

1 New Brunswick Energy and Utilities Board
2
3 Motions Day Hearing, June 21, 2007
4 Re: Generation and Other Costs And Request for Distribution of
5 DISCO Financial Statements
6
7 IN THE MATTER OF an application by New Brunswick Power
8 Distribution and Customer Service Corporation (DISCO) for
9 approval of changes in its Charges, Rates and Tolls (Includes
10 Interim Rate Proposal)
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12 Delta Hotel, Saint John, N.B.
13 June 21st, 2007
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16 CHAIRMAN: Raymond Gorman, Q.C.

17 VICE-CHAIRMAN Cyril Johnston
18

19 MEMBERS: Yvon Normandeau

20 Constance Morrison

21 Robert Radford

22 Edward McLean

23 Roger McKenzie
24

25 BOARD COUNSEL: Ellen Desmond
26

27 BOARD STAFF: John Lawton

28 Doug Goss

29 David Young
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31 BOARD SECRETARY: Lorraine Légère

32 ASSISTANT SECRETARY: Juliette Savoie
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35 CHAIRMAN: Good morning, everyone. The purpose of this

36 Motions day is to deal with the motion relating to

37 generation and certain other costs which was filed by

38 DISCO, a motion dealing with the PPAs and SLAs which was

39 filed by the Public Intervenor in a motion filed by JDI

40 requesting that DISCO be ordered to file quarterly

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2 financial statements.

3 My name is Raymond Gorman. I will be chairing this
4 session of the NBEUB. This morning the panel will consist
5 of Ed McLean, Yvon Normandeau, Tony Morrison, Vice
6 Chairman, Cyril Johnston, Bob Radford and Roger McKenzie.

7 At this time I will take the appearances. And I will
8 start with DISCO.

9 MR. KEYES: Thank you, Mr. Chairman. Edward Keyes on behalf
10 of DISCO. Joining me today at the counsel table is Mr. Ed
11 Kee from CRA International, Mr. Terry Morrison, my
12 partner, Sharon MacFarlane and Darren Murphy.

13 CHAIRMAN: Thank you, Mr. Keyes. Now for the intervenors
14 let's start with the Canadian Manufacturers and Exporters
15 NB Division.

16 MR. LAWSON: Good morning. Gary Lawson appearing for CME.

17 CHAIRMAN: Thank you, Mr. Lawson. Enbridge Gas New
18 Brunswick. Nobody here from Enbridge. FPS Canada Inc.

19 MR. BAIRD: Chuck Baird, Mr. Chairman.

20 CHAIRMAN: Thank you, Mr. Baird. Irving Oil Limited. No
21 one here from Irving. J. D. Irving Pulp and Paper Group.

22 MR. BOOKER: Good morning, Mr. Chair. Andrew Booker.

23 CHAIRMAN: Thank you, Mr. Booker. NB Forest Products
24 Association. New Brunswick System Operator.

25 MS. DESMOND: Mr. Chair, I believe that the System Operator

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advised the Board yesterday they would not be able to attend.

CHAIRMAN: Thank you. Utilities Municipal.

MR. ZED: Peter Zed representing Utilities Municipal. And

I'm joined by Dana Young and Marta Kelly.

CHAIRMAN: Thank you. Vibrant Communities Saint John?

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

CHAIRMAN: I couldn't find you.

MR. PEACOCK: Yes. And I'm joined this morning by Dr. Ken
Sollows.

CHAIRMAN: Thank you. Was there somebody from Irving that
is sitting there behind Kurt?

MR. SABEAN: Yes. Brent Sabean for Irving. And we sent in
a letter yesterday. We are not going to be participating
today. Rather we are just observing.

CHAIRMAN: Thank you, Mr. Sabean. Public Intervenor.

MR. THERIAULT: Good morning, Mr. Chair. Daniel Theriault.

This morning I'm joined by Bob O'Rourke and Jamie

O'Donnell. And I also have with me with Kurt Strunk of
NERA who is going to be a witness this morning. Thank
you.

CHAIRMAN: Thank you, Mr. Theriault. And the Energy and
Utilities Board.

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MS. DESMOND: Good morning, Mr. Chair. Ellen Desmond. And with me is Board Consultant Andrew Logan and Board Staff Dave Young, John Lawton and Douglas Goss.

CHAIRMAN: Thank you, Ms. Desmond. There are a number of informal intervenors who have also registered for these hearings. And I will just go through the list to see if anybody is present. Agricultural Alliance of New Brunswick, anybody here? City of Miramichi? Department of Energy? Flakeboard Company Limited?

MR. BURKE: Yes, Mr. Chair. Pat Burke.

CHAIRMAN: Thank you. Mr. Terry MacDonald? Saint John Board of Trade? And Times and Transcript? I guess that looks after the appearances.

As I indicated when we got started, this Motions Day arises out of three Notices of Motion which were filed by various parties. On April the 19th DISCO filed a Notice of Motion that the Board make a determination whether during the course of the hearing of this application it is appropriate to consider evidence as to the reasonableness of the generation and certain other costs which underlie the Applicant's Revenue Requirement for the test year 2007, 2008.

The issue of what was meant by certain other costs was raised. And DISCO defined them as (1) assets transferred

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by transfer order; (1) non-fuel costs of the generators supplying to DISCO, which includes generators, operation, maintenance and administration costs, amortization and decommissioning, finance charges, taxes and special payments in lieu of taxes; and (3) costs with respect to intercompany contractual arrangements.

Subsequent to that the Public Intervenor filed a Notice of Motion on May the 23rd requesting that the New Brunswick Energy and Utilities Board take jurisdiction over the power purchase agreements, the PPAs and the service level agreements, the SLAs that had been entered into by the New Brunswick Power and Distribution Customer Service Corporation, DISCO. It was agreed that these two motions would be heard at the same time because of the similarity of the subject matter.

The third Notice of Motion was just filed by J. D. Irving Pulp and Paper Group, requested that the New Brunswick Energy and Utilities Board order that the New Brunswick Distribution and Customer Service Corporation, DISCO, distribute at least quarterly their financial statements. Such statements would be due no later than 30 days after the end of the selected period.

The Board considers that the motion brought by the Applicant and the motion brought by the Public Intervenor

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2 each involves the same or at least similar issues. So the
3 Board proposes to deal with these two motions as follows.

4 Each party will present their comments and arguments on
5 both motions in one submission.

6 The Public Intervenor will go first. All parties except
7 the Applicant will then go in order. The Applicant will
8 then presents its submission. The Public Intervenor will
9 have an opportunity to respond to comments and arguments
10 made by other parties. The Board will then proceed to
11 hear argument and comments on the motion by JDI Pulp and
12 Paper Group as follows.

13 JDI will go first. All parties except the Applicant will
14 proceed in order. The Applicant will submit comments and
15 arguments. And JDI will be provided an opportunity to
16 respond to the comments and arguments of the other
17 parties. If anybody has any difficulty with this
18 approach, I guess maybe this would be the time to discuss
19 it. Anybody have any difficulty with that?

20 MR. KEYES: The Applicant has none.

21 CHAIRMAN: We will take silence to be acquiescence I guess.

22 Okay. I guess at this point in time we have a couple of
23 exhibits that should be marked. First of all, the Public
24 Intervenor report prepared by Mr. Strunk of NERA should be
25 marked.

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I don't believe that PI has any exhibits marked up to this point in time in the proceedings. So that would become PI-1, is that correct? If there is no objection that will be marked as PI-1.

The other exhibit which was filed was the evidence of Mr. Kee, the CRA report, and I believe exhibit numbers to date for the Applicant are up the exhibit A-4. So that will become exhibit A-5.

Prior to proceeding are there any preliminary issues that I haven't covered that any of the parties wish to raise? Then I guess, Mr. Theriault, I would ask you to come forward and have Mr. Strunk I guess brought up to the witness table to be sworn. I will ask the Board secretary to swear Mr. Strunk.

KURT G. STRUNK, sworn:

DIRECT EXAMINATION BY MR. THERIAULT:

CHAIRMAN: The witness has been sworn, Madame Secretary.

Thank you. Mr. Theriault, proceed.

Q.1 - Thank you, Mr. Chairman. Could you please give us your full name?

A. Kurt Strunk.

Q.2 - And, Mr. Strunk, where do you reside?

A. I reside in New York, New York, in the United States.

Q.3 - Now, Mr. Strunk, your résumé is attached to your report

2 which has been introduced this morning as PI-1, but could you
3 briefly outline to the Board your background with respect
4 to post restructuring power purchase agreements and how
5 they have evolved into a competitive market?

6 A. Yes. I have been examining power contracting in the
7 context of my work at NERA since about 1996, and I have
8 watched those power contracts and seen how those have
9 developed as competition has been introduced into the
10 industry and how they have changed.
11 Specifically I have worked on a number of issues regarding
12 the prudence of power purchases by utilities. I have
13 worked with Nevada Power on that since 2001, as well as
14 its affiliate CR Pacific Power Company. I have been
15 involved in several cases before the FERC involving
16 affiliate contracts and the applications of the standards
17 that FERC uses to evaluate a contract.

18 In that context I have looked at hundreds of power
19 contracts. And I have also worked with governments as
20 they have introduced competition and had to change the way
21 their utilities procure power. I worked in Mexico on that
22 issue and I worked in Ireland on that issue.

23 MR. THERIAULT: Thank you, Mr. Strunk. Mr. Chairman, given
24 Mr. Strunk's testimony here and his résumé I would ask
25 that he -- move that he be declared an expert in the field

1 - 245 - Mr. Strunk - Direct by Mr. Theriault -
2 of utility economics with specialization in the examination,
3 review and comment on power purchase agreements.

4 CHAIRMAN: Thank you, Mr. Theriault. Any of the intervenors
5 have any comments with respect to having him declared as
6 an expert witness? What about the Applicant?

7 MR. KEYES: The Applicant has no objection.

8 CHAIRMAN: Okay. He will be declared as an expert witness
9 as described by Mr. Theriault then.

10 MR. THERIAULT: Thank you.

11 Q.4 - Mr. Strunk, have you ever testified before a regulatory
12 tribunal in New Brunswick before?

13 A. Yes, I have.

14 Q.5 - And when and where?

15 A. Last year in this -- before this Board.

16 Q.6 - Before the Public Utilities Board?

17 A. That's right.

18 Q.7 - Okay. Could you briefly outline for the Board, Mr.
19 Strunk, the documentation that you used to -- that you
20 reviewed in preparing your report?

21 A. Yes. That document is outlined on page 2 of my report,
22 but it primarily concerned a review of the PPAs which
23 would include the vesting agreement, an amendment to the
24 vesting agreement, the Coleson Cove tolling agreement

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1 - 246 - Mr. Strunk - Direct by Mr. Theriault -
2 and the Point Lepreau power purchase agreement. I also
3 reviewed the LaCapra audits from the prior rate
4 proceeding. I reviewed the New Brunswick White Paper on
5 energy policy. I reviewed the New Brunswick Electricity
6 Act. And I reviewed excerpts from the December 21st,
7 2005, decision of the New Brunswick Board of Commissioners
8 of Public Utilities.

9 Q.8 - Okay. Could you, Mr. Strunk, for the Board -- I know
10 your report is in evidence, but could you briefly
11 summarize the conclusions that are contained in your
12 report?

13 A. Yes. My report outlines the concerns that regulators
14 generally have with respect to affiliate contracts for
15 wholesale power. And those concerns arise in a specific
16 situation, and that situation is when one affiliate is a
17 regulated monopoly and another affiliate is not regulated,
18 and the regulated company passes the costs of the
19 wholesale contract on to its captive customers on a dollar
20 for dollar basis.

21 In that situation regulators generally and regulatory
22 economists are concerned that the arrangement between the
23 affiliated entities would be preferential to the
24 unregulated affiliate. And that could have harm both to
25 captive customers in that the prices that captive
26

2 customers pay may be too high, and to non-affiliated power
3 suppliers in that there may be some harm to competition
4 that results from the affiliate preference.

5 And this is a general concern that is not tied to the
6 ownership of the entities in question. And I have given
7 FERC in my report as an example of that concern and how
8 one regulator has addressed that concern and set up rules
9 and standards to deal with its concerns.

10 I think the concern that I have just outlined is entirely
11 applicable to the situation in New Brunswick. DISCO and
12 GENCO are affiliated entities. DISCO is procuring all of
13 its power from GENCO under the wholesale agreements, the
14 PPAs, and is passing through 100 percent of those costs on
15 a dollar for dollar basis to captive customers. GENCO is
16 not regulated. These are the precise conditions where in
17 my experience regulators have been concerned about
18 preferential affiliated contracts that may have harm to
19 captive customers or to the competitive market.

20 The general concerns that I have about affiliate
21 preference are heightened when I consider the other
22 aspects of the New Brunswick situation. The first aspect
23 that I think is important is the lack of a competitive
24 market. GENCO's position as a monopoly in the wholesale

2 generation market heightens the concern that may be -- that

3 there may be harm to non-affiliated potential suppliers.

4 The nature of the vesting agreement is the second

5 circumstantial factor that I think is also relevant. The

6 vesting agreement leaves pricing decisions to be agreed

7 upon by buyer and seller in a non-transparent fashion, and

8 in light of that that would heighten the concern that

9 captive customers may pay too much.

10 Given those factual circumstances, I believe it is

11 necessary to consider evidence on two important questions

12 in the upcoming rate proceeding. Those two questions are,

13 first, was DISCO's administration of the PPAs prudent,

14 and, second, are the wholesale rates embedded in the PPAs

15 just and reasonable.

16 The prudent standard and the just and reasonable standard

17 are well established standards in regulatory practice. I

18 do not think that given the situation in New Brunswick

19 that the Board can conclude that DISCO's rates are just

20 and reasonable without answering these two questions in

21 the affirmative.

22 Q.9 - Thank you, Mr. Strunk. Now since you have prepared your

23 report and forwarded it to myself, have you had the

24 opportunity to review the CRA report that was prepared by

2 Mr. Edward Kee?

3 A. Yes. I had two days to review it, yes.

4 Q.10 - Okay. And as the CRA report relates to your

5 conclusions, is there anything you would like to point out
6 to the Board?

7 A. Sure. As I read Mr. Kee's report, Mr. Kee concedes that
8 the review of the PPA administration by the Board for
9 prudence should proceed. However, Mr. Kee does not
10 support review of whether the PPA rates themselves are
11 just and reasonable. And he combines this with the
12 question of whether they were prudent to be entered into
13 at the outset.

14 I have four main points of response to Mr. Kee's
15 testimony. The first is that although Mr. Kee concedes
16 that the prudence of the administration should be done by
17 the Board -- the review of prudence of administration of
18 the PPAs should be done by the Board, Mr. Kee
19 misrepresents the discretion of the operating committee in
20 administration of the vesting agreement.

21 The contract examples that Mr. Kee relies upon do not
22 support the point that the New Brunswick vesting agreement
23 is similar to post-restructuring contracts in the U.S., or
24 vesting agreements elsewhere.

25 The view that the FERC standards are not relevant to

2 New Brunswick ignores the basic reasons for why standards are
3 needed. The standards, as I have explained, are needed
4 when there is a regulated monopoly and an unregulated
5 affiliate, and the regulated monopoly is passing costs of
6 the contract on a dollar for dollar basis to its captive
7 customers, and the affiliate is unregulated. That's the
8 situation that has been -- for which those standards have
9 been developed.

10 So to dismiss those standards as not relevant ignores the
11 basic reasons for why the standards are needed.

12 But most troublesome in Mr. Kee's report is the notion
13 that the only need for the Board to review the PPA rates,
14 that the reason that the Board does not need to review the
15 PPA rates, Mr. Kee premises that on the GENCO being
16 government owned and it coming out of a government
17 process. However, by extension of that argument, there
18 would be no need for the Board to regulate DISCO at all.

19 In order for the Board to conclude that DISCO's rates are
20 just and reasonable, it would have to take the position
21 that anything done by a government entity is just and
22 reasonable.

23 Q.11 - Mr. Strunk, perhaps I could take you back to the three
24 points that you mentioned. The first point you state that
25 the CRA report misrepresents the discretion of the

2 operating committee. Could you possibly elaborate on that?

3 A. Sure. As I note in my report, Section 11 of the vesting
4 agreement gives the operating committee the right to
5 address operating and administrative issues related to the
6 agreement.

7 These include any and all other issues arising between
8 GENCO and DISCO under the agreement, which either GENCO or
9 DISCO may reasonably request the operating committee to
10 address.

11 To me that signals that anything in the vesting agreement
12 could be taken by either GENCO or DISCO to the operating
13 committee to decide and that it gives the operating
14 committee the discretion to take decisions on issues
15 related to the agreement.

16 The operating committee has a specific role in -- with
17 respect to calculating the fuel component of the vesting
18 energy price. In Schedule 6(2) of the vesting agreement
19 at the end of that schedule, it states, "The operating
20 committee shall manage, develop and maintain the process
21 for establishing the fuel component of the vesting energy
22 price in accordance with the modelling guidelines set out
23 above as such modelling guidelines may be amended from
24 time to time.

2 The modelling of the electric sector in New Brunswick is
3 very complicated and there are a lot of inputs that go
4 into the modelling of it and the existence of guidelines
5 does not make the modelling black and white. There is
6 discretion embedded in -- at least embedded in the text of
7 the vesting agreement.

8 Q.12 - Thank you. Moving on to the second point you raised.

9 I believe it was that the contract examples do not support
10 the point that New Brunswick's vesting agreements resemble
11 post deregulation contracts in the U.S. or vesting
12 agreements elsewhere.

13 Could you elaborate on that?

14 A. Sure. I would turn to page 16 of Mr. Kee's report where
15 he outlines what he titles "Appropriate comparisons for
16 N.B. vesting agreements". And he starts out with the U.S.
17 contracts and lists two contracts that have features that
18 are similar to the vesting agreement.

19 And the first agreement he cites is the full requirement
20 contract between Exelon Generating Company and
21 Commonwealth Edison that was in place between 2001 and
22 2006.

23 That contract is not comparable to the vesting agreement
24 for a number of reasons. The most important difference
25 between that contract and the vesting agreement

1 - 253 - Mr. Strunk - Direct by Mr. Theriault -

2 in my mind is that that contract had no impact on retail
3 rates. The buyer under that contract, Commonwealth
4 Edison, was subject to a rate freeze. So its wholesale
5 procurement was not -- did not affect its retail rates and
6 it could not pass through the costs of that contract to
7 its retail customers.

8 So I think there are a number of other distinctions
9 between that contract and the vesting agreement. But to
10 me that is the most important one. In New Brunswick we
11 have a wholesale agreement that is getting passed through
12 entirely to retail customers. And that was not the case
13 with respect to the Exelon Generation, Commonwealth Edison
14 contract that was in place through the end of 2006.

15 The second contract that Mr. Kee refers to is the contract
16 between Mountainview and Southern California Edison.

17 Now in my report I say that the vesting agreement does not
18 resemble contracts that we see in post restructuring
19 markets elsewhere, including the U.S.

20 Now the Mountainview and Southern California Edison
21 contract was entered into in the context of a reregulation
22 of the California market. It was entered into in the
23 context of a movement not towards deregulation and
24 competitive markets, but towards reregulation.

25

2 And that was after the California crisis. And so I would
3 call that a post post restructuring contract, not a post
4 restructuring contract. Because it was entered into in
5 the context of a reregulation of a sector and a move back
6 towards cost of service regulation in California.

7 The other important thing to note about both of these
8 contracts is that they are subject to regulatory review
9 and there FERC has jurisdiction over those contracts.

10 Then Mr. Kee goes onto cite vesting contracts in the
11 Australian market, vesting contracts in the UK market.

12 And I think that experience may indeed be revealing. For
13 example, the vesting contracts that were used in the UK
14 restructuring and reform process were set at prices that
15 were above market and were designed to provide a subsidy
16 to the coal industry.

17 So there were specific government objectives that
18 accompanied those vesting contracts in the UK.

19 Further, Mr. Kee cites the directed contracts used in
20 Ireland. I myself was part of the team developing the
21 directed contracts that were used in Ireland. And Mr. Kee
22 says that these contracts will have several features that
23 are similar to the vesting agreement, including the use of
24 modelling to develop prices.

25 Neither the buyer nor the seller under those directed

2 contracts uses modelling to develop the prices. The prices
3 are handed to those -- are determined by the regulator.
4 They are not determined subject to the buyer and seller
5 agreeing to modelling parameters once the contract is
6 signed, the regulator determines those prices.

7 And further, the contracts in Ireland are not comparable
8 in the sense that they are voluntary contracts. The
9 buyers have the option to enter into those contracts.
10 They are not imposed.

11 So I think in whole the contracts that have been cited by
12 Mr. Kee are indeed not comparable and are not appropriate
13 comparisons to the New Brunswick vesting agreement.

14 Q.13 - Mr. Strunk, now with respect to this particular point,
15 does the article that was supplied by Mr. Kee lead you to
16 any conclusions?

17 A. Well precisely, as I mentioned, with respect to the UK
18 experience, Mr. Kee, on page 16 of the article states that
19 vesting contracts may be used to meet a broader set of
20 policy objectives and as compared to bilaterally
21 negotiated contracts. And I think that is absolutely
22 right. Vesting contracts can be used to meet government's
23 policy objectives as they were in the UK with respect to a
24 subsidy to the coal industry.

2 Q.14 - Now would that lead naturally to just and reasonable
3 prices, Mr. Strunk?

4 A. I think the context -- I think there is an important
5 difference between the review by a regulator of a contract
6 to determine -- or a rate -- of a rate schedule -- to
7 determine whether that is just and reasonable than the
8 government imposing contracts as part of a broader policy
9 objective.

10 It's a very different test and I don't think that the fact
11 that a government has issued contracts pursuant to certain
12 policies means that those contracts necessarily meet the
13 just and reasonableness test as it would be implied in
14 regulatory practice.

15 Q.15 - Thank you. Now with respect to the third point, I
16 think it was the CRA view that FERC affiliate rules are
17 not relevant in New Brunswick ignore basic reasons for
18 affiliate rules. Perhaps you could expand upon that.

19 A. Sure. I cited the FERC standards as an example of one
20 regulator that has had this concern and has set up
21 standards to deal with situations like the one we have
22 here. It's certainly not the case that that's a concern
23 that's only encountered in the U.S. It's definitely been
24 encountered in my work in Ireland where the companies are
25 publicly owned. ESP, the incumbent supplier, is

2 publicly owned. And the CER, Commission for Energy

3 Regulation, in Ireland has been concerned as the industry

4 restructures there and transforms regarding self-dealing

5 between ESP to arms of ESP.

6 There is an interesting paper done by the NRRI, the

7 National Regulatory Research Institute, in the U.S. They

8 did a paper in 1996 that cast the issue of affiliate

9 dealing as a general problem, not a problem that is

10 specific to the U.S.

11 Q.16 - Now, Mr. Strunk, is there anything else you would want

12 the Board to know with respect to the CRA report?

13 A. I think there is a bit of a lack of clarity with respect

14 to the prudent standard versus the just and reasonable

15 standard. To evaluate whether the wholesale rates that

16 are embedded in the PPAs are just and reasonable does not

17 necessarily mean that we have to go back to 2004 and look

18 at whether the decision to enter those contracts were

19 prudent.

20 The tests of just and reasonableness can be performed

21 independently and does not tie onto the prudence of the

22 initial contracts.

23 So that's a clarity whether I think on page 3 at the

24 bottom of Mr. Kee's report he portrays it as two options.

25 One, we determine whether DISCO has prudently administered

2 the PPAs, or, two, we compel evidence and testimony on the
3 costs and activities of GENCO and review whether those --
4 whether it was prudent to enter -- for DISCO to enter into
5 the PPAs. I think that the question of prudence and just
6 and reasonableness are related, but distinct.

7 On page 7 Mr. Kee states that NERA wrongly concludes that
8 the PPAs have never been reviewed by any regulator. I
9 think the statutory responsibility of the Board in this
10 case to certify that DISCO's rates are just and reasonable
11 is something that has not, to the best of my knowledge,
12 been done by any other entity.

13 It's not -- I'm not aware that Electric Finance Corp. has
14 the responsibility to certify that the PPAs are just and
15 reasonable and that the rates are just and reasonable. I
16 don't -- I'm not aware that NB Power has a responsibility
17 to certify that the PPA rates are just and reasonable.

18 And I don't think that you can certify that the whole rate
19 can be just and reasonable unless there is some assurance
20 that the generation rate which comprises 80 percent of it
21 is -- there is some assurance that that is a just and
22 reasonable rate under the wholesale PPA.

23 Q.17 - Is there anything else, Mr. Strunk?

24 A. Yes, there is. I was moving on to page 9. Mr. Kee
25 highlights that the Nevada state regulator cannot look

2 through the wholesale power purchase agreements held by the
3 regulated investor-owned utilities, and that is because in
4 the U.S. there is a distinction between state regulatory
5 jurisdiction and federal regulatory jurisdiction, and FERC
6 has exclusive jurisdiction over the wholesale rates.

7 But we don't have that situation in Canada. There is not
8 a federal regulator that is assuring that the wholesale
9 rate between GENCO and DISCO is just and reasonable. In
10 the U.S. the state regulators cannot look through the
11 contracts because there is another regulatory agency that
12 does that. And they can be assured that the wholesale
13 rates are just and reasonable by virtue of federal
14 regulatory review.

15 So I think it is worth clarifying that, that that's why in
16 the States the state regulators cannot look through the
17 contracts.

18 Q.18 - Anything else?

19 A. That's all I had on the Kee report.

20 Q.19 - Okay. Now, Mr. Strunk, in your opinion should the
21 Board take jurisdiction over the PPAs?

22 A. Yes. To the extent that means reviewing whether or not
23 the costs incurred under the PPAs were prudently incurred,
24 that is, that the administration of the PPAs was

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2 prudent, and whether or not -- and answering the question of
3 whether or not the wholesale rate is just and reasonable,
4 yes.

5 Q.20 - Now is there anything in the CRA report that would
6 cause you to reconsider that opinion?

7 A. No.

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

10 CHAIRMAN: Thank you, Mr. Theriault. Mr. Lawson, do you
11 have any cross?

12 MR. LAWSON: No cross, Mr. Chair.

13 CHAIRMAN: Thank you, Mr. Lawson. Mr. Baird?

14 MR. BAIRD: No thank you, Mr. Chair.

15 CHAIRMAN: Thank you. Mr. Sabean, I understand you are not
16 going to participate?

17 MR. SABEAN: That's correct.

18 CHAIRMAN: Mr. Booker?

19 MR. BOOKER: No questions, Mr. Chair.

20 CHAIRMAN: Thank you. Mr. Zed?

21 MR.ZED: No questions, sir.

22 CHAIRMAN: Mr. Peacock.

23 MR. PEACOCK: Mr. Chair, I do have just one brief question
24 and it concerns the Kee's report. In the report the
25 author suggests that government owned corporations are

2 implicitly regulated by the government, and of course in the
3 New Brunswick example NB Power is a crown utility. In
4 your experience how effective are governments in terms of
5 regulating their own state or crown utilities outside of a
6 forum like this?

7 A. I think it would be very difficult for me to generalize
8 experience, but I would respond that the Board has
9 explicit jurisdiction over DISCO. And so given that
10 explicit jurisdiction there would be no need for the Board
11 to regulate DISCO if the fact that -- if government
12 ownership were to vitiate the need for regulation.

13 MR. PEACOCK: Thank you.

14 CHAIRMAN: Ms. Desmond, anything from the Board?

15 MS. DESMOND: Mr. Chair, perhaps could we save our questions
16 until after the Applicant has done their cross-
17 examination?

18 CHAIRMAN: Fine. Mr. Keyes?

19 MR. KEYES: I do have a few questions.

20 CROSS-EXAMINATION BY MR. KEYES:

21 Q.21 - Mr. Strunk, first I wanted to get an idea of your
22 experience as an expert. Can you tell me how many times
23 you have actually testified as an expert in court or
24 before a regulatory tribunal?

25 A. Yes. I have listed in my résumé expert testimony on

2 page 3 of my résumé.

3 Q.22 - I want to be specific please, not where you have acted
4 as consulting expert in preparing reports but where you
5 have actually testified and been qualified as an expert.
6 Just give me an idea.

7 A. Right. So that with all of the instances where I have
8 submitted reports and in the -- so there you have 11
9 instances where I have filed testimony. And I have given
10 oral testimony in hearings on three occasions.

11 Q.23 - Three occasions? Okay. Thank you.

12 A. I was qualified as an expert in those cases.

13 Q.24 - Would the last time have been when you were here last
14 year?

15 A. Yes.

16 Q.25 - How many of those were actually on power contract
17 issues?

18 A. Well, last year was on power contract issues and --

19 Q.26 - Were the other two occasions?

20 A. The other occasions, yes, were related to power contract
21 issues.

22 Q.27 - Can you just tell me -- obviously you don't need to
23 tell me about last year. But the other two previous
24 cases, what were those cases?

25 A. Those cases were related to Dayton Power and Lights

2 rates. And I compared those Dayton Power and Lights rates to
3 the contracts that are available in the wholesale market
4 and made a comparison of their rate, default rate offering
5 to contracts that are available in the wholesale market.

6 Q.28 - And who were you testifying on behalf of in those
7 hearings?

8 A. On behalf of Dayton Power and Lights.

9 Q.29 - And what positions were you supporting in those
10 testimonies?

11 A. In that testimony, the Dayton Power and Lights had a given
12 rate. And based on my calculations of equivalent
13 contracts in the wholesale market, that rate was
14 reasonable and less than what it would cost for Dayton to
15 go out and buy equivalent service in the wholesale market.

16 Q.30 - So both of those other two were dealing with the same
17 issue basically?

18 A. They were two cases. But they related to the same issue.

19 Q.31 - And your report that you filed with the Board is in
20 support of the Public Intervenor's motion obviously,
21 correct?

22 A. That's correct.

23 Q.32 - Okay. Can you just explain to me your understanding of
24
25

2 what you expect to happen if the Public Intervenor's motion is
3 granted, from the context of what the Board can do?

4 A. Sure. I outline that in my report in Section 5. I'm
5 sorry, in Section 6. So what does it mean if the Board
6 takes jurisdiction, that the two issues, the two questions
7 that I posed on page 17 of my report would be subject to
8 interrogatories, testimony and so forth.

9 So any issues related to those two questions, one, whether
10 the purchased power contracts were -- pardon me, purchased
11 power contracts were prudently incurred, and whether the
12 wholesale rate paid by DISCO under the PPAs are just and
13 reasonable.

14 Z\Q.33 - So just let me be a little bit more specific. Could
15 the Board decide, if the motion is granted, that the PPAs
16 should no longer be in effect because these contracts were
17 not procured in the competitive process or are not pure
18 cost of service contracts?

19 A. I cannot prejudge what the Board would determine. But I
20 think it is reasonable for the Board to look at whether or
21 not the costs are just and reason' -- whether the PPA rates
22 are just and reasonable.

23 I don't think it's necessary that -- it's not necessary
24 that it has to be procured in a competitive

2 environment for it to be just and reasonable. It's not
3 necessary for it to be a strict cost of service agreement
4 for it to be just and reasonable.

5 Q.34 - Could the Board change the prices or other terms for
6 the PPAs or SLAs if it is granted the motion?

7 A. I don't believe that the Board has -- the Board regulates
8 DISCO. And the Board could disallow a portion of the PPA
9 costs. But I don't think that the Board could change the
10 contracts. But they could disallow a portion of the
11 contract costs.

12 Q.35 - And is it your understanding that the Board could
13 decide that some of GENCO's weren't prudently incurred?

14 A. Now I think that's a distinct question from the question
15 that I have -- I think is appropriate for view in the
16 context of the rate proceeding. And that is whether or
17 not the resulting rates are just and reasonable.
18 And I think that does not -- you don't need to determine
19 GENCO's prudence to determine that necessarily.

20 Q.36 - So is your answer no? Or is your answer yes?

21 A. The answer is no.

22 Q.37 - How would, in your opinion, would the Board deal with a
23 situation where it decided that some of GENCO's were not
24 prudent, yet couldn't change the PPAs?

25 A. The Board would simply allow the recovery of the

1 - 266 - Mr. Strunk - Cross by Mr. Keyes -

2 amounts that it deemed to be just and reasonable by DISCO.

3 Q.38 - I want to turn to page 7 of your report. And you

4 mentioned that -- you analyzed that that is an agreement

5 and testified this before the Board previously. That was

6 in the earlier report dated January 31, 2006, correct?

7 A. Right.

8 Q.39 - And that report was co-authored I understand by Mr.

9 Meehan?

10 A. That's correct.

11 Q.40 - And for the record, Mr. Meehan, is he an associate of

12 yours?

13 A. He's a colleague.

14 Q.41 - Okay. With NERA?

15 A. With NERA.

16 Q.42 - Okay. Now I want to ask you what additional work you

17 did to prepare the 2007 report that you have filed with

18 the Board?

19 A. I haven't performed a direct comparison. And I don't

20 have the old report with me. But I can tell you generally

21 that I did some additional analysis and resorts with

22 respect to the just and reasonable standard with respect

23 to the prudent standard in Canada. And that was the

24 primary addition that this report contains relative to --

25 Q.43 - So you took the 2006 report. And that is the basis for

2 the report you filed with the Board.

3 A. Yes.

4 Q.44 - And you added to it or subtracted to it where you felt
5 appropriate?

6 A. I confirmed that the vesting agreement -- I got a copy of
7 the vesting agreement, the Coleson Cove tolling agreement
8 from the Board's website as it was filed in this case. I
9 confirmed that those were the same.

10 I looked at the amendment to the contract. And I
11 confirmed that the vesting agreement that was filed in
12 this case is indeed the vesting agreement that I looked at
13 in the last case.

14 Q.45 - Okay. So for you to tell us -- can you tell us today
15 specifically how your 2006 report differs from your 2007
16 report? Does it differ at all? Or is it the same
17 conclusions?

18 A. With respect to the issues that I addressed in -- I
19 haven't performed a comparison. I really haven't looked
20 at the two reports side by side.

21 Q.46 - Okay. Now I want to turn to a different area for a few
22 minutes. Your support of the Public Intervenor's motion
23 seems to be based to a large extent on the U. S. FERC
24 rules and guidelines for power contracts between
25 affiliates, correct?

2 A. Yes, in that those provide a good example for why
3 regulators are concerned about this type of thing.

4 Q.47 - Can you advise us in your experience what kind of
5 companies are subject to FERC regulation?

6 A. They are investor owned utilities.

7 Q.48 - Are government owned electric utilities subject to FERC
8 regulation?

9 A. No.

10 Q.49 - And in the U.S. are government owned electric companies
11 subject to state utility regulation?

12 A. No.

13 Q.50 - Can you tell us why that would be the case?

14 A. Government owned utilities in the U.S., for example TVA,
15 has a statute. TVA, Tennessee Valley Authority, was
16 formed -- has a specific statute, and in that statute that
17 TVA actually has a reference to having to look at just and
18 reasonable. And so in some cases there is no need for --
19 in some cases those government entities are self-
20 regulating.

21 Q.51 - And in other -- are you aware of the reason in other
22 cases?

23 A. Generally they are self-regulating government entities.
24 Sometimes they are regulated by other government entities.
25 For example, my understanding is

2 that TVA regulated some of the munis within its service
3 territory.

4 Q.52 - What is FERC's concern about affiliate wholesale power
5 contracts?

6 A. I have outlined that concern in my report, but basically
7 the concern is that there are -- that the purchasing
8 utility has captive customers and that the captive
9 customers could be harmed as a result of preferential
10 dealings with affiliates, and, secondly, that the
11 competitive market could be harmed or that -- by
12 preferential dealings with affiliates.

13 Q.53 - This is what you refer to in your report as affiliate
14 abuse?

15 A. That's a funny term because it sort of sounds like child
16 abuse, right, and it's not the affiliate that is being
17 abused, actually it's affiliate preference. It's not that
18 we are abusing the affiliate, we are -- actually I think I
19 used the term preferential self-dealing. I don't think I
20 used --

21 Q.54 - That may be my term.

22 A. Okay.

23 Q.55 - I'm not putting words in your mouth, but --

24 A. Okay.

25 Q.56 - Just again for the record could you explain what you

2 mean by that, and I used the word affiliate abuse,
3 preferential self-dealing, just so I have a clear
4 understanding of that.

5 A. Sure. That there could be a relationship between the
6 affiliate and the -- or an unregulated affiliated company
7 and a regulated utility with a monopoly over end use
8 customers, and that that relationship could cause
9 customers' rates to be too high or could cause damage to
10 the market in which the unregulated affiliate is
11 competing.

12 Q.57 - Are you suggesting based on your report and your
13 evidence here today that this self-preferential treatment,
14 or affiliate abuse as I call it, might be taking place in
15 New Brunswick?

16 A. No, I have made no conclusions to that -- with respect to
17 that, but I have stated that it is generally a concern and
18 that because it's generally a concern, it's worth making a
19 finding in the context of the Board's responsibility to
20 certify that DISCO's rates are just and reasonable. It's
21 worth making a finding that there is no harm as a result
22 of the affiliate relationship and the affiliate contracts.

23 Q.58 - So again I guess for clarification, so what is your
24 concern with the vesting agreement?

2 A. Well I don't have -- I have mentioned that the vesting
3 agreement is not terribly transparent in the way its
4 priced, and given that, I think that it's worth -- that
5 the review of the administration of the vesting agreement
6 is fair game in this rate hearing which -- an issue that
7 Mr. Kee also agrees with, and whether the underlying rates
8 -- whether the capacity prices and the energy prices in
9 the vesting agreement are just and reasonable.

10 Q.59 - You are not suggesting, correct me if I am wrong, that
11 the government is basically the owner and regulator of the
12 NB Power Crown Corporations has failed to properly oversee
13 these corporations that are parties to the vesting
14 agreement?

15 A. I have no evidence that that's the case, but I do believe
16 that the Board in its role as certifying DISCO's rates as
17 just and reasonable can review and can confirm that.

18 Q.60 - I want to turn you to page 12 of your report. You
19 refer to a self-regulating Crown Corporation in the first
20 paragraph of Section 5(b), and I just want to get an
21 understanding of what you mean by this.

22 A. Sorry. What page are you on?

23 Q.61 - Page 12, under (b) there, first paragraph. The Crown
24 Corporations were in some cases self-regulating. And I

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2 wanted to get an understanding of what you mean by this.

3 A. My understanding was that before the Ontario Energy Board,
4 Ontario Hydro was self-regulating, for example.

5 Q.62 - So you are referring to it in the Ontario context?

6 A. Yes.

7 Q.63 - Okay. I just want to get a little understanding of
8 your position with respect to how you believe government
9 owned utilities are regulated generally?

10 A. I think it really differs by on a case by case basis. I
11 don't think there is -- I can make a generalization. In
12 some cases the board of directors deems -- determines the
13 rates. In some cases as I have mentioned in TVA, there is
14 a reference to just and reasonable in the statute. So
15 it's hard to make a generalization.

16 Q.64 - Let me be a little bit more specific then. Are you
17 aware of how NB Power was regulated prior to 1989?

18 A. It may have been self-regulating. I do not know.

19 Q.65 - So you are not aware of how that changed from 1989
20 either then?

21 A. I'm not familiar with that history, no.

22 Q.66 - Would you agree with me that the New Brunswick
23 provincial government retained significant responsibility
24 and authority for regulating GENCO, DISCO and the other NB
25 Power Crown Corporations?

1 - 273 - Mr. Strunk - Cross by Mr. Keyes -

2 A. The government is not -- the ministry is not a regulatory
3 entity in the same way that the Board is a regulatory
4 entity. So no, I do not agree.

5 Q.67 - What about with respect to -- how would you then
6 classify GENCO, as an unregulated or a deregulated
7 company? Is that your position?

8 A. That's my understanding, yes.

9 Q.68 - Now turn back a bit to the FERC rules. I think you
10 said that they don't apply to government owned utilities
11 in the U.S., is that correct?

12 A. That's right.

13 Q.69 - So why do you think that the FERC rules are relevant to
14 the situation here in New Brunswick?

15 A. I think they are relevant to the situation here in New
16 Brunswick because they were designed to address a
17 situation that is in place here in New Brunswick, and that
18 situation is precisely the fact that the distribution
19 company has a monopoly over captive customers and is
20 passing through wholesale power costs from an affiliate on
21 a dollar for dollar basis.

22 Q.70 - So I just want to get it clear on the record --

23 A. Right.

24 Q.71 - -- that that's your position. Okay. Now you state --
25 I want to turn to page 11 of your report, it's one page

2 before. You state in Section 4(a), and I quote, "The suite of

3 PPAs were put in place to allow DISCO to procure power

4 during the transition to a competitive market structure. "

5 Explain what you meant by this statement? Is there

6 anything else we need to read into that?

7 A. Well my understanding that there was a desire to move to a

8 competitive market structure comes from the White Paper --

9 Q.72 - Okay.

10 A. -- and the PPAs do taper off as plants retire, at least

11 the vesting agreement.

12 Q.73 - Are you aware of the process by which the PPAs were

13 developed?

14 A. I'm not fully privy to all the -- no.

15 Q.74 - You weren't aware that they were transition contracts?

16 You have heard that phrase before? You are familiar with

17 that?

18 A. Sure.

19 Q.75 - Does that sound reasonable to you under the

20 circumstances of your understanding of the New Brunswick

21 electricity sector?

22 A. It's certainly the case that transitional contracts have

23 been implemented as jurisdictions move towards competitive

24 markets. That's not uncommon and it

25

2 doesn't -- no, it doesn't surprise me.

3 Q.76 - You are aware that they were imposed by the government?

4 A. I don't know what -- I know there was a statement in that
5 regard in Mr. Kee's testimony.

6 Q.77 - You weren't advised of that in your meetings or any
7 discussions prior to preparing your report, that they were
8 imposed contracts?

9 A. Whether they were imposed does not really affect my
10 testimony.

11 Q.78 - Okay. Well then explain to me how the process, if it
12 was imposed, differs from the process by which a bilateral
13 power contract in the U.S. wholesale power market is
14 developed? It's negotiated, correct?

15 A. Right, a bilateral contract in the U.S. is negotiated. I
16 think Mr. Kee addresses that in his article and he says
17 that there are distinctions between vesting contracts and
18 bilaterally negotiated contracts. He says that one of the
19 differences is that vesting contracts can be used to
20 implement broader policy objectives.

21 Q.79 - Talking about -- I am specifically talking about
22 negotiated versus imposed contracts here. Knowing that in
23 New Brunswick, assuming what I am telling you is correct,
24 that they were imposed, would that, and the government's
25 role in doing that, thus determining the structure,

2 prices, terms and other features of the PPAs, would that give
3 you any reason to change your conclusions in your report?

4 A. No.

5 Q.80 - So you don't consider -- let me just be clear on this,
6 you don't consider the government's role in doing that as
7 implicit regulation in any sense of the meaning? Is that
8 what I am hearing you say, or can I take from your meaning
9 of your comments?

10 A. Yes, that's right. When I think of regulation, I think of
11 boards explicitly regulating things such in the fashion
12 that this board regulates DISCO's rates.

13 Q.81 - So I want to turn now to page 12 again of your report
14 and Section 4(b), the second paragraph. You state that
15 the vesting agreement "is intended to be a commercial
16 contract free from regulatory review". What do you mean
17 by that?

18 A. It is my understanding that it is NB Power's position that
19 this contract, that the terms and conditions of this
20 contract should not be subject to challenge in this
21 upcoming rate proceeding or in any other regulatory
22 proceeding.

23 Q.82 - So that is your understanding and as a result, this
24 supports your conclusion that the Board should undertake a
25

2 regulatory review.

3 A. I think yes, yes.

4 Q.83 - So I want to get clear on this issue of regulatory
5 review. Would the approval of the New Brunswick Minister
6 of Energy, in your opinion, be equivalent to a regulatory
7 review?

8 A. No. I don't -- an approval by the ministry, as I
9 understand it, does not include a certification that the
10 rates are just and reasonable, whereas a review by this
11 Board includes a certification that -- there is a
12 statutory responsibility to assure that the rates are just
13 and reasonable.

14 Q.84 - Okay. I want to turn to another issue. Could the PPAs
15 have prices in your examples that you have given, that are
16 too low?

17 A. They very well may be but in the context of -- yes, they
18 very well may be.

19 Q.85 - So a just and reasonable rate at the end of the day,
20 could be a higher rate than the PPA rates?

21 A. Yes.

22 Q.86 - So could one of the government objectives in
23 structuring the PPAs been to provide lower rates to
24 consumers?

25 A. It is possible.

2 MR. KEYES: Thank you very much.

3 CHAIRMAN: Thank you, Mr. Keyes. I think we will take a
4 short break at this point in time and then we will come
5 back and see if Ms. Desmond has any questions and then go
6 to rebuttal. Thank you.

7 (Recess - 11:00 a.m. - 11:15 a.m.)

8 CHAIRMAN: Ms. Desmond, do you have any questions?

9 MS. DESMOND: No questions at this time. Thank you.

10 CHAIRMAN: Thank you. Mr. Theriault, any redirect?

11 MR. THERIAULT: Yes. Just a couple, Mr. Chair.

12 REDIRECT EXAMINATION BY MR. THERIAULT:

13 Q.87 - Mr. Strunk, when you and Mr. Keyes were discussing the
14 imposing of the PPAs, I had a question from that. And
15 that is there any way you can say that the existence of a
16 PPA automatically leads you to conclude that there are
17 just and reasonable rates?

18 A. No.

19 Q.88 - And also, you have reviewed, I think you stated earlier
20 in your testimony, that you have reviewed the EUB Act and
21 the Electricity Act. So my question to you is did you see
22 anything in those pieces of legislation that makes the New
23 Brunswick government the regulator?

24 A. No. That specifically refers to the Board as then
25 regulator.

2 MR. THERIAULT: Okay. Thank you.

3 CHAIRMAN: Thank you very much. Any questions from the
4 Board? Thank you, Mr. Strunk.

5 WITNESS: Thank you.

6 CHAIRMAN: Mr. Keyes?

7 MR. KEYES: Yes, I would like to call Ed Kee to the stand.
8 Not to be confused.

9 CHAIRMAN: I think we're already confused on that one.

10 MR. KEYES: I can tell you I was too for a little while.

11 CHAIRMAN: Perhaps the Board Secretary could swear Mr. Kee.

12 EDWARD KEE, sworn:

13 DIRECT EXAMINATION BY MR. KEYES:

14 Q.1 - Mr. Kee, could you state your name for the record
15 please?

16 A. Edward E. Kee.

17 Q.2 - And your address?

18 A. My address is Charles River Associates, 1201 F Street
19 Northwest, Washington, D. C., 2004, U.S.A..

20 Q.3 - And can I ask you your occupation?

21 A. I'm a Management Consultant.

22 Q.4 - With CRA International?

23 A. Yes.

24 Q.5 - Now Mr. Kee, you are the author of exhibit A-5, correct?

25 A. I am.

2 Q.6 - I want to focus for a few minutes on your résumé, in
3 order to give the Board some background on your education
4 and experience. If you could turn to page 17 of your
5 report. This is a copy of your résumé, correct?

6 A. Yes, it is.

7 Q.7 - First of all, could you tell us a bit about your
8 education?

9 A. I was an undergraduate at the U. S. Naval Academy where I
10 studied Systems Engineering, graduated from there, went
11 into the Navy as a Nuclear Engineer, left the Navy five
12 years later and went to Harvard Business School, graduated
13 from there in 1985.

14 Q.8 - Now I want to talk a little bit about your professional
15 history. Could you go through that? I know it is there.
16 And it is not a race. So I won't -- I will ask you to
17 slow down a little bit so that we can follow along. But
18 just give us a bit of background on your professional
19 history.

20 A. After leaving the Harvard Business School I went to work
21 for an independent power generating company called
22 Catalyst Energy where I was a developer of power plants,
23 negotiated contracts, developed projects and those sorts
24 of things. I left there in 1987 and joined a consulting
25 firm called McKenzie & Company where I focused on the

1 - 281 - Mr. Kee - Direct by Mr. Keyes -
2 electricity industry, and in particular upon electricity
3 procurement.

4 I managed the All Source Procurement for example for
5 Virginia Power where they bought over time I think it was
6 3' or 400 megawatts of power. I left McKenize and was an
7 independent consultant to independent power companies for
8 about a year.

9 Q.9 - Let's say 1989?

10 A. That was 1989 and '90. I then joined what was then called
11 Charles River Associates as a consultant and began doing
12 in addition to management consulting expert testimony. I
13 left Charles River Associates, then named, in 1993 and
14 joined a firm called Pugnam Hayes & Bartlett. And the
15 firm changed a number of times until last year. But they
16 were because my firm was acquired.

17 And during that time I opened an office for Pugnam Hayes &
18 Bartlett in Australia where my work and my team's work in
19 that country were related to the transition from
20 government-owned utilities to privatize corporatized
21 entities operating in a competitive market.

22 I came back to D. C. in 2000, and when my firm was
23 acquired by a firm called PA Consulting Group based in
24 London. And I left PA Consulting Group last year to go
25 back to what is now called CRA International, again doing

2 a mix of management consulting and litigation and expert
3 witness testimony.

4 Q.10 - I'm want to now turn to basically page 20 to 25 of your
5 résumé. And that specifically details where you have been
6 and what cases you have been qualified as an expert
7 witness before courts and regulatory boards, is that
8 correct?

9 A. It is. This c.v. was developed to be compliant with the
10 U. S. Federal Rules of Evidence. So I would have to
11 disclose every testimony I have given. And I had them all
12 back to 1990. 1990 I guess was my first testimony.
13 But I have testified a number of times on electricity
14 market issues, on power contract disputes and related
15 issues both in litigation and before regulatory bodies.

16 Q.11 - Have you had an opportunity to testify on restructuring
17 and reform of the electricity industry in the various
18 issues you have been involved in?

19 A. I have, and in several countries, yes.

20 Q.12 - Yes. Now on pages, turning back, 17 through 20 are a
21 list of consulting engagements. I don't want you to go
22 through every one. But are there a few there that you
23 could highlight and explain to the Board which engagements
24 would have been relevant to your involvement in the
25 matters before the Board today?

2 A. The primary engagement for consulting work that is
3 relevant here is the work I did in Australia where I was
4 the Economic Adviser to the Government of South Australia,
5 in their process of taking a government owned vertically-
6 integrated utility, transforming that into a disaggregated
7 privatized set of companies operating in a competitive
8 market. In effect doing what was started in New Brunswick
9 but still isn't quite finished yet.

10 There are a number of other engagements where I have done
11 similar issues and similar things. I worked in Ireland
12 during the review of the market there and developing a new
13 market, worked on a number of cases. Pacific Gas and
14 Electric, I have testified before the California Public
15 Utilities Commission on the right form of standard
16 contract. There are others. But those are the
17 highlights.

18 Q.13 - I also note at page 25 of your report where your résumé
19 lists publications. You have been involved in authoring a
20 number of publications, is that correct?

21 A. I have. I have written articles on these issues,
22 competition, power contracts, related issues over the
23 years.

24 Q.14 - Just highlighting a couple, the second one down,
25 Reaping the Benefits of Electricity Industry Reform. Down

2 below in 2003, Regulated Businesses, Maximizing Shareholder
3 Value Through Active Management?

4 A. Correct. Yes.

5 Q.15 - And then obviously the article that is attached to your
6 report entitled Vesting Agreements, Tool for Electricity
7 Market Transition?

8 A. Right.

9 zQ.16 - Those are all things. And you have also made a number
10 of presentations over the years?

11 A. Correct. I have.

12 Q.17 - And those are all listed as well?

13 MR. KEYES: Mr. Chairman, at this point I would ask Mr. Kee
14 to be qualified and move that he be qualified as an expert
15 in the electricity industry with specific experience in
16 electricity industry restructuring, electricity markets,
17 vesting in power purchase agreements.

18 CHAIRMAN: Thank you, Mr. Keyes. Does any intervenor have
19 any objection to having Mr. Kee qualified as an expert as
20 described by Mr. Keyes? Again, I guess silence will be
21 taken as acquiescence. So the Board will qualify Mr. Kee
22 as an expert witness as described by Mr. Keyes.

23 K MR. KEYES: Thank you, Mr. Chairman.

24 Q.18 - Mr. Kee, now I'm going to ask you to turn to your
25 report. Can you just give me a bit of background as to

2 what you were engaged to do in the process that led to the
3 writing of your report?

4 A. I was contacted by Cox & Palmer to specifically review the
5 motion set forward by the Public Intervenor about taking
6 jurisdiction over the PPAs.

7 In connection with that I reviewed a number of other
8 materials which are fully listed in exhibit 2, including
9 the prior rate case that DISCO went through, the
10 transcripts, some of them for that proceeding, the
11 Electricity Act, the Energy and Utilities Board Act and a
12 number of other relevant documents, including these PPAs
13 and some documents related to them.

14 Q.19 - And you have also reviewed Mr. Strunk's report?

15 A. Sure. And specifically to rebut -- respond to
16 Mr. Strunk's report supporting that Public Intervenor motion.

17 Q.20 - So I'm going to turn to page 1 of your report, item
18 1.1. And just before you get into the details of the
19 rationale behind your conclusions, if you could just
20 summarize. And I guess I'm looking at 1.1.

21 A. Yes. The highlight of my conclusions and recommendations
22 are, as a top level recommendation, that this Public
23 Intervenor motion should be rejected, that the NERA report
24 doesn't support that motion, that the PPAs do

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2 not allow NB Power discretion over pricing, that the U.S.
3 Federal Energy Regulatory Commission, FERC affiliate
4 transaction rules aren't relevant to the New Brunswick
5 Power PPAs, and finally that there are examples from other
6 countries, other contexts that have contract, transition
7 vesting contracts similar to the PPAs to provide better
8 guidance than the investor owned contracts in the U.S.

9 CHAIRMAN: Excuse me for just a minute. I know somebody has
10 closed the door. But this is a public hearing. So we
11 should keep the door open. Thank you.

12 MR. KEYES: Thank you, Mr. Chairman.

13 Q.21 - Turn to page 5 of your report, and I'm going to ask you
14 to review your responses to the issues raised, and I guess
15 it's in response to the report provide by NERA. They
16 answered a number of questions and I would like your
17 evidence as to your position with respect to those answers
18 that were given by Mr. Strunk in the NERA report.

19 A. Absolutely. And I will talk about each one of those
20 questions, but first of all let me make a general
21 statement about those questions. Those questions seem to
22 be made not exactly in the context of New Brunswick. So
23 they are a bit general and they basically are answerable
24 in that general sense, but those questions could have been
25 written to be more specific to this particular situation

1 in this province, but they weren't.

2 Q.22 - That's your analysis of it?

3 A. That's my overall view of them. But let's go to the
4 questions themselves. The first question that NERA posed
5 was what concerns the wholesale power contracts between
6 affiliates raised for regulators. Again a very general
7 question. And the response to that question was that the
8 FERC -- the U.S. FERC context in investor owned utilities
9 that are regulated in the U.S. provided some guidelines as
10 to how regulators ought to view these contracts. And I
11 have two basic high level responses to that. The first is
12 that those FERC affiliated transaction cases do not
13 involve government utilities. FERC doesn't have
14 jurisdiction over those utilities. And in fact in New
15 Brunswick we are talking about government utilities.
16 The second general comment is that FERC review of those
17 contracts even between investor owned utilities is
18 prospective. FERC has given us contracts to review and
19 they approve them or not. It's a very rare and difficult
20 situation for FERC to get involved in in going back and
21 reexamining those contracts, and a very unusual situation,
22 and yet that's what apparently the Board is being asked to
23 do here.

24 And I provide in exhibit 4 which goes through a lot of
25

2 those FERC cases and explains why they are different from the
3 New Brunswick context.

4 NERA's second question is what regulatory standards should
5 be used to evaluate the reasonableness of DISCO's power
6 purchase costs.

7 Q.23 - You address that on page 6 of your report?

8 A. I do. And the general response to that question is that
9 there ought to be an examination of the extent to which
10 DISCO is engaged in prudent managerial behaviour. And I
11 would agree with that.

12 But it seems that there are several levels that that
13 prudent managerial behaviour could be examined and I talk
14 about those. And the first one is whether it was prudent
15 -- or could be viewed to be prudent for DISCO to have
16 entered into these contracts at all back in 2004.

17 And my conclusion is that those agreements were imposed
18 upon DISCO by government. They were not management
19 decisions. They were imposed. And there really aren't
20 any issues of prudent management to be reviewed there for
21 the Board or anyone else.

22 The second is whether there could be a review of the
23 structure, terms, conditions, prices and features of the
24 PPAs, and whether DISCO was prudent in agreeing to those
25 terms if you will when the contracts were formed.

2 First of all, I have a hard time separating the existence
3 of the contracts from the terms of the contracts. But
4 more importantly those contract terms, conditions and
5 prices were developed by the government and imposed upon
6 DISCO and GENCO and the other government owned
7 corporations, and therefore there can be no issues of
8 prudent management on the part of DISCO for having entered
9 into contracts with those prices, terms, conditions and
10 other features.

11 And the last level of review, which I think is an
12 appropriate one, is to examine how DISCO is administering,
13 managing, implementing those PPAs as they are written.
14 That in my mind is -- and I think Mr. Strunk agreed with
15 me -- is that that's an appropriate role for the Board to
16 review.

17 There are a number of things DISCO must do to implement
18 and administer those contracts, and the Board should in
19 fact look at those things to determine whether DISCO has
20 been prudent in that administration.

21 The next question NERA raises -- or I guess I will also
22 say this, that I'm not an expert on the Electricity Act,
23 but my review of Section 156 could have been that that was
24 meant to deem these PPAs and the terms and prices in these
25 PPAs prudent at the first hearing, thereafter for

2 the Board to review how those prudent contracts could be
3 administered. I have a hard time understanding how they
4 could be deemed prudent in one review and then revisited
5 on another review. But that's just my personal opinion.

6 Q.24 - So then the third question that NERA was asked to
7 answer is on page 7.

8 A. NERA's third question was are there unique factors in New
9 Brunswick in the pricing provisions of these PPAs that
10 compel their review.

11 And essentially NERA raises two issues, one, there is no
12 competitive market, and the other issue is that the form
13 of the PPAs compel review.

14 My understanding is that those two are really a part of a
15 bigger reference back to the FERC rules, that if there had
16 been a competitive market in New Brunswick you potentially
17 could have gone out and looked at a lot of other power
18 purchase agreements that were in the market, if you will,
19 and said, here is a benchmark based on those other
20 contracts to compare the PPAs to and we can reach a
21 decision based on that.

22 Well you can't. And in making that statement, NERA makes
23 the statement that the PPAs have never been reviewed by
24 any regulator. Well in my conclusion, the government in
25 its role as implicit regulator through its oversight

2 and control of these companies, both before and after
3 restructuring, in fact is that review, that those PPAs and
4 all of the details of those PPAs were developed by the
5 government, they were imposed upon DISCO and GENCO and the
6 other companies, they were reviewed and approved by the
7 Minister of Energy. And in my view that does constitute
8 regulatory review and in fact means that they have been
9 reviewed and need not be reviewed again.

10 The other point in this question that NERA makes is that
11 because there is -- the form of the PPAs is such that it
12 allows discretion among the parties that that's an issue.

13 And I discuss that in a later point, so I won't go to
14 that now. But I disagree with that level of discretion
15 and in fact point out that the Board has full authority to
16 review the activities of the operating committee and the
17 outcome of their actions in their DISCO rate reviews.

18 The Board's fourth question was whether the lack -- the
19 acknowledged lack of jurisdiction over GENCO by the Board
20 should impede the review of these PPAs. And essentially
21 my conclusion is that NERA's arguments really don't
22 support that position.

23 NERA cites two situations that might seem to support it,
24 but in fact support the opposite conclusion, the Nevada
25 situation where the Nevada regulator effectively

2 reviews its jurisdictional state regulated utility's

3 purchasing activities for prudence, not the contracts but
4 their activities in purchasing power, again an appropriate
5 role for the Board, but it doesn't support the conclusion
6 that the Board ought to look into those contracts that are
7 signed and perhaps revise or abrogate them.

8 Q.25 - And the other point that he looks at is Maryland, New
9 Jersey and Illinois.

10 A. Right. The other example provided here is that -- the
11 example is raised of Maryland, New Jersey and Illinois.
12 In those states the combination of regulatory rules and
13 legislation requires the load serving entities to obtain
14 power contracts through an open and competitive
15 solicitation process, and the forms of the PPAs and the
16 process by which bids are evaluated are very well spelled
17 out and overseen.

18 And the resulting PPAs however, once signed, even NERA
19 concludes that the state really has no power to alter or
20 review those rates. They only have a power as this Board
21 would to review new contracts and how they are procured.
22 So in whole these arguments, these examples, don't support
23 the conclusion that there ought to be a review of the
24 PPAs.

25 The next question was what sort of review does NERA

2 conclude is appropriate and what does it mean to take

3 jurisdiction over the PPA. And as far as I can tell --

4 and I was confused a bit by both the report and Mr.

5 Strunk's testimony about what exactly he thinks it means

6 to take jurisdiction, but there seems to be this

7 requirement that the Board find the rates resulting from

8 the PPAs as just and reasonable, and that can only be done

9 by reviewing GENCO's costs. And I disagree with that.

10 And in fact, I think Mr. Strunk at some level disagrees

11 with it because he said that he wouldn't expect to see an

12 investigation relating to the existence of these PPAs

13 before the Board, given how they were formed, and I have a

14 hard time saying --

15 Q.26 - Just for clarification, his report states that at page

16 17, what you just quoted.

17 A. Right. The exact quote is he would not expect to see an

18 investigation relating to the prudence of the original

19 decision to enter into these agreements as a result of the

20 environment under which the PPAs were executed. And I'm

21 assuming that's essentially a reference to the government

22 development and imposition, but I have a hard time

23 understanding how you can review the terms, conditions,

24 prices of these contracts if you decide that the contracts

25 themselves are prudent.

2 Finally in this same question, response by NERA they list
3 -- he lists the three tests that FERC might use to decide
4 whether an affiliate contract is appropriate or not on
5 page 18 of Mr. Strunk's report.

6 And again these are from the U.S. FERC contexts between
7 investor owned utilities and their investor owned
8 affiliates. They really don't apply to New Brunswick
9 Power or these PPAs. And in fact I put forward a fourth
10 test that you could add to that list, which is if the PPAs
11 are between government owned corporations the details of
12 the PPAs were developed by the government, the PPAs were
13 imposed upon the parties, then the PPAs could be deemed to
14 be prudent, and the prices and terms could be deemed to be
15 just and reasonable. That would seem to be an appropriate
16 test from New Brunswick context.

17 The last question asked is about the sufficiency of the
18 LaCapra audits.

19 Q.27 - You are on page 10 of your report?

20 A. Page 10. And essentially this goes to some extent to the
21 issue of operating committee discretion. Because it is
22 all about the PROMOD modelling that is used to develop the
23 fuel component of energy prices in the vesting agreement.
24 Essentially Mr. Strunk is saying that the LaCapra

2 audit, the written reports produced by LaCapra, were not
3 sufficient and that the Board ought to do more. And I
4 have to say I agree the Board could and should do more if
5 it deems that necessary.

6 But I also note that the LaCapra audits were not the
7 entire body of evidence produced in the last rate case
8 which is suggested by the NERA report.

9 In fact DISCO provided extensive evidence and detail in
10 the PROMOD modelling to the Board and the Public
11 Intervenor in confidence. And they allowed the Public
12 Intervenor's independent expert to have full access to
13 that model and all the details in the 2005 proceeding.
14 So the fact that the LaCapra audits may not have been on
15 their face sufficient is really not even an issue. And it
16 is my understanding that DISCO is prepared, as part of the
17 Board's review of its prudent management of these
18 contracts, to offer similar detailed evidence on those
19 PROMOD runs and similar expert access to the model.

20 Q.28 - Now Mr. Kee, your report ends with respect to dealing
21 with those questions.

22 A. Mmmm.

23 Q.29 - You then turn at page 12 to addressing the comment that
24 the PPAs do not allow NB Power discretion over prices.
25 Can you comment on that for us?

2 A. Well, I commented on that earlier. My feeling was that
3 this was a sufficiently interesting issue, to have a
4 separate discussion of all of the points raised in the
5 NERA report about the operating committee discretion.
6 And let me just put this in context. In the context of an
7 investor owned regulated monopoly and its investor owned
8 unregulated affiliate, something like the operating
9 committee might raise eyebrows. It wouldn't necessarily
10 be disallowed.

11 And in fact most power contracts, due to their complexity,
12 would have some provisions in them for dispute resolution,
13 for the parties to examine issues and agree on them, no
14 matter how affiliated they were and no matter how they
15 were reviewed by FERC. So these are not unusual on any
16 level. But more importantly, these provisions first of
17 all don't provide the operating committee the ability to
18 change prices.

19 Second of all, all the activities that I will talk about
20 in a second are subject to the full review and evidence-
21 gathering of the Board. So whatever happens in the
22 operating committee, the Board has every ability to look
23 at that, examine it and put that into the same box as
24 DISCO's prudent administration of these contracts.

25 Now let's talk about the different aspects that are

2 supposedly giving the operating committee discretion. The

3 first one and the most important one is this fuel

4 component modelling.

5 And the primary concern there is that the PROMOD modelling

6 is described and guidelines are given in the contract.

7 But the detailed model settings if you will aren't

8 provided. And I have some experience with modelling

9 including PROMOD. And I must say that if you were to put

10 together a schedule let's say that provided every detail

11 of the PROMOD modelling, it would be hundreds of pages and

12 would probably lead to more uncertainty and potential for

13 error than the process that has been followed.

14 And as I said before, the operating committee's role in

15 this modelling is subject to full oversight and review by

16 the Board. And should the Board find that there has been

17 something there they don't like, they are certainly able

18 to give DISCO guidance.

19 The next one is interruptible energy. The Section 6.8 of

20 the vesting agreement calls for the operating committee to

21 develop a process and a procedure to develop the

22 interruptible energy price. Again while there may be some

23 discretion in that, the Board certainly has full oversight

24 of how that is done. And once that procedure is done and

25

2 approved by the Board, there would be no more involvement and
3 no more discretion in what the actual price is resulting
4 from that procedure.

5 The next section that is mentioned by Mr. Strunk is this
6 idea of additional costs, essentially section 7 of the
7 vesting agreement, where in effect DISCO has options to
8 either participate or not participate in investments and
9 major refurbishments and in projects to sort of ensure
10 environmental compliance of the GENCO assets.

11 Again, these kinds of clauses are not unusual in long-term
12 power purchase agreements, whether there is a specific
13 asset involved. They also frankly give the Board a lot of
14 ability to oversee, review DISCO's decision-making about
15 exercising or not exercising these options, about DISCO's
16 challenges if you will of GENCO cost estimates, including
17 going to arbitration if those cost estimates aren't
18 satisfactory.

19 So I see that not as a discretion over pricing but rather
20 a valuable option for DISCO to be able to opt out of those
21 or opt into them, depending on which is best for the
22 ratepayers and the Board's ability to oversee that, make
23 them an appropriate thing to do.

24 Q.30 - The next comment that you have in your report, Mr. Kee,
25 is at page 15. You comment I believe on NERA's reliance

2 on the FERC rules --

3 A. Right.

4 Q.31 - -- as suggesting that they are applicable to the New
5 Brunswick situation.

6 Could you comment on that?

7 A. Absolutely. While Mr. Strunk has characterized the FERC
8 standards, the FERC rules, the FERC guidelines as
9 examples, I must say it is just about the only example in
10 that report. And the heavy reliance, if not sole reliance
11 on FERC rules and guidelines are just not enough. The
12 FERC rules and guidelines, as I have said before in
13 briefer terms, apply to investor owned companies who are
14 dealing with investor owned affiliates.

15 The potential for preferential self-dealing or affiliate
16 abuse, call it what you like, arises from the concern that
17 the unregulated affiliate, investor owned affiliate, might
18 be able to make higher profits because of that arrangement
19 compared to not having that arrangement. And in this case
20 there are only government owned utilities involved.

21 The government has oversight over those utilities. The
22 government requires in legislation for the accounts of
23 those companies to be provided in great detail to the
24 government and to review them. The Minister sees those

2 audited reports in the subsidiaries of New Brunswick Power.

3 And I have to say that even in Section 105 of the Act,
4 which again I'm not totally familiar, but sort of saw the
5 results last year, there is a very clear role of the New
6 Brunswick Government in regulating this industry and in
7 fact overseeing everything that happens. So to suggest
8 that New Brunswick has no regulation except for the
9 regulation granted in legislation to this Board is a gross
10 misstatement.

11 Q.32 - The next item you comment on at page 16 is what you
12 consider appropriate comparisons for the N. B. vesting
13 agreements?

14 A. Yes. And my comment in this section isn't meant to be
15 specific but simply to say that the NERA report seems to
16 go consistently to the U.S. context and affiliate
17 contracts in regulated utilities, either FERC level or
18 state level in the U.S. as examples. And my intention was
19 to point out that there are contracts which, while not
20 identical to the vesting agreement, has some features that
21 are similar.

22 The Exelon Generating and Commonwealth contract, while
23 yes, they are not exactly the same, there were some
24 features that were similar, as does the Mountain View

2 contract. The Mountain View contract approved by FERC had
3 incentives in it. It had risk-sharing in it, very similar
4 to the vesting agreement, and yet was approved by FERC.

5 Q.33 - I noted that Mr. Strunk didn't mention the Australian
6 market in --

7 A. Well, let me go on. The Australian market is perhaps the
8 most relevant example where the government owned utilities
9 were disaggregated and vesting agreements put into place
10 to allow a transition to the full market opening. And
11 those contracts lasted some years depending on which date
12 and which contract. But they were specifically intended
13 to help transition the rates and the agreements from the
14 implicit hedges and the implicit benefits to customers of
15 vertical integration to a market. And my article that I
16 attach basically talks about the things that are not so
17 good, the bad things that can happen when you don't have
18 such transition agreements. And California was the
19 perfect example where that vertical integrated implicit
20 hedge was torn apart and there was nothing to replace it.

21 And the result was that the load serving entities were
22 purchasing power in the spot market with no hedges and led
23 to, you know, what has been described as sort of a \$20
24 billion mistake.

25 Had California put into place agreements like the

2 vesting agreement, like the vesting contracts in Australia,
3 that whole crisis, the financial crisis, could have been
4 averted. So that is all I have.

5 \Q.34 - Now in that context there were some other criticisms
6 Mr. Strung had of your report. And you may have already
7 addressed it. But I just want to give you the opportunity
8 if you hadn't.

9 He indicated that he felt you misrepresented the
10 discretion of the operating committee. Did you need to
11 add anything further on that?

12 A. I don't think so. Certainly the operating committee has
13 a role. That role was described in a fairly detailed way
14 in the vesting agreement.

15 And the Board's ability to review every action, every
16 detail of the action of the operating committee, is in
17 fact an appropriate role for the Board and should mean
18 that there isn't any discretion over pricing that is
19 inappropriate unless the Board allows it.

20 Q.35 - There was another point, you have already dealt with
21 it, I guess. He indicated that your contract examples
22 were were not identical and you said they weren't intended
23 to be, they were just similar. The one in Australia and
24 the Mountainview and Exelon contract. I don't know if you
25 need to address anything further on that.

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2 A. Well let me just say that every government owned utility
3 that moves into restructuring reform ends up having a bit
4 of a different view.

5 The UK was different from Australia, different from New
6 Zealand, different from Singapore, different from the
7 other provinces in Canada even. And that is not
8 unexpected and it may be difficult to find perfectly -- a
9 contract that is perfectly the same as the vesting
10 agreement. But certainly my point was that such
11 agreements which are neither market-based, procurement
12 under a competitive -- or pure cost of service based are
13 certainly common, they are typical and they have been used
14 in other situations similar to the situation in New
15 Brunswick.

16 Q.36 - The next point that he had concerns in your report were
17 your comments on the FERC standards. Was there anything
18 else that you needed to address in that regard because you
19 have mentioned that.

20 A. Well my recollection of Mr. Strunk's testimony, not so
21 much his report, was that FERC was an example only,
22 although again I will say, it seemed to be almost the only
23 example and that his entire premise seems to be that GENCO
24 is an unregulated essentially monopoly supplier of
25 generation and therefore these contracts as affiliate of

1 DISCO and therefore these must be reviewed.

2
3 And I guess I just say again that the government's role,
4 as owner and self-regulator of these companies, means that
5 they are not unregulated. GENCO is regulated. It is
6 overseen by the government. And therefore, the FERC
7 standards simply don't apply.

8 Q.37 - There was a fourth point. I don't think he went back
9 to it. There was a fourth criticism, I believe, dealing
10 with, if my notes are correct, there was no need for the
11 Board to regulate DISCO, or something to that effect. I
12 don't think your report actually said that, did it?

13 A. It did not. And in fact I was a bit surprised by Mr.
14 Strunk's comment that there is no role for the Board if
15 the government is in fact an implicit regulator.
16 My review of the Electricity Act, and the Energy and
17 Utilities Board Act suggests that there is a very specific
18 role in legislation for this Board. And the question we
19 are at today is what exactly that role involves, not that
20 there isn't any other regulator or that the Board doesn't
21 need to be here.

22 Q.38 - So I guess in conclusions, Mr. Kee, turning to page 3
23 and 4 of your report, you have set out those conclusions
24 on the PI's motion and I give you the opportunity to
25 comment on your position.

2 A. Well my position is that the Public Intervenor's motion
3 should not be approved and perhaps I am also a bit
4 uncertain about what it means to take jurisdiction over
5 these PPAs. But my review of the last DISCO rate case and
6 other related issues suggest that there is at heart here a
7 desire for a review not of the PPAs and not of GENCO's
8 costs, but a review of the entire restructuring reform
9 process and the PPAs as instruments to implement that
10 process.

11 And that I think is inappropriate. This should not be a
12 part of the DISCO rate review process to go back and
13 review the government's reform and restructuring process
14 and the way that was implemented.

15 So I may be reading too much into the Public Intervenor
16 motion, but I don't think that's appropriate and more
17 importantly my belief is that these PPAs are by being
18 developed by the government and imposed on the companies,
19 that they should not be reviewed. There are no issues of
20 prudent management on the part of DISCO in those two
21 things and so the Board's role should be only in reviewing
22 whether DISCO has appropriately managed and implemented
23 and administered those contracts.

24 MR. KEYES: Thank you very much. Those are my questions,
25 Mr. Chairman.

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CHAIRMAN: Thank you, Mr. Keyes. It is almost noon so I think the Board will take an adjournment until 1:00 and when we come back we will commence cross-examination with Mr. Lawson.

(Recess - 12:00 p.m. - 1:00 p.m.)

CHAIRMAN: Good afternoon. Mr. Lawson, are you ready to proceed with cross-examination?

MR. LAWSON: Yes, Mr. Chairman. Thank you.

CHAIRMAN: Proceed.

CROSS-EXAMINATION BY MR. LAWSON:

Q.39 - Mr. Kee, I just have actually a few points -- questions. I'm going to leave it to the Public Intervenor to do most of the examination on matters so as to save duplication. But I did want to ask you, first of all, you would agree, Mr. Kee, that there was in fact by the legislature of New Brunswick under the Electricity Act an addressing of the issue of the question of prudence and the deeming parts in Section 156?

A. My recollection of Section 156 was that it discussed the deeming prudence of the PPAs, yes.

Q.40 - Right. Amongst other things?

A. Yes.

Q.41 - Yes. And your recollection I presume is also that that was specific to the first rate increase hearing, is that

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correct?

A. Well my reading and my review of the Board's decision on that point suggests that that only covered the first hearing. But as I said before, it seems inconsistent to me to have a contract and its terms deemed prudent in one hearing and then not deemed prudent in future hearings. So that's a bit inconsistent and I'm not quite sure how that was meant to work and how it will work here.

Q.42 - But will you agree though that with the stroke of a pen for a few words that Section 156 could readily have been modified to ensure that in fact if it was intended beyond the first hearings to be deemed, that that could easily have been legislated?

A. Yes, I would agree that in general the legislation could have been clearer on that point.

Q.43 - Clearer to express your view of what should happen?

A. It could be clearer in all regards, frankly, to reach some conclusion as to what the government intended.

Q.44 - And you would agree as well that the legislation mandates, and I think you said close to the end of your evidence basically, a task for this Board with respect to rates in New Brunswick for DISCO's rates, is that right?

A. Yes. My review of the Electricity Act and the EUB Act show that the government has specified a role for this

2 Board, although the question we are asking ourselves today
3 isn't clearly spelled out, as far as I could tell, in that
4 role.

5 Q.45 - But the role is to establish whether or not rates to be
6 charged were just and reasonable, is that correct, as you
7 understand it?

8 A. I believe those words appear in the Act, yes.

9 Q.46 - Okay. Now wouldn't you agree that in the context in
10 which we are dealing, that it would be very challenging
11 for a regulator to determine whether or not a rate is just
12 and reasonable if it didn't have the opportunity to
13 examine 80 percent of the costs that are incurred by the
14 parties whose rates has to be determined whether it's just
15 and reasonable?

16 A. Well I wouldn't agree with that as a matter of course.
17 The logic chain to get to that conclusion would be the
18 conclusion that just and reasonable can only be a finding
19 that comes from an examination of the costs that underlie
20 the PPA.
21 Even Mr. Strunk would agree that if the PPAs were cost of
22 service based perhaps or they were market based with
23 procurement under a competitive process, that they may not
24 have any need to examine the underlying costs to determine
25 a just and reasonable finding.

2 And in fact I propose that the Board could in fact find
3 that because the government developed and imposed these,
4 whatever their objectives and whatever their purpose, they
5 could also use that to determine that they are just and
6 reasonable.

7 Q.47 - But I premised the question on under the circumstances
8 and in these circumstances we don't have those two things
9 that you and Mr. Strunk agree could have been
10 determinative -- assisting at least in determining whether
11 just and reasonable, is that right? No market price for
12 comparison, for example.

13 A. Well as I discussed earlier, those are two of the tests
14 that FERC would have used and they don't apply here, but
15 also if you were to apply them it would be very difficult
16 given the situation. And I will also say that just and
17 reasonable -- and I disagree with Mr. Strunk's additional
18 remarks here today, that that is not a well defined term.

19 In fact that term could mean a lot of things. And so
20 it's not quite so simple as saying what is just and
21 reasonable and there is a fine bright line there.

22 Q.48 - But I'm really asking you the question of in the
23 circumstances we have here, where there are no market
24 condition comparisons and no other benchmarking, if you
25 will, that in the circumstances to be asked to determine,

2 you define the definition of just and reasonable, rates are
3 just and reasonable, without being able to know what the
4 costs are of 80 percent of this person whose rates you are
5 regulating, is a very difficult task.

6 A. Well I would disagree with you that if the government
7 intended and the Board found that the definition of just
8 and reasonable included deeming prudent the contracts
9 implemented by the government, then it would be a very
10 simple task.

11 Q.49 - And if the legislation does not deem it to be the case
12 you would agree it's a difficult task?

13 A. Well if that's not -- if that's not the end result the
14 Board would have a lot of work to do, let's put it that
15 way.

16 Q.50 - It would be a difficult task. I'm not asking a trick
17 question. You would have to admit, it would be a very
18 challenging task for the Board to do, correct?

19 A. If what you are suggesting is the Board look behind the
20 PPAs to determine the details of those prices and the
21 costs that might underlie them, that would be a lot of
22 work and that would be a significant task, although I
23 don't agree that's appropriate.

24 MR. KEYES: Okay. Thank you. Those are all the questions I
25 have.

2 CHAIRMAN: Thank you, Mr. Lawson. Mr. Baird?

3 MR. BAIRD: Thank you, Mr. Chairman. I have a couple of
4 questions of this witness.

5 CHAIRMAN: Would you like to come forward here so that the
6 witness is able to see you when asking the questions.

7 MR. BAIRD: That would be very helpful. Thank you, Mr.
8 Chairman.

9 CROSS-EXAMINATION BY MR. BAIRD:

10 Q.51 - I will be making reference to your report, so if you
11 have it handy we can go quicker. In your report you talk
12 about -- and in your discussions earlier -- the issue that
13 these contracts and assets were deemed by the government
14 as the implicit regulator to be prudent at the time.
15 Did you see any direct evidence in your review whether the
16 government actually did do any review, or did it take in
17 any of its implicit regulatory powers to examine the
18 capital asset base or anything?

19 A. Well in response to that I will say I did not -- was not
20 involved at the time the PPAs were developed. I wasn't
21 part of the process here. I did talk to and reviewed Ms.
22 MacFarlane's testimony on that point. I did review
23 documents provided to me by DISCO that had to do with the
24 risk allocation and the terms of the agreement that were
25 used in the development of those.

2 My understanding is that those came from the government.

3 I also understand that those PPAs were reviewed by and
4 approved by the Minister of Energy. Those things give me
5 some comfort that the government is aware of them, was
6 responsible for them, and has reviewed and approved them.

7 Q.52 - Thank you. In your review of the Electricity Act did
8 you see any article in it that authorized the Minister of
9 Energy to conduct such reviews or approve such contracts
10 other than the issue that the Lieutenant-Governor-in-
11 Council had the authority?

12 A. I'm not certain I understand your question. If your
13 question is did I see in the Electricity Act a provision
14 that required or allowed the Minister of Energy to review
15 these PPAs, I did not see such a provision. I did not see
16 a provision for the Lieutenant-Governor either. That
17 didn't show up in my review either.

18 Q.53 - So in determining that the government was in itself as
19 the owner the implicit regulator, did you see any evidence
20 in the legislation that appointed any authority to do a
21 review of the rates other than this Board here?

22 A. First of all, I didn't see any indication in the
23 Electricity Act or the other acts I reviewed that this
24 Board had jurisdiction to review the costs of GENCO or to

2 review the terms of the PPA. If that's your question, I guess
3 the answer is I didn't see that.

4 Q.54 - Thank you. Moving on to another issue here. You
5 mentioned in your testimony this morning in commenting on
6 the PROMOD model that you had some experience in that
7 area. And I guess to help us, would you characterize
8 PROMOD as an assumptive model, a deterministic model, or a
9 probabilistic model?

10 A. I'm not quite sure how you are using those terms.

11 Q.55 - Well I clarify by saying I'm using them in a nuclear
12 context.

13 A. My understanding of the PROMOD model is that it develops
14 an hourly dispatch projection of all of the power plants,
15 and that that hourly dispatch is based on the inputs and
16 assumptions that go into it. I wouldn't -- I'm not so
17 sure I understand where you are going with the other parts
18 of your question now.

19 Q.56 - The next question I have on that is did you see in your
20 review of the expert testimony and things on PROMOD any
21 evidence of any testing that was done to determine the
22 fidelity of the model?

23 A. I only reviewed the LaCapra audits. I did not review the
24 detailed in confidence evidence provided to the Board and
25 the Public Intervenor. I'm unaware of what the Public

2 Intervenor's expert did when he was allowed to examine the
3 model. So the answer is if there is I don't know.

4 Q.57 - Thank you. One final question. In the Electricity Act
5 and the famous clause we were talking about in 159 or 6, I
6 believe it is, do you see any mention in there where the
7 government in deeming that it referenced the GENCOs?

8 A. I believe it referenced the transfer of assets. That's
9 something that would apply to more companies than just
10 DISCO. There may be other references. I don't have the
11 entire Act -- the entire Section 156 in my head, I'm
12 sorry.

13 MR. BAIRD: If I read 156, can we make it available to the
14 witness?

15 CHAIRMAN: Certainly.

16 Q.58 - If you were to read the third line of 156, it says
17 assets acquired by the distribution corporation, the
18 transmission corporation or the SO on or before the
19 commencement of this section, shall be deemed to have
20 prudently acquired. Did you see any mention of GENCO in
21 that at all that it was prudent?

22 A. I agree with you that GENCO is not mentioned in that line
23 in the Act, the section.

24 Q.59 - In fact, it is only mentioned in the last line where it
25 says -- I'm sorry -- the third to last line where it talks

2 about power purchase contracts are deemed to be necessary for
3 the provision of this contract. It didn't deem them as
4 prudent. It basically says they are deemed to be
5 necessary.

6 A. I would agree that that's what the section 156 says.

7 MR. BAIRD: Thank you. I have no further questions, Mr.
8 Chairman, or the Board.

9 CHAIRMAN: Thank you, Mr. Baird. Mr. Sabean, do I
10 understand you have no questions?

11 MR. SABEAN: That's correct.

12 CHAIRMAN: Mr. Booker?

13 MR. BOOKER: No questions, Mr. Chair.

14 CHAIRMAN: Thank you. Mr. Zed?

15 MR. ZED: I think we do not have any questions.

16 CHAIRMAN: Thank you. Mr. Peacock?

17 MR. PEACOCK: Just a few questions, Mr. Chair.

18 CHAIRMAN: Do you want to come over here to the table here.

19 It's very difficult to see you over there. I would ask
20 you to come over to the Reserved table in front.

21 CROSS-EXAMINATION BY MR. PEACOCK:

22 Q.60 - Thank you. In the witness' brief you refer to the
23 concept of implicit regulation in the sense that you
24 mention that government owned corporations are implicitly
25 regulated by the government. Obviously I'm not very

2 knowledgeable about the regulatory process in North America,
3 but it appears at least in reference to the discussion of
4 this morning that government owned utilities in the United
5 States may in fact be implicitly regulated in part because
6 they are not explicitly regulated in a regulatory forum
7 like the energy and utilities Board or another Canadian
8 regulator. Is that observation correct?

9 A. Well I suppose generally it is, that the reason that state
10 and federal regulation of investor owned utilities exist
11 in the U.S. is by virtue of that investor owned concept,
12 that you have companies that have a role in the
13 electricity utility industry that have monopoly
14 franchises, yet they are investor owned companies.
15 Private companies have been granted in some cases monopoly
16 rights and therefore must be subject to economic
17 regulation to ensure they don't abuse those rights. The
18 whole concept of regulation came from that basic concept.
19 The government owned utilities simply don't have private
20 shareholders, they don't have that same issue and in fact
21 they are self-regulating or implicitly regulated by
22 themselves. I'm certain that you could imagine a role in
23 a country in a province or a state where there were
24 legislated differences from that that required or allowed
25 the regulation of government owned entities, but

2 implicitly the government ownership would be the regulation,
3 and here in fact there was a time I understand before 1989
4 when the Board as it was then structured had no
5 jurisdiction over any of the electricity companies in New
6 Brunswick. Well of course they were regulated but by the
7 government. My view is that the legislation, the Act, the
8 EUB Act, carved out a role for this Board to regulate
9 certain things and everything else remains under the
10 mandate of the government.

11 Q.61 - Thank you. And you actually partly addressed my second
12 question but I will certainly give you an opportunity to
13 expand. Can you offer some relevant Canadian examples of
14 how implicit regulation helps produce just and reasonable
15 rates?

16 A. I'm sorry. I really haven't thought about that concept,
17 so I can't give you those examples.

18 Q.62 - Okay. The final question I guess I'm not sure if you
19 will be able to answer, but I will ask it in part because
20 of my limited understanding of the concept of implicit
21 regulation, and to be frank, my slight unease with the
22 idea.

23 If in theory a provincial government were to move its re-
24 election in part because of public dissatisfaction with
25 the Crown utility, how then does the ratepayer continue to

2 maintain confidence in the idea of implicit regulation?

3 A. Well without judging why elections turn out the way they
4 do, certainly the government has a very strong feedback
5 mechanism from the public who are also ratepayers. And
6 indeed you can imagine a situation where governments could
7 change because of unhappiness with their role and their
8 actions as the implicit regulator.

9 So I see that change of government and the ability to
10 change governments as in fact a reality that says that
11 consumers who are also ratepayers have some feedback to
12 give their view to the government that they don't like or
13 don't care for those actions.

14 Q.63 - Given however that, you know, a typical provincial
15 election in North America is once every four years, is
16 that sufficient regulatory scrutiny even if it is
17 essentially by the ballot box? My concern is that is that
18 final say on the ability of a said government to be an
19 implicit regulator is only stated once every four years,
20 would that not allow for some mistakes to be made as an
21 implicit regulator in the years in between?

22 A. If I can understand your question, it is essentially
23 asking whether government regulation through ownership is
24 a perfect thing, and I would say it probably isn't, not
25 much is perfect in this world, and if in your hypothetical

2 you had a world where there was only an election every four
3 years and that the only opportunity the consumers who are
4 also ratepayers had to give any feedback, that might lead
5 to some issues. But it need not.

6 MR. PEACOCK: Thank you.

7 CHAIRMAN: Thank you, Mr. Peacock. Mr. Theriault?

8 CROSS-EXAMINATION BY MR. THERIAULT:

9 Q.64 - Thank you, Mr. Chair. Mr. Kee, do you have a copy of
10 my notice of motion?

11 A. I don't have one with me, no.

12 MR. THERIAULT: Would it be possible to provide one to the
13 witness.

14 Q.65 - Mr. Kee, I would ask you just to take a few minutes
15 just to read it and let me know when you have finished it.

16 A. I'm fine. I recall it. I have read it a few times.

17 Q.66 - Okay. Where in the notice of motion does it say that
18 the Public Intervenor is asking the Board to review the
19 restructuring of the electricity market in New Brunswick?

20 A. Well as I explained earlier, the wording -- in fact the
21 wording just below the actual motion says the jurisdiction
22 would include but not be limited to, and in that list of
23 things that it would include it includes a review of the
24 costs of GENCO.

25 It doesn't specifically say you are to review the

2 overall process, but in my mind to review the costs of GENCO
3 and potentially disallow aspects of the PPAs that were
4 part of the government restructuring reform effort is
5 tantamount to reviewing that restructuring process, the
6 structure, the direction and all the details of it. So
7 it's an implicit thing that I read into this, not
8 explicit.

9 Q.67 - So it doesn't say it?

10 A. No, it doesn't.

11 Q.68 - Okay. Where in the notice of motion does it say that
12 the Public Intervenor is asking the Board to review the
13 prudence of DISCO's decision to enter into the PPAs and
14 SLAs?

15 A. Again, that's not explicitly stated here.

16 Q.69 - So it doesn't?

17 A. No.

18 Q.70 - Okay. And where in the notice of motion does it say
19 that the Public Intervenor is asking the Board to review
20 the prudence of DISCO's decision to enter into the tolling
21 agreement with Colesonco and Holdco?

22 A. Again that explicitly is not in this explanation, but as I
23 have stated, if you disallow costs related to those
24 agreements, the net effect is to take action to disallow
25 the entire agreement in effect, given the joint ownership.

1
2 Q.71 - But to my question, it doesn't say that?

3 A. Not directly, no.

4 Q.72 - No. And only indirectly through your interpretation?

5 A. That's true.

6 Q.73 - Okay. Where in the notice of motion does it say that
7 the Public Intervenor is asking the Board to disallow the
8 changes from the tolling agreement being passed on to
9 DISCO -- sorry -- the charges -- disallow the charges from
10 the tolling agreement being passed on to DISCO?

11 A. Other than a general review of the costs here, there isn't
12 any such explicit statement.

13 Q.74 - Thank you. Where in the notice of motion does it say
14 that the Public Intervenor is asking the Board to review
15 the prudence of DISCO's decision to enter into a power
16 purchase agreement with Nuclearco?

17 A. Well let me just say in general that the motion itself
18 talks about all the PPAs and again I'm unclear about what
19 the meaning of the explanation is, but Nuclearco isn't
20 specifically mentioned other than as a part of the PPAs as
21 a general concept.

22 Q.75 - So it doesn't mention it?

23 A. It mentions the power purchase agreements as a general
24 matter which includes the Nuclearco PPA, I understand.

25 Q.76 - Well I'm going to read the question again, just so that

1
2 we are clear. Where in the notice of motion does it say that
3 the Public Intervenor is asking the Board to review the
4 prudence of DISCO's decision to enter into a power
5 purchase agreement with Nuclearco?

6 A. Again it doesn't directly say that, but I have inferred
7 that from what it does say.

8 Q.77 - Okay. So the answer is it doesn't say that?

9 A. It does not say those words.

10 Q.78 - Where in the notice of motion does it say that the
11 Public Intervenor is asking the Board to disallow the
12 charges from the public purchase agreement from being
13 passed on to DISCO.

14 A. The public -- I'm sorry, I didn't --

15 Q.79 - Okay. Where in the notice of motion does it say that
16 the Public Intervenor is asking the Board to disallow the
17 charges from the power purchase agreement from being
18 passed on to DISCO?

19 A. I guess what it says is disallow costs being passed
20 through to DISCO's customers, not to DISCO. So if you are
21 asking a different question than customers then I would
22 say it doesn't say that.

23 Q.80 - Again where in the notice of motion does it say that the
24 Public Intervenor is asking the Board to disallow the
25 charges from the power purchase agreement from being

2 passed on to DISCO? Does it say that in that document you
3 have in front of you?

4 A. Those precise words do not appear here.

5 Q.81 - Okay. Thank you.

6 A. I will agree to that.

7 Q.82 - Where in the notice of motion does it say that the
8 Public Intervenor is asking the Board to review the
9 prudence of DISCO's decision to enter into a vesting
10 agreement with NuclearCo -- or sorry -- GENCO? And I will
11 read it again. Where in the notice of motion does it say
12 that the Public Intervenor is asking the Board to review
13 the prudence of DISCO's decision to enter into a vesting
14 agreement with GENCO?

15 A. I will agree that this notice of motion does not include
16 those precise words.

17 Q.83 - Thank you. And where in the notice of motion does it
18 say that the Public Intervenor is asking the Board to
19 disallow the charge from the vesting agreement from being
20 passed on to DISCO?

21 A. I will agree that those words are not in this notice of
22 motion.

23 Q.84 - Thank you. Now, Mr. Kee, you have I think stated in
24 your earlier testimony that you reviewed the Electricity
25 Act and the Energy and Utilities Board Act?

1 - 324 - Mr. Kee - Cross by Mr. Theriault -

2 A. I have reviewed those, although I must admit that I'm not
3 an expert on either one of them.

4 Q.85 - Okay. And where does it say that the government
5 developed the PPAs?

6 A. That topic was not covered in those two pieces of
7 legislation. I got that information from my review of Ms.
8 MacFarlane's testimony and other documents I was provided
9 as part of my review for this case.

10 Q.86 - Okay. So I understand Ms. MacFarlane's testimony.

11 What other documents?

12 A. As I mentioned earlier in my response to I believe Mr.
13 Baird, I was provided from DISCO the risk allocation
14 documents and the terms -- basically the term sheets that
15 were used to develop those PPAs, all of them. And my
16 understanding is that those were developed as a part of
17 government's action to implement restructuring.

18 Q.87 - But it's not in the legislation?

19 A. I think I said that I didn't see it in the legislation,
20 no.

21 Q.88 - And where does it say that the government imposed the
22 PPAs?

23 A. That did not come from my review of legislation. That
24 came from my review of Ms. MacFarlane's testimony and
25 other documents.

2 Q.89 - Again other documents being what?

3 A. The transcripts of hearings before the prior Board, other
4 things such as that.

5 Q.90 - So I just want to be clear on this because -- so we
6 have Ms. MacFarlane's testimony saying that these were
7 imposed by PPAs and other transcripts. Do you know which
8 witnesses?

9 A. I do not recall.

10 Q.91 - Okay. Where does it say that the government has
11 oversight on the PPAs?

12 A. I don't believe I have seen that in writing, but I
13 certainly acknowledge that the government in its role as
14 owner and control and oversight of these companies would
15 have such oversight.

16 Q.92 - That's your opinion.

17 A. It is.

18 Q.93 - Okay. But you haven't seen anything -- any document or
19 transcript that would refer to that?

20 A. Well I would -- I don't think I have seen that explicitly
21 written down, no.

22 Q.94 - Okay. Thank you. Where does it say that the Minister
23 of Energy has oversight on the PPAs?

24 A. Other than my understanding, and I can't recall where I
25 saw this, that the Minister of Energy approved those

2 PPAs, I don't have anything in writing about that.

3 Q.95 - So your answer is you don't know?

4 A. My understanding is that the Minister of Energy reviewed
5 and approved these PPAs. I think your question was
6 slightly different. Where does that --

7 Q.96 - Where does it say that the Minister of Energy has
8 oversight on the PPAs was my question specifically?

9 A. Well I suppose that if you looked closely enough at the
10 details of the ownership by the government, the
11 responsibilities of the boards of these companies, you
12 could probably get there, but I haven't done that detailed
13 review.

14 Q.97 - So you haven't seen anything that would lead you to
15 believe that the Minister of Energy has oversight on the
16 PPAs?

17 A. I haven't seen any documents that explicitly stated that,
18 no.

19 Q.98 - Thank you. Would you agree with me, Mr. Kee, that the
20 Board has jurisdiction over the rates, tolls and charges
21 of DISCO?

22 A. I believe that's an excerpt from the Act and I would have
23 to agree with that.

24 Q.99 - Thank you. Would you agree that the Board must satisfy
25 itself that the tolls, rates and charges of DISCO's are

2 just and reasonable?

3 A. I believe that's also an excerpt from the Act, so I would
4 agree with that as well.

5 Q.100 - Thank you. So if I understand your testimony here
6 today, you are stating to the Board that despite 80
7 percent of the costs to -- that 80 percent of the costs to
8 DISCO come from the PPAs and despite the government has no
9 active role in the regulation of any of the recognized
10 companies -- reorganized companies, sorry -- and despite
11 that the government did not design or implement the PPAs
12 or have any oversight over them --

13 A. I'm sorry. You mean the Board didn't or the government
14 didn't?

15 Q.101 - The government did not design or implement the PPAs.

16 A. I'm sorry. Are you asserting that the government had no
17 role in developing and implementing those PPAs? Is that
18 hypothetical or --

19 Q.102 - No, but I mean you had stated earlier that there was
20 nothing in the legislation.

21 A. I'm sorry. I must totally disagree with that
22 hypothetical, if that's what it is.

23 Q.103 - Okay. Let's break it down then. You are here today
24 stating that despite 80 percent of the costs to DISCO come
25 from the PPAs that the Board should not be allowed to

2 examine the costs passed through from GENCO and Nuclearco to
3 DISCO?

4 A. I don't believe I discussed this issue of how much of the
5 costs are coming from the PPAs or how much are not
6 reviewed. My conclusion is that it's possible this Board
7 could find that the PPAs are deemed prudent and just and
8 reasonable by virtue of their origins in government
9 action.

10 Q.104 - Okay. Let me put it to you another way. Let's take a
11 hypothetical situation. Let's say that DISCO has evidence
12 before this Board that 80 percent of their costs for the
13 revenue requirement come from the PPAs. So I put the
14 question to you again under this situation. Are you
15 intending to argue to the Board that despite 80 percent of
16 the costs to DISCO come from the PPAs, that the Board
17 should not be allowed to exercise the costs passed through
18 from GENCO and Nuclearco to DISCO?

19 A. I think there is a word missing in your question. But I
20 think you are asking this question. Should the Board
21 review those strictly as a matter of how much of the total
22 costs they are?

23 I think that has nothing to do with it. And typical of a
24 distribution utility, most of its costs come from
25 purchasing power. The fact that those power purchase

2 agreements could be deemed prudent or reasonable has nothing
3 to do with the magnitude of those costs.

4 Q.105 - So I assume that is what you are asking the Board to
5 do?

6 A. If you could say your question again, I might be able to
7 give you a straight answer on that one.

8 Q.106 - You are asking that the Board, notwithstanding 80
9 percent of the costs to DISCO come from the PPA's, that
10 the Board should not be allowed to examine the costs
11 passed through from GENCO and Nuclearco to DISCO?

12 A. I think that a reasonable outcome of this proceeding could
13 be the Board's finding that the government's action in
14 developing these PPAs could render them prudent and just
15 and reasonable. And therefore the answer is yes, that
16 could happen.

17 Q.107 - Okay. And again you are here before us today,
18 notwithstanding that the Board has jurisdiction over DISCO
19 and a responsibility to approve rates that are just and
20 reasonable, that the Board should not be allowed to
21 examine the costs passed through from GENCO and Nuclearco
22 to DISCO?

23 A. That's right. My view is that these PPAs give rise to
24 costs to DISCO, but that the costs underlying PPAs have
25 nothing to do with the role the Board has.

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2 The Board could and in my view should find that these PPAs
3 are reasonable and prudent and therefore need not go
4 through the PPAs to look at the costs of companies over
5 which they have no jurisdiction.

6 MR. THERIAULT: Thank you very much. Thank you, Mr.
7 Chairman. That is all.

8 CHAIRMAN: Thank you. Ms. Desmond?

9 CROSS-EXAMINATION BY MS. DESMOND:

10 Q.108 - Mr. Kee, I just have a couple of questions for you.

11 You have indicated that the PPAs were imposed by
12 government by government and that they were not management
13 decisions. And there have been some questions in relation
14 to this.

15 But when you say government, can you clarify who we are
16 speaking about? Is it the legislative branch of
17 government? Is it the owners? Who exactly are you
18 referring to?

19 A. I don't have a detailed understanding of who caused these
20 actions to be taken back in the days that they were taken
21 prior to 2004. And I haven't discussed that exact linkage
22 of who and exactly which branch.

23 My understanding, based on only broad knowledge of this,
24 is that the boards would have taken action as a result of
25 the wishes of their shareholder which is the

1 - 331 - Mr. Kee - Cross by Ms. Desmond -

2 government. But I don't know any more than that.

3 Q.109 - So other than Section 105 of the Electricity Act, is
4 there any other legislative provision that supports your
5 view then that government is effecting regulation?

6 A. I'm sorry. That was Section 105?

7 zQ.110 - I believe earlier you had said Section 105 of the
8 Electricity Act was a fashion of government regulation.
9 So other than that particular legislative section, is
10 there any other legislative provision?

11 A. I can't specifically recall any other provisions that
12 would lead me to this conclusion. But I would just say
13 that the absence of anything in that legislation about how
14 GENCO or the other companies would be regulated sort of
15 leaves me with the strong conclusion that the government
16 remains the implicit regulator.

17 So it is the absence of language that clearly defines the
18 regulation that gives rise to my conclusion that the
19 government retains that implicit regulation that they have
20 had and would have continued until such time as that
21 changes.

22 Q.111 - Can I have you just turn to page 6 please of your
23 report?

24 A. Yes.

25 Q.112 - And sir, the last bullet point on page 6. You suggest

2 that it is appropriate for the Board to review whether DISCO
3 has prudently implemented, administered and managed the
4 PPAs.

5 What do you have in mind with respect to that particular
6 bullet point? That is what is it that the Board would be
7 specifically able to do if it were to review the PPAs in
8 this context?

9 A. Well, I think I have talked about some of those things
10 earlier. Certainly reviewing the activities of the
11 operating committee, and especially as that includes the
12 PROMOD modelling to develop the fuel component of the
13 vesting energy price, that is certainly something that we
14 ought to be looking at.

15 There are other things the operating committees do that
16 ought to be reviewed. And in fact the operating
17 committees' activities as a general topic should be
18 reviewed by the Board to ensure themselves that DISCO is
19 properly and prudently administering this contract.

20 And as a general matter -- I believe Mr. Strunk phrased
21 this pretty well -- to the extent that the vesting
22 agreement of the other PPAs have explicit provisions in
23 them, then there is a burden on DISCO and the operating
24 committee or both to make sure that those provisions are
25 properly implemented and the prices come out the way they

2 are supposed to in the agreement. So it is a matter of
3 implementing a fairly long and complicated agreement.

4 Q.113 - In your opinion, sir, what options then would be
5 available to the Board at the conclusion of this review?

6 A. If you are referring to what would the Board, could the
7 Board, should the Board do in that review of whether DISCO
8 has prudently administered the contract, if that is your
9 question, I suppose I don't want to prejudge what their
10 options are.

11 But I assume they could take a number of actions directing
12 DISCO to do things differently, if that was what they
13 felt, perhaps disallowing some costs if they had not been
14 prudently -- if they resulted from imprudently
15 administering the agreement. I suppose I don't want to
16 limit the options available to the Board in their review
17 of that.

18 MS. DESMOND: Thank you. Those are all my questions.

19 CHAIRMAN: Thank you, Ms. Desmond. Mr. Keyes, redirect?

20 MR. KEYES: Nothing on redirect, Mr. Chairman. Thank you.

21 CHAIRMAN: Thank you. And I guess we would be ready for
22 argument. And perhaps it might be appropriate to take
23 about a 15-minute break. So we will reconvene at 2:00
24 o'clock for argument.

25 (Recess - 1:45 p.m. - 2:00 p.m.)

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2 CHAIRMAN: Mr. Theriault, are you ready to proceed?

3 MR. THERIAULT: Yes, Mr. Chairman, I am.

4 Mr. Chairman, the purpose of the motion brought by the
5 Public Intervenor is to have the Board take jurisdiction
6 over the power purchase agreements and the service level
7 agreements entered into by DISCO. We have outlined in our
8 motion what we mean by jurisdiction. Despite the
9 testimony of Mr. Kee, we have purposely been very specific
10 in our wording. The argument today will focus on two
11 areas. How can the Board take jurisdiction over the PPAs?

12 And why should the Board take jurisdiction over the PPAs?
13 With respect to the question of how can the Board take
14 jurisdiction, I would submit this is essentially a review
15 of Section 156 of the Electricity Act. This matter was
16 discussed at length in the first hearing. And the Board
17 made certain findings and orders.

18 Section 156 of the Electricity Act states "For the
19 purposes of the first hearing before the Board under
20 Division B of Part C, and for the first hearing before the
21 Board under Division C of Part C, the assets transferred
22 by transfer order or otherwise attributable by virtue of a
23 transfer order or assets otherwise acquired by the
24 Distribution Corporation, the Transmission Corporation or
25 the SO on or before the commencement of this section shall

2 be deemed to have been prudently acquired and useful for the
3 operation of a distribution or transmission system as the
4 provision of these services of the SO. And any
5 expenditures arising from the distribution services
6 contract, standard service contract, power purchase
7 contract, transmission service contract or auxiliary
8 service contract entered into on or before the
9 commencement of this section are deemed to be necessary
10 for the provision of the service."

11 Regulation 2005-23 to the Electricity Act defines what is
12 the first hearing. Section 2 states "For the purposes of
13 Section 156 of the Electricity Act, the first hearing
14 means the public hearing, whether an electronic, oral or
15 written hearing that is first held before the Board after
16 all pre-hearing conferences and other preliminary
17 procedural matters have been completed."

18 I submit, Mr. Chairman, it is very clear that the first
19 hearing has been completed and that this hearing is not
20 the first hearing.

21 As to the meaning of Section 156, this has already been
22 decided by the previous Board. Section 90 of the EUB Act
23 states that in essence that every decision, order or
24 direction made by the PUB continues in effect.

25 This does not mean that this Board cannot revisit an

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2 order made by PUB. But I would submit that there would have
3 to be a compelling reason to do so. Such reasons are not
4 present today.

5 In the first hearing, the PUB ruled that Section 156 is
6 spent and of no force and effect in respect of any
7 applications following the first hearing. The PUB
8 rejected DISCO's argument that Section 156 has a residual
9 impact arising out of its deeming provisions. They ruled
10 that DISCO's position does not give proper consideration
11 to the opening words of the section, which clearly state
12 that the section applies for the purposes of the first
13 hearing before the Board.

14 In essence they maintain that those words apply to the
15 whole of the provision. And there is no wording in the
16 section which suggests, or by necessary implication
17 suggest that its provisions are to have any impact on
18 subsequent hearings. As such we maintain that the meaning
19 of Section 156 has already been decided and any further
20 argument is moot. As such the Board is going to take
21 jurisdiction of the PPAs as requested in our motion.

22 Alternatively, Mr. Chairman, if the Board does not agree
23 with this interpretation, then it is necessary, I submit,
24 for the Board to examine Section 156 as a starting point.

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2 First it must be noted that Section 156 is contained under
3 the heading of transitional provisions, that is it is not
4 even contained in Part 5 of the Act which deals with rate
5 applications. Rather, it is contained in Part 6 of the
6 Act dealing with transitional provisions.

7 In their text, Sullivan and Driedger on Construction of
8 Statutes, the authors state that for purposes of
9 interpretation headings, they should be considered part of
10 the legislation and should be read and relied on like any
11 other contextual feature.

12 They go on to state that this approach has been applied by
13 courts to ordinary federal legislation and despite the
14 Interpretation Act to provincial legislation as well.

15 We agree with Sullivan and Driedger when they state "When
16 provisions are grouped together under a heading it is
17 presumed they are related to one another. Conversely the
18 placement of provisions elsewhere under a different
19 heading suggests the absence of such a relationship."

20 In other words by placing Section 156 in a different part
21 from the actual section dealing with rate application
22 suggests that except for a first hearing this section is
23 transitional in nature and has no further effect.

24 And when interpreting the legislation, the most common
25

2 interpretive principle is the ordinary meaning rule. That is

3 the words are assumed to bear their ordinary meaning

4 unless and until this assumption becomes untenable.

5 According to Sullivan and Driedger, modern courts have

6 stated that the ordinary meaning rule consists of the

7 following propositions. First, it is presumed that the

8 ordinary meaning of a legislative test is the meaning

9 intended by the legislature. In the absence of a reason

10 to reject it, the ordinary meaning prevails.

11 Obviously a reading of Section 156 clearly indicates that

12 for the purposes of a first hearing, the PPAs are off

13 limits. However, by its very wording, at subsequent

14 applications the Board can inquire into the prudence of

15 any expenditure arising from the power purchase contracts

16 to which DISCO is a party.

17 And the second proposition suggested by Sullivan and

18 Driedger is even if the ordinary meaning is plain, courts

19 must consider the purpose and scheme of the legislation in

20 relevant legal norms. They must consider the entire

21 context.

22 A review of the Electricity Act clearly makes any rate

23 application subject to a public hearing. This process

24 must be open and transparent. And a full and complete

25 examination must be conducted.

2 The transitional nature of Section 156 clearly shows that
3 for a second and subsequent hearing the Board can and
4 should examine the underlying costs of the PPAs. If the
5 legislature intended anything different they would have
6 concluded an examination of these contracts and would have
7 done so in Part 5 of the legislation which deals with the
8 actual rate applications.

9 The third proposition suggested by Sullivan and Driedger
10 is that in light of number 1 and 2 outlined earlier, the
11 court may adopt an interpretation that modifies or departs
12 from the ordinary meaning provided the interpretation is
13 plausible.

14 I submit that in establishing a public hearing process
15 where the public interest is to be protected, the
16 legislation would never have anticipated that contracts,
17 which form over 80 percent of the cost contained in the
18 utilities' application, would be shielded from public
19 scrutiny. Failure to examine these costs would lead to
20 utterly ridiculous interpretations of the legislation and
21 would I submit, Mr. Chairman, bring this whole process
22 into disrepute.

23 Now the second part of my argument today is to deal with
24 why should the Board take jurisdiction over the PPAs?
25 With the first part of the argument I tried to explain

2 how, from a legal point of view, the Board can and should take
3 jurisdiction over the PPAs.

4 I now want to turn to why the Board should take
5 jurisdiction. First of all, as part of the interim rate
6 hearing DISCO, in the affidavit of Sharon MacFarlane,
7 states that "Approximately 80 percent of the costs which
8 makeup Distribution Corporation's Revenue Requirement for
9 2007, 2008 consists of power purchase costs which are
10 contractual obligations arising from the three power
11 purchase agreements described as the Genco PPA, the
12 Colesonco PPA and the Nuclearco PPA."

13 Section 105 of the Electricity Act obliges the Board to
14 only approve a rate charge if you were satisfied that such
15 charges are just and reasonable. Section 72 of the EUB
16 Act states that the jurisdiction of this Board may be
17 exercised notwithstanding any contract or agreement or Act
18 of the Legislature.

19 As a result of these sections of the Electricity Act and
20 the EUB Act, I submit that the Board is obliged to
21 consider the PPAs for which Ms. MacFarlane states comprise
22 80 percent of their revenue requirement.

23 I further submit that if these underlying costs are not
24 reviewed, there is no way in which this Board can
25 determine if DISCO's revenue requirement is just and

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reasonable.

Now this morning the Public Intervenor has provided a report of Kurt Strunk of the National Economic Research Associates. Mr. Strunk's career has focused on regulation of the electricity market both in the competitive and noncompetitive environment. He has analyzed hundreds of power purchase agreements. His testimony and report have focused on six areas, some of which I will summarize very briefly for the Board.

First he dealt with what concerns the wholesale power contracts raise for regulators. As Mr. Strunk pointed out, in these situations regulators are concerned that the purchasing utilities customers may be paying too much as a result of contractual terms that are overly preferential to the affiliate seller.

I am not here today, Mr. Chairman, alleging that DISCO's customers, that is, the New Brunswick ratepayers, are paying too much as a result of the PPAs. What I am alleging is that we don't know. Since 80 percent of the revenue requirement is contained in these PPAs, a full open and transparent examination of the underlying costs needs to be presented to the Board to ensure these costs are just and reasonable.

Mr. Strunk focused on what is a just and reasonable

2 regulatory standard. As he stated, in order for a cost to be
3 a just and reasonable rate, the cost must be prudently
4 incurred. Mr. Strunk in his report mentions that this
5 standard has been used by numerous jurisdictions,
6 including the Ontario Energy Board. The OEB cites a two
7 stage test for a prudence inquiry.

8 The first stage is one in which the decision of the
9 utility is presumed to have been made prudently unless
10 those challenging the decision demonstrate reasonable
11 grounds to question the prudence of that decision.

12 How can anyone hope to challenge DISCO's decisions if they
13 cannot examine and question 80 percent of the underlying
14 costs that constitute the revenue requirement?

15 The prudence test was also applied in the case of Yukon
16 Energy Utilities Board, which I will hand out at the end
17 of my presentation, which was heard before the Court of
18 Appeal for the Yukon Territory in 2001.

19 In this case, Mr. Chairman, the Board denied a recovery of
20 a bad debt between the utility and a customer. The Board
21 stated that while the Board must give the utilities an
22 opportunity to earn a fair return on assets, it is not
23 required to approve all expenses if they were not
24 prudently incurred.

25 In this case, the Board took jurisdiction over an

2 agreement reached between the utility, the government and a

3 customer and ruled that the agreement was not prudent and

4 should not be paid by the ratepayers and should be

5 absorbed by the utility. The Court of Appeal upheld the

6 Board's ruling and the prudence standard applied by the

7 Board in the Yukon.

8 Now Mr. Strunk in his report focuses on the lack of

9 competition here in New Brunswick. Mr. Strunk also in his

10 report notes that in Ms. MacFarlane's affidavit she states

11 that the PPAs were designed and intended to permit the

12 parties contracting with DISCO to recover their forecasted

13 underlying costs and returns over time.

14 Mr. Strunk also noted that the PPAs are affiliate

15 contracts. Both of these points are reason enough for the

16 Board to scrutinize these contracts to determine whether

17 the costs in the contracts were prudently incurred and

18 just and reasonable.

19 As well, Mr. Strunk points out that since there is no

20 competition in New Brunswick, GENCO acts as a monopoly

21 supplier of generation services. As such, the Board and

22 DISCO have no transparent benchmark against which to

23 compare the cost of power charged by GENCO.

24 Therefore, Mr. Chairman, Board scrutiny over these costs

25 are needed to ensure that the public interest is

2 protected and that the rate increase is just and reasonable.

3 Furthermore, Mr. Strunk maintains that since the PPAs
4 leave important decisions to the operating committee,
5 decisions which impact the power purchase costs of DISCO,
6 regulatory oversight of the PPA is needed to ensure
7 ratepayers are paying reasonable rates.

8 As to the area that Mr. Strunk looked at with respect to
9 the lack of jurisdiction over GENCO, this motion asks the
10 Board to take jurisdiction over those PPAs to which DISCO
11 is a party. I submit the Board is obliged to ensure any
12 rate increase is just and reasonable. This means the
13 Board must inquire whether the wholesale rates paid by
14 DISCO are just and reasonable. This is the only way to
15 ensure that DISCO's expenditures are prudent.

16 It is not an attempt to regulate GENCO. Rather it is a
17 prudency examination of DISCO's expenditures to ensure
18 that 80 percent of their costs are just and reasonable. I
19 submit there is no other way for the Board to satisfy its
20 statutory obligation when reviewing a rate increase.

21 In conclusion, Mr. Chairman, I submit that by virtue of
22 the legislation and by virtue of the environment
23 surrounding the PPAs, the Board is obliged to take
24 jurisdiction over the PPAs. It is only by doing this that
25

2 the Board can satisfy itself that a full, transparent and
3 prudent examination of the revenue requirement by DISCO
4 has been achieved.

5 Thank you very much.

6 CHAIRMAN: Thank you, Mr. Theriault. Are there any
7 questions of Mr. Theriault from the Board? Thank you.

8 MR. THERIAULT: Mr. Chairman, I do have -- for the
9 convenience of the Board I have prepared my presentation
10 that I just gave, my argument, and I would like to hand
11 that out to the Board, as well as a copy of the Yukon
12 case.

13 CHAIRMAN: Perhaps you could give that to the Board
14 secretary and it will get distributed. That way we will
15 be able to continue on with --

16 MR. THERIAULT: I have copies for all the parties too.

17 CHAIRMAN: Thank you.

18 CHAIRMAN: Mr. Lawson?

19 MR. LAWSON: Thank you, Mr. Chair. I presume you are okay
20 if I do it from here?

21 CHAIRMAN: That's fine.

22 MR. LAWSON: Thank you. I have the advantage of following
23 the Public Intervenor and therefore can say he did a far
24 better job than I could with exact -- he must have taken
25 my notes and improved upon them vastly, which would say

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that certainly two votes to nothing so far in favor of his motion to the extent that that matters.

I will just be very brief. Section 156 I would agree with the Public Intervenor on his interpretation of it. If you break down Section 156 and take out a lot of the words and if you put -- just look at it for the purposes of the first hearing before the Board under Division B of part 5, which is the one that is relevant here. And then it goes on, breaks down into two parts.

One, the assets transferred and I am going to leave out a bunch of it, shall be deemed to be prudently acquired and -- and that's where the conjunctive comes in. The qualifier for the purposes of the first hearing applies to (1), the assets transferred and (2), certain thing shall be deemed to be necessary for the provisions of the service.

So those are the two things that are qualified for the first hearing and only the first hearing. In fact, by implication because it is under the transition section and because it specifically says only for the first hearing, I would say the implication is that that deeming -- that prudence in fact ends or has ended already as a result of being at the end of the first hearing. And in fact implies an obligation on this Board independent of the

2 logic of it to in fact look at the prudence following that
3 first hearing.

4 So that is what we, along with the Public Intervenor and
5 others, I think, are encouraging this Board to do in
6 saying it really follows under the obligation to determine
7 whether or not they are just and reasonable, that you
8 would look at those costs.

9 Like the Public Intervenor, we aren't saying that there is
10 some self-dealing here, with the government. What we are
11 saying, and as one of the witnesses said this morning, is
12 there isn't any evidence of self-dealing. We would agree,
13 I believe it was Mr. Kee said, there is no evidence of
14 self-dealing, absolutely none. That is because there is
15 no evidence at all, one way or another, that would allow
16 this Board to decide whether there is self-dealing.

17 One of the witnesses' comments was it could be conceivable
18 that the pricing is too low. How would we know? We won't
19 know until an examination has been done.

20 I fear, make no mistake about it, everybody fears, I
21 think, the success of this dog catching the car, what are
22 we going to do with it? It will be a monster to catch.

23 And it will be a big job. And I think Mr. Kee
24 acknowledged that this morning.

2 Unfortunately, none of us have the luxury of being able to
3 say because it is a big job, we should ignore it. I think
4 you have as a board, an obligation to look at it.

5 Probably and hopefully, for the sake of all, not every
6 time you have a hearing.

7 So somebody has got to take and deal with the car once it
8 has been caught at least once. And then once the
9 determination has been made on that issue, that will be
10 done for future hearings subject to any further changes
11 and so on.

12 I would submit that to seek to have a determination
13 whether or not the rates are just and reasonable, by not
14 being entitled to look behind the 80 percent of the costs,
15 is the equivalent to being asked to engage in a fist fight
16 but being told that you are going to have to have your
17 hands tied behind your back.

18 And I don't think that is what the legislature would have
19 intended. They gave this Board a role and that role is to
20 look and see if it is just and reasonable. And I submit
21 the only way you can do that, do it properly. There was a
22 decision. It is not for us to determine why the power was
23 given to the Board. The government passed that power
24 explicitly to this Board to make a determination if it is
25 just and reasonable. I submit the

2 only way you are going to be able to do that and do it to meet
3 your statutory obligations and to do what was intended is
4 to have an examination of that car when the dog catches
5 it.

6 Thank you, Mr. Chairman. That's all we have.

7 CHAIRMAN: Thank you, Mr. Lawson. Are there any questions of
8 Mr. Lawson from the Board? Okay. Mr. Baird?

9 MR. BAIRD: Thank you, Mr. Chairman, Board Members. I think
10 the comments made before have been very properly stated
11 regarding the need for full and transparent examination of
12 the costs of DISCO.

13 I would refer to comments made by the Premier of New
14 Brunswick reported in Hansard on April 12th 2007. And I
15 quote, "pertaining to the potential rate increase that NB
16 Power will be bringing to the EUB that process will allow
17 an open and transparent process." He continues -- "we
18 continue to seek input from industry stakeholders and such
19 agricultural producer groups." He says, "we are committed
20 to allowing NB Power to break even, submitting them to
21 break even."

22 Without a full examination of 80 percent of the costs I
23 respectfully submit this Board cannot fulfil the wishes
24 of the government nor the people of this province and
25 request that you make those available. Thank you.

2 CHAIRMAN: Thank you, Mr. Baird. Any questions from the
3 panel? Thank you. Mr. Booker?

4 MR, BOOKER: Thank you, Mr. Chair. The motion from the
5 Public Intervenor ask for the GENCO costs to be open to
6 scrutiny. We are in agreement with this motion and his
7 reasoning.

8 In the 2005 hearing, the PUB and many intervenors were
9 very frustrated by the lack of evidence on the projected
10 costs making up the PPAs passed onto DISCO. Despite
11 several attempts the GENCO cost makeup was never fully
12 divulged. Now we have an interim increase of 9.6 percent
13 put in place with minimum evidence.

14 As Mr. Wayne Wolfe of J.D. Irving said at the Interim Rate
15 hearing, it's interesting to note that the NB Power group
16 of companies to make money, while the profit at DISCO is
17 much lower.

18 There have been two fiscal year ends at NB Power since the
19 previous hearing under the PUB and since deregulation. In
20 total DISCO has produced a profit of \$4.6 million in the
21 last two years. At the same time all the rest of NB Power
22 produced a profit of \$101.4 million. Without any
23 disclosure, it's impossible to learn which part of NB
24 Power made all the money. One can speculate that a great
25 deal of that money is made by GENCO because the PPAs

2 overcharged DISCO for the true cost of power, but there is a
3 real absence of evidence.

4 Mr. Chair, there is no need to turn these up, but in
5 evidence binder A-2 in one place it states that the PPA
6 costs from GENCO have increased by 13 percent. And in
7 another line it stated that the price of fuel has
8 escalated by 10.1 percent. And it goes on to say that that
9 10.1 percent is driven primarily by increases in world
10 commodity prices for heavy fuel oil and natural gas.

11 We have no idea what the real fuel costs are for GENCO
12 today, but one huge change has been the stronger Canadian
13 dollar resulting in perceivably lower fuel costs. Without
14 opening GENCO, there will be no way to understand the true
15 escalation of power costs.

16 Outside of fuel costs, when were are dealing with such
17 large differences between the earnings of DISCO and the
18 rest of NB Power, it's difficult to understand why only
19 DISCO should be scrutinized.

20 In summary, in our opinion, there are many questions to be
21 asked outside of the DISCO cost structure in order to
22 arrive at a proper determination of the DISCO costs.

23 Thank you, Mr. Chair.

24 CHAIRMAN: Thank you, Mr. Booker. Any questions from the
25 Board? Thank you. Mr. Zed?

2 MR. ZED: Thank you, sir. Well, my presentation is going to
3 be very brief, because we are going to adopt whole
4 heartedly the argument put forth by Mr. Theriault as the
5 Public Intervenor. And to the extent it has been referred
6 to and adopted by those that followed.

7 I would like to point out and with respect, and you know,
8 the Board is very aware, but that any order you make and
9 any kind of investigation you undertake, it's in the
10 public interest. And whether it's a matter of due
11 diligence or just plain common sense, I submit I find it
12 very difficult to fathom how somebody could make an order
13 in the public interest when 80 percent of the -- 80
14 percent of the pages are missing. 80 percent of the
15 investigation is not done. It just doesn't make any sense
16 to anybody in this room, I believe.

17 And so I would ask you then to -- if you say that common
18 sense and due diligence dictate that you undertake such an
19 investigation, refer to the statutory requirements of 156.

20 We have heard very convincingly how that is no longer
21 applicable.

22 Mr. Theriault, I believe, referred to Section 72 of the
23 Energy and Utilities Board Act, which clearly states that
24 your jurisdiction under this part, and that is in dealing
25 with public utilities, may be exercised by it

2 notwithstanding any existing contract or agreement or Act of
3 the Legislative Assembly of New Brunswick.

4 Now I don't know how that could confer any broader
5 jurisdiction on this Board. It says go and do your job in
6 the public interest. And if an Act says something
7 contrary, don't pay attention to it. If a contract
8 purports to oust your jurisdiction, don't pay attention to
9 it. Do your job in the public interest.

10 So what if -- and I will address -- I will limit my
11 comments to one very discrete matter that hasn't been
12 touched on. And that is what if you come to the
13 conclusion that the contract purports to pass on -- or
14 DISCO purports to pass on costs that you find to be
15 imprudent? They are still run by contract. I think it's
16 common ground that this board does not have the authority
17 to alter that contract. And I would merely say that is
18 not the Board's problem. The Board's problem is to do
19 what is best in the public interest.

20 There is a provision under the Act, the Electricity Act,
21 Section 105, that any decision of this Board is passed on
22 to the Lieutenant-Governor-in-Council and then it's in
23 government's lap. And as we have seen over the past
24 several years, governments have not been reluctant to
25 substitute their decision for the decision of the Board

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when they felt it was appropriate.

But this Board should not be swayed from making the proper decision with that section. That -- is what the section is there, the legislature has enacted it. Whether we agree it should or shouldn't be there, it's there. And we say please don't shy away from making what we would submit is the right investigation and the right decision because of government overview.

At the end of the day, let the record show that this Board has done the right thing. If government differs, let them stand up and differ.

Thank you.

CHAIRMAN: Thank you, Mr. Zed. Any questions from the Board? Thank you. Mr. Peacock.

MR. PEACOCK: Thank you, Mr. Chair. Vibrant Community Saint John has only a few comments to offer, in part because so much legal ground has already been covered by other intervenors. Our bias, Mr. Chair, is simple. We feel that in order for low income New Brunswickers to maintain confidence in their electricity regime, they must be assured that the Crown utility does not abuse its effective monopoly position.

And in order to ensure this, comprehensive regulatory scrutiny is required. In other words, our electricity

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2 regime calls for a very high degree of transparency.

3 Obviously we feel that this degree of transparency is not
4 present as long as roughly 80 percent of utility costs are
5 exempt from regulatory scrutiny. As a result we say let's
6 open as many of the utility books as possible.

7 You will no doubt recognize, Mr. Chair, that our
8 intervention is limited in its capacity, and even if every
9 part of NB Power's operations were opened to scrutiny we
10 would have difficulty ploughing through all the details.
11 We submit, however, that these books still must be opened,
12 if only to restore New Brunswick's confidence in the
13 provincial electricity system.

14 In successfully applying for its various rate increases
15 over the last few years the utility is essentially ensured
16 that it can keep its lights on. These increases have had
17 a profound effect on utility customers, however, and I can
18 say based on conversations I have had with citizens
19 throughout New Brunswick that a lot of low income
20 customers are having enormous difficulty keeping their
21 lights on.

22 In the name of fairness, we need to ensure that the burden
23 these cost increases have placed on low income consumers
24 is just and reasonable. To do this we need to remove
25 current barriers to regulatory scrutiny of all NB

2 Power operations.

3 A final thought, Mr. Chair, and that is in general support
4 of as much regulatory scrutiny as allowed under the law.
5 And on this question of law I will simply bow to the
6 argument of the Public Intervenor.

7 We may add, however, that we were greatly troubled by the
8 opinion of DISCO's witness, Mr. Kee, that state owned
9 operations like DISCO, or in today's argument GENCO, are
10 implicitly regulated by government.

11 It is our humble opinion, Mr. Chair, that if this implicit
12 regulation exists in New Brunswick then it hasn't exactly
13 served the interests of electricity consumers in this
14 province. That is why we much prefer explicit regulation,
15 for it gives small intervenors like ourselves a chance to
16 participate in a process that fairly decides if proposed
17 rates and costs are just and reasonable.

18 While we have confidence in the government departments to
19 oversee the utility, we much prefer the idea that this
20 regulator also oversee the utility operation. Because of
21 this we ask you to have a good look at the 80 percent of
22 utility operations that have not yet been examined in case
23 the implicit regulation has missed anything. Let's shine
24 a light on all utility operations and help restore some
25 public confidence in New Brunswick's electricity system.

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2 Thank you.

3 CHAIRMAN: Thank you, Mr. Peacock. Are there any questions
4 from the Board? Thank you. Mr. Morrison, I see you have
5 changed places with Mr. Keyes. Can I take from that that
6 you are going to make argument?

7 MR. MORRISON: You can, Mr. Chair. Thank you. Good
8 afternoon, Mr. Chair, members of the Board.
9 Having been in the position of representing the utility in
10 a rate case when all the intervenors are the people that
11 pay the rates, I hope you don't go on the vote count,
12 because my count is about six to one.
13 Mr. Chair, members of the Board, in his cross-examination
14 of Mr. Kee this morning Mr. Theriault put a number of
15 questions, questions about where in my notice of motion do
16 I say that I'm asking you to disallow costs from GENCO to
17 DISCO.
18 Let's remember that there is more than just Mr.
19 Thériault's motion here today. I also have a motion
20 before the Board and my motion is couched in much general
21 terms. It is my submission that all of the issues that
22 Mr. Kee addressed are encompassed in my motion, which in
23 my submission, essentially deals with the fundamental
24 issue in this proceeding here today.
25 And let's cut to the chase. Both motions are dealing

2 with one fundamental issue, and that fundamental issue is,
3 simply put, whether DISCO's revenue requirement, and of
4 course that's the basis for setting rates, should be based
5 on the PPA costs or the underlying generation costs, the
6 costs that flow from GENCO, Nuclearco and the NUGS.

7 And I also want to be crystal clear about this. DISCO has
8 no objection to disclosing the underlying costs. And I
9 will say that again. DISCO has no objection to disclosing
10 the underlying costs. Indeed, in the last rate hearing
11 virtually all of the generation costs were filed, with the
12 exception of the NUG contracts, and that was because the
13 NUGs for confidentiality reasons did not want them
14 disclosed. DISCO wasn't a party, the Board ruled they
15 couldn't look at them.

16 So this is not a case, repeat, not a case, of DISCO
17 attempting to shelter the costs from public disclosure. I
18 know that has been stated in the media, it has been
19 repeated outside this hearing room in the last case and
20 perhaps during this proceeding. It is simply not true.
21 The issue isn't the disclosure of the information, but
22 rather its role in the ratemaking process.

23 Also for clarity, I would like to dispel another
24 misconception, and it has been stated time and time and
25 time again here today. And that is that 80 percent of the

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2 costs are sheltered from public scrutiny. That is simply not
3 correct.

4 It is true that approximately 80 percent of DISCO's costs
5 flow through the PPAs, but let us remember that more than
6 50 percent of GENCO's costs flowing to DISCO is the fuel
7 component of the vesting energy charge. The fuel
8 component was subject to detailed scrutiny by this Board
9 the last time. It will be subject to detailed and
10 rigorous scrutiny by this Board in this proceeding.

11 Now the Public Intervenor's motion asks that the Board
12 take jurisdiction over the PPAs and the SLAs. With all
13 due respect, this Board cannot take or assume jurisdiction
14 over anything the Board does not already have jurisdiction
15 over. The law is crystal clear on that point and I will
16 refer the Board to the Supreme Court of Canada case in
17 Atco Gas Pipeline where it states, administrative
18 tribunals or agencies are statutory creations. They
19 cannot exceed the powers that were granted to them by
20 their enabling statute. They must adhere to the confines
21 of their statutory authority or jurisdiction and they
22 cannot trespass in areas where the legislature has not
23 assigned them authority.

24 So it's not simply a question of cheeking jurisdiction.
25 You either have jurisdiction to look at the

2 underlying generation costs or you do not. And I will get
3 into my jurisdictional arguments a little later. But
4 first I want to talk a little bit about the expert
5 evidence that has been filed.

6 The Public Intervenor submitted evidence of course by Mr.
7 Strunk and discussed submitted evidence by Mr. Kee. Mr.
8 Strunk's position is that the Board should assume
9 jurisdiction over the PPAs and scrutinize the underlying
10 generation costs. Clearly that's his position. And when
11 you boil down his evidence there are really three reasons
12 that he says you should do that.

13 And they are, first, that the PPAs are between a regulated
14 entity, DISCO, and a non-regulated affiliate, GENCO and
15 Nuclearco, and therefore the Board should be concerned
16 about self-dealing. That's the first reason.

17 The second one is because the PPAs are between affiliates,
18 they must meet one of three tests in order for you to not
19 look at those underlying costs. The PPAs must be cost
20 based contracts or they must be market-based contracts --
21 sorry -- the first one is cost of service contracts or
22 they must be market-based contracts, or there must be a
23 competitive market so you can have a benchmark to compare
24 the prices.

25 According to Mr. Strunk if any one of those three

2 conditions or none of those three conditions apply, then you
3 have to look at the underlying costs.

4 I would like to deal with the first one, and that is self-
5 dealing, or affiliate abuse or however you want to
6 contemplate it. Mr. Strunk's position is that because the
7 PPAs are between a regulated DISCO on the one hand and an
8 unregulated affiliate, let's say for clarity we will say
9 GENCO, the contracts must be scrutinized in order to
10 overcome concerns about self-dealing.

11 In support of this proposition Mr. Strunk relies on FERC
12 rules and the principles set down in the Edgar case which
13 is referred to in his report. Mr. Kee's evidence on the
14 other hand is that the FERC guidelines in the Edgar case
15 have no application in New Brunswick.

16 The FERC rules are in place to prevent abuse between
17 investor owned state regulated monopolies and their
18 investor owned affiliates. I would suggest to you that
19 Mr. Kee demonstrated quite clearly that these rules are
20 not applied to publicly owned utilities in the United
21 States. DISCO, GENCO and Nuclearco are not investor
22 owned. They are publicly owned.

23 But more importantly, however, is the fact that the terms
24 of the PPAs were not negotiated between the parties. The
25 terms were imposed by government. And the public

2 record with respect to the imposition and the creation of the
3 PPAs is clear. The evidence in the last hearing by Ms.
4 MacFarlane, the transcripts -- it was clear and it was
5 debated in the last hearing. I'm not going to reiterate
6 that evidence.

7 But the principles outlined in the Edgar case and in the
8 FERC rules, which Mr. Strunk relies upon, are intended to
9 prevent the abuses of self-dealing.

10 Now the law has long been sceptical of non-arms length
11 transactions. And it is founded in the potential for
12 abuse by related companies in negotiating contract terms
13 that benefit the parties or their shareholders in which
14 may not be commercially prudent. Sweetheart deals, in
15 other words.

16 To overcome this evil, the law has said that one must view
17 related party contracts with suspicion. I submit that in
18 this case there is no justification for legal scepticism.

19 Yes, it's true, the PPAs are made between related parties.

20 But it is not the case where the terms were negotiated.

21 There can be no sweetheart deal. There was no deal.

22 The terms of the PPAs were imposed on DISCO and its
23 suppliers, Nuclearco and GENCO. Accordingly, in my
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2 submission, there is no concern that the related parties have
3 negotiated contracts having beneficial terms.

4 The contracts, as I said, were not negotiated, but
5 dictated by a third party. And they were instituted as
6 part of the government's restructuring of NB Power. The
7 same is true of the transfer orders. There is more than
8 just the PPAs that transfer costs, there is the transfer
9 orders.

10 And the costs transferred to DISCO from Holdco under the
11 transfer orders were carved in stone by the legislation.

12 I would refer you to sections 12 to 34 of the Electricity
13 Act.

14 So there is no need to resort to scepticism to overcome
15 the evil of self-dealing because there is no self-dealing.

16 The terms were not negotiated between two investor owned
17 affiliates.

18 I would like to talk a little bit about what I call Mr.
19 Strunk's three tests. Mr. Strunk contends that because
20 the PPAs are between affiliates they must meet one of the
21 three tests or if they don't they must be subject to Board
22 review and the tests of PPAs must be cost of service
23 contracts subject to FERC-type guidelines or they must be
24 market-based contracts or there must be a competitive
25 market so that you have a benchmark to compare

2 costs.

3 According to Mr. Strunk, if none of these conditions are
4 met, the Board must assume jurisdiction over the PPAs.

5 Now as Mr. Kee explains, Mr. Strunk's three tests derive
6 from FERC rules. Under FERC rules, a supply contract
7 between a regulated investor owned distribution company
8 and an unregulated investor owned affiliate must meet one
9 of the three tests, otherwise FERC will examine the
10 underlying costs of the affiliate supplier. The reason
11 for this is to ensure that supplier's costs are not
12 inflated thereby providing the common shareholder, the
13 investor owner, with an undue profit or benefit at the
14 expense of the ratepayer.

15 Now it is correct that the PPAs are neither cost-of-
16 service contracts subject to any type of FERC-like
17 guidelines or market-based contracts. However, the PPAs
18 are not, as I said earlier, between investor owned
19 affiliates. And that is the fundamental distinction
20 between the FERC-type situation and the situation in New
21 Brunswick. I would suggest to you that Mr. Strunk ignores
22 the government's role in determining the structure and
23 pricing of the PPAs.

24 Mr. Strunk's third criteria is that because there is no
25 competitive market there is no transparent price

2 benchmark against which to compare the PPA prices. Again he

3 contends that this situation argues in favor of the Board

4 testing the underlying the generation costs.

5 Again, Mr. Strunk refers to the tests that were developed

6 by FERC. And I say again, it is my submission that they

7 have no application to this situation, because we are not

8 talking about investor owned affiliates. And Mr. Strunk

9 again ignores the very significant role of government in

10 putting the terms of these PPAs in place.

11 It is my submission that the PPAs are completely different

12 in nature from the investor owned affiliate contracts the

13 FERC rules are designed to address. As Mr. Kee points

14 out, the PPAs are more akin to the contracts developed for

15 use in Australia, which he talked about this morning.

16 In light of the different nature of the PPAs, Mr. Kee

17 rejects Mr. Strunk's three tests and says that a new New

18 Brunswick-specific test should be the appropriate

19 standard. And that's found at page 10 of his report. And

20 basically it says where the government imposed the terms

21 of the contract, created the terms of the contract and is

22 requiring two publicly owned companies to abide by the

23 terms of the contract, there is no reason for you to

24 exercise any review of any of the underlying costs that

2 might flow through them.

3 Finally, I would like to deal with Mr. Strunk's last
4 concern, which is the discretion of the operating
5 committee. Now he contends that the vesting agreement --
6 and he was talking mostly about the vesting agreement with
7 GENCO, gives the operating committee wide discretion over
8 key provisions.

9 Because of this discretion the Board must step in to
10 ensure that prices are justified by underling costs. It
11 is our submission that Mr. Strunk's underling assumption
12 that the operating committee has wide discretion as to
13 price and other key provisions is simply not borne out.
14 In particular, Mr. Strunk contents that the operating
15 committee has wide discretion in setting the fuel
16 component of the vesting energy price. And that's
17 essentially Article 6.2 in Schedule 6.2 of the vesting
18 agreement. It is my submission that Schedule 6.2 sets out
19 the process for determining the fuel component and the
20 operating committee's role in administering it. Quite
21 simply put, I would say that the PPA sets out the recipe.

22 The operating committee's job is to follow the recipe.
23 And again, I would like to remind you that the fuel
24 component is a part of all of -- DISCO's revenue
25 requirement that got the

2 most scrutiny in the last rate case. And will be scrutinized
3 in this rate case. So that that should be of no concern
4 to the Board, because you are going to see it all, every
5 bit of it.

6 I would urge the Board to carefully review the provisions
7 of Articles 6 and 7 of the vesting agreement. First of
8 all, I would point out that Article 7 doesn't even involve
9 the operating committee. But that aside, I would suggest
10 to you that the provisions of Article 6 referred to by Mr.
11 Strunk as conferring wide discretion on the operating
12 committee, in fact contain either a formula or stipulated
13 process for determining amounts referred to in them.

14 The only possible exception -- and I would concede this,
15 is in Article 6.8, the provision states that the operating
16 committee must develop and maintain procedures for
17 calculating the interruptible energy price. And as Mr.
18 Kee quite properly pointed out, this Board should review
19 the activities of the operating committee to make sure
20 that they are indeed properly administering the provisions
21 of the PPA. So again that should not be a reason for
22 concern.

23 I would like to, just before I leave this particular
24 topic, refer you to page 12 of Mr. Kee's report. And he

2 said, "I conclude that the vesting agreement operating
3 committee has little or no discretion over the terms,
4 prices, or other features of the PPAs."

5 That's all I am going to say about the evidence. And I am
6 going to launch and I am hoping that you had some coffee
7 at lunchtime, but I don't think there is any way that we
8 can deal with this issue, as Mr. Theriault did, without
9 dealing with the always scintillating topic of statutory
10 construction.

11 The issue here is much broader and much more fundamental
12 than the discussion of Section 156. There really is a
13 fundamental jurisdictional issue that this Board is going
14 to have to grapple with. And I am going to try to explain
15 my view of that issue.

16 It is DISCO's submission that the Board should not, and
17 indeed cannot under the existing legislation, consider the
18 underlying generation costs in determining DISCO's revenue
19 requirement in this hearing. And I am going to begin by
20 examining the purpose and intent of the Electricity Act.
21 Pursuant to Section 3 and 4 of the Act, the old New
22 Brunswick Power was transformed from a vertically-
23 integrated utility into a holding company and several
24 subsidiaries, DISCO, GENCO, TRANSCO, Nuclearco.

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2 And these are all distinct corporate entities governed by
3 the Business Corporations Act. That was the first step in
4 restructuring, was creating these -- I think they were
5 once referred to as butterflies, but HOLDCO and
6 subsidiaries.

7 The next step in restructuring was to apportion the
8 assets, employees, rights and obligations among the
9 various corporate entities. And that was accomplished in
10 two steps, transfer orders and the PPAs. So the
11 apportionment of the employees, assets, liabilities, et
12 cetera was accomplished by way of transfer orders. And it
13 is important to recognize that these assets and
14 liabilities were transferred by order. They were not
15 subject to negotiation on the part of DISCO or the other
16 operating companies.

17 And transfer orders are dealt with by an entire division
18 of the Electricity Act. And that is Part 2, Division B.
19 I referred to it earlier, sections 12 to 34. So after
20 that was done, after the assets and liabilities were
21 assigned by transfer order, the next step was the PPAs.
22 And if you want to look and discern what the real intent
23 and purpose of the Electricity Act, I refer to Part 2 of
24 the Act where corporate restructuring, the transfer orders
25 are found. You need look no further

2 than the title of that division, that part of the Act. And it
3 is entitled "Restructuring of New Brunswick Power
4 Corporation."

5 Now where do the PPAs fall in? After the assets,
6 employees, et cetera were assigned by transfer order, a
7 mechanism was required regarding the sale and purchase of
8 power between the companies. The PPAs are agreements that
9 were required as a direct result of restructuring. They
10 are the vehicle by which the generating companies charge
11 DISCO for the supply of power. They are an integral part
12 of restructuring. Because they are the direct result of
13 the creation of the operating companies under the
14 Electricity Act and the assignment of the assets,
15 liabilities and obligations. So the central purpose of
16 the Electricity Act was to restructure NB Power.

17 Another key element of restructuring is the change in the
18 regulatory regime. Under the Electricity Act only DISCO
19 and Transco fall within the jurisdiction of this Board.

20 The Board has no regulatory authority over the generating
21 companies GENCO and Nuclearco. This was confirmed in the
22 previous Board's decision June 19th. And you can find
23 that at page 77 of the decision.

24 So getting back to the question I posed a few moments ago,
25 what is the intent and purpose of the Electricity

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Act? I submit that its purpose and intent is crystal-clear.

And it is to restructure NB Power from a vertically-integrated utility and a distinct Distribution and Transmission Corporation, and to vest the regulator with jurisdiction over only the distribution and transmission functions.

So why is this important, you might ask? If this Board decides that the revenue requirement is to be based on underlying generation costs, then several serious ramifications flow from that.

First, the Board would have to examine all of GENCO's costs. This would entail GENCO filing detailed information as to its OM&A costs, amortization expense, interest costs, return on equity and defending each and every one of those costs.

An amortization study for GENCO would have to be prepared and filed with the Board. And expert evidence would have to be -- expert witnesses would have to be called to defend it. The Board would also have to engage in a capital structure hearing, with GENCO calling an expert to defend the presumed capital structures in the PPAs. And of course I'm sure the other intervenors would be filing their own capital, ROE expert evidence as well.

In short, the Board would be required to conduct a

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full-blown examination of GENCO's revenue requirement in exactly the same way that it is conducting an examination of DISCO's revenue requirement in this proceeding. Would generic hearings into GENCO's and Nuclearco's accounting policies be required? I don't know. Mr. Theriault said that it is not his intention to attempt to regulate GENCO. But it is my submission in fact that is exactly what would happen. So once you get through GENCO, the revenue requirement hearing on GENCO, you would have to go through exactly the same exercise with Nuclearco. So we have two hearings ahead of us at least. The other ramification of that decision is that once the Board has reviewed the revenue requirements for GENCO and Nuclearco, the issue of cost allocation arises. Having determined that rates are to be set based on the costs of GENCO and Nuclearco, the Board cannot then rely on the existing cost allocation methodology approved by the previous Board. That methodology is based on PPA costs. If the PPA costs will no longer form part of the revenue requirement for rate-setting purposes, then the Board will have no choice but to require a new cost allocation study based on the cost of GENCO and Nuclearco

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2 and embark on an entirely new CARD hearing.

3 Embarking on this course will have profound legal
4 implications. The backbone of restructuring is the PPAs.

5 The PPAs define the relationships between the various New
6 Brunswick Power companies. And as is common with vested
7 agreements, as Mr. Kee has noted this morning, assigns and
8 allocates risk based on public policy decisions.

9 If this Board elects to ignore the PPAs in determining
10 DISCO's revenue requirement, then effectively it is
11 treating NB Power as a vertically-integrated utility.

12 That clearly defeats the purpose of the legislation.

13 As I just mentioned, once the Board embarks on a
14 consideration of the underlying generation costs, the
15 Board would have no choice but to conduct revenue
16 requirement hearings into GENCO and Nuclearco, no
17 different in substance than it is now doing into DISCO.

18 In short the Board would be exercising de facto regulatory
19 jurisdiction over both GENCO and Nuclearco.

20 And this is important. Under the current legislation the
21 Board has no regulatory jurisdiction over the generators.

22 Again, it is my submission that the intent and purpose of
23 the legislation would be undermined.

24 Now Mr. Theriault referred to Driedger. And everybody
25 refers to Driedger. It is sort of the bible on statutory

2 interpretation and construction of statutes. Now I'm going to
3 talk a little bit about construction of statutes.

4 At page 35 the Driedger text discusses the purposive
5 purposes approach to statutory interpretation and
6 indicates that it is much favored by modern courts.

7 Further at page 35 he sets out what are called the
8 propositions comprising this type of analysis.

9 The purposive purposes approach to statutory

10 interpretation may be summarized by the following

11 proposition. All legislation is presumed to have a

12 purpose. It is possible for courts to discover or to

13 adequately reconstruct this purpose through

14 interpretation.

15 Legislative purpose should be taken into account in every

16 case at every stage of interpretation, including the

17 determination of ordinary meaning. Other things being

18 equal, interpretations that are consistent with or promote

19 legislative purpose should be preferred, and

20 interpretations that defeat or undermine legislative

21 purpose should be avoided.

22 The ordinary meaning of a provision may be rejected in

23 favor of an interpretation more consistent with the

24 purpose if the preferred interpretation is one the words

2 are capable of bearing.

3 Now page 64 it goes on. "An interpretation that runs
4 counter to the legislature's purpose should be avoided
5 even though it is based on the ordinary meaning of the
6 words. This proposition can be understood as an
7 application of the golden rule. Interpretations that tend
8 to defeat the purpose of legislation are often labeled
9 absurd and rejected on that account."

10 And I won't bore you with too many of these. But I do
11 have two more. And I do believe they are important. At
12 page 88 he says "It is presumed that legislation is
13 enacted for a purpose and that each feature in the
14 legislative scheme has some function to fulfil. An
15 interpretation that defeats the purpose of legislation or
16 renders some feature of it pointless or futile is likely
17 to be labeled absurd."

18 And finally -- I know that you are wishing I didn't embark
19 on this -- at page 85 and 86 is a summary of the modern
20 absurdity role. "The modern view of the golden rule may
21 be summarized by the following proposition. It is
22 presumed that legislation is not intended to produce
23 absurd consequences. Absurdity is not limited to logical
24 contradictions and internal incoherence. It includes
25 violations of justice, reasonableness, common sense and

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2 other public standards. Also absurdity is not limited to what
3 is shocking or unthinkable. It may include any
4 consequence, consequences that are judged to be
5 undesirable because they are contradictory values or
6 principles that are considered important by the courts."
7 "Thirdly, where the words of legislative text will allow
8 for more than one interpretation, avoiding absurd
9 consequences is a good reason to prefer one interpretation
10 over the other. Even where the words are clear, the
11 ordinary meaning may be rejected if it would lead to an
12 absurdity."

13 And finally, "The more compelling the reason for avoiding
14 an absurdity, the greater the departure from ordinary
15 meaning may be tolerated. However the interpretation that
16 is adopted should be plausible."

17 The reason for my going on at length about Driedger is
18 that it is my submission that when you look at the
19 Electricity Act as a whole the clear purpose and intent of
20 the Act is to restructure NB Power from a vertically
21 integrated utility into its distribution, transmission and
22 generation functions, and to have only the distribution
23 and transmission functions subject to the regulatory
24 jurisdiction of this Board.

25 If the Board interprets the Electricity Act as

2 extending its jurisdiction to test the underlying generation

3 costs, then it is submitted that the intent and purpose of

4 the legislation would clearly and unequivocally be

5 defeated. In the legal sense it results in an absurdity.

6 An interpretation that results in an absurdity must be

7 rejected even if the ordinary meaning of the words is

8 clear.

9 I am getting to the end and I'm sure that's a relief to

10 all. But there are some other considerations that I think

11 the Board should take into account.

12 It was touched upon briefly this morning and it goes to

13 whether or not you can amend the PPA.

14 The evidence that DISCO has filed in this case is its

15 revenue requirement evidence, and the revenue requirement

16 evidence is based on the PPA costs, in other words, what

17 DISCO must pay under the PPAs. As you know, the revenue

18 requirement is the fundamental issue in determining rates.

19 The revenue requirement is based on DISCO's costs -- it's

20 based on the costs which DISCO is contractually bound to

21 pay pursuant to the PPAs.

22 At the end of the day, it is the PPA costs which DISCO

23 must pay regardless of the actual underlying generation

24 costs. Given this reality, it is submitted that the

25 revenue requirement must be based on the PPA costs. To

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2 base the revenue requirements on something other than what
3 DISCO actually is required to pay will result in either an
4 under-recovery or an over-recovery of revenue by DISCO.
5 If there is an under-recovery, DISCO would be entitled to
6 an increase in its allowed revenue requirement with a
7 consequent increase in rates beyond that which has been
8 applied for.

9 In other words if we are under-recovering and you are
10 basing the requirement on generation costs, the revenue
11 requirement is going to go up and you would have to order
12 a higher rate than that which has been actually applied
13 for. Otherwise the Board would be required to end the
14 PPA. And perhaps I don't agree with Mr. Strunk on much
15 but I do agree with him on that point. I don't think you
16 have the jurisdiction to amend the PPA.

17 Now the only reason we are here having this discussion
18 today is because the contract -- PPA contracts -- are with
19 DISCO affiliate, GENCO. Normally a regulator does not
20 inquire into the underlying generation costs of a contract
21 supplier, a non-affiliate contract supplier. For example,
22 if DISCO was purchasing its energy and capacity from Hydro
23 Quebec under supply contract this Board wouldn't enter
24 into an examination of Hydro Quebec's costs. It wouldn't
25 do so for two reasons. One, you have no jurisdiction over

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2 Hydro Quebec, and, two, commercial contracts are deemed to be
3 prudent -- entered into prudently. With respect to those
4 two criteria, I would say that the first is clearly
5 present. You don't have any regulatory jurisdiction over
6 GENCO. With respect to the second the prudence of the
7 contract, I have already gone into that. That's Mr.
8 Strunk's issue on self-dealing, as I mentioned earlier.
9 There should be no concern about self-dealing in this case
10 because there was no real dealing between GENCO and DISCO
11 as far as the PPAs are concerned.
12 And I'm almost loathe to do this, but I'm going to.
13 Although the previous Board has ruled that Section 156 is
14 now spent, and I know that Mr. Zed has raised this
15 already, it is my submission that the practical effect of
16 Section 156 must endure. If there was no Section 156 then
17 the previous Board would have reviewed the prudence and
18 reasonableness of DISCO's costs coming to the PPAs and the
19 transfer orders in the last hearing. It would have
20 undertaken the review, would have come to a determination.
21 Once the Board made those conclusions, I would suggest it
22 would not revisit those issues in subsequent hearings
23 unless there was a significant change in circumstances.
24 In short, the Board's conclusions, had it reviewed the
25 underlying costs regarding the prudence and reasonableness

2 of those costs, would have had lasting effect.

3 So what Section 156 did is substitute the legislature's
4 judgment on the prudence and reasonableness of those costs
5 for that of the Board. In short, the legislature dictated
6 the findings that the Board would have made in the first
7 hearing. The determination by the legislature that these
8 costs are prudent I suggest must endure in the long-term.
9 To conclude that the effect of Section 156 does not endure
10 beyond the first hearing is, in my submission, to render
11 Section 156 meaningless. If in this hearing the Board can
12 revisit the reasonableness and prudence of the costs the
13 PUB could not review in the previous hearing, then the
14 only effect of Section 156 was to delay the review.

15 It is my submission that the intention of the legislature
16 in enacting Section 156 cannot have been merely to buy
17 time until this hearing. It is submitted that the clear
18 intention of Section 156 is to deem those costs prudent in
19 the same way the Board would have done had it reviewed
20 those costs in the first hearing. Once deemed prudent,
21 that issue should not later be reviewed.

22 As I mentioned earlier, to conclude otherwise would
23 render Section 156 meaningless. I note that Section 156
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2 has not been repealed even though the previous Board had
3 recommended that it be repealed, and I was always curious
4 as to why the Board made that recommendation if its force
5 had been spent.

6 Finally I just refer you to page 7 of Mr. Kee's reports
7 and his comments on Section 156, which I might add he
8 developed quite independently of me. His comment was, one
9 interpretation of Section 156 is that the Board was
10 required to deem the existence and form of the PPAs and
11 SLAs prudent in the first hearing and then only review
12 DISCO's administration of those agreements in subsequent
13 hearings.

14 I'm wrapping up, Mr. Chairman. I will be done in a few
15 short minutes.

16 This is a summary of my conclusions.

17 The clear purpose and intent of the Electricity Act is to
18 restructure the old NB Power from a vertically integrated
19 utility into its distribution, generation and transmission
20 functions. And importantly, and you cannot ignore this,
21 to have only the distribution and transmission functions
22 subject to your regulatory jurisdiction.

23 Relying on the underlying generation costs and ignoring
24 the PPAs in determining the revenue requirement

2 effectively undermines restructuring, and would require the
3 Board to exercise de facto jurisdiction over GENCO and
4 Nuclearco.

5 Interpreting the Board's jurisdiction to extend to a
6 review of the underlying generation costs results -- and
7 please don't take this personally -- in a legal absurdity
8 and should be rejected.

9 As I mentioned earlier, if the Board elects to ignore the
10 PPAs in determining DISCO's revenue requirement, then
11 effectively it is treating NB Power as an integrated
12 utility. With all due respect, I submit that this Board
13 has no jurisdiction to undermine the public policy
14 objectives set out in the legislation.

15 To examine generation costs would require GENCO and
16 Nuclearco to justify their costs before this Board,
17 effectively subjecting them to regulation over which this
18 Board has no jurisdiction.

19 Regardless of the underlying generation costs DISCO is
20 still obligated to pay the PPA costs. Basing the revenue
21 requirement on something other than DISCO's actual costs
22 would result in either over-recovery or under-recovery of
23 DISCO's revenue requirement.

24 And in conclusion, again I must emphasise that this is not
25 a case of DISCO trying to shelter the generation cost

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information from disclosure. Our objection is not to the disclosure of the generation costs. Quite frankly, our concern is the impossibility of reconciling the current legislative regime with the concept of basing the revenue requirement on anything other than the PPA costs.

There is a disconnect between the current legislation and the ability of this Board to rely on generation costs in setting DISCO's revenue requirement. It is akin to trying to fit a round peg in a square hole. They are completely in my submission incompatible and mutually exclusive.

If you choose to treat the NB Power group of companies as an integrated utility the Board would for all practical purposes be substituting its own policy objectives for that of the legislature.

Those are my comments, Mr. Chairman, and members of the Board. And I'm sorry I was so long winded but some things just take what they take.

CHAIRMAN: Well you have to take the time that's necessary to put forward your argument, Mr. Morrison. I do have one question. You said three or four times in the course of your argument that DISCO has no objection to disclosing the underling costs.

Is it DISCO's intention to disclose those costs as

2 part of the evidence that would be filed in early July, or is
3 that essentially an offer to disclose those costs in the
4 event that one or more of the intervenors were to request
5 specific pieces of information?

6 MR. MORRISON: Well I can tell you that that has been the
7 subject of some discussion, Mr. Chairman. I guess from my
8 point of view, from a practical point of view it makes no
9 difference.

10 I was resisting the notion of filing it with our July 3rd
11 filing because by filing it one could interpret that we
12 are filing it as part of our evidence in support of the
13 revenue requirement, which flies in the face of everything
14 I have just said for the last half hour. But that's not
15 to say that we wouldn't do that if the Board directed us
16 to do that.

17 And again it's clear that DISCO has no objection to filing
18 the information. It is not a question of that. It's a
19 question of how we deal with this given the legislative
20 regime we are living in.

21 CHAIRMAN: And perhaps that leads me to the second question,
22 and that is how much time would you require in early July
23 if the Board required it? Can I take from that that the
24 information would be readily available, or perhaps you
25 need to confer with somebody on that issue. I see some

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signals.

MR. MORRISON: There is two points to that. One, it's physically impossible to pull that information together by July 3rd. And the next question is a lot of that depends on what the Board decides today. If it's -- the generation cost information a witness to explain where the generation costs come from, that is probably doable within a reasonable timeframe. But if the Board decides that it is going to have to undertake essentially revenue requirement hearings for DISCO, GENCO and Nuclearco, you are looking at several months. It would be months. Because just doing an amortization study for GENCO is going to take a long time, if that is where the Board is going.

So I guess what I am saying to you, Mr. Chair, is that it depends on what the Board decides and certainly we would be open for direction as to generation cost filing.

Because as you know, there is various levels. I mean you have high level, intermediate level or get down into, you know, how many conductors there are, and so on. So it's very difficult to put a box around it.

CHAIRMAN: Fair enough. Could you put your mind then to what level you would have anticipated being prepared to disclose when you made that statement that there is no

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2 objection to disclosing these underlying costs. I just wonder
3 if you had put your mind to --

4 MR. MORRISON: We have had some discussions about it. I
5 know it wouldn't be ready for July 3rd but probably --
6 probably around the end of July, and we would -- that's
7 assuming it would be in the form essentially as the DISCO
8 revenue requirement evidence has been filed, that sort of
9 level of detail.

10 CHAIRMAN: Thank you. I don't have any further questions
11 for you, Mr. Morrison. Does other members of the Board --
12 Mr. Johnston?

13 VICE-CHAIRMAN: Mr. Morrison, just a couple of topics that I
14 would like to touch on. Towards the end of the argument
15 you talked about Section 156. Prior to that you had been
16 discussing the structure of the Electricity Act and how
17 that should impede the Board from becoming the de facto
18 regulator of GENCO, as you put it. But then you said
19 towards the end that had Section 156 not been in place at
20 the last rate hearings the PUB would have made certain
21 inquiries into certain subjects. And I guess I lost a
22 little bit there in terms of what subjects they would have
23 inquired into had Section 156 not been in existence that
24 would not have been prohibited by the other arguments that
25 you have raised.

2 MR. MORRISON: Well I guess the point I was trying to make,
3 Deputy Chairman, is this. If NB Power were still a
4 vertically integrated utility, okay, and it had come
5 before the Board for a rate increase, the Board would have
6 made a number of inquiries.

7 It would have done essentially the way it used to do rate
8 cases -- well when I say used to -- this Board only had
9 jurisdiction since 1990 -- but it would have done -- it
10 would have treated all of the NB Power group of companies
11 as an integrated utility, there would have been all of
12 those costs -- all that cost information would have come
13 in.

14 Because of restructuring because of the Electricity Act it
15 is my submission that the legislature said, okay, you
16 can't do that anymore because it flies in the face of
17 restructuring. You can't have these costs. So we are
18 going to tell the Board that the first time it goes to
19 review DISCO's costs, all of the costs flowing through the
20 PPAs have to be deemed to be prudent as if the Board had
21 done it itself essentially, is my argument.

22 So that on a go forward basis regardless of the words for
23 the purposes of the first hearing, and I know I have
24 argued this before unsuccessfully -- and I would also
25 point out a couple of things, yes, you are not bound by

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2 the previous decision of the Board -- if you want to revisit
3 Section 156 again, and I suggest that you do, I think
4 there are a couple of good reasons why you should.
5 One, when the previous Board looked at it wasn't necessary
6 to their decision because that issue wasn't before them.
7 So in that sense it is obiter. Secondly, the applicant
8 and the intervenors were asked to address that issue two
9 days before the conclusion of the hearing, and there was
10 very little time to prepare argument. I'm not crying
11 about that. I'm just putting it as a fact. So that if
12 the Board chooses that it wants to look -- revisit Section
13 156 I think it can do that.

14 But the thrust of my argument isn't whether Section 156
15 lives on or not. The thrust of my argument is as soon as
16 you look at the underling generation costs, as soon as you
17 do that, you basically have to treat the companies as an
18 integrated utility. You have to. It's the only way you
19 can look at those costs. And to do that you have to
20 assume de facto regulatory jurisdiction over GENCO and
21 NuclearCo. You have to bring them in, there has to be
22 witnesses, they have to prove their case. If that's not
23 regulating GENCO and Nuclearco I don't know what is.

24 VICE-CHAIRMAN: I want to come back -- perhaps I didn't
25 express my question very clearly. I understand your

2 argument with respect to being limited and that we cannot
3 become the de facto regulator of GENCO. You have made
4 that point quite clearly.

5 If that's the case does Section 156 make any difference
6 anyway, or in your submission would the same result have
7 occurred whether Section 156 existed or not?

8 MR. MORRISON: I will have to think about that, Mr.

9 Johnston, but if Section 156 wasn't in place when we did
10 the last hearing I probably would have made this argument
11 in the last hearing in any event.

12 VICE-CHAIRMAN: The second question that I have is the other
13 intervenors made reference to Section 172 of the Energy
14 and Utilities Board Act, and I just want your comments on
15 that as to whether that applies to our proceedings under
16 the Electricity Act and whether you have anything in
17 response to their comments.

18 MR. MORRISON: I have looked at section 72. I don't think
19 it adds much to the debate because basically what section
20 72 says is the jurisdiction of the Board under this part
21 may be exercised notwithstanding another statutory
22 provision or a contract. The key point there is the
23 jurisdiction of the Board. You first have to determine
24 what your jurisdiction is, determine whether it's limited
25 by some other contract and so on. So I don't think it

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2 adds much to the debate. If you don't have the jurisdiction
3 Section 72 doesn't offer anything.

4 It's also under Part 3 which deals with public utilities,
5 and I'm not sure that -- I would have to look at it a
6 little bit further -- I'm not sure that it applies to
7 DISCO in any event.

8 VICE-CHAIRMAN: My final point is you made your argument
9 with respect to statutory interpretation and the absurdity
10 issue, and we really got that from both sides today, to
11 the extent that the other intervenors were essentially
12 arguing that if we accepted your premise that it would
13 lead to an absurd interpretation of our obligation to
14 ensure that DISCO's rates are just and reasonable. So the
15 absurdity argument has been sort of presented in both
16 ways. And I'm just wondering whether there is an
17 interpretation that you or anybody else would like to
18 offer that is not -- doesn't render an absurdity in either
19 direction.

20 MR. MORRISON: I can say, Vice-Chairman, that I have
21 grappled with this issue. I thought about it for a long
22 time. And essentially the problem as I see it, and as I
23 ended my argument with, which is the round hole land in
24 the square peg, there is definitely a disconnect between
25 the notion of revenue requirement based on a purchase

2 power agreement costs or -- sorry -- based on underlying
3 generation costs and the statutory regime that is in
4 place. It's certainly not my place to be making
5 recommendations as to statutory changes. But it's my
6 discomfort in what I feel is the impossibility of
7 reconciling that.

8 And again this really is -- and again it's not about
9 generation costs. The problem is we have a structure -- a
10 restructured NB Power and the intervenor is asking you to
11 base DISCO's revenue requirement as if it was an
12 integrated utility. That's how -- that's the dilemma.

13 And I'm sure we can talk about Dreidges and construction
14 statutes until we are blue in our face, and -- but I guess
15 you have to look at what you believe is the fundamental
16 intent and purpose of the Electricity Act. My submission
17 is that, yes, while setting just and reasonable rate forms
18 a part of that Act, the over-arching intent and purpose of
19 the Act is to restructure NB Power and to only regulate
20 DISCO.

21 VICE-CHAIRMAN: Thank you.

22 CHAIRMAN: Any other questions?

23 COMMISSIONER MCLEAN: Thank you, Mr. Chairman. I just want
24 to go back for a second to the purpose and intent of the
25 Electrical Act which you referred to, and the setting up

1 of the companies and the dividing of the assets and the --

2 could you just explain a little bit, who did this and what
3 was it based on? Was NB Power's management and executive
4 involved or was it done by the government, and what did
5 they base all this on and did they really know what they
6 were doing?
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8 MR. MORRISON: Well the last question I can't answer. I can
9 tell you what the evidence in the last proceeding said.
10 The evidence in the last proceeding essentially - and I
11 don't have it in front of me but I will paraphrase it --
12 the government made a determination that NB Power was
13 going to be restructured. In order to do that, assets had
14 to be transferred and a structure had to be put in place.

15 As I understand it, it was done by modelling, it was done
16 by consultants which were hired by the Department of
17 Finance and I believe the Department of Energy, but I
18 could be wrong on that.

19 The intent was to have the costs of the generators
20 recovered over time, not on a dollar for dollar basis,
21 over time, through DISCO. DISCO would be the entity that
22 would be the source of revenue through rates. They were
23 constructed -- the models were constructed such that over
24 time, let's say GENCO -- GENCO and Nuclearco, would earn a
25 commercial return allowing them to go to the capital

2 markets. There would be a debt equity swap at some point in
3 this process, allow the generators and DISCO eventually to
4 go to the capital markets, thereby relieving the
5 provincial treasury of the debt. In other words, they
6 would hold their own debt, thereby increasing or at least
7 stabilizing the provincial government's debt rating. And
8 operate on that basis. My understanding is
9 that NB Power's role in that process was simply to advise
10 those who were creating the models, if there was something
11 that you are doing that is basically telling them what the
12 ramifications of some of their decisions would be.
13 But it is also my understanding that NB Power officials
14 were not intimately involved in designing the financial
15 models and the ultimate structure which resulted. Your
16 last question is beyond me.

17 CHAIRMAN: Anything further from the Board? Thank you.

18 Mr. Morrison. Mr. Theriault, I guess I would invite you
19 to do any rebuttal that you wish to at this time.

20 MR. THERIAULT: Thank you, Mr. Chairman. First of all I
21 guess I wish to deal -- I'm going to try and remember the
22 questions from the Board. With respect to Commissioner
23 McLean's questions, I would like to remind the Board that
24 there was no evidence today as to who drafted these
25 documents. If they were referred to in the last decision,

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I don't think it would be appropriate for the Board to even consider that.

The only evidence today as to that was from witness Kee. And I think it was clear from cross examination that he really didn't have any background on that. And so I would urge the Board to be careful in looking at that. I believe there was discussion from something Mr. Peacock tried to do a few weeks ago with respect to information from the previous hearing and it was disallowed.

With respect to the questions put by Deputy Chair, I would ask you, once the transcript is, look at the absurdity argument. I don't believe I did argue that. And I think if you go back, and once the transcript comes through, without me rearguing what I argued, I think you will find that the progressions I make would not lead to an absurdity. So I would encourage you to do that.

And Mr. Chairman, with respect to your question to Mr. Morrison with respect to the delay in the filing, this is the Applicant's application. This information I have had an opportunity to review previous transcripts. And this is not new to them. They know that this issue was coming up. The PUB made a ruling. So they knew. They should have been prepared. So I would ask the Board not to consider a delay as being a part or parcel of your

2 deliberations.

3 With respect to Mr. Morrison's comments as it related to
4 Mr. Strunk's testimony, again I would ask that the Board,
5 rather than rely on any paraphrasing that may have been
6 done, the transcripts will be available. And I would ask
7 the Board to review I think what Mr. Strunk said. And I
8 think you will find it is very coherent.

9 Again Mr. Morrison in his comments made reference to what
10 do we file. And I think some of the intervenors -- I
11 think Mr. Lawson said, you know, this is a huge task. But
12 it doesn't take away from the statutory obligation of the
13 Board to deal with it. And because it is difficult
14 doesn't mean it shouldn't happen.

15 Now also I think Mr. Morrison referred to the cost
16 allocation in the CARD hearing. Again it was our
17 intention to seek approval of the Board to conduct a CARD
18 hearing. A CARD hearing is a proper and legitimate aspect
19 of a rate case. And I think one should be conducted.

20 Again, Mr. Chairman, we are not seeking to regulate GENCO.

21 If the underlying costs of the PPAs are not prudent and
22 subsequently not just and reasonable, the Board can
23 disallow these costs. This is not -- this is not
24 regulating GENCO. It is regulating DISCO.

25 If that happens, if the Board were to rule at the end

2 of everything coming in that there were no -- that it was
3 not just and reasonable, the rate application, and
4 disallowed which the Board is allowed to do some of it, then
5 that would become a corporate decision for DISCO to make on
6 how to deal with that. It wouldn't be regulating GENCO.

7 They would still have to deal with those costs. But they
8 would have to find some other way to make it up. Similar
9 to -- and again I will point out the Yukon case that I
10 supplied to the Board.

11 That is all I have. Thank you.

12 CHAIRMAN: Thank you, Mr. Theriault. And I guess if there
13 were questions from the Board. Do any of the other
14 intervenors want to make any comment on those questions?
15 All right. Well, the Board will consider the evidence and
16 the arguments that have been put before it today. And we
17 will render a decision as soon as possible.

18 There is another motion, being a motion from J.D. Irving
19 Pulp and Paper Group requesting that the New Brunswick
20 Energy and Utilities Board order that the New Brunswick
21 Distribution and Customer Service Corporation, DISCO,
22 distribute at least quarterly their financial statements.

23 Such statements would be due no later than 30 days after
24 the selected period.

2 We will take a short break. But it seems to me we
3 probably could hear that motion this afternoon.

4 Now Mr. Morrison, are you involved in that? I understand
5 you have a commitment that is somewhat urgent. And I
6 appreciate that.

7 My partner Mr. Keyes was going to argue that motion in any
8 event, Mr. Chairman. So that doesn't interfere with my
9 plans.

10 CHAIRMAN: Okay. Well, Mr. Booker, are you in a position to
11 argue that today?

12 MR. BOOKER: Yes, I am, Mr. Chair.

13 CHAIRMAN: Okay. We will take a brief recess and come back
14 and deal with your motion. Thank you.

15 (Recess - 3:45 p.m. - 4:00 p.m.)

16 CHAIRMAN: Mr. Booker, are you ready to proceed?

17 MR. BOOKER: I am, Mr. Chair.

18 Mr. Chair and Commissioners, on June 4, 2007, JDI
19 submitted a motion that asked for DISCO to prepare and
20 distribute quarterly financial reports. Evidence to
21 justify such a request is as follows:

22 On page 59 of the annual report for the NB Power Group for
23 the year ending March 31st, 2006 there is a discussion on
24 governance. The last section is called Governance
25 Practices and the last paragraph reads as follows:

2 "Since 2004, the corporations have worked to benchmark
3 practices with industry best practice and to position the
4 Boards to be consistent with guidelines set forth by the
5 Toronto Stock Exchange (TSX). These guidelines address
6 key areas of effective corporate practice, including
7 identification of responsibilities for stewards of the
8 Corporations and clear communication of roles and
9 responsibilities between Boards and management."

10 Under securities legislation, TSX listed companies are
11 required to file on the System for Electronic Document
12 Analysis and Retrieval (SECAR) interim financials (balance
13 sheet, income statement, statement of retained earnings
14 and cash flow) together with an interim Management and
15 Discussion Analysis (MD&A) under securities legislation
16 (N151-102). Such filings must be made within 45 days
17 after the end of the interim period.

18 Under the circumstances, realizing that NB Power is not a
19 TSX listed company, but apparently they wish to behave as
20 one, it does not seem unreasonable that DISCO be asked to
21 send out quarterly statements so that everyone knows the
22 financial state of DISCO rather than wait for the next
23 hearing.

24 The Board decision of June 1st 2007 states that there
25 will be a rebate to customers have been overcharged on the

2 interim rate. If we wait until the issuance of NB Power's
3 financial report for the current year, history tells us
4 that it will not be issued until September 2008, long
5 after the end of the 2008 fiscal year and some 15 months
6 after the Board's decision of June 1st 2007.

7 It also a concern to us that the effective changes that
8 take place during the year are not disclosed under the
9 current system. Already, since the Board hearing in May,
10 UPM in Miramichi have announced a nine to 12-month
11 shutdown starting in August of 2007.

12 The evidence in document A-2 shows that the load supplied
13 by GENCO is projected to increase by 325,600 megawatt-
14 hours. This is equivalent to about 37 megawatts on
15 average in 2007 over the load from the previous year. And
16 the fuel component of this increased load is responsible
17 for \$14.5 million of DISCO shortfall, again from evidence
18 in A-2.

19 The decrease in load at UPM will be about 77 megawatts
20 for the last six months of this fiscal year. In other
21 words if there is an increase of 37 megawatts in the first
22 half of DISCO's year, there will be a net load decrease of
23 40 megawatts in the second half of the fiscal year because
24 of the UPM shutdown.

25 In addition the second half of the year is the time of

2 the year when DISCO is under the most pressure to be able
3 to supply the load because of colder weather. So therefore
4 the UPM shutdown should make it easier and cheaper for
5 DISCO to supply the rest of the provincial load.

6 In other words as a result of the UPM shutdown, DISCO will
7 be in a position to benefit from either a lower volume of
8 expensive heavy fuel oil at Coleson Cove, the reduction in
9 the use of combustion turbines or maybe there will be less
10 out-of-province power purchases. Any of these cases will
11 reduce DISCO costs. Overall UPM consumes almost 5 percent
12 of the in-province load. So this shutdown is significant
13 to the sales of DISCO.

14 Mr. Chair, this is said not to point to UPM as a problem
15 but rather to illustrate the dynamic nature of the New
16 Brunswick demand and supply.

17 In summary, without interim results, we will see no
18 financial information from NB Power until well over a year
19 from now. We know that there have been major changes
20 announced that will have a significant effect on the load
21 requirements for DISCO.

22 I propose that it is entirely proper to have DISCO, and if
23 the Board so rules on opening GENCO, also to have GENCO
24 distribute quarterly financial reports. Otherwise
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2 how are we ever to know the actual results versus budget and
3 ultimately whether or not a rebate is justified.

4 Mr. Chair, I have copies of this for the Board. I can
5 give them to the Board Secretary to hand out later.

6 CHAIRMAN: Thank you, Mr. Booker. I guess I'm not entirely
7 certain what you are proposing that the Board would do
8 with these quarterly financial statements. And when are
9 you suggesting the quarters would begin?

10 MR. BOOKER: Mr. Chair, we are looking to really take the
11 DISCO year and dividing into fourths. So actually they
12 begin in March. So just from March until three months
13 later.

14 We would like to see these reports filed, may be not
15 published in a fancy book like this, but at least
16 available, perhaps through the NB Power website, for
17 people to review and examine.

18 CHAIRMAN: Okay. And I guess in your motion you said
19 distribute. So are you suggesting distribute at least to
20 the Intervenors in this process? Is that really what you
21 are asking?

22 MR. BOOKER: Within this process, yes, Mr. Chair. But
23 thinking going forward, I'm just thinking out loud that a
24 website distribution would probably be acceptable as well.

25 CHAIRMAN: Thank you. Any questions from the Board? Thank

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2 you, Mr. Booker. Mr. Lawson?

3 MR. LAWSON: Thank you, Mr. Chairman and Members of the
4 Board. We would be supportive of this application. And I
5 guess see some merit to it, given that there has been an
6 Order of this Board for interim rate increase, which was
7 premised on the set of financial circumstances for the
8 year that were anticipated. It would appear as though a
9 great deal of the year will be completed before this
10 process is done. Some might say even more than the year
11 will be completed before this process is done. And it
12 would seem very appropriate for the Board as part of its
13 oversight of its decision for an interim rate increase to
14 get these statements be able to review them to see whether
15 or not that which was the premise on which the decision
16 for an interim rate increase is still supported. Because
17 as we can see from the UPM matter, we don't know what kind
18 of an impact it will have, but it would appear as though
19 it could have a significant impact in some fashion on NB
20 Power or DISCO. Thank you.

21 CHAIRMAN: Thank you, Mr. Lawson. Any questions? Mr.
22 Baird?

23 MR. BAIRD: Thank you, Mr. Chairman, Members of the Board.
24 We fully support the application of Irving Paper on this.
25 And would add only that in our current following of the

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2 changes in fuel prices, as evidenced by the various industry
3 indices, and by StatsCan, coupled with the change in the
4 Canadian dollar, the financial situation of DISCO is going
5 to change dramatically as has been indicated and that
6 publishing of these statements would certainly be an
7 indication to all of us as to what was likely to happen
8 long term.

9 So for that reason we fully support that and would agree
10 with Mr. Booker that a website with the information on it
11 and a distribution at least to the intervenors would be
12 more than adequate.

13 CHAIRMAN: Thank you, Mr. Baird. Any questions for Mr.
14 Baird? Mr. Zed?

15 MR. ZED: We take no position on this motion.

16 CHAIRMAN: Thank you. Mr. Peacock?

17 MR. PEACOCK: Mr. Chair, as you know in this corner, we are
18 big fans of regulatory scrutiny. So we certainly support
19 the proposition.

20 CHAIRMAN: Thank you. Mr. Theriault?

21 MR. THERIAULT: Thank you, Mr. Chair. Certainly, we would
22 support the motion brought for the reasons stated by Mr.
23 Booker. But also I think it would be informative for the
24 Board to have that on an ongoing basis, and it would lead
25 to a more open and transparent process. Thank you.

2 CHAIRMAN: Mr. Keyes?

3 MR. KEYES: Thank you, Mr. Chairman. You read into the
4 record the motion, so I won't do that. But as part of the
5 justification for its motion, J.D. Irving indicates and I
6 quote on the face of the document, "that these financial
7 statements would enable the Board to determine whether
8 rebates should be issued."

9 It is DISCO's submission based on the nature of the
10 present application before the Board, that there is no
11 requirement for actual financial statements to be filed.
12 Furthermore, it is our position that the EUB lacks
13 jurisdiction to order DISCO to file quarterly financial
14 statements. Even if it did have such jurisdiction, we
15 submit, that the production of DISCO's financial
16 statements would be of no assistance whatsoever to the
17 Board in determining whether rebates should be issued in
18 the present case.

19 Mr. Chairman and Members of the Board, DISCO's application
20 for approval of changes in the charges, rates and tolls
21 that it charges for its services was made pursuant to
22 Section 101 of the Electricity Act as amended. Section
23 101(3) sets out the jurisdiction of the Board when
24 considering an application made under this section. It
25 states, "The Board shall, when considering an application

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2 under this section, base its order or decision respecting the
3 charges, rates and tolls to be charged by the Distribution
4 Corporation on all of the.." and this is the important
5 wording, "..projected revenue requirements for the
6 provisions of the services referred to in Section 97."
7 Nowhere does Section 101 require or permit the Board to
8 deal with actual revenue requirements as may be reflected
9 in DISCO's financial statements. The key word in this
10 section is "projected", which in our submission does not
11 confer any authority on the Board to base its decision in
12 approving or denying a rate increase on DISCO's actual or
13 current financial position nor does it require DISCO to
14 file its financial statements. The interim rate was based
15 on projected costs and expenses, not actual costs and
16 expenses. In support of these projected costs and
17 expenses DISCO will file its evidence in support of its
18 application that the Board will then consider in the full
19 hearing on the matter.

20 It is the role of the Board to approve just and reasonable
21 rates as we know. Section 101(5) states that the Board
22 shall, (a) approve the charges, rates and tolls, if
23 satisfied that they are just and reasonable or, if not so
24 satisfied, fix such other charges, rates or tolls as it
25 finds to be just and reasonable.

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The Supreme Court of Canada in the Bell decision, which has been referred in previous hearings and CRTC case noted that, "it is trite to say that in fixing fair and reasonable tolls the regulator must take into consideration the level of revenue needed by the respondent."

In DISCO's revenue requirements are defined by the Act as follows: "revenue requirements" means the annual amount of revenue required to cover projected operation, maintenance and administrative expenses, amortization expenses, taxes and payments in lieu of taxes, interest and other financing expenses and a reasonable return on equity."

The Board in its June 1, 2007 decision granting DISCO an interim rate increase of 9.6 percent ordered DISCO to file a proposal with the Board that will address the issue of how to provide rebates to persons who are customers at any time during the period the interim rates are in effect, but are not customers at the time interim rates ceased to be in effect. DISCO's rebate proposal has now been filed with the Board.

Any rebate which may be ordered would only be required if it is determined that DISCO's charges, rates and tolls are found not to be just and reasonable. At that time the

2 mechanism for providing the rebate will come into play based
3 on the difference between the interim rate and such rate
4 as the Board determines is just and reasonable. The
5 calculation of any rebate will not rely on the financial
6 position of DISCO as may be reflected in its financial
7 statements.

8 The interim rate approved by the Board forms part of the
9 final rate mandated by the Board. The central obligation
10 of the Board is to provide just and reasonable rates for
11 DISCO. The Board's assessment of such just and reasonable
12 rates must be based on DISCO's projected revenue
13 requirements. DISCO's actual financial position at any
14 time they are prepared is irrelevant. As I previously
15 stated Section 101 of the Act states based on the charges
16 of the projected revenue requirements. The key word as I
17 said is "projected". Past operating earnings have no
18 bearing whatsoever on the current application before the
19 Board. In fact filing quarterly financial statements as
20 requested in the motion will only reflect DISCO's position
21 at a particular point in time and will be no benefit to
22 the Board in calculating a rebate.

23 As I know the Board is aware from previous hearings,
24 DISCO's financial position is subject to significant
25 variability in its operating earnings due to any number of

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2 issues which may be in play at any given time. Accordingly,
3 large components of DISCO's operating earnings are outside
4 management's control and can result in significant swings
5 month to month and year to year in its results. This can
6 and does have a significant impact on actual to budgeted
7 financial results. These variable components include
8 hydro generation, export margins, exchange rates and
9 weather to name a few. Accordingly, it is our submission
10 that the variable and uncertain information contained in
11 any unaudited quarterly financial statements will be of
12 absolutely no benefit to the Board in calculating a
13 rebate.

14 The application before the Board is based on prospective
15 rate making. DISCO is not attempting to recover losses
16 suffered in the period preceding the date of the
17 application.

18 If the requested rate increase was based on DISCO's actual
19 revenue requirements as contained in its financial
20 statements it would result in retroactive rate making. It
21 would be the same as if there was a loss in 06/07 and you
22 were to take that loss and increase rates based on the
23 losses incurred in the previous year. The principle of
24 retroactivity, as the Board is aware, states that a
25 regulator cannot consider losses or gains from a year that

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2 pre-dates the test year.

3 In its written submission J.D. Irving also quotes from
4 page 59 of the NB Power group of companies March 31, 2006
5 annual report where it states under the governance
6 practices section that "the corporations have worked to
7 benchmark practices with industry best practices and to
8 position the Boards to be consistent with the guidelines
9 set forth on the Toronto Stock Exchange. All TSX
10 companies must send out interim financial statements under
11 securities legislation, they argue that DISCO should also
12 be required to do the same.

13 It is our submission that while DISCO's governance
14 practices call for it to be "consistent with" the TSX
15 guidelines, they are not required to comply with them.
16 The bottom line in our submission is it would be far too
17 costly to DISCO to produce interim financial reports to
18 the TSX standards. It is our position that DISCO is
19 consistent with the TSX guidelines as it issues annual
20 financial statements that are reviewed and vetted by a
21 committee of the Legislature each year.

22 In conclusion Mr. Chairman, J.D. Irving argues that the
23 production of DISCO's quarterly financial statements would
24 enable the Board to determine whether a rebate should be
25 issued. The interim rate of 9.6 percent was

2 based on the projected revenue of DISCO. If after considering
3 all of the evidence, the Board concludes that the 9.6 rate
4 has not been justified and orders a lower rate, any rebate
5 will be based strictly on the difference between the 9.6
6 percent rate collected since June 8th 2007 and the new
7 rate as ordered by the Board in its final decision.

8 Simply put, the difference between those numbers is the
9 amount that will be the subject of the rebate to the
10 customers of the various classes. Financial statements
11 will not assist the Board in calculating the amount of the
12 rebate.

13 For all of these reasons, it is DISCO's request that the
14 motion brought by J.D. Irving be dismissed. Thank you.

15 CHAIRMAN: Thank you, Mr. Keyes. Any questions from the
16 Board? Thank you. Mr. Booker, do you have any rebuttal?

17 MR. BOOKER: Very brief, very short rebuttal, Mr. Chair. I
18 guess other Intervenors indicated that such financial
19 statements would indeed help the Board reach further
20 decisions about DISCO dealing with the dynamic financial
21 situation facing the New Brunswick markets today. As well
22 as with regard to Section 101(3), we agree that it does
23 address projected costs, but we believe that the Board
24 does have the ability to apply terms and conditions as a

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result of its order on the interim increase.

As well with regard to the actual preparation of the statements, we know that it is not impossible and not an undue administrative burden to actually produce quarterly financial statements, as we do it within our group of companies. Just because it is a challenge, does not mean that it should not be done.

I guess, Mr. Chairman, in closing to quote some of the language from earlier today, to us it seems an absurdity to go forward when we know that there is a major structural change in the market such as the loss of a major load, which will greatly impact revenue requirements.

Thank you, Mr. Chair.

CHAIRMAN: Thank you, Mr. Booker. We will on this matter as well endeavour to I guess put out a decision just as soon as possible. Is there anything else at this Motions Day that any party wishes to bring up? Then we will stand adjourned. Thank you.

(Adjourned)

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

Reporter