number that -- if you are looking at heavy fuel oil, the number is probably closer to 7 million barrels per year.

Q.14 - 7 million barrels per year. So in terms of being a purchaser of oil at least, it would be fair to say there is nothing particular in the large volumes you consume that give you a way to significantly influence the world prices that exist for that commodity at a particular time?

MR. BISHOP: Well, I certainly don't significantly -- or don't probably at all influence the world price indexes. That is correct.

Q.15 - That is right. And when you go to purchase the fuel -- again we will stay with oil at this time -- you would have

a process at NB Power to purchase that particular commodity,
is that correct?

MR. BISHOP: That is correct.

Q.16 - You would have people -- from what you have just told
me, I suspect at one time perhaps you were responsible for
carrying out that process?

MR. BISHOP: That is also correct.

Q.17 - Right. Do you engage brokers to assist you in the
purchase of fuel?

MR. BISHOP: I -- on occasion. Typically no.

Q.18 - Typically no?

MR. BISHOP: That is correct.

Q.19 - So typically you would go directly to world suppliers
and ask them to supply a certain quantity at a certain
time?

MR. BISHOP: That is correct.

Q.20 - Right. And as you have said, that the indicator for
that would be the world price indexes that are available
to you?

MR. BISHOP: For heavy fuel oil and natural gas there are
indexes. They are not quite as rigorous for coal,
petroleum coke, Orimulsion --

Q.21 - Right.

MR. BISHOP: -- which are the other three fuels that

principally would burn.

Q.22 - Okay. So the indexes would be fairly important then with respect to the natural gas and to the crude oil that you would use?

MR. BISHOP: That is correct.

Q.23 - And essentially you would send out requests, or some type of -- I will call it a proposal to have two or three different suppliers propose you, and they would come back with a price?

MR. BISHOP: That is correct. We do issue requests for proposals and typically have as high as six, seven or more.

Q.24 - All right. Okay. And I suspect you normally pick the best price that comes along for you?

MR. BISHOP: It is the best price evaluated for the same type of fuel, yes.

Q.25 - Yes. Okay. So there would be some adjustments based on the quality of the fuel that was being brought in?

MR. BISHOP: That is accurate.

Q.26 - And I don't want to get into a lot of technical. And would I be correct in my -- and this is something you shouldn't do -- but would I be correct that you are not ever likely to get somebody quoting you a price that is 25 percent of the current indexes at that time, are you?

MR. BISHOP: I think that is a bit much. So the answer is no.

Q.27 - Right. And would I be fair to say that the best you can hope for is maybe 2, 3 percent through some hard negotiations at a particular time?

MR. BISHOP: On the indexes that is probably quite correct.

I do want to point out that there is freight. And there is profit built in there for the fuel suppliers. So there are areas of negotiation.

Q.28 - Yes.

MR. BISHOP: And there are some special particular circumstances from time to time.

Q.29 - Sure. Sometimes you can do a little better if you shop around and negotiate. But we are not talking in the total scheme of thing of the price you are paying something that would be as much as even 10 percent, would we, on the overall consumption of fuel?

MR. BISHOP: That is correct.

Q.30 - Right. Okay. Now you mentioned the same thing with natural gas. NB Power buys some natural gas I understand?

MR. BISHOP: NB Power does not buy natural gas. It buys electricity that is produced from natural gas from third parties.

Q.31 - Okay. So this would be -- and if I refer to your

letter, would be more directed to the second bullet on page 2 of your letter which says "during negotiations for purchase of electrical energy to supplement Genco's portfolio of generations." Is that where that fits in?

MR. BISHOP: That is correct.

Q.32 - Right. Okay. So then in actual fact you are not on the world market purchasing natural gas on a regular basis for the operation of your facility?

MR. BISHOP: That is correct.

Q.33 - Okay. Now you mentioned coal. There is also I understand indexes for coal. But the quality of coal I understand varies from different supplier or different areas. And that is part of the equation as well?

MR. BISHOP: That is correct. And that is in fact where you can get 10 percent or more variances in coal prices.

Q.34 - Okay. So it will be coal, would you get 20 percent on coal?

MR. BISHOP: That is conceivable, yes.

Q.35 - It is conceivable? Okay. And the coal would be used for your Belledune plant. And I guess not for Dalhousie yet?

MR. BISHOP: No. It is only Belledune at the time.

Q.36 - Belledune. Okay. And that represents about 20, 25 percent of your generation capacity?

MR. BISHOP: That is correct. And represents about a million tons of coal per year.

Q.37 - Yes. Thank you. Now I want to go on to the purchase and sale of electricity. And I understand there is markets established for that, is that correct, Mr. Bishop?

MR. BISHOP: There is quite frankly only one market established. It is the New England market.

Q.38 - Is that the ISO New England market?

MR. BISHOP: That is correct.

Q.39 - Okay. We went on the Web this morning. And I'm going to show you these. And perhaps you can help me out a little bit. Now as I understand the situation, Mr. Bishop, the current price for buying and selling electricity is operated through this ISO New England -- I guess we will call it an energy hub for lack of a better term, or maybe you have one.

MR. BISHOP: That is the current price of energy for the New England market alone, yes.

Q.40 - Yes. And before I get into the details of what this is, but when New Brunswick Power sells electricity outside of New Brunswick one of the most favourite places to try to sell electricity is in New England?

MR. BISHOP: Unfortunately that isn't quite correct.

Q.41 - Okay.

MR. BISHOP: Today for example we would probably have zero sales to New England because of the generation situation and be selling to other neighbouring utilities.

Q.42 - Okay. So you would also sell to Nova Scotia Power and perhaps Hydro Quebec from time to time?

MR. BISHOP: Nova Scotia, Hydro Quebec, Prince Edward Island and the northern Maine utilities that are isolated from the New England grid.

Q.43 - Very good. But the pricing to and from New England is set out with this ISO marginal price program that they have?

MR. BISHOP: That is correct. That is only energy. There is no capacity or ancillary services or any other type of pieces that make up that price. That's strictly an energy commodity market per hour.

Q.44 - Right. And if I were to refer you about two-thirds of the way down under location, ID the number 4010, as I understand that if you were going to -- well, just to back up how this works. As I understand it people that are in need of buying energy, they go to the New England ISO and put in their requirements. That's how the process starts?

MR. BISHOP: Essentially that's correct.

Q.45 - Right. And they post the requirements of the various utilities that are in need of electricity somehow on a web

or on some type of a form that is accessible by other utilities?

MR. BISHOP: That is correct.

Q.46 - Right. And these other utilities then have the opportunity if they wish to meet some of that demand and the price they are prepared to do it at?

MR. BISHOP: That's correct. Generators will bid into that market.

Q.47 - Right. Now -- and normally that would be part of the process of New Brunswick Generation Company under the new reorganization of N.B. Power?

MR. BISHOP: That's correct. We are able to bid into that market.

Q.48 - And what I'm getting at is that this price in New England is very much set and established by market forces?

MR. BISHOP: That is correct.

Q.49 - Right. So what I'm getting at is let's say that we have had the rain that they have had in Manitoba for the last two weeks and you could dispatch power to this market through your Mactaquac Dam, the cost of producing another megawatt hour at the Mactaquac Dam wouldn't be the basis upon which you set the price into the New England market, would it?

MR. BISHOP: Well no. In fact we would very seldom ever

price it off the Mactaquac Dam to begin with.

Q.50 - That's right. The point I'm making is -- well the reason for that is the Mactaquac Dam your variable cost of megawatt hour of electricity is very low for Mactaquac?

MR. BISHOP: And that energy is used to serve in-province loads to New Brunswick.

Q.51 - Yes. And I'm just using hypothetical, but what I'm getting at is the market price is what determines what you buy and sell your electricity at, not necessarily the marginal cost of each particular plant -- marginal fuel costs of each particular plant?

MR. BISHOP: Well we certainly will not bid knowingly into a market at a price that is below the marginal cost of the plant that we would serve that electricity from, which in effect says it has to be somewhat at or near the marginal cost of the plant that we expect to produce it from that coming hour.

Q.52 - Now at any given time of course the marginal costs of New Brunswick Generation's companies next megawatt hour of electricity can vary depending on which plant you have to dispatch from?

MR. BISHOP: That's absolutely right.

Q.53 - So regardless of the price you can sell it at one of the factors may be, well whichever -- if someone was to

come to you and want electricity what I suggest, Mr. Bishop, is that you could set your price and they wouldn't necessarily know which plant you would be dispatching from, would they?

MR. BISHOP: That is correct.

Q.54 - Thank you. I want to talk a little bit about the fourth bullet in --

CHAIRMAN: Mr. Hyslop, do you want to put that in as an exhibit?

MR. HYSLOP: I'm sorry, Mr. Chair. I would move to have a two page document consisting of current five minute marginal prices and currently hour data by location, hub coupon, being two pages of ISO New England's website for 10:40 this morning made part of the record.

CHAIRMAN: That's Public Intervenor 1.

MR. HYSLOP: Thank you, Mr Chair.

Q.55 - I want to move on to the fourth bullet in your letter if I could, Mr. Bishop. It says, when setting prices in the New Brunswick market or evaluating Genco's strategy in setting bid prices?

MR. BISHOP: I see it, yes.

Q.56 - Okay. Now I want to talk about since the reorganization has there been any process where Genco has yet bid, supplies to the New Brunswick market?

MR. BISHOP: No, there is not.

Q.57 - And as I understand the situation with regard to bid prices, at the present time at least and for the foreseeable future the distribution company is required under the legislation to take its electricity from Genco?

MR. BISHOP: Genco is required to deliver energy to Disco. Disco can in fact should it desire reduce its nomination of capacity in Genco, which in fact actually then provides it an option to reduce that.

Q.58 - And I understand if there has been a reduction and if at some point in time they come back, at that point in time they can bid? When I say "they", I refer to Disco. Or Genco would bid for Disco's business?

MR. BISHOP: Genco could bid for Disco's business or anybody else's business.

Q.59 - That's right. And at the present time with relation to Disco is it anticipated that you will have to bid for any of their business within the next foreseeable year?

MR. BISHOP: No. No.

Q.60 - Now also I understand at some point in time under this reorganization when it comes to bid pricing, some of the large industrial users of electricity will be able to leave the market and shop around for their electricity?

MR. BISHOP: That is correct.

Q.61 - Correct. And I understand -- and I don't want to get way ahead of the process here, but if they do that they will be required to pay some exit fees to Genco or the New Brunswick Power group for the non-utilization of capital assets that are presently in place?

MR. BISHOP: I really don't know the answer to that. I think the Board in fact will have a determination in that.

Q.62 - Okay. No. What I'm getting at -- I'm not getting at whether or not -- what the exit fees will be, but it's anticipated there will be exit fees?

MR. BISHOP: I'm not certain that's the case.

Q.63 - Okay. You are going to leave it up to the Board?

MR. BISHOP: We will make our case at that time.

Q.64 - Would it be fair to say then, sir, that N.B. Power will be making a case that there should be exit fees?

MR. BISHOP: It may. I --

Q.65 - And until these large industrials know what it's going to cost them to leave do you anticipate receiving RFP's for the supply of their electricity?

MR. BISHOP: If they intend to leave we may in fact receive RFP's.

Q.66 - Yes. And at this time have any of the large industrial suppliers indicated to you their intention to leave the New Brunswick grid?

MR. BISHOP: Not formally, no.

Q.67 - Thank you. Just very briefly, New Brunswick Generation company's assets are well known in the industry in terms of your plants and plant capacities?

MR. BISHOP: I think they are reasonably known, yes.

Q.68 - Yes. And there is -- I may be wrong on this but the last large facility that was brought on was Belledune in the early 1990's.

MR. BISHOP: That's correct.

Q.69 - Right. So most of these plants have been around for a few years and I suggest are plants to people knowledgeable in the industry would have some understanding of how they worked and how the generation units -- in a general sense?

MR. BISHOP: I believe they do, yes.

Q.70 - Yes. So people who might be competitors of Genco would have a pretty good idea of the -- in a ballpark type of setting of the different types of costs that would be associated with operating such facilities?

MR. BISHOP: That's correct. In the ballpark they do and I think that's one of the issues that I want to ensure that you and the Board understands in my request in confidentiality for these items is that we talked about fuel price or coal prices for example in the \$60 range, and we buy a million dollars of fuel, if a competitor has

an advantage of understanding that there is a dollar -- even a dollar to be gained or lost, that in fact that's a dollar times a million dollars, or a million tons for one dollar.

It may be two or \$3, which is 2' or \$3 million. The same thing with heavy fuel oil, that a dollar in heavy fuel oil represents \$7 million. And you can rest assured that any fuel provider out there who will not gain intelligence to decrease the cost of fuel to Genco and subsequently through to a customer service.

Q.71 - To go on from that the issue is how many megawatt hours of electricity would NB Genco produce each year?

MR. BISHOP: We produce about 15 Terawatt hours.

Q.72 - Yes. And you will have to forgive me --

MR. BISHOP: 15 million gigawatt hours or 15 billion megawatt hours.

Q.73 - That's helpful. Thank you very much. So we would spread that additional \$7 million out over 15 million megawatt hours -- 15 billion, I'm sorry?

MR. BISHOP: Well I prefer to look it as \$7 million over a billion dollars of revenue from in-province customers or .7 percent rate increase.

Q.74 - Now -- so to tie things together, many of these commodities -- there is some fine variances that you are pointing out and you have pointed out the significance of

it very well, but in actual fact, however, most of what we are dealing with are market commodities whether it be -- and I understand your evidence -- it's crude oil, the gas and buying and selling electricity, but generally speaking are reflective of marketed forces at play as opposed to negotiations on a specific item, although I do appreciate your evidence, there are some minor -- there are some gains that can be made in a particular purchase, is that correct?

MR. BISHOP: That's correct. I guess to characterize them as minor, again I can easily add up to a one to two percent rate increase as a result of intelligence being out there.

Q.75 - How would you get to 2 percent?

MR. BISHOP: \$20 million.

Q.76 - That would be .2 percent, would it not?

MR. BISHOP: I think my math is different from yours.

Q.77 - Can you verify?

MR. BISHOP: 20 million on a billion.

Q.78 - 20 million on a billion, 2 percent. Just a couple of questions on the Orimulsion issue. You are involved on negotiations on the Orimulsion, Mr. Bishop?

MR. BISHOP: I am, yes.

Q.79 - Now the request was for the fuel costs relating to

Orimulsion. I believe it was in one of the EGNB

interrogatories. You use the phrase, and I just want to understand this, you have current sensitive negotiations - - or discussions with the Orimulsion supplier.

My question is what would the past fuel costs for the Orimulsion have to do with these discussions at this time?

MR. BISHOP: We presently have a contract for another five years for supply of Orimulsion to the Dalhousie plant.

Q.80 - Which I assume they are going to honor?

MR. BISHOP: We think they are going to honor it. Given the set of circumstances and the political situation in Venezuela, I am not prepared to assume that. And as a result I am not prepared to characterize that we should provide any information or other things that could give Venezuela any opportunity to move out of that contract.

Q.81 - Has the Orimulsion supplier been given notice of today's proceedings into the confidentiality of their information?

MR. BISHOP: No, they have not.

Q.82 - I am going to ask that we defer to have that notice given since we gave it to everybody else, Mr. Chairman, before we go further with this issue?

MR. HASHEY: Makes no common sense at all, I would say. If it is sensitive negotiations, I would object to that. I

would really deal with this in the confidentiality side of things knowing the circumstances that Mr. Bishop has outlined. I don't think we should be providing anything to Venezuela right now but if the Board directs otherwise, that is fine.

Q.83 - I am wondering if --

CHAIRMAN: I just want to understand that. Mr. Bishop, there is no contract for this five years you are talking about. You are in negotiation to secure that contract. Is that correct?

MR. BISHOP: No, Mr. Chairman. There is a contract now for the supply of fuel to the Dalhousie power station.

CHAIRMAN: Presently?

MR. BISHOP: Presently.

CHAIRMAN: When does that expire?

MR. BISHOP: It expires in as late as January of 2010.

There are some termination provisions in that contract that could permit Venezuela to terminate it earlier.

CHAIRMAN: Are there confidentiality provisions in that contract?

MR. BISHOP: Yes, there are.

CHAIRMAN: Now what do you want, Mr. Hyslop? You want us to direct notice -- first it is all the media of New Brunswick this morning and now you have got international

governments.

MR. HYSLOP: I'm not sure I argued very forcefully on the one this morning, Mr. Chair, but I will withdraw the request to have the Venezuelans but I would ask for an undertaking from the people presenting this application to write and ask these people if they object to the past fuel costs for Orimulsion in the dates that are significant, whether they wish to have them held confidential in confidence or not?

CHAIRMAN: Okay. Well when this witness is concluded, Mr. Hyslop, we will allow counsel to make argument on that point.

MR. HYSLOP: Sure. Thank you very much, Mr. Chair.

Q.84 - The current sensitive discussions then are all related to the current existing contract. Is that correct, Mr. Bishop?

MR. BISHOP: The Dalhousie contract has been referenced by Venezuela in these negotiations.

Q.85 - Yes. And the negotiations relate to other contracts or alleged contracts as well?

MR. BISHOP: That is correct.

Q.86 - And your feeling is that if you were to divulge these fuel costs, this might upset the Venezuelans who would then either default or stop negotiations on these other

issues?

MR. BISHOP: I -- that is hard to judge. Quite frankly, my position here is that I am recommending we not take the risk and find out.

Q.87 - Okay. Well, no, what I am getting at is that that is the risk is that the Venezuelans might well take that position if the fuel costs became known publicly?

MR. BISHOP: They may take that yes.

Q.88 - Yes. And you don't want to run that risk?

MR. BISHOP: That is correct.

MR. HYSLOP: Nothing further on that. Those are all my questions, Mr. Chair. Thank you.

CHAIRMAN: Those are all of Mr. Bishop that you have?

MR. HYSLOP: Yes.

CHAIRMAN: Any other Intervenor have any questions of Mr. Bishop?

MR. STEWART: Mr. Chairman, I'm not sure I'm an Intervenor but --

CHAIRMAN: Sorry. Who is it? Hold up your hand.

MR. STEWART: Mr. Stewart.

CHAIRMAN: Mr. Stewart. Yes, sir.

MR. STEWART: I am not sure if I am technically an Intervenor but I do have some questions for this witness on this issue. I don't know if you were calling to me or

not.

CHAIRMAN: Well I am glad you spoke up. I think in the circumstances we have invited the other signatories to various contracts, et cetera, to be present today. And it is not just to view our proceedings. It is to be able to participate in them and if you or any other counsel or Mr. Dever want to make a presentation -- or cross examination of this witness or whatever, please come forward and do so.

MR. STEWART: Thank you, Mr. Chair. I don't know if I am out of order just yet.

CHAIRMAN: Pardon me?

MR. STEWART: There may be others before me?

CHAIRMAN: No. You have got the floor, you have got the floor. We will give you a minute and ask you -- we want to see the white of your eyes. So I will ask Mr. Hyslop if he wouldn't mind going back to his place?

MR. HYSLOP: My corner.

CHAIRMAN: Your corner, right. And come on up, Mr. Stewart.

CROSS EXAMINATION BY MR. STEWART:

Q.89 - Mr. Bishop, I appreciate you just came in the room this afternoon. My name is Chris Stewart and I represent Bayside Power and Grandview Cogeneration Corporation. Just a couple of brief questions.

As you are aware, there has been a request for the disclosure of the agreements between your company and my clients. And I just have a couple of quick questions about those.

When I say it is correct that both of the power purchase agreements between Genco and Bayside Power and Genco and Grandview Cogeneration contain confidentiality clauses.

Is that correct?

MR. BISHOP: That is correct.

Q.90 - And in broadstrokes, those confidentiality clauses require, I guess, your company or both parties to the agreement to not disclose the substance or the contents of those agreements without the permission of the other?

MR. BISHOP: That is my understanding, yes.

Q.91 - And I would assume, but perhaps not, but you have not received any permission from either Bayside Power or Grandview Cogeneration to release any of the details of those contracts?

MR. BISHOP: That is also correct.

Q.92 - Now the contracts, they were the result of protracted negotiations. Is that correct?

MR. BISHOP: They were.

Q.93 - And all the various terms, the financial terms, cost formulas, they were all negotiated over a period of time?

MR. BISHOP: Yes and individually and at quite different times.

Q.94 - Yes. And those negotiations were detailed and they were private as between the negotiating parties?

MR. BISHOP: That is correct. Were both detailed and private.

Q.95 - And I expect the goal of your negotiation was to get the lowest possible price and the goal of the other side was probably to get the highest possible price?

MR. BISHOP: I can assume that is right. I know it is from our point of view.

Q.96 - I thought so. And it was a regular commercial negotiation for the supply?

MR. BISHOP: Yes, it was, Mr. Stewart.

Q.97 - Now if I established a new say 40 watt -- 45 watt -- megawatt, excuse me, generation unit today, who could I sell my electricity to?

MR. BISHOP: I suspect you could sell it on the market through New Brunswick. If in fact Disco had a request for proposals, that may give you an opportunity. Either one of those two locations. Under certain circumstances perhaps even to Genco, although I have no authorization, or for that matter, need at the moment.

Q.98 - Well I am not marketing at the moment so -- it could

sell to other utilities?

MR. BISHOP: To other utilities, yes.

Q.99 - Nova Scotia?

MR. BISHOP: That is correct. Yes, there is an open transmission tariff in New Brunswick to allow you to access those utilities.

Q.100 - So if I am in the business of selling electricity, because of the open transfer tariff, I can -- or transmission tariff, excuse me, I could sell my electricity to anybody who wants to buy it. Is that correct?

MR. BISHOP: That is correct.

Q.101 - And I could sell it by posting or answering nominations on that website that Mr. Hyslop referred you to earlier. Is that correct?

MR. BISHOP: Yes, you can.

Q.102 - So my clients didn't have to sell their power to you, did they?

MR. BISHOP: No, they did not.

Q.103 - They could have sold it to other people?

MR. BISHOP: That is possible. In fact Bayside does sell it to other people for many months --

Q.104 - Yes.

MR. BISHOP: -- of the year.

Q.105 - And there were -- in fact other suppliers could be potentially competing with them to supply you with electricity?

MR. BISHOP: That is also correct.

MR. STEWART: Those are my questions, Mr. Chair.

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

MR. DEVER: Yes, Mr. Chairman.

CROSS-EXAMINATION BY MR. DEVER:

Q.106 - Mr. Bishop, I'm Bill Dever and I'm here today representing St. George Power. And I guess I just have very few questions following on the same line of Mr. Stewart. I guess I would like you to confirm that the St. George Power agreement has the confidentiality provision in it?

MR. BISHOP: Yes, it does. That's correct.

Q.107 - And that provision was put in place as a result of commercial negotiations between arms-length parties intended to preclude either party from disclosing the contents of the contract?

MR. BISHOP: That is correct, yes.

Q.108 - And without repeating the same questions as Mr. Stewart, there is a commercial market for the sale of electricity and the sale of electricity from St. George Power could be made to other companies and other companies

could be competing with St. George Power to sell electricity to Genco?

MR. BISHOP: That's correct. There are a number of ways that you can buy and sell energy on the market, one of which was referenced earlier which is the hourly market, the New England market. There are other bilateral deals that are done that are available to your St. George -- would have been available to your St. George facility when these negotiations began. The sale of capacity and energy, many products of which those kinds of sales aren't available in the New England market through the energy market.

MR. DEVER: Thank you. That's all the questions I have, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Dever. Anybody else?

MR. THIBODEAU: Yes. Gilles Thibodeau for Fraser Papers.

CROSS EXAMINATION BY MR. THIBODEAU:

Q.109 - Thank you, Mr. Chairman. Mr. Bishop, my name is Gilles Thibodeau and I'm representing Fraser Papers Inc. And along the same lines as my predecessors there, the question is the agreements with New Brunswick Power involving Fraser Paper do contain a confidentiality clause, do they not?

MR. BISHOP: I'm certainly aware that the agreement for the

sale of energy from your CoGen facility to New Brunswick Power is, yes.

Q.110 - Yes. And is it not also a fact that in Fraser Papers' case Fraser Paper can only exclusively purchase power from New Brunswick Electric Power Commission?

MR. BISHOP: Yes. I believe from the Disco group you can exclusively.

Q.111 - That's right. And the same applies to the sale of its power from the CoGen operation exclusively sold to New Brunswick Electric Power Commission?

MR. BISHOP: That's correct. New Brunswick, now New Brunswick Generation Company, has the exclusive right to purchase that.

Q.112 - And were they to have breached that agreement -- or sell otherwise they would be in breach of their agreement with the New Brunswick Electric Power Commission?

MR. BISHOP: That's correct. It would be in default of the terms of the agreement.

Q.113 - And these agreements, sir, were negotiated as your letter of July 6th, exhibit A-8 states, in good faith?

MR. BISHOP: That is correct, to the best of my knowledge.

Q.114 - And were negotiated over a period of time?

MR. BISHOP: Yes, they were.

Q.115 - And involve long-term contract in both cases?

A. Yes, they do.

MR. THIBODEAU; I have no further questions, Mr. Chairman.

Thank you.

CHAIRMAN: Thank you. Any others?

BY MR. SOLLOWS:

MR. SOLLOWS: It's my turn. Just for clarity purposes, I know we are talking about a series of different contracts, but these weren't all negotiated and signed simultaneously. These must have occurred at certain points in time?

MR. BISHOP: Yes, they have, sir. In fact I think they have occurred from a period back in the early '90s out through very near the present day.

MR. SOLLOWS: Okay. And that's what I found a little bit confusing, because I seem to get the impression that from the questioning and answering that has gone on is that there was a market operating at the time that these contracts were signed that gave the people an option to purchase or sell into that market. And I'm going back to our Open Access Transmission Tariff which we -- I think came into effect in 2003, did it?

MR. BISHOP: Actually the transmission system was opened in 1998 but in fact the tariff was in 2003, that's right.

MR. SOLLOWS: The specific reference was to the tariff?

MR. BISHOP: Yes.

MR. SOLLOWS: Yes.

MR. BISHOP: Yes. I should -- I will take this opportunity to clarify. That's certainly when the Fraser's contract for example was negotiated. There was not a market and in fact I suspect Frasers may have been able to negotiate, had they chose to do that, for a transmission path into New England, although it certainly wouldn't have been an open market. But it certainly would have been -- would have had a bilateral agreement with people in New England and the negotiation of course with New Brunswick Power the integrated power utility would then have been for a transmission path.

And transmission paths were in fact negotiated certainly back as far as early as the '80s -- early '80s for that matter. So while there was not a market the participants certainly may have been able to access markets outside of New Brunswick.

MR. SOLLOWS: And that would hold for all of the contracts that we are talking about, even that were signed before the official opening of markets here and before there was an Open Access Transmission Tariff?

MR. BISHOP: The same would apply, yes, sir.

MR. SOLLOWS: So while there may not literally have been a

market that was accessible to them, there could have been --
they could have negotiated a different contract?

MR. BISHOP: Yes. In fact as an example there were companies in northern Maine that actually used the New Brunswick power system and had bilateral agreements for capacity and energy, terms of which we did not know the understanding, but actually purchased transmission from New Brunswick Power, purchased the right to use the transmission from New Brunswick Power to deliver into southern Maine.

MR. SOLLOWS: Thank you.

BY THE CHAIRMAN:

CHAIRMAN: Mr. Bishop, the question I had was basically the same as Commissioner Sollows has put to you, but just to be absolutely clear on the record, none of the contracts that we are looking at today were signed after the Electricity Act became the law of the Province of New Brunswick?

MR. BISHOP: That -- yes, sir, that is correct. None have been signed since that.

CHAIRMAN: Okay. But prior to that time for better or worse, for lesser or more, you were as the New Brunswick Power Corporation was regulated by this Board?

MR. BISHOP: That is correct.

CHAIRMAN: And at that time this Board could demand that you file with us any documentation that we saw fit to request that was in the public interest?

MR. BISHOP: That's correct.

CHAIRMAN: Okay. And I don't want to get into legal issues here at all. But certainly to the best of your knowledge your corporate representatives were aware of that fact at the time they entered into these various contracts?

MR. BISHOP: I believe that is a fact.

CHAIRMAN: Yes. That's the best you can say. If a -- I call it expunging, sensitive information occurred in reference to these contracts, can you see that impeding your business of acquiring contracts with the third party generator suppliers? In other words, the prices, the fuels, the various technical matters that were there but -- so that the plain English language of the contracts themselves be placed on the public record, can you see that as damaging your commercial interests in negotiating with other companies?

MR. BISHOP: I think it causes those companies to take a second look at whether they would choose New Brunswick Power or some other company that weren't under the same obligations to disclose those agreements or those terms. Bear in mind it does provides confidential -- or provides

what I believe is sensitive information on pricing and other information, terms and conditions, what technical, whether they have ancillaries available and all the other types of products.

So I believe if I were in their shoes I think I would look at it. I would need something as a premium it would seem to weigh against having those not made available to the public.

Now I want to stress as well that in certainly the information that I have requested to remain confidential to Mr. Thomas, I certainly agree that Genco will authorize Disco to make that information available on a very strict confidentiality agreements. We have nothing to hide in here with the exception of keeping it limited exposure so that there is not unlimited use of this information for market purposes.

CHAIRMAN: Okay. Thank you. Any questions for anybody who has put questions to the witness arising out of the Board's questions? Mr. Dever?

MR. DEVER: Yes, Mr. Chairman. I guess just a point of clarification. The St. George Power contract is dated May 21st 2004. I believe that's after the Electricity Act came into effect?

CHAIRMAN: October 1st 2004.

MR. DEVER: Well they kept changing the date, so --

CHAIRMAN: Pardon me?

MR. DEVER: They kept moving the date. So it's October 1st?

CHAIRMAN: Yes. Well it was a moving target, we know that.

Okay.

BY MR. NELSON:

MR. NELSON: Mr. Bishop, in the original application you

were talking about fuel surcharges and all, Disco was.

And in the fuel surcharge out of the \$66 million that was

asked 29 million of it was gas. Do you have a gas fired

generation plant?

MR. BISHOP: No. No, we do not. However, the pricing

arrangement that is -- that we have with Bayside and

Grandview, the two gas fired plants in New Brunswick from

which we purchase electricity, actually has a gas related

component in the pricing of that to N.B. Power. So that

in fact the price of the energy does vary in proportion to

gas price fluctuations or the purchase price of the gas of

those facilities.

So in that light we do have an exposure to the gas that

those facilities burn when that electricity is made

available to New Brunswick Power Genco.

MR. NELSON: And when you bring them -- when they come on

line are they one of the last ones to come on line when

required?

MR. BISHOP: Quite frankly it depends on the particular contract. In -- there are times when both of those units have the exclusive right to sell to New Brunswick Power or New Brunswick Power Genco has the requirement to purchase the energy that is generated.

MR. NELSON: Because that's almost 40 percent approximately -- I'm just going to the top of my head here -- almost 40 percent of the increase that was required --

MR. BISHOP: That's correct.

MR. NELSON: -- in the original application?

MR. BISHOP: That of course is a direct function of that kind of an increase in gas prices over the past couple of years.

MR. NELSON: Now following up on Mr. Hyslop -- what Mr. Hyslop said, you have basically said that your requirements in the sense of fuel requirements and all, do not really affect the world market or anything. You know, they are not great enough to affect the world market?

MR. BISHOP: No. In other words we are a price taker by and large.

MR. NELSON: Now could you also -- what is the contract that you have with Disco, the length of time and the exclusivity of it?

MR. BISHOP: Well the contract is -- I have got to have somebody help me here with term, is a 20 or 25 year contract. It is a long-term contract. And in fact it provides that N.B. Power will provide all of its present day generation available for Disco to serve its customer's load.

MR. NELSON: So it's an exclusivity contract?

MR. BISHOP: That it is, yes.

MR. NELSON: So you have no -- for the next 25 years you have no competition we will say to supply distribution with their power?

MR. BISHOP: Only for the amount of capacity and load that is today present. In fact as the load -- if a load increases Disco or Distribution Company, customer service, has the right, in fact obligation, to go out and seek sources to a request for proposal. There is no obligation on the part of Generation to bid on that. So that introduces a means by which other competitors can enter into the New Brunswick customer market.

MR. NELSON: Thank you.

BY MR. DUMONT:

MR. DUMONT: You were talking about Bayside Power. Are you telling us that even if the cost of power at Bayside would be above your cost at other generating stations -- well, I

might be out of line here, but what I want to know if the cost of Bayside Power or any other generator using natural gas, if that cost to buy that power would be higher than what you can produce at other plants, would you still have an obligation to buy that power?

MR. BISHOP: For certain periods of time, that's correct. That is the way the deal is structured.

MR. DUMONT: Thank you.

CHAIRMAN: Any further questions arising out of the Board's questions. Mr. Hyslop?

MR. HYSLOP: Thank you, Mr. Chair. I'm wondering, I can't help but think that the cross examinations by Mr. Stewart and Mr. Dever and others, that might be termed loosely a friendly cross examinations. Do I have the opportunity to ask a couple of questions arising out of theirs?

CHAIRMAN: Of them?

MR. HYSLOP: Relating to the questions that they put to the witness, Mr. Chair.

CHAIRMAN: Okay. Go ahead.

MR. HYSLOP: Thank you. Very briefly, and some of these questions seem to flow, Mr. Bishop, is it correct that there is certain times of the year when these companies must sell all of their output to Genco under the terms of the contract, for example in the winter heating season?

There has been reference to that line of questioning by at least two of the witnesses -- or two of the questioners prior to this. It flows out of it, Mr. Chair.

MR. STEWART: It does not flow out of any of the questions of myself, Mr. Dever or Mr. Thibodeau.

MR. HYSLOP: It flows out of the answers given by the witness who says there are certain periods or certain times when they have to take.

CHAIRMAN: We are going to take a 15 minute recess. Would you both check with the shorthand reporter to see where we are coming from here? Thank you.

(Recess)

CHAIRMAN: What did the search of the transcripts disclose?

MR. STEWART: I believe, Mr. Chairman, that it showed -- the question from the Board did touch on this issue, and not from any of the nonutility generators in the so-called soft cross examination.

Before -- I did raise my sort of initial procedural objection. And I want to put my second objection to this questioning on the record. And quite frankly, Mr. Chairman, it is the obvious one. This is the whole darn point after all.

This hearing, among other things, is to determine whether or not these agreements are to be disclosed, under

what terms they are to be disclosed and whether they will be held confidential or not.

And to allow Mr. Hyslop to cross examine the witness on the contents of those agreements beyond potentially the fact that there is a confidentiality clause, cuts to the heart of the matter. And I would object to that line of questioning or any questioning which moves to those points. Thank you.

CHAIRMAN: Mr. Hyslop?

MR. HYSLOP: I think the answer is on the record that perhaps we were looking for or thought we had received. I do still have a couple of questions relating to the nature of the confidentiality that arise out of my friend's questions, Mr. Chair. If I might proceed. I can assure the Board they don't go to the terms of the contracts.

CHAIRMAN: Well, certainly Mr. Bishop is one of the parties that could be asked on that. I'm not going to get down to a very narrow ruling in these matters.

But Mr. Hyslop if you want to put a question or two to Mr. Bishop in reference to the confidentiality clauses, why by all means go ahead.

RE-CROSS EXAMINATION BY MR. HYSLOP:

Q.116 - With respect to confidentiality clauses, Mr. Bishop, you indicated that they were contained in the contracts?

MR. BISHOP: Yes, sir. I did. And I want to make one correction, however, to the transcript, that upon reviewing the Fraser's contract for the sale of the Cogeneration to New Brunswick Genco, there is not, and I emphasize there is not, a confidentiality agreement or clause in that agreement.

However, my position remains similar, is that that agreement was negotiated on an arm's length good faith basis. And recognizing that when the request for these agreements was made by Mr. Gaetan Thomas to me, we actually phoned Fraser's and were -- the response was they would not permit us to provide those.

Q.117 - Thank you, Mr. Bishop. Now I'm wondering if prior to the entering into negotiations were any confidentiality agreements signed relating to the terms of the negotiations and the final contracts being kept confidential, any written agreements to that nature?

MR. BISHOP: I'm sure my memory isn't going to be accurate here. But I believe that there was not any interim confidentiality agreements.

Q.118 - Thank you. And with respect to the confidentiality clauses contained in those contracts, I think your evidence was that you had agreed that neither party would disclose the information to any outside agency without the

consent of the other.

However, would it be fair to assume that within the terms of that if it was in the interests of -- public interest as part of a judicial proceeding or a proceeding of this nature, it would be understood and assumed by all parties that in that type of a process, on the weight of the matters, the contracts could disclosed and both parties would accept that. Would that be fair?

MR. BISHOP: I'm not sure that I can answer that without legal advice. I certainly wouldn't undertake without legal advice to disclose that without the consent of the other party.

Q.119 - And if in the event of a court order at some point in time that would disclose that, of course you would comply with the court order regardless of the fact you might be in conflict or in breach of your confidentiality clause, is that correct?

MR. BISHOP: That is correct.

Q.120 - Thank you. And would it be possible, Mr. Bishop, that in fact that type of provision might be in the confidentiality clauses? Can you comment on that one way or the other?

MR. BISHOP: I haven't read those clauses in the last couple of weeks. But it may be possible, yes.

MR. HYSLOP: Thank you very much. I have nothing further.

Thank you, Mr. Chair.

CHAIRMAN: Thank you, Mr. Hyslop. Mr. Hashey, do you have any questions?

MR. HASHEY: I don't believe so, Mr. Chair, except to say that the Fraser's contracts being spoken of by

Mr. Thibodeau, I'm not sure there was clarification when he was cross examining. But I assumed, for the purpose of his cross examination, that he was dealing with the Genco contract. As you know there are two here in issue. One is the Disco contract if you like, is the sale to Fraser's. And that is possibly in a different category. But I didn't want that to be left on the record.

I think that in fairness Mr. Bishop is speaking strictly to the Genco contract which he is involved in. Although I don't think it may matter a whole lot as to one or the other. We can hear from Fraser's on their position on the Disco one as well in due course.

CHAIRMAN: No. That certainly was my impression, Mr. Hashey, as you have outlined it. Quite frankly I had never twigged Disco having a contract outside of the tariff with Fraser's. You do have a contract?

MR. HASHEY: There is one.

CHAIRMAN: Pardon me?

MR. HASHEY: There is a contract with Fraser's, yes. Those are the two that we requested to be dealt with as part of our request on confidentiality or our issues on confidentiality, not necessarily requested. But there was the Saint John Energy and the Fraser one which were --

CHAIRMAN: I seem to have gotten waylaid this weekend and didn't read it all.

MR. HASHEY: I'm sorry. It was City of Edmundston that I'm talking about there, on the two. That is right. It is not the Fraser one. But I believe there is a couple of Fraser's there.

What has been pointed out to me is Disco does have an industrial contract for the sale of power to the Fraser's mill. Now I don't think that is really part of the issues here on this confidentiality at this point.

CHAIRMAN: No. I presume that to be one of the standard ones that NB Power Disco would have with any large industrial user.

So it is not really in the same ball park as the -- I will call it NUG contracts that we are dealing with here.

MR. HASHEY: That is correct.

CHAIRMAN: That is a different kettle of fish.

MR. HASHEY: Correct. Yes.

CHAIRMAN: They are not tied together. Okay. Thank you.

Thank you for giving up your afternoon on the Miramichi, Mr.

Bishop. I appreciate your coming down on such short notice. Thank you. You are excused. Where do we go from here, Mr. Hashey?

MR. HASHEY: It would seem to me that this might be the appropriate time to have the third party representatives who have given time on short notice as well to come here to make their pitch with respect to the request for the contracts, if that would be appropriate, which would lead to the arguments tomorrow on the general issues.

CHAIRMAN: That certainly was where I was going to go. I'm losing context here all the time. So I thought I would check with you.

Musquash certainly has no problem with their contract being made public. It is simply Genco to a provincial department for the Musquash facility. So that certainly can be put on the public record. That is my understanding?

MR. BISHOP: That is correct.

MR. HASHEY: That is correct.

CHAIRMAN: Good. So we will have that on the record. We will mark it as an exhibit tomorrow morning if we could.

MR. HASHEY: I want to make sure that we have it here today.

We will do our best to put that on the record tomorrow.

If we can that would certainly do it within the Interrogatory process.

CHAIRMAN: Well, okay. Appreciate it if you could, Mr. Hashey.

So I will go from here on in with alphabetical order.

And, Mr. Stewart, do you want to come up front and make your presentation on behalf of Bayside Power LP and Grandview Cogeneration Corporation?

MR. STEWART: Mr. Chairman, if I may, just a question when I begin. I'm sort of new to these proceedings. And we did a little bit of scrambling around the last couple of days to try to figure out exactly the context in here or what the Board had to say on these issues up to this point. I have assumed, although there have been various points today where I have not been exactly sure whether -- it seemed to me there were two issues here. One is should the parties to these agreements, Genco and -- at least the two that involved my particular clients, be provided -- either Genco or my two clients be ordered to provide this agreement to the Board in the first place. And then to the extent that they are, how should they be treated by the Board in terms of whether they are held confidential, and what have you.

Those are the two issues as I see them. But as I said, I don't know what the Board has ruled to date or if there has been any discussion or submissions, at least on the first point.

CHAIRMAN: Well, we have requested that Disco get the contracts and have them available for us for the various -- the reasons that have gone on in the transcript for some time, as you can appreciate.

But one of them is that it is the Board's feeling that the information contained therein may well be necessary for us to have access to in order that a proper cost of service and allocation rate design matter go forward.

So that we come today -- and Mr. MacNutt, Board Counsel will haul me up short if I have got this incorrect -- that according to the Board's policy on confidentiality, we come today, and Mr. Hashey and/or yourself and the other nonutility generator participants will make argument as to why they should not form part of the public record.

And then -- presumably then you -- then we go through to a new stage which is the various Intervenors in our process here can ask the Board for an order that they be able to review the contracts in confidence and then to make a plea to the Board to order that an in-camera

hearing be held in order that we can look at those contracts in detail.

Now Mr. MacNutt, fill me in. I have been all over the waterfront here for the last few days. So am I on target here?

MR. MACNUTT: Almost, Mr. Chairman. We are at the stage where Disco, the applicant has requested that certain documents or portions of documents be kept confidential and have submitted in what is now exhibit 8 the identification of the documents which are the subject matter of their request of confidentiality.

They have supplied an abstract of the reasons and their supporting argument why they should be declared confidential.

Several of -- two of the Intervenors have indicated that in accordance with part 2 of the policy that they object -- no, part 1 of the policy -- object to the Board ordering or declaring those provisions to be confidential.

And what we are considering right now is the submission by one of the parties to the third party contracts which the Board has requested, he is going -- Mr. Stewart on behalf of two of them is going to make a submission as to why the Board should declare the documents confidential and why they should not be

produced, and if produced the circumstances under which they may be examined in-camera.

Tomorrow it is my understanding we will be hearing arguments from Mr. Hashey as to why you should -- why the Board should issue a declaration of confidentiality with respect to the information. And we will be hearing the Intervenors contra, i.e. why the documents should be put on the public record in unredacted form.

CHAIRMAN: Okay. So what we have with the PPA's that -- with the exception of the NUG contracts, forms the subject matter of this confidentiality proceeding, Mr. Hashey on behalf of Disco has already said he will put on the public record the agreement with those matters that Disco believes are confidential. I call it expunged or redacted or whatever else.

The NUGS are in a different category in that to me it is a two-stager, that we talk about whether or not the contract in a redacted form should immediately go on the public record or if it should not, if it should only be treated in confidence.

And then after somebody has looked at it and said no, we want to have an in-camera hearing to deal with the entire NUG contract, and here is why, we then go in-camera after a Board order.

And we can make a ruling as to whether a redacted version can go on the public record, and we just simply discuss the provisions or terms in-camera, or if certain portions of the details should go on the public record.

Again, Mr. MacNutt, have I done that all right?

MR. MACNUTT: Close enough I think, Mr. Chairman.

CHAIRMAN: Thank you. Mr. Stewart, that any help?

MR. STEWART: It is. But it raises a question that we may need to wrestle with a little bit. According to Mr. Hayes, I have Mr. MacDougall to thank for being here today, because he raised the issue.

I'm wondering a little bit, Mr. Chairman, whether Mr. MacDougall raised it after the horse was out of the barn.

It seems to me that the parties to these agreements should be able to make submissions to the Board as to whether or not they should be compelled to provide those agreements at all.

My understanding it is not an agreement with Mr. Hashey's client. And whether he has a photocopy of it in his materials -- maybe he has. But it seems to me that the Board should not have ruled, if in fact that is what has happened, that it has a right to see those contracts or that those contracts are properly disclosable to the Board as part of Disco's application, when it is not a

contract involving Disco, at least without having

representations from my clients, and I assume Mr. Dever and Mr. Thibodeau's clients.

Because with respect, it seems to me there are two issues.

One is do we have to disclose them? And then if we do then on what terms?

CHAIRMAN: Well, really it is Genco at the request of Disco

that has provided them pursuant to the Board's request.

And you have been given notice so that you can then argue

as to whether or not they should -- any part of them

should form part of the public record.

It is as simple as that, in that we have gone through, as

everybody in this room is aware, the total reorganization

of the old NB Power. And we have not done a cost

allocation or rate design study since the early '90s.

And the one which was originally filed by Disco is based

purely upon agreements, as I like to say, which were

negotiated by consultants and a couple of civil servants,

some of them who may be in the room today, behind closed

doors.

And it might be in the public interest if those contracts

were given a bit of scrutiny as the result of us having

looked at the actual figures as they stand today.

Now that is where we are coming from. So part of it is a willingness on the part of NB Power Corporation to share with the Board.

So in particular, in this first run-through after that reorganization, and for the first time in 13 years, we look at the actual figures and see how they properly reflect the classification of the costs, et cetera, and at the end result in just and equitable rates. It is as simple as that. So we are here with some reluctance Genco has provided them to Disco for -- on the basis they would file them in confidence with the Board. They are objecting to them being part of the public record and we are saying well, we are here. We are going to rule on it but we want you folks to have an opportunity to have your input into it before we put anything on the public record and before we went in-camera on the other or whatever. It is a bit of a make up the rules as you go along, Mr. Stewart.

MR. STEWART: Well I guess I appreciate that, Mr. Chairman.

I am just looking at Mr. Bishop's letter which is part of exhibit A-8. In the second paragraph he deals with the contracts. He talks about, you know, first item of confidentiality is the release of five power purchase agreements that Genco has with non-utility generators. He

goes on to say, it is a concern -- they are negotiating in good faith and should be kept confidential.

I don't recall -- I can certainly speak for my client -- that they were never consulted by Genco certainly or the Board, with respect, on the issue of whether or not these agreements should be disclosed.

They are contracts between our client and another corporation which is not a party to this hearing.

CHAIRMAN: I certainly don't want to get into an argument.

The questions that I put with Mr. Bishop is that any third party that contracts with a utility that at the time is under regulation has got to be fully well aware that in this country that contract can be the subject matter of an order from the regulator that it go either on the public record or at least be viewed in confidence. Now that has got to be taken as a given.

And your clients would be aware of that from your excellent legal advice at the time of signing it. I am sure of that. And yet again, this Board has been reluctant to do what we did because we said in our decision we have no jurisdiction under the new legislation over Genco. We have no jurisdiction. Yet if we are tasked with trying our best to set just and reasonable and fair and equitable rates for the people of this province,

then it was our strong belief that we should be able to get to that kind of information to test what Disco is coming forth, and I am sure in good faith, and saying look, this is the way the thing falls.

Now we have set up the policy. It is there. It is certainly we took Nova Scotia's, but it is very comparable to many other jurisdictions across Canada on the way in which they deal with confidentiality issues.

Having said all that, Mr. Stewart, I am sorry, but we are trying to make due as an imperfect world here. And thank heavens for Mr. MacDougall in bringing to our attention what was an oversight on the Board's part. So we gave you the best notice that we could in the shortest time we could.

MR. STEWART: Well, Mr. Chairman, I am going to make one more final comment on this point. And I think I was told by somebody more senior to me when I was a young lawyer that it is never a good idea to use the judge's -- in this case the Chairman's words against him, but I am going to go out on a limb in any event.

I think your words were that you had absolutely no jurisdiction over Genco. And I understand that that being the case, as far as I am aware, the parties to the agreement are Genco and -- at least the two agreements

that involve my clients -- and you know, and that separation of the NB Power group is, you know, by operation of statute. So if that being the case, it would seem to me that then the issue of whether the Board has jurisdiction to compel disclosure of the agreements -- and I appreciate that you can direct Mr. Hashey to do certain things. And if he can't do those things, then that has consequences for his client, I suspect that they have all their ducks in a row. I have no doubt of it either.

But it seems to me that it would be preemptive for the Board to rule that it has a right to see the contract between two parties over whom it has no jurisdiction today, without at least hearing submissions from the parties to those contracts.

Now as I understand, Genco's submission is contained in Mr. Bishop's July 6th letter and I guess the testimony that he gave today. That is fine. It stands. But with respect, up until now, and I appreciate in the good faith in everybody here, no one has asked us. And I would request the Board to allow us permission to address the issue as to whether these contracts are properly before the Board. If they are, and I am prepared to make those -- you know, those submissions simultaneously -- I had quite frankly been prepared to come up here and say, here

is why I think they shouldn't be disclosed at all. And if you do, here is why I think they should be treated confidentially.

Quite frankly, I heard this morning, Mr. Chairman, a discussion about signatories to a confidentiality, you know, agreement. I did get the policy from Board staff for which I am very grateful. But I wasn't even aware that there was agreements signed. Trying to scramble around at the last minute.

CHAIRMAN: I thought in your casual reading time, Mr.

Stewart, you would be going to our website and following along as an interested citizen.

MR. STEWART: Well I looked on the website and it's not there.

CHAIRMAN: It isn't?

MR. STEWART: No, it's not.

CHAIRMAN: It should be.

MR. STEWART: I agree.

CHAIRMAN: It is supposed to be.

MR. STEWART: Mr. Chairman, I am going to request the Board allow us to address the issue as to whether the contract should be disclosed in the first instance.

CHAIRMAN: All right. And you are certainly welcome to do that and that is why we did belatedly invite you here.

There is just one thing I will say. Is that if the facts were precisely as you had said then, you know, we would have had the jurisdiction to look at those contracts up until the first of October of 2004. But then because of the change in the legislation, you are able to say now they are no longer in front of you. You have no jurisdiction over them. And we are looking at it is quite frankly, we are looking at it from a higher level than just the strict legal thing, is that on a public policy basis, the regulator, we were not officially aware of them and we didn't get jurisdiction to look at particular things until such time as an application for rates were made to us. And frankly, they should have been made a long time before they were. But there you have it.

So we are here with a bad hand and trying to get the best play from it as we possibly can. But Mr. Stewart, please go ahead and make your presentation on those two points.

MR. STEWART: Thank you, Mr. Chair. And I suspect my whole presentation may be shorter than the discussion we have had so far.

Mr. Chairman, as the letter from Mr. Bishop points out and as he confirmed in his testimony today, I think it is universally recognized by everyone, including the Board,

and it was recognized in your comments just now, that these agreements were negotiated in good faith and it wasn't merely on, I think as Mr. Bishop reads in his letter, not merely on the understanding that they be confidential, but on a contractual obligation that they be confidential. And the point you made, Mr. Chairman, is a good one. And it is the obvious response to that point, which is well, you know, at that time NB Power was one big group. And if you enter into a contract to supply a regulated utility then that means that you are understanding the league in which you are playing. I understand that.

But I have two responses to that. Number one is, and it's kind of a variation of what we were just talking about, and that is the rules have changed. We are operating in a different league. And the concern of the confidentiality of these agreements and disclosure of the confidentiality of the agreements is not merely their retrospective effect but also their prospective effect.

These agreements represent pricing and commercial negotiations with -- while they may have taken place prior to certain legislative changes, disclosure of them will occur today when there is in essence a free market. So yes, you are right, if our only customer had been

NB Power and if we were operating under the previous circumstance -- and I am talking about early '90s or before the -- I think as Mr. Dever is going to say -- before the legislative changes were all before us and passed by the House and we were sitting around waiting for them to be proclaimed -- everybody would -- knew what the new rules were.

And from our client's perspective, the concern here isn't so much, as Mr. Bishop said, that we have anything to hide, it is that these are our commercial -- these are the arrangements we made. We still have the same generation unit. Probably have similar costs. And if we disclose what we paid or what we charged last week, then that reflects on our reality today. And I appreciate the Board's concern in wanting to make sure that it understands and do the best it can, from I think as you put it, Mr. Chairman, not exactly a legal perspective but from a public policy perspective, that is all well and good.

But the fundamental reality is that disclosure will occur today in the business environment that my clients operate in today.

I think I used the example outside with one of my colleagues that, you know, if I go and my neighbour buys a

Ford Taurus yesterday and gets a certain price for it and he tells me that, I know when I go to the dealership I'm going to get that price or I'm going to get a better price. It doesn't matter whether the rules have changed surrounding the laws for sales of cars in the meantime. That was the price he paid for the Taurus yesterday or last week or last year. I'm going to beat that price today. That information is going to be valuable to me in the marketplace today.

These agreements are commercially sensitive documents today. They are unique. They were hard negotiated and in a myriad of parameters. The five non-utility generators compete with each other. Genco competes with other potential purchasers. The contracts now exist in an unregulated business environment. And I guess that's my key point, Mr. Chairman. This kind of commercially sensitive information, just like knowing exactly what my neighbour paid for his Ford Taurus, is golden. The -- whatever terms anyone - you know -- it's not unusual, in fact I would submit it's extremely typical that when parties negotiate a long-term supply agreement, whether it's cleaning an office building or electricity or snow ploughing services or all the other things that people do, or roofing services, it is because they reach an

agreement, and I think the term was there is a premium

involved. And in this particular case there might be a discount involved.

If you know that -- if I know what the pricing is of a previous contract and I know that the deal is that we will keep it confidential, then I may be discounting my price, because I know that the neighbour is not going to find out what this current customer paid for the Taurus. And so when the neighbour comes in I negotiate with him new and fresh. That affects the pricing. And the minute the neighbour finds out the price for the other car, then there are consequences.

I did over the weekend read the Board's policy on confidentiality, and I would submit, Mr. Chairman, that the onus here is on the party seeking disclosure. And I think that's important. And my understanding of the policy as I understand it has its genesis or its root or its legal authority in section 133 of the Electricity Act.

And forgive me, Board members, if this has been discussed before I arrived in the room, but I will make my pitch in any event.

That section, and I'm paraphrasing a bit, reads that where information is obtained by the Board concerning the cost of a person in relation to operations of a person

that are regulated by this part, that is, Disco, in other words where you receive information concerning the cost for Disco to operate, and if you are going to take the view that that allows you to reach back two jumps, not only with their power purchase agreement with Genco but with how Genco supplies -- or has power purchase agreements with other third parties, it would seem to me that this section applies to that information as well. Such information shall not be published or revealed in such a manner as to be available for the use of any person unless in the opinion of the Board such publication or revelation is necessary and in the public interest. So the opening premise is if you receive this information it is to be held confidential. And only if it's shown to you that it's in the public interest that it not be confidential, then you are to disclose it. I think it's that small but important fundamental point which addresses a lot of the information and certainly that huge big stack of cases that were thrown around here this morning. Because as desperately as I could, and skipping my lunch, I went through those cases and every one of them talks about a court of law. Or talks about a circumstance where the normal common law rule of an open court applies. That is, in a criminal proceeding or in the Sierra Club

judicial review proceeding, the premise is if you are going to rely on evidence before the judge or before the decision maker, you can't do it unless you are prepared to put it on the record. And it's only in exceptional circumstances where you are allowed to keep it confidential.

But that's not the circumstance here at all. The circumstance here is, according to section 133, you receive the information that's confidential and you only disclose it if it's in the public interest to do so.

So the onus is not on my clients or Mr. Hashey or Genco.

The onus is on the person seeking to make this information public. That it's in the public interest to do so.

Otherwise you are bound to keep it confidential.

Just step back for a brief moment, Mr. Chairman. It is the position of the parties here as I can sort of wring them out from listening to what people were saying today and in the materials I got on Friday, is that Disco has been asked to disclose contracts. It has said -- and again in essence, as I understand it, we don't have them.

We can maybe ask Genco for a copy of them. We don't know what they say. We will ask Genco and Genco will give it to us or they won't.

Genco has said well, I don't sense a strong objection

to disclosing them, but really it is not us who has got something to lose here necessarily by disclosure of these, it's our suppliers who have something to disclose.

So we are not prepared to disclose them until such time as the suppliers either agree and say it's okay or you order us to do it in any event.

And I think it's clear that the non-utility generators have said no. We don't have anything to hide exactly, but we don't want to put our confidential business information on the public record.

Mr. Hyslop, who I understand is the Public Intervenor's counsel, is the person here who is seeking to make this information to get is disclosed and to make it -- make it public. And I know it's in exhibit A-8 somewhere, but Mr. Hyslop has filed a response with the Board on Friday and he has a little schedule A attached to his letter. And he deals with his IR number 17, which is the one, of course, that we are talking about. There is only a few lines there in the little box, but I want to address Mr. Hyslop's submissions.

It's -- I am not sure it's in the binder or not, Mr.

Chairman? I will proceed, Mr. Chairman?

CHAIRMAN: Go ahead.

MR. STEWART: Thank you. I am talking about both issues

here so the Board is clear. I am talking about both with respect to the issue of whether the contract should be disclosed in the first place and then whether or not the second step comes true that it should be made public. And my submission is and it is why I spent so long talking about the Act is that I would submit the rule here is it's confidential unless Mr. Hyslop can convince you to make it public.

Mr. Hyslop says the third party contracts are material and relevant factors with respect to the classification and allocation of costs among customer classes. He doesn't tell us how. And neither, I would submit, Mr. Chairman, is there one shred of evidence before this Board as to how that may be the case.

And Mr. Hyslop was very clear a few minutes ago or a couple of hours ago, I want to make the evidentiary record clear. Well, if the onus is on him to show why these contracts should be disclosed and/or that they should be public, then there should be some evidence as to why they are material and relevant factors with respect to classification and allocation of costs --

CHAIRMAN: Mr. Stewart, I will interrupt you there simply to say and make the point that a quasi-judicial tribunal or economic regulator like this Board differs from a

courtroom in that we can bring our experience, be it great or small, to the table. And, you know, Mr. Hyslop may well be able to say something like the contract terms and conditions are material and relevant factors with respect to classification and allocation of costs. And we here will either appreciate it or dismiss it.

In other words, the onus of Mr. Hyslop having to have someone give us a dissertation on a cost allocation rate design before we can decide is not the same here as it would be in a courtroom. I just wanted to make that clear to the room. Thanks.

MR. STEWART: Fair enough, Mr. Chairman. And I guess my point is that not simply that what's been suggested or what's been thrown out is tenuous or a little weak or maybe not corroborated by expert testimony or anything, there is nothing.

I mean I haven't heard anyone say -- and certainly Mr. Hyslop hasn't said anything in his written response here that I need to know those prices because X. Here is how it relates. Now maybe he will do that when he gets up and if he does, then I will make my response if I have anything I think that says, but so far I haven't heard anything. I haven't heard him say this is why I need that number.

If you -- to read on -- the Public Intervenor submits that the applicant has not provided sufficient evidence to establish commercial sensitivity, whether it was -- with respect I think your comments with respect to evidentiary burdens in this context are clear, but again that assumes that the onus is on us to say we have to prove commercial sensitivity.

I think we have proven commercial sensitivity. I believe the testimony and the letter from Mr. Bishop are clear.

And I think to the extent there is onus, we have met it.

I haven't seen any onus met by Mr. Hyslop.

And then he says finally, alternatively the public interest in receiving the information in the public forum outweighs the deleterious effects to the applicant's commercial sensitivity. Well, I disagree with that.

I would submit that the public interest is in allowing Genco to negotiate contracts with its suppliers on best possible economic terms. The evidence of Mr. Bishop was, yes, well, you know, there is a discount or there is a premium. My suppliers are going to charge me a premium if they are going to have to make their contracts public.

And with respect, common sense dictates I am less likely to give you a break on price if I know you are going to tell it to all my customers or all my other potential

customers. And if I know I do a deal with you, it's not going to get back and haunt me to my other customers, then maybe I will give you a break.

With respect, Mr. Chairman, if Disco buys a pick-up truck from Downey Ford for X-numbers of dollars and wants to include that in their cost of service, it seems to me that it's a perfectly legitimate exercise for this Board to say was that a fair price you paid for the pick-up truck. And if it's not, then we won't allow you to put it in your cost of service. We won't allow you to recover that cost in your rates.

The Board should look at was the X-numbers of dollars paid too much? And if so, we will only allow you Y. But the Board should not -- and I would submit cannot, for example, require Downey Ford to disclose its contract with Ford Motor Company about what it paid for the truck. Even if the terms of those agreements trickle down to how much Downey's charged Disco for the truck because it's going to. It can't help but.

If the Board requires the supplier of the suppliers to disclose all its prices, then their competition is going to be all over it. And that's not in the public interest. Any more than it would be for the Board to say well, okay, then, Ford Motor Company, you disclose to us how much you

had to pay Auto Parts for the brake shoes and the windshield wipers on the truck. And I know that's a silly example, but I am trying to make the point.

Disco gets its electricity from Genco. It has contractual arrangements with Genco. It will -- and I am sure Mr. Hashey and his team will lead mountains of evidence to support why it believes its entitled to a rate increase. And the Board will access that and look at it and it will decide whether that's appropriate.

But it seems to me that as part of that exercise, the Board doesn't have either the legal right, nor do I believe it is in the public interest for you to then be able to look behind that and allow yourselves to look at the cost to Genco of its materials that it services. It's electricity that it resells to Disco. Either Disco can satisfy you or it can't. And forcing our clients to disclose their confidential business information to its detriment is not in the public interest.

Disco has an obligation to convince you it's entitled to its rent increase. It will meet that obligation, I am sure. But we can't trample on the rights of other parties to negotiate contracts or to keep their confidential terms or keep the terms confidential in this business environment, in this regulatory environment, which in

non-regulated for our clients now. Can't sacrifice this on that alter.

One brief legal argument or legal submission, Mr. Chairman and Board Members. And that's a variation of the theme that I was talking about in terms of all the cases you were talking about that were referred to this morning. And I sure you may hear more about it later this afternoon.

For example, the Sierra Club decision that has been thrown around here and says it creates an obligation and the rules of supplying when things should be disclosed and when they are confidential. That is in reference to the - - that whole case turns on an application under Rule 151 of the Federal Court Rules, for example. And I just picked this one because it was the one top and it was the one that was discussed the most. That is in the context of the presumption that you are in an open court and not before this Board, which has no authority other than is granted to it by its statute. You are entirely a creature of statute. You are not a court.

The starting point is things are confidential unless you are comfortable that they are in the public -- unless you rule that it has been established to you that it's in the public interest for them not to be comfortable. And

all this authority about dealing with when you keep things confidential in the reverse situation has no applicability here.

And finally, Mr. Chairman, my last comment is I appreciate the certain common sense submission, argument -- and I am sure you are going to hear it from others -- in fact I think it was alluded to by one of the Board Members earlier today that -- well, how else are we going to do this, because there is some issue with respect to a fuel surcharge and there is a flow through of costs. So unless we see, you know, your agreements, then how are we going to be able to assess that fuel surcharge and how that's going to work?

And with respect, I don't know. I don't know how you are going to do that. I bet Mr. Hashey and his team are up to the challenge, but I don't know how you are going to do that. But ordering non-parties to this hearing to disclose their commercial terms of their contracts is not the way to do it. That may help you, it's going to hurt us.

Those are my submissions.

CHAIRMAN: Mr. Stewart, you didn't have the good fortune of being with us when we were struggling with confidentiality issues. You may have been here in Lepreau or Coleson

Cove. I can't remember.

MR. STEWART: I was only an Informal Intervenor in those.

CHAIRMAN: Okay. Well, you were here. Anyway, and the onus that you have read into Section 133 is -- certainly is a very good argument for that. But if you look at our policy on confidentiality, you know, it's unstated in the statute but we don't have to receive something from someone if in fact they say we want this in confidence, because the common law is clear in this country that if a tribunal such as ours accepts something in confidence, which is not allowed the scrutiny of the parties to the proceeding during the proceeding and it forms -- or forms the basis of any part of our decision, the courts will strike it down.

So if you were to read our policy on confidentiality is that I would suggest to you that we are trying to couple the section in the legislation with our right to say no, we won't accept that document in confidence. You don't have to file that, period. If you don't want to file it, that's fine. To doing one here, that brings that onus around to where those parties which are requesting confidentiality in fact have to make an effort to prove same. And I have likened it onto Freedom of Information Requests, so that Government, for instance, can't just

give a blanket -- say that entire document is confidential, but rather they have to be extremely specific in it and say, the document itself only certain portions and those portions are limited to this.

Now I just give you -- we had those discussions in this room and certainly our Board has been cognizant of -- our general rule is -- the primary rule is anything that is filed with us is public knowledge, period. And we have always treated that if it's going to be confidential, then it is handled in a very different fashion, because of that common law rule.

All right. Just having said -- I just wanted to make our approach, since you weren't present, clear as to that.

MR. STEWART: And my apologies, Mr. Chairman, and sort of because of that, but with -- I have heard what you have said. And I guess my only response to that is section 133 says what it says. And we are -- you know, all of us who are practicing lawyers appreciate that statute changes the common law. That's where statutes came from, I dare say.

And so I agree that with much of the information -- maybe even most of the information that fits under section 133, it's very easy for the Board to rule that it's in the public interest.

But your starting point, I would submit since -- what

was it, October of 2003 -- since this legislation --

CHAIRMAN: 2004.

MR. STEWART: 2004, excuse me. Your starting point is it is confidential. And many -- and for most situations and most circumstances, it is in the public interest for it all to be disclosed.

CHAIRMAN: Well, frankly, if you go back to the provisions as they were prior to the Electricity Act, and the Public Utilities Act, it's much the same. No question about it. There the Board could -- if it were filed in confidence, the Board could not disclose it until after a public hearing, so that the parties could participate in a discussion such as we are having today, and the Board find it to be in the public interest to release. Simple as that.

MR. STEWART: Right. And my -- and as a practical matter, I am not sure it makes much difference except this one crucial point. I think it is important to understand where we start from and where we have to go to, because I think there are conflicting arguments on both sides of these. I am sure that the Board Members and yourself are sitting up there saying, well there are conflicting arguments here. You know, there is the need that you wanted the information as expressed by you. Then there is

the need to ensure that the legitimate business interests of people who negotiate contracts in good faith have to protect those interests and not to have them suffer any sort of commercial detriment as a result. And so when you are balancing those interests, I suspect it's going to be pretty close. And I think you need to understand where you are and where you need to be pushed to.

MR. STEWART: Do I hear underlying this argument, Mr. Stewart, this may be a totally unfair question, that although you -- your clients object to public disclosure of these contracts, that you might perhaps be prepared to share the information in pursuant with the confidentiality policies of the Board?

MR. STEWART: My client's position, Mr. Chairman, is two-fold. And I am probably just repeating what you said, but the other way around. Our position is with respect, the Board has neither the jurisdiction, neither is it in the public right -- public interest, excuse me, to order disclosure of these agreements, number one. Number two, if the Board does not accept those submissions and orders them disclosed, then at a minimum they should be held on the strictest confidence.

CHAIRMAN: Thank you, Mr. Stewart.

MR. SOLLOWS: I just have really one line of questioning

here. I wonder if you are familiar with the processes that are being developed around these issues in competitive markets elsewhere?

MR. STEWART: Well, the one -- the one processes that I recall that were before this Board was the initial go-arounds of hearings for natural gas marketers.

As you may recall or may be aware, the marketing of natural gas under the Gas Distribution Act as it then existed, and to a certain extent as it exists now, was that the actual sale of the commodity was free market.

And repeatedly this Board took the position that it had no interest in requiring natural gas marketers to disclose their arrangements with their suppliers other than to confirm that they had supply.

There was a protection in the public interest in terms of making sure that people that go around selling gas really have gas to sell and there was some sort of element of regulation. But in a free market the Board recognized in order for the free market to work, you have to be able to do commercial deals.

MR. SOLLOWS: Right.

MR. STEWART: And that was in the public interest.

MR. SOLLOWS: So is there any room in your mind for an argument relating to market power of a participant. That

if one participant in a so-called free market can exert market power?

MR. STEWART: I am not sure I am in a position to answer that.

MR. SOLLOWS: Are you aware of how this stuff is handled in New England?

MR. STEWART: I am not.

MR. SOLLOWS: It's my understanding that when you bid into the New England market your bids -- at least in the spot market -- they are held in confidence for a period of time and then become a matter of public record.

MR. STEWART: That would make sense, although I am unaware that that's an issue. Because when you are bidding into the spot market it is a very short term market. So what you bid in -- I think the document that Mr. Hyslop marked -- I didn't get a copy of it -- but I mean literally those prices could change daily or change hourly.

MR. SOLLOWS: Some change every five minutes.

MR. STEWART: Yes. Exactly. So it's a very, very short term market. So there is a recognition of protection. What I bid yesterday or two days or an hour ago, whatever the time limit is, is not material. The problem is that the financial arrangements in these agreements reflect

directly on what the market situation is today.

MR. SOLLOWS: Right. And again it's my understanding that agreements such as this would normally be filed in the US case with the federal regulator, and in fact the federal regulator has on record -- on a confidential basis certainly, but on record all of the particulars relating to the plans and the contracts.

MR. STEWART: I'm not sure of that. I think that -- I'm not sure that FERC requires the filing of all those bilateral agreements. I think that the utilities -- I don't know. I think the utilities may, but I'm not sure.

MR. SOLLOWS: It certainly is an area where matters are revolving. It's not static in any respect, is it?

MR. STEWART: No. And that's part of the concern.

MR. SOLLOWS: I understand. Thank you.

CHAIRMAN: Thank you, Mr. Stewart. Did I see a hand up back there? No? Okay. Mr. Dever, do you have anything you wish to add?

MR. DEVER: Just to make a brief submission. I would like to make a brief submission.

CHAIRMAN: Okay. Would you like to come up to the front table, please.

MR. DEVER: Mr. Chairman, I won't once again go over the same ground as Mr. Stewart did. I think that the

presentation that he made summarizes a lot of the concerns I guess that St. George Power has about the St. George Power agreement that it has with Genco.

Quite frankly it hasn't been -- I have heard nothing to date that suggests any reason that that contract is material to these proceedings. There is certainly no issue of fuel surcharge that arises out of a hydro development.

And the cost that Disco needs to put forward in its rate case is cost that comes from Genco, not from St. George Power.

We have objected to the disclosure of our contract under the terms of our contract. And the reason being that we have made a significant investment in that facility that it's operating.

It was -- the contract was negotiated in the context of an open market and it's now operating in an open market. And our only source of revenue is the sale of electricity and to have our contract on the public record would be a commercial disadvantage to us I think with very little benefit to the Board in the context of the Disco rate case.

And I guess in the context if the Board were to order the contracts to be put on the Board under confidential

terms, we have concerns about the Intervenors in this room.

We have concerns about the other non-rate, non-utility generators who compete with us. We have concerns about Intervenors in the room who may compete with us now or in the future in terms of the generation of electricity and the sale of electricity to NB Power or NB Genco.

So all those things lead us to take the position that in the first place the contracts should not be released. And in the second place if they are released that they be strictly controlled in terms of access.

CHAIRMAN: Thanks, Mr. Dever. Fraser's, I'm sorry, I took you out of sequence. Come up, Mr. Thibodeau.

MR. THIBODEAU: Thank you, Mr. Chairman and members of the Board. I will waive the French for today there, though I had prepared a submission in French.

First of all, Mr. Chairman and members of the Board, we or Fraser Papers received notice of this hearing Thursday, I believe.

CHAIRMAN: Mr. Thibodeau, if you want to address the Board in French, those of us who are not equipped with the second language, we can turn on our translation. That is what the booth is back there for. I want to make that very clear for New Brunswickers.

MR. THIBODEAU: Yes. Well, I appreciate that. But I'm sure my friends in back would like to leave also. No, Mr. Chairman. I will do my best in the second language.

CHAIRMAN: As stated there, we only became aware of this application. Now Fraser Papers -- and I won't repeat what has been said already. We are talking about contracts that are sensitive in nature. Fraser Papers is a pulp and paper manufacturer. And this is a very competitive market.

And you will realize, as you mentioned, that the Board members all have the benefit of their own experience. And the cost of electricity is a big factor in producing pulp and paper.

Now having said that I am certainly in agreement with the position of Mr. Stewart with respect to whether or not the Board would have jurisdiction in this particular matter. Bearing in mind that the contract is between Genco or was originally with NB Power. Now apparently it has been transferred by transfer order to Genco.

Now there is no question that you have to address whether or not there is going to be a contract here between these two parties, namely Disco. And the question has been asked.

In any event, the first item that I would like to

bring to your attention is that this matter of confidentiality is an important issue. And I'm not too certain if section 133 that has been alluded to in the Act -- and my interpretation is very close to Mr. Stewart there. I believe that the burden would be on somebody that is claiming that there would be an interest in making this information public to raise the points or raise the arguments in favor of making this information public. And so far I have not heard in this room at least any motive to render the information public.

Now we at Fraser Papers have two contracts with Genco. Or at least one is for the purchase of power. And the other is for the sale of power. And it is a fact that one of them does not. And that is the one involving the Cogeneration facilities at Edmundston that does not have a confidentiality clause.

But nevertheless I think you will understand that there is an implied term in every contract as to confidentiality. And that is what we are asking here,

Mr. Chairman.

CHAIRMAN: With a regulated utility?

MR. THIBODEAU: Well, now --

CHAIRMAN: At the time that you executed that agreement it

was a regulated utility, pure and simple. That was back when,
in the mid --

MR. THIBODEAU: 1995.

CHAIRMAN: -- '90's sometime?

MR. THIBODEAU: That is right. At that point. Now what --
you know, I will be coming to this. And I might as well
deal with it right now.

It is the Fraser's position that as far as these contracts
are concerned, that Fraser's has a vested right in having
these contracts kept confidential.

Now you alluded at one point in your cross examination,
when were these contracts made? Well, they were made
certainly before the implementation of the Electric Act as
it stands now, which is not that long ago.

And I would just like to read. And you know, I hate going
into legalistics here. But a case there I think that is
important for the Board to know or to be aware is Atlantis
Transportation Services versus Air Canada.

And it says the following. And I will just read the major
points there. "The defendant has the right to plan its
affairs on the basis of the law as it stood at the time
the contract was made. Simply stated it is that the
defendant had the true legal rights to order its affairs
on the basis of existing legislation. If the legislature

had intended to annul previous existing defences and revise the full rights of action that were incapable of being asserted under the law as it stood in 1986, the amendment would surely have been worded in such a way as to make manifest that intention."

Now in this particular instance I am putting forward the proposition that the Public Utilities Board here does not have any authority to change the vested rights of Fraser Papers, my client, with respect to confidentiality of agreements that he signed 10 years ago.

And this is an important point for the Board I submit --

CHAIRMAN: Just so I understand you though, there is no confidentiality clause in that agreement.

MR. THIBODEAU: Yes. But it is implied. That is the Cogen' -- it is an implied term that --

CHAIRMAN: Would you give me some precedent for where you get an implied term that it is confidential?

MR. THIBODEAU: I think it is an implied term of any contract, Mr. Chairman, that if I have a contract with B and C, there is an implied term that I won't go out and discuss the terms of my agreement with anybody else, unless the other parties waive.

I think Mr. Bishop properly defined or described the

situation when New Brunswick Electric Power negotiated any of its contracts. You know, you do that in good faith. And I don't think it is out there to make it public. Otherwise how would you handle the normal course of business, Mr. Chairman? That is how business is done. As I stated on the section 133, the confidentiality of information, I submit that when you read the section prima facie it should be kept confidential. In this case we think it should not even be disclosed. That is our first position. Second position that if it is ordered to be disclosed, then it should be kept confidential at all times. And that is the position of Fraser Papers Inc., Mr. Chairman, Members of the Board.

CHAIRMAN: Thank you. Consensus up here is that that closes the argument in reference to that issue and the Board will adjourn until 9:30 tomorrow morning. And go on from here. We will have to make a ruling, of course, on that. Thank you.

MR. COLES: Mr. Chairman, if I may, we intervened and were granted Intervenor status. I am assuming tomorrow then you will be hearing argument from the Intervenors in opposition to keeping this information confidential. And I have not addressed that point.

CHAIRMAN: No, you haven't. And some of the other

Intervenors as well.

MR. COLES: Yes. So I am assuming tomorrow when we --

CHAIRMAN: Yes. We start afresh is what we are going to do.

MR. COLES: Thank you.

CHAIRMAN: Thank you.

(Adjourned)

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

Reporter