

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 Dobie 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)