

1 (9:30 a.m.)

2 MR. NOSEWORTHY, CHAIRMAN: Good morning,  
3 everybody. I'd like to welcome everybody here to what  
4 is referred to, I guess, as motions day. My name, once  
5 again, is Bob Noseworthy. I'm Chair and CEO of the  
6 Public Utilities Board. As I indicated previously, for  
7 purposes of this hearing I'm chairing the panel. It is the  
8 same panel that would have sat at the pre-hearing  
9 conference, and as I indicated then, will be the panel,  
10 hopefully, that will sit for the duration of the hearing.  
11 To my far left is Darlene Whalen, who is Vice-chair of  
12 the Board. To my immediate right is Fred Saunders,  
13 who is a Commissioner with the Board. To my far right  
14 is Don Powell, a Commissioner with the Board. Legal  
15 counsel for the Hydro hearing is Mark Kennedy. And  
16 Cheryl Blundon is the secretary to the Board and  
17 secretary for this panel. I won't ask you to introduce  
18 yourselves again. I think the parties look familiar. I  
19 understand that there's no representative ... and will  
20 probably look more familiar before this is all over, I'm  
21 sure. There's no representative here from, at least at  
22 this point in time, from Labrador City this morning, and  
23 I understand from the Town of Happy Valley-Goose  
24 Bay. Whether they are delayed in arriving or they're  
25 not coming, I don't know if we know for sure at this  
26 point in time. And ...

27 MR. BROWNE, Q.C.: Mr. Chairman, I spoke to Mr.  
28 Hearn earlier this morning and he hadn't intended to  
29 attend today.

30 MR. NOSEWORTHY, CHAIRMAN: He hadn't?

31 MR. BROWNE, Q.C.: He had not.

32 MR. NOSEWORTHY, CHAIRMAN: Okay. Thank you,  
33 very much, Mr. Browne. And I understand that Joe  
34 Hutchings is not with us, will not be attending today.

35 MS. HENLEY ANDREWS: Mr. Chairman, no. I'm here  
36 on behalf of both of us this morning.

37 MR. NOSEWORTHY, CHAIRMAN: Okay. Thank you,  
38 very much. Just one housekeeping item. And indeed,  
39 we will sit today from 9:30 until 12:30 and from 2:00 to  
40 4:30, if necessary, in the p.m. And we will try and have  
41 a 15 minute break or so around 10:45 and 3:15, if  
42 necessary, if that's acceptable to everybody. I don't  
43 have any opening statement this morning, as such. I'll  
44 get right to the agenda.

45 There has been an agenda which, I  
46 understand, should have been distributed, in any  
47 event. Does everybody have that agenda? Okay. So  
48 we'll deal with the issues that are noted on the agenda  
49 in the order, indeed, that they're outlined. And for the  
50 benefit, perhaps, of those who do not have the agenda,  
51 I'll just review it. The first item we'll try and deal with  
52 this morning is any procedural order clarifications, and  
53 there are two, that I'm aware of, the E filing directions  
54 that were contained in order PU-7 of 2000, 2001 ... or  
55 2001, excuse me. The facsimiles, there's an issue  
56 surrounding that. We will also get an update from the  
57 legal counsel concerning the PUB E filing server and  
58 the web site, which is certainly germane to 1A, which is  
59 the E filing directions. We will also briefly have an  
60 opportunity to outline the set-up for the hearing room  
61 and we'll briefly talk about the itinerary for outside St.  
62 John's. The fourth item is the primary reason, I guess,  
63 for why we're here today. We have two motions, the  
64 first one being from the consumer advocate concerning  
65 the removal of Dr. Morin as the PUB expert witness,  
66 and the second one from the industrial customers  
67 concerning their entitlement for hearing costs. There's  
68 nothing further, I'll get to the first order of business.

69 The E filing component, if you will, of the  
70 procedural order had created a little bit of concern, I  
71 think, among the parties. Certainly that wasn't  
72 unanticipated. I think the procedural order itself  
73 indicated our desire, and I think I heard from the parties  
74 on this, to utilize E filing for the purposes of this  
75 hearing, certainly to facilitate the exchange of  
76 information, to try and provide a means and a  
77 mechanism whereby it can be dealt with in perhaps a  
78 more reasonable fashion for those who wish, as  
79 opposed to paper versions and paper copies. I think,  
80 from the point of view of the Board, that we wanted to  
81 at least make an effort to try and accommodate these  
82 requests to the extent possible and to the extent that  
83 technology would allow, recognizing, of course, that  
84 there is a whole host of background material and  
85 information that would relate to this hearing, which  
86 certainly wouldn't be in a form for electronic filing, and  
87 indeed, it would be unreasonable to expect that that  
88 would be put in that form for purposes of this hearing.  
89 So certainly, one of the issues surrounding electronic  
90 filing was what, indeed, is to be filed electronically,  
91 what information and reports and documentation,  
92 recognizing full well that as the procedural order points  
93 out, that the paper copies are the original and official  
94 copies, for purposes of the hearing.

1 MR. BROWNE, Q.C.: Mr. Chairman, we're having  
2 difficulty hearing.

3 MR. NOSEWORTHY, CHAIRMAN: I apologize. I'll  
4 lean forward and speak up. Sorry.

5 MR. BROWNE, Q.C.: Thank you, Mr. Chairman.

6 MR. NOSEWORTHY, CHAIRMAN: So the first issue  
7 surrounds the matter of what information, indeed, we  
8 would require or encourage to be filed electronically.  
9 The second item surrounds the preparedness, I  
10 suppose, of the Public Utilities Board, in terms of being  
11 able to receive this information and put it on our web  
12 site, which we had indicated we would make every  
13 effort to do in our procedural order. And I'll ask Mr.  
14 Kennedy to address that in a moment. And I think that  
15 that's the extent of the issues that surrounded the  
16 electronic filing.

17 With regard to first item. There has been a  
18 letter, which was circulated to all the parties, which  
19 made an effort to identify what should be filed by  
20 electronic filing, what information and, indeed, what  
21 information would not be required. And that letter, I  
22 think, went out to all the parties on the 13th of July, and  
23 would have identified in particular the exceptions,  
24 covering letters or correspondence, background reports  
25 and Board orders or historical documentation prepared  
26 previous to this hearing and case law filed in support of  
27 motions. So that information would have gone out.  
28 And certainly, there's no expectation ... clearly this is  
29 voluminous information, I would suggest, that is in  
30 only a paper copy at this point in time and it's  
31 unreasonable to expect, if you will, that that information  
32 would be filed electronically. All other information we  
33 would expect would be. I will entertain some  
34 discussion at the end of Item 1 on the agenda on this  
35 matter and the facsimile issue. So certainly, we'll have  
36 a chance to discuss that further. It may be appropriate,  
37 actually, to ask Mr. Kennedy to give us an update  
38 which relates to Item 2 on the agenda, because I think  
39 it is a matter which is relevant to this electronic filing  
40 discussion, as well. Mr. Kennedy?

41 MR. KENNEDY: Thank you, Mr. Chairperson. There's,  
42 in the process, arrangements being made for the  
43 hosting of the web site file server. There were  
44 (inaudible) issues for the building here, so it  
45 necessitated having it hosted off site to ensure that  
46 there would be relatively unimpeded access by the  
47 public and the parties to the documents that are on the

48 file server. And it looks like that's about one or two  
49 weeks away from being live. And I think one to two  
50 weeks, so don't hold our feet to the flames, but we are  
51 working diligently towards having that go live as soon  
52 as we can. In the meantime, I can confirm that most of  
53 the parties have been filing electronic versions of the  
54 documents. It might not necessarily be the PDF  
55 versions yet, because they're waiting on obtaining  
56 Adobe writer licence, and in the meantime they're filing  
57 their documents in whatever format they're using  
58 locally, which may be Wordperfect. I think that it may  
59 make sense for them to be converted to PDF's at the  
60 time, and then refiled with the Board so that the Board  
61 staff are not in the position of converting to PDF so  
62 that there's no issue there. But I think that the IT  
63 people of each of the parties or secretaries can deal with  
64 the IT person for the Public Utilities Board itself in  
65 making arrangements for that, because I think that's  
66 something that can take place at that level. And that's  
67 about it, Mr. Chairperson.

68 MR. NOSEWORTHY, CHAIRMAN: Thank you, very  
69 much. The other commitment that we did make in the  
70 correspondence that we sent out is to entertain a  
71 discussion on this, which I'll do in a moment, on the  
72 electronic filing, if there are any concerns or additional  
73 points that people would like to raise. The second item  
74 which is on the agenda relates to a fairly simply  
75 straight-forward issue, and it relates to the matter of a  
76 facsimile filing, which is certainly acceptable under the  
77 procedural order. There has been an issue which has  
78 been raised regarding the number of copies. Clearly it  
79 would be inappropriate, I think, to expect that 17 copies  
80 be filed via facsimile which would conform with the  
81 requirements in terms of the order for distribution. So  
82 I think for purposes of accommodating ... and we will  
83 certainly update the procedural order with respect to  
84 this, and perhaps other items that will come up from  
85 time-to-time. But where a document has been filed by  
86 facsimile, the original of the document, copies to the  
87 Board and copies to the party identified in the  
88 distribution list must be received by 2 p.m. on the next  
89 business day. So I think that that's a ... where we would  
90 have a facsimile copy of information which would be  
91 filed, indeed, the expectation would be that the copies  
92 would be distributed to the parties by 2 p.m. on the next  
93 business day. That's another item if somebody would  
94 wish to comment on that, certainly we'd entertain any  
95 discussion on that particular item, as well. That  
96 concludes my comments, in any event, on Items 1 and  
97 2 and Mr. Kennedy's remarks regarding the E filing  
98 server. And I would now entertain and seek comments,

1 indeed, from each of the parties on any or all of these  
2 items. And I'd first go to the applicant, Hydro.

3 MS. GREENE, Q.C.: With respect to the E filing, it will  
4 be a learning experience for us all, and we have already  
5 encountered some problems. So hopefully this morning  
6 the clarification that has been provided will be helpful.  
7 With respect to what can be filed electronically, we do  
8 agree that we should not be required to provide any  
9 reports that have not been originated for this hearing,  
10 such as reports from previous Board hearings or reports  
11 that have been prepared by third parties, such ...

12 MR. BROWNE, Q.C.: Excuse me, Mr. Chairman, but we  
13 can't hear. I don't think it's Ms. Greene's fault.

14 MS. HENLEY ANDREWS: I can't either, no.

15 MR. NOSEWORTHY, CHAIRMAN: Is there any way  
16 we can turn up the volume on the speaker system,  
17 please?

18 THE CLERK: From my end here, like I just have my  
19 equipment, like I hear it fine. But in regard to the  
20 equipment here, I'm not really familiar with it, at all.

21 MR. NOSEWORTHY, CHAIRMAN: Okay. There  
22 seems to be a little bit more volume now, or is that ...

23 MS. HENLEY ANDREWS: Yes, there is.

24 MR. NOSEWORTHY, CHAIRMAN: Is that okay? Can  
25 people in the back hear now, as well? I apologize once  
26 again. Continue, please, Ms. Greene.

27 MS. GREENE, Q.C.: Just to start again. I had said that  
28 the electronic filing process will be a learning  
29 experience for all the parties as well as for the Board,  
30 and I am sure that there will be other issues that arise as  
31 we go forward with respect to it. We agree that with  
32 the letter of clarification that has been provided by the  
33 Board ... we had already raised the issue of the  
34 requirement to file electronically reports that were  
35 prepared by third parties that we did not have access  
36 to, such as Board reports, such as the report that was  
37 prepared by Quetta, etcetera. So we believe that the  
38 clarification will be helpful to the parties as we proceed.  
39

40 I would like to mention that we have provided  
41 discs to two, of the application and pre-filed evidence  
42 to two of the parties who have asked for it. It's a CD

43 where the application and the pre-filed evidence has  
44 been, is on the CD. And if any of the other parties  
45 would like a copy we can provide that, as well. One  
46 copy was also provided to the Board.

47 In the interim until the server is established, I  
48 would request that the parties with respect to  
49 information requests, provide them to us electronically.  
50 We have found it to be very helpful. Newfoundland  
51 Power provided us with an electronic copy of their  
52 information request and the industrial customers did for  
53 their first round of information request, not the ones  
54 that were received late yesterday, but the first ones.  
55 And that will be helpful so that we will not have to  
56 retype all of the questions. So if the other parties will  
57 be able to provide to us the information requests in  
58 electronic format, as well as hard copy, it would be very  
59 helpful to the process of getting the answers back.  
60 Those are my comments with respect to the electronic  
61 filing.

62 MR. NOSEWORTHY, CHAIRMAN: Thank you.  
63 Newfoundland Power, please?

64 MS. BUTLER, Q.C.: Mr. Chairman, Newfoundland  
65 Power has no comments or problems with the electronic  
66 filing so far. We did have a question in relation to the  
67 issue of facsimiles to the Board. Do you want us to  
68 address that now or wait?

69 MR. NOSEWORTHY, CHAIRMAN: No, now please.

70 MS. BUTLER, Q.C.: When, in fact, a document is  
71 forwarded to the Board by facsimile we have been in  
72 the practice of forwarding it by facsimile to the other  
73 parties.

74 MR. NOSEWORTHY, CHAIRMAN: Yes.

75 MS. BUTLER, Q.C.: And my question is, does a hard  
76 copy have to follow to the other parties or is facsimile  
77 to the other parties satisfactory?

78 MR. NOSEWORTHY, CHAIRMAN: I ask the secretary  
79 to ... or the legal counsel to comment on that.

80 MR. KENNEDY: I imagine, Mr. Chairperson, that in the  
81 interests of saving trees that when unless counsel  
82 themselves want a hard copy followed up from a fax  
83 then the fax might be an appropriate way for counsel to  
84 deal with counsel. It's a mechanism that counsel all  
85 know and trust to deal with each other by fax machine.

1 So, in those circumstances I think that the Board might  
2 be able to work with the parties to be able to do it that  
3 way.

4 MR. NOSEWORTHY, CHAIRMAN: That would be  
5 fine, as far as we're concerned. I think the point is that  
6 we would require the copies by the next business day,  
7 and I think that requirement can be met. Industrial  
8 customers?

9 MS. HENLEY ANDREWS: Mr. Chairman, a couple of  
10 things. One is that my understanding from my  
11 secretary yesterday was that there were discs going  
12 with the copies to each of the other parties, and if one  
13 didn't reach Hydro then it will today. I certainly saw  
14 them in the envelopes yesterday when the matters were  
15 going out.

16 The second thing is with respect to the PDF  
17 format. We don't have an IT department in our office or  
18 an IT person, per se, in our office. So while we are  
19 arranging to get an extra licence for Adobe Acrobat  
20 writer, we all had a Dobe Acrobat reader but not the  
21 writer there are some learning curve issues, not only for  
22 me, which is minor, but also for our staff who are  
23 expected to use it almost instantaneously. One of the  
24 challenges ... and that's something we'll deal with but  
25 people are going to have to bear with us, it may take us  
26 a little while.

27 The other thing is that with respect to the 2  
28 p.m. deadline for filing the documents, when we  
29 discussed the various deadlines and the changes in the  
30 timing for information requests and experts' reports and  
31 those types of things, in most cases there was only a  
32 day or maybe two days grace that was sort of  
33 negotiated to some of the original filing deadlines, but  
34 at that point there was no discussion at all about the  
35 filing being at 2:00 rather than at 4:00. And it might not  
36 sound like a big difference but when I'm dealing with  
37 my expert in Winnipeg, who's got a two and a half hour  
38 time difference and the 2:00 filing you might as well say  
39 is 12:30, from a practical point-of-view then that extra  
40 day that's been added is effectively lost in the process.  
41 And that's reflected in the fact that the information  
42 requests that we filed yesterday that wasn't adequate  
43 time to really proof them properly because the time  
44 deadlines were so tight for getting the stuff from our  
45 experts in the first place that actually if I'd had the extra  
46 couple of hours it would have made a big difference.  
47 And I wondered why 2:00 was the close of business  
48 effectively for the filing of the documents?

49 MR. NOSEWORTHY, CHAIRMAN: Well, I think it  
50 allowed, in fairness, with the copies that would be  
51 coming in to the Board office here, it would allow us to  
52 deal with them on the next business day as well as  
53 opposed to receiving them at 4:00 or 4:30 in the  
54 afternoon at our close of business. It would give us an  
55 opportunity during that next business day to deal with  
56 the documentation, essentially.

57 MS. HENLEY ANDREWS: Well, even three would be  
58 an improvement, actually.

59 MR. NOSEWORTHY, CHAIRMAN: Okay, point taken.

60 MS. HENLEY ANDREWS: Those were all my  
61 comments.

62 MR. NOSEWORTHY, CHAIRMAN: Okay. Thank you.  
63 Consumer Advocate, please?

64 MR. BROWNE, Q.C.: Yes, Mr. Chairman. The issue of  
65 facsimile. I'm uncertain of what has been proposed  
66 now, but let's be clear about it. It's my understanding  
67 what had been proposed is that we can serve the other  
68 parties by facsimile, which is within the Rules or the  
69 Regulations as provided by the Lieutenant Governor in  
70 Council, and once we do that we're not required to file  
71 17 copies with the Board?

72 MR. NOSEWORTHY, CHAIRMAN: No, no. The point  
73 is that the expectation would be that, indeed, the copies  
74 would be required, consistent with the procedural  
75 guidelines that have been outlined, but those original  
76 copies, the original of the document and the copies  
77 would have to be filed and followed up to that facsimile  
78 by 2:00 on the next business day, in accordance with  
79 the distribution lists.

80 *(10:00 a.m.)*

81 MR. BROWNE, Q.C.: And, Mr. Chairperson, you made  
82 reference to 17 copies. And indeed, 17 copies is in the  
83 circular that's been provided as a requirement. Why are  
84 we into 17 copies, can someone explain that to me? I  
85 can count four people here, I can count Mr. Kennedy,  
86 I can count Ms. Blundon, and maybe Board staff, but I  
87 understand from previous hearings it was ten copies.  
88 Seventeen seems like an awful lot of copies going  
89 around. I just wondered ... you know, certainly we're  
90 not being ... are we being environmentally conscious  
91 here or are we providing copies for the sake of  
92 providing them?

1 MR. KENNEDY: Mr. Chairperson, if I may?

2 MR. NOSEWORTHY, CHAIRMAN: Sure.

3 MR. KENNEDY: Perhaps what I can do is ask the  
4 Board secretary to provide to me a list of where those  
5 17 copies go and then I can provide it to counsel so  
6 they can see why we need 17 copies of the  
7 documentation.

8 MR. NOSEWORTHY, CHAIRMAN: Is that  
9 reasonable? I know the requirement has been for all  
10 documentation coming forward to the Board that I've  
11 seen, 15 copies, I think, this is an expanded number for  
12 the purposes of this hearing. But we'll certainly revisit  
13 that issue and if there's fewer copies that we can  
14 manage with we'll certainly do that.

15 MR. BROWNE, Q.C.: See, your Rules of Procedure  
16 under 10.1 under the Regulations provided by the  
17 Lieutenant Governor in Council provides that "An  
18 intervenor or the intervenor's agent shall file copies of  
19 the intervenor's submission with the Board." And then,  
20 "Upon the filing of an intervenor's submission the  
21 Board shall supply copies of the submissions to other  
22 parties." That's what the Lieutenant Governor in  
23 Council directed. And I think I see some inconsistency  
24 here between what you were directed by the Lieutenant  
25 Governor in Council in the Regulations and what's  
26 being done here.

27 MR. NOSEWORTHY, CHAIRMAN: I think, indeed, we  
28 had indicated that the last time that certainly the Rules  
29 and Regulations are outlined and, to some degree, have  
30 been followed, I think, in relation to previous hearings.  
31 We would hope to feel that there's refinements and  
32 improvements that would be ... could be carried out  
33 along the way, and indeed, the Rules and Regulations  
34 provide for a condition that would allow for procedural  
35 changes to be made from time-to-time. And I guess  
36 that's what we're doing here, hopefully, with a view to  
37 improving the process. I believe the pre-hearing  
38 conference and things that we've engaged in, the  
39 meetings that we've held with counsel, will hopefully  
40 facilitate and get, if you will, the ducks in a row prior to  
41 the start of the hearing on September the 24th so that  
42 the procedural practices and guidelines will, indeed, be  
43 outlined and things can flow smoothly. So I think that's  
44 the effort that we're trying to do. If it conflicts to some  
45 degree with the letter, if you will, of the Rules and  
46 Regulations that are contained, there is a provision for  
47 some flexibility there, and that's what we're employing.

48 MR. BROWNE, Q.C.: This Rule 14.1 says that "a copy  
49 of any information requests directed to a party under  
50 Subsection 1 shall be filed with the clerk of the Board  
51 and served on all parties to the proceeding." There  
52 seems to be some consistency here in what the  
53 Lieutenant Governor directed in Council that the Board  
54 be master of its own procedure, alright, but the Board  
55 be also the distribution wing for the parties in getting  
56 materials. You've effectively countered that and  
57 changed that by having the parties take over that  
58 function, which was normally a Board function.

59 MR. KENNEDY: Mr. Chairperson, if I may just help  
60 here. Section 3 of the Rules for the Board indicate that  
61 "Unless otherwise directed by the Board, these  
62 regulations apply to proceedings arising from an  
63 application to the Board for an order," which would be  
64 the case here. And then two is, "In any application or  
65 other proceedings the Board may dispense with, vary  
66 or supplement any provisions of these regulations on  
67 those terms as the Board considers necessary." So I  
68 suggest that the Board clearly, by virtue of Rule No. 3,  
69 has the ability to, as it says, dispense with, vary or  
70 supplement any provisions of these regulations. Thank  
71 you, Mr. Chairperson.

72 MR. NOSEWORTHY, CHAIRMAN: Thank you.

73 MR. BROWNE, Q.C.: For the record, I don't agree with  
74 that at all. I think the Lieutenant Governor in Council  
75 was directed by the Legislature, under Rule ... under the  
76 enactment, under Section 20 of the Public Utilities Act,  
77 this all comes from the Legislature, "To make rules and  
78 regulations for the Board," that's what Section 20 says,  
79 effectively. And what the Lieutenant Governor in  
80 Council has done, it hasn't followed the legislative  
81 directive at all if we're to look at 2. It says the Board  
82 can make its own rules under 2. The Lieutenant  
83 Governor in Council has, in fact, re-delegated that to  
84 the Board. Now, if that was to be the case I would think  
85 the Lieutenant Governor in Council would have to go  
86 back to the Legislature, I think ... there's a lot of  
87 seasoned lawyers here. I think that that would be  
88 consistent with anything a court would tell us on that.  
89 So I believe you have limited capacity, despite anything  
90 what the Lieutenant Governor in Council attempted to  
91 do in Section 3(2), and I think you should revisit that.  
92 There's no certainty for the parties in any proceeding  
93 where we can get a fax one day changing the rules of  
94 procedure. The rules of procedure are codified. And I  
95 have great difficulty with the ability of an administrative  
96 tribunal changing the rules on the fly, and this is what

1 we're seeing here. So I would suggest the matter  
2 should be revisited. I think the parties have a right to  
3 rely upon the rules given by the Lieutenant Governor in  
4 Council. And that variation section, I think, is ultra  
5 vires any direction the Legislature gave the Lieutenant  
6 Governor in Council. That's our position on that.

7 In reference to facsimile transmissions and the  
8 2:00 deadline, I agree a 2:00 deadline is too early in the  
9 day for us to do business. We should have ... we have  
10 experts retained from outside our time zones, and that  
11 creates an added burden. And I echo the comments of  
12 Ms. Janet Henley Andrews in reference to that. I notice  
13 the Board seems to have a lot of difficulty itself. We  
14 got a facsimile transmission at 6:45 or 6:48 p.m. in  
15 reference to the Board's experts. 6:48 last night, that's  
16 when we got that, despite the fact I see that the Board  
17 seemed to have it at, what does it say, seemed to have  
18 it earlier. What does it say? "Received by hand, Board  
19 of Commissioners, July 17th," it says on it. I assume it  
20 wasn't received by hand 6:45 p.m. Then we got another  
21 transmission today at 8:21 a.m. in reference to ... so.

22 MR. NOSEWORTHY, CHAIRMAN: Certainly there are  
23 standards that, you know, we're trying to apply here in  
24 terms of the procedures. In particular, I think there were  
25 some problems with machines, copy machines and what  
26 have you yesterday. But I think, certainly, as I  
27 indicated to Ms. Andrews, it's a point taken in respect  
28 to the timing, but I think standards in times have to  
29 apply. There may be exceptions to that if indeed there  
30 is extenuating circumstances. But I don't think we  
31 should try and cover that off in laying down rules and  
32 procedures. But certainly, as I indicated, we'd take that  
33 under advisement, the comments on the time and we'd  
34 consider if an adjustment in that would be appropriate.

35 MR. BROWNE, Q.C.: In reference to the electronic  
36 filing, we've filed nothing electronically to date. We're  
37 uncertain concerning this particular directive. It's on an  
38 experimental basis, it's admittedly so. And it seems it  
39 may require firms to incur expenditures to be able to do  
40 this. You know, I haven't had an opportunity, really, to  
41 discuss this with the people who have our IT contract.  
42 But certainly, it would be onerous if the Board is  
43 attempting to require firms to go out and expend money  
44 for an electronic filing. If all the Board is saying, put  
45 your information requests in an e-mail and file it as an  
46 attachment, that's fine, I think anyone can do that, that's  
47 basic. But the conversion process which the Board is  
48 requiring prior to filing, if that is, indeed, what's being  
49 required here, that's of concern. And also, I note that

50 references are made to cutting and pasting. Now, what  
51 is going to be cut and what is going to be pasted in  
52 reference to anything that we would file, we would  
53 assume the integrity of our documents, if they be put  
54 on a server, that no one will take a heading and replace  
55 it with their own heading, that the document will remain  
56 whole and complete. So, plus, we're in the process of  
57 preparing our case. We have been successful in  
58 retaining experts, we're dealing with them, we're under  
59 a tight time frame. And to be honest with you, it's not  
60 a priority with us. Our priority is to prepare our case.  
61 If we can assist with electronic filing that would be an  
62 add on, but it's not a priority with us. Thank you, Mr.  
63 Chairman.

64 MR. NOSEWORTHY, CHAIRMAN: Thank you.  
65 Counsel, are there any comments that you would ...

66 MR. KENNEDY: Just on the last comment to the  
67 Consumer Advocate, Mr. Chairperson, and perhaps it  
68 might provide some assistance to counsel for the  
69 Industrial Customers as well. What's required in order  
70 to produce a document in what's known as the PDF  
71 format, which is the proprietary format of Adobe sold  
72 under the licence of the Adobe Acrobat is to buy the  
73 Adobe writers. The Adobe reader is free, that's  
74 probably why you have that one already. The Adobe  
75 Writer you have to buy. The Adobe Writer licence is  
76 about \$500 Canadian. The conversion of a Word  
77 document or Wordperfect document or any document,  
78 for that matter, into a PDF document is as simple as  
79 opening up the document inside the Adobe Writer,  
80 literally the same as you would open up a document in  
81 Microsoft Word or in Corel Wordperfect. In that regard  
82 it is all but, to use the term used in the business, idiot  
83 proof, and that PDF documents can be generated  
84 cheaply and easily and then transmitted equally easily  
85 by file attachments, as could be a Word document or a  
86 Wordperfect document. So I think that once the  
87 Consumer Advocate perhaps delves into the issue a bit  
88 more they'll realize how simple it is to convert these  
89 documents to PDF's and hopefully follow the Board's  
90 directions as per the procedural order. Thank you, Mr.  
91 Chairperson.

92 MR. NOSEWORTHY, CHAIRMAN: Thank you. I  
93 guess, certainly the matters that have been raised here  
94 this morning will be taken under consideration in  
95 respect of both the E filing considerations and the  
96 facsimiles, and I thank you for your comments.

1 Moving on to the next item on the agenda,  
2 which would be listed under "Other Issues," again, I  
3 guess, a couple of comments from me may be  
4 appropriate on each one of these. The configuration of  
5 the hearings room, basically we're advocating that for  
6 the purposes of the hearing to begin in September the  
7 24th that it would remain as we see it this morning. We  
8 have tried different alternative configurations. We have  
9 indeed looked at a horseshoe arrangement. I think it's  
10 fair to say that with the size of the tables that are  
11 necessary to, you know, accommodate reasonably the  
12 amount of paper that people have to deal with that  
13 putting that in a horseshoe configuration consumes  
14 virtually the whole room, leaves very little amount, I can  
15 assure you, in the back, please believe me on this, for  
16 any observers or members of the public to attend and  
17 sit comfortably. We have looked at perhaps in bringing  
18 some additional tables forward and having three in  
19 front, two in the rear. That, in itself, provides not the  
20 visual benefit that's there now, and perhaps for those  
21 that would be seated in the back would indeed not  
22 allow an unimpeded view of the panel if you will. Not  
23 that that's terribly important, but it may be, and  
24 witnesses, in particular. So we've looked at the, as I  
25 say, three and two, and that really hasn't worked out.  
26 We are cognizant of cost, quite clearly, and to look at  
27 another venue with sound systems and for an extended  
28 period, I think, is not something we'd want to entertain.  
29 We have to try and deal with the space that we have  
30 here now, so taking into account all these, and we have,  
31 I can assure you, juggled these tables around six ways  
32 to Sunday. We haven't really found anything that's  
33 more suitable. Certainly, I can appreciate the fact that  
34 this is not a perfect situation for everybody, but indeed,  
35 I don't think there's an optimum, perhaps, configuration  
36 that we could contemplate that would satisfy  
37 everybody's requirements.

38 The other item that I have here, before getting  
39 into the motions, is really the itinerary outside St.  
40 John's.

41 *(10:15 a.m.)*

42 MR. NOSEWORTHY, CHAIRMAN: We are, again,  
43 trying to grapple with this issue, as I'm sure you are,  
44 perhaps, in particular the Consumer Advocate, as well,  
45 especially with a view to Labrador. We've set aside a  
46 week in our schedule to visit Labrador and possibly  
47 other locations, as well. It is clearly a matter that we  
48 need to deal with, for everybody's benefit, fairly soon,  
49 and get the itinerary established. We are getting

50 overtures from ... I believe you would have seen a letter  
51 circulated from Ms. Yvonne Jones, an MHA for the  
52 south coast of Labrador, and essentially she has  
53 identified there an expectation of three consultations in  
54 coastal Labrador itself, likely. Over the next little while  
55 we've had ... again, I think correspondence from a  
56 number of communities in Labrador with expectations  
57 that there will be certainly some visitation, if you will, in  
58 relation to the public hearing itself. It's not going to be  
59 an easy itinerary to develop and I wouldn't contemplate  
60 that we'd sit around in this format and do it. I would  
61 like to ask the counsel, again, I think it's been proven  
62 fruitful in the past in relation to the procedures  
63 themselves, to meet with other counsel and to sort of  
64 review in depth the situation, if you will, to try and set  
65 a reasonable approach in itinerary for the visits to  
66 Labrador and other locations outside of St. John's if,  
67 indeed, that's appropriate and that we would hopefully  
68 come to some sort of consensus and resolution on this.  
69 If not, it's a matter that will likely have to be discussed  
70 in our next motions day, but I'm hopeful and confident  
71 that we might be able to come up with an itinerary that  
72 would satisfy everybody in this room, and perhaps  
73 others, as well. So I'd be proposing that to take place  
74 sooner rather than later. Those are my comments under  
75 "Other Issues." And again, I'd like your comments or  
76 responses to those so we could take them into  
77 consideration. And I'd ask the Applicant, in the first  
78 instance, to respond, please?

79 MS. GREENE, Q.C.: Thank you, Mr. Chairman. We  
80 have no comments with respect to the first item under  
81 the heading of "Other Issues" that is the setup of the  
82 hearing room. The hearing room is acceptable to us  
83 and we leave it to the other parties if they have  
84 concerns to raise them. With respect to the itinerary  
85 outside of St. John's, yes, we have a very real interest  
86 in the ... with respect to the discussion with respect to  
87 that, and we will obviously be as cooperative as  
88 possible in the discussions you've suggested be held  
89 by counsel. Those are my comments.

90 MR. NOSEWORTHY, CHAIRMAN: Thank you.  
91 Newfoundland Power, please?

92 MS. BUTLER, Q.C.: Thank you. Mr. Chairman,  
93 Newfoundland Power has no problem with the hearing  
94 room. And in relation to the travel outside St. John's, it  
95 was determined at the pre-hearing that, in fact, there  
96 would be a trip to Labrador the week of October 14th.  
97 That remains satisfactory to Newfoundland Power. The  
98 meeting that's going to be held between counsel

1 obviously could go ahead today if Mr. Hearn were here,  
2 but he's not. And other than that constraint then I  
3 suggest we do it as soon as possible and get it locked  
4 in. Those are our comments.

5 MR. NOSEWORTHY, CHAIRMAN: Thank you.  
6 Industrial Customers, please?

7 MS. HENLEY ANDREWS: Mr. Chairman, with respect  
8 to the setup of the room, I have only one concern, and  
9 if I was in the front row I wouldn't have it, which is that  
10 with Ms. Greene, as she is now, there's no problem with  
11 my seeing the witness, but if Ms. Greene has somebody  
12 alongside her my view of the witness area is going to  
13 be completely obstructed. And the normal ... I would  
14 expect that she would generally have somebody at  
15 counsel table with her. But perhaps I can explore with  
16 Ms. Blundon or Mr. Kennedy, some ideas that might  
17 alleviate that problem by reorganizing the witness table  
18 rather than ours.

19 MR. NOSEWORTHY, CHAIRMAN: There's a  
20 possibility of, I think, probably raising the witness table  
21 or things of that nature.

22 MS. HENLEY ANDREWS: I think that that might ...

23 MR. NOSEWORTHY, CHAIRMAN: We'd be ... thank  
24 you, very much for your cooperation. Thank you.  
25 Consumer Advocate, please?

26 MR. BROWNE, Q.C.: Reference to the setup of the  
27 hearing room, we have an unobstructed view, so we're  
28 fine. Reference to the itinerary outside St. John's, the  
29 previous day, as is noted in the transcript in July 5,  
30 2001, we suggested Goose Bay, Happy Valley-Goose  
31 Bay and Labrador City, as well as Corner Brook and  
32 Grand Falls. We've heard nothing in reference to  
33 Corner Brook or Grand Falls in the Board's order. Are  
34 customers in the island being deprived of the hearing?  
35 Under our mandate we have to represent the  
36 consumers, ultimately, and the general service  
37 consumers, as well, and these are everywhere. So I  
38 would hope that even though Labrador has a particular  
39 interest in these hearings, that is not to imply others do  
40 not. I also mentioned during the conference counsel  
41 had together that the tele-medicine facility at Memorial  
42 University has been used by Ministers of Finance now  
43 in successive years to receive consultations from  
44 communities all across the island and into Labrador on  
45 the budget, and I had attended these on behalf of a  
46 party, as counsel, on two occasions and it worked quite

47 well. Obviously, it's impossible to get into every  
48 community in Labrador, and once the process has  
49 started if we favour one community over the other we  
50 may be getting into some difficulty. I don't know if an  
51 arrangement can be made through Ms. Yvonne Jones  
52 to deal with all the coastal communities in one setting,  
53 but certainly we would have to visit Labrador City and  
54 Happy Valley-Goose Bay. But the tele-medicine facility  
55 is also a possibility and something you might want to  
56 look at. It was very efficient, I noticed. Thank you, Mr.  
57 Chairman.

58 MS. GREENE, Q.C.: Mr. Chairman, with respect to that,  
59 based on a suggestion from the Consumer Advocate  
60 we did explore the sites that would be available for the  
61 tele ... the conferencing through telemedicine, and just  
62 for the record, and we will discuss it really with counsel,  
63 the telemedicine facilities, unfortunately, are not broad  
64 and extensive in the areas in which we operate. They  
65 are available at St. John's, Goose Bay, Nain, Forteau,  
66 Twillingate, Port aux Basques, Corner Brook, St.  
67 Anthony and Gander. So there are a number of sites,  
68 and that's something we certainly will discuss, but  
69 they're not in any extensive number of any of our  
70 locations.

71 MR. NOSEWORTHY, CHAIRMAN: Okay, thank you.

72 MS. HENLEY ANDREWS: Mr. Chairman, also arising  
73 out of Consumer Advocate's comments, I notice, I  
74 think, in one of the interventions somebody had  
75 actually requested a hearing in Corner Brook on the  
76 west coast, and there are three people or three groups  
77 who have indicated, from Stephenville, that they wish  
78 to make representations. It's obviously quite expensive  
79 for those groups to travel to St. John's in order to make  
80 their representations and take time off work and those  
81 types of things. And it may very well be that the lack  
82 of public interventions is partly affected by the cost of  
83 having to come into St. John's to participate, and you  
84 know, I wondered what the Board's position was with  
85 respect to at least a hearing on the west coast.

86 MR. NOSEWORTHY, CHAIRMAN: I guess just to  
87 comment very briefly, you'll notice the agenda said  
88 "outside St. John's," it didn't necessarily say Labrador.  
89 There is, I think, a window of opportunity for that, but  
90 clearly, given time constraints and cost constraints, I  
91 think we would want to come up with, sort of, a well  
92 thought through plan with a view to specifically,  
93 location, with the view to sort of maximizing the public  
94 participation in this whole process. And I think my

1 comment in my opening statement during the pre-  
2 hearing conference is, indeed, I want to try and  
3 encourage to the extent permitted by logistics and cost,  
4 the opportunity for public participation, recognizing  
5 that it's very difficult and quite expensive for people to  
6 travel to St. John's. So I'm hopeful, I guess, that the  
7 process that we might engage in, through counsel, will,  
8 indeed, come up with something that will satisfy, as I  
9 had indicated just a few moments ago, the parties in  
10 this room, but also those wishing to make some public  
11 comment and public intervention as well.

12 MS. HENLEY ANDREWS: Thank you.

13 MR. NOSEWORTHY, CHAIRMAN: Okay. Moving on  
14 to the next order of business on the agenda and indeed  
15 would be the motions, and there are two motions before  
16 the Board, one from the Industrial Customers seeking  
17 an order from this panel concerning their costs of  
18 intervention in the hearing, and the second item is an  
19 issue which was raised originally by the counsel for the  
20 Industrial Customers during the pre-hearing and since  
21 had been followed up by a formal motion by the  
22 Consumer Advocate, and that requests an order from  
23 the Board regarding the retention of Dr. Roger Morin.  
24 Does Counsel have anything to say or add at this time,  
25 please?

26 MR. KENNEDY: Mr. Chairperson, there was a letter  
27 forwarded under my signature to both the Board  
28 Secretary, as well as counsel for each of the intervenors  
29 and list of the parties of interest. That was the letter, I  
30 think, that the Consumer Advocate had referred to as  
31 he got in at 6:45 p.m., which I note was I believe in part  
32 due to the fact that their own fax machine was tied up at  
33 the time that it was trying to be sent yesterday  
34 afternoon, no doubt a product of faxes flying around  
35 between the parties as everyone filed their notifications  
36 of extra witnesses and information requests that might  
37 have been filed yesterday as well. In any event, the  
38 letter dated yesterday, the 17th, provided notice to all  
39 the parties that the staff of the Board of Commissioners  
40 of Public Utilities had, in light of the fact that there were  
41 a number of other experts already retained by other  
42 parties to testify on the issue of cost of capital, had  
43 made the determination that it was unnecessary to call  
44 Dr. Morin as an expert before the hearing, and that  
45 would, I would add, be in the interest of just utilizing  
46 resources as efficiently as we could.

47 And I also note, Mr. Chairperson, that there's  
48 been raised by counsel, and not just one, but several

49 counsel, some issues concerning the operation of the  
50 Board during a hearing, and that there seems to be  
51 some misconceptions that some of the counsel for  
52 intervenors that they are operating under, and I  
53 thought that with the permission of the Board I've  
54 jotted down a few notes which I was just going to read  
55 out and elaborate and help explain for the parties what  
56 procedures are employed by the Board and by staff in  
57 a process such as this hearing. And so with your  
58 permission.

59 *(10:30 a.m.)*

60 MR. KENNEDY: "While it's anticipated that a more  
61 formalized document will be drafted and provided to the  
62 public concerning the role and operation of the Board  
63 of Commissioners of Public Utilities, it seems an  
64 appropriate time to provide some general information  
65 about the division of roles and duties undertaken by  
66 various elements of the Public Utilities Board."

67 "First, as confirmed by the Newfoundland  
68 Court of Appeal in the stated case decided in June of  
69 1998, the Board has the authority and duty for the  
70 general supervision of all public utilities in the  
71 Province, and in carrying out this function has the  
72 general authority to make all examinations and inquiries  
73 and keep itself informed as to the compliance by public  
74 utilities with the law and, as well, that it has the right to  
75 obtain, from a public utility, all information necessary to  
76 enable the Board to fulfil its duties. It's also confirmed  
77 by the Court of Appeal in the stated case, and I quote  
78 here, 'It is important to remember, however, that in  
79 addition to its periodic adjudicative role, which itself  
80 involves a large measure of policy implementation in  
81 arriving at its decisions, the Board has, because of its  
82 duty of general supervision of all public utilities, an  
83 ongoing supervisory role of the activities of the utilities  
84 between hearings as well which is facilitated by  
85 statutory requirements for periodic reporting of  
86 financial information to the Board."

87 "In keeping with the statutory obligation, the  
88 Public Utilities Board maintains staff and, where  
89 needed, retains experts. Together these individuals are  
90 responsible for carrying out the Board's duty to provide  
91 the ongoing supervisory role of the utility."

92 "Reference to the Board of Commissioners of  
93 Public Utilities as 'The Board' can lead to some  
94 confusion, as the Board has at least two distinct  
95 elements. First, the Board of Commissioners of Public

1 Utilities is a statutory corporation, and as such,  
2 operates as any statutory corporation would. It has  
3 staff entrusted with carrying out many of the functions  
4 required of it under its mandate, as described earlier,  
5 and it has an officer responsible for supervising that  
6 staff. By operation of the Public Utilities Act, one of  
7 the Commissioners is appointed to act as Chief  
8 Executive Officer. The Chief Executive Officer acts as  
9 any Chief Executive Officer would, managing the affairs  
10 of the Board, providing direction to staff and  
11 monitoring the Board's finances, such as" ...

12 MR. BROWNE, Q.C.: Excuse me, Mr. Kennedy, is this  
13 the Court of Appeal you're reading from now?

14 MR. KENNEDY: No, no.

15 MR. BROWNE, Q.C.: Okay. No, I didn't get your  
16 closed quote there. I was just wondering.

17 MR. KENNEDY: I beg your pardon. The close quote  
18 was after "reporting of financial information to the  
19 Board," quite some paragraphs ago.

20 MR. BROWNE, Q.C.: Okay.

21 MR. KENNEDY: "The CEO acts as any CEO would,  
22 managing the affairs of the Board, providing direction  
23 to staff and monitoring the Board's finances, such as its  
24 budgets and cash flow."

25 "Under the Act, the Board is permitted to  
26 employ legal counsel, accountants, engineers,  
27 stenographers or other persons that it may require or  
28 consider advisable."

29 "Also, by operation of the Act, the CEO is also  
30 the Chairperson of the Board. As an appointed  
31 Commissioner the Chairperson is responsible for  
32 conducting, among other things, hearings on  
33 applications filed by utilities, and others, such as the  
34 one currently before the Board. A Panel is struck to  
35 hear an application, in the present case, comprised of  
36 four individual Commissioners. Once an application is  
37 convened before the Panel the Panel is seized of the  
38 matter. Upon this event, every effort is made to ensure  
39 that the Panel has no further contact, discussions or  
40 communication with any of the staff of the Board or any  
41 other Commissioners not serving on the Panel  
42 concerning any matter raised in the application. Neither  
43 does the Panel have any direct contact with any of the  
44 experts, or other witnesses hired by the Board to

45 provide evidence during the hearing. In effect, it is  
46 only the staff of the Board that has direct  
47 communication with any of the witnesses or experts  
48 concerning matters raised by an application."

49 "There is, however, one exception to this rule,  
50 that is me. I act as counsel to the Board. Currently this  
51 means I have two roles, one is to work with staff and  
52 any experts to coordinate their analysis of the  
53 application. My other role is to provide advice to the  
54 Board on procedural matters, such as helping with the  
55 selection and setting of dates and locations for the  
56 hearing. In the present case, this was achieved by my  
57 meeting with counsel for the Applicant and the  
58 Intervenors, both individually, and as a group, to help  
59 facilitate the process and then reporting to the Board on  
60 what, if any, consensus was achieved between the  
61 parties on such matters. Ultimately, however, the Board  
62 makes its own decisions and issues an order  
63 accordingly."

64 "I also note that while this is the only  
65 application for counsel, the other business of the Board  
66 continues unabated. This requires, at times, that I  
67 provide advice to the Board and staff on legal matters  
68 that are unrelated to the current application. Any  
69 decisions regarding the retention or non-retention of  
70 any experts or other witnesses, any analysis of the  
71 merits of the Hydro application or synthesis of  
72 evidence to be filed during this hearing, issuance of  
73 information requests, and responses thereto are  
74 decided solely and exclusively by the staff of the  
75 Board, without consultation with the Panel or, because  
76 their CEO is also the Chairperson of the Panel, even  
77 without consultation with their CEO. The only  
78 evidence that the Panel hears, and therefore the only  
79 evidence upon which the Panel can render its decision  
80 is the evidence filed on the public record."

81 "I hope this achieves the desired effect, that is,  
82 to shed light on the processes employed by the Board  
83 during a hearing and, with it, to alleviate the concerns  
84 of the parties and public concerning how the Board  
85 fulfils its mandate. As I indicated, the intention is to  
86 issue a formal document describing in more detail the  
87 protocols employed by the Board during this process."  
88 Thank you, Mr. Chair.

89 MR. NOSEWORTHY, CHAIRMAN: Thank you, Mr.  
90 Kennedy. It would seem now appropriate, indeed, to  
91 deal with the issue of what to do with the motion filed  
92 by the Consumer Advocate, following which we will

1 turn the attention, our attention to the motion filed by  
2 counsel for the Industrial Customers.

3 MR. BROWNE, Q.C.: Mr. Chairman.

4 MR. NOSEWORTHY, CHAIRMAN: Yes.

5 MR. BROWNE, Q.C.: Can we have an opportunity to  
6 react to this statement that was made?

7 MR. NOSEWORTHY, CHAIRMAN: Sure.

8 MR. BROWNE, Q.C.: I don't know if other parties want  
9 to. There seems to be an attempt there to define the  
10 role of counsel and define the role of experts. I  
11 certainly will have something to say about that.

12 MR. NOSEWORTHY, CHAIRMAN: Sure.

13 MR. BROWNE, Q.C.: I'm not going to lose that  
14 opportunity.

15 MR. NOSEWORTHY, CHAIRMAN: I guess just one  
16 more comment, and then I'll call for a discussion on the  
17 items, including any comment that you wish to make on  
18 the ... certainly not to preclude any comment that you  
19 wish to make on the statement. I guess in light of the  
20 withdrawal of Dr. Morin as an expert, the Board is,  
21 indeed, predisposed to simply adjourning the motion  
22 regarding his retainment, sine die. I hope I've  
23 pronounced that right. But we would, first, like the  
24 views of the counsel in this regard. And as I had  
25 indicated previously, we could certainly entertain any  
26 comment on the statement itself. I will first go to the  
27 Consumer Advocate in this instance.

28 MR. BROWNE, Q.C.: What are we to deal with, the  
29 motion? It's our motion, I guess we would have the  
30 ability to withdraw it, then, Mr. Chairman.

31 MR. NOSEWORTHY, CHAIRMAN: Yes.

32 MR. BROWNE, Q.C.: But the comments that we just  
33 heard from Mr. Kennedy, we would like an opportunity  
34 to react to that, as well. So you want to deal with the  
35 motion first or which do you want to deal with?

36 MR. NOSEWORTHY, CHAIRMAN: Probably the  
37 comments first and then you could deal with the motion  
38 at the same time.

39 MR. BROWNE, Q.C.: Yeah. I would agree with counsel  
40 for the Board that some rules should be established for  
41 the Board's appointment of experts. From an  
42 appearance perspective this has always caused parties  
43 some difficulty. We see a witness appointed by the  
44 Board, giving evidence, and then leaving the witness  
45 stand and going into the Board's inner sanctum. We  
46 don't know what transpires there. We have no idea if  
47 the experts continue to give advice to the Board after  
48 their appearance here, and we would suggest that the  
49 Board follow Rule 35 dealing with court experts. If the  
50 court appoints an expert, the expert files their report  
51 with the court and then parties are given an  
52 opportunity to question, by way of cross-examination,  
53 the expert on that report and the expert doesn't caucus  
54 with the judge after. So, I would think that Rule 35 may  
55 give the Board some guidance.

56 In reference to the role of counsel, this too  
57 falls into a similar pattern, and I think we've dealt with  
58 Board counsel in various hearings, but once again, if  
59 counsel is providing legal advice to the Board on any  
60 particular matter which pertains to this hearing that  
61 advice should be public so that the other parties have  
62 an opportunity to react to that advice, I think that is the  
63 norm, and I can provide some articles on that on the  
64 role of legal counsel in assisting the Board, and there is  
65 a certain latitude that legal counsel does have in  
66 assisting the Board, but when it comes to advice on  
67 matters pertaining to the hearing, that advice cannot be  
68 confidential, that advice must be out in the open for all  
69 of us to hear to we can react to it just to ensure that the  
70 advice is sound with our own views of the law on that  
71 particular issue. These are my comments on that.

72 MR. NOSEWORTHY, CHAIRMAN: Thank you. You  
73 can proceed now with your comments on the motion,  
74 Consumer Advocate, please?

75 MR. FITZGERALD: Mr. Chairman, I'll speak to that.  
76 And just following up on that last point Mr. Browne  
77 was making regarding the role of ... not so much, sorry,  
78 the role of counsel, but the experts. I appreciate Mr.  
79 Kennedy's comments regarding the protocols that the  
80 Board is striving to follow, that is to create what we call  
81 in our profession, I guess, Chinese walls between  
82 different divisions. And we have no doubt, in good  
83 faith, that the Board is attempting to accomplish, you  
84 know, these insulating pockets of roles, I guess. But  
85 there is ... the point, as we made in our Notice of  
86 Motion, there is good case law that, from our  
87 perspective, that is, the public and people appearing,

1 that there is an identity between the Board and its staff,  
2 and that is where the whole area of case law derives  
3 from, and that is the (inaudible) of bias goes further  
4 than Panel members, it could actually extend down into  
5 staff, as well. So I just ... there is good case law on the  
6 point that there is, in fact, an identity between the  
7 Board in everything that occurs behind closed doors,  
8 even though, of course, in good faith, you're striving to  
9 maintain independence.

10 On the issue of the motion, my first comment  
11 on that would be, I guess, the old saying is underlying  
12 every conflict is miscommunication. The reason, of  
13 course, that we undertook to motion was the ...  
14 certainly part of it derived from the pre-hearing  
15 information that we received on the 4th of July  
16 regarding the Board's intention at that point apparent  
17 intention to hire Dr. Morin, as disclosed in Appendix A,  
18 I believe it was, in the materials that we received the eve  
19 of the hearing.

20 At the hearing itself, the pre-hearing on the 5th  
21 of July, it was disclosed by the Consumer Advocate  
22 that there was a cost of capital expert to be retained. I  
23 believe other parties, other Intervenors indicated that  
24 intention as well. And the issue of Dr. Morin's, what  
25 we ... the problem with Dr. Morin's appearance on  
26 behalf of the Board or Dr. Morin's association with the  
27 Board, however you want to put it, was brought up.  
28 And I believe, Mr. Chairman, you certainly  
29 acknowledged that it was an issue.

30 The difficulty then occurred when we received  
31 PU No. 7, PU No. 7, which was a formalization of the  
32 order of the Board, the order of witnesses in Appendix  
33 A indicated, at that point, the order of witnesses. It  
34 indicated that the Intervenor, Newfoundland Power, the  
35 Industrial Customers and Consumer Advocate would  
36 have a cost of capital expert witness, and it also  
37 indicated that the Board would have a cost of capital  
38 expert witness. It also indicated that the Board would  
39 have a cost of service expert witness. This document  
40 differed from the earlier document in that it didn't name  
41 Dr. Moran, nor did it name the Wilson expert. We then  
42 communicated with the Board, the Board Secretary,  
43 which was counsel for the Board, indicated was  
44 probably not the correct thing to do, and indicated that,  
45 by correspondence, that regarding our request as to  
46 whether on the 12th of ... sorry.

47 The order came out on the 11th of July. At  
48 that point in time we needed direction to find out

49 whether Dr. Morin had been retained or not, so we  
50 sought that direction by writing the secretary. Legal  
51 counsel returned correspondence on the 12th of July,  
52 to our inquiry, indicating that the Board has already  
53 provided its directions on the matter. We were simply  
54 looking at that point to discover whether Dr. Morin was  
55 still in the cards, if I can put it that way. By that  
56 answer, and by PU No. 7, we could not come to any  
57 other conclusion that, in fact, Dr. Morin was still going  
58 to be retained. We then embarked upon our motion and  
59 with some time and effort put the matter together.

60 We, last evening, received the ... at 6:48 p.m.  
61 we received a filing from the PUB indicating that  
62 William Brushett and Dr. John Wilson had been  
63 retained, no mention of Dr. Morin. We're still not  
64 certain what the situation is.

65 Actually, this morning at 8:21 a.m. we received  
66 a letter from legal counsel and now we officially have  
67 been told that Dr. Morin has been relieved. In this  
68 letter legal counsel has indicated the rationale for this  
69 late notification and it says, I'm reading from page 2 of  
70 the correspondence, first paragraph, it says, "Rule 9 of  
71 the Board of Commissioners, the Public Utilities  
72 Regulations, 1996 requires that parties filing a notice of  
73 intervention include information on the qualification of  
74 any expert witness whose opinion the Intervenor  
75 expected to rely upon during the hearing. However, not  
76 all Intervenors did so. Accordingly, it could not be  
77 determined by staff what experts would be called during  
78 the hearing."

79 However, again referring back to PU No. 7, I  
80 think I'm referring to the right document there, and that  
81 is the Procedural Order, it was contemplated by the  
82 Board as of July 11th that Newfoundland Power, the  
83 Industrial Customers and ourselves or the Consumer  
84 Advocate would be calling a cost of capital expert  
85 witness.

86 So, I guess my point is we ... perhaps  
87 communication could be better defined on issues like  
88 this. Certainly, from a selfish point-of-view it would  
89 have saved me a lot of time and effort and a lot of trees,  
90 as we're very concerned about trees this morning, 17  
91 copies of the memorandum would not have been sent  
92 out. And in fact, it turned out to be 25 copies. So, I  
93 guess, you know, the letter that we received this  
94 morning mentions that the point is moot. It may be  
95 moot, but the underlying point is, I guess, previous  
96 communication of the intention, in good faith, would

1 have been good. And that's really our comment on  
2 that, Mr. Chairman.

3 MR. NOSEWORTHY, CHAIRMAN: Do you have any  
4 comment on the disposition of the motion, at this  
5 point?

6 MR. FITZGERALD: The only comment I would make is  
7 I would ... I don't know if I have to make a motion, but  
8 I would like PU 7 amended, because it indicates now,  
9 officially, that the Board will be calling a cost of capital  
10 expert witness. The letter received this morning  
11 indicates that there will not be a cost of capital witness.  
12 And Mr. Chairman, you mentioned that the motion  
13 would be adjourned sine die. That means that it just  
14 enlarges the date, and that tells me, perhaps, that the  
15 Board might reconsider its position in the future. If  
16 that's the case, that's the case. But if it's not the case I  
17 would think it's appropriate that the PU No. 7 be  
18 amended.

19 MR. NOSEWORTHY, CHAIRMAN: Thank you. It is  
20 just about 10:55. Perhaps we could adjourn. It's a little  
21 bit beyond our break time. Rather than proceed with  
22 the other comments, which may take us well beyond  
23 that, I'd proceed to break at this time for 15 minutes.  
24 Thank you.

25 *(break)*

26 *(11:10 a.m.)*

27 MR. NOSEWORTHY, CHAIRMAN: Thank you.  
28 Perhaps we could proceed on on the first motion, and  
29 I would ask the Applicant to speak next, please.

30 MR. FITZGERALD: Excuse me, Mr. Chairman, are you  
31 moving onto the second motion?

32 MR. NOSEWORTHY, CHAIRMAN: No, no, no. I'm  
33 looking for comments on this particular motion from the  
34 other parties at this point in time and I guess I'm  
35 looking for the Applicant to comment if indeed she  
36 wishes to on this particular motion.

37 MS. HENLEY ANDREWS: I think that's you, Maureen.

38 MR. NOSEWORTHY, CHAIRMAN: Pardon?

39 MS. GREENE, Q.C.: You're asking me to reply to the  
40 motion before the Applicant speaks.

41 MR. KENNEDY: I think we have some confusion as to  
42 which motion we're dealing with.

43 MR. NOSEWORTHY, CHAIRMAN: Yes.

44 MS. GREENE, Q.C.: Motion, yes.

45 MR. NOSEWORTHY, CHAIRMAN: We're dealing with  
46 the motion in respect of Dr. Morin. I've heard from the  
47 Consumer Advocate, I guess, at this point in time and  
48 I'm of the understanding just prior to break that the  
49 Consumer Advocate had finished with the comments  
50 and I would now like the other parties to comment if  
51 indeed they wish to comment on the first motion in  
52 relation to the Consumer Advocate's motion on Dr.  
53 Morin, please.

54 MS. GREENE, Q.C.: Sorry about that, Mr. Chairman.

55 MR. NOSEWORTHY, CHAIRMAN: I'm sorry for my  
56 lack of clarification.

57 *(11:13 a.m.)*

58 MS. GREENE, Q.C.: I understand from the discussion  
59 that occurred prior to the break that the Consumer  
60 Advocate, in view of the decision taken by the Board,  
61 the Consumer Advocate really is not proceeding with  
62 his application and therefore we take no position with  
63 respect to the motion either. We believe the point is  
64 moot and is not helpful to the process to deal with the  
65 particular motion or application that was raised by the  
66 Consumer Advocate at this time.

67 With respect to the other issues that have  
68 been raised by Board counsel and also by both the  
69 Consumer Advocate and by Mr. Fitzgerald dealing with  
70 the process or the protocols to be issued by the Board  
71 in terms of how the Board deals with staff and with  
72 experts and with Board counsel, I suggest that it would  
73 be more helpful for the process that once the document  
74 is formalized, as had been stated by Board counsel, that  
75 at that time if there are any concerns or issues that any  
76 party to the process would be able to make an  
77 application at that time to address that particular issue.  
78 As the Consumer Advocate has mentioned, there is a  
79 lot of jurisprudence with respect to the appropriate  
80 relationship with Board staff, with Board counsel, and  
81 with the ability of the Board to set its own rules of  
82 process, so I think it's premature at this time for us  
83 really to get into that and would suggest that we await  
84 a formal document from the Board and that if any of the

1 parties have any issues, we would then take a motion or  
2 an application to address those specific issues.

3 MR. NOSEWORTHY, CHAIRMAN: Thank you very  
4 much. I'll go to the Industrial Customers now because  
5 I think, Ms. Andrews, you would have raised the issue  
6 initially at the pre-hearing conference, and again by just  
7 way of further clarification, if you wish to comment on  
8 the statement by counsel in terms of the protocol, I'd  
9 like you to do that at this time as well.

10 MS. HENLEY ANDREWS: Thank you, Mr. Chairman.  
11 I'm quite satisfied with the Board's action with respect  
12 to Dr. Morin in terms of relieving him, I guess, from his  
13 retainer and not planning to call an expert with respect  
14 to, at least that's my understanding, to call an expert  
15 with respect to rate of return and capital structure. I do  
16 think that Mr. Browne's point with respect to the  
17 amendment of PU-7 would be appropriate because it  
18 would then make it quite clear to everyone that there is  
19 no intention for the Board to call an expert with respect  
20 to capital structure.

21 With respect to Mr. Kennedy's comments, I do  
22 appreciate them. There's always been a certain degree  
23 of apprehension as to what may or may not take place  
24 when witnesses go through the door into the same area  
25 as the panel members and the clarification with respect  
26 to the witness side was quite helpful and I look forward  
27 to receiving something in writing in that regard.

28 With respect to his description of the role of  
29 Board counsel, again I'd rather wait and see precisely  
30 what comes out in writing, but the clarification is  
31 welcome and if there are any issues which arise from  
32 that, then I presume the parties might raise them, and  
33 obviously the fact that they might not be raised  
34 immediately is no guarantee that they wouldn't be  
35 raised at some time in the future if there was a concern.

36 MR. NOSEWORTHY, CHAIRMAN: Thank you very  
37 much. Newfoundland Power, on both issues ...

38 MS. BUTLER, Q.C.: Yes, that's fine. Thank you, Mr.  
39 Chairman. Mr. Chairman, Mr. Kennedy's comments,  
40 timely as they are, on process, are for the most part  
41 common sense which Newfoundland Power accepts.  
42 When in fact something comes in writing, we may or  
43 may not address them. We'll see what the actual  
44 statement looks like. In relation to the Consumer  
45 Advocate's motion on Dr. Morin, it is indeed moot and

46 I need not waste any of the Board's time responding to  
47 that.

48 MR. NOSEWORTHY, CHAIRMAN: Okay. Thank you  
49 very much. Counsel, do you have any final comments,  
50 please?

51 MR. KENNEDY: No, Mr. Chairperson.

52 MR. NOSEWORTHY, CHAIRMAN: Okay. Are there  
53 any questions then? Okay, thank you very much.  
54 What I would propose is that we proceed on with the  
55 second motion here, see where we are in respect of  
56 lunch. I would like to sequester, just for a few minutes,  
57 on the Dr. Morin motion with my colleagues on the  
58 panel, but rather than take the time to do that now, I'd  
59 like to proceed into the second motion, see how far we  
60 get there. It may take us beyond lunch in which case I'll  
61 take the opportunity to sequester with my panel  
62 colleagues rather than waste time now at lunchtime and  
63 then come back. If this happens to conclude before  
64 lunch or a little bit into lunch and proceed to continue  
65 on and I can sequester just for a brief time, for five  
66 minutes perhaps, at the end and come back and we'll try  
67 and conclude in the quickest manner possible. Is that  
68 satisfactory? Okay.

69 The second motion that we have before us ...

70 MR. FITZGERALD: Mr. Chairman, I'm sorry, there's  
71 one matter still arising, I guess, or I'd like to speak to  
72 just before we go to the second motion, and it's related  
73 to our application regarding Dr. Morin, and it's a point  
74 of clarification really and it gets back to the lines of  
75 communication, just so we're clear as to who contacts  
76 who when. As I had recited earlier the chronology of  
77 what gave rise to our Notice of Motion, One, I did  
78 mention that the Consumer Advocate, I on behalf of the  
79 Consumer Advocate, wrote the Board's secretary on the  
80 11th of July, I believe it was, to ask for clarification on  
81 PU No. 7 as to whether Dr. Morin was being retained or  
82 not, precipitated by PU No. 7 itself which indicated that  
83 there was still going to be a cost of capital expert.

84 Legal counsel wrote me back on behalf of the  
85 Consumer Advocate and indicated that, "Please note  
86 that any direct communication with the Board  
87 concerning matters raised or arising from the Hydro  
88 application other than the filing of a formal motion or  
89 other application or related documentation such as  
90 information requests is inappropriate."

1 Now I had written, on behalf of the Consumer  
2 Advocate, at that point the Board's secretary. Legal  
3 counsel then says, "As such we would request that all  
4 future communication," this is the key word, "of a non-  
5 evidentiary nature be directed to the undersigned as  
6 Counsel to the Board of Commissioners of Public  
7 Utilities."

8 I don't know, counsel, if you could ... if I'm  
9 misunderstanding this letter. I don't know if you have  
10 it in front of you there now. As I understand it, if I was  
11 to contact the Board on matters of a non-evidentiary  
12 nature, I'm to contact counsel.

13 MR. NOSEWORTHY, CHAIRMAN: Counsel ...

14 MR. KENNEDY: With your permission, Mr.  
15 Chairperson, that's correct. That's what the intention of  
16 the letter was, that instead of placing counsel in a  
17 position where they need to contact the Board directly  
18 about matters involving orders in particular that it  
19 seemed to be more appropriate that it would be a  
20 counsel-to-counsel communication, and that was the  
21 thrust of that letter that, in ... and in keeping with that,  
22 correspondence received from yourself as counsel to  
23 the Consumer Advocate, while it was requesting  
24 clarifications about a position of the Board vis-a-vis  
25 PU-7, and I guess as counsel to the Board I felt that that  
26 was a question more properly put to counsel of the  
27 Board rather than directly to the Board, but clearly it's  
28 not meant to supersede any of the directions that the  
29 Board has provided in PU-7 regarding the filing of  
30 evidentiary-related documentation, which would  
31 include motions, that would just follow in the normal  
32 course of events, so more of a communication of  
33 correspondence in nature.

34 MR. FITZGERALD: Okay. Thank you, counsel. I'm  
35 just wondering, Mr. Chairman, just to get a handle on  
36 again our distribution list, the letter wasn't just sent to  
37 the Board's secretary, it was sent to all hands, and again  
38 it was, we were attempting to comply with PU No. 7 on  
39 the distribution listing. Does this letter now amend PU-  
40 7 as well when it comes ... is there now a differentiation  
41 between communications generally or are we to ...

42 MR. NOSEWORTHY, CHAIRMAN: I'll ask counsel to  
43 comment again because specifically it's, it was his letter  
44 as ...

45 MR. KENNEDY: This might be something that might  
46 be more appropriate to work out with between counsel,

47 but at this point the purpose of it is that  
48 communications of a correspondence nature would be  
49 between counsel. PU-7 applies to the filing of  
50 application related documentation, so the application  
51 material itself, motions, information requests, response  
52 to information requests, expert reports and so on, as is  
53 provided in PU-7 itself. I'm not sure if PU-7 specifically  
54 says evidentiary matters, but clearly that's the intent of  
55 PU-7, is to cover the filing of evidentiary  
56 documentation. You'll see filing of documents, (c), or  
57 (a), "All documents filed with respect to this  
58 proceeding shall be placed on the public record, and  
59 then the filing of documents, this subsection shall  
60 govern filing of documents with the Board." Filing is  
61 accomplished when the Board receives the submission  
62 and then how the distribution is to take place. And so  
63 I would suggest that a letter is not a document, would  
64 not normally be considered to be a document between  
65 counsel to be entered on the public record, that that  
66 would be correspondence between the parties.

67 MS. HENLEY ANDREWS: But the Board isn't a party.  
68 I mean, the Board is the Adjudicator.

69 MR. KENNEDY: Correct.

70 MS. HENLEY ANDREWS: So everything that's  
71 delivered by one of the parties to the Board should be  
72 on the public record.

73 MR. KENNEDY: Yes, that's correct.

74 MS. HENLEY ANDREWS: Whether it's something that  
75 you ultimately deal with as Board counsel or whether  
76 it's something that somebody else deals with.

77 MR. KENNEDY: Clearly I can't force people as counsel  
78 to the Board to not write the Board in, except insofar as  
79 the Code of Professional Conduct requires counsel to  
80 not make direct contact with the client of counsel and  
81 that communication would normally be between  
82 counsel. That's the spirit and intent of that direction  
83 provided to Mr. Fitzgerald as counsel to the Consumer  
84 Advocate. But clearly there's some confusion here  
85 about what documents apply to my indication in the  
86 letter of correspondence and the filings, so that's  
87 perhaps something that could be better worked out in  
88 a discussion between counsel. That's what the purpose  
89 of the discussions are for and that's what I'm  
90 suggesting, that we could have a discussion about that  
91 and see if it can be resolved consensually. If not, then  
92 I guess it's a matter that would have to be placed back

1 before the Board, and we have a motion today on the  
2 29th, or if someone feels that it needs to be dealt with  
3 prior to then, they could ask for a hearing date prior to  
4 then.

5 MR. BROWNE, Q.C.: But the only thing I'd point out,  
6 Mr. Chairperson, is that the letter wasn't directed to the  
7 Board. Obviously it's totally inappropriate if I were to  
8 call you as Chairman and ask what are you doing with  
9 Dr. Morin. That wasn't done. That would be  
10 inappropriate. The letter was sent to the Board's  
11 secretary. Now, it would be up to the Board's secretary  
12 to determine where that went. I would imagine she  
13 would have an opportunity to discuss it with legal  
14 counsel, so maybe the Board itself from an orderly  
15 perspective should state, look, anything coming to the  
16 Board should go to the Board's secretary. Obviously  
17 some matters would have to be sent to counsel and  
18 other matters she can deal with on her own, so it's  
19 difficult for us because, you know, they're saying non-  
20 evidentiary. Well, what's more evidentiary than say  
21 who's going to give evidence at a hearing, right, so I  
22 think that would be evidentiary.

23 MR. NOSEWORTHY, CHAIRMAN: Well, I think  
24 counsel fairly pointed to the fact that there may be  
25 some confusion or conflict that exists. Is it satisfactory  
26 that he would meet with others and try and sort this  
27 out, and indeed the 29th is there for any further  
28 discussion if that can't be, and there may be additional  
29 matters like this as well. Is that suitable to everybody?

30 MR. FITZGERALD: Mr. Chair, that seems like a  
31 reasonable way to deal with it. In the interim, however,  
32 we're stuck, if you will, with PU No. 7, which is the  
33 governing document, and I guess, as Mr. Browne was  
34 saying, a qualitative decision has to be made on every  
35 document as to whether this is something that's  
36 evidentiary or non-evidentiary, grey area or not. Our  
37 distribution listing says send it right now to the Board's  
38 secretary. Are we to follow that or not, I guess is the  
39 direction that we would like today, because there will be  
40 other communication.

41 MR. NOSEWORTHY, CHAIRMAN: Clearly, you know,  
42 the procedural order as far as the panel is concerned is  
43 the direction that you would currently follow. I'd like  
44 the opportunity to at least, perhaps when we sequester,  
45 to have a chat with counsel on the matter. I'm hoping  
46 that if there is a meeting that can take place, it can be  
47 sooner rather than later. We can resolve this issue and  
48 on a consensual basis.

49 MR. FITZGERALD: Thank you, Mr. Chairman.

50 MR. NOSEWORTHY, CHAIRMAN: Thank you. I'd  
51 like to proceed now with the second motion, which is  
52 the application by the Industrial Customers pertaining  
53 to their hearing costs, and I'd like to ask Ms. Andrews  
54 to introduce this motion, please.

55 (11:30 a.m.)

56 MS. HENLEY ANDREWS: Thank you, Mr. Chairman.  
57 This is the very first hearing before this Board in which  
58 the rates charged to the Industrial Customers are  
59 regulated by the Board. Industrial Customers have  
60 participated in hearings over the last ten years. Now  
61 there hasn't been one with respect to Hydro rates since  
62 1992, but have participated in hearings about, with  
63 respect to Newfoundland Power and with respect to, for  
64 example, isolated rural customers in the '95/96 area,  
65 because at various points in time they could be affected  
66 by decisions of the Board on certain specific areas,  
67 whether it was a policy area or whether it was rate of  
68 return, for example, and up until the 1994 *Electrical*  
69 *Power Control Act*, of course the Industrial Customers  
70 were also required to contribute to the subsidy for the  
71 rural customers of Hydro and therefore had a very  
72 active interest in the rates to be charged to and the  
73 costs and the revenue to be derived from the rural  
74 interconnected as well as the rural isolated systems.  
75 But apart from that, until this hearing, the Industrial  
76 Customers' rates had not been regulated. They were set  
77 between the Industrial Customers and Hydro. Well,  
78 they were set by Hydro for the Industrial Customers, is  
79 perhaps a better way to describe it.

80 Equally important is that each of the Industrial  
81 Customers at the present time has an individual  
82 contract with Hydro. Their individual contracts  
83 represent, in many cases, decades of experience and  
84 decades of dealing with issues that are specific to each  
85 of those customers. They are not a standard form  
86 contract.

87 Hydro is proposing, to a large degree, a  
88 standard form type of contract for the Industrial  
89 Customers at his hearing. In that standard form  
90 contract, particularly with respect to non-firm rates, also  
91 with respect to Hydro's position on things like  
92 converters and a variety of other issues, transformer  
93 losses, there are radical changes that have, for the  
94 Industrial Customers, that have very serious cost

1 consequences for each of them, some more than others  
2 depending on what the particular issue is.

3 In this hearing the Industrial Customers are  
4 being asked to end up paying 18 percent more in their  
5 electrical rates in 2002 than they are paying in 2001.  
6 The dollar value that is attributed to that increase in  
7 rates is roughly \$4.9 million.

8 There are only four Industrial Customers.  
9 While the costs don't end up being split equally  
10 between them, you can see, looking at that amount of  
11 money and looking at the number of island Industrial  
12 Customers, that this hearing has very serious cost  
13 consequences for the Industrial Customers.

14 With respect to every other of the major  
15 players, every other customer at this hearing is  
16 represented by funded, and represented and has its  
17 costs covered. Hydro's costs of participating in the  
18 hearing are included in its rate base. Newfoundland  
19 Power's costs of participating in the hearing are  
20 included in its rate base. Under the Consumer  
21 Advocate's legislation or directions, the Consumer  
22 Advocate is entitled to recover taxed costs. The  
23 Consumer Advocate is representing every single  
24 consumer of Newfoundland and Labrador Hydro and of  
25 Newfoundland Power except the Industrial Customers.  
26 You can see from the experts that have been put forth  
27 by the parties that all of those parties are planning to  
28 call expert witnesses on cost of service and rate design,  
29 on rate of return, on capital structure, and you can also  
30 see from your, I'm sure your preliminary look at the  
31 application and the evidence which has been filed on  
32 behalf of Hydro, that costs get moved back and forth  
33 between the classes of customers depending on  
34 whether a particular facility, whether it's a generation  
35 facility, a transmission facility or a distribution facility,  
36 is considered to be common or specifically assigned to  
37 an individual class of customers. If the Industrial  
38 Customers do not participate actively and to the same  
39 extent as the other customers or the other intervenors,  
40 then there is a very serious risk that the industrial  
41 customers will end up bearing more than their fair share  
42 of the cost of service simply by not having participated  
43 to the same degree and call experts of their own to  
44 balance the opinions of other experts who might be  
45 called before the Board.

46 You must know yourselves, since there was  
47 some preliminary discussion with Dr. Morin, that these  
48 experts are extremely expensive, they make the lawyers

49 look cheap, and we need to participate in this hearing,  
50 the industrial customers have a vested interest in this  
51 hearing, and as an argument that given the small  
52 industrial base of the Province of Newfoundland, that  
53 the province as a whole and the people of  
54 Newfoundland as a whole have a serious interest in  
55 making sure that the costs allocated to its industrial  
56 base are fairly assigned and fairly dealt with.

57 Having said that, while I note that both  
58 Newfoundland Power and Newfoundland Hydro have  
59 submitted that the cost application is premature, I don't  
60 believe that it is. It is extremely difficult to operate and  
61 make decisions with respect to incurring costs in  
62 relation to a hearing, particularly costs of the experts, if  
63 you have no idea before you start whether you have  
64 any prospect of recovering those costs at the end.  
65 Now when you go to court, you know that generally  
66 speaking the winner gets his or her costs and the loser  
67 doesn't. The loser pays those costs. But in this case,  
68 in the absence of some type of direction from the  
69 Board, we could win, I use the term loosely, by being  
70 successful in reducing the amount of the increase for  
71 the industrial customers, and yet there is no rule of  
72 thumb, there is no indication to us, whether even if  
73 successful we will be able to recover our costs.

74 Now if you look at the legislation, and in  
75 particular if you look at Section 90 of *The Public*  
76 *Utilities Act*, you see that Section 90, Sub 1, says that,  
77 "The cost of an incidental to a proceeding before the  
78 Board shall be in the discretion of the Board and may  
79 be fixed at a definite amount or may be taxed and the  
80 Board may order by whom they are to be taxed, to  
81 whom they are to be allowed, and the Board may  
82 prescribe a scale under which costs shall be taxed."

83 We're not looking for an order saying how  
84 much we will be entitled to recover in costs. We're  
85 quite ... we would be quite happy to have conditions  
86 attached to the recovery of costs, and I'll get into that  
87 in a few minutes. We would be quite happy to be  
88 entitled to our taxed costs assuming that those  
89 conditions are met, but we really would like some  
90 direction from the Board as to whether there is a  
91 reasonable prospect of recovering our costs, and we  
92 feel that in fairness and in justice, given that everybody  
93 else participating in this hearing has the ability to  
94 recover their costs, not only their legal costs but also  
95 their experts' costs, mostly from the consumer, that the  
96 industrial customers should, except in exceptional  
97 circumstances, be afforded precisely the same benefit,

1 because the industrial customers ultimately are going to  
 2 contribute to Hydro's costs and they're probably  
 3 ultimately going to contribute to the cost of the  
 4 Consumer Advocate in their rates, because that's just  
 5 the way the costs get passed on.

6 Now Hydro has taken the position that the  
 7 industrial customers are in a different class, that the  
 8 industrial customers should be paying their costs out  
 9 of their pockets because they're large commercial  
 10 enterprises and they don't fit the categories of types of  
 11 people who normally get costs. Well if that's the case,  
 12 perhaps Hydro should be paying its costs of  
 13 participating in the proceeding and Newfoundland  
 14 Power out of their profits. This is a regulatory process.  
 15 This is mandated by Government. It is not a  
 16 discretionary cost if we are to participate properly and  
 17 fully in the hearing, which, like it or not, our clients  
 18 have to do in order to protect themselves.

19 When you look at the case law ... first of all,  
 20 when you look at the case law, there is precedent for  
 21 the Public Utilities Board awarding costs to an  
 22 intervenor such as the industrial customers. In the  
 23 cases that are attached to the material submitted by  
 24 Newfoundland and Labrador Hydro, there is a case  
 25 which is a decision of the Supreme Court of Canada in  
 26 *Consumers Association, Bell Canada and the*  
 27 *Consumers Association of Canada*, and if you look at  
 28 page 585 of that decision, you will see in the last  
 29 paragraph on page 585 ... do you have the references  
 30 there?

31 MR. NOSEWORTHY, CHAIRMAN: Uh hum.

32 MS. HENLEY ANDREWS: A reference to  
 33 *Newfoundland and Labrador Hydro versus*  
 34 *Newfoundland and Labrador Federation of*  
 35 *Municipalities* in 1979, and that was a case where the  
 36 Board of Commissioners of Public Utilities had awarded  
 37 costs in a fixed sum to the Newfoundland and Labrador  
 38 Federation of Municipalities. Now the Federation of  
 39 Municipalities, through its component municipalities,  
 40 would normally be able to pay the costs of participating  
 41 but they'd be paying it out of their taxpayers' money,  
 42 and in that particular case Hydro were taxed the award  
 43 of costs partly on the ground that the amount was  
 44 excessive and that the costs should have been taxed on  
 45 a party-and-party basis, and that was rejected by the  
 46 Supreme Court of Newfoundland, that position was  
 47 rejected. So in fact we know, and Mr. Hutchings  
 48 advises me that he represented the Federation of

49 Municipalities at various points in the '80s, and that the  
 50 Federation of Municipalities did get its costs of  
 51 participating in hearings on a number of occasions.

52 But the, one of the important points that is  
 53 established in the *Bell Canada* case and one of the  
 54 things you have to note is that the *Bell Canada* case  
 55 was decided in February of 1986, and the Supreme  
 56 Court of Canada referred at the bottom of the same  
 57 paragraph that I was referring to, the Supreme Court of  
 58 Canada said, "In the course of rejecting Hydro's  
 59 contention," Furlong said, "I can find no support for  
 60 bringing in the rules as to costs in this court to  
 61 proceedings before independent bodies." In other  
 62 words, he didn't see why the cost rules with respect to  
 63 the court would have any application to costs before  
 64 independent bodies.

65 And as Gushue, with whom Morgan  
 66 concurred, also said, and I'm quoting, "The manner in  
 67 which the costs are arrived at and awarded is a matter  
 68 strictly within the discretion and competence of the  
 69 Board and this court has no jurisdiction to interfere  
 70 with that discretion unless of course improperly  
 71 exercised. The fact that a litigant in a court proceeding  
 72 is subject to various rules relating to costs, is of no  
 73 relevance here." And that quote has been quoted with  
 74 approval in the Supreme Court of Canada, and that is  
 75 the law in Newfoundland, which is the fact that a  
 76 litigant in a court proceeding is subject to various rules  
 77 relating to costs is of no relevance with respect to a  
 78 hearing before the Public Utilities Board.

79 (11:45 a.m.)

80 The Act, Section 90, is quite broad. It gives to  
 81 the Board quite a broad discretion, and it doesn't limit  
 82 the Board's discretion with respect to costs to awarding  
 83 costs at the end of a hearing. There is nothing in  
 84 Section 90 of *The Public Utilities Act* that refers to  
 85 costs being awarded at the end of a hearing. It simply  
 86 says that the Board has discretion to award the costs,  
 87 and that is a distinction. What you're going to find is  
 88 that if you look at some of the other cases that have  
 89 been submitted to you by my learned friend, that the  
 90 legislation, you have to look very carefully at the  
 91 specific provisions of the legislation being dealt with in  
 92 those cases, because the provisions in the various acts  
 93 that are being looked at in most of those cases are very  
 94 specific, and the fact that a court ultimately decided that  
 95 it was, might have been premature in those  
 96 circumstances or that there was no jurisdiction in those

1 circumstances, does not necessarily mean that this  
2 Board has no jurisdiction under the legislation by  
3 which it is governed, and that is quite critical and I'm  
4 going to deal with that but first I want to deal with the  
5 issue of circumstances and potential conditions.

6 As I pointed out, in the *Newfoundland and*  
7 *Labrador Hydro versus Newfoundland and Labrador*  
8 *Federation of Municipalities* case, which was a  
9 decision of the Newfoundland Supreme Court, Court of  
10 Appeal, in 1979, the court upheld an award of costs on  
11 a lump sum basis in favour of the Federation of  
12 Municipalities. Similarly, in the *Bell Canada and*  
13 *Consumers Association of Canada* case in 1986, the  
14 Supreme Court of Canada dealt with a cost issue, but  
15 what had happened in a number of the cases is that  
16 guidelines had been set by many boards or many  
17 regulatory boards with respect to the award of costs to  
18 intervenors, and that's the area of the Supreme Court of  
19 Canada case that I want to focus on.

20 If you look at page two of the decision in the  
21 *Bell Canada* case, which is attached to my materials,  
22 you see in the headnote, the third paragraph down, the  
23 one that begins, "Under Section 73 of the NT Act," the  
24 second sentence says, "Earlier in 1978 the CRTC had  
25 stated that it would exercise this discretion to increase  
26 the participatory capacity of responsible intervenors at  
27 regulatory hearings," and I think that that aspect of it is  
28 important. Obviously it is in the discretion of the Public  
29 Utilities Board to determine whether at the end of the  
30 hearing industrial customers have acted responsibly in  
31 the course of the hearing.

32 You also see that the Supreme Court of  
33 Canada in that case dismissed the appeal, and in the  
34 short headnote down below, also on page two, it said,  
35 "Nevertheless, given the nature of the proceedings and  
36 the financial arrangements of public intervenors, a  
37 broad interpretation of the indemnification or  
38 compensation principle was justified and a strict view  
39 of the courts with respect to the award of costs  
40 inapplicable." So the ultimate conclusion of the  
41 Supreme Court of Canada was that there should be a  
42 broad interpretation of the indemnification for  
43 compensation principle and that the strict view of the  
44 courts with respect to costs doesn't apply.

45 Now what happened in the *Bell Canada* case  
46 is that the Consumers Association, among others, was  
47 awarded costs by the CRTC, and when the time came to  
48 tax the costs, Bell Canada objected to paying to these

49 intervenors, wanted to take into account in dealing with  
50 the costs to these intervenors amounts of funding that  
51 they had received from other sources. So where an  
52 intervenor had received Government assistance, for  
53 example, in participating in the hearing, or whether,  
54 when an intervenor was funded by a public interest  
55 group other than its own group or funded through  
56 donations, Bell Canada felt that the only thing that  
57 ought to be paid to those intervenors as taxed costs  
58 was their actual out-of-pocket costs and the direct  
59 costs to those associations, and the court dealt with the  
60 public participation issue and also dealt with the issue  
61 of what you might call double recovery for want of a  
62 better word, and that discussion starts at page six of the  
63 decision. And what you see at paragraph eight is that  
64 in its Telecom decision, CRTC 78/4 in 1978, the  
65 Commission stated that, "One of the objective of its  
66 practices and procedures was to increase the capacity  
67 of intervenors to participate at public hearings in an  
68 informed way and in the course of discussion of  
69 possible forms of financial assistance to intervenors it  
70 made the following statement of principle with respect  
71 to the award of costs." And then you see what that  
72 statement of principle is, and it really focuses, the last  
73 sentences of the quote. "Costs will only be available to  
74 intervenors who have participated in a responsible way,  
75 have contributed to a better understanding of the issue  
76 by the Commission. As noted above, costs will not be  
77 available to intervenors who already have funding from  
78 Government or other sources that would, in the  
79 Commission's opinion, enable them to participate in a  
80 case."

81 The first sentence is the sentence that we  
82 consider to be critical. In other words, there is no  
83 direction from this Board at the present time as to the  
84 basis upon which or the circumstances in which it  
85 might consider awarding costs to intervenors. The  
86 general principle that an intervenor who participates in  
87 a responsible way and has contributed to a better  
88 understanding of the issues by the Commission ought  
89 to get its costs would seem to be reasonable. An  
90 intervenor that doesn't participate in a responsible way  
91 obviously should not get its costs or one that does not  
92 contribute to a better understanding of the issue.

93 You'll see that the CRTC subsequently  
94 published Rules of Procedure, and in the Rules of  
95 Procedure there were four criteria, "Has a substantial  
96 interest in the outcome of the proceeding or represents  
97 the interests of a substantial number or class of  
98 subscribers, has participated in a responsible way, has

1 contributed to a better understanding of the issues by  
2 the Commission, and does not have sufficient financial  
3 resources available to enable it to prosecute its  
4 interests adequately, having regard to the financial  
5 implications of the application for the intervenor or  
6 where the intervenor represents the interests of a group  
7 or class of subscribers for each member thereof, and the  
8 intervenor requires the assistance provided by costs to  
9 do so."

10 Now if you look at (d), that is a judgement  
11 question based upon the implications of any particular  
12 application. In this particular matter, given that it has  
13 been eight years since the last rate hearing and given  
14 the significant changes being proposed by Hydro in  
15 terms of its relationship with its industrial customers  
16 and the complete re-working of its proposed contracts  
17 with its industrial customers, there is a need to fully  
18 participate in the hearing.

19 Now some might argue that the industrial  
20 customers have sufficient financial resources, but really  
21 does anybody have sufficient financial resources to  
22 participate fully in a hearing where everybody else is  
23 entitled to recover their costs and to call the experts  
24 who need to be called and incur those expenses when  
25 they're operating a business? A regulation of these  
26 types of costs is out of the control of the industrial  
27 customers.

28 If you look across the country you will find  
29 that while a similar criteria has been adopted by many  
30 public utilities boards, nonetheless, for example in  
31 Manitoba, the Manitoba Public Utilities Board on a  
32 number of occasions has awarded costs to MIPUG, the  
33 Manitoba Industrial User's Group, and other  
34 jurisdictions, including the Yukon, have also awarded  
35 costs to industrial customers, and in fact they've been  
36 awarded occasionally in Ontario. That would require  
37 some checking with other public utilities boards.

38 If you take a look then at what was done in  
39 this particular case in the Supreme Court of Canada,  
40 they came to the conclusion that the discretion to  
41 award costs is fully with the Board. The Board has the  
42 ability to determine when and to whom and in what  
43 circumstances it awards costs. Those guidelines have  
44 been adopted by some other jurisdiction but they don't  
45 have to be adopted here, they are not set as mandated  
46 guidelines, or they can be interpreted as other  
47 jurisdictions have done in whatever way the Public

48 Utilities Board considers to be fair in the circumstances.

49  
50 And you'll see at page 12 of 15 of the *Bell*  
51 *Canada* decision at paragraph 26 that the court says,  
52 "Courts of Appeal in three provinces have held that in  
53 the exercise of the discretion to award costs under  
54 provisions in essentially the same terms as Section 73  
55 of *The National Transportation Act*, regulatory  
56 tribunals were not bound by the principles and rules  
57 governing the award of costs in the courts although the  
58 application of the principle of indemnification would  
59 not appear to have been directly in issue in these cases.

60 And the court ultimately concluded that it was  
61 within the jurisdiction of the CRTC to award costs to  
62 intervenors who had received funding from other  
63 sources and that the Supreme Court of Canada was not  
64 prepared to limit the discretion of the regulatory  
65 tribunal to that extent, and it says at paragraph 30 of the  
66 second or third sentence down, "In view of the nature  
67 of the proceedings before the Commission and the  
68 financial arrangements of public interest intervenors,  
69 the discretion conferred on the Commission by Section  
70 73 must include the right to take a broad view of the  
71 application of the principle of indemnification or  
72 compensation. The Commission therefore should not  
73 be bound by the strict view of whether expense has  
74 been actually incurred that is applicable in the courts.  
75 It should, for example, be able to fix the expense which  
76 may be reasonably attributed to a particular  
77 participation by a public interest intervenor as being  
78 deemed to have been incurred whether or not as a result  
79 of the particular means by which the intervention has  
80 been financed there has been any actual out-of-pocket  
81 expense."

82 (12:00 p.m.)

83 That is what I understand the Commission to  
84 have done in this case. It did not reject the general  
85 concept of indemnification or compensation as  
86 indicated by the provision in its draft and adopted rules  
87 that the costs awarded to an intervenor shall not exceed  
88 those necessarily and reasonably incurred by the  
89 intervenor in connection with its intervention, another  
90 reasonable limit.

91 And basically the final conclusion of the  
92 Supreme Court of Canada in the last sentence, "In  
93 doing so, the Commission did not in my opinion err in  
94 law so long as it adopted a reasonable approach as it

1 appears to have done to what should be deemed to be  
2 the expenses incurred for the intervention on behalf of  
3 CAC and NAPO (phonetic) et al."

4 So basically what the Supreme Court of  
5 Canada said to all of us in February of 1986 is that a  
6 board such as the Public Utilities Board has the  
7 discretion to award costs and to interpret the  
8 provisions with respect to costs in a broad way in order  
9 to achieve the objectives which seem to be reasonable  
10 in the circumstances. And I would submit that in the  
11 present circumstances, the objective of ensuring that a  
12 group of customers, we do represent all of the industrial  
13 customers of, island industrial customers of Hydro, that  
14 a group that is otherwise unrepresented at the hearing  
15 and which will be the only group that doesn't know in  
16 advance where the money is going to come from if it  
17 takes a reasonable approach to the hearing, that this is  
18 a circumstance in which it would be reasonable and  
19 prudent for the Board to indicate that as long as the  
20 industrial customers participated in the process in a  
21 valuable way, that they should be entitled to their costs  
22 on a party-and-party basis at the conclusion of the  
23 hearing with obviously the Board to make the decision  
24 at the conclusion of the hearing as to whether we have  
25 participated in such a way, but that would be very  
26 useful to us at the outset because we don't, we are not  
27 currently on a even playing field with the other  
28 participants in the hearing, and my clients have to look  
29 at these costs as well as looking at the potential of an  
30 18 percent increase in their rates, and that's substantial.

31 Now some of the other cases that have been  
32 referred to by counsel, one of them in particular, which  
33 is with Newfoundland Hydro's material, is a decision in  
34 Ontario ... that Hydro's or ... maybe it's Newfoundland  
35 Power's. Anyway, there's one of the cases, is a 1985  
36 decision of the Ontario Court, and if you'll just bear  
37 with me for a second I'll find it. And I would simply  
38 point out ... yeah, that's the *Regional Municipality of*  
39 *Hamilton Wentworth* case, and that is a decision of the  
40 Ontario Supreme Court in June of 1985.

41 COMMISSIONER SAUNDERS: As to which ...

42 MS. HENLEY ANDREWS: Hydro's materials.

43 MS. BUTLER, Q.C.: It's actually attached to your own  
44 material.

45 MS. HENLEY ANDREWS: Yeah, that one is there as  
46 well, but I just wanted to point out that that case pre-

47 dates the decision of the Supreme Court of Canada and  
48 there are useful principles that are set forth in the case  
49 in terms of what types of criteria might be utilized.

50 In addition, and I'm going to reserve most of  
51 my comments with respect to materials that other  
52 people have filed until after they have made their  
53 argument, but I did wish to point out that it's the  
54 Supreme Court of Canada decision in 1986 would  
55 override any contrary decision that had been made  
56 prior to that time.

57 So on that basis we would submit that  
58 provided that the industrial customers behaved in a  
59 responsible way and contribute value and insight in the  
60 course of the hearing, that the industrial customers  
61 should be entitled to their taxed costs at the conclusion  
62 of the hearing, and we would submit that it is not  
63 premature to give an indication of that view at this time  
64 and that it's fully within the jurisdiction of the Board  
65 applying a liberal and broad interpretation to Section 90  
66 to exercise that jurisdiction at this time. Thank you.

67 MR. NOSEWORTHY, CHAIRMAN: Thank you very  
68 much. We'll proceed on now to, I guess, Hydro's  
69 comments on this motion, please.

70 MS. GREENE, Q.C.: Mr. Chairman, before I begin with  
71 comments, we have not received anything from the  
72 Consumer Advocate with respect to this application  
73 and I thought that it might be helpful if the Consumer  
74 Advocate is supporting the application for costs as  
75 well that he would speak prior to us replying to the  
76 application on costs. So that ...

77 MS. BUTLER, Q.C.: In fact, Mr. Chairman, I wonder  
78 whether Hydro shouldn't go last on this?

79 MS. GREENE, Q.C.: That also would be helpful. I think  
80 certainly we should know what the position of the  
81 Consumer Advocate is. I believe I know the position of  
82 Newfoundland Power from the documentation that's  
83 been filed by Newfoundland Power, but at this point I  
84 have no indication of the power of the Advocate, and  
85 if he indeed is supporting the application, I think he  
86 should speak before I get the opportunity to reply.

87 MR. NOSEWORTHY, CHAIRMAN: I would ... do you  
88 have any objection, Mr. Browne, to that procedure?

89 MR. BROWNE, Q.C.: I don't know the rationale for  
90 that, Mr. Chairperson.

1 MS. GREENE, Q.C.: I think it would expedite the  
2 process. I will speak once in reply to the application.

3 MS. BUTLER, Q.C.: Mr. Chairman, I'm quite prepared to  
4 go next if it's ... then Mr. Browne can indicate his  
5 position after lunch if that's of any assistance to the  
6 Board.

7 MR. NOSEWORTHY, CHAIRMAN: Okay. Well I'd ask  
8 you to proceed and then Mr. Browne next, please.

9 MS. BUTLER, Q.C.: Okay. I'll say at the outset to the  
10 Chairman and the panel that nothing that's been stated  
11 this morning by counsel for the industrial customers  
12 addresses the issue which you have to address, and  
13 that is, quite frankly, whether the cost application is  
14 premature, and if you ask yourselves when you recess  
15 on this issue whether you've been provided with any  
16 authority whatsoever to satisfy you that an award of  
17 costs can be made at this date, you will conclude that  
18 you have not been given such an authority.

19 Newfoundland Power filed a response to the  
20 application of the industrial customers on July 4th and  
21 its position is clear, to seek costs before the hearing  
22 starts is premature, and this position applies equally to  
23 the application which I think is alluded to in the  
24 intervenor application of Lab City.

25 Costs are clearly in your discretion. There's no  
26 quarrel over what the legislation says. Section 90 of  
27 *The Public Utilities Act* is almost identical to Section 28  
28 of the EPCA and the question you'll be addressing on  
29 this hearing, quite frankly, is whether Hydro is seeking  
30 rates that reflect sound financial administration for  
31 domestic, commercial and other users in the Province  
32 under Section 4 of *The Hydro Corporation Act*.

33 The discretion which you will exercise  
34 ultimately will be exercised after you have heard all the  
35 evidence before you. If you determine that now, it  
36 certainly would be a mistake. Newfoundland Power  
37 may in fact at the end of the day seek its costs, or,  
38 better still, or as an alternative, Newfoundland Power  
39 may make a submission to this panel at the end of the  
40 day that you award costs against somebody who's  
41 been a nuisance to these proceedings, and that is what  
42 all the cases suggest on the issue of costs.

43 Attached to Newfoundland Power's  
44 application is a case called *Ontario High Court of*  
45 *Justice, Divisional Court, re Ontario Energy Board*.

46 I'm going to suggest to the panel at this point that if  
47 you accept our submissions you will find that in fact  
48 there are two cases which are ultimately of assistance to  
49 this panel. This is one of them, the *Ontario High Court*  
50 *of Justice*, and the other is the last case attached to Ms.  
51 Greene's authorities, and that is the *Manitoba Society*  
52 *of Senior Citizens* case.

53 Looking first at the *Ontario High Court of*  
54 *Justice* decision of (unintelligible), Holland and  
55 Rosenberg, in the headnote itself, very first paragraph,  
56 you'll see the finding that the Ontario Energy Board has  
57 jurisdiction to order costs clearly, similar to Section 90  
58 of the Act under which you are guided, but it was not  
59 a proper exercise of the jurisdiction to order interim  
60 costs, thereby providing intervenors with funding in  
61 advance of a hearing. Such an order would require  
62 specific legislative authority not for the board to confer  
63 jurisdiction upon itself under the guise of awarding  
64 costs.

65 This case is an interesting case because there  
66 were actually two applications brought forward and the  
67 court determined that they would hear them both  
68 together because they were similar. The first one was  
69 an application by the municipality of Hamilton  
70 Wentworth under what they call the *Consolidated*  
71 *Hearings Act*, and they were there appealing an order  
72 of a joint board.

73 The second application that was brought, that  
74 was basically an application seeking the opinion of the  
75 court on a stated case. In other words, can we award  
76 costs? And I'll show you the question as it was put to  
77 the Board at page three of the decision. Looking at  
78 page three of five, just under the large type, "Pursuant  
79 to Section 31 of the *Ontario Energy Board Act*, can the  
80 Board lawfully order interim costs to be paid in  
81 accordance with the following criteria and procedure?"  
82 Interim costs is the issue. And the legislation under  
83 which it was guided, you'll see about halfway down the  
84 page at the start of the No 2, "On receipt of an  
85 application the Board may direct an interim order of  
86 costs be made on such terms and conditions that it  
87 considers reasonable."

88 You do not have a section that allows you to  
89 award interim costs. You have a section that allows  
90 you to award costs in your discretion, and despite the  
91 finding at the bottom of that page, Mr. Chairman and  
92 members of the panel, that the jurisdiction of the Board  
93 is very broad. The conclusion reached, looking at the

1 next page, four, towards the bottom, the interpretation  
2 of the section is held ... "Characteristics of costs as  
3 determined over the years are awards made in favour of  
4 a successful or deserving litigant," etcetera, "must  
5 await the conclusion of the proceeding, payable by way  
6 of indemnity, not payable for the purpose of assuring  
7 participation in the proceedings." These four elements  
8 are of particular assistance to the panel and the  
9 decision you must make today, and the conclusion of  
10 course is at page five and no costs, no interim costs  
11 were allowed.

12 As an example of circumstances under which  
13 at least one other jurisdiction awards costs, we  
14 provided you with copies of the Nova Scotia Utility and  
15 Review Board Rules of Practice and Procedure  
16 Respecting Costs, and similar to submissions made by  
17 Ms. Andrews this morning you'll see there in Section 5,  
18 Sub 2, "That the Board could determine the following  
19 conduct to be unreasonable, frivolous or vexatious,"  
20 etcetera. And then in Section 6 there is a section that  
21 deals with awarding, the consideration of awarding  
22 costs against a utility to non-profit public interest  
23 intervenors with limited financial resources, so in that  
24 jurisdiction, Nova Scotia, there is a specific ability to  
25 consider awarding costs to non-profit public interest  
26 intervenors. That is not the status of the industrial  
27 customers, and indeed in the case that follows behind  
28 that, the Nova Scotia Utility and Review Board Order,  
29 that section was considered but you'll see at the third  
30 page of the decision the application was not awarded.

31 Now, the industrial customers did refer you to  
32 the *Newfoundland and Labrador Hydro, Federation of*  
33 *Municipalities* case from our Court of Appeal, which  
34 we accept did hold that this Board could make an award  
35 of costs, however, they did not hold that you could  
36 make an award of costs at the beginning of the hearing,  
37 and to satisfy you of that I want you to look, if you  
38 could, at page 318, and that decision is attached to Ms.  
39 Andrews' submission.

40 (12:15 p.m.)

41 318, paragraph one, where it refers to Chief  
42 Justice Furlong. I'll just wait for Mr. Saunders there to  
43 catch up. About halfway through that paragraph,  
44 "This reference was duly heard on numerous dates  
45 between November 17th, 1977, and February 6, '78,  
46 occupying in all some 22 days of hearings." Okay.  
47 And then it goes on to say, "As a result of reference,  
48 Lieutenant-Governor-in-Council approved an increase

49 in rates and on the 17th of March '78 an order-in-council  
50 duly issued." Then on the 5th of June '78 they brought  
51 the application for costs. The application by the  
52 Federation of Municipalities for its costs was brought  
53 three months after the award and after 22 days of  
54 hearings. That's what that case stands for.

55 The industrial customers also rely on the *Bell*  
56 *Canada* case, which is also attached to their  
57 authorities, and again I want to satisfy this panel that  
58 the application was brought after the hearing. You'll  
59 see that at page two of fifteen. It's the same paragraph  
60 in fact that Ms. Andrews kindly referred you to earlier.  
61 The paragraph starts with, "At the conclusion of the  
62 CRTC hearing on a B.C. rate increase application, the  
63 CRTC's taxing officer affirmed, awarded costs to the  
64 CAC and the National Anti-Poverty Organization."  
65 That's page two, the paragraph starting with, "At the  
66 conclusion of."

67 The issue, members of the panel, that had  
68 gone to the Supreme Court of Canada and that was  
69 alluded to by Ms. Andrews this morning, was that of  
70 double recovery. Should they have awarded costs  
71 knowing that these people also had funding? That's  
72 what this decision addresses. It does not address the  
73 decision that you have to address today.

74 Finally the industrial customers referred to the  
75 case of (*unintelligible*) *Lake and West Coast*  
76 *Transmission* from British Columbia Court of Appeal,  
77 and there you will find the only case where there is a  
78 reference to an award of costs before the hearing  
79 started. At the bottom of the opening page, one of  
80 seven, you'll see the British Columbia Utilities  
81 Commission had refused to make an order for costs in  
82 favour of the Appellant Indian Band who was one of  
83 the intervenors to review applications for construction  
84 of a natural gas transmission line and on appeal to the  
85 British Columbia Court of Appeal they argued that the  
86 Commission had failed to exercise discretion for the  
87 award of costs under *The Utilities Commission Act*.

88 However, you'll find in page two of seven  
89 under the word "Held," that the Commission had not  
90 acted with unfettered discretion, and that is why the  
91 Court of Appeal set aside their decision. There was no  
92 clear reason to be found in the record for refusing the  
93 order for costs, and the adverse inference drawn was  
94 that the Commission had acted according to a minister's  
95 direction.

1 I'm going to refer you to the page of the  
2 decision where that's made clear. There was a letter  
3 written by the Minister directly to the Board telling  
4 them not to award costs. You'll see that at page three  
5 of seven, "Dear Mrs. Taylor: It is the Government's  
6 wish that the Commission continue on its course of  
7 cost recovery for hearings that it will recover its costs  
8 where in its discretion it feels this is appropriate,"  
9 etcetera, etcetera. So the Court of Appeal said the  
10 panel in addressing, in refusing the Indian Band's  
11 request for costs at the beginning of the hearing,  
12 basically had this letter in its pocket and had acted with  
13 fettered discretion. There's no common ground, this  
14 case with your own case today. So although this is the  
15 only case in which an application was made at the  
16 beginning of the hearing and had been denied but  
17 ultimately overturned on appeal, the case is highly  
18 distinguishable.

19 Newfoundland Hydro accepts Newfoundland  
20 Power's position that the application for costs is  
21 premature and that's indicated in page two, paragraph  
22 one, sub three, of Ms. Greene's intervention of  
23 (inaudible), and they refer to a reference re National  
24 Energy Board decision. The only point I'd ask you to  
25 note about that decision is that it does not ... the  
26 underlying legislation in that case does not give the  
27 Board the discretion to award costs at all.

28 However, Ms. Greene appropriately refers to  
29 this Manitoba Society of Seniors case, which is very  
30 significant, decided in 1982, and addresses the issue of  
31 a premature award of costs quite frankly head on.  
32 When the proceedings started in that particular case,  
33 the Manitoba Society of Seniors, who clearly did not  
34 have financial wherewithal to participate fully in the  
35 proceedings, sought costs and the Board had declined  
36 the order. The Society alleged that the decline of that  
37 order was a breach of natural justice and in fact a  
38 breach of their Charter rights and the court held that  
39 Section 56 of *The Public Utilities Board Act*, which  
40 you'll see right at the bottom ... I'm sorry, that's not 56,  
41 58. 56 is on page two of four in paragraph eight. It's  
42 almost identical to your Section 90, so you're dealing  
43 with legislation which is comparable. The Board held  
44 that that section related to an award of costs after the  
45 hearing, and you'll see that, ladies and gentlemen, in  
46 paragraph eight right at the bottom of the paragraph,  
47 before you get into paragraph nine. "I'm of the view  
48 that 56 relates to an award of costs after a hearing. It is  
49 my view that the preliminary demand for costs could  
50 not be met by the Board under existing legislation. One

51 can understand why the legislation does not provide  
52 for the Board to make a preliminary award on costs.  
53 The Board's function is not simply to provide a forum  
54 for a hearing but rather to play an active part in such a  
55 hearing to protect public interest, including the interest  
56 of senior citizens."

57 So essentially the two leading cases and the  
58 two relevant cases are the Ontario Hydro, supplied by  
59 ourselves, and the Manitoba Society of Seniors,  
60 supplied by Hydro, and they both give us the same  
61 thing. This Board can award costs later in your  
62 discretion but you cannot award them before the  
63 hearing starts.

64 I will tell you at the appropriate time if an  
65 application is made for costs for industrial customers,  
66 and if I'm following Ms. Andrews' logic on this, if the  
67 suggestion is being made that the common consumers  
68 of this province pick up the costs of the industrial  
69 customer in addition to any other costs of this hearing,  
70 then we will vigorously oppose that too, but the entire  
71 application at this stage, quite frankly, is premature.  
72 Those are my comments, Mr. Chairman.

73 MR. NOSEWORTHY, CHAIRMAN: Thank you very  
74 much. Appropriate and timely. It's right on the mark at  
75 12:30. We will adjourn for now until two o'clock this  
76 afternoon, at which time we'll reconvene and proceed  
77 with the Consumer Advocate, please. Thank you.

78 *(lunch break)*

79 *(2:00 p.m.)*

80 MR. NOSEWORTHY, CHAIRMAN: Good afternoon,  
81 I hope you had an enjoyable lunch. We'll continue to  
82 proceed on the second motion now, and I'd ask the  
83 Consumer Advocate to provide his comments please?

84 MR. BROWNE, Q.C.: Thank you, Mr. Chairman, we  
85 were appointed under Section 117 of the *Public*  
86 *Utilities Act*, which states in part that, "The Lieutenant  
87 Governor in Council may appoint a Consumer  
88 Advocate under (inaudible) upon those terms and  
89 conditions that the Lieutenant Governor in Council may  
90 determine, and all costs relating to the Consumer  
91 Advocate shall be borne by the Board". The Order in  
92 Council reflects the following minute, "Upon, under the  
93 authority of Section 117 of the *Public Utilities Act*, the  
94 Lieutenant Governor is pleased to appoint the  
95 Consumer Advocate for Public Utilities Board hearings

1 to represent the interest of domestic and general service  
2 consumers on terms acceptable to the Minister of the  
3 Justice after consultation with the Public Utilities Board  
4 for the purpose of the upcoming rate hearings." There  
5 is no reference to the industrial customers in that MC.

6 The Board clearly has jurisdiction under  
7 Section 90 to utilize the discretion to award costs to  
8 anyone. I agree with the case law that's been referred  
9 to in that insofar as it makes reference to the fact that  
10 costs probably shouldn't be awarded until the  
11 conclusion of the hearing.

12 Janet Henley Andrews and Joe Hutchings  
13 have appeared before this Board on numerous  
14 occasions and will have a very valuable contribution to  
15 make to this process. I think the industrials were wise  
16 to retain them. Having said that, however, it would not  
17 be in our position in any case that the consumers of the  
18 province should bear the cost of the industrials. That's  
19 our position.

20 MR. NOSEWORTHY, CHAIRMAN: Thank you, and  
21 now I'll ask Hydro if they would provide their comments  
22 please?

23 MS. GREENE, Q.C.: Thank you, Mr. Chair. Hydro  
24 acknowledges that the island industrial customers have  
25 a significant interest in this hearing, and that it is the  
26 first time that the Board will have reviewed and set  
27 industrial rates, and the rules governing service to  
28 these customers. However, other customers who are  
29 represented at this hearing also have significant  
30 interest, such as Newfoundland Power because of the  
31 expense incurred in buying purchased power from  
32 Hydro. The consumers as represented by the  
33 Consumer Advocate, the Town of Labrador City has  
34 intervened, as has the Town of Happy Valley-Goose  
35 Bay, so there are a number of parties before the Board  
36 who have interest in the proceeding, and we  
37 acknowledge all of those interests and their  
38 participating in the hearing.

39 However, the issue before the Board is not  
40 whether they have an interest. The issue is who is best  
41 to bear the costs of such interventions. We believe  
42 that the application raises significant issues for the  
43 Board for this hearing and for future hearings, and that  
44 the Board must carefully consider the authority that it  
45 clearly has under Section 90, and in that I will speak to  
46 two aspects. One is the time at which the Board can  
47 exercise the discretion it has been granted under

48 Section 90 of the *Public Utilities Act*, and the other are  
49 the factors that the Board should consider and take  
50 under consideration when they are considering whether  
51 an award for costs should be made.

52 It is our submission that this application  
53 clearly raises the first issue, and that is the appropriate  
54 time for the Board to consider whether it will exercise its  
55 discretion to award costs under Section 90 of the Act.

56 Before I refer to legal authorities for our  
57 position, there is one point that I would like to address  
58 with respect to the submission this morning, on what I  
59 call a factual position of the Industrial Customers, and  
60 that is Mrs. Andrews' submission that her clients would  
61 be one of the few who are not entitled to funding for  
62 this hearing. She said that it would be unfair, and it's a  
63 question of fairness that the other parties are entitled to  
64 funding, and that at this point her clients have no  
65 assurance that they will receive any award for costs at  
66 the conclusion of the hearing.

67 I would point out that there are other  
68 intervenors. The Town of Labrador City has also raised  
69 the issue of costs and is uncertain at this point as to  
70 whether it has any ability to recover costs. The Town  
71 of Happy Valley-Goose Bay has also intervened. I  
72 would take from Ms. Butler's comments this morning  
73 that Newfoundland Power has not made a decision as  
74 to whether it will seek funding from Hydro or seek an  
75 award for costs at the conclusion of the hearing.

76 With respect to Hydro's ability to pass on the  
77 costs of this hearing to its customers, I would agree  
78 with Ms. Andrews that in the appropriate  
79 circumstances Hydro would be entitled to recover its  
80 costs of this hearing from its customers. I would point  
81 out that to date we have not done so. In our past  
82 hearings, whether it was our '92 hearing or the cost of  
83 service hearing, or the rural rate inquiry, the costs of  
84 the hearings were absorbed as expenses and in effect,  
85 I guess, were absorbed by the shareholder. We did not  
86 seek an Order of the Board to amortize the cost or to  
87 pass the cost on to our customers.

88 Nor have we, in what has been filed to date,  
89 included the cost of this hearing in our test year for  
90 recovery. At the time we filed that was based on our  
91 past practice and our exposure to what costs have been  
92 in the past. To be frank with you, since we have filed  
93 and since we are gaining a better appreciation of what  
94 the costs would be of this hearing, particularly if we are

1 ordered to pay costs of other parties, that we have not  
2 paid in the past, we will have to take under advisement  
3 and consider filing an amendment to include the cost of  
4 the hearing to be recovered from ratepayers in future  
5 years.

6 So I did want to clarify that point, that in the  
7 past Hydro has not passed on these costs, but we have  
8 absorbed them as expenses, so in effect they have  
9 reduced the profit, the level of profit recovery for that  
10 year, and we have not included in what has been filed  
11 to date, any element of recovery of the costs of this  
12 hearing, but I would point out that that issue is  
13 presently under advisement and reconsideration now  
14 that we have a better appreciation of the cost and the  
15 magnitude of the cost which will far exceed any costs  
16 Hydro has had to pay in the past for a regulatory  
17 proceeding.

18 And of course, the question not only for ...  
19 particularly for the Board in all of these circumstances  
20 is who is best to bear the burden, the cost of the  
21 regulatory burden for these hearings, and that is what  
22 one of the, part of the issue that is here before you  
23 today. So dealing with ... I'd now like to turn to the  
24 substantive law with respect to the application, having  
25 made those few preliminary comments.

26 And the first is that Hydro acknowledges that  
27 Section 90 of the *Public Utilities Act* does give the  
28 Board the discretion to award costs to an intervenor  
29 and it is our submission that that must be done  
30 following the conclusion of a hearing. So our basic  
31 position with respect to the current application is that  
32 it is premature and I'll go through with you and explain  
33 why we believe that, and I will refer to cases which I  
34 submit clearly demonstrate that the Board lacks the  
35 authority to make the order as requested by the  
36 Industrial Customers.

37 It is interesting to note that none of the cases  
38 relied upon by counsel for the Industrial Customers  
39 refer to the authority of the Board to award costs at the  
40 beginning of a hearing. All of the cases deal with  
41 awards for costs that have been made following the  
42 conclusion of a hearing. For example, much reliance  
43 has been made by Ms. Andrews on the *Hydro v. The*  
44 *Federation of Municipalities* case. We submit that that  
45 case is authority for the proposition that the Board  
46 does have the discretion to award costs but only ...  
47 against Hydro, but only following the conclusion of a  
48 hearing.

49 Ms. Butler ably demonstrated this morning  
50 with respect to the cases filed by the Industrial  
51 Customers that all of those cases do not support the  
52 issue of an award at the commencement of a hearing,  
53 and I will not repeat that particular point but we also  
54 submit that when you look at the cases that have been  
55 filed, all of them deal with an award at the conclusion of  
56 a hearing, and they are not pertinent, or they are not  
57 relevant to the issue which is before you today, which  
58 is your jurisdiction to award costs at the  
59 commencement of a hearing. And what I would like to  
60 do now is to refer you to the cases that have been filed  
61 by Hydro and we submit that there are three cases  
62 directly on this point dealing with the authority of a  
63 Board to award costs under authority which is very  
64 similar to what has been granted to this Board under  
65 Section 90 of the Newfoundland Public Utilities Act.

66 The first case that has been referred to already  
67 by counsel for Newfoundland Power, but I would like to  
68 refer to it again because I believe that it is exactly on  
69 point with the issue before the Board, and that is the  
70 case referred to in our reply, and that is the *Manitoba*  
71 *Society of Seniors Inc. v. Greater Winnipeg Gas*  
72 *Company*. This was a decision of the Manitoba Court  
73 of Appeal from an order denying costs to a society of  
74 seniors who sought costs at the commencement of a  
75 hearing using some of the same arguments that Ms.  
76 Andrews has used here before you this morning.

77 The first thing that I'd like to draw your  
78 attention to is to page two of that decision where you  
79 will find the reference to the section in the Manitoba  
80 Public Utilities Board Act which gave the Board the  
81 authority to award costs, and that you will find on page  
82 two in paragraph eight. I won't read it now but when  
83 you compare that section to Section 90 of the  
84 Newfoundland Public Utilities Act, you will find that  
85 they are similar with respect to this issue.

86 You will see that the decision of the Manitoba  
87 Court of Appeal with respect to interpreting that  
88 section of the Manitoba Act which I submit is on all  
89 fours with the Newfoundland Public Utilities Act,  
90 Section 90, is that that section, and I'm referring to the  
91 last paragraph under page, the last paragraph under  
92 Section 8 on page two of that decision where the court  
93 found that the section in the Manitoba Act related to an  
94 award of costs after a hearing, and I'm quoting here, it  
95 is my view that the preliminary demand for costs could  
96 not be met by the Board under existing legislation. One  
97 can understand why the legislation does not provide

1 for the Board to make a preliminary award for costs.  
2 The Board function is not simply to provide a forum for  
3 a hearing, but rather to play an active part in any such  
4 hearing to protect the public interest, including the  
5 interest of senior citizens. So the appeal of the  
6 Manitoba Society of Seniors was denied and the court  
7 upheld the decision that there was no jurisdiction in the  
8 Board to make a preliminary award for costs as is  
9 sought in this application by Counsel for the Island  
10 Industrial Customers.

11 The second case that I would like to refer to is  
12 the decision of the Ontario High Court of Justice, the  
13 divisional court, in 1985 in the Regional Municipality of  
14 Hamilton-Wentworth (*phonetic*), and Hamilton-  
15 Wentworth Save the Valley Committee Inc., et al, which  
16 was also included with our materials when we filed.

17 MR. NOSEWORTHY, CHAIRMAN: Sorry, what was  
18 the page number?

19 MS. GREENE, Q.C.: I'm just waiting, if you have the  
20 case, I haven't referred you to a page number yet.

21 MR. NOSEWORTHY, CHAIRMAN: Oh, okay, yes, I  
22 have it.

23 (2:15 p.m.)

24 MS. GREENE, Q.C.: Ms. Butler this morning referred  
25 you to the (inaudible) Ontario Energy Board decision,  
26 and that decision was made at the same time as this  
27 particular decision and as both of those cases raised  
28 the same issue, which was the authority of a Board to  
29 make a preliminary award of costs, the court  
30 consolidated both cases and gave the decision in the  
31 matter. Ms. Butler referred you this morning to the  
32 shorter decision in the Ontario Energy Board Act case,  
33 but this case, the decision that I'm referring you to  
34 gives the reasons, more of the reasons for the decision,  
35 which is the same in both cases. They are both  
36 decisions of the divisional court in Ontario dealing with  
37 the issue. So the issue in this particular case was the  
38 authority of a Board which had awarded an intervenor  
39 group funding, the particular issue there was a hearing  
40 under the Consolidated Hearings Act, dealing with a  
41 request of a municipality for a new road. An intervenor  
42 group asked for funding and was granted funding. The  
43 municipality appealed the decision of the regulatory  
44 board, and was successful, and the court held that the  
45 Board did not have the jurisdiction to make a

46 preliminary award for costs, which is the very issue  
47 before you today.

48 So the first thing we must consider is whether  
49 the section of the Act that granted the Board the  
50 authority to make costs is similar to the authority that  
51 this Board has under Section 90 of the Newfoundland  
52 Public Utilities Act. The section in the Act under  
53 review by that court can be found on page 368 of the  
54 decision, and again, I will not read it here, but if you  
55 take the time to review it you will see it's similar in that  
56 the Board had a discretion to award costs.

57 I turn now to page 376 of that case, to just read  
58 the decision of the court on the issue, and here I refer  
59 to the first paragraph under the heading "conclusion"  
60 on that page, and the judgement of that court reads,  
61 "Having considered the matter carefully, I am of the  
62 opinion that the Board had no jurisdiction to make the  
63 impuned orders, as it's discretion to award costs does  
64 not extend that far. I accept and adopt the reasoning of  
65 Hoven J.A. (*phonetic*), in the Manitoba Seniors case as  
66 correctly setting out the principle to be applied to the  
67 jurisdiction of the Board under Section 7 of the  
68 Consolidated Hearings Act.

69 And it's interesting, if you look to the next  
70 paragraph, which I think is also helpful to this Board for  
71 the issue before it today, the court stated, and here I  
72 refer to the second paragraph now under that heading  
73 of "conclusion". "The Board in the application before  
74 us clearly attempted to fund intervention in advance of  
75 a hearing and before the Board has had an opportunity  
76 to determine the value of the contributions to be made  
77 by the intervenor to the issue before it. While the  
78 Board has a broad discretion in its power to award  
79 costs, I am satisfied that this Board has not awarded  
80 costs here but rather has attempted to compel the  
81 applicant to provide intervenor funding, something  
82 which the Board has no jurisdiction to do. It is for the  
83 legislature in clear language to so empower a board or  
84 a tribunal, should it be found desirable as a matter of  
85 public policy". So in that case, the order of the Board  
86 was struck down, that it didn't have the jurisdiction to  
87 make a preliminary award for costs.

88 Similarly, in the decision that has been referred  
89 to by Newfoundland Power, which is (inaudible)  
90 Ontario Energy Board, and I will not refer you to that  
91 case, because Ms. Butler has referred it to you as well,  
92 but it's authority for the very same proposition.

1 So our position on this application simply put  
2 is that it's premature, that the Board lacks the  
3 jurisdiction under Section 90 of the Act to make a  
4 preliminary award for costs. At an appropriate time,  
5 should any intervenor to the hearing wish to make a  
6 further application with respect to costs, Hydro would  
7 take a position at that time on the merits. As the Board  
8 is aware, there are a number of factors that a Board may  
9 take into account in whether it would exercise its  
10 discretion to award costs. Some have been raised by  
11 Counsel for the Island Industrial Customers, such as  
12 whether the intervenor has added to the process,  
13 whether the intervention has been reasonable, whether  
14 the ...

15 Other factors that the Board may wish to  
16 consider would be, is the intervenor representing a  
17 public interest or a special interest. Is it appropriate,  
18 who is appropriate to pay the costs if it's a special  
19 interest group?

20 And those sorts of considerations that the  
21 Board would take into account in coming to a  
22 conclusion as to whether it should exercise its  
23 discretion to award costs can only be adequately and  
24 properly considered at the conclusion of a hearing, so  
25 I will not speak to the merits of the particular  
26 application at this point in time as to whether the  
27 Industrial Customers should at the conclusion of the  
28 hearing be awarded costs. I would say at this time our  
29 position will be at that time that we are, we will oppose  
30 such an application, but I don't think that it's the  
31 appropriate time today to speak to the merits of that.  
32 The other thing I would point out is that there are other  
33 parties to this proceeding such as the Town of  
34 Labrador City who have also raised the issue of costs,  
35 so the Board in coming to its consideration should  
36 have the opportunity to consider all of those issues,  
37 and that is most properly done after the hearing process  
38 has been completed. Thank you.

39 MR. NOSEWORTHY, CHAIRMAN: Thank you very  
40 much, Ms. Greene. Does Counsel have any comments?

41 MS. HENLEY ANDREWS: Do I get another chance to  
42 respond?

43 MR. NOSEWORTHY, CHAIRMAN: Yes, you do, after.

44 MR. KENNEDY: I would suspect that you would want  
45 to do that after my comments, Counsel.

46 MS. HENLEY ANDREWS: Okay.

47 MR. KENNEDY: Yes, members of the panel, Mr.  
48 Chairperson, I just wanted to draw your attention to,  
49 first of all, the actual provisions of the Act which I think  
50 have been put into play by virtue of the motion made  
51 by the Industrial Customers, and in turn by the  
52 responses of the intervenors, and the Applicant, as  
53 opposing the motion.

54 Some of this may seem to be emphatically  
55 stating the obvious, but if you can bear with me.  
56 Section 2 of the *Electrical Power Control Act*,  
57 subsection (h), provides you with the definition of what  
58 constitutes an industrial customer. Section 27 of the  
59 *Electrical Power Control Act*, subsection 1(a), states  
60 that the Public Utilities Board may give directions as to  
61 the nature and the extent of interventions by persons  
62 interested in a matter that is to be the subject of a  
63 reference or a inquiry held under this Act. As has been  
64 alluded to already by parties, Section 28 is the cost  
65 provision in the EPCA and it, for the most part, mirrors  
66 the cost provision of Section 90 of the *Public Utilities*  
67 *Act*, which I will not read out again. It's been read a  
68 number of times already so there's little to be gained by  
69 that. However, I would point out that there was  
70 reference made by counsel indicating that the Board  
71 should provide a broad and liberal interpretation of  
72 Section 90 and in that regard I would point the Board to  
73 Section 118 of the *Public Utilities Act*, which in turn  
74 provides the specific jurisdiction of the Board that the  
75 Act shall be interpreted and construed liberally in order  
76 to accomplish its purposes and where a specific power  
77 or authority is given the Board by this Act, the  
78 enumeration of it shall not be held to exclude or impair  
79 a power or authority otherwise in this Act conferred on  
80 the Board. It's just, it's almost two different thoughts in  
81 that provision, I would suggest as Counsel to the  
82 Board, my interpretation of that provision, and other  
83 counsel may have a comment on that, is that really  
84 there's two thoughts there in that provision. One is  
85 that the Act is to be construed liberally when being  
86 interpreted, and also that in the event of where there is  
87 a specific power provided to the Board, it won't be  
88 deemed to be impaired by virtue of some other power.  
89 So in other words, a general power won't trump a  
90 specific power if one is, if there is a conflict between  
91 two of them within the Act itself.

92 However, as a general matter of interpretation  
93 of a statute, I would suggest that the provision must  
94 support the interpretations being called upon it without

1 the necessity of the panel resorting to invented words  
2 or with them, invented powers. Costs as a general rule  
3 would normally follow the event, is the term of art used,  
4 meaning that costs are normally determined at the  
5 conclusion of a hearing, or at the conclusion of a trial,  
6 or the conclusion of an application as the case may be.  
7 Although this is a rule of court and there's nothing in  
8 your Act that would prevent you per se from, or that  
9 would mandate that you follow that particular rule, and  
10 that's something that the Board will need to determine  
11 whether it will take that into account, particularly in  
12 light of the comments of the Newfoundland Court of  
13 Appeal in the Hydro and Federation of Municipalities  
14 decision wherein the court made it clear that the rules  
15 providing, rules guiding the awarding of costs in court  
16 have no specific application to hearings before the  
17 panel itself.

18 In hearing argument for Counsel for the  
19 Industrial Customers, I had a sense that, that counsel  
20 may have been suggesting that an alternative remedy  
21 may be appropriate if an outright order for the awarding  
22 of costs, you know, prior to the hearing was deemed to  
23 be inappropriate by the Board, and that the alternative  
24 remedy or order from the Board would be by way of  
25 some directions from the Board in its decision which  
26 would be able to provide some level of comfort, if you  
27 will, to the Industrial Customers, that there is, and I  
28 think I'm quoting counsel correctly, a reasonable  
29 prospect of recovering their costs on the application.  
30 That, I would suggest, raises the issue of whether the  
31 Board is willing to entertain a decision that is more  
32 general in nature rather than a decision addressing the  
33 specifics of the motion put forward by the Industrial  
34 Customers in that it's been noted that to this point there  
35 hasn't been a lot of direction provided by previous  
36 boards on what factors may be taken into consideration  
37 in determining whether to award costs at the end of the  
38 day and the Board may or may not feel that it's an  
39 appropriate time to do that but that is a mechanism that  
40 it has available to it to provide in its decision some  
41 general directions on the factors that the Board is likely  
42 to consider at the end of the day in determining  
43 whether it will award costs when an application is made  
44 to seek them, and clearly it can't be an exhaustive list,  
45 but nonetheless, might be helpful to the parties, and  
46 that's all the comments I was going to make, thank you,  
47 Mr. Chair.

48 MR. NOSEWORTHY, CHAIRMAN: Thank you, Mr.  
49 Kennedy. Ms. Andrews, if you would please, in  
50 rebuttal?

51 MS. HENLEY ANDREWS: Yes, Mr. Chairman, a  
52 number of comments. First of all, if you look at the  
53 Ontario Energy Board decision, the 1985 decision that  
54 was referred to by Counsel for Newfoundland Power.  
55 That is a very different, that was a very different  
56 application than the application that the Industrial  
57 Customers are making, and it was, it is different in a  
58 number of respects, but the primary difference is that  
59 there was a request for interim costs, for interim  
60 funding, so there was actually a request that there be  
61 money paid upfront to the intervenors to enable the  
62 intervenors to participate in the hearing, and you can  
63 see that when you look at the decision. It's quite clear  
64 that that was the case. It was that it was an interim  
65 award of costs that was being sought. In this particular  
66 case we're not looking for an order that we have our  
67 costs in advance. We're not looking for intervenor  
68 funding to that extent. What we are looking for is an  
69 order at the outset that indicates that at the conclusion  
70 of the hearing, provided that the Industrial Customers  
71 act reasonably and add value to the hearing, that we  
72 will be entitled to our taxed costs. That's what we're  
73 looking for, and I think that that's a big distinction  
74 between both the Ontario Energy Board case and also  
75 the Manitoba case to which Ms. Greene referred.

76 And the other thing that needs to be taken  
77 into account is that when you look at the Ontario  
78 Energy Board case, the Regional Municipality of  
79 Hamilton-Wentworth case, and also the Manitoba case,  
80 you'll see that all three of those decisions predate the  
81 decision of the Supreme Court of Canada in Bell  
82 Canada, I believe. In fact, when you look at the  
83 Regional Municipality of Hamilton-Wentworth case in  
84 particular, there is a reference in that case on page 371  
85 to the Court of Appeal decision in Bell Canada and the  
86 CRTC, and it notes, it's right at the very bottom of page  
87 371, it notes that leave to appeal to the Supreme Court  
88 of Canada granted June 6th, 1983, so you can see that,  
89 in fact, the decision that they're referring to is the Court  
90 of Appeal decision in the Bell Canada case, and not the  
91 Supreme Court of Canada one, and the Supreme Court  
92 of Canada decision was decided, as I pointed out earlier  
93 in February, in February of 1986, so the Ontario Energy  
94 Board decision, the Municipality of Hamilton-  
95 Wentworth decision, and the Manitoba Society of  
96 Seniors decision, were all decided before the Supreme  
97 Court of Canada. Now you would say, well what  
98 difference does that make? Does it make any  
99 difference? And the only reason that I point that out is  
100 because Hydro has argued that the costs are kind of  
101 like court costs, and that costs ought to be interpreted

1 narrowly as being the same kinds of costs or in the  
 2 same types of circumstances as court costs in a court  
 3 and, in fact, my learned friend specifically quoted from  
 4 certain parts of the Hamilton-Wentworth decision  
 5 specifically in that regard, but what you'll find is that as  
 6 I pointed out this morning, when you look at both the  
 7 Newfoundland Court of Appeal decision, which is the  
 8 governing decision in this province, on the Federation  
 9 of Municipalities case, and if you look at the Supreme  
 10 Court of Canada decision in the Bell Canada matter,  
 11 both of those cases expressly state that the jurisdiction  
 12 of a Public Utilities Board to award costs is much  
 13 broader than, and is not limited to, the authority that a  
 14 court has, so that's a really important thing to remember  
 15 which is that the Supreme Court of Canada decision  
 16 overrides other courts with respect to the interpretation  
 17 of the scope of costs which a tribunal such as this is  
 18 entitled to award, and expressly states that it's not  
 19 limited to the types of circumstances that you would  
 20 find in court.

21 The (inaudible) Lake and West Coast  
 22 Transmission case, which was included in my materials,  
 23 and which was referred to by Counsel for  
 24 Newfoundland Power is interesting in one respect, and  
 25 that is that my learned friend utilized that case as an  
 26 indication that it's not appropriate to make an order in  
 27 advance, but in fact that's not what the case dealt with  
 28 at all. In that particular case the British Columbia  
 29 Utilities Commission had been asked by a party to  
 30 award costs in advance of a hearing. They wanted, in  
 31 fact, the type of upfront intervenor funding type of  
 32 costs in advance. The British Columbia Utilities  
 33 Commission declined to award the costs but the basis  
 34 upon which they declined to award the costs was that  
 35 they had received a letter of direction from a  
 36 government or a government agency indicating that  
 37 they shouldn't, and that the legislation was about to be  
 38 changed. Well what the Court of Appeal said in British  
 39 Columbia is wait now, you fettered your discretion.  
 40 You had the discretion to say yes or no and instead of  
 41 exercising your discretion you followed the direction  
 42 from an outside body and you weren't entitled to do  
 43 that, and it was upon that basis that they overturned  
 44 the decision of the Utilities Commission, but in fact  
 45 there is nothing in the decision at all that indicates that  
 46 it would be inappropriate to deal with the issue of costs  
 47 in advance, so what we're really dealing with here is  
 48 that when you take a look at the way in which the  
 49 Supreme Court of Canada broadly interpreted the  
 50 mandate of Boards with respect to costs, that what  
 51 you're dealing with here is an application for which I

52 acknowledge there is little precedent, but no  
 53 prohibition, so it may very well be that there is no  
 54 specific case that you or I can hang our hats on that  
 55 says, yes, it's authorized ... neither is there any specific  
 56 case that we can hang our hats on that deals with the  
 57 type of order that we are seeking here, which says that  
 58 you can't, and you do have discretion and what the  
 59 courts have done through all of the cases is support  
 60 the discretion of the Commission to say yes or no, and  
 61 that it would be very difficult for a party to successfully  
 62 appeal an exercise of the Board's discretion unless it  
 63 can be shown that they didn't act in accordance with  
 64 the legislation or acted capriciously.

65 (2:45 p.m.)

66 So the discretion, I would submit, is there and  
 67 there is no case law to guide you either for or against  
 68 except the decision of both our Newfoundland Court of  
 69 Appeal and the decision of the Supreme Court of  
 70 Canada which expressly provides that your discretion  
 71 is broader than the discretion that a court would have  
 72 in similar circumstances, and when you look at the  
 73 legislation, and particularly when you look at Section 90  
 74 of the legislation, you will see that it doesn't deal with  
 75 a timeframe, it doesn't say at the conclusion of a  
 76 hearing, at the beginning of a hearing, in the middle of  
 77 a hearing. And Section 118, as Mr. Kennedy pointed  
 78 out, says that the Act is to be construed liberally, and  
 79 that's precisely what the Supreme Court of Canada said  
 80 too in dealing with the Bell Canada one because it's  
 81 looking at meeting the needs of particular  
 82 circumstances in a situation where individuals and  
 83 groups will be negatively affected, or have potential to  
 84 be negatively affected by the outcome of a public  
 85 hearing.

86 Most litigation in the courts is between  
 87 individual parties, and the outcome of most litigation in  
 88 the courts doesn't have a broad impact on the remainder  
 89 of society, at least not in the civil context. And the last  
 90 point that, I think it's the last point or it's going to be  
 91 close, in rebuttal that I'd like to make is that Ms. Greene  
 92 argued that she had took some issue with our  
 93 submission that the Industrial Customers are one of the  
 94 few that are not funded. Well, see the Town of  
 95 Labrador City and the Town of Happy Valley-Goose  
 96 Bay, they're general service customers, as far as I'm  
 97 aware, so their interests are expressly covered by the  
 98 role that the Consumer Advocate has been given by  
 99 Government. They may also have an interest in  
 100 participating themselves in the hearing, but they are in

1 fact represented in a more general way by the Consumer  
2 Advocate. Now I haven't gone back to look at  
3 Newfoundland Power's cost of service that was  
4 submitted in 1996 and 1998, but my recollection, and I  
5 stand to be corrected, is that there is certainly a  
6 category in there for regulatory costs, and that  
7 Newfoundland Power does include in its cost of service  
8 its regulatory costs. I haven't looked at what Hydro did  
9 in 1992 either, or what it's been doing more recently,  
10 and I take Ms. Greene's word for it that there is, that up  
11 till this point they haven't been seeking to recover that  
12 cost, but we also need to take into account that they're  
13 reconsidering that particular position, so when you  
14 look at that, the only party, or the only class of  
15 customers not otherwise represented in terms of having  
16 the opportunity to recover its costs are the industrial  
17 customers, unless the Board decides that this is  
18 something that with a proper and prudent and  
19 reasonable intervention, that to which we should be  
20 entitled. We're not looking to have our costs up front.  
21 We're looking to have an indication from the Board as  
22 to whether or not, in certain circumstances we should  
23 be entitled to have the costs ... and to correct Mr.  
24 Kennedy, and I don't want to split hairs on the wording  
25 of it, but it's not that we are seeking directions for a  
26 level of comfort, we are seeking a conditional order, an  
27 order which attaches what we consider to be reasonable  
28 conditions on granting us costs at the end so it will  
29 have to be revisited at the end, and that is an order that  
30 says that as long as we add value and act reasonably,  
31 that the Industrial Customers shall be entitled to their  
32 taxed costs. Thank you.

33 MR. NOSEWORTHY, CHAIRMAN: Thank you. Are  
34 there any questions from the panel? Ms. Whalen?

35 COMMISSIONER WHALEN: No, no questions.

36 MR. NOSEWORTHY, CHAIRMAN: Commissioner  
37 Powell.

38 COMMISSIONER POWELL: No.

39 COMMISSIONER SAUNDERS: I have one, Mr. Chair.  
40 Ms. Andrews, Ms. Henley Andrews, your motion for  
41 costs, or in your motion you're not saying that if we  
42 don't get costs or get some level at this juncture, we  
43 won't be able to appear, we won't be able to intervene,  
44 you're not saying that, I gather?

45 MS. HENLEY ANDREWS: No, I'm not.

46 COMMISSIONER SAUNDERS: No, and if that level of  
47 comfort is not forthcoming at this stage, I presume  
48 you're going to continue your intervention?

49 MS. HENLEY ANDREWS: That is correct. The place  
50 where it may make a difference is that as issues become  
51 apparent during the course of the hearing, there may  
52 very well be something that comes up where ideally we  
53 would, for example, want to call another expert ...  
54 however, there are budgetary constraints from my  
55 client's perspective, and if they knew that they had a  
56 reasonable prospect of recovering a good portion of  
57 their costs at the end of the day, then getting that  
58 additional expert might be feasible, whereas if they  
59 don't have that assurance, it won't be feasible.

60 COMMISSIONER SAUNDERS: Okay, and your reason  
61 that you put forward, unless I've missed something, is  
62 that you want to be treated in the matter of costs like all  
63 of the other parties.

64 MS. HENLEY ANDREWS: That is correct, like they are  
65 treated or are entitled to be.

66 COMMISSIONER SAUNDERS: Or entitled to be, and  
67 if costs are not awarded to your client, what happens to  
68 those costs in the end?

69 MS. HENLEY ANDREWS: Those costs get paid by the  
70 Industrial Customers out of their revenues.

71 COMMISSIONER SAUNDERS: Right.

72 MS. HENLEY ANDREWS: And presumably reduces  
73 their profits.

74 COMMISSIONER SAUNDERS: Yes. Good, thank you,  
75 Mr. Chair.

76 COMMISSIONER WHALEN: Just, I just want to follow  
77 up on Commissioner Saunders' question. His  
78 supposition was that if the costs are not awarded, the  
79 revenues would be reduced, and hence the profits. If  
80 we do award costs, what happens?

81 MS. HENLEY ANDREWS: Well then the out-of-pocket  
82 costs that have been incurred, now normally ... and  
83 taxed costs are a peculiar beast, without getting into a  
84 lot of detail, but normally on taxed costs you would  
85 recover your experts' costs and you would recover a  
86 certain contribution to your legal costs, but it seldom  
87 amounts to all of the legal costs, but the thing is that, in

1 effect, if we got our taxed costs, the Industrial  
2 Customers would end up paying the difference between  
3 what the Board awarded and what it actually cost them,  
4 but it would obviously be a much, much lower amount  
5 than they would end up paying if they had to foot the  
6 bill entirely because, as I'm sure you're aware, the  
7 greatest cost associated with full participation in the  
8 hearing is the experts' costs, and they would get all of  
9 that back.

10 COMMISSIONER WHALEN: Who ends up paying  
11 those costs then, it would be the customers at  
12 Newfoundland and Labrador Hydro?

13 MS. HENLEY ANDREWS: If the taxed costs were  
14 awarded? Yes, and that would include the Industrial  
15 Customers, but when you look at the, at the Consumer  
16 Advocate, as an example, the Consumer Advocate's  
17 costs are paid by the Board but I think the Board  
18 recovers its costs in turn from the utilities, so it all gets  
19 passed on.

20 COMMISSIONER WHALEN: In terms of the level of  
21 comfort that you're looking for, you're looking for a  
22 conditional order with the condition ... I got from your  
23 comments, conditions precedent upon us being  
24 assured, or at least being able to ascertain that you've  
25 made a reasonable and valuable contribution to the  
26 hearing, is that ... I guess I'm just trying to get to the  
27 point of, if we ... we can't ascertain that until at the end  
28 of the hearing.

29 MS. HENLEY ANDREWS: That is correct.

30 COMMISSIONER WHALEN: So I'm not sure what sort  
31 of conditions we would be able to put in upfront if we  
32 still have to do an assessment of the value of your  
33 contribution at the end of the hearing in any event.

34 MS. HENLEY ANDREWS: Uh hum.

35 COMMISSIONER WHALEN: And we would have to  
36 hear from the parties in terms, on that basis as well, so  
37 I guess anything that we do upfront would still have a  
38 back-end condition attached to it, you know.

39 MS. HENLEY ANDREWS: And it would but it would  
40 also contain an indication as to whether the Board is  
41 open to the Industrial Customers recovering their costs,  
42 and that is something that has previously not been  
43 dealt with by the Board in a hearing where the

44 Industrial Customers have been regulated, and that has  
45 ...

46 COMMISSIONER WHALEN: Have the Industrial  
47 Customers ever made representation at other hearings  
48 for recovering costs?

49 MS. HENLEY ANDREWS: Yes, we have made  
50 representations at other hearings but as I indicated this  
51 morning, in some hearings actually the representations  
52 weren't even ultimately dealt with in the report of the  
53 Board because there often ends up being so much that  
54 is dealt with that costs can sometimes get overlooked.  
55 In the Newfoundland Power hearing in which we  
56 participated in 1998, we did seek an order for costs  
57 which were declined, but the circumstances were quite  
58 different, at least I would submit they were quite  
59 different because the Industrial Customers are not a  
60 customer of Newfoundland Power. We wanted to have  
61 input with respect to some of the rate return, rate of  
62 return and capital structure issues because we knew  
63 that at the next hearing that Hydro was involved with,  
64 that would become an issue, but the factual  
65 circumstances were quite different because the  
66 Industrial Customers were not being regulated at that  
67 hearing.

68 COMMISSIONER WHALEN: That's all I have, thank  
69 you.

70 MS. HENLEY ANDREWS: Thank you.

71 MR. NOSEWORTHY, CHAIRMAN: Thank you. I  
72 think Ms. Whalen asked my question partially. I think,  
73 Ms. Andrews, you heard, I think, a number of  
74 submissions in terms of the fact that the Board lacked  
75 authority to make this decision and certainly we'll  
76 deliberate on that, but you had indicated that there are  
77 conditions and terms that you feel could apply to the  
78 discretion of the Board which would allow for a  
79 favourable order. I believe, as well, I heard counsel, Mr.  
80 Kennedy talk about the fact that we should be cautious  
81 that we shouldn't invent words and invent powers to  
82 be, I think to quote him directly. You have commented  
83 on the fact that the conditions that you're looking at  
84 would be adding value and acting responsibly, and I  
85 think Ms. Whalen referred that that's a very difficult  
86 determination until after the hearing itself. Would you  
87 care to comment or are there any other terms and  
88 conditions that you might see here ... there is limited  
89 precedent, I think everybody agrees with that. This is  
90 not something that the Board has a lot of, a lot of

1 precedent and previous experience with. Are there any  
2 other items or terms and conditions beyond those  
3 which can only be determined after the fact that would  
4 lend us some guidance in this matter?

5 (3:00 p.m.)

6 MS. HENLEY ANDREWS: If you look at the Bell  
7 Canada decision, which is the Supreme Court decision  
8 that I keep returning to, and in particular if you look at  
9 page seven of that, what you'll find is that in that  
10 particular case the CRTC had adopted draft rules of  
11 procedures, so they hadn't actually adopted rules of  
12 procedure, but they had adopted draft ones, and the  
13 three critical conditions as far as I'm concerned were the  
14 first three, and I'll deal with, and I've already dealt with  
15 the issue of the financial resources, because I think  
16 that's really a question of degree, and I'm not going to  
17 argue that, but you see, has a substantial interest in the  
18 outcome, or represents the interests of a class of  
19 subscribers, so that would be one. And has  
20 participated in a responsible way, and has contributed  
21 to a better understanding of the issues by the  
22 Commission.

23 It's true that those, and Ms. Whalen has  
24 rightly pointed out, that at least with respect to the  
25 participating in a responsible way and contributing to  
26 a better understanding, that those types of conditions  
27 will still require interpretation at the end of the hearing,  
28 and they will require a consideration at the end of a  
29 hearing. However, with those types of conditions, we  
30 can to a very large degree, and we feel quite confident  
31 that we've always participated in a responsible way,  
32 and we feel we've always contributed to a better  
33 understanding of the issues, but we would know that if  
34 we behaved responsibly and did focus on the issues  
35 that were both of interest to the Industrial Customers,  
36 and where we might assist the Board, that we would  
37 have the comfort of knowing that, that our clients could  
38 recover a substantial portion of their costs at the end of  
39 the day on a party and party basis, and of course, party  
40 and party costs are taxed by a taxing master and I don't  
41 know to what extent any of you are familiar with that  
42 process, and I'm operating on the basis that none of  
43 you are particularly familiar with the process, but you  
44 know, a taxing master looks at what you're submitting  
45 and determines the reasonableness of the costs for  
46 various issues. But that is the, those are the types of  
47 conditions that I would consider to be appropriate in  
48 the context of this hearing, and in the context of the  
49 intervenors as they are right now, where the Island

50 Industrial Customers are the only group of intervenors  
51 who are being called upon to pay their costs out of  
52 their own pocket.

53 MR. NOSEWORTHY, CHAIRMAN: I think I'm required  
54 to go around on this one more time for any final  
55 comments. Newfoundland Power?

56 MS. BUTLER, Q.C.: No further comments.

57 MR. NOSEWORTHY, CHAIRMAN: The Consumer  
58 Advocate please?

59 MR. BROWNE, Q.C.: We have nothing further.

60 MR. NOSEWORTHY, CHAIRMAN: Ms. Greene?

61 MS. GREENE, Q.C.: Not with respect to the issue of  
62 costs. I acknowledge that unless there is something  
63 unusual I have no right to say anything additional  
64 further as much as I might like to with respect to some  
65 of the comments, but there is one issue that Board  
66 Counsel raised that I think it would be helpful if I put  
67 our position here and that if there's need for discussion  
68 we can have that at this time. It does not relate directly  
69 to the application but it does relate to the reference by  
70 Board Counsel to Sections 27 and 28 of the *Electrical*  
71 *Power Control Act*. It's Hydro's position that these  
72 sections are not applicable to this hearing. Under the  
73 previous practice there were sections in the *Electrical*  
74 *Power Control Act* prior to 1994 under which Hydro  
75 was required to make a reference to the Board if we  
76 wished to alter classes of rates for our, for  
77 Newfoundland Power and for our rural customers but  
78 not for industry, and at that time this section was in the  
79 Act as well and it related to reference or inquiries when  
80 there was a proposal by Hydro to alter rates which the  
81 Board considered and then reported to the Lieutenant  
82 Governor in Council. The Act was amended to delete  
83 those sections and the amendments to the *Electrical*  
84 *Power Control Act* in conjunction with amendments to  
85 the *Hydro Corporation Act 1996*, made Hydro fully  
86 subject to the jurisdiction of the Board under the  
87 *Public Utilities Act*, so that while sections in the  
88 *Electrical Power Control Act* in the past on costs may  
89 have been relevant to a reference by Hydro, it is our  
90 position that it is not today and I don't think anything  
91 turns on it for the issue of this particular application,  
92 but I did want to say that if you look at Section 27 of  
93 the *Electrical Power Control Act*, it talks about  
94 references or inquiries under this Act, and when you  
95 look back to the sections dealing with what can be a

1 reference or inquiry under this Act, it deals with the  
2 ability, for example, under Section 5 of the Lieutenant  
3 Governor in Council, to refer issues to the Board, it  
4 deals with hearings by the Board under part two,  
5 dealing with allocation and reallocation of power where  
6 there will be inquiries, but when you go through the  
7 Act there is nothing in there dealing any more with a  
8 reference by Hydro, so when you come to Sections 27  
9 and 28 of the Act dealing with reference or inquiries  
10 under this Act, we submit that that is not applicable to  
11 the current application so that we are under the *Public*  
12 *Utilities Act*, and the only relevant section with respect  
13 to costs is Section 90.

14 MR. NOSEWORTHY, CHAIRMAN: Thank you.  
15 Counsel, any final ...

16 MR. KENNEDY: There's one comment I was going to  
17 make concerning the expert evidence that arose from  
18 some of the questions of the Board. I was going to  
19 note that the Board might take into account that the, by  
20 virtue of the Industrial Customers confirming that they  
21 were calling a cost of capital expert, allowed in part at  
22 least for the staff of the Board to decide not to call Dr.  
23 Morin, so there was some benefit gained by the staff by  
24 virtue of a cost of capital expert being called by the  
25 Industrial Customers, so in that respect I just thought  
26 I would mention that as a factor that the Board may  
27 want to consider in looking to the issue of whether to  
28 cover the costs of, in particular, the experts of the  
29 Industrial Customers, and that's the only comment I was  
30 going to make, Mr. Chairperson.

31 MR. NOSEWORTHY, CHAIRMAN: Thank you. Ms.  
32 Andrews, I think you have the last say if there are any,  
33 indeed, final comments on this matter.

34 MS. HENLEY ANDREWS: Mr. Chairman, it's an  
35 unusual circumstance, but I have nothing further to  
36 add.

37 MR. NOSEWORTHY, CHAIRMAN: Thank you very  
38 much.

39 MR. BROWNE, Q.C.: That last comment Mr. Kennedy  
40 made, that's new. We haven't heard that before. You're  
41 suggesting that the Board incur the cost of the cost of  
42 capital expert being put forward by the Industrials.  
43 Now that's ultimately the consumer who will be paying  
44 for that because the consumer is paying for all the  
45 court, all the costs to the Board and I don't know

46 whether or not that's appropriate, and I don't know  
47 whether or not other people have comments on that.

48 MS. GREENE, Q.C.: I actually didn't think that Board  
49 Counsel intended it that way but that it might be a  
50 consideration that the Board might consider in  
51 determining whether there was added value or benefit.  
52 I did not take, and perhaps we could ask for clarification  
53 that Board Counsel was suggesting that the Board  
54 agree to pay for the expenses of the expert of the  
55 Industrial Customers in cost of capital?

56 MR. KENNEDY: No, I was just suggesting that the, in  
57 the issue of efficient utilization of resources which is all  
58 relating to the costs overall which in turn gets passed  
59 on to the consumer, whether it's an expert retained by  
60 the Board or potentially an expert retained by an  
61 intervenor, that in determining the issue of allowing the  
62 industrial customers their costs, and Ms. Janet Henley  
63 Andrews seemed to focus on the costs of her experts in  
64 particular, that that would just be something that the  
65 Board would want to be cognizant of when it was  
66 making it's decision and it was just put out there for  
67 that purpose.

68 MS. BUTLER, Q.C.: Mr. Chairman, to complete the  
69 circle on that, I would just say that Newfoundland  
70 Power's position would be premature is premature and  
71 any consideration like that is something that you  
72 should put your minds to when the argument is more  
73 appropriately brought, which would be at the end of the  
74 hearing.

75 MS. GREENE, Q.C.: And on that point as well, the  
76 comments of the Commissioners as well as some of the  
77 additional comments by Board Counsel and Ms.  
78 Andrews, really raise new issues that we hadn't dealt  
79 with, and the issue is what are the appropriate  
80 considerations for a Board in awarding costs, and we  
81 have not really addressed those issues and I would  
82 submit that if you are considering that that we have the  
83 opportunity, because there is other case law with  
84 respect to what is appropriate for the Board to consider  
85 when awarding costs, and our position is that this  
86 application is premature. We submit that if you find  
87 you have the authority to award it, that we be given the  
88 opportunity to make submissions, as Ms. Andrews just  
89 did then, with respect to what are the appropriate types  
90 of considerations you should take into account.

91 MS. HENLEY ANDREWS: In response to that it was  
92 clear to all the parties at the time that we made our

1 application, which I would point out was before the pre-  
2 hearing, that the issue was on the merits of the  
3 application with respect to costs. The fact that Hydro  
4 or anybody else may have decided to defend the  
5 application on the basis that it was premature does not  
6 get away from the fact that they have had the case law  
7 to which we, on which we were relying since the 29th of  
8 June and could have made those submissions.

9 MR. NOSEWORTHY, CHAIRMAN: Thank you. Any  
10 final comments? Well that concludes the consideration  
11 on the second motion before us. It is now quarter after  
12 three. Are there any other matters that any party would  
13 wish to raise at this point in time, or comment on? I  
14 haven't provided for any particular other business  
15 under the agenda, although our next motion day is not  
16 until August the 29th, and I would certainly want to  
17 give everybody an opportunity, if there was any other  
18 particular issues that they would wish to raise or  
19 comment on at this time.

20 MR. BROWNE, Q.C.: I have one, Mr. Chairman. I think  
21 it was on July 8th or 9th we made a request to the Board  
22 through the Board's Secretary for various documents  
23 and reports, historical documents that are with the  
24 Board. None had to do specifically with this hearing  
25 and our experts, one of our experts was requesting them  
26 to assist in the preparation of our case with due  
27 diligence. We didn't hear anything from the Board  
28 immediately until after the Board issued its order, its  
29 procedural order and then the next day we got a letter  
30 from the Board's Secretary stating that these requests  
31 should be in the form of information requests which is  
32 something I have some trouble with because anyone  
33 can come off the street and request a copy of a report  
34 that was done in 1985 or something that was done in  
35 1993, and you could knock on the Board's door and  
36 request that. They're not really information requests  
37 peculiar to this hearing. They don't arise out of this  
38 hearing as such, and another point related to that is if  
39 you put them in the form of information requests which  
40 we had to do because we didn't have time to argue the  
41 point, then you're generating 25 copies of these reports  
42 for everyone, and many of the parties would have them.  
43 I'm sure Newfoundland Power would have them on file,  
44 as would Hydro, and I just wonder the appropriateness  
45 of that. The Board isn't a party to the proceeding. The  
46 Board is the administrative tribunal hearing, and I guess  
47 we can request, make information requests to the  
48 Board's, to experts that are appointed by the Board,  
49 because they're not even retained by the Board.  
50 There's a difference between an appointment and a

51 retention ... experts who are appointed by the Board we  
52 can make information requests to them but we're taking  
53 it a step beyond when we're making information  
54 requests directly to the Board which is what we were  
55 told to do and I think that's probably a, a letter we  
56 ought not to have gotten because of the reasons I'm  
57 stating. You're putting yourselves more into play that  
58 way by becoming more of a party than more of, than the  
59 decision maker. So it's two points. I don't know if we  
60 should be directing information requests to the Board  
61 as such. We should be directing information requests,  
62 I guess, to the, to the experts appointed by the Board,  
63 and if there is something, if there are historical  
64 documents in your files, reports and so on that  
65 someone wants to take a look at, I don't know if we  
66 need 25 of those generated because someone asked for  
67 one when someone can come off the street and get one,  
68 and I guess I could have come up and got them just as  
69 easily or sent a taxidriver up or something, so I just find  
70 that peculiar, and that ought to be revisited. I don't  
71 know if anyone has any comment on that.

72 MS. HENLEY ANDREWS: I can say that from my  
73 perspective in the past we have certainly regularly  
74 simply made a telephone call to the Clerk or the  
75 Secretary of the Board when we were looking for a copy  
76 of the decision of the Board on a particular matter or  
77 something that would be part of the public records that  
78 are maintained. I think there's a real danger here that we  
79 can get so bogged down with procedural stuff that it  
80 ends up costing us a lot of time and money rather than  
81 saving it, and something like that which is the request  
82 simply for documents that are historical documents, I  
83 don't see that every party has to be provided with a  
84 copy of a request like that from anyone, whereas if they  
85 were true information requests relating to evidence to  
86 be given by Board witnesses, that would be different.

87 MS. GREENE, Q.C.: Mr. Chair, we're grappling with  
88 some of the information requests that have come in.  
89 We are receiving requests as well for documentation  
90 that is of historical value, whether it's an order in a  
91 previous capital budget hearing, or the report on the  
92 cost of service methodology hearing, which is similar to  
93 the requests that the Consumer Advocate has made to  
94 the Board and so that it might be helpful if some  
95 direction was given, whether the Board will provide  
96 those sorts of historical type of documents, or whether  
97 or how is that to be dealt with. We've even received a  
98 request to provide people with copies of legislation  
99 which should be available to counsel in the normal  
100 fashion, and there are other requests as Mr. Browne has

1 mentioned, of historical nature that are of some  
2 relevance to this hearing. We have received requests,  
3 and Mr. Browne has directed his to the Board, so it  
4 would be helpful to receive some clarification.

5 MR. NOSEWORTHY, CHAIRMAN: Sure, okay, are  
6 there any other comments on that point?

7 MR. BROWNE, Q.C.: The only thing I would say in  
8 addition is that it slows us down, Mr. Chairman. We're  
9 in a pretty restricted timeframe here and we have experts  
10 away looking for these reports. It seems to be more  
11 form over substance here now. We sent a letter  
12 requesting, and some days pass, and then we get, well  
13 put them in a different form and request again, and in  
14 the meantime the clock is ticking and our expert is down  
15 in Virginia saying where is this material I'm looking for  
16 because you're requesting me to put questions to  
17 parties by July 25th and we have to file our own  
18 evidence shortly thereafter, so we don't have time for  
19 this form of nonsense, I would put it. The Board's got  
20 documents of a historical nature and we're looking for  
21 them, surely we're able to retrieve them. It's never been  
22 a problem in the past, so we're not that unruly yet that  
23 we need to be put in a straightjacket for rules. It might  
24 come to that, I don't know.

25 MR. NOSEWORTHY, CHAIRMAN: No, I think there's  
26 certainly an effort here to try and control the  
27 documentation and ensure exchanges. There may be  
28 very well a matter of reconsideration that could indeed  
29 accommodate that in a more direct and forthright way  
30 without compromising other things and we'll take that  
31 into consideration.

32 MR. BROWNE, Q.C.: Thank you, Mr. Chairman.

33 MR. NOSEWORTHY, CHAIRMAN: Thank you. It's  
34 twenty after three. We'd like to probably ... it's  
35 breaktime in any event, break for 15 minutes and then  
36 we'll return and I'll have some final comments.

37 (break)

38 (3:45 p.m.)

39 MR. NOSEWORTHY, CHAIRMAN: The Board has met  
40 and there are three areas which I'll briefly address.  
41 Certainly the order number one, I'll call it, motion  
42 number one in relation to the Consumer Advocate's  
43 motion in respect of Dr. Morin, the Industrial  
44 Customers' motion with regard to hearing costs, and

45 we've lumped the third category into a host of  
46 procedural matters, I guess, that have been dealt with  
47 today in various formats. With regard to Order No. 1,  
48 since the matter is moot, the Board has concluded, the  
49 Board adjourns the motion to signa die (*phonetic*).  
50 With regard to Order No. 2, the hearing costs, we have  
51 been exposed to a good presentation by all parties this  
52 afternoon. It is a massive amount of material. We  
53 would like to sort of review the transcripts and I would  
54 commit to having a decision out on that matter within  
55 the next few days. The third item which is the, as I  
56 referred, the host of procedural items that have been  
57 raised today and will likely be ongoing, we would like  
58 the opportunity to review the transcripts which we'll  
59 have tomorrow, and we will have an order coming out  
60 which will amend the procedural orders to the extent  
61 that is needed, provide clarification to the other points  
62 that have been raised today, and we would get that  
63 matter out as quickly as possible, and I would commit  
64 by the end of the week. We do acknowledge as well in  
65 dealing with just the host of procedural issues that  
66 have been raised today that the next motions day is  
67 August the 29th, which is a considerable period away.  
68 We don't want any degree of frustration or problems to  
69 build up. We want the process to run smoothly and we  
70 would ask that rather than leave things hanging or  
71 certainly questions, that these should be dealt with  
72 counsel to counsel, and I understand that there is a  
73 meeting planned for next week and that process  
74 perhaps can be dealt with there, but we would  
75 encourage that the matters be dealt with counsel to  
76 counsel so over the interim period, over the next few  
77 weeks, that these matters can be dealt with forthwith,  
78 and I'm sure counsel to the Hydro hearing will take  
79 whatever measures are necessary to get those  
80 clarifications as quickly as possible. That's the  
81 conclusion of the business today that's been dealt with  
82 on motions day, and the Board now adjourns. It's next  
83 hearing date presently scheduled for the 29th of  
84 August, 2001, and I thank you very much for your  
85 participation and attention here today.

86 (hearing adjourned)