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1 (9:00 a.m.)  
 2 CHAIRMAN:  
 3 Q. Good morning, ladies and gentlemen. Just to  
 4 make sure everyone is on the right track in  
 5 respect of what's happening this morning and  
 6 the order, the procedural order, I guess, in  
 7 respect of this matter has Hydro going first,  
 8 followed by Newfoundland Power, Industrial  
 9 Customers, Board Counsel, hearing counsel, and  
 10 then clean up by Hydro, I suppose. If there  
 11 are any questions that the Board has of any of  
 12 the counsel, following your presentations,  
 13 we'll ask them after each one is done, and as  
 14 far as breaks are concerned this morning,  
 15 we'll try and work in a break or two,  
 16 depending on how long you people are, so as  
 17 not to interrupt your thought flows. So we'll  
 18 break after someone is finished, on or about  
 19 the time that we'd normally break.  
 20 There's one thing I forgot to mention  
 21 when we closed out the last session, and that  
 22 was to extend the thanks of the Board to Mr.  
 23 O'Reilly. So I wanted to do that before I  
 24 forgot it, and I'm sure you'll pass that on,  
 25 would you, please, Ms. Greene?

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1 process itself has been the most extensive in  
 2 terms of volumes that Hydro has filed to date  
 3 to support a Capital Budget Application.  
 4 I'd like first to look at the legal  
 5 provisions that are applicable in this review  
 6 of the Capital Budget, and I only will refer  
 7 to them briefly as they are referred to and  
 8 outlined in our final written argument.  
 9 The first is Section 37.1 of The Public  
 10 Utilities Act, which requires Hydro to provide  
 11 service and facilities which are reasonably  
 12 safe and adequate and just and reasonable.  
 13 The second relevant legislative section is  
 14 Section 3B of The Electrical Power Control Act  
 15 (1994). This section sets out the policy of  
 16 the Province and it states that: "sources and  
 17 facilities for production, transmission and  
 18 distribution of power are to be managed and  
 19 operated in a manner that results in," and  
 20 here there are three subsections that are the  
 21 most relevant. The first is that it must  
 22 result in the most efficient production,  
 23 transmission and distribution. The second is  
 24 that it must result in consumers having  
 25 equitable access to an adequate supply of

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1 GREENE, Q.C.:  
 2 Q. Yes, certainly, Mr. Chair.  
 3 CHAIRMAN:  
 4 Q. So anything else by the way of anything  
 5 preliminary?  
 6 MS. NEWMAN:  
 7 Q. No, Mr. Chairman.  
 8 CHAIRMAN:  
 9 Q. Nothing. Very well then. If you're ready,  
 10 Ms. Greene, we'll commence to listen.  
 11 GREENE, Q.C.:  
 12 Q. Yes, thank you, Mr. Chair. Good morning, Mr.  
 13 Chair, Commissioners. On March 28th of this  
 14 year, Hydro submitted its 2004 Capital Budget  
 15 for approval as required by Section 41 of the  
 16 Public Utilities Act. Hydro is requesting  
 17 approval of a Capital Budget of \$34.2 million,  
 18 which is the second lowest Capital Budget  
 19 Hydro has requested approval of since it  
 20 became regulated in 1996. Our actual capital  
 21 expenditures over the same time period have  
 22 averaged approximately \$38.3 million. The  
 23 amount of the evidence that Hydro filed with  
 24 this application, as well as the responses to  
 25 the requests for information and the hearing

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1 power, and the third is that power should be  
 2 delivered at the lowest possible cost  
 3 consistent with reliable service.  
 4 The next relevant section is Section 41  
 5 of The Public Utilities Act, which is the  
 6 section under the which the application is  
 7 grounded. Subsection 1 of this section  
 8 requires Hydro to submit its annual capital  
 9 budget for a succeeding year by December 15th  
 10 in each calendar year. Hydro has filed, in  
 11 the first quarter of this year, and I can  
 12 advise the Board now that based on the  
 13 schedule, we anticipate filing again in the  
 14 first quarter of next year, in order to ensure  
 15 that the regulatory process can be met and  
 16 that we get approval of the budget in a timely  
 17 way. We file in the first quarter, it's  
 18 unlikely we'll get a decision until the end of  
 19 the third quarter or the beginning of the  
 20 fourth quarter.  
 21 The next subsection that's very relevant  
 22 is that Hydro cannot proceed with the  
 23 construction or purchase in excess of \$50, 000  
 24 or a lease in excess of \$5,000 without the  
 25 prior approval of the Board. And of course,

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<p>1 GREEN, Q.C.:</p> <p>2 Q. .... Section 41 also requires Hydro to file a</p> <p>3 report following that year with respect to the</p> <p>4 actual capital expenditures in the year, as</p> <p>5 had been approved by the Board. The last</p> <p>6 section that I'd like to refer to is Section</p> <p>7 54 of The Public Utilities Act, which imposes</p> <p>8 on Hydro an obligation to serve customers.</p> <p>9 Hydro, as a regulated monopoly, must provide</p> <p>10 the service to its customer.</p> <p>11 So those are the relevant legislative</p> <p>12 provisions that the Board must take into</p> <p>13 account in considering Hydro's application,</p> <p>14 and sometimes it's very difficult to apply</p> <p>15 what can be actual theoretical provisions to a</p> <p>16 concrete situation. Fortunately, however, the</p> <p>17 Board has given guidance on how those sections</p> <p>18 are to be interpreted and to be applied to</p> <p>19 Capital Budget Applications, and in fact, we</p> <p>20 have three decisions of the Board that provide</p> <p>21 guidance to this particular panel with respect</p> <p>22 to how those legislative provisions are to be</p> <p>23 interpreted and applied in a Capital Budget</p> <p>24 Application.</p> <p>25 Before getting into those three specific</p>	<p>1 Orders, I would like to point out that Hydro</p> <p>2 does not agree with the submission of the</p> <p>3 Industrial Customers where they appear to</p> <p>4 suggest that each and every project must be</p> <p>5 proven to be lowest cost and that this is what</p> <p>6 is required by the legislation. Hydro submits</p> <p>7 that this is not the correct interpretation</p> <p>8 and it is not the interpretation that has been</p> <p>9 applied by the Board on at least three</p> <p>10 previous occasions where they have dealt with</p> <p>11 this issue. So I would like to refer to the</p> <p>12 three Orders of the Board with respect to</p> <p>13 this.</p> <p>14 The first is the Order of the Board, P.U.</p> <p>15 7 (2002-2003), arising from Hydro's 2001</p> <p>16 General Rate Application. Hydro's 2002</p> <p>17 Capital Budget was considered in the context</p> <p>18 of that General Rate Application. The same</p> <p>19 issues raised by Industrial Customers in this</p> <p>20 hearing were raised at that time, including</p> <p>21 the Capital Budget process itself, the</p> <p>22 standards for justification for capital</p> <p>23 expenditures, and the adequacy of</p> <p>24 documentation provided by Hydro to support</p> <p>25 capital projects. The Board considered the</p>
Page 7	Page 8
<p>1 issues with respect to that and here I would</p> <p>2 like to read from P.U. 7 at page 95 of that</p> <p>3 Order.</p> <p>4 At the top of page 95 is a summary of the</p> <p>5 Board's decision and the previous pages,</p> <p>6 commencing at page 91, deal with some of the</p> <p>7 capital budget issues raised in the hearing,</p> <p>8 as well as the legislative provisions that</p> <p>9 were applicable. And after reviewing the</p> <p>10 issues and the legislation, the Board made a</p> <p>11 decision which states, and I'm reading now</p> <p>12 from the top of page 95, "the Board will</p> <p>13 require NLH, commencing with its 2003 Capital</p> <p>14 Budget Application, to use a net present value</p> <p>15 methodology, together with supporting</p> <p>16 justification, to evaluate projects of a</p> <p>17 material amount. Where a project is not</p> <p>18 evaluated against other acceptable</p> <p>19 alternatives and/or if the project does not</p> <p>20 produce a positive net value, sufficient</p> <p>21 rationale must be provided to justify</p> <p>22 implementation. The Board has set out</p> <p>23 guidelines to be used by NLH in future Capital</p> <p>24 Budget Applications in Schedule 3 attached to</p> <p>25 this decision." And in Schedule 3, the Board</p>	<p>1 did outline twelve conditions which Hydro had</p> <p>2 to comply with in filing its Capital Budget</p> <p>3 Application, including such matters as the</p> <p>4 project description, the project</p> <p>5 justification, the operating history, and</p> <p>6 other matters that are listed in Schedule 3.</p> <p>7 However, what is clear from this decision is</p> <p>8 that a project is to be evaluated when there</p> <p>9 are other acceptable alternatives and even</p> <p>10 then, the Board went on to say if the project</p> <p>11 didn't produce a positive net value,</p> <p>12 sufficient rationale could be provided to</p> <p>13 justify the implementation in any event.</p> <p>14 Having received that direction in P.U. 7,</p> <p>15 Hydro filed its 2003 Capital Budget, and in</p> <p>16 the 2003 Capital Budget hearing, the</p> <p>17 Industrial Customers raised the same issues</p> <p>18 again, dealing with the process and the</p> <p>19 standards of justification required.</p> <p>20 Order No. P.U. 29 (2002-2003) of this</p> <p>21 Board approved Hydro's 2003 Capital Budget as</p> <p>22 submitted. In Appendix 2 to that Order, at</p> <p>23 page 23, the Board found that Hydro had given</p> <p>24 sufficient justification to demonstrate that</p> <p>25 the projects were required to maintain safe,</p>

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<p>1 GREENE, Q.C.:</p> <p>2 Q. .... adequate, reliable, least-cost power to</p> <p>3 its customers. So the Board specifically</p> <p>4 found that Hydro had complied with the</p> <p>5 directions given in P.U. 7 and approved the</p> <p>6 Budget.</p> <p>7 The next Order I'd like to refer to</p> <p>8 arises from the Newfoundland Power Capital</p> <p>9 Budget Hearing for 2003, and this is P.U. 36</p> <p>10 (2002-2003), and there are a couple of quotes</p> <p>11 from this Order which are relevant to assist</p> <p>12 the Board in its consideration of the</p> <p>13 legislation and how it has to be applied to a</p> <p>14 Capital Budget Application. And I'm reading</p> <p>15 from the bottom of page 6 of that Order, where</p> <p>16 the Board stated "the Board acknowledges its</p> <p>17 role as one of testing the necessity and</p> <p>18 reasonableness of the utility's capital</p> <p>19 expenditures based on efficient management and</p> <p>20 operations of its assets, as well as equitable</p> <p>21 access to least-cost and reliable (phonetic)</p> <p>22 power, while at the same time maintaining a</p> <p>23 balance between the competing interests of</p> <p>24 consumers and investors in the utility." And</p> <p>25 then they went on, just on page 7, to point</p>	<p>1 out that "while the role of the Board is</p> <p>2 straightforward, the challenge becomes in</p> <p>3 operationalizing that and applying it to a</p> <p>4 Capital Budget Application."</p> <p>5 They did review the issues, and in that</p> <p>6 particular Order, directed that Newfoundland</p> <p>7 Power was to follow the same guidelines with</p> <p>8 respect to Capital Budget Applications as</p> <p>9 Hydro, and they imposed on Newfoundland Power</p> <p>10 the same conditions as have been imposed on</p> <p>11 Hydro in P.U. 7. Having looked at P.U. 7, you</p> <p>12 will see that the Board recognized that a net</p> <p>13 present value methodology should be done only</p> <p>14 where there were acceptable alternatives and</p> <p>15 that even then, there could be justification</p> <p>16 provided to justify a project.</p> <p>17 So Hydro submits that the Board has given</p> <p>18 direction three times now with respect to how</p> <p>19 the legislation is to be implied and</p> <p>20 interpreted with respect to Capital Budget</p> <p>21 Application submitted for approval by the</p> <p>22 Board from a utility.</p> <p>23 (9:17 a.m.)</p> <p>24 The next thing that I would like to look</p> <p>25 at is the actual approval process and the</p>
Page 11	Page 12
<p>1 Capital Budget process itself. The Industrial</p> <p>2 Customers have suggested, in their evidence,</p> <p>3 as well as their participation in the hearing,</p> <p>4 and in their argument, that there should be</p> <p>5 another review of the Capital Budget process</p> <p>6 and that the Board should give new issues, new</p> <p>7 guidance, new directions with respect to the</p> <p>8 Capital Budget process, and do that in the</p> <p>9 midst of this 2004 Capital Budget Hearing.</p> <p>10 Hydro does not agree with this position and</p> <p>11 our position is set out on pages 5 to 9 of our</p> <p>12 final argument. We believe the Board has</p> <p>13 given direction three times on the very same</p> <p>14 issues. The Board also, in P.U. 36,</p> <p>15 acknowledged that there are issues relating to</p> <p>16 the Capital Budget process that would be</p> <p>17 better explored in a technical type of</p> <p>18 conference in which all interested parties</p> <p>19 would be able to have input and to</p> <p>20 participate. So Hydro's submission is that--</p> <p>21 and it is Hydro's certainly very willing and</p> <p>22 eager, looks forward to the participation in</p> <p>23 the technical conference, that it is not fair</p> <p>24 or reasonable for the Board to change the</p> <p>25 rules of the game on Hydro in the midst of a</p>	<p>1 hearing when Hydro has complied with the</p> <p>2 previous directions of the Board on this</p> <p>3 topic.</p> <p>4 The other issue with respect to the</p> <p>5 review of the process that I'd like to comment</p> <p>6 on now is the Industrial Customers' position</p> <p>7 and approach in this hearing. Clearly,</p> <p>8 capital expenditures will impact customers'</p> <p>9 rates when utilities are regulated on a return</p> <p>10 on rate base method. Hydro acknowledges that</p> <p>11 this Capital Budget, if approved for 2004,</p> <p>12 will impact Industrial Customers' rates and</p> <p>13 other customers' rates. Hydro clearly</p> <p>14 acknowledges that the Industrial Customers, as</p> <p>15 does any other party with an interest, has a</p> <p>16 right to participate and seek to raise issues</p> <p>17 with respect to projects. However, Hydro</p> <p>18 submits that certain aspects of the Industrial</p> <p>19 Customers' position in this hearing, and as</p> <p>20 outlined in their brief, are not reasonable.</p> <p>21 There are five particular positions advanced</p> <p>22 by the Industrial Customers that Hydro would</p> <p>23 briefly like to refer to and explain to the</p> <p>24 Board why they feel that this particular</p> <p>25 position and approach is not reasonable in the</p>

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1 GREENE, Q.C.:

2 Q. ... context of this hearing.

3 The first is one I've already discussed

4 briefly, is that the Industrial Customers are

5 raising, for the third time before the Board,

6 the second time for the Industrial Customers,

7 but also we do have P.U. 36, the issue of

8 economic justification for all projects and

9 the type of documentation to support a Capital

10 Budget. This was raised in Hydro's case in

11 two previous hearings in which the Industrial

12 Customers participated. The Board again gave

13 the very same direction with respect to the

14 other utility in this jurisdiction which is

15 regulated on the same rules and must apply to

16 the same regulator for approval of its Capital

17 Budget. The Board indicated in that Order

18 that there would be a technical conference in

19 the future to discuss general issues relating

20 to the Capital Budget process.

21 With that background, what do the

22 Industrial Customers do this time? They raise

23 the very same issues again. They called a

24 witness to suggest a classification system,

25 and it quickly became clear during the hearing

Page 15

1 even after being told of P.U. 36, they

2 continue with their strategy of trying to get

3 these issues explored again, and as a result,

4 they extended unnecessarily the time for this

5 hearing.

6 The first one is with respect to their

7 approach on raising the same issues that the

8 Board has given direction on. The second

9 point is stated on page 5 of their written

10 brief, where they state that they were not

11 aware, until June of 2003, that there were

12 minimum filing requirements for new generation

13 and transmission projects on the Island

14 Interconnected system. We find it difficult

15 to understand how they can take that position

16 in light of the evidence. Hydro's 2002

17 Capital Budget, which was considered in the

18 2001 GRA, of which Industrial Customers

19 intervened and fully participated, had a

20 Section 3 for projects subject to the minimum

21 filing guidelines, just like Section 3 in the

22 2004 Budget. In fact, the pre-filed evidence

23 of Mr. Reeves, on page 16 of that evidence,

24 referred to the minimum filing guidelines and

25 the minimum filing projects. In fact, there

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1 that Mr. Barreca was relying on a

2 classification system which he could point out

3 was applied by the Manitoba regulator with

4 respect to the gas utility. He had no

5 knowledge as to whether it was applied with

6 respect to the electrical utility or, in fact,

7 whether it was applied by any other regulator.

8 He also acknowledged that this wasn't the only

9 classification system and that there were

10 others that could be possible, including the

11 one that Hydro uses, which is safety,

12 regulatory and legal requirements, reliability

13 and then least cost, where are discretionary

14 projects.

15 So Industrial Customers submitted

16 evidence which was vague and not definitive,

17 having known the previous direction of the

18 Board that this issue was to be addressed in

19 the form of a technical conference. In fact,

20 one of the issues the Industrial Customers

21 raised in the pre-trial brief is that they

22 were not told about P.U. 36 by Board counsel

23 or by the Board, and I'm going to come back to

24 that particular issue and explain why I have

25 trouble with that particular position. But

Page 16

1 was cross-examination with respect to the

2 minimum filing guidelines on November 9th,

3 2001, at page 25 of the transcript, but in

4 response to questions from Board counsel, Mr.

5 Budgell went through the minimum filing

6 guidelines and the projects that were in that

7 particular application. Similarly, the 2003

8 Capital Budget had a Section 3 minimum filing

9 guidelines. With that record, it is difficult

10 to see how Industrial Customers can say that

11 they were not aware until June of 2003 that we

12 have projects subject to minimum filing

13 guidelines.

14 The other thing they say is that the

15 guidelines were set by the utilities. That is

16 not correct. There was a report submitted to

17 the Board and reviewed by the Board and the

18 Board approved the guidelines and set the

19 guidelines.

20 The third point with respect to the

21 position of Industrial Customers in this

22 hearing that we would like to point out to the

23 Board why we feel that the position is

24 unreasonable, in light of the evidence and the

25 record, is the position they have taken with

Page 17

1 GREENE, Q.C.:

2 Q. .... respect to the obligation of the Board to

3 advise them of Orders coming from hearings in

4 which they have not been participating as

5 parties. They have taken the position that

6 the Board must specifically advise them of an

7 Order if they think they may have an interest

8 in that Order, when they have not participated

9 as a party. That is rather a novel argument

10 when I read it for the first time as a lawyer.

11 I submit that it is the obligation of legal

12 counsel to know issues that are going on in an

13 area of practice in which they practice. I

14 would submit that here, where they are raising

15 issues on the Capital Budget process and the

16 justifications to be provided by Hydro for a

17 budget, it would have made common sense, if

18 not normal legal precedent, for them to have

19 looked at Orders for the other utility on the

20 very same issues, by the very same Board, in

21 the very same jurisdiction. Hydro does not

22 agree that the Board or Hydro has an

23 obligation to advise any party of Orders, when

24 these Orders are publicly available. That's

25 the normal obligation of a lawyer to do the

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1 direction of the Board. I characterize this

2 as sour grapes on the part of the counsel, and

3 one is left to wonder why as to why it was

4 included in their submission. It is not

5 appropriate commentary. It wasn't in the pre-

6 trial brief and it continues not to be for

7 final argument.

8 The last area, and as I said, these are

9 the aspects of their participation in this

10 case, which we find unreasonable, is that the

11 Industrial Customers have continued to object

12 to the vast majority of Capital projects that

13 Hydro has proposed since 2001. For 2002 and

14 3, if you look back, it was the vast majority

15 of projects in which they had an interest.

16 What about the 2004 Capital Budget? Yes, they

17 have not objected to projects that do not

18 impact them. Now mind you, they carefully

19 point out that they're not consenting to them,

20 but they don't take a position on projects

21 which do not have a financial impact on them.

22 But of the projects that do affect them, they

23 are objecting to more than 80 percent of the

24 value of the projects. 80 percent.

25 Hydro submits that the scatter-gun

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1 research and to know what's going on in an

2 area of law in which they practice.

3 The next point on which Hydro would like

4 to point out why we feel their position has

5 been somewhat unreasonable in certain aspects,

6 not all aspects, but certain aspects in this

7 particular application we believe have been

8 unreasonable, is in their written brief, as

9 well as in their pre-trial brief, the

10 Industrial Customers took exception to the

11 fact that Hydro's 2003 Capital Budget was

12 approved, despite their participation, and

13 they stated that the Board appeared to have

14 reversed the burden of proof. I was very

15 surprised when I read the pre-trial brief. I

16 continued to be surprised when I saw that it

17 was included in their final submission. I

18 believe that these comments are not

19 appropriate. There is an implied inference of

20 bias, which the Board did address to

21 Industrial Customers at the beginning of the

22 hearing. Perhaps the Industrial Customers

23 should think that the Capital Budget was

24 approved because Hydro had provided all

25 justification and had met all previous

Page 20

1 approach used previously with respect to the

2 approach is a reasonable way to describe the

3 approach of Industrial Customers to the

4 Capital Budget Applications of Hydro. So with

5 respect to their participation in this

6 particular hearing, we believe that their

7 participation has been unreasonable, in

8 certain aspects, and I've outlined five of

9 them for the Board. And I will come back to

10 that when I come to the issue of costs.

11 Now I'd like to look at the 2004 Capital

12 Budget itself. As I've already mentioned,

13 we're seeking approval of \$34.2 million and

14 that we have averaged about \$38 million since

15 we've been regulated. I noted with interest

16 that I received, on Friday, Newfoundland

17 Power's Capital Budget for 2004 where they are

18 seeking approval of approximately \$54 million,

19 and that last year they received approval for

20 \$55 million. In our Capital Budget, there are

21 four main categories: generation; transmission

22 and rural operations; general properties; and

23 allowance for unforeseen events. And no party

24 objects to the allowance for unforeseen

25 events, I will make no additional comment on

Page 21

1 GREENE, Q.C.:

2 Q. .... it this morning, but refer the Board to

3 our written argument on it.

4 Before looking at the specific projects,

5 there are a number of general comments that I

6 would like to make because I believe they are

7 important for the Board to bear in mind when

8 they approach the Capital Budget. I believe

9 that the Board should bear in mind certain

10 facts about Hydro's system that are relevant

11 in the review of capital projects, including

12 when the Board must make a determination of

13 whether there are acceptable alternatives that

14 need to be evaluated using the net present

15 value methodology, and there are nine that I

16 would just briefly like to mention.

17 The first is that Hydro operates in an

18 isolated system. We cannot turn to a

19 neighbour to buy power in an emergency or a

20 shortage. The second is we have a number of

21 challenging geographic issues. We have a low

22 number of customers, so we have sparsely

23 populated areas which we must serve, requiring

24 long radial feeders in some cases. The third

25 element is weather. We all know our weather

Page 23

1 the preparation of the Capital Budget

2 Proposal. We have demonstrated in the past

3 and in this hearing for the RFI process and

4 during the hearing itself, that questions were

5 answered in a forthright, timely and competent

6 manner by experienced knowledgeable people who

7 know the system and know the issues.

8 The next general point about the approach

9 of the Capital Budget is that no party called

10 any evidence to contradict the specific

11 projects for which Hydro has requested

12 approval, other than the Industrial Customers

13 for four projects and I will deal with those

14 when I come to the specifics of the project.

15 And the last comment is really just one

16 that we've talked about before, which is that

17 the Board shouldn't micromanage the utility

18 and in fact, the Board shouldn't manage the

19 utility at all. That is not the role of the

20 Board and everyone recognizes that is not

21 appropriate, including the Industrial

22 Customers. The challenge to the Board is to

23 get the balance between the supervisory and

24 legislative requirements, and in this regard,

25 I have included some references in the Stated

Page 22

1 can be very challenging and pose unique

2 challenges to both electrical utilities that

3 are operating in the Province.

4 The fourth factor that's relevant is

5 Hydro's critical role as the supplier of more

6 than 80 percent of the province's energy

7 requirements. We also operate the bulk

8 transmission grid required to supply that 80

9 percent of power.

10 So for these reasons, some components of

11 our facilities and equipment are absolutely

12 critical and Hydro must ensure that they are

13 available. We cannot run them to failure

14 which seems to be a theme of the Industrial

15 Customers. If we did that, we would not be

16 complying with our obligation to provide

17 reliable service.

18 The next point that's relevant to the

19 overall approach to the budget is the fact

20 that Hydro has experienced professional staff

21 who are knowledgeable about the facilities and

22 their operation. Hydro has demonstrated in

23 the eight Capital Budgets we have brought

24 before the Board that our process is rigorous

25 and that sound engineering judgment goes into

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1 Case of the Newfoundland Court of Appeal which

2 I think are relevant about the approach with

3 respect to this. So it's not for the Board to

4 substitute its judgment on managerial and

5 business issues and to get into a detailed

6 review of the engineering accounting detail

7 that may be supporting the project. And the

8 Board has recognized that in the past, as

9 well.

10 So looking at the specific project, I

11 would like to deal first with the category of

12 generation. Hydro is requesting approval of 5

13 million dollars approximately in 2004 for

14 projects in the generation area; and 3 million

15 dollars in future years associated with this

16 project. This category covers all Hydro and

17 Thermal plants which are 8 Hydro plants and

18 one Thermal plant with a total capacity of

19 just over 1500 megawatts. The Industrial

20 Customers have objected to seven projects of

21 the ten in this category. There are three

22 types of projects which respect to the seven

23 they have objected to. The first category I

24 will call obsolescence. Hydro has applied for

25 approval of four projects on the basis that

Page 25

1 GREENE, Q.C.:

2 Q. .... the equipment is obsolete, is technically

3 obsolete. There are no longer spare parts

4 available to support that and there is no

5 manufacturer support to support the project.

6 (9:35 a.m.)

7 Here we have the replacement of Unit No. 7

8 Exciter at Bay D’Espoir, Section B, page 5;

9 replace Unit 2 Governor Controls, Cat Arm,

10 page 10 of Section B; replace Unit 2 Exciter

11 at Cat Arm, Section B, page 12; and upgrade

12 the control system at Holyrood, Section B,

13 page 17. When you look at all four of those

14 projects, you will see that the equipment

15 being replaced is obsolete, critical spare

16 parts are unavailable and there is limited, if

17 any, manufacturer’s support for the equipment.

18 You will also see that two of them are

19 continuation of programs the Board has already

20 approved in similar circumstances. These are

21 the exciters where there have been a number of

22 exciter replacements at Hydro, and in fact,

23 the one proposed here is the last one for the

24 Bay D’Espoir plant. You will also see, when

25 you look at the project justification, that

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1 approached to this, rather than the

2 replacement as proposed by Hydro. We will

3 point out that the Engineering Report filed

4 with the Application did analyze the phased

5 approach as recommended by the manufacturer,

6 as stated by Mr. Haynes in the transcript of

7 July 9th, at page 2, lines 14 to 19.

8 No evidence was submitted by the

9 Industrial Customers to contradict Hydro’s

10 evidence that this is the lowest cost option

11 and required to replace an obsolete system.

12 We submit that the evidence is clear the

13 project should be done at this time.

14 The last category in this heading relates

15 to the physical condition of the facility.

16 Here I include the replacement of Gate Hoist

17 No. 2 at Bay D’Espoir at the Ebbe Control

18 Structure. The evidence is clear about the

19 deteriorated condition of this gate and I

20 refer you to the project justification. Mr.

21 Haynes in the transcript of July 11th at page

22 225 and going on to page 226, explained why

23 because of the weight of this gate and the

24 operation of the gate it is not possibly of

25 carrying on with doing the ad hoc maintenance

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1 Unit No. 7 at Bay D’Espoir for which there is

2 one project, and Unit 2 at Cat Arm, for which

3 there are two, are critical components of

4 Hydro’s production facilities. They are

5 required to meet customer load and Hydro must

6 ensure that they are available, which requires

7 a proactive preventative maintenance approach;

8 you cannot run them to failure. We also have

9 pointed out what the cost would be if these

10 production facilities are not available and

11 increased production from Thermal facilities

12 must be obtained. So that’s the first

13 category which is obsolescence.

14 And the last project in there requires a

15 little bit of an additional comment and that’s

16 the upgrade of the control system. Again, the

17 control system at Holyrood is obsolete. This

18 system manages all three units at Holyrood.

19 It controls the boiler, burner management, the

20 turbine and generator monitoring and the other

21 systems at the plant. Hydro submitted an

22 Engineering Report in Section G, Tab 2 of the

23 Application to support the replacement of this

24 control system. The Industrial Customers are

25 suggesting that there should be a phased

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1 repairs and why it was not possible to replace

2 with a same type of system. An engineering

3 judgment was exercised in determining that the

4 physical condition of the facility required it

5 to be replaced with another type of gate

6 hoist. Similarly the other project in this

7 category, physical condition, is a civil

8 structure at Holyrood which is at Section B,

9 page 222. An Engineering Report was submitted

10 in Section G, Tab 3, which respect to the

11 liner. The Board already approved the

12 replacement of the stack liner on Unit 1.

13 Unit 2 is in the same condition. The

14 Engineering Report attached shows that it is

15 the least-cost alternative for the ensured

16 continued operation of Holyrood to replace the

17 liner. The screens in the pumphouse are also

18 in a severely deteriorated condition and

19 require to be replaced. No evidence was lead

20 by the Industrial Customers to contradict the

21 engineering assessment of these facilities.

22 The last project in the generation

23 category to which the Industrial Customers

24 objected was the ambient monitoring system

25 enhancement at Holyrood. Here, I would refer

Page 29	Page 30
<p>1 GREENE, Q.C.:</p> <p>2 Q. .... you to page 19 of Hydro's argument and</p> <p>3 the only point with respect to the Industrial</p> <p>4 Customers' position where they state that</p> <p>5 because we have not received information, the</p> <p>6 2003 projects, we shouldn't be approved--this</p> <p>7 project should not be approved, is to point</p> <p>8 out that the information to be obtained from</p> <p>9 the 2004 Capital project is information of a</p> <p>10 different environmental nature than the</p> <p>11 previous one. It is to provide for current</p> <p>12 information on the measurement of fine</p> <p>13 particulate and NOx, which has not been the</p> <p>14 subject matter of other projects at Holyrood.</p> <p>15 Moving to TRO which is the next category</p> <p>16 in the 2004 budget, the majority of the</p> <p>17 projects in this category did not impact the</p> <p>18 Industrial Customers and they took no position</p> <p>19 on them. There are two projects, however, to</p> <p>20 which they did object, which I would like to</p> <p>21 briefly refer to and that is the replacement</p> <p>22 of the insulators on TL 233 which is the</p> <p>23 project at Section B, page 27. These are the</p> <p>24 replacement of the defective Canadian Ohio</p> <p>25 brass insulators and I refer you to page 20 of</p>	<p>1 the argument, Hydro's written argument for</p> <p>2 that. The only comment here is Industrial</p> <p>3 Customers in their written brief suggested</p> <p>4 that while the failure rate was increasing, it</p> <p>5 wasn't high enough yet, and arbitrarily out of</p> <p>6 the air they picked another failure rate that</p> <p>7 they said the Board should impose, rather than</p> <p>8 the one that Hydro has put before the Board</p> <p>9 before with respect to how it approaches the</p> <p>10 replacement of the Canadian Ohio brass</p> <p>11 insulators. They are suggesting an arbitrary</p> <p>12 factor which there was no evidence to support</p> <p>13 to substitute for Hydro's sound engineering</p> <p>14 advice and judgment which has been accepted by</p> <p>15 the Board before. The last category in TRO,</p> <p>16 the second one, is the upgrade of 128 kV, 66</p> <p>17 kV protection. There is only certain of the</p> <p>18 lines covered by this project that impact</p> <p>19 Industrial Customers. And here I would just</p> <p>20 refer you to the transcript of July 11th, page</p> <p>21 76, when Mr. Martin explained that we have had</p> <p>22 ten mis-operations of these relays which have</p> <p>23 caused outages in nine years, and that in his</p> <p>24 judgment they must be replaced.</p> <p>25 The last category in the 2004 Budget is</p>
Page 31	Page 32
<p>1 that of general properties. There are two</p> <p>2 types of categories here. One is the vehicle</p> <p>3 and the last one would be the IS&amp;T one.</p> <p>4 Looking at the vehicle, the Industrial</p> <p>5 Customers--by the way, these are projects B81,</p> <p>6 starting up in B81. The first issue the</p> <p>7 Industrial Customers took with respect to</p> <p>8 these is the replacement criteria. They</p> <p>9 stated that there was no basis for the</p> <p>10 replacement criteria that Hydro has put</p> <p>11 forward. I would point out and refer the</p> <p>12 Board to the transcript of July 11th, page 86</p> <p>13 and page 100 of that transcript, where Mr.</p> <p>14 Reeves, in his evidence, explained that there</p> <p>15 had been a review with the other utilities of</p> <p>16 replacement criteria and that Hydro's criteria</p> <p>17 has been developed as a result of that review.</p> <p>18 I would also point out that the same criteria</p> <p>19 will be used in the 2002 Capital Budget where</p> <p>20 the Board approved the replacement using the</p> <p>21 same criteria for Hydro. I would also refer</p> <p>22 the Board to P.U. 36 at page 20 where the</p> <p>23 criteria for Newfoundland Power is set out for</p> <p>24 the replacement of vehicles, and you will see</p> <p>25 that the replacement criteria is very similar</p>	<p>1 to Hydro when you look at the age of the</p> <p>2 vehicle, the number of kilometers driven, the</p> <p>3 maintenance cost and the condition of the</p> <p>4 vehicle. So Hydro submits the replacement</p> <p>5 criteria are valid. The other point</p> <p>6 Industrial Customers have stated is that we</p> <p>7 didn't apply the criteria. We didn't apply--</p> <p>8 if you say it's okay, we didn't apply it and</p> <p>9 they refer to the responses to IC-36 and what</p> <p>10 you must look at is that IC-36, as Mr. Reeves</p> <p>11 also said in the transcript of July 9th on</p> <p>12 page 96, that that was prepared in April of</p> <p>13 2003 and you must account for the extra period</p> <p>14 of time until these vehicles are replaced, and</p> <p>15 when you do that, they will meet the</p> <p>16 replacement criteria of Hydro. You must also</p> <p>17 recognize that the replacement criteria is one</p> <p>18 factor. We also have to look at the age, the</p> <p>19 kilometers, the maintenance, the physical</p> <p>20 condition and that this is done on an</p> <p>21 individual basis and a judgement made with</p> <p>22 respect to each vehicle.</p> <p>23 Now the last category in the 2004 Budget</p> <p>24 are those that are in IS&amp;T and the primary one</p> <p>25 here is the radio and there is no doubt that</p>

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1 GREENE, Q.C.:  
 2 Q. .... the radio attracted the most attention in  
 3 this hearing. However, before I get to the  
 4 radio, I would like to refer to the IC  
 5 argument on page 31 where they stated the  
 6 Hydro's evidence was characterized by a  
 7 partial disclosure sometimes having the effect  
 8 of being misleading. Hydro takes great  
 9 exception to this position. Hydro in all  
 10 issues before the Board has been frank, open,  
 11 helpful and co-operative. We assure the Board  
 12 that Hydro's position is always to ensure that  
 13 accurate information is before the Board and  
 14 we take pains to do that at all times. For  
 15 example, in this hearing, in re-direct Mr.  
 16 Haynes explained he wanted to correct what he  
 17 had said about the operation of Gate 2 at the  
 18 Control Structure at Ebbe. Similarly with  
 19 respect to the usage statistics given in the  
 20 consultant's report for the use of mobile  
 21 radios. When it was brought to our attention  
 22 that they didn't appear to be correct, we  
 23 filed the corrected one, even though I use  
 24 both of those examples as issues, neither one  
 25 of those were significant with respect to the

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1 least it appears to me from reading the  
 2 argument and having participated in the  
 3 hearing, that the parties have agreed that a  
 4 mobile radio system is required by Hydro, so  
 5 there's no issue that we need a mobile radio  
 6 system. I think it's also clear that the  
 7 condition of the existing system is such that  
 8 it or at least critical parts of it need to be  
 9 replaced. So I think there's no dispute over  
 10 that. The disagreement appears to be how we  
 11 address the condition of the current system.  
 12 Six issues have been raised by the various  
 13 parties on this and I'm going to deal with  
 14 them briefly. The first issue I see as a red  
 15 herring and that is that the Passport type of  
 16 system was not referred to in the consultant's  
 17 report Business Case. Proposition on this was  
 18 clearly stated in the hearing when we said  
 19 that we are not bound or committed to any  
 20 particular type of system at this time. The  
 21 final decision will be made following approval  
 22 by the Board and the call of tenders where we  
 23 will use a functional specification. Once we  
 24 receive the tenders, analysis will be  
 25 completed of the function of technical and

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1 project; however, Hydro has always ensured  
 2 that the correct information is before the  
 3 Board and that's part of my role, as counsel,  
 4 that if there is some mis-information, we  
 5 correct it through re-direct. The production  
 6 panel here were composed of Messrs. Haynes,  
 7 Downton, Dunphy and McDonald who gave evidence  
 8 for almost three and a half days on the very  
 9 technical issues. They are all very  
 10 experienced in their area of responsibilities  
 11 and I think it is clear that they answered all  
 12 questions in an open, competent and forthright  
 13 manner.  
 14 The Industrial Customers also said that  
 15 Hydro used terms in an in-house way and not  
 16 with respect to what was generally accepted  
 17 definitions in the industry. They didn't say  
 18 what definitions they were talking about.  
 19 They filed no evidence of what generally  
 20 accepted definitions are in the industry, so  
 21 we submit that that should be discounted by  
 22 the Board.  
 23 (9:47 a.m.)  
 24 Now I would like to spend just a few  
 25 minutes on the radio. I think it's clear, at

Page 36

1 cost requirements. At this point, it appears  
 2 the Passport type of system may meet Hydro's  
 3 needs, but we are not committed to it. I  
 4 would also refer you to the consultant's  
 5 report of Hydro in Appendix C to the Business  
 6 Case where he talks about the very rapid  
 7 changing nature of this technology, and  
 8 similarly to Mr. Barreca at the transcript  
 9 July 11, page 30, where he acknowledged that  
 10 technology changes so fast, that this is the  
 11 appropriate type of case to give Hydro that  
 12 type of flexibility.  
 13 The second point that has been raised is  
 14 that detailed engineering had not been done,  
 15 and no, Hydro doesn't do detailed engineering  
 16 at this point in time for this type of  
 17 project. That will be done during the design  
 18 phase when we have more information and  
 19 following the approval by the Board. And here  
 20 I would refer you to the transcript of July  
 21 11th, page 115; and July 9th, page 68 for  
 22 that. The next issue that has been raised is  
 23 the cost of the Passport system, and what  
 24 Hydro is saying is that when Hydro engineers  
 25 looked at and did their estimate, having

Page 37

1 GREENE, Q.C.:

2 Q. .... become familiar with the suppliers of the

3 product and what it could do, when they did

4 the estimate, it's within the same order of

5 range as the other type of trunked radio

6 system. So as the cost is in that range, it

7 looks like it could be a feasible alternative

8 to provide the same level of functionality

9 required for the same cost. And therefore,

10 because the costs are similar, the results of

11 the Business Case are valid for the Passport

12 type of radio.

13 The second issue raised on the radio was

14 whether we should have a trunked radio or a

15 conventional radio. And this was raised by

16 Newfoundland Power. Hydro has stated that the

17 trunked radio offers additional functionality

18 over the conventional, even though it has a

19 slight--and it does have a slightly higher

20 cost. The additional benefits are channel

21 efficiency, better re-use of radio channels,

22 and it's easier to expand, should we need to

23 expand for such things as additional

24 requirements. I would refer you to the

25 transcript of July 7th, at page 90 and at page

Page 39

1 acknowledged that he was not familiar with VHF

2 radio systems, that that was not his area of

3 expertise.

4 Hydro submitted analysis on July 4th with

5 respect to the phase replacement. It did

6 include the six new sites where Hydro now

7 currently does not have coverage that these

8 six new sites would be done at once. It also

9 included moving to six Hydro sites from Aliant

10 sites. Why? Because the analysis showed it

11 was cheaper to be on the Hydro sites. All of

12 the other repeater sites were phased. This

13 analysis clearly demonstrated that the phased

14 replacement of the existing repeater sites is

15 not cost effective. The lowest cost

16 alternative is the immediate replacement of

17 all of the mobile radio system.

18 The fifth point raised and it's raised by

19 Newfoundland Power is the contribution of

20 Works Services. Yes, it is true that we have

21 not finalized how Works Services and

22 Transportation will contribute and whether it

23 will be operating or capital. That, once we

24 have approval of this project, there will be

25 negotiations with Works Services and when

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1 12 where the benefits of the trunked radio are

2 set out, as well as to the response of NP2,

3 the request for information which list these

4 additional benefits. So we believe that the

5 trunked radio does provide additional

6 functionality over a conventional radio.

7 However, again, the final decision will be

8 made following evaluation of the tenders.

9 The third issue raised by Newfoundland

10 Power Industrial Customers to question the

11 radio was the issue of moving to 12 1/2

12 kilohertz channels. Hydro is not relying on

13 that as a rationale for this project. The

14 primary reason for replacing the system is the

15 physical and technical obsolescence of the

16 current system. We will use whatever

17 appropriate channels is required by Industry

18 Canada when we do the final design of the

19 system.

20 The fourth issue on the radio is that

21 some parties have suggested a phased

22 replacement. And here I would like to refer

23 to the evidence of Mr. Barreca. I wanted to

24 point out that in the transcript of July 11th

25 at page 51, lines 18 and 19, Mr. Barreca

Page 40

1 finalized, we will report back to the Board on

2 the nature of their contribution and this will

3 be done before the project goes into service

4 and goes into rate base, the Board will have

5 assurances how the appropriate contributions

6 from Works Services are treated to the benefit

7 of the rate payer. What Hydro has asked

8 approval for is what Hydro needs to meet its

9 needs. The contribution of Works Services

10 will be of benefit to the rate payers.

11 The last issue under radio that requires

12 comment is the issue raised by Board hearing

13 counsel with respect to the potential for

14 duplication with Newfoundland Power. Our

15 understanding is that Newfoundland Power does

16 not require mobile radio system for five to

17 ten years. Hydro requires one now.

18 The evidence shows that the existing type

19 of system can be expanded, however if the

20 requirement is not for five or ten years, we

21 submit, is not reasonable at this time to

22 require Hydro to delay the project until

23 Newfoundland Power finalizes its requirements

24 for projects and may be five to ten years out.

25 We are certainly willing and have already

Page 41

1 GREENE, Q.C.:

2 Q. .... discussed with Newfoundland Power what

3 the requirements are and believe these can be

4 accommodated with respect to the project.

5 The other projects that are abducted to

6 by Industrial Customers and I believe it's all

7 of the information systems projects, are dealt

8 with generally in our final argument and do

9 not require additional comment here, with the

10 exception of two. The first is the end user

11 and server Evergreen program, which is on B-

12 66. I would refer the Board to the transcript

13 of July 7th at pages 48 and 49, where the four

14 main components of this project were outlined.

15 Mr. Hutchings, in his cross-examination,

16 focused on one of the four main components,

17 which was the end user devices, and not the

18 other three components. In fact, Mr. Downton,

19 in cross-examination, went on and started to

20 explain the other three components of the

21 project, Mr. Hutchings interrupted him once he

22 got to the first one, the end user one, and I

23 refer you here to the transcript, page 149 at

24 line 2, where it is clear that Mr. Downton was

25 going on to explain the other projects. So,

Page 43

1 this project which is the second of the

2 project, that the Board has already approved

3 1.2 million dollars in 2003.

4 In conclusion, I'll point out that we are

5 seeking approval of 34.2 million dollars.

6 That it is Hydro's submission that the

7 projects are required to provide safe reliable

8 least cost power to customers. Hydro has

9 complied with the statutory requirement and we

10 have complied with the previous Board

11 directions with respect to a justification to

12 be supplied to support a Capital Project. We

13 believe and submit that we have demonstrated

14 that we have a vigorous Capital Budget

15 Process, that we have engineering expertise

16 and sound engineering judgment which has been

17 applied to these projects. We therefore

18 submit that all of the 2004 Capital Projects

19 should be approved as submitted.

20 The last topic on which I need to make a

21 comment is the issue of cost. I am assuming

22 that Industrial Customers will ask for cost as

23 they did last year. Our general submission,

24 as you are aware, is that Industrial Customers

25 should not be awarded their cost of

Page 42

1 with respect to that, we would point out the

2 four main components of the project as

3 outlined in the transcript and submit adequate

4 justification has been provided for them.

5 The last project that requires specific

6 comment is the energy management system at

7 page B 53 of Section B. The Industrial

8 Customers have objected to the replacement of

9 the energy management system. I would point

10 out that our argument on it is brief and it is

11 on page 22 of the final argument. I would

12 also like to point out that no RFIs were asked

13 about this project this year or last year, I

14 believe it was the first year of the project.

15 There was no cross-examination, not one

16 question last year or this year about this

17 project. There was no evidence to contradict

18 Hydro's evidence with respect to it, contained

19 in the justification and the Independent

20 Engineering Report that was provided by an

21 internationally recognized company KEMA that

22 was filed in support of the 2003 Capital

23 Budget Application. So, in light of that, it

24 is very difficult to understanding the

25 Industrial Customers position to object to

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1 intervening in a hearing, whether it's a

2 Capital Budget or a General Rate Application,

3 that they represent specific interest groups

4 who have the resources to pay for the

5 intervention. And this has generally been

6 accepted by the Board. The only exception was

7 in the General Rate Application where they

8 received a nominal amount of the costs they

9 had submitted. Well, it was more than

10 nominal, but it was a fraction of what they

11 had submitted. They asked for, but were not

12 awarded costs last year in the 2003 Capital

13 Budget. So, Hydro submits that it is not

14 reasonable that the Utility and ultimately its

15 customers pay for the cost of the intervention

16 of the Industrial Customers, as is a general

17 principle. In coming back to their

18 participation in this hearing, Alvei already

19 outlined why Hydro believes that the

20 Industrial Customers' approach in this hearing

21 has been unreasonable in a number of respects.

22 We believe that the Board must take that into

23 account and that that reinforces Hydro's

24 submission that they should not be awarded

25 costs for this hearing. And in fact, Hydro

Page 45

1 GREENE, Q.C.:

2 Q. .... requests that the Board consider awarding

3 Hydro a portion of its cost against the

4 Industrial Customers.

5 Section 90 of the Public Utilities Act

6 gives the Board the discretion to award costs

7 to either party. Hydro has never asked before

8 for costs to be awarded against a party.

9 However, for the reasons outlined, we do

10 believe that certain elements of the approach

11 have been unreasonable and in that regard, we

12 believe that the parties must bear the

13 consequences when they take, what we believe

14 are unreasonable approaches. And if the Board

15 should so agree, we do request that the Board

16 consider awarding a portion, not all, but a

17 portion of Hydro's costs against the

18 Industrial Customers. Thank you, Mr. Chair,

19 that concludes my submissions at this time.

20 CHAIRMAN:

21 Q. Thank you, Ms. Greene. Commissioner Martin,

22 do you have any questions.

23 COMMISSIONER MARTIN, Q.C.:

24 Q. No.

25 CHAIRMAN:

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1 the Utility can submit or must submit, I think

2 it says, an application for approval of their

3 annual Capital Budgets, but "it" meaning the

4 Act. The P.U. Act does not outline any

5 specific guidelines, parameters or direction

6 in respect of how that approval is to be done,

7 what makes up the process, like it does with

8 respect to rates. Rates, it appears to me, is

9 somewhat clearer. And when you look at

10 Section 3(a) of the EPCA, again, as I said,

11 there isn't any specific reference to Capital

12 Budgets, except with respect to management and

13 operation of the facilities. Section 4

14 requires the Board, in carrying out its duties

15 and exercising its powers, to apply tests that

16 are consistent with generally accepted sound

17 public utility practice, whatever those test

18 may be. There aren't any specific tests that

19 are contained in the legislation by reference

20 or otherwise. So, I guess my question to you

21 is, do you see that there's a difference in

22 how the Board is empowered to deal with a rate

23 application, as opposed to a Capital Budget

24 Application? That's question number one. And

25 falling from that, is there authority in that

Page 46

1 Q. Commissioner Powell, do you have any

2 questions?

3 COMMISSIONER POWELL:

4 Q. No.

5 CHAIRMAN:

6 Q. No questions, okay. I have a question, Ms.

7 Greene. I guess it's probably a question and

8 an observation. After I had read the argument

9 that you put forward as well as the

10 intervenors and Board counsel, I got to

11 thinking about the responsibility of the Board

12 in respect of Capital Budgets, as opposed to

13 the Board's responsibility in respect of

14 applications for rates for approval. And

15 under the Act, it seems as if, in respect of

16 the Board's authority to approve rates, that

17 that is somewhat specific in that the Board

18 can set the Rate Base of the Company, Rate of

19 Return and there's a procedure that the Board

20 has adopted in line with what the legislation

21 says that gets you to the calculation of a

22 rate for rates for customers.

23 (10:02 a.m.)

24 The process in respect of Capital Budget

25 approval is not so clear. It merely says that

Page 48

1 section that I referred to, having to do with

2 Capital Budgets, for the Board to deny a

3 Capital Budget in whole or in part and how

4 does that then tie in with the invasion, if

5 you like, of the sphere of management of the

6 Utility that you referred in your oral

7 argument and that you pointed out in your

8 written argument and you attached a copy of

9 Judge Green's and his comments in that regard

10 that are contained in Paragraphs 31, 32, 118

11 and 120. Now, if you want some time to think

12 about that, we can break now or we can break

13 after we hear from Mr. Hayes?

14 GREENE, Q.C.:

15 Q. Well, I think I'm in a position to respond.

16 The questions that you raise are challenging

17 questions. Hydro, as you know, as Alvei

18 already said, this is our eighth Capital

19 Budget and its clear that the process is

20 evolving. And one of the reasons it is

21 evolving is because of some of the very

22 questions that you have outlined and the

23 intervention of intervenors who have raised

24 what are significant issues that need to be

25 addressed by the Board for the--when they have

Page 49

1 GREENE, Q.C.:

2 Q. .... to balance the interest of the Utility

3 and the interest of the consumers.

4 So, the challenge that the Board said

5 itself in P.U. 36 is often how do they

6 actually operationalize and implement those

7 legislative provisions in the context of the

8 Capital Budget Application. And the answers

9 aren't always clearly written in black and

10 white. That's one of the challenges of being

11 a lawyer, we get to consider legislation and

12 argue for different interpretations which is

13 what makes the law, I guess, interesting. But

14 looking specifically at your question, first,

15 your first question was, do you think that

16 there is a difference in how the Board is

17 empowered to deal with a General Rate

18 Application and a Capital Budget Application.

19 The Board has been given statutory authority

20 with respect to both. With respect to a

21 general Rate Application, it is true that

22 there is more specific guidance given in

23 various sections of the Public Utilities Act

24 with respect to how that is to be done. There

25 are a number of sections dealing with rate

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1 determine how they're going to apply it.

2 However, the good news is that the Board

3 has addressed their minds to this issue on

4 pre-occasions and has also decided that

5 because of the nature of the capital budget

6 process and how it is changing, that there are

7 issues that need to be addressed in a less

8 adversarial form in the nature of a technical

9 conference. And we believe that's a good

10 approach and we look forward, as I said

11 earlier, to participating in that because

12 there are a number of issues we believe that

13 could be introduced to streamline this process

14 and to make it more beneficial for rate

15 payers, for the Utility, for the Board and for

16 Intervenors.

17 So, part of the dilemma, I think Mr.

18 Chair, comes from the fact that there are

19 less, in terms of numbers, of specific

20 directions in the legislation with respect to

21 Capital Budgets. The other thing that I think

22 is also correct is there's less precedent out

23 there for how people approach capital budgets

24 because the evidence is clear. Nova Scotia is

25 the only jurisdiction that requires the annual

Page 50

1 base and how it can be valued, for example.

2 There are also other sections dealing with

3 what can be rates, rates must be with respect

4 to providing services that are required for a

5 customer. So, there has been--or that there

6 are a number of specific sections that the

7 Board must take into account in determining

8 such things as rate base. It is also true

9 that there have been a number of precedents

10 developed through, sometimes, judicial

11 authority and sometimes precedents of this

12 Board and in other jurisdictions that can give

13 guidance to the Board in coming up with

14 specific issues dealing with a General Rate

15 Application.

16 Now, we don't have that same situation

17 with respect to Capital Budgets. We only have

18 Section 41 of the Public Utilities Act that I

19 referred to and I'm sure that other parties

20 will, as well, and we have the general

21 principles that we refer to in our written

22 argument and our oral argument and that

23 Industrial Customers referred to. So, you

24 have more of a general statement that the

25 Board must operationalize and actually

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1 approval by the Regulator of the Utilities

2 Capital Budget. So, us lawyers like to go and

3 look for precedent, that's part of our

4 training. And in the Capital Budget area,

5 there's not a lot. So, I understand your

6 dilemma and I think the good news is the Board

7 has given direction. And once they give

8 direction, the Utility and the Intervenors

9 have to rely on that and it shouldn't be

10 changed lightly unless there is input, unless

11 it's a significant reason to change it. There

12 must be some certainty; they can't change

13 every year. So, I don't know if that's

14 helping, Mr. Chair, but there some of the

15 issues that we, at Hydro, had grappled with as

16 well over the past, certainly the past three

17 to four years.

18 CHAIRMAN:

19 Q. Thank you, Ms. Greene. I guess, probably if

20 there is a dilemma in my mind, it's that Alvei

21 probably been around too long in terms of, I

22 know what the process, in terms dealing with

23 capital budgets was like several years ago and

24 then it got to a public hearing process

25 eventually where seldom, if ever, any opposing

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1 CHAIRMAN:  
 2 Q. .... parties presented themselves to be heard.  
 3 And then, I guess to put a date on it, we came  
 4 into the age of the Consumer Advocate starting  
 5 in 1996 and since that time, there's been a  
 6 number of processes that have been revised, I  
 7 suppose. One of which is the Capital Budget  
 8 Application and hearing process. But I feel  
 9 that some elements of that whole process have  
 10 moved ahead faster than others. And I'm  
 11 particularly thinking about the, let's say the  
 12 transparency that this forum offers to the  
 13 public and to the customers, if you like, of  
 14 the utilities. And I'm also thinking about  
 15 the elements of the process that fortunately,  
 16 I think, the technical conference schedule for  
 17 '04 is intended to address, at least, in part.  
 18 And so, I guess if there's a dilemma, it's  
 19 that the approval process of the Capital  
 20 Budget seems to me, in the whole ball of wax,  
 21 not to have kept up with the external or  
 22 public hearing process, the transparency, if  
 23 you like and the move to make things more  
 24 transparent and so there's my concern. I  
 25 won't call it a dilemma, although that's

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1 CHAIRMAN:  
 2 Q. If you wish, we'll take a break now and come  
 3 back in 15 minutes.  
 4 (BREAK - 10:15 A.M.)  
 5 (10:34 a.m.)  
 6 CHAIRMAN:  
 7 Q. Mr. Hayes, are you ready now to proceed?  
 8 MR. HAYES:  
 9 Q. Yes, I am, thank you, Mr. Chair. Mr. Chair  
 10 and Commissioners, as a purchaser of the bulk  
 11 of the electrical generation generated by  
 12 Hydro, Newfoundland Power has a significant  
 13 stake in Hydro's annual capital expenditures.  
 14 This year from our review of Hydro's Capital  
 15 Budget as filed, it appeared that one project,  
 16 in our judgment, was not justified on the face  
 17 of the record and we intervene for the purpose  
 18 of reviewing the detailed information on that  
 19 project, and that was, of course, the VHF  
 20 Radio Replacement Project at page B71 of the  
 21 Application. We confine our intervention in  
 22 the proceeding to that project and today we  
 23 will again essentially confine our remarks to  
 24 the VHF project.  
 25 As we noted in our written submission,

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1 probably an apt word, but I thought I would  
 2 throw it out to you and maybe the others might  
 3 take note. And if they have anything helpful  
 4 to offer, I would like to hear from them when  
 5 they do their oral argument. I'd certainly  
 6 like to hear comments, if they have any. And  
 7 I'm not sure Alvei made myself absolutely  
 8 clear and if I haven't, then feel free to ask  
 9 any questions you have of me in terms of what  
 10 it is I'm trying to say here.  
 11 And I guess, basically it boils down to,  
 12 the difference that I see in the legislation  
 13 between the approval process for rates  
 14 compared to that for Capital Budgets. One  
 15 being fairly specific, the other being fairly  
 16 vague and if there's very much differences  
 17 between those two descriptions.  
 18 Now then, it's quarter past ten, Mr.  
 19 Hayes and -  
 20 HENLEY ANDREWS, Q.C.:  
 21 Q. Mr. Chair, could we take a break now?  
 22 CHAIRMAN:  
 23 Q. Sure we could.  
 24 HENLEY ANDREWS, Q.C.:  
 25 Q. Thank you.

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1 Newfoundland Power's view is that Hydro has  
 2 not justified its proposal to spend 8.8  
 3 million dollars on the VHF radio at this time.  
 4 It is not to suggest that some expenditure on  
 5 Hydro's mobile radio requirements is not  
 6 necessary, but merely that the project as  
 7 currently proposed, it has not been shown  
 8 either to be necessary or to be the least  
 9 cost. All else being equal, it is the Board's  
 10 obligation pursuant to the Electrical Power  
 11 Control Act to approve only those capital  
 12 expenditures that are consistent with the  
 13 provision of least cost electrical service.  
 14 If alternative viable solutions exist to an  
 15 identified capital expenditure requirement, it  
 16 is the utility's obligation to evaluate the  
 17 pros and cons of those alternatives and to  
 18 present those to the Board and the cost  
 19 justifications so that the Board can discharge  
 20 its obligations under the legislation.  
 21 With respect to this particular project,  
 22 it is remarkable in Newfoundland Power's view  
 23 that the system that's currently preferred by  
 24 Hydro, which we all know is the Passport  
 25 system, is not even mentioned in the principal

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1 MR. HAYES:  
 2 Q. .... documentation filed in support of the  
 3 project. Neither the Business Case, nor the  
 4 consultant's report which was attached to it,  
 5 mention the Passport system which Hydro had  
 6 identified almost two years ago, according to  
 7 their testimony, and its first mention on the  
 8 record was during direct examination of the  
 9 Panel on the first day of the hearing. The  
 10 cost information on this system, which was  
 11 provided in response to an Undertaking, was  
 12 acknowledged to be a "order of magnitude"  
 13 estimate only and it was acknowledged not to  
 14 be as detailed as the estimates provided in  
 15 the consultant's report of the other systems  
 16 evaluated. We submit that this level of  
 17 uncertainty with respect to the cost and the  
 18 technology that is to be involved in this  
 19 project is not appropriate in relation to the  
 20 approval of the capital expenditure of almost  
 21 9 million dollars. Further, where a solution  
 22 is proposed that is not least cost,  
 23 Newfoundland Power submits that information  
 24 should be submitted on the record that clearly  
 25 shows why the higher cost solution provides

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1 the consultant's report and in our view, there  
 2 also appears to be some uncertainty among the  
 3 witness panel with respect to the specifics of  
 4 the contents of that cost estimate. We submit  
 5 that as the record currently stands there is a  
 6 significant degree of uncertainty with respect  
 7 to what the new VHF radio system will  
 8 ultimately cost. Hydro testified that a more  
 9 detailed process of radio system design has  
 10 yet to take place, and my learned friend said  
 11 this morning that Hydro doesn't do that at  
 12 this stage. Well, it is Newfoundland Power's  
 13 submission essentially that they should. It  
 14 is clear from the cost estimates currently on  
 15 the record and the variability among those  
 16 costs of the various systems that the choice  
 17 of technology or a choice of system can result  
 18 in significant cost variances. And in the  
 19 circumstances, we believe that approval of the  
 20 project at this stage would be premature.  
 21 Newfoundland Power also believes that  
 22 it's appropriate that Hydro address the  
 23 concerns which were implied in our Request  
 24 for Information 93 and reiterated by Mr.  
 25 Barreca in response to the Chair's question at

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1 better value to the utility and its customers.  
 2 In relation to the VHF radio project, Hydro  
 3 has chosen to propose a solution that is not  
 4 the least cost. The conventional radio  
 5 technology is the least cost, according to  
 6 Hydro's own estimates. And Hydro has  
 7 acknowledged that conventional technology  
 8 provides all the required functionality. In  
 9 our view there is not compelling evidence on  
 10 the record that Hydro requires the features of  
 11 the newer technology, and this is technology  
 12 that if adopted we must remember forces Hydro  
 13 to throw out the entire existing system,  
 14 repeaters, radios, the works. And it is  
 15 evident from the record that technology  
 16 choices can significantly affect costs. The  
 17 variability among the cost estimates for the  
 18 systems reviewed by the consultant should give  
 19 the Board pause in our view. The  
 20 estimates varied by several million dollars.  
 21 The currently preferred system, the Passport  
 22 system, is estimated at about 5.7 million  
 23 dollars which is the same cost as a system  
 24 recommended by the consultant, but again, this  
 25 is not as detailed an estimate as the ones in

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1 the evidence stage. Before (unintelligible)  
 2 any existing system entirely to the trash  
 3 heap, we believe that Hydro ought to fully  
 4 evaluate to what extent the life of the  
 5 current system might be extended. Merely  
 6 observing that certain components are  
 7 manufacturer discontinued and based on typical  
 8 experience others may not be supported by  
 9 vendors is not sufficient judgment for almost  
 10 a 9 million dollar expenditure.  
 11 Hydro has acknowledged that with the  
 12 exception of some recent failures and in  
 13 particular with the central switch, the system  
 14 has essentially continued to provide adequate  
 15 function, yet the Board is now being asked  
 16 that it is appropriate to reject the current  
 17 technology and essentially throw the entire  
 18 system out. As you will recall, Mr. Barreca  
 19 who admittedly said he doesn't have specific  
 20 experience with VHF systems, but does have  
 21 long experience in the telecommunications  
 22 business, testified that it is not unusual for  
 23 telecommunications equipment to provide  
 24 service well beyond its expected life. In  
 25 response to NP-3, Hydro initially stated that

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1 MR. HAYES:  
 2 Q. .... they didn't consider trying to extend the  
 3 life of the system because of industry  
 4 requirement to Industry Canada requirement to  
 5 move from 25 kilohertz to 12 kilohertz  
 6 channels and because the repeaters had been  
 7 manufacturer discontinued. However, during  
 8 the hearing, Hydro acknowledged that the radio  
 9 channel issue was--counsel acknowledged this  
 10 morning is not really an issue at this time  
 11 and it would not, certainly not be an issue if  
 12 they were to stick with the old system. And  
 13 in addition, Hydro now is aware that a  
 14 capital, a compatible repeater equipment can  
 15 be obtained and that equipment would have  
 16 manufacturer vendor support. So it may be the  
 17 case that the life of the current system can  
 18 be extended by a program of replacement based  
 19 on a detailed condition assessment of the  
 20 system or the various components of the  
 21 system. And Mr. Barreca has testified that  
 22 this may be the least cost solution of Hydro's  
 23 requirements for radio, for mobile radio. If  
 24 it turns out after a detailed examination of  
 25 extending the life of the current system is

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1 out that there is nothing on the record to  
 2 suggest that Newfoundland Power has been less  
 3 than cooperative in relation to the  
 4 possibility of sharing telecommunications  
 5 facilities with Hydro. In fact, it is Hydro's  
 6 evidence that discussions had taken place with  
 7 Newfoundland Power and information has been  
 8 exchanged. This is not an issue of  
 9 cooperation between the utilities. It is  
 10 simply a question of what is least cost for  
 11 Newfoundland Power's customers. Mr. Hughes  
 12 testified during Newfoundland Power's Capital  
 13 Budget Application last year that Newfoundland  
 14 Power made a determination following  
 15 discussions with Hydro that our participation  
 16 in VHF system is not a cost effective  
 17 proposition at this time. He testified that  
 18 Newfoundland Power's management disagreed with  
 19 Hydro's decision to replace the VHF system.  
 20 And it was more than Newfoundland Power was  
 21 willing to pay. Ultimately Newfoundland Power  
 22 has the obligation to assess what is the least  
 23 cost telecommunication system for our  
 24 customers. Having reviewed all of the  
 25 evidence on the record in this proceeding,

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1 not viable, then Hydro has to bring forward a  
 2 solution which is either least cost  
 3 or failing that, which provides demonstrated  
 4 additional value. And in Newfoundland Power's  
 5 view, the record now before that Board doesn't  
 6 meet that standard.  
 7 Before closing, I would like to briefly  
 8 address an issue that was raised in the  
 9 closing submission of Board hearing counsel.  
 10 First paragraph 34 of Board hearing counsel's  
 11 written submission has a reference of an  
 12 expenditure of \$383,000.00 on  
 13 telecommunications in Newfoundland Power's  
 14 2003 Capital Budget. I want to point out for  
 15 the Board's information that most of that  
 16 expenditure relates to line protection and  
 17 only a small portion of that expenditure  
 18 relates directly to mobile radio requirements  
 19 and voice radio communication. In paragraph  
 20 43 of Board hearing counsel's submission  
 21 contains the statement that Newfoundland Power  
 22 has avoided making any meaningful or  
 23 enforceable commitments about sharing in the  
 24 cost and subsequently using a new VHF system.  
 25 While that's technically true, I want to point

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1 Newfoundland Power is still of the view that  
 2 the proposed VHF radio system is simply too  
 3 rich for us. And with the introduction of a  
 4 different system architecture, it would  
 5 appear, as Board hearing counsel notes in  
 6 paragraph 38 of their submission, that  
 7 previous estimates of Newfoundland Power's  
 8 cost participation may be outdated (phonetic)  
 9 with the uncertainty of both technology and  
 10 price that are now apparent on the record, we  
 11 must be conscious of the fact that the costs  
 12 may become even less favourable to  
 13 Newfoundland Power. Newfoundland Power's  
 14 radio system has been in place since the early  
 15 80's and is still providing good service.  
 16 Hydro has testified that Newfoundland Power  
 17 has told them that our system has five to ten  
 18 years of remaining useful life. With that in  
 19 mind, I submit and agree with counsel for  
 20 Hydro that the suggestion that Newfoundland  
 21 Power become involved in the detailed way of  
 22 developing Hydro's system to the extent  
 23 suggested by Board hearing counsel in  
 24 paragraph 48 of their submission, is not  
 25 really necessary. Further, the Board will

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1 MR. HAYES:  
 2 Q. .... soon be hearing Newfoundland Power's 2004  
 3 Capital Budget Application and the Board will  
 4 also hear from Newfoundland Power's management's  
 5 view of Hydro's VHF radio system and  
 6 the likelihood of Newfoundland Power's  
 7 participation I'm sure they would be more than  
 8 happy to provide whatever information is  
 9 required.  
 10 REPORTER:  
 11 Q. Excuse me, I have to interrupt the hearing,  
 12 I'm having a problem here with one of the  
 13 decks.  
 14 (10:45 a.m)  
 15 Note:  
 16 Hearing Recorder requested hearing stoppage,  
 17 he advised the proceeding that he was  
 18 experiencing problems with the recording of  
 19 evidence that has been presented by the  
 20 speaker, Mr. Gerard Hayes, since the end of  
 21 the break at 10:35 a.m.  
 22 Mr. Hayes advised that his oral comments  
 23 have not deviated very much from his speaking  
 24 notes - (really only in delivery).  
 25 All parties were canvassed and it was

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1 Q. Yes. Deck A is now -  
 2 CHAIRMAN:  
 3 Q. I have a question, but do you have any  
 4 questions of Mr.--are you finished, by the  
 5 way?  
 6 MR. HAYES:  
 7 Q. Not quite.  
 8 CHAIRMAN:  
 9 Q. No, I didn't think you were. So we'd better  
 10 let you finish first.  
 11 MR. HAYES:  
 12 Q. Thank you.  
 13 CHAIRMAN:  
 14 Q. And you're on Deck A, I hope. Carry on, Mr.  
 15 Hayes.  
 16 MR. HAYES:  
 17 Q. I'm on deck. Who's on first? We don't know.  
 18 I'd just like to sum up by saying that we'd  
 19 like to reiterate the submissions in our  
 20 written brief and simply ask the Board to, at  
 21 this stage, withhold its approval of the VHF  
 22 radio proposal and to require that Hydro  
 23 refile its proposal with a more detailed  
 24 evaluation of the radio system they intend to  
 25 build and a better explanation of why the

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1 agreed to the suggestion that Mr. Hayes submit  
 2 a summary of his oral comments at the  
 3 conclusion of the hearing.  
 4 Hearing recorder changed tapes and  
 5 hearing recording reconvened at 10: 55 a.m.  
 6 (10:55 a.m.)  
 7 MR. HAYES:  
 8 Q. I'm quite happy to file a written summary of  
 9 this. I mean, essentially it really follows  
 10 and perhaps just reiterates or emphasizes  
 11 certain aspects of our written submission.  
 12 CHAIRMAN:  
 13 Q. I've written down almost everything you said,  
 14 anyway.  
 15 MR. HAYES:  
 16 Q. Thank you, chair, I'm very flattered. But -  
 17 CHAIRMAN:  
 18 Q. As long as you do that within the next couple  
 19 of days and circulate copies to the parties.  
 20 MR. HAYES:  
 21 Q. That won't be a problem, Mr. Chair.  
 22 CHAIRMAN:  
 23 Q. Okay. So you're going to use Deck A, Mr.  
 24 Transcriber, and we'll -  
 25 MR. MOSS:

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1 proposed expenditures, and in particular,  
 2 expenditures above least cost are necessary  
 3 and what benefits they do provide to the  
 4 Hydro--to the utility.  
 5 Mr. Chair, I guess I'd just briefly like  
 6 to address your question of Ms. Greene before  
 7 the break with respect to how the Board ought  
 8 to be looking at capital expenditures and the  
 9 difference between capital expenditures, I  
 10 guess, and rates.  
 11 Rates, as we know, is a very fine art or  
 12 science, depending on how you look at it, and  
 13 I think it's appropriate that very, very  
 14 detailed provisions be contained in the  
 15 legislation to deal with rates. Of course,  
 16 rates are probably the most sensitive issue  
 17 for customers, as well.  
 18 With respect to capital expenditures, as  
 19 Ms. Greene said, it is very clear that there  
 20 is a much more general approach to it in the  
 21 legislation. But we do have the benefit of  
 22 the Board's experience over time, whether that  
 23 actually constitutes a precedent or not in  
 24 this particular form, I would suggest that it  
 25 probably does not, but it provides certainly

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1 MR. HAYES:  
 2 Q. .... guidance as to how the Board can address  
 3 and can consider capital expenditures.  
 4 With respect to filing requirements and  
 5 documentation which have been made an issue,  
 6 in particular, by the Industrial Customers, we  
 7 agree that this is evolving. Now, whether  
 8 we've found the right balance of information  
 9 and of level of information and volume of  
 10 information is a question, I think, that's  
 11 still open, and hopefully we will address that  
 12 in some sort of generic proceeding in the next  
 13 little, as has been ordered by the Board.  
 14 With respect to the standard, however, I  
 15 believe it's a little more straightforward and  
 16 really based on guidance of past Board  
 17 decisions in this area, and I would submit,  
 18 based on Newfoundland Power's philosophy with  
 19 respect to what is required of capital--before  
 20 capital expenditure can be approved and that  
 21 is essentially this, we believe that a capital  
 22 project must be shown to be necessary for the  
 23 least cost and reliable provision of power to  
 24 customers. And the Board must somehow satisfy  
 25 itself that the project is necessary and that

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1 and as well throughout your oral argument you  
 2 used the term "least cost". You seldom,  
 3 except in your last comment, used the term  
 4 "reliable service" in connection with it. And  
 5 if you look at the relevant section of the  
 6 Act, and Ms. Greene has alluded to it as well  
 7 in her argument, and coming from a  
 8 representative of a utility I'd like to hear  
 9 what you have to say about least cost and  
 10 reliable service and how the Board is to weigh  
 11 that?  
 12 MR. HAYES:  
 13 Q. Well, I guess least cost--I mean, reliable  
 14 service is certainly another issue entirely.  
 15 And I think to some extent you have guidance  
 16 from the -  
 17 CHAIRMAN:  
 18 Q. You say it's another issue. Is it another  
 19 issue or is it the same issue, I guess, is the  
 20 question I'm asking. Can you talk about least  
 21 cost without also considering reliable service  
 22 in the context of how it's used in the Act?  
 23 MR. HAYES:  
 24 Q. Well, I don't think so. I think ultimately  
 25 reliable--safe and reliable electrical service

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1 it is least cost, in most cases, least cost of  
 2 viable alternatives, and if it's not the least  
 3 cost, and this is particularly apropos with  
 4 respect to the VHF project, why is it  
 5 necessary to proceed with a project or with an  
 6 alternative that is not least cost. And we  
 7 believe that the evidence should be fairly  
 8 compelling in that regard. It's not enough to  
 9 list a number of additional benefits. I think  
 10 it's incumbent on the utility to show why  
 11 those particular features are necessary to  
 12 improve service or improve reliability. It  
 13 has to benefit customers.  
 14 So, those are my comments with respect to  
 15 what I acknowledge what is a bit of a dilemma  
 16 and a bit of a challenge for the Board.  
 17 Hopefully that's helpful. Thank you.  
 18 CHAIRMAN:  
 19 Q. Thank you, Mr. Hayes. Mr. Martin? Mr.  
 20 Powell?  
 21 COMMISSIONER POWELL:  
 22 Q. No.  
 23 CHAIRMAN:  
 24 Q. Just one question I have for you, Mr. Hayes,  
 25 and that is throughout your written argument

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1 is the goal that we are attempting to achieve.  
 2 In fact, it's the goal that we are legally  
 3 obliged to achieve for our customers. So  
 4 that, I think, provides the context. The  
 5 least cost issue is somewhat separate but it  
 6 is--it has to be considered in the context of  
 7 what reliability of service is required. And  
 8 least cost itself, well, you have to determine  
 9 what are the viable options, and to some  
 10 extent you may find some variability with  
 11 respect to how they contribute to reliable  
 12 service. But, I think you have to evaluate  
 13 each of those things independently and perhaps  
 14 bring them together at the end. Least cost is  
 15 essentially an economic judgment and it  
 16 essentially, I think, means cumulative present  
 17 worth analysis, at least that's been accepted  
 18 by the Board, either in that present value or  
 19 cumulative present worth. Once you've  
 20 determined which is the least cost in terms of  
 21 what the system is--what costs are going to be  
 22 imposed on the system, then I think that's  
 23 probably enough if you determine that that  
 24 particular alternative contributes  
 25 sufficiently to reliable safe electrical

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1 MR. HAYES:  
 2 Q. .... service. However, there may be  
 3 situations, as I've already indicated, where  
 4 another alternative which is not least cost  
 5 does provide real benefits to the system and  
 6 to customers. These may be service benefits.  
 7 There may be some possible reliability  
 8 benefits, as well, but not necessarily proven  
 9 to the extent that you can prove what the  
 10 costs will be. So there's a little bit more  
 11 of an art to that, I think. But I do think  
 12 you have to consider both. One is more of a  
 13 mechanical exercise, the least cost exercise,  
 14 the other provides the context.

15 CHAIRMAN:  
 16 Q. Do you have any suggestions as to how we're to  
 17 determine which of the alternatives is going  
 18 to give reliable service down the road, whose  
 19 evidence do we accept on that?

20 MR. HAYES:  
 21 Q. Well, you know, I think this is the dilemma of  
 22 the judge in all cases. At some point you're  
 23 thrown back on yourself, aren't you? And in  
 24 some respects you won't have any competing  
 25 evidence or evidence that controverts the

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1 sized the system, we're not sure of the  
 2 technology we're going to use, and this is all  
 3 in the context of systems that even on the  
 4 public service systems, the lower standard of  
 5 systems varied by approximately \$2 million.  
 6 That's a lot of variability in cost. It is  
 7 Newfoundland Power's view that those decisions  
 8 ought to be made at an earlier stage, before  
 9 you come in and ask for the full price tag.  
 10 So it's really a question about, as I say, the  
 11 substance of the filing, not the weight of the  
 12 paper. And it's not an easy thing, it's not  
 13 an easy job; your job is a difficult one.

14 CHAIRMAN:  
 15 Q. Um-hm.

16 MR. HAYES:  
 17 Q. And I don't think I can provide more than  
 18 that.

19 CHAIRMAN:  
 20 Q. Thank you, Mr. Hayes. We've spent a lot of  
 21 time during this hearing talking about least  
 22 cost. We haven't spent a lot of time talking  
 23 about reliable service in terms of the  
 24 alternatives. And if you take the VHF system  
 25 as an example, we've talked about least cost,

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1 evidence in chief that's provided by the  
 2 utility, in some cases, you will. In those  
 3 cases you've got a couple of choices, who  
 4 sounds more credible or whose case is more  
 5 compelling. In other instances you will  
 6 simply have the cross-examination of counsel  
 7 which will challenge some of the proposals or  
 8 assertions of the witness, and that will  
 9 hopefully give you some sense of whether what  
 10 you're hearing is compelling. And I don't  
 11 know if there's any easy answer to that. I  
 12 mean, at the end of the day this is all about  
 13 not how many pages you file, but what's the  
 14 substance of those pages.

15 CHAIRMAN:  
 16 Q. Um-hm.

17 MR. HAYES:  
 18 Q. And that's really when I come back to the VHF  
 19 radio project, that's one of the problems, I  
 20 guess, Newfoundland Power had with it, you've  
 21 got a business case that's 20 odd pages long,  
 22 you've got a consultant's report that goes  
 23 into intimate detail, but yet, Hydro turns  
 24 around and says we haven't done detailed  
 25 engineering on this yet, we haven't really

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1 we've talked about whether or not it's  
 2 required in the present circumstances that we  
 3 have within Hydro, whether or not the system  
 4 needs to be replaced in whole or in part. By  
 5 using that only as an example I don't recall  
 6 in my reading of the evidence and the argument  
 7 any suggestion with respect to whether or not  
 8 that's going to provide reliable service down  
 9 the road, or turn it around, whether or not  
 10 it's not going to provide reliable service  
 11 down the road. We seem to have taken a lot of  
 12 time talking about the cost is what my point  
 13 is.

14 MR. HAYES:  
 15 Q. Well, I think perhaps from the utility's and  
 16 other utility's perspective that's perhaps our  
 17 role in these proceedings is to challenge  
 18 those -

19 CHAIRMAN:  
 20 Q. Points.

21 MR. HAYES:  
 22 Q. The assumptions of the case for the Board's  
 23 benefit. And in many cases it comes down to  
 24 engineering judgment, in many cases  
 25 Newfoundland Power will be satisfied. And at

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1 MR. HAYES:  
 2 Q. .... the end of the day the answer, I mean,  
 3 you probably can't be absolutely certain, but  
 4 you can be reasonably comfortable that what  
 5 the engineering judgment is telling you,  
 6 because these people are professional people,  
 7 is reasonable and that it is justified in  
 8 terms of reliable service. You probably won't  
 9 get it dead on in all cases, but over time I  
 10 think you get a sense of it. And you said  
 11 you've been at it a long time, and I think  
 12 that helps. I wouldn't envy you if this was  
 13 your first proceeding.  
 14 CHAIRMAN:  
 15 Q. Yeah, when I said that there hasn't been a lot  
 16 of discussion on the element of reliable  
 17 service, I didn't mean to imply that Hydro's  
 18 application avoided that issue, because it  
 19 didn't. But the challenge to the application  
 20 is in the area of cost, in my opinion, more so  
 21 than in the area of reliability. And I can't  
 22 help but read that section in whole and that  
 23 is in terms of the amalgamation, if you like,  
 24 of the reliable services aspect with the least  
 25 cost aspect. And when I see the argument, and

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1 Q. I don't believe there was a suggestion that  
 2 the lower cost alternative was not consistent  
 3 with reliable service. It was acknowledged  
 4 that it did provide the functionality that was  
 5 required.  
 6 CHAIRMAN:  
 7 Q. No, I guess I may have anticipated that you  
 8 would have spent more time on reliable service  
 9 mainly because of the fact you rely on Hydro  
 10 to provide you with what, 70 percent of your -  
 11 MR. HAYES:  
 12 Q. I think it's higher than that, yes.  
 13 CHAIRMAN:  
 14 Q. Well, 80 percent or whatever it is, it's a  
 15 substantial number. And I would think that  
 16 reliable service is an important a factor, if  
 17 not more important, than what least cost is.  
 18 Is that--am I off on the wrong tangent?  
 19 MR. HAYES:  
 20 Q. No. I certainly wouldn't want to suggest,  
 21 though, that one is more important than the  
 22 other. I think they're both important, but I  
 23 think you have to strike a balance. That's  
 24 always a challenge with utilities and it's a  
 25 challenge for the Board, but I think you do

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1 I've noticed it in other arguments as well, by  
 2 the Industrial Customers that least cost is  
 3 used in talking about some of the projects but  
 4 there's no emphasis, at all, on reliable  
 5 service, and you've done the same thing  
 6 throughout your argument. And I'll point you  
 7 to page 1, I think it was--let me find it. If  
 8 you go to page 1 of 13 at line 19, you said  
 9 that "The Hydro's proposals is not the least  
 10 cost of the alternatives presented." Now,  
 11 while I might agree with that, I also in the  
 12 back of my mind have to insert reliable  
 13 service there and I say, well, Mr. Hayes  
 14 forgot to include that.  
 15 MR. HAYES:  
 16 Q. And I guess if I had added the words  
 17 "alternatives consistent with reliable  
 18 service", I think it would still, I think,  
 19 would address your concern that I didn't  
 20 mention it, but I think it's implied in any  
 21 event, you know, by the whole of our  
 22 submission.  
 23 CHAIRMAN:  
 24 Q. Were you -  
 25 MR. HAYES:

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1 have to balance those two. I would suggest to  
 2 you that if Newfoundland Power thought or was  
 3 convinced based on the record before the Board  
 4 that the VHF radio system was not going to  
 5 provide reliable service tomorrow, we would  
 6 not be contesting this proposal.  
 7 CHAIRMAN:  
 8 Q. Okay. Anything else?  
 9 MR. HAYES:  
 10 Q. No.  
 11 CHAIRMAN:  
 12 Q. Thank you. Are we ready to proceed with the  
 13 Industrial Customer?  
 14 (11:04 a.m.)  
 15 HENLEY ANDREWS, Q.C.:  
 16 Q. Yes, Mr. Chairman.  
 17 CHAIRMAN:  
 18 Q. Okay. Ms. Henley Andrews, are you going  
 19 first?  
 20 HENLEY ANDREWS, Q.C.:  
 21 Q. Yes, Mr. Chairman. I do apologize for running  
 22 out a little while ago, but that was  
 23 unavoidable.  
 24 CHAIRMAN:  
 25 Q. That's fine. I was about to run out myself.

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1 HENLEY ANDREWS, Q.C.:  
 2 Q. Mr. Chairman, the Industrial Customers look at  
 3 the capital budgets quite differently than  
 4 Hydro and to some extent look at it  
 5 differently from Newfoundland Power. The  
 6 issue for the Board, as far as we are  
 7 concerned, is whether the Board has enough  
 8 information before it to make a decision as to  
 9 whether proposed projects are at the lowest  
 10 possible cost consistent with reliable  
 11 service. And I note in your comment before to  
 12 Mr. Hayes that you were focusing on the  
 13 reliable service issue as well as the lowest  
 14 possible cost. And I would point out that if  
 15 a detailed reading of our own submission would  
 16 indicate that at the end of most of the  
 17 submissions, for example, page 13, with  
 18 respect to the Excitor at Bay d'Espoir, page  
 19 17 with respect to the Governor controls, page  
 20 18 with respect to the unit 2 Excitor at Cat  
 21 Arm and a variety of other places we refer not  
 22 only to the least possible cost alternative,  
 23 but we do also refer to consistent with  
 24 reliable service. And I think you'll probably  
 25 recall from the 2001 hearing that the evidence

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1 manner that will result in the most efficient  
 2 production transmission and distribution, but  
 3 will result in consumers in the province  
 4 having equitable access to an adequate supply  
 5 of power and that will result in power being  
 6 delivered to customers in the province at the  
 7 lowest possible cost consistent with reliable  
 8 service. And we've emphasized the lowest  
 9 possible cost consistent with reliable service  
 10 in bolding it and underlining it on page 3 of  
 11 our submission.  
 12 In looking at the criteria that are set  
 13 out in Section 3(b) of the EPCA make no doubt  
 14 that some of those criteria require a level of  
 15 judgment on the part of the Board. For  
 16 example, "efficient" in subsection 1,  
 17 "efficient" is a relative term. Efficient can  
 18 have different meanings to different people.  
 19 And "equitable" in subsection 2 is also a  
 20 subjective standard to some degree.  
 21 Similarly, reliable service in subsection 3 is  
 22 expressed in terms that could basically be  
 23 described as subjective. In most situations  
 24 in interpreting legislation of this nature,  
 25 and you will find it, in fact, in back of the

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1 from our own customers at that hearing  
 2 indicated that reliability of service was  
 3 something that was of great importance to the  
 4 Industrial Customers, in particular, to North  
 5 Atlantic Refining.  
 6 So, what we have to look at in dealing  
 7 with the capital budget is whether the  
 8 evidence that's been presented meets the tests  
 9 set out in the relevant legislation and the  
 10 relevant regulations. And when you look at  
 11 that, you'll find a discussion of the capital  
 12 budget framework starting at page 2 of our  
 13 submission. And like Hydro we refer to  
 14 Section 3(b) of the Electrical Power Control  
 15 Act, 1994. And we agree with you, chairman,  
 16 that there's nothing in the Public Utilities  
 17 Act specifically dealing with how to go about  
 18 evaluating a Capital Budget Application like  
 19 there is with respect to a Rate Application.  
 20 However, there is guidance provided to the  
 21 Board to some extent in Section 3(b) of the  
 22 Electrical Power Control Act, and that is that  
 23 all sources and facilities for the production,  
 24 transmission and distribution of power in the  
 25 province should be managed and operated in a

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1 Electrical Power Control Act itself or in the  
 2 Public Utilities Act, and I can't remember  
 3 which right off the top of my head, but  
 4 there's a provision there as well as in the  
 5 Interpretation Act in the province that  
 6 legislation to be given its broadest possible  
 7 meaning, etcetera, etcetera. And in most  
 8 cases where there's a level of subjectivity  
 9 implied by the legislation the test is one of  
 10 reasonableness. In this case, when you look  
 11 in subsection 1 it says "most efficient", so  
 12 the reasonableness test is quantified to some  
 13 extent by the fact that you are to look at the  
 14 most efficient. Equitable access means fair,  
 15 if you look at the dictionary definition. You  
 16 probably have to say in judging it reasonably  
 17 fair, what is reasonably fair. And similarly,  
 18 when you're looking at reliable service,  
 19 because different customers will have  
 20 different expectations with respect to  
 21 reliability the issue becomes one of what is a  
 22 reasonably reliable service, and that can be  
 23 looked at in the context of what different  
 24 customers need and it can also be looked at in  
 25 the context of what are the standards that

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1 HENLEY ANDREWS, Q.C.:

2 Q. .... other utilities apply in looking at the

3 reliability of their service and the level of

4 reliability that they provide. But I think we

5 would all have to agree that when it comes to

6 the issue of cost, the legislature has been

7 extremely specific. It not only says "lowest

8 cost", it says "lowest possible cost

9 consistent with reliable service".

10 In looking at Hydro's capital projects

11 and its evidence, not only its direct evidence

12 and pre-filed evidence, but also the evidence

13 that has been given on cross-examination one

14 of the questions that you should ask

15 yourselves is whether there is any evidence

16 that the alternatives to the particular

17 options preferred by Hydro have been shown to

18 be unreliable or potentially to result in

19 unreliable service. Now, there is two

20 projects that are really good example of that.

21 If you look at our submission starting at page

22 10 and dealing with the replacement of the

23 unit No. 7 Excitor at Bay d'Espoir, we object

24 to that project and we object to it on the

25 basis that the testimony. If you go to page

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1 five years and Hydro hasn't investigated the

2 cost of replacing the existing gate hoist with

3 another screw stem hoist, although there is

4 evidence from Hydro's witnesses that screw

5 stem hoists are still in use. And that--it's

6 the inability to evaluate whether what Hydro

7 has put forward is the least possible cost

8 option consistent with reliable service is our

9 objection to the gate at Ebbegunbaeg whereas

10 in some of the other projects to which we have

11 objected we don't believe that there has been

12 evidence provided to indicate that there is a

13 reliability issue.

14 So, when you look at the statute, the use

15 by the legislature of lowest possible cost

16 consistent with reliable service, in our

17 submission, indicates that there are two

18 tests: The project has to be consistent with

19 reliable service required for reliability, and

20 it has to be at the lowest possible cost

21 consistent with that reasonable level of

22 reliability.

23 I don't want to address each project in

24 detail, because we've already done that in our

25 submission. What we propose to address is the

Page 86

1 12, is that Hydro has not investigated the

2 cost of a re-engineered field temp simulation

3 card, nor has it attempted to get a spare

4 field temp simulation card from other sources.

5 And in this particular case we say that Hydro

6 has not provided information to establish that

7 replacing the No. 7 Excitor at Bay d'Espoir is

8 the least possible cost option for reliable

9 service.

10 But when you look at our position with

11 respect to the gate hoist at Ebbegunbaeg which

12 is the next item, we acknowledge that there is

13 a problem with the gate hoist. We agree that

14 Hydro has provided sufficient evidence to

15 indicate that the gate hoist as it presently

16 exists may not be consistent with reliable

17 service. Our objection when you look at the

18 discussion is--starts at page 14, and we state

19 at page 14 that the Industrial Customers don't

20 question that high reliability with respect to

21 the operation of the gate is important, but

22 that not withstanding that we have difficulty

23 with the proposal because there has been no

24 information provided with respect to the cost

25 of maintaining the gate over the next three to

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1 fundamental issues raised by many of the

2 projects. The Board does have to strike a

3 balance when addressing capital budgets and

4 the Board has to be cognisant of the fact that

5 capital budgets have real costs for consumers.

6 But if the Board is satisfied that Hydro has

7 met the test set out in the EPCA so that the

8 customer is getting the least possible cost

9 imposed upon it and that that cost is

10 consistent with providing a reasonable level

11 of reliability to the customer, then in those

12 circumstances the project should generally be

13 approved.

14 We disagree with the submission by

15 Newfoundland Power that sometimes you don't

16 have to take the lowest possible cost

17 alternative. That's not what the Act says.

18 It doesn't say sometimes. It's the lowest

19 possible cost alternative consistent with

20 reliable service.

21 There's no doubt that the capital budget

22 process over the last number of years has been

23 an evolving process. And when it comes to

24 Hydro, which serves the Industrial Customers,

25 Hydro's capital budgets weren't subject to

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1 HENLEY ANDREWS, Q.C.:  
 2 Q. .... approval until legislative change in  
 3 1996. The Industrial Customers, through their  
 4 participation in the 2001 rate hearing which  
 5 dealt with both rates for 2002 and the 2202  
 6 capital budget developed concerns with respect  
 7 to Hydro’s capital budget process, and it is  
 8 that issue which has caused the Industrial  
 9 Customers to become more involved in the  
 10 capital budget process, because the capital  
 11 budgets have to meet the legislative standard,  
 12 and we are concerned that what is being put  
 13 forward to the Board does not always meet that  
 14 standard.  
 15 The counsel for Newfoundland and Labrador  
 16 Hydro has suggested that when it comes to  
 17 things like the Technology Conference, that  
 18 this is something of which the Industrial  
 19 Customers ought to have been aware.  
 20 (11:20 a.m.)  
 21 Generally in law there is a fixed  
 22 understanding that a party not involved in a  
 23 particular piece of litigation is not bound by  
 24 the decision in that litigation. Our concern  
 25 with respect to the technical conference was

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1 is not what we are suggesting. What we are  
 2 suggesting is that perhaps the Board has been  
 3 applying the wrong burden of proof and that it  
 4 is our feeling and our observation as we look  
 5 at the process and read the decisions that the  
 6 assumption is that Hydro must be right unless  
 7 it’s proven otherwise. And yet, the role of  
 8 the Board, as defined in the Public Utilities  
 9 Act and as defined in the EPCA, is to approve  
 10 or disapprove Hydro’s Capital Budget because  
 11 Hydro is not permitted to proceed with a  
 12 capital project over \$50,000 without the prior  
 13 approval of the Board. So if the Board  
 14 doesn’t give the approval, Hydro can’t proceed  
 15 with it. And if Hydro did proceed with it,  
 16 then presumably one of us would be here at the  
 17 next rate hearing arguing that the costs  
 18 associated with that particular project  
 19 shouldn’t be included in rate base.  
 20 So the issue for us is the issue with  
 21 respect to burden of proof, and the normal  
 22 civil test for burden of proof is on the  
 23 balance of probabilities. Is it more likely  
 24 than not that Hydro has provided evidence to  
 25 satisfy the Board, and that is, in fact, what

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1 that it was presented to us during the  
 2 Settlement Conference that we ought to be  
 3 bound by the decision of the Board in the  
 4 Newfoundland Power matter to drop the issues--  
 5 I can’t say that we ought to be, but whether  
 6 we should consider dropping our issues with  
 7 respect to Hydro’s capital budgeting process  
 8 in favour of waiting for the outcome of a  
 9 technical conference, and that was of concern  
 10 to us. I don’t think that there’s any  
 11 obligation on any counsel to read every single  
 12 procedural order that comes out of a preceding  
 13 matter, and we weren’t aware of it and we felt  
 14 that if it was the intention of the Board to  
 15 have the issue of process be dealt with at the  
 16 technical conference and to ask us to  
 17 participate in that, it would have been better  
 18 had we been asked at the very beginning of the  
 19 hearing process and not after we had hired a  
 20 witness and filed written testimony with  
 21 respect to the issues.  
 22 Now, Ms. Greene suggested this morning in  
 23 her argument that what--that when it comes to  
 24 the burden of proof, that we are suggesting  
 25 that the Board is biased. And in fact, that

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1 you’re there to determine. We wanted to raise  
 2 the issue because we felt that it is a  
 3 legitimate legal question, the issue of the  
 4 burden of proof, and we also raised the issue  
 5 because it is our submission that the burden  
 6 is not on the intervenors to disprove Hydro’s  
 7 case. The burden is on Hydro to prove, on the  
 8 balance of probabilities, that each individual  
 9 project meets the test, and that its Capital  
 10 Budget, as a whole, meets the test. The  
 11 intervenors’ role is to raise questions and  
 12 ask questions relative to Hydro’s position to  
 13 determine or to help the Board determine the  
 14 reasonableness of Hydro’s position, not to  
 15 disprove any particular project.  
 16 Now it is totally irrelevant that this is  
 17 Hydro’s second lowest capital budget, and it  
 18 is totally irrelevant that Hydro’s average  
 19 capital budget has been \$38.3 million. It is  
 20 also irrelevant that this is the most  
 21 extensively documented capital budget to date.  
 22 We are not concerned with having volumes and  
 23 volumes of justification. It’s just as much  
 24 trouble and expense for our clients as it is  
 25 for anybody else. Our issue is with respect

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1 HENLEY ANDREWS, Q.C.:

2 Q. .... to the quality, not the quantity, of the

3 information that is provided to the Board.

4 The Board has given some guidance with

5 respect to capital budgets, and that guidance

6 is given, as Hydro's pointed out, in P.U. 7

7 and in P.U. 29. However, the fact that the

8 Board has given some guidance to Hydro doesn't

9 let Hydro off the hook. It also doesn't

10 transfer the burden to the Board. And you

11 will recall that Mr. Barreca raised some

12 concerns with respect to the legislative

13 process itself, which is where the Board

14 approves on the basis that it effectively

15 shifts responsibility from Hydro to the Board

16 and that it becomes a real problem if somebody

17 is saying well, this is a reliability issue or

18 this is safety issue or this is an

19 environmental issue, and then the Board

20 doesn't approve the project, and there is a

21 problem, who's going to take the blame. And

22 that's unfortunate, but that's the way the

23 legislation is written. In other

24 jurisdictions, as was pointed out, in most

25 other jurisdictions, there isn't pre-approval

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1 And in most of the projects, there are

2 alternatives that have been acknowledged by

3 Hydro's witnesses as consistent with reliable

4 service, and the answer that you get, if you

5 look carefully through the transcript with

6 respect to most of the objections, is well,

7 the other alternative is not acceptable to

8 Hydro. And why? Why is it not acceptable to

9 Hydro? We don't get very much of an

10 explanation as to what the problem is with

11 reliability. What we get, time and time

12 again, is an assertion that Hydro has

13 competent, qualified staff who are capable of

14 making a decision, and we don't disagree that

15 Hydro has competent, qualified engineering

16 staff. But the option that they prefer is not

17 necessarily the least possible cost option,

18 consistent with reliable service, and they

19 have to demonstrate that it is.

20 One of the greatest red herrings that has

21 come up in the last three Hydro Capital Budget

22 hearings is the issue of micromanaging. The

23 first thing we have to do when we talk about

24 micromanaging is define what we mean by it,

25 because the Board has the job to oversee

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1 of the Capital Budget, but Capital Budgets or

2 major capital items, depending on the

3 circumstances, are dealt with in the context

4 of the rate hearings and as to whether they

5 will be--whether all or a portion will be

6 included in rate base.

7 But having said that, it's not enough for

8 Hydro to say "this is a reliability issue."

9 Hydro has to tell you how it's a reliability

10 issue, to what extent it's a reliability issue

11 and whether it's a real liability issue or

12 only a theoretical, improbable one. So that

13 the Board can make a reasoned determination of

14 the nature of the risk.

15 Now the fact that the Board has issued

16 some guidance doesn't mean that Hydro doesn't

17 have to meet the legislative requirements.

18 Hydro still has to meet the legislative

19 requirements. And one of the things that is

20 important is that viable alternatives be

21 evaluated. Now viable alternatives are

22 alternatives that are consistent with reliable

23 service. So it's not every alternative that

24 has to be evaluated. It's the alternatives

25 that are consistent with reliable service.

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1 Hydro's Capital Budget process and as Hydro

2 pointed out in its review of the legislation,

3 Section 4 of the EPCA imposes that obligation

4 specifically upon the Board and to do it in

5 accordance with generally accepted accounting

6 practices within the utility industry. Now if

7 the Legislature directed the Board to oversee

8 and to have final word with respect to

9 approval of capital projects, then clearly the

10 Legislature contemplated that the Board could

11 question, to some degree, the management of

12 the utility, and that goes without saying,

13 both with respect to rate review, as well as

14 with respect to capital.

15 (11:34 a.m.)

16 Now micromanaging, by its nature, by

17 terminology, is very different from managing.

18 So when we are talking about, an example would

19 be operating costs associated with let's say

20 personnel costs, micromanaging would be the

21 Board getting in there and saying you should

22 have this particular person and you shouldn't

23 have that particular person, and you should

24 have this, but not that person. But the Board

25 can certainly say to Hydro, as it did in the

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1 HENLEY ANDREWS, Q.C.:

2 Q. .... decision out of the 2001 hearing, "we're

3 going to give you a productivity allowance and

4 you manage your business, you make the

5 decisions within the framework of what we have

6 approved as to who's the most important, so

7 that you come in line with that budget."

8 Well, micromanaging, I would submit, in the

9 Capital Budget process is getting into it to

10 the level that you're saying how many screws,

11 how many bolts, and I'm bringing it down--I'm

12 exaggerating, I will acknowledge on that. But

13 there is, I think, a big distinction to be

14 drawn between the Board's role and being

15 distracted by the use of the term

16 'micromanaging'.

17 Hydro referred to changing the rules of

18 the game or the ever-changing rules of the

19 game. The statute has not changed since 2001.

20 The legislation concerning the Capital Budget

21 has not changed. The rules haven't changed.

22 The guidelines have changed to some degree.

23 But that's to be expected because when there

24 is a Capital Budget with no intervenors,

25 you're going to have a very different dynamic

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1 explore the issues and to get answers. If

2 Hydro doesn't like the public hearing process,

3 then it should talk to its shareholder and try

4 and get the legislation changed. But the

5 bottom line here is that we believe that we

6 have participated in what we hope is a

7 constructive and productive way to improve the

8 processes employed by Hydro and to help our

9 customers remain viable in this Province.

10 The question before--we called expert

11 evidence in this hearing at considerable cost,

12 and we called that expert evidence because we

13 were concerned that our message was not

14 getting through, with respect to the

15 appropriate tests and with respect to the type

16 of material that Hydro has been submitting.

17 The fact that Hydro has experienced

18 professional staff doesn't mean that they

19 always choose the least-cost alternative,

20 consistent with reliable service. And when

21 you look at the budget, you have to take it in

22 that context.

23 And I'm now going to pass the microphone

24 over to Mr. Hutchings, who's going to deal

25 specifically with the argument in the context

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1 than a Capital Budget Application when there

2 are intervenors.

3 With respect to the technical conference,

4 the Industrial Customers have no objection at

5 all to having a technical conference. But,

6 having said--that deals with the issues of

7 standards and those types of things. But

8 having said that, this hearing still has to be

9 dealt with on the basis of what's contained in

10 the legislation and the guidelines or tests

11 that come out of a technical conference still

12 have to comply with the legislative framework.

13 This is the second time that Hydro has

14 referred in its closing argument to the

15 position of the Industrial Customers being the

16 scatter-gun approach, and we take great

17 offence to that. Mr. Hutchings and I have

18 been in the litigation area for a long time,

19 and never have I been accused before of taking

20 unnecessary or an unreasonable position in any

21 piece of legislation or any piece of

22 litigation. It's a personal attack on Mr.

23 Hutchings and on me, which is unwarranted. In

24 addition, the concept of public hearings is

25 that the parties have the opportunity to

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1 of the IS&T projects and also, some of the

2 transmission.

3 CHAIRMAN:

4 Q. Okay. I'm just trying to think when we had

5 the last break. I think it was around 10:15.

6 We have to hear from Mr. Hutchings, Mr.

7 Kennedy and back to Ms. Greene. Yes, I think

8 if everyone is okay with it, we'll go ahead

9 with Mr. Hutchings now before the break.

10 HUTCHINGS, Q.C.

11 Q. That's fine with me, Mr. Chair. Thank you.

12 CHAIRMAN:

13 Q. Okay. Thank you. Carry on, Mr. Hutchings.

14 HUTCHINGS, Q.C.:

15 Q. Thank you, sir. Mr. Chair, obviously we don't

16 need to repeat everything that's in the

17 written argument that has been filed in

18 respect of the particular projects and subject

19 matters that I've dealt with. I'd just

20 highlight a couple of points and largely in

21 relation to items that counsel for Hydro has

22 referred to earlier.

23 Very briefly, with respect to the

24 replacement of insulators in B-27, this item

25 is dealt with at page 30 of our submission,

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1 HUTCHINGS, Q.C.:

2 Q. .... and counsel for Hydro refers to, you

3 know, again, lack of evidence having been led

4 on the subject by the Industrial Customers and

5 questioning and so on. It's perhaps a useful

6 little illustration of the point that we're

7 trying to make here. At page 75 of the

8 transcript of July 11th, 2003, I asked Mr.

9 Reeves if Hydro had worked out the probability

10 of there being two defective insulators in a

11 string, because that's the only time--there

12 have to be at least two, and my impression

13 from Mr. Reeves' evidence was that usually you

14 had to have more than two before you really

15 got to a problem. And Hydro had not worked

16 out, and he said that they had not worked out

17 the probability of there being more than two

18 insulators defective in a single string. So

19 we propose then a logical response. Six

20 percent doesn't mean anything. Six percent of

21 the insulators that were tested were found to

22 be defective. Is that an enormous problem or

23 is that not really a problem at all? You need

24 to have the additional information in order to

25 know whether, at this stage, you need to

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1 small that we're going to have a problem with

2 these things. When it gets to the point where

3 the probability is such that there is a real

4 danger, a real threat to reliability

5 associated with it, we can deal with the

6 subject.

7 And this comes back to another theme

8 which governments and governmental

9 organizations generally have, in my

10 experience, a bit of a problem in dealing

11 with, and that's the time value of money. If

12 you or I go out today to spend money, that

13 money costs us more than if we can defer that

14 expenditure for another year, except in the

15 bargain basement sale type of situation where

16 you can get a bargain today, you may be better

17 off to spend your money today. But generally

18 speaking, the later you can spend your money,

19 the less over overall cost is going to be, and

20 that principle needs to be applied, in our

21 submission, in respect of any rational capital

22 budgeting process. Can we defer? Because if

23 we defer, we save, and by saving, we comply

24 with the mandatory provisions of the

25 legislation, relative to lowest possible cost,

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1 replace those insulators in order to ensure

2 reliable service. There isn't a least-cost

3 issue with respect to these things. I mean,

4 we didn't get into, you know, whether you can

5 get an insulator that costs four cents more

6 here or there.

7 The issue is do these things need to be

8 replaced, and for Hydro simply to come in and

9 say "well, six percent of them are defective."

10 If six percent of defibrillators being used in

11 heart surgery are defective, I think we got a

12 big problem. If six percent of the bubble gum

13 machines in drug stores are defective, I don't

14 think anybody much cares. What we've got to

15 do is bring this down to something realistic

16 that the Board can make a decision on. It's

17 not sufficient, as we've said, for Hydro to

18 look at this and say "well, this is our

19 decision, this is our judgment." The Board

20 has to have evidence before it in this

21 particular legal proceeding, the way we're set

22 up here, which will allow it to make a

23 judgment, and we have made what we suggest is

24 a logical interpretation of the evidence

25 that's before us, that the probability is very

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1 assuming always that reliability of service,

2 at the appropriate level, is not threatened.

3 Generally in respect of the information

4 systems and technology projects, Mr. Chair,

5 you address in your questions, and

6 particularly in discussion with Mr. Hayes, a

7 problem which is common to all adjudicative

8 tribunals in dealing with expert evidence.

9 For a long time, there was great concern in

10 all Courts and tribunals that experts would

11 simply overwhelm the trier of fact, whether it

12 be a jury or a judge or a board like this,

13 that an expert would simply come in and, with

14 all the knowledge and experience at his or her

15 disposal, just wow the Board and say "well,

16 we've heard from the greatest expert in the

17 world. What can we possibly do?" That's a

18 concern that has diminished over the years and

19 there was a great debate, I'm sure that Mr.

20 Martin is familiar with, of whether or not an

21 expert was allowed to give an opinion on the

22 ultimate decision which was before the trier

23 of fact in any situation. Sometimes--there

24 was a time when that wasn't permitted, but

25 we've come around and the decisions--the

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1 HUTCHINGS, Q.C.:

2 Q. .... problem that you face in respect of

3 evaluating this expert testimony is the same

4 as in evaluating the testimony of a medical

5 expert in a malpractice case or a crime lab

6 individual in a criminal case. There are

7 basic tests that you look for, in terms of the

8 reliability.

9 There are experts give opinions based

10 upon certain facts, and those facts are like

11 any other facts. They can be right or they

12 can be wrong. They can be proven or they can

13 be not proven. And if the underlying facts

14 upon which the opinion is based are not

15 proven, then the opinion is of no value.

16 Equally, you have to evaluate the witnesses

17 that come before you, in terms of their own

18 credibility and creditability in the sense of

19 are they being completely upfront with you?

20 Are they really trying to convey all of the

21 specialized knowledge that they have to you?

22 Are they answering questions directly? Are

23 they helpful to the Board or are they trying

24 to control the information that the Board is

25 getting? And that is the real issue that I

Page 107

1 refer you briefly to the transcript of July

2 the 9th of 2003, and at page 88 of that

3 transcript, from the production panel, I was

4 asking if Hydro had looked at any other system

5 that does not use a central switch, other than

6 Passport, and this question was at line 16 and

7 17 of page 88 of the July 9th, 2003

8 transcript. The answer was, "no, I'm not

9 aware of any other." "You're not aware of any

10 other?" "No." Then the question, "have you

11 ever heard of a radio access control system

12 produced by Zetron?" and the acknowledgement

13 of yes, is then that the panel was aware of

14 that system. And then when you go to page 129

15 of the same transcript, we find out, not only

16 was Hydro aware of it, that they had visited

17 the factory, that they had visited a customer

18 and had a great deal of information about this

19 alternative. But the initial answer was that

20 the witness was not aware of any other such

21 system.

22 The concern is, and it is understandable

23 sometimes that witnesses may not want to

24 overburden the Board with more information

25 than the Board needs or can handle. But, when

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1 think you have to confront here.

2 We've dealt with that at pages 31 through

3 32 and on through with specific references

4 from pages 32 through 34 of the submission

5 that's before you, and I note that nothing in

6 Hydro's submission specifically addresses the

7 particular examples that have been highlighted

8 here. Indeed, in the submission made this

9 morning by counsel for Hydro, there is an

10 acknowledgement that the issue dealt with at

11 the very bottom of page 33 and onto the top of

12 page 34, the twelve and a half kilohertz

13 requirement, is now not an issue. Hydro

14 believes that it is not an issue,

15 notwithstanding that their evidence was of a

16 new channel requirement and of Hydro being

17 required by Industry Canada to use 12.5

18 kilohertz radio channels. This is a matter of

19 concern if Hydro puts forward certain items as

20 being requirements and ultimately

21 acknowledges, well, no, they are not actually

22 requirements at all. The Board needs to be

23 concerned about the quality of the evidence

24 that it is receiving.

25 And there are other examples. I will

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1 a specific question is asked, "did you look at

2 any other systems?" and the answer is no, and

3 it is only when a specific system is raised

4 that we find out that there was a considerable

5 investigation into this other system, the

6 Board has to have a concern about the

7 reliability and completeness of the

8 information that its getting, and this is the

9 point toward which our remarks at page 34 and

10 following were directed, and we stand by those

11 remarks, notwithstanding the exception that

12 Hydro's counsel took to them this morning.

13 In our position as counsel to our

14 clients, we have a duty to bring these points

15 to the attention of the Board. This is an

16 adversarial legal proceeding and it is our

17 duty to put our clients' position to the Board

18 in the hope that the Board will have the best

19 available information before it and good

20 guidance, in terms of how it should resolve

21 the conflicts that are presented to it. And

22 it is for that reason, and for no other

23 reason, that we raise and press before this

24 Board or clients' interest in ensuring that

25 its electrical service is both reliable and

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1 HUTCHINGS, Q.C.:

2 Q. .... provided at least cost. This is a

3 legitimate position which arises directly from

4 the statute which governs us and Hydro and the

5 Board.

6 In respect of the evidence of Dr. Barreca

7 which was given before the Board, we have

8 submitted that he has carefully restricted

9 himself to his area of expertise and has

10 provided evidence upon which the Board can

11 feel comfortable in relying. There is a

12 reference made by Ms. Greene to the transcript

13 of July the 11th and specifically, Mr.

14 Barreca's answer in dealing with his

15 familiarity with the mobile radio systems.

16 The question was put, I believe, by

17 Commissioner Powell, and at line 11 of page 51

18 of the transcript of July the 11th, the

19 question is "well then, that we're on the

20 subject, in relation to the project, and

21 bearing in mind what your expertise has been,

22 do you have any comment in respect of the age

23 of the system that Hydro has in place right

24 now and the condition of it? Have you any

25 familiarity with that at all?" And the answer

Page 111

1 So this actually provides, and it's

2 useful that Ms. Greene made the reference, an

3 illustration of a direct and balanced, and in

4 our submission, fair answer by an expert

5 witness with respect to a specific question

6 put to him in that regard.

7 As indicated, Mr. Chair, I will leave

8 much of the balance of the specific projects

9 to stand upon the detailed submissions that we

10 have made in writing. I would correct the top

11 line on the bottom paragraph of page 37, where

12 we say "Hydro is apparently paying over

13 \$200,000 for one Citrix server." I think the

14 reference to the transcript at page 154 of, I

15 believe it is the July 9th transcript, will

16 show that that number should actually be

17 193,000 and odd. So the point remains. I

18 just want to make sure that the reference is

19 familiar to you.

20 The issue of the mobile radio system, I

21 think has been dealt with very directly and

22 properly by Mr. Hayes in his submissions and

23 in the written submission that we have put

24 before you.

25 In respect of the replacement of the

Page 110

1 was not, as one might conclude from Ms.

2 Greene's submission this morning, no. It was

3 yes and no. "I'm not familiar with" the

4 reference here is VHS mobile radio systems.

5 Obviously it's intended to be VHF. And the

6 questioning goes on then, you know, "yes, you

7 haven't done any examination of the system out

8 of what's taken place here in this room?" The

9 answer, "No, sir, I haven't. It's a

10 telecommunications system with switching

11 equipment, controllers, repeaters. It's not

12 totally foreign to me. You'd be surprised how

13 common the life cycles are between this type

14 of equipment and other types of

15 telecommunications equipment," and that's

16 directed specifically at the question, "do you

17 have a comment on the age?" And Mr. Barreca

18 says, "let's talk about life cycles. So

19 insofar as the age, the equipment is aged,

20 there's no doubt about that. It's near its

21 average life expectancy. As I've noted, that

22 doesn't mean that you need to replace the

23 whole thing. But then, it doesn't mean that

24 you don't need to replace the whole thing.

25 Certainly, you have to take a look at that."

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1 Energy Management System, my recollection, I

2 unfortunately don't have the transcripts of

3 the last year's Capital Budget, but my

4 recollection was that there had been some

5 issue there, but whether or not that is in

6 fact the case or whether there had been

7 questions raised about the Energy Management

8 System at the last hearing, it is simply

9 impractical for persons in the position of the

10 Industrial Customers here to attempt to put

11 themselves in a position to provide specific

12 expert evidence on something as purely Hydro

13 related as the Energy Management Control

14 System. Mr. Barreca didn't speak to that, nor

15 would he be expected to. And really, it would

16 be only--I mean, these are one-of-a-kind

17 systems, so that it would be only a specific

18 person delegated to examine the specific

19 alternatives and having the necessary

20 expertise who could offer an opinion to this

21 Board which would be useful in that

22 connection.

23 The issue the Board has to decide though

24 is does it have enough information to make a

25 balanced judgment about this multimillion

Page 113

1 HUTCHINGS, Q.C.:

2 Q. .... dollar project when what it has is the

3 written record that appears before it at this

4 stage. If the Board does, as in our

5 submission, it should have some concerns about

6 the completeness of the information that is

7 being put forward by Hydro in the absence of

8 specific cross-examination and background

9 information that can draw out additional

10 information. It is worthwhile for the Board

11 to consider, given the value of that project,

12 whether it should direct a specific and

13 independent evaluation of it.

14 The other issue, Mr. Chair, that I need

15 to deal with is the issue of costs in this

16 proceeding, and Ms. Greene's assumption is

17 correct that the Industrial Customers are

18 seeking their costs of participation in this

19 hearing. The costs of the hearing are in the

20 discretion of the Board under Section 90 of

21 the Public Utilities Act and in your

22 submission it is appropriate for the Board to

23 consider the contribution made by a specific

24 party to the proceeding in determining whether

25 or not to award costs.

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1 on the Board in exercising its discretion

2 under Section 90 of the Act.

3 It is suggested by Ms. Greene that the

4 Board ought to consider making an award of

5 costs against the Industrial Customers in

6 respect of this proceeding. And I guess we do

7 have to address that as a serious suggestion.

8 Mr. Chair, as you have indicated, these

9 hearings have evolved and the procedures for

10 dealing with Capital Budgets have evolved

11 considerably over time. In my submission,

12 that evolution has made these hearings better,

13 has made the process better, has made the

14 process, as you have said, more transparent

15 and more balanced for many years in different

16 types of public utilities hearings. There was

17 a real danger that the Board or the Board's

18 counsel would be cast in the role of

19 representing consumers and users of electrical

20 services simply because there was nobody else

21 there to do that. The Industrial Customers

22 have come forward here and have invested time

23 and money and effort. The benefits of that do

24 no solely accrue to the Industrial Customers.

25 On a very broad brush sort of scale, if a

Page 114

1 The fact of whether or not a particular

2 intervening party can or cannot independently

3 finance those costs, I think, is of minor

4 importance. This Board has, quite clearly,

5 held on any number of occasions in the past

6 that when it goes to set rates for utilities,

7 it doesn't consider the ability to pay.

8 Equally in our submission, the ability to

9 independently fund as regards costs is not--if

10 not a wholly inappropriate criteria and it is

11 certainly not a criteria that should be given

12 any significant weight in the Board making its

13 decision.

14 What does need to be considered is the

15 Board's duty to act fairly. And that is a

16 technical legal phrase that has, sort of,

17 taken over the Lexicon from the Rules of

18 Natural Justice. Everyone else in this room,

19 Mr. Chair, will have their costs recovered out

20 of the electricity rates. Our clients do not

21 live in a cost plus world. They have nowhere

22 to pass costs on. They are price takers in

23 their markets and their investment in this is

24 coming out of their own pockets. The fairness

25 of that situation, I think, must weigh heavily

Page 116

1 particular project that's going to get

2 assigned to common costs here is not approved,

3 20 percent of the savings will go to the

4 Industrial Customers and 80 percent will go

5 elsewhere.

6 In our submission and this is not a time

7 for us to be unduly modest, we are making a

8 contribution here and a contribution that

9 deserves to be recognized. Mr. Barreca

10 doesn't come here for nothing, anymore than

11 myself or Ms. Henley Andrews do. And our

12 clients are making a very real contribution to

13 this process. We are, in my submission,

14 making it a more balanced process, making it

15 the type of process that is contemplated by

16 the legislation where the Board has more

17 evidence to consider, has cross-examination,

18 has submission, which, in our submission, has

19 been made in a reasoned and professional

20 manner to the Board. We cannot accept the

21 suggestion of counsel for Hydro that our

22 participation has been, in any way,

23 unreasonable. We have put to the Board legal

24 positions on issues such as burden of proof

25 and such as the level of information that the

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1 HUTCHINGS, Q.C.:

2 Q. .... Board ought to be looking at in terms of

3 making its decisions. And we have not gone on

4 an un-focused attack on Hydro. As I said at

5 the beginning of the 2001 Rate Hearing, our

6 clients are bottom line people. They will not

7 invest in these proceedings simply for the

8 joy, if there is any joy in throwing mud at

9 anyone.

10 (12:04 p.m.)

11 These are intended to be serious

12 interventions in which the interests of our

13 clients coincide with the provisions of the

14 legislation. That is to say the provision of

15 reliable service at the least possible cost.

16 That's why we're here. It is, in our view,

17 inappropriate for Hydro to suggest that our

18 participation has been in any way,

19 unreasonable and, therefore, inappropriate for

20 the Board to consider any award of costs

21 against the Industrial Customers. And in our

22 view, with respect, Mr. Chair, it is entirely

23 appropriate for the Industrial Customers to

24 join with Newfoundland Power and when he is

25 here, the Consumer Advocate, in having its

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1 there is no standing, you fellows will

2 disappear. So, the Industrial Customers are

3 one of many customers Hydro have had. You're

4 only representing four of the Industrial

5 Customers and plus there's all these retail

6 customers. So, how do you propose if we were

7 to think that you were treated unfairly to

8 correct that?

9 HENLEY ANDREWS, Q.C.:

10 Q. I think there's a couple of things. For

11 example, I can perhaps given an illustration.

12 In our office, a number of years ago, we came

13 to the conclusion that when we hired students,

14 articling students, they weren't always

15 getting the same information as to what

16 various policies were on various things. And

17 so we put together a handbook and now every

18 articling student, when they come to us,

19 they're given a handbook and so they know what

20 the various policies are and it's consistent.

21 The problem faced by the Industrial

22 Customers is probably even worse when you look

23 at other intervenors who often participate in

24 the Rate Hearing process without any counsel

25 at all. I mean, these minimum filing

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1 valuable contribution to these proceedings

2 compensated by all of the rate payers of the

3 province who, in our submission, do obtain a

4 benefit there from. Unless you have further

5 questions, Mr. Chair, those are the

6 submissions on behalf of the Industrial

7 Customers.

8 CHAIRMAN:

9 Q. Thank you, Mr. Hutchings. Ms. Henley Andrews,

10 Commissioner Martin, Commissioner Powell?

11 COMMISSIONER POWELL:

12 Q. I just have one issue with the Industrial

13 Customers. I'd like a little clarification

14 on--it's a subject that came up in your final

15 submission and a prior submission that, I

16 guess, if you turn to page five of your

17 submission, you talked about the--the second

18 paragraph--the Industrial Customers not being

19 aware of guidelines and things. It's been

20 talked about a number of times, but I haven't

21 heard anybody propose a solution if you

22 perceive that there's some injury to the

23 Industrial Customers. I mean, how do you,

24 yourselves, you're just legal counsel, you're

25 employed for a point in time. As a Board,

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1 requirements aren't published anywhere, as an

2 example. So, we realize that the system is

3 not going to be perfect, but you know, when

4 there are relevant decisions or relevant

5 guidelines, things like that developed, if

6 they were centralized somewhere so that--and a

7 list of them there, so that an intervenor can

8 be provided with a list of, you know, things

9 adopted by the guidelines and decision adopted

10 by the Board that might be relevant, let's

11 say, to a Capital Budget Hearing, then that

12 will, sort of, raise the awareness level. And

13 at that point in time, it would be a question

14 of whether you've made the effort to actually

15 go in and review it or not.

16 So, you know, there are ways to do it,

17 but we have to acknowledge that the best

18 processes in the world are still going to

19 occasionally miss something. The reason why

20 we raised the issues was because there seemed

21 to be so many at one time. And so that really

22 becomes the issue.

23 COMMISSIONER POWELL:

24 Q. Every order of the Board is listed on the web

25 site. So any of the Industrial Customers, if

Page 121

1 they want to keep abreast of things -  
 2 HENLEY ANDREWS, Q.C.:  
 3 Q. The orders of the Board are listed, but that's  
 4 a fairly recent thing. The minimum filing  
 5 requirements don't appear anywhere on the web  
 6 site.  
 7 COMMISSIONER POWELL:  
 8 Q. So, it's really that it's a much more narrow  
 9 or focused that what we were led to believe or  
 10 implied.  
 11 HENLEY ANDREWS, Q.C.:  
 12 Q. Well, it can be, but not necessarily. You  
 13 see, the thing is that in a Newfoundland Power  
 14 hearing, the ultimate--like, take Newfoundland  
 15 Power hearing--the ultimate decision in the  
 16 Newfoundland Power hearing is something that  
 17 we would, as a matter of course, take a look  
 18 at. But there are six, seven, sometimes  
 19 twenty other minor rulings during the course  
 20 of any rate hearing. And unless your web site  
 21 indicates the context, like the issue, which  
 22 we do find, for example, in legal cases when  
 23 we go to do our research, we don't have to  
 24 read every single case decided by the Supreme  
 25 Court of Newfoundland. We can go and do a

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1 a presentation or anybody else wants to make a  
 2 presentation, they are at a considerable  
 3 disadvantage if the most relevant things  
 4 aren't brought to their attention because how  
 5 else would they find out about them. And I  
 6 don't think you're going to make it perfect,  
 7 but I think you can make it better.  
 8 COMMISSIONER POWELL:  
 9 Q. It becomes very difficult in terms of Hydro  
 10 and both the Board trying to anticipate a  
 11 problem of a person who, we anticipate, may  
 12 have an interest in the hearing.  
 13 HENLEY ANDREWS, Q.C.:  
 14 Q. I agree.  
 15 COMMISSIONER POWELL:  
 16 Q. Thank you.  
 17 CHAIRMAN:  
 18 Q. Thank you, Mr. Powell. Just one question I  
 19 wanted to put to both of your, whoever wants  
 20 to, can answer it. And I'm getting back to my  
 21 initial question, I guess, to Ms. Greene and  
 22 that is about the evolving process. My  
 23 question is, is it sufficient for the  
 24 Industrial Customers to question the projects  
 25 without bringing forward alternatives? And

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1 search by topic and find the cases that are  
 2 relevant to the specific topic. And the  
 3 technical conference issue, for example, was  
 4 not something--first of all, the whole concept  
 5 of technical conferences only came up in, sort  
 6 of, the second last set of rules or the third  
 7 last set of rules. And so that, it wouldn't  
 8 have been something that we would have been  
 9 looking for.  
 10 COMMISSIONER POWELL:  
 11 Q. But how do we separate, as a Board, you as a  
 12 lawyer, going to represent the Industrial  
 13 Customers, as opposed to looking beyond you to  
 14 the Industrial Customers because we have no  
 15 knowledge, next time we're at a hearing, there  
 16 may be one or two different people  
 17 representing the Industrial Customers. So,  
 18 therefore, we have to look beyond you.  
 19 HENLEY ANDREWS, Q.C.:  
 20 Q. Exactly and in one sense that was the point  
 21 that I was making at the very beginning which  
 22 is that, you know, the Industrial Customers at  
 23 this point in time are represented by people  
 24 who have been involved in the process. But if  
 25 the Federation of Municipalities wants to make

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1 I'll refer you to three quotes that I picked  
 2 up during both your arguments. One was by Ms.  
 3 Henley Andrews who said that viable  
 4 alternatives have to be evaluated. She said  
 5 that at about 11:30. I don't have any other  
 6 reference. And then Mr. Hutchings said, we  
 7 have to consider the best available  
 8 information and that was at 11:52. And  
 9 thirdly, a few minutes after that, Mr.  
 10 Hutchings, you said it's difficult for the  
 11 Industrial Customers to provide expert  
 12 evidence on some projects. I grant you that.  
 13 But if you take this case as an example, we  
 14 have the evidence of Hydro, we have the  
 15 argument of Hydro, we have some evidence from  
 16 the Industrial Customers in respect of an  
 17 element of Hydro's budget and we have argument  
 18 of the Industrial Customers. I'm leaving  
 19 Newfoundland Power out of it just to keep it  
 20 simple. Is there a hole here in respect of  
 21 the evidence that presents the alternative to  
 22 the Board and that would be evidence, let's  
 23 say, contrary to what Hydro has presented.  
 24 HUTCHINGS, Q.C.:  
 25 Q. Mr. Chair, you're facing, to some extent, a

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1 HUTCHINGS, Q.C.:

2 Q. .... situation that a court faces when a

3 defendant chooses not to call evidence. In

4 many cases and this is something that lawyers

5 decide day by day, one hears the Plaintiff's

6 case and one concludes at the end of the

7 Plaintiff's case that it's not proven. I

8 don't need to answer this case because they

9 have not proven on the balance of

10 probabilities what they need to prove in order

11 to satisfy the court that they're entitled to

12 the relief that they're looking for. And

13 that's the first point that any tribunal gets

14 to, okay. Is there a case to be met? I mean,

15 there are some cases where even on the face of

16 it, no matter, you know, that a litigant will

17 put forward a case, say, you know, even if you

18 prove everything you say, you still haven't

19 made your case because as a matter of law,

20 you're not entitled to this. That's the

21 unusual case, but there are many cases where

22 you don't have evidence on the other side, but

23 the test that you have to apply remains the

24 same in that you have to be satisfied on the

25 balance of probabilities that the project is

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1 basis of the tests that we put in place, this

2 is the least cost alternative. There may be,

3 in some cases, a situation where Hydro come in

4 and say, listen, there are no alternatives to

5 this. The stack at Holyrood was struck by

6 lightning and we've got to put one up and

7 this is the only kind that works. Fine.

8 They, nonetheless, have to prove that on the

9 balance of probabilities by evidence. And

10 that's the situation that every litigant faces

11 and that's the burden that's on every

12 litigant. And in making that decision, of

13 course, as to whether that initial burden has

14 been met, you can take into account the cross-

15 examination. There may be suggestions put to

16 a witness in the course of cross-examination

17 which the witness is not able to dispel, that

18 might cast some doubt on the initial

19 expression of opinion from that witness. What

20 about this issue? What about the possibility

21 of doing X or Y? And why haven't you

22 investigated this possibility? I mean, maybe

23 there's a perfectly reasonable explanation why

24 no one would every investigate the possibility

25 or it may be that the witness will say, that

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1 necessary in order to produce reliable service

2 and be that it is the least cost alternative.

3 And what's a little bit different, I

4 guess, in this context, but it's similar in

5 many other sorts of legal proceedings is that

6 there is, in our submission, an onus given the

7 wording of the legislation on Hydro to show

8 what the alternatives are and that they are of

9 higher costs than the one that is being

10 suggested.

11 Where a piece of legislation says least,

12 obviously it's being compared to something.

13 There's least and there's more and there's

14 more and there's most. So, in this situation,

15 in our submission, there is a burden on Hydro

16 to come in and say, this is what we're

17 proposing to do. We need to do this because

18 if we don't do this, then our reliability

19 indices will not be met and so on and so on.

20 Now, this is, in our judgment, the least

21 cost alternative. We've looked at B, C and D

22 and B might be cheaper for the first three

23 years, but then it goes to heck in a hand

24 basket. D is out to lunch altogether and

25 ultimately, in terms of least cost on the

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1 might be worth looking at or it's a--well, we

2 really haven't looked at that and I can't rule

3 it out. Maybe that's the answer. And if

4 you're left in that situation, you've got to

5 weigh on the balance of probabilities whether

6 or not the test has been made, has been met.

7 It will only be occasionally and with

8 respect to specific types of items that

9 expertise will be available externally, that

10 is going to be of help to the Board by way of

11 expert evidence such as we were able to give

12 on the telecommunication projects from Mr.

13 Barreca. A lot of these are very specific

14 Hydro based projects that the greatest expert

15 in the world is not going to be able to give

16 you a useful opinion on, unless he actually

17 goes into Hydro's system and checks it out and

18 sees what has to get done and what's the best

19 way to do it.

20 And that highlights our point, I suggest,

21 that you need to be very careful in terms of

22 evaluating the reliability of the expert

23 testimony that you're getting. I don't know

24 if that's helpful to you, sir.

25 (12:20 p.m)

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1 CHAIRMAN:  
 2 Q. Thank you, Mr. Hutchings. It's twenty after  
 3 12. Mr. Kennedy, do you have any idea how  
 4 long you'll be?  
 5 MR. KENNEDY:  
 6 Q. Twenty minutes.  
 7 CHAIRMAN:  
 8 Q. Ms. Greene, you're going to be the last we're  
 9 going to hear from, so do you have any  
 10 indication in your own mind as to how long you  
 11 may be?  
 12 GREENE, Q.C.:  
 13 Q. I will be some time. I would like the  
 14 opportunity to discuss it with the people.  
 15 So, I can't be definitive at this point.  
 16 CHAIRMAN:  
 17 Q. Why don't we hear from Mr. Kennedy now, if  
 18 he's only going to be twenty minutes and then  
 19 that will give you an opportunity to see where  
 20 you are and it may be that we can cut a few  
 21 minutes off your time, who knows?  
 22 GREENE, Q.C.:  
 23 Q. It may be, usually I find that with  
 24 discussion, I do tend to get shorter. I'm  
 25 certainly agreeable to that if Mr. Kennedy is

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1 (RECESS - 12:21 P.M.)  
 2 (12:32 p.m.)  
 3 CHAIRMAN:  
 4 Q. Okay, Mr. Kennedy, when you're ready.  
 5 MR. KENNEDY:  
 6 Q. Thank you. Chair, I thought I would start  
 7 first with just some comments regarding the  
 8 test to which Hydro is expected to meet in  
 9 putting forward its Capital Budget, and  
 10 really, there's a number of sources that the--  
 11 of both legislation and the Board's own  
 12 pronouncements on procedures and policies and  
 13 the like that have an impact on how the Board  
 14 assesses individual Hydro projects. As  
 15 counsel for one party or another or all of  
 16 them have already pointed to you, obviously  
 17 Section 41, which is the triggering provision  
 18 under The Public Utilities Act that requires a  
 19 utility to seek approval of the Board prior to  
 20 extending an amount in excess of \$50,000 on a  
 21 project. And as rightfully pointed out by  
 22 yourself, Chair, however Section 41 doesn't  
 23 actually provide much in the way of direction  
 24 to the panel about exactly how it's to go  
 25 about assessing these capital budgets. But I

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1 and if the other parties in the room are.  
 2 CHAIRMAN:  
 3 Q. If everyone is still in shape to continue for  
 4 20 minutes, if not, well then, we'll adjourn.  
 5 How do we feel? Okay.  
 6 MR. KENNEDY:  
 7 Q. Chair, five minutes might help actually just  
 8 for me to gather my own thoughts as -  
 9 CHAIRMAN:  
 10 Q. Good, twenty down to five, that's -  
 11 MR. KENNEDY:  
 12 Q. I hate to rain on your parade, but -  
 13 CHAIRMAN:  
 14 Q. Okay, well, Mr. Kennedy, if you're ready,  
 15 let's hear from you.  
 16 MR. KENNEDY:  
 17 Q. No, I -  
 18 CHAIRMAN:  
 19 Q. Oh, five minutes, oh, okay, I'm sorry.  
 20 MR. KENNEDY:  
 21 Q. - was wondering if we could take a five minute  
 22 break.  
 23 CHAIRMAN:  
 24 Q. I thought you said you were going to be five  
 25 minutes. I couldn't pass up that.

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1 would suggest to you that clearly Section 41  
 2 implies that there is to be a test, otherwise,  
 3 why have the provision in there? If it's just  
 4 a case of rubber-stamping a Capital Budget,  
 5 just by virtue of it being filed, that's  
 6 nonsensical. So the requirement of the  
 7 utility to file and seek approval of the Board  
 8 implies that the Board then would assess that  
 9 Capital Budget against some rational test or  
 10 procedure in deciding whether it's reasonable.  
 11 Section 3 of The Electrical Power Control  
 12 Act clearly also provides some input into this  
 13 process. However, I'm not so sure I would  
 14 agree with all of the statements of some of  
 15 the counsel regarding how Section 3 should be  
 16 interpreted, in light of in particular Capital  
 17 Budget Applications. Generally, what I mean  
 18 by this is the fact that Section 3 of The  
 19 Electrical Power Control Act, and the  
 20 particular provision that we're dealing with,  
 21 reads "it is declared to be the policy of the  
 22 Province that," and then "(b) all sources and  
 23 facilities for the production, transmission  
 24 and distribution of power in the Province  
 25 should be managed and operated in a manner:" A

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1 MR. KENNEDY:  
 2 Q. .... is "that would result in the most  
 3 efficient production, transmission and  
 4 distribution of power." Roman number two,  
 5 "that would result in consumers of the  
 6 Province having equitable access to an  
 7 adequate supply of power," and Roman number  
 8 three, "that would result in power being  
 9 delivered to consumers in the Province at the  
 10 lowest possible cost, consistent with reliable  
 11 service." Roman numeral four and five are  
 12 really germane to any of the matters at hand.  
 13 And then it closes off by saying "and where  
 14 necessary, all power sources and facilities of  
 15 the Province are to be assessed and allocated  
 16 and reallocated in a manner that is necessary  
 17 to give effect to this policy."  
 18 Again, it's just a policy. It's not an  
 19 actual test per se. And it's been suggested  
 20 to you, by some counsel, that this provision,  
 21 and in particular, the requirement that the  
 22 result--that this policy will result in power  
 23 being delivered to consumers in the Province  
 24 at the lowest possible cost, consistent with a  
 25 reliable service, would apply to a project-by-

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1 think the Board has got to grapple with how  
 2 far down into the trenches, so to speak, do  
 3 you apply Section 3 of The Electrical Power  
 4 Control Act.  
 5 Now in addition to Section 41 of The  
 6 Public Utilities Act and Section 3 of  
 7 Electrical Power Control Act, there is the  
 8 Stated Case, as its known, and Hydro has  
 9 pointed out specific provisions of the Stated  
 10 Case that would, I think, provide the Board  
 11 with some further input, and I think it's  
 12 quite important that the Court of Appeal, in  
 13 the Stated Case, went out of its way, so to  
 14 speak, to point to the fact, and this is at  
 15 page 15 of Hydro's final argument, that there  
 16 will normally be a presumption of managerial  
 17 good faith and a certain latitude given to  
 18 management in their decisions with respect to  
 19 expenditures. Now they're not just words that  
 20 the Court of Appeal put in there for the sake  
 21 of them. They're a clear indication by the  
 22 Court of Appeal that there's this element of  
 23 good faith afforded to the utility. It's a  
 24 necessary part of the equation when this panel  
 25 goes to regulate the utility. Otherwise, it

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1 project analysis. That each and every project  
 2 that's put forward as part of a capital budget  
 3 would require this panel to fix in its mind  
 4 whether that project is the lowest possible  
 5 cost, consistent with reliable service.  
 6 Now that's not what Section 3 of the EPCA  
 7 says. Section 3 of the EPCA says just simply  
 8 that the policy of the Province is that all  
 9 facilities and sources for the transmission  
 10 and distribution of power shall be managed and  
 11 operated in a manner that would result in  
 12 power being. So for instance, you could take  
 13 it from the sublime to the ridiculous and say  
 14 that "well, do we have to make sure that every  
 15 bolt that Hydro buys is the lowest cost bolt?"  
 16 or do we say that the entire transmission pole  
 17 and cleaning all the bolts is the lowest  
 18 possible cost or do we say the project as  
 19 described in the Capital Budget for the  
 20 upgrading of TL214 has to be conducted in the  
 21 lowest possible cost? Or do we say that the  
 22 overall provision of electrical service  
 23 forwarded by Hydro has to be at the lowest  
 24 possible cost, consistent with reliable  
 25 service? So it's a graduated scale up, and I

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1 would involve, without that presumption of  
 2 managerial good faith, your requiring to make  
 3 sure that every single project has been  
 4 analyzed fully, independently of Hydro, that  
 5 you couldn't trust Hydro in its good faith and  
 6 that you would require an independent  
 7 examination or expert's report on every single  
 8 project that they put forward. So I think  
 9 that that's an important thing, important  
 10 statement that the Court of Appeal made.  
 11 In addition to those factors, if you  
 12 will, or considerations that the panel need to  
 13 take into account when assessing a Capital  
 14 Budget, there's also the language that this  
 15 Board has already used in relation to P.U. 7  
 16 and in relation to P.U. 36 and in relation to  
 17 the actual wording of Schedule 3, which is the  
 18 schedule that Hydro is meant to adhere to,  
 19 pursuant to the Order of this Board coming out  
 20 of P.U. 7.  
 21 So as has been stated previously, it's  
 22 the balancing between the not wanting to  
 23 micromanage the utility versus the general  
 24 regulatory oversight that's required of the  
 25 Board, and I think that, you know, on the

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1 MR. KENNEDY:  
 2 Q. .... polar sides of that debate, you might get  
 3 consensus from all the parties. For instance,  
 4 the Board stepping in and designing a dam  
 5 that's going to be erected, it's got to be  
 6 this height, got to be this width, that's  
 7 clearly micromanaging, and everyone would  
 8 agree with that, I'm going to suggest.  
 9 Conversely, on the regulatory oversight, if  
 10 the Board were just to say anything up to \$40  
 11 million is approved. Well, that would be  
 12 abdication of its role and therefore, you say,  
 13 well that's right over on the other side of  
 14 the equation. Clearly though, there is a big  
 15 grey area, the grey area of where does the  
 16 Board strike the balance. And in answering  
 17 the question of where is that inflection  
 18 point, I would suggest that it's right where  
 19 you are standing. Ultimately, as long as  
 20 you're within that zone of reasonableness, if  
 21 you're not down in the polar ends of either  
 22 side, this Board's pronouncement on where the  
 23 balance is stuck is where the balance is  
 24 struck. It's somewhat tautological, but it's  
 25 nonetheless a fact that there is no solid

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1 because you could argue that the tag of  
 2 consistent with reliable service was added by  
 3 the Legislature as a backstop, if you will.  
 4 Read that provision without consistent with  
 5 reliable service. It would mean that all  
 6 sources and facilities for the production,  
 7 transmission and distribution of power in the  
 8 Province should be managed and operated in a  
 9 manner that would result in power being  
 10 delivered to consumers in the Province at the  
 11 lowest possible cost. Well, we all know how  
 12 you could get the lowest possible cost, as  
 13 long as we don't mind the power going out  
 14 every day. So the fact of the matter is that  
 15 putting in consistent with reliable service,  
 16 you could argue that it's almost not the case  
 17 of putting a burden on Hydro to ensure that  
 18 projects further reliability, but almost  
 19 putting a burden or an obligation on the  
 20 utility to not trim out from underneath and  
 21 threaten reliability in the opposite  
 22 direction. It's a perfectly reasonable  
 23 interpretation of how that provision should be  
 24 read.  
 25 So in other words, the legislation, the

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1 piece of evidence or predetermined strike  
 2 point. The Board has to arrive at that strike  
 3 point, and it has to arrive at that strike  
 4 point comfortable with the result that will  
 5 follow about the level of detail, the level of  
 6 justification, the level of documentation, the  
 7 level of the filing requirements that are  
 8 dictated by this Board are what will be  
 9 reasonable, because that's what you determine  
 10 them to be.  
 11 The other thing I wanted to comment on  
 12 was some questions from the panel regarding  
 13 the least cost versus the least cost  
 14 consistent with reliable service, and it's  
 15 actual lowest cost, but we use least as  
 16 synonymous with, but the lowest possible cost  
 17 versus the lowest possible cost consistent  
 18 with reliable service. And it's been  
 19 suggested that that language, lowest possible  
 20 cost consistent with reliable service, means  
 21 that each project has to be assessed in  
 22 relation to whether it furthers the  
 23 reliability of the system along somehow. If  
 24 that was what was being suggested, then I'm  
 25 not so sure I agree with that proposition

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1 Legislature may have wanted to ensure that the  
 2 Section 3, lowest possible cost, was not  
 3 applied in a vacuum. That it was--that the  
 4 Board could properly take into account the  
 5 impact that cheaper solutions may have on  
 6 system reliability. So that where there might  
 7 actually be a lower cost alternative, but wait  
 8 a minute, is that going to have an impact on  
 9 reliability. And so it could be used in that  
 10 sense as well.  
 11 We also recognize that not every project  
 12 is tied to reliability, every capital project.  
 13 For instance, safety oriented projects, ones  
 14 involving the safety of workers of Hydro has  
 15 been traditionally considered to be a  
 16 perfectly legitimate capital expenditure to  
 17 make. If there is an unsafe condition that  
 18 threatens to injure or worse to an employee of  
 19 Hydro, then no one seems to take issue with  
 20 the fact, yes, that's a proper expenditure to  
 21 make, if there is a true safety issue. Well,  
 22 that's got nothing to do with reliability and  
 23 it's got nothing really to do with the lowest  
 24 possible cost consistent with reliable  
 25 service. As long as when the project is

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1 MR. KENNEDY:  
 2 Q. .... approved, the solution is a reasonable  
 3 solution. So it's necessary and it's  
 4 reasonable, but doesn't have much to do with  
 5 reliability per se.  
 6 Similarly, there's other projects which I  
 7 would suggest don't fall into the rubric of  
 8 how do they impact on reliability, and that  
 9 would be projects more equivalent to like  
 10 corporate stewardship. One of those would be  
 11 the ambient air monitoring project of Hydro.  
 12 I think the Industrial Customers were correct  
 13 in pointing out that this project's not  
 14 required per se by legislation, and the  
 15 project's not required per se by safety. It's  
 16 not going to do much in the way of  
 17 reliability. But clearly, as is the evidence  
 18 of Hydro, it's being put forward as part of a  
 19 corporate stewardship that this is--they have  
 20 fumes, exhaust and particulates and effluent  
 21 coming out of Holyrood that they would like to  
 22 monitor to ensure that they behave as a good  
 23 corporate citizen.  
 24 (12:47 p.m.)  
 25 Well, if you accept that corporate

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1 reliability factor or whether it's a factor  
 2 based on individual aspects of its operation,  
 3 and then how these capital projects will  
 4 address those reliability factors one way or  
 5 the other. What's the target level of  
 6 improvement that Hydro hopes to obtain by  
 7 spending X millions of dollars on a particular  
 8 project.  
 9 I would point out PUB-1, which was an  
 10 RFI, and the question was "Does Hydro use a  
 11 system reliability target when assessing its  
 12 capital program? If so, was is the  
 13 reliability target and how is that target  
 14 index monitored in relation to specific  
 15 capital projects, as well as the capital  
 16 program overall?" And Hydro's answer was:  
 17 "Hydro does establish annual reliability  
 18 targets related to delivery point performance  
 19 and the under frequency load shedding  
 20 (phonetic) events on an overall system basis.  
 21 These may be used when assessing the capital  
 22 program; however, typically it is through the  
 23 analysis of various lines and plants that the  
 24 'worst performers' are identified. These  
 25 analyses also indicate what the root problems

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1 stewardship is an important part of being a  
 2 company, then that's a project that would need  
 3 to be assessed by this Board, independent of  
 4 whether it's the lowest possible cost, whether  
 5 it's going to provide the lowest possible cost  
 6 electricity service, because it won't, just by  
 7 virtue of the fact that you're spending the  
 8 money, nor does it have anything to do with  
 9 reliability per se. It's got to do with  
 10 things entirely different from that. So while  
 11 Section 3 provides some input, I don't think  
 12 that you can answer every question about  
 13 whether a capital project should be approved  
 14 or not, based on that language in Section 3  
 15 regarding lowest possible cost and reliable  
 16 service.  
 17 I would point out as well that in regards  
 18 to reliable service, having said all that, I  
 19 would suggest that there is some concern here  
 20 with the lack of tying some of the capital  
 21 projects to the reliability of the system.  
 22 There's no clear, in anywhere I could see, no  
 23 clear indication by Hydro, in this Capital  
 24 Budget, of what its corporate reliability  
 25 target is, whether that's an overall system

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1 are and form the basis for the justification  
 2 of specific capital projects." So it's not  
 3 something that you could really grab ahold of,  
 4 in the sense that well, there's the  
 5 reliability target that Hydro's shooting for.  
 6 Here's the project that, or projects, that  
 7 they hope to improve reliability through, in  
 8 marching towards that reliability target. And  
 9 so that that would give something for the  
 10 Board to subsequently assess capital  
 11 expenditures to see if it had the affect that  
 12 was intended.  
 13 I indicated as well that an approach by  
 14 the Board of saying well, anything up to \$40  
 15 million would be approved would be abdication  
 16 of your duties to assess a capital project for  
 17 its necessity and reasonableness, as is  
 18 indicated is the test under P.U. 7 and P.U. 36  
 19 or P.U. 36 in particular. And in relation to  
 20 that, there was some evidence led by Hydro  
 21 regarding its use of some financial indices to  
 22 determine what an appropriate level of capital  
 23 expenditures would be in a given year, and  
 24 there's an RFI that specifically requested  
 25 some more information regarding that, and

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1 MR. KENNEDY:  
 2 Q. .... that's PUB-3. And it relates in  
 3 particular to the direct testimony of Mr. John  
 4 Roberts and the question was, "is the  
 5 guideline detailed therein (capital programs  
 6 should not normally exceed cash flow from  
 7 operations and be kept to the level of  
 8 depreciation) used by other Canadian  
 9 utilities? If so, please provide details. If  
 10 not, please provide details on why Hydro uses  
 11 this guideline." And the answer was: "Hydro  
 12 is not aware of what guidelines that may be  
 13 used by other Canadian utilities. Hydro  
 14 considers that a capital program that equates  
 15 to cash flow from operations will not present  
 16 difficulties related to financing. It is only  
 17 guideline and would, at times, be exceeded by  
 18 significant costs for multi-year projects  
 19 related to reliability improvements, new  
 20 sources of generation and requirements of  
 21 specific projects."  
 22 Nonetheless, clearly at least some  
 23 overall general indices tied to the utility's  
 24 finances, whether it's a measure of the  
 25 existing depreciation or net income plus

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1 in a rational process as well, and I think  
 2 that that's something that might be ideally  
 3 suited to be dealt with in a thorough manner  
 4 through the generic hearing.  
 5 But ultimately, for this Capital Budget  
 6 Application, as is corrected pointed out by  
 7 counsel for the Industrial Customers, just the  
 8 fact that there is a generic hearing in the  
 9 offering doesn't preclude this Board or remove  
 10 this Board from having to exercise its  
 11 jurisdiction for this application. And I  
 12 think ultimately, the law that--the test that  
 13 Hydro has to meet is the test that this Board  
 14 put out for it in P.U. 7, and as subsequently  
 15 elaborated upon in P.U. 36, which although was  
 16 the decision relating to Newfoundland Power's  
 17 Capital Budget, does contain general  
 18 pronouncements of what would be expected of a  
 19 utility when it puts forward its Capital  
 20 Budget Application. And those general  
 21 directions apply equally to Hydro as they do  
 22 to Newfoundland Power. Ultimately, the test  
 23 is whether there's been sufficient evidence  
 24 led before this Board of a project, as  
 25 proposed, and whether its necessary and

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1 depreciation or what have you, what I think  
 2 assists a panel a great deal in being able to,  
 3 at least from that 30,000-foot view on a  
 4 capital application by capital application  
 5 basis, determine whether it's a capital budget  
 6 exceeding normal expenditure levels in a given  
 7 year, as you could expect a certain amount to  
 8 come year over year in any event.  
 9 Now these are issues that may be best  
 10 dealt with during the generic hearing, as is  
 11 mentioned. There's quite a bit of evidence  
 12 that would need to be led for this panel to  
 13 make a solid determination of what financial  
 14 indices, on the first view, might be one that  
 15 would assist this Board in that manner.  
 16 There's clearly some room for rationalizing  
 17 the process and bringing together a single  
 18 pronouncement of the objectives and the tests  
 19 that the Board would employ in assessing  
 20 capital budgets and that would be an  
 21 amalgamation or taking language from or  
 22 direction from Section 41 of The Public  
 23 Utilities Act, Section 3 of the EPCA, the  
 24 previous Board decisions, the Stated Case, and  
 25 so on, and that that can be brought together

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1 reasonable. That's the ultimate test that  
 2 this panel has indicated that it will go by.  
 3 Just dealing with the VHF project in  
 4 particular, there's two points I wanted to  
 5 make. One was in Hydro's closing arguments,  
 6 at page 25, it's the first main paragraph of  
 7 that page, first complete paragraph, and it's  
 8 a sentence about mid ways through and after  
 9 discussing the trunk type of design, Hydro  
 10 writes "the final decision whether to use a  
 11 central switch or distributed type of  
 12 architecture will be made following tender  
 13 evaluation." Now one would wonder why Hydro,  
 14 in this instance, didn't apply for--which is a  
 15 question I asked some of the witnesses of  
 16 Hydro, and I don't know if there was an  
 17 entirely satisfactory answer provided, about  
 18 why they wouldn't have done, in this instance,  
 19 conducted themselves in a fashion similar, in  
 20 this instance, to what they've done in the  
 21 past, where they sought approval of the Board  
 22 for an expenditure to conduct detailed  
 23 engineering work. And then once that detailed  
 24 engineering work was completed and they've got  
 25 themselves fairly fashioned to what they plan

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1 MR. KENNEDY:  
 2 Q. .... to do, by way of a capital project, that  
 3 they would then come in with more detailed and  
 4 harder numbers, if you will, about the cost of  
 5 a project.  
 6 As I think Mr. Barreca agreed with, when  
 7 I was crossing him on the stand, there is a  
 8 further degree of latitude that needs to be  
 9 afforded to the utility when they are  
 10 contemplating a project that's very technology  
 11 based, simply because the technology is moving  
 12 so fast. You're trying to hit a moving  
 13 target. You need to provide--it's reasonable  
 14 to expect to provide the utility with an extra  
 15 degree of latitude to be able to respond to  
 16 market conditions and get the best price per  
 17 performance ratio that they can get at a given  
 18 moment in time. Less of a consideration when  
 19 you're talking about upgrading a transmission  
 20 line like TL214, simply because that is not  
 21 new technology. That's existing technology  
 22 that they should be able to provide very hard  
 23 numbers for right now, if they plan to do the  
 24 project next year.  
 25 As hopefully can be gleaned by my closing

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1 took exception to some of my comments in the  
 2 closing brief regarding this point, and in  
 3 particular, he pointed out paragraph 38, but I  
 4 wanted to just go to paragraph 39. And this  
 5 is a statement in my paragraph 39 of my  
 6 closing brief, from the report of Joint  
 7 Coordination between Newfoundland and Labrador  
 8 Hydro and Newfoundland Power, which was filed  
 9 with the Board, so it's a public document.  
 10 And working group 10 was in particular  
 11 responsible for trying to get a meeting of the  
 12 minds between the two utilities on a VHF  
 13 project. And paragraph 39 says, the report  
 14 also notes that "Newfoundland Power has agreed  
 15 to provide Hydro with input to ensure the  
 16 design of the new system does not  
 17 unnecessarily or unreasonably preclude the  
 18 possibility of Newfoundland Power utilizing  
 19 the system in the future". Now, that to me,  
 20 got lawyer all over it. It's got more  
 21 cushions that a couch. I don't think that  
 22 there's anything there that you could grab a  
 23 hold of and enforce to show how clearly worded  
 24 this is the couch side. We could easily have  
 25 rewritten that sentence if Newfoundland Power

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1 submission, however, my greatest concern with  
 2 the VHF project is the possible duplication  
 3 that may be created by virtue of having two  
 4 communication systems operated independently  
 5 by the two utilities. As is indicated by  
 6 counsel for Hydro, it's Hydro's position that,  
 7 as far as they're aware, Newfoundland Power is  
 8 five to ten years out from a replacement of  
 9 its existing VHF system. But I don't think  
 10 there was any solid evidence provided to this  
 11 panel by any of the Hydro witnesses of exactly  
 12 how far Newfoundland Power is from replacing  
 13 its VHF system. Is there two years left in  
 14 the life with a three-year possible extension  
 15 by upgrading portions of it? Or is it a full  
 16 five years as is with just normal O&M to keep  
 17 it going? They are two completely different  
 18 scenarios. And I think that there's a great  
 19 deal more evidence that would need to be led  
 20 about Newfoundland Power's VHF, existing VHF  
 21 system and its present worth, in order for  
 22 this Board to know whether, in fact,  
 23 Newfoundland Power should be directed to  
 24 participate in this project.  
 25 My learned friend for Newfoundland Power

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1 wanted to, by saying Newfoundland Power has  
 2 agreed to provide Hydro with input to ensure  
 3 the design of the new system will allow  
 4 Newfoundland Power to utilize the system in  
 5 the future. That's an entirely different  
 6 statement than saying ensure the design of the  
 7 new system does not unnecessarily or  
 8 unreasonably preclude.  
 9 So, there's a lot of dancing going on  
 10 between the two utilities on this project.  
 11 Why? I don't know, but clearly there has not  
 12 been a meeting of the minds between the two  
 13 utilities. There has not been a legitimate  
 14 discussion between the two utilities about how  
 15 they're going to share this system in the  
 16 event Newfoundland Power needs to upgrade its  
 17 own VHF system.  
 18 To allow Hydro to just proceed ahead with  
 19 the project on the basis that needs it and  
 20 hoping against hope that Newfoundland Power  
 21 would participate in some meaningful way in  
 22 the future is, I think, it would be a sad  
 23 development because it would be another case  
 24 of where duplication may have been avoided and  
 25 an opportunity missed and this is certainly

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1 MR. KENNEDY:  
 2 Q. .... one of them.  
 3 I've tried to provide the Panel with some  
 4 sort of clear suggestion about how they could  
 5 actually get the two utilities' heads together  
 6 and that's mostly by, I think, in the  
 7 circumstances, knocking their heads together.  
 8 (1:02 p.m.)  
 9 And I provided, under Paragraph 48 of my  
 10 closing brief, some specific conditions that  
 11 the Board could attach to the VHF project if  
 12 they were to approve that project, pursuant to  
 13 Hydro's application with specific dates about  
 14 who would provide what. And the whole purpose  
 15 of it is to ensure that this NHF project, if  
 16 it was to go ahead as proposed, goes--or at  
 17 least as Hydro's thinks it's going to go  
 18 ahead--goes ahead in a manner that will  
 19 certainly ensure that Newfoundland Power  
 20 participates in the project both by capital  
 21 cost and subsequently by the participating in  
 22 the operating and maintenance costs of the  
 23 system.  
 24 And the last comment I was going to make  
 25 regarded some commentary between Hydro and the

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1 to being able to prove its case and justify  
 2 its projects and generally to be afforded an  
 3 opportunity to demonstrate its success in  
 4 managing the assets of the utility  
 5 efficiently. It shouldn't view the process as  
 6 an irritant or something that it should just  
 7 need to get past on the way back to its normal  
 8 course of business. So, ultimately, it's one  
 9 of attitude and that entirely is one in  
 10 Hydro's own control. And Hydro must recognize  
 11 that it is a monopoly and as such, the normal  
 12 pressures brought to bear on its operations  
 13 which are namely competition, aren't present.  
 14 And therefore, the normal break that's  
 15 there on a company's decision to spend money,  
 16 is not present. It's absent. And that's why  
 17 we regulate them. And everyone is marching  
 18 towards the same spot of trying to strike the  
 19 fairest balance between Hydro and its  
 20 customers to ensure a low cost electrical  
 21 rates consistent with reliable service.  
 22 Thank you, that's all the comments that I  
 23 have.  
 24 CHAIRMAN:  
 25 Q. Thank you, Mr. Kennedy. Any questions that

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1 Industrial Customers concerning what is being  
 2 perceived by Hydro to be a scatter gun  
 3 approach by the Industrial Customers and I  
 4 guess related to that is their issue of costs.  
 5 To my mind, there's been no evidence that the  
 6 Industrial Customers have caused the process  
 7 to be unnecessarily prolonged or that they've  
 8 acted unreasonably in the process. There's no  
 9 evidence of any high-handedness or  
 10 obstrufication (phonetic) by Hydro. There's  
 11 no evidence that they acted in any way other  
 12 than in the best interests of their own  
 13 clients which is clearly what you would expect  
 14 of counsel hired by the Industrial Customers  
 15 to do. I think some of the levels of  
 16 frustration that are experienced by some of  
 17 the parties in this hearing is borne in part  
 18 from the transitory nature of the process.  
 19 We're caught up in the middle of trying to  
 20 change everything. And some parties are  
 21 frustrated over the level of documentation or  
 22 the level of justification. But ultimately, I  
 23 think it's a case of Hydro's level of  
 24 comfortableness with being regulated. I would  
 25 suggest that Hydro should almost look forward

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1 you have for Mr. Kennedy? No? We're back to  
 2 you, Ms. Greene. Now do you want to proceed?  
 3 Do you need a break?  
 4 GREENE, Q.C.:  
 5 Q. No, thank you, Mr. Chair. I'm ready to  
 6 proceed if that's convenient for the Panel.  
 7 CHAIRMAN:  
 8 Q. Yes.  
 9 GREENE, Q.C.:  
 10 Q. There were a limited number of issues that  
 11 were raised that I would like to address in  
 12 reply. The first relates to the questions put  
 13 by the Chair which is the role of reliability  
 14 and how you balance the cost of a project with  
 15 respect to a liability. From Hydro's  
 16 perspective, it is a balance, obviously. And  
 17 I think that was also referred to by hearing  
 18 counsel, that you can't look at cost in  
 19 isolation. That the issue of reliable service  
 20 for customers is a very valid issue and that  
 21 is why Hydro, in its written argument and in  
 22 oral argument this morning, did outline a  
 23 number of factors we think are important that  
 24 must be taken into account by Hydro and by the  
 25 Board in assessing what is reliability.

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1 GREENE, Q.C.:

2 Q. The difficulty however, sometimes comes and is

3 not a one-to-one relationship where you've can

4 specifically show each projects and how it

5 will impact on reliability, where those

6 projects do affect reliability. Because as

7 Mr. Kennedy rightly pointed out, not all

8 projects do.

9 So, what we have found is that

10 engineering judgment is required in some cases

11 and based on the nature of Hydro's system,

12 that engineering judgment requires Hydro to

13 take action where it may not be able to

14 specifically state that this particular

15 project will improve reliability by Y percent

16 or by plus 1 percent or whatever. And I

17 believe you'll find that that's the same with

18 respect to Newfoundland Power. So, even when

19 it comes to reliability, it is not absolute in

20 terms of what reliability means. And there

21 have not been standards established with

22 respect to each and every element. There may

23 be some elements with respect to distribution

24 feeders for example. And Hydro has adopted

25 standards with respect to its expectations for

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1 has been suggested by the Industrial

2 Customers. We have supplied economic

3 justification for each and every project. And

4 we do believe the Board has a right to ask

5 questions. Hydro fully understands that it is

6 regulated and that--well, there may be times

7 that we wonder about the timing. This has

8 been a heck of a July at Hydro, this year, but

9 we certainly do understand about being

10 regulated. And we do appreciate the

11 opportunity to demonstrate to the Board and to

12 our public that we are proceeding in an

13 efficient way so that we can satisfy all of

14 the people in Newfoundland. We are meeting

15 our mandate of lowest cost reliable power

16 because that's what we are all about.

17 The level of frustration doesn't come

18 with the fact of regulation. Because if there

19 is a level of frustration in the Capital

20 Budget process, is that we are being asked the

21 same questions for, in this particular case,

22 three years in a row and having thought the

23 Board had given direction to which we had

24 responded correctly as the Board told us last

25 year. It is somewhat frustrating to find the

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1 the operation of generation facilities and

2 thermal facilities, but these are specific to

3 particular pieces of equipment. So, that is a

4 balance the Board must take into account in

5 looking at the element of reliability and how

6 that gets determined in the unique situation

7 that we face here in Newfoundland. That's the

8 first point, that we do believe it is a

9 balance, we cannot look at it in isolation.

10 The next point deals with the

11 legislation. Here Mr. Kennedy has helped me

12 and has shortened my reply because he has

13 repeated essentially what we said in our

14 written argument and in oral argument this

15 morning. Now, we do not believe that the test

16 is applied to each and every project as had

17 been suggested. The legislation does set out

18 what, in a very general way, what the

19 standards are. The Board has given direction

20 to Hydro in PU 7, PU 29 as well, when they

21 found that we had interpreted PU 7 correctly

22 and in PU 36, we submit that we have met the

23 legislative burden, we have responded to the

24 directions. We're not asking the Board to

25 accept what we're saying on blind faith, it

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1 very same issues arising again, knowing that

2 there is also a generic hearing to be held on

3 the issue. When is there any certainty with

4 respect to the rules we must meet before we

5 file the application? That's where the level

6 of frustration is coming from with this

7 particular hearing, not certainly with the

8 regulatory process.

9 The next comment really just goes to how

10 you assess credibility of witnesses. And I

11 believe that the Board must look at it in the

12 overall context of the evidence and not one

13 isolated statement. And this is particularly

14 true when you're talking about a technical

15 area where there may not be the same level of

16 understanding between the examiner and the

17 witness. We've talked about length of time

18 and I was reflecting--I've been involved in

19 the regulatory process at Hydro one way or

20 another, mostly as counsel for all of the

21 hearings since 1985. That's almost 18 years

22 and I won't tell you how long I practised

23 before that, but it's a significant number of

24 years. And what I found during that process,

25 that when you get into a very technical area,

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1 GREENE, Q.C.:

2 Q. .... there is some a mis-communication between

3 a witness and a cross-examiner. I've seen it

4 many times. So that when you look at

5 something, you must look overall at the

6 context of the questions. And I'll use one

7 example which Mr. Hutchings used, the Zetron

8 system. You'll have to look at the fact that

9 Mr. Downton did explain what the Zetron system

10 was, part of the problem is that the Zetron

11 system is not a pure distributed architecture

12 system. It can be made to work that way. So,

13 what I am suggesting to the Board, that you

14 must look at the overall context of the

15 witnesses and how they presented themselves

16 during the week. And as I've already

17 explained, if at any time it appears that

18 there is misinformation, no matter how minor,

19 on the record, that's part of our role, is

20 always to ensure that the Board has full

21 accurate information so they can make a proper

22 decision. That's what makes the process work

23 and that's how Hydro has done it, certainly

24 for the last, since it's been regulated.

25 The next comment is with respect to Ms.

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1 There are two issues with respect to the radio

2 that I'd like to address and I think that I

3 would like to suggest something that I believe

4 will address some of the issues that appear to

5 have arisen which we have had difficulty in

6 trying to understand why some of the issues

7 have arisen to be honest. With respect to

8 this particular project, everyone has agreed

9 we need a radio system. Everybody has agreed

10 we need to do something with the radio system.

11 There have been various issues raised which

12 have been addressed in written argument and in

13 oral argument this morning, so I won't repeat

14 them. The ones--but what Hydro is prepared to

15 propose at this time is what I would suggest

16 is a conditional approval to address some of

17 the issues because indeed Hydro does want to

18 satisfy the Board and the parties of what we

19 are proposing is required for this system and

20 we believe that it is part of our role and

21 that it is the most reasonable project.

22 I'm not sure if this is the correct

23 adjective, but I would call it a conditional

24 approval, that Hydro would, if receives

25 approval from the Board, proceed to do as it

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1 Andrews' comments with respect to personal

2 attack. It certainly was never intended to be

3 a personal attack. During those years of

4 practice, I personally believe that it is not

5 helpful to the process to engage in personal

6 attack whether it by one counsel to another or

7 with a witness; it doesn't assist the process.

8 What we were trying to determine was what we

9 believe is a fair comment and a strategy or a

10 position that has been adopted with respect to

11 this particular matter. And I won't bore you

12 with how long my relationship is with Mr.

13 Hutchings or Ms. Andrews which goes back to

14 law school days, practising together,

15 attending each other's weddings, et cetera, to

16 assure the Board it is not a personal attack

17 and was never intended to be that way, but it

18 is a fair commentary, in my submission, as to

19 a strategy they may have adopted on behalf of

20 a client. Then again, it may deal with some

21 of the frustration we see for the last three

22 years that this particular intervenor objects

23 just about every project that impacts them.

24 The next comment is with respect to the

25 radio, the actual specific radio project.

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1 has said, the detailed engineering work that

2 is required to do the tender evaluation and to

3 report back to the Board after the results of

4 the tender evaluation before proceeding

5 further to award any specific elements of the

6 work.

7 Thank you, Mr. Chair, that concludes the

8 comments that I wish to make at this time.

9 CHAIRMAN:

10 Q. Okay, thank you, Ms. Greene. So, we're done.

11 I'd like to thank you all for your

12 contributions. We will certainly try and get

13 to a decision on these matters at the earliest

14 possible date with no promises as to when,

15 seeing it's July. But we do understand the

16 schedule and the urgency of some of these

17 matters being attended to and all of it being

18 attended to, I guess, before we get into the

19 GRA. So, again, thank you for your co-

20 operation, enjoy the rest of the summer.

21 Upon conclusion at 1:17 p.m.

CERTIFICATE

1  
2 I, Judy Moss, hereby certify that the foregoing is  
3 a true and correct transcript in the matter of  
4 Newfoundland and Labrador Hydro, 2004 Capital  
5 Budget Application, heard before the Board of  
6 Commissioners of Public Utilities, Prince Charles  
7 Building, St. John's, Newfoundland and Labrador on  
8 the 28th day of July, A.D., 2003 and was  
9 transcribed by me to the best of my ability by  
10 means of a sound apparatus.  
11 Dated at St. John's, Newfoundland and Labrador  
12 this 28th day of July, A.D., 2003  
13 Judy Moss