

(1:36 p.m.)

MR. SAUNDERS, PRESIDING CHAIRMAN: You fellows have spent a lot of time trying to show the relationship between the weather and the accident rates, but I think you got it wrong. The relationship is between the FA hearings and the weather. Are there any preliminary matters before we proceed? No? The purpose of this session today of course, having received your well-prepared arguments, I've been through them in some detail, and I think the Commissioners have as well, the purpose of this session is to give you all a chance to rebut, I guess, or question the arguments of the others and to offer any clarification of the points that you may have raised yourself or any expansion of those points. It's not intended that you would go through the written argument that you have submitted. We're quite familiar with those at this stage and in the interest of time as well I would hope that this session would only deal with your rebuttal or questions or expansion of your own arguments. The way in which we plan to proceed is the Applicant first, followed by the Consumer Advocate, followed by Board Counsel, and after each of you, if there are any questions that the panel members have, we will insert them at that time rather than wait till the very end. If we don't finish this afternoon, I think Board Counsel has already discussed with each of you the possibilities for tomorrow, and it's not a problem with the panel, so if we have to we'll sit tomorrow morning, but if there's any hope of finishing this afternoon, barring any schedule problems that you fellows may have, we'll try and finish, if we have to sit late, well then, so be it, and I think you're okay with that, are you?

UNIDENTIFIED SPEAKER: Yes.

MR. SAUNDERS, PRESIDING CHAIRMAN: Yes. So unless there's something else, we'll start with Mr. Whalen, Mr. Stamp.

MR. WHALEN, Q.C.: Mr. Stamp is going to ...

MR. STAMP, Q.C.: Thank you, Mr. Chairman, Commissioners. As you've indicated, and it's our intention in any event, that we will not be taking you through our pre-filed argument, and so I will limit myself to, I guess, responding to some of the issues that I think are raised in some of the other arguments. I don't intend to respond to every point in those arguments about which we're in dispute because I think to a large

extent our filed argument covers many of those topics in any event, but there are some that I do want to comment on and that's what I will try and limit myself to today. I don't think it'll take me an exceedingly long time to do that but I'll be as quick as I can to go through it. So with that brief commentary, Mr. Chairman, I can begin if you wish.

I think I would like to start, first of all, with the point that is raised, I guess, at page 18 of the argument of the Consumer Advocate, and the theory, I guess, that there's a provincial law that entitles purchasers of insurance products that are purchased through the mechanism of Facility Association to buy those products essentially at a break even price, in other words, that as a matter of law they are entitled to that, and I think that they come to the conclusion that they have based on Section 97 of the *Insurance Companies Act*, which is set out in page six of that same argument, and it simply says that, "The unincorporated non-profit association of insurers known as Facility Association, known as the Facility Association, is continued under the name Facility Association."

Now, our ... I guess we'd make a number of comments in response to that general proposition. Certainly I think it's safe to say, based on what, the position we've taken in this hearing and to a brief extent in our written argument, but certainly in the past hearing, Mr. Chairman and Commissioners, we vigorously disagree with this interpretation, but regardless of the interpretation, let me say, there are a number of things that can be said in any event, and the first, I guess, and foremost item that we can say is that that's exactly, precisely, how this application was filed by the Applicant on a break even basis, so you have that evidence, compelling evidence from Mr. Pelley that that is exactly what the instructions were and exactly how he proceeded to prepare and file the application.

Then there is a theory that somehow we have accumulated over time some kind of profit. Our view on that is that there is no profit or essentially no profit. It's been essentially a break even mechanism over the 17 years or so that it's been in operation under the current context in this jurisdiction. I think the numbers worked out to be about 2 1/2 percent over 17 years, and that's about one-seventh of one percent per year. If this was RRSP returns, we'd be looking at Freedom 95, I guess. The point we say, Mr. Chairman, is that, you know, it's impossible to be as precise, that every year it will be an

1 exact dollar fit, it just won't work, but this is very nearly
2 that result.

3 Another point on this general topic is that the
4 legislation of course, and it's again set out in the same
5 argument, the Consumer Advocate's argument, and it's
6 at page seven, sets out Section 98 of the *Insurance*
7 *Companies Act*, and 98(2) in particular, "The Association
8 shall, in its Articles of Association or Bylaws, and in
9 terms not inconsistent with this act, establish a plan to
10 be known as the Plan of Operation."

11 (1:45 p.m.)

12 So here you have a legislative directive that
13 Facility Association must have a plan of operation, and
14 of course we know from the legislation it's got to be
15 approved by the Superintendent of Insurance, and
16 amendments to the plan must be approved by the
17 Superintendent of Insurance, and we know of course
18 that it has been approved. The Consumer Advocate's
19 own witness at the hearing, Mr. Morris, Superintendent
20 of Insurance, acknowledged that this is the plan that
21 has been approved and that the amendments, such as
22 they are, of recent periods, have been approved by his
23 office as well. So you have basically a statutory plan of
24 operation or a statutory prescribed plan of operation.
25 It's created, approved by the Superintendent of
26 Insurance. He is the other regulator in this, I guess in
27 this setting, and he has the statutory obligation, he or
28 his predecessors, statutory obligation to approve the
29 plan of operation and amendments.

30 And if you would ... I'll just take you for a
31 moment to the Plan of Operation. It's in the materials
32 that were, I guess, filed by the Board as preliminary
33 materials. I'm not sure how it's laid out, where it can be
34 located in the Board's materials. I just know where my
35 copy is. If you need a moment to get that, by all means,
36 but I can tell you that I'm reading from Article 5 of the
37 Articles of Association and that heading on that article
38 is Participation Ratios. I'm going to the bottom part, I
39 guess, of Clause 1, and I'll just read this for you for the
40 record. "At the end of each fiscal year, profit or loss for
41 each class of business shall be determined separately
42 for each accident year in each jurisdiction in accordance
43 with accounting procedures approved by the Board."
44 That board means the Facility Association Board.
45 "Calculations for an accident year shall include all
46 policies earned during such calendar year. Profits shall
47 be credited or distributed to each member and loss shall
48 be charged against each member in accordance with the

49 member's appropriate participation ratio determined in
50 the manner hereinafter set forth in this Article 5."

51 So that's the Plan of Operation and the
52 particular part of Article 5 of the Plan of Operation that
53 the Superintendent of Insurance, or one of the current
54 superintendent's predecessors, has approved as the
55 regulator responsible for that approval, so the point
56 we're making of course, Mr. Chairman, is that the whole
57 interpretation of Section 97 must also be read in light of
58 Section 98, and our view, of course quite clearly, is that
59 taking the whole picture and taking what the
60 Superintendent has approved, obviously there is some
61 disagreement about what that interpretation should be.

62 In any event, we also say in this broad, I
63 guess, comment to that initial point that's been made on
64 their part, that even if there was a profit, and there
65 wasn't, but if there was a profit, rates should still be set
66 respectively. We've heard Ms. Elliott say that, we've
67 heard Mr. Pelley say that, we know Mr. Suchar said it.
68 We've had some of the documentation that he has
69 produced here as well, and it's referred to in the
70 decision of the Board that they filed following that last
71 hearing, which I think is in March 2001, that they filed
72 the decision, and of course there's a reference, I think,
73 at page 18 of that decision. I'll just make brief mention
74 of it. I think it's filed in the same package of materials.
75 I'm referring to page 16 of the document that is the
76 Board's earlier decision, Mr. Chairman, and the bottom
77 of page 18, last fully paragraph. "While there may be
78 profits generated by Facility Association on behalf of
79 its members and regardless to whom these profits
80 belong, the Board agrees with the expert actuarial
81 evidence of Mr. Suchar and Mr. Pelley, these profits
82 should not be used in setting rates for the future." So
83 that's a decision that the Board has already examined
84 and a conclusion and a ruling they have already come
85 to.

86 So these are reasons why, I guess, the
87 statutory theory of break even in our view is not
88 important, because we have filed that way, there are no
89 profits. The Plan of Operation is being followed
90 precisely as it directs it to be followed. It's approved by
91 the Superintendent, and of course it's a prospective
92 exercise exactly, as Mr. Pelley, Mr. Suchar and Ms.
93 Elliott have all testified or as all have indicated to the
94 Board on various occasions, and the Board itself has
95 ruled that way.

1 Now, I think, you know, there are, there is a
2 prospect or possibility that at some point in the future,
3 none of us can speak to this until it occurs, but we do
4 accept the point that this issue may become important,
5 and, for example, the Consumer Advocate is right, and
6 if the population of Facility Association that's insured
7 through that mechanism is to continue to grow, for
8 example, this issue may have to be revisited. I don't
9 know. There may be a change in the views at the Board
10 of Directors of Facility Association. They may direct
11 their actuarial experts to produce a filing that has a
12 different objective. That could happen, I don't know.
13 And if it happens, then I guess the Board will have to
14 deal with it at that time, and that may be an issue at that
15 point, and I would suggest, if I may, that some of the
16 initial comments that we made in our own argument as
17 to the historical setting for this mechanism may become
18 important in that kind of discussion, as I say, should
19 that actually occur.

20 So basically I think we can leave that
21 discussion for another day. We have not filed, other
22 than a break even application. All these other features
23 suggest that the concern or the theory advanced by the
24 Consumer Advocate is not important in this hearing,
25 and if it becomes important in another one we'll deal
26 with it at that time.

27 Just coming back though to the point that has
28 been made and I've referenced already, that the
29 Consumer Advocate suggests that the number of
30 persons who are insured through this mechanism will
31 likely increase, that retention, I think he said, is
32 occurring and will continue to occur. Now, our
33 submission is that the likelihood of Facility
34 Association's numbers rising, I mean, that any
35 suggestion that that will occur is speculation. There is
36 no evidence to suggest it. Our position is basically
37 this, if rate adequacy is achieved through this hearing,
38 then it's certainly not intuitively sound, a sound
39 conclusion that this is what will occur, and as to
40 retention occurring and apparently will occur, is the
41 conclusion that he's made, the evidence is, I think,
42 completely to the contrary on the part of Mr. Pelley, on
43 the part of Mr. Hickey and on the part of Mr. Anthony.

44 Another aspect of this same, I guess,
45 suggestion on his part is that should that occur, the
46 profile of the population in Facility somehow gets
47 better, gets to be an improved population risk. Our
48 submission is that there is absolutely no evidentiary
49 foundation for that type of assertion. I guess all we

50 could say about it is that the people who are not
51 currently in Facility Association, who might under
52 some circumstance find themselves there, may be the
53 people, for example, with accidents and convictions
54 who are still insured in a regular market. I'm sure there
55 are some. Maybe if insurance companies restrict their
56 underwriting or tighten their underwriting processes,
57 they may remove some of the people that are insured
58 who fall into those categories who have been kept on
59 for whatever reasons might have been appropriate at
60 the time. Mr. Anthony discussed some of those kinds
61 of issues and so did Mr. Hickey. But if that happens,
62 you know, there may well be, there could well be, I
63 suppose, under some circumstances, a further
64 population shift into Facility, but it doesn't necessarily
65 follow that the risk pool, the profile will improve.

66 I guess one of the suggestions that has been
67 made through the evidence, Mr. Hickey, and Mr.
68 Anthony primarily focused on this, is that if you have
69 a non-standard market, what has been referred to as a
70 grey market in some of the discussion, that is active,
71 then there is a greater opportunity that those people
72 who might be otherwise moved into Facility for some
73 reason will find insurance in that market, and of course
74 for that market to work, this market has to work, and so
75 that's, there is a marketing aspect although our request
76 to this panel and to the Board generally is to approve
77 based upon actuarial evidence, based upon actual costs
78 that have been disclosed.

79 So as for the suggestion that somehow the risk
80 profile improves, we just, I don't know, I think that, I
81 just don't see any logic or evidentiary basis for it. I
82 don't see any intuitive explanation for it, so I submit
83 that there is nothing on which the Board could draw
84 that conclusion.

85 There was evidence that an actuary could
86 have led to, you know, to develop that type of view. I
87 guess it was open to the Consumer Advocate to bring
88 the Consumer Advocate's actuarial expert to do it and
89 he has obviously chosen not to. And, Mr. Chairman on
90 that point generally again, my recollection of all of the
91 evidence, been over it any number of times, I guess, I
92 don't recall anybody testifying that even with rate
93 adequacy, the population of Facility Association is
94 expected to grow. In fact, as I say, my general sense of
95 the evidence was that it's quite to the contrary.

96 Now, I want to turn to some of the specific, I
97 guess, line items in the actual document. There is a

criticism, I guess, I interpret it as, of Mr. Simpson. It's suggested he didn't have in-depth knowledge of the uninsured automobile premium, \$19, which was proposed. Our view on that is he didn't need to have that in-depth knowledge. We know from the evidence that Facility Association has a Rates, Rules and Rates Committee. It has a rate setting process that it follows when the actuary is engaged, and of course all that contact and communication is with the actuary. The actuary, Mr. Pelley, was here, and he gave detailed and particularized evidence on all of what took place there. So Mr. Pelley was fully familiar with this issue and, as he explained, very simply Newfoundland did not have the database, the credibility to the data that was required to properly get an indicated rate, an actuarial, I guess, indicated rate, and so they do what so often appears actuaries do, they go to some other database to use it as a surrogate for the same information, and that's what happened here. They used, as we know, the New Brunswick situation or the setting there, the arrangements there. It did have that background. They were satisfied that that was similar enough to this jurisdiction that it would apply, and that was the explanation for it.

There is a comment at page 18, and it appears again at page 21, and there are other comments of like, I guess, type, and that is this suggestion, it's in the last sentence of the middle paragraph, that "The requirement balances a creation of compulsory market for auto insurance's legislative mechanism designed to guarantee," and this is the part I'm interested in, "a fair and affordable supply of a product."

Now, our point on this, Mr. Chairman, is that it's important for all of the stakeholders that the rate be set fairly, and that's only one of the criteria that the Consumer Advocate advocates. He's also concerned about affordable rates and he talks about impact and people on fixed incomes and so on in different locations in this document, but we suggest that it's a fundamental principle of insurance, any insurance, that the premium charged must be commensurate with the risk that's undertaken, and it may not be what some people perceive as affordable, but it must be commensurate with the risk.

(2:00 p.m.)

In other words, it must be properly valued to compensate for the risk, so there is obviously a possibility in any number of settings where fair and

affordable will not be the same result. They may well bump into each other as propositions, and our point, and we've made this in our written argument, is that the Board has a responsibility to all the stakeholders to fairly price this product. If for some reason there are people who can't afford the product, that's a concern that we say belongs to another venue, not this one.

Just if I might mention that Ms. Newman in her brief did comment that there is no statutory framework that invites the Board to, I guess, engage in sort of social legislation of the sort that maybe the Consumer Advocate would like to see.

Now, there is a comment at page 22 dealing with the suggestion that Mr. Pelley or Eckler's have been historically inaccurate in their effort for the Facility Association in, I guess in their filings with the Board. The suggestion, he's been too high, in some years he's been too low. I think though that again Ms. Newman's memorandum correctly summed up really what we're dealing with here, actuarial judgement. It's a forward looking exercise as she says and I think as both the actuaries indicated themselves, and so, you know, they are highly trained experts, they can give reasoned expert opinion, but of course they're not clairvoyant. They cannot guarantee at the end of the year that the dollars will match exactly, so they certainly use their best expert judgement. They offer realistic expectation of what the future will bring and that's what we have had presented in this case.

I make, I guess, the observation as well, Mr. Chairman and Commissioners, that in every rate filing, as I understand it, Facility Association files a rate and the Board directs its actuarial experts to review it. So in the process there is always a second opinion and suggestion that these opinions are so grossly in error is, I think really isn't recognized, the whole nature of what actuaries do.

I recall in speaking, Mr. Suchar's evidence, in that previous hearing, I asked, you know, Mr. Suchar asked was he concerned with the fact that the outcome in that particular case, I guess, we were looking at surpluses over time on some particular occasions or periods of time, asked whether he was concerned that he as an actuary advising the Board had not been able to sort of say, well, you know, this won't happen or that was the Board in some way, you know, not exercising good judgement in his view because it has occurred. His view on it very clearly was, based on the

1 information that we had available when we did these
2 things, we acted in a good expert fashion, and the
3 Board did the right thing, so that's what we're faced
4 with here, is competing expert opinions and there is no
5 clairvoyant here. The Board has a job again to do what
6 they think is best to achieve a fair result, and, as I say,
7 that may not necessarily be in every case affordable.

8 And specifically I guess I would say that some
9 time was spent with Mr. Pelley on his last, previous
10 filing, the point being he was too low and, you know,
11 we're back now looking for a rate, recognizing that we
12 were much too low the last time. Well, of course, by
13 that observation Ms. Elliott was lower again. The rate
14 was approved, I think, at the rate that Ms. Elliott
15 proposed in fact, except for the modification for the
16 delay in implementation, so by that measure, you know,
17 Ms. Elliott was more incorrect than Mr. Pelley. I think
18 that again that doesn't recognize the nature of actuarial,
19 the actuarial, I guess, expertise.

20 Again though this does touch on the, I guess,
21 comments made that question Mr. Pelley's objectivity
22 and I find it a little peculiar that when the criticism that
23 he's high and he's low, that that suggests a lack of
24 objectivity. I mean, you would think he would be high
25 all the time if there was that bias or lack of objectivity
26 on his part. It's the same thing with the exclusion of
27 data points, which is part of the same discussion, I
28 guess, criticism at this point that he's excluded certain
29 low data points, and in the case of bodily injury, third
30 party liability, private passenger, he hadn't excluded
31 any high ones.

32 Well, you know, I think I might summarize Mr.
33 Pelley's view on this this way, he doesn't create the
34 data, he just works with it and analyzes it and decides
35 what is, in his opinion, actuarially appropriate in terms
36 of deciding what really is a reflection of where we're
37 going in the future.

38 Just by way of brief mention, the Consumer
39 Advocate took Mr. Pelley to the last filing. There were
40 ... he deleted high points in that filing. The fact that he
41 deleted high points in this filing is not a criticism, it's
42 simply that the data didn't require deletion, and that's
43 the point that you have to analyze in this whole
44 process, but again I will make this further observation
45 on that point. Ms. Elliott and Mr. Pelley were both
46 here, they put their opinions into reports, they got over
47 there on the stand and they gave their evidence and
48 they were questioned and cross-examined, and the

49 expert that was engaged for the Consumer Advocate is
50 not here, I presume it's because the Consumer
51 Advocate deliberately chose not to bring that person,
52 in other words, don't have the benefit of those, of that
53 other view.

54 At page 24 there is a, there is attributed, I
55 guess, to Mr. Pelley or Mr. Simpson perhaps, I'm not
56 sure, the suggestion that the population of Facility
57 Association will automatically decrease with rate
58 increases, and, in other words, the cause and effect,
59 immediate cause and effect. Mr. Pelley was questioned
60 on this very point and I think Mr. Simpson was as well.
61 I think it's unfair to characterize the evidence the way
62 that's suggested at page 24 of the Consumer
63 Advocate's argument, and really I think that all they
64 could say was, is that there is an expectation that over
65 time that will have an influence, so adequate rates won't
66 guarantee that people will wind up in Facility
67 Association. I guess though inadequate rates very
68 much help ensure that that will occur.

69 There is a discussion at page 31 about the
70 weighted average or the preference of the weighted
71 average on the part of Ms. Elliott and I guess the
72 theory that it is, it makes better sense or it's a better
73 practice. Mr. Pelley explained that in this particular
74 package of data, I guess, that he was looking at in this
75 case, there was a lot of randomness and so weighted
76 average may not always, doesn't always, give you the
77 most responsive measure, and of course the very idea
78 of a rule, any kind of a rigid rule, speaks against the
79 thing being successful. I mean, there may well be
80 circumstances, there could be changes in legislation,
81 for example, that would mitigate against paying much
82 attention to the most recent data because it might be
83 redundant by reason of legislation, so you can't have,
84 we submit, a rigid rule that says we'll always use a
85 weighted average. You must look at the data, you must
86 be an expert, you must understand what it is you're
87 engaged to do, and then looking at the data with your
88 expert training, decide what is appropriate in the
89 circumstances.

90 I guess if anything does tend to distinguish
91 Mr. Pelley and Ms. Elliott's approaches is that Mr.
92 Pelley does, I guess, tend to be more open in the view
93 that he will take as he looks at data. Ms. Elliott does
94 seem to be more inclined to have a set of rules that she
95 says, well, I'll use five years here, I'll use a weighted
96 average here, I'll always do these things, I won't exclude
97 any data as outliers in the loss development factor

1 selection. These appear to be rather hard rules that she
2 feels comfortable with. The question for the panel of
3 course will be whether that's the best approach in all of
4 the circumstances, and you've certainly had the benefit
5 of hearing them both extensively on this topic.

6 I want to bring up one point though that deals
7 with this issue of weighted average particularly and I
8 invite you to look at the transcript. You don't have to
9 look at it now but I'll just mention it for you. It's a
10 transcript for December the 19th at page 18, if you want
11 to note that if you'd like, and ...

12 MR. SAUNDERS, PRESIDING CHAIRMAN: What was
13 that again, Mr. Stamp?

14 MR. STAMP, Q.C.: December the 19th, Mr. Chairman,
15 at page 18, and I'm looking at the line 51, and I guess
16 down to the bottom of that right-hand column. I'll just
17 read bits of it. I'm speaking first, "Thank you. He also
18 indicated, and you hopefully can speak to this, that he
19 understood that the bulk of, the great bulk of the 12
20 percentage points which are attributable to the
21 difference in loss development views is made up by the,
22 in your case, the non-exclusion, I guess, of the data
23 points, and not by the weighted average which is also
24 a feature of your report in that area." Ms. Elliott says,
25 "Correct." So the point being of course that she agrees
26 that the weighting issue is not a large feature in this
27 discussion. It is the, in her case, the non-exclusion of
28 data that is the feature. So while she has a preference
29 for weighted averages, she acknowledges that the great
30 bulk of the difference of 12 percentage points, which
31 rests on this area, is linked to the exclusion of data
32 points rather than the selection of a weighted average
33 over a simple average.

34 And at the bottom of the same page, I ask her
35 specifically about this point. I say, "Although not
36 disagreeing with the five year average, you actually
37 prefer a five year weighted average." She says, "That's
38 correct." I say, "But it's not a disagreement as to
39 methodology. It's just your preference." She says,
40 "That's correct." So again it's not a case where she's in
41 any way critical of the use of a simple average by Mr.
42 Pelley. She is quite content that it's appropriate and
43 proper methodology. She just happens to prefer herself
44 a weighted one and she acknowledges that in this
45 particular context not much turns on it anyway.

46 There's a discussion at the middle paragraph
47 of page 32 about there being no rationale provided by

48 Eckler in their rate filing for the exclusions. I guess my
49 comment on this point is that the way this works, of
50 course, is that there is a lot of opportunity before we
51 get to this point in time, before the filing actually is
52 even made for the Board and the Board's actuary to
53 engage in discussion, and that is what happens, and for
54 the Board staff, I guess, to engage as well, and to
55 question, I guess, the theory and the approach that is
56 being taken, and of course obviously, quite obviously
57 in the evidence given at this hearing. Mr. Pelley gave
58 very specific and detailed discussion and explanation
59 of his rationale in every one of these areas where there
60 were loss development factors excluded. So the fact
61 that it's not in the filing, I don't know why that would be
62 of any consequence. It's certainly been well explained
63 in the process.

64 (2:15 p.m.)

65 On the point of the exclusion of certain loss
66 development data, I guess if I understand the position
67 taken by the Consumer Advocate, they suggest that
68 there is a, there's not a consistency in how its done.
69 You know, there's not a rule. Different reasons apply to
70 different circumstances, and of course, as I said already,
71 and I think as Mr. Pelley would acknowledge, that is the
72 very nature, he would say, of actuarial judgement. You
73 don't have a rigid rule. You look at each case
74 individually and you use your best actuarial judgement
75 to come to a conclusion. I think our view would be that
76 if you do adopt a rigid rule, eventually that rule, rigid
77 rule, will lead you into trouble. You have to have the
78 ability to exercise wide judgement as the circumstances
79 demand.

80 On the discussion at page 36, in the middle
81 paragraph, about the use of half year data and I guess
82 annual data, reference there to, the reference to the
83 approach followed by Mercer as being the approach
84 used by the actuary for IBC, I'll invite the Consumer
85 Advocate to tell me where that was in the evidence, I
86 couldn't find it, that the IBC does anything in the way
87 of trending analysis following the same approach that
88 Ms. Elliott did. I certainly know that if he's talking
89 about the publication of data, it's published half yearly,
90 but if there is actually an analysis that was explained
91 about in the evidence, I didn't get it and I'd be happy if
92 he would explain that to the panel.

93 I will say though, we'll just take you for a
94 moment to evidence of Mr. Pelley on this particular
95 point. This came up in the trending issue and, or the

1 trending discussion, and this is at the transcript of
2 December 12th at page 45 and at line 55, Mr. Chairman
3 and Commissioners. At this point the Consumer
4 Advocate is questioning Mr. Pelley about, I guess, the
5 methodology and so on in, and particularly about the
6 half yearly data. Mr. Pelley says, and this is because in
7 the earlier filing they had used some aspects, half year
8 data because they were coming forward at a point in
9 time where the half year data was available. He felt that
10 the Board would want to have the most current data
11 available and he used that half year data in certain
12 applications, I guess.

13 The point that I'm referring to is at line 55. Mr.
14 Pelley says, "We pooled it in, not specifically for trend
15 but for loss development, and the estimate of the
16 provincial rate level change, yes." Mr. O'Flaherty,
17 "And did the methodology, and I'll call it that for now,
18 did that allow you to adjust for seasonality?" Mr.
19 Pelley, "The only ... it didn't allow us" ... Mr. O'Flaherty,
20 "And let me rephrase the question. As a result of using
21 that approach, did you adjust for seasonality?" Mr.
22 Pelley, "In the places where we needed to, we did." Mr.
23 O'Flaherty, "Okay. So then I take it in your opinion
24 then the use of the half yearly data and adjusting for
25 seasonality was a reasonable approach in 2001." Mr.
26 Pelley says, "Well, in 2001 the place where we needed
27 to make that adjustment was not in trend but rather in
28 the analysis of the provincial rate level requirement, so
29 if you're inferring some relationship back to my
30 previous comments about the use of half year data, it
31 wasn't in the same place." So I make that point as well.

32 MR. SAUNDERS, PRESIDING CHAIRMAN: What was
33 the reference again on that, Mr. Stamp, please?

34 MR. STAMP, Q.C.: Yes, Mr. Chairman, December the
35 12th, page 45, and line 55 through 76.

36 MR. SAUNDERS, PRESIDING CHAIRMAN: Thank
37 you.

38 MR. STAMP, Q.C.: And I'm at the bottom of page 39 of
39 the Consumer Advocate's argument. In this area there's
40 a discussion about the negative 6.8 percent frequency
41 trend for comprehensive, and no evidence to suggest
42 that the selection makes sense intuitively. Well, I
43 guess the point that Mr. Pelley was making in his
44 evidence was that it made in his mind very good sense
45 intuitively and there was graphic, I guess, clear graphic
46 indications to support that. In fact I'll invite you to look
47 at that particular graph, Mr. Chairman. That's located,

48 what's being discussed there is the, in the actual filing,
49 Appendix A, Tab 5, and specifically the chart at 5.32,
50 5.32. That chart is the frequency trend for
51 comprehensive coverage, private passenger, and the
52 way the chart is depicted, Mr. Pelley went back to, I
53 guess, 1990, and we show the downward slope of the
54 data in the graph and we show the regression line
55 through it, regression line continues to go lower after
56 the last data point. Mr. Pelley decided that it didn't, he
57 wasn't satisfied that that was correct. His expert
58 opinion was that he should look and recognize that the
59 most recent data points, I think there was one, two,
60 three, four, yeah, some six of them, that he saw which
61 was fairly flat, and he wasn't prepared, he said, to
62 accept that this trend would continue to decline with all
63 that flat recent history.

64 The criticism that is made, I guess, of that
65 theory by Ms. Elliott, and it's a horse that the Consumer
66 Advocate likes to ride, is that once you have a
67 regression that shows in this case minus 6.8 percent,
68 you're bound to follow it. You should follow it
69 regardless. The thing that's intriguing about this
70 particular coverage in this particular example is the fact
71 that the period of flatness is six years, and if you look
72 then at the report, if you look at Mercer's report, you
73 know, in respect to this filing, and I'm referring to page
74 14 particularly, and at page 14 this is a, it's dealing with
75 the private passenger filing, I guess, and it's dealing
76 specifically with loss trend rates and there's a list of
77 issues that Ms. Elliott raises that she has concerns
78 with. One of those issues is the number of years of
79 historical data included in the regression.

80 And if you turn to page 14 then, this is where
81 I'm taking you on this point, in the bottom paragraph
82 she's discussing her preference for time periods. "We
83 believe that a more appropriate balance between
84 stability and responsiveness of trend factors would be
85 achieved by giving less consideration to the experience
86 of older years, particularly for the coverages involving
87 vehicle damage. For bodily injury we recommend using
88 a ten year accident year period spanning 1992 to 2001.
89 We would also find it appropriate to use a ten year
90 accident period for accident benefits, however, due to
91 the changes in the coverage implemented in 1994, we
92 recommend an eight year accident period spanning '94
93 to 2001 be used," and this is the part that I really am
94 interested in, Mr. Chairman and Commissioners, "for the
95 property damage tort, collision and comprehensive
96 coverages, we recommend using a ten year accident
97 period spanning 1992 through 2001 in estimating the

1 severity trend and," I emphasize this bit, "and a five
2 year accident period spanning 1997 through 2001 in
3 estimating the frequency trend."

4 So really, you know, very peculiar point that is
5 evident here is that you have six or so data points, six
6 years of data, as Mr. Pelley says essentially flat. If you
7 do a regression through that, we don't have such a
8 regression because he uses back in this case to 1990,
9 but if you were to do a regression only in a flat period,
10 I think even the non-actuaries among us, certainly me
11 included, would say, well, that's going to look a bit
12 more flat, I think. So on the one hand there's a criticism
13 that he's used too many years, and then when the
14 recent years, in fact more years than even is
15 recommended by Ms. Elliott, shows a flat trend, they
16 still nevertheless want to insist that the regression and
17 the, I guess, negative result minus the 6.8 percent or
18 whatever it was, that's established by that long term
19 regression, must be used for this rate filing. I mean, it
20 really is having it both ways, critical of the length of
21 time but insisting on the regression and the result
22 achieved using that long term regression, wanting to
23 use a shorter period but not appearing to recognize that
24 the shorter period is, in fact, flat. That to me struck me
25 as one of the more disingenuous types of arguments
26 that had been advanced that is a criticism of Mr.
27 Pelley's approach.

28 Go to page 42, if I may, and that's dealing with
29 the issue of the CLEAR. I want to make the point here
30 simply this, Mr. Pelley mentioned this in his evidence,
31 it was a board in this case, not this panel obviously but
32 the Board in a general sense, that requested or directed
33 that the rate that the CLEAR filing, the CLEAR,
34 implementation of CLEAR, be done in the context of a
35 rate application, so it's really simply complying with a
36 request from the Board itself. And again this is ... at the
37 bottom of that page I might just mention to you that
38 that's again a reference where this suggestion is that
39 retention is occurring and will continue to occur. I just
40 don't know where the evidence is that supports that
41 suggestion or assertion. In fact, as I say, I thought it
42 was amply demonstrated to the contrary that retention
43 is a major issue in Facility Association mechanism
44 insurance. Mr. Hickey and Mr. Anthony both, you
45 know, explained just how significant the turnover was.
46 I think, I'm just going from memory now, but I thought
47 Mr. Hickey said, you know, a year later half the people
48 will be gone.

49 I want to just make ... in the discussion on
50 surcharges and the discount, surcharges are dismissed
51 by the Consumer actuary (*sic*) as being without
52 actuarial foundation, and so not to be, the theory is that
53 they should not be approved. Of course we agree they
54 don't have an actuarial foundation but they have an
55 intuitive, I guess, explanation, and that is that people
56 who are, maybe in this case it's the 45 percent or
57 whatever that number will be, who have the accidents
58 and convictions, but it's a question of surcharging
59 those people who are most likely, I guess, or at least in
60 that context, affecting the rate cost, and I make the
61 observation that there is no actuarial evidence or data
62 to support the clean driver discount either. That
63 however is recommended. But again it's the same
64 intuitive argument, that the other side of it, that 60
65 percent or whatever it was that the Consumer Advocate
66 has focused on will have the benefit of a clean driver
67 discount. Of course as Mr. Pelley explained, this is an
68 integrated package and if you change one aspect of
69 that integrated package, you change the off balance
70 calculations that have been done and rate has to be
71 found some place else if it doesn't get achieved through
72 the mechanism of this integrated package to the extent
73 that this is already built into the application.

74 Mr. Chairman, I want to just take a few
75 moments on the issue of, I guess, timing, and this
76 comes up in the unallocated loss adjustment expense
77 provision, and in a general sense, I guess, as well,
78 because the question was should we go back and get
79 another study for CLEAR, should we do some further
80 review of some other aspect of the data to try and bring
81 it up to date. As Mr. Pelley explained, Facility
82 Association follows a lengthy process to request rate
83 adjustments and in a sense, I submit to you, they're sort
84 of chasing the changes as this goes along. They
85 clearly require rate adjustment and but because of the
86 way this works there is a real risk, we suggest, that they
87 never quite catch the peaks. There's always a
88 reluctance, I guess, to see the rates climb and that
89 reluctance may well result in, as I say, in Facility never
90 reaching the peaks, but there is, I guess, a great relief
91 when rates should happen to fall because there's no
92 objection to it, I guess happy to push it along. So, you
93 know, we probably may reach the bottoms a lot easier
94 than we reach the tops in terms of Facility experience,
95 and the concern that Mr. Pelley has mentioned about
96 this is, I guess, in terms of rate adequacy, is the, and
97 some of the other witnesses as well, the disruption that
98 occurs in the marketplace when you don't have proper
99 rate adequacy for one element, an important element,

1 and this of course, as they discussed, is perhaps a real
2 problem in that non-standard market, the grey market
3 that has been discussed so much as well.

4 I guess we would say is that, and if you look
5 at 1985 when this Facility first was sort of statutorily
6 created and look at today's rates, and forget all the ups
7 and downs that occurred in the way, you know, the rate
8 today is certainly higher than the rate in 1985, I would
9 submit, and I suspect that the rate in 2013 would be
10 higher than the rate in 2003. It's generally upward. So
11 in that context we submit that Facility is always chasing
12 these changes.

13 (2:30 p.m.)

14 Now, an immediate concern, we clearly know,
15 we submit, Mr. Chairman and Commissioners, that
16 Facility rates are presently substantially inadequate,
17 and if we just go back as far as only November when
18 Ms. Elliott did her report, she recognized at that time
19 that they were substantially inadequate, so they're
20 inadequate today, (inaudible) tomorrow, inadequate
21 next week. Every policy that's sold in Facility while this
22 process is ongoing is sold at an inadequate rate, and
23 we know that the Board is going to hear this final
24 aspect of this hearing and then ultimately rule, and I'm
25 sure they'll do that at their earliest convenience, but
26 there will take time obviously to do that and we know
27 that there's something like 105 days of time even from
28 the date that the Board is able to give a decision, so
29 we're looking at, you know, sort of optimistically
30 sometime in June would be the earliest that we could
31 possibly expect, even if you were to give a decision
32 next week, I think June would probably be the earliest
33 time, so that's a real feature to recognize, and, as I say,
34 Mr. Chairman, Commissioners, it's not just this four
35 percent that this board has to concern themselves with.
36 You have all of these stakeholders to be concerned
37 about.

38 You've heard this discussion about cross-
39 subsidization and we submit it's a very real concern,
40 and the evidence of the people who are in the business
41 and who operate insurance companies have confirmed
42 that, so the longer it takes to have rate adequacy, the
43 greater the concern, and, as I say, in this case it perhaps
44 underlines again this issue of chasing the change that
45 I'm suggesting occurs.

46 I want to just have a quick moment or two on
47 the chart on page 50, Mr. Chairman. To the extent that

48 the winter of 2000/2001 is a feature here, I think we've
49 discussed that in, you know, considerable detail in our
50 written argument and I don't want to go into all of that.
51 You know, you've already had the benefit of reading
52 that. I'm sure you're comfortable with what we think, at
53 least understanding what we're suggesting. But I do
54 want to look just at these numbers for a moment, just to
55 make these observations for you.

56 In February 2001, we have 484 accidents
57 according to, I guess, I didn't compare these numbers
58 with the actual exhibits, but I'm sure they're right, 484
59 accidents according to, I guess, Sergeant Hill. It's the
60 worst accident month in the period December to April,
61 and yet it's far from the worst snowfall. That month had
62 122.6 centimeters of snow, so a good bit lower than the
63 month of January and very significantly lower than the
64 month of December, yet it's got the highest accidents.
65 Now, if the worst winter is going to work the way the
66 logic suggests it's going to work, you would expect that
67 would, 173 centimeters, that's where you'd have the
68 most accidents. We don't see it.

69 If you look at March 2001, the actual snowfall
70 is 45.8 centimeters. It's actually, Mr. Chairman and
71 Commissioners, lower than the average of 54, and yet
72 the accidents for that month are higher than the
73 average. December, as I've mentioned already, has the
74 highest snowfall of the three months, the highest
75 snowfall over the whole month, all those months. It's
76 got the lowest accident rate for all of the, I guess, worst
77 months, December, January and February. It's got the
78 lowest accident rate. So I guess my point is, where's
79 the consistency and therefore where's the logic, where's
80 the explanation that this all fits? I submit to you that
81 Mr. Pelley's concerns, and I won't go through all those
82 because they're all laid out in our argument, really are,
83 you know, further underscored by these kinds of
84 inconsistencies.

85 I'm almost done, Mr. Chairman. I just might
86 point out that I've filed, and I don't intend to take the
87 panel through the cases, filed four cases dealing with
88 the issue of adverse inference, and we've made the
89 point in our written argument that an actuary was
90 engaged. Now, the Intervenor's submission, I don't
91 know where you have that, I just have my own copy
92 and it's sort of put together my own way, but paragraph
93 seven of that Intervenor's submission says, "The
94 Intervenor will rely upon the opinion of an expert in
95 actuarial science to support the position of the
96 Intervenor, in particular on November 14th, 2002, the

1 firm and specific individuals described in Schedule B to
2 this submission were retained to advise the Intervenor
3 and to prepare an expert report in respect of this
4 matter."

5 The point we make, and which was made in our
6 written argument, is that this board is entitled to draw
7 an adverse inference from the fact that that expert report
8 was not provided to you, and these cases that I've
9 provided for you, as I say, I don't intend to, I'll just
10 maybe make some mentions, and this will probably be
11 in the transcript, I guess, of this process so that you
12 needn't make detailed notes of it, but *Lavest and Comeau*
13 (phonetic), there's a discussion at page 427 and 432
14 about the very issue I'm talking about, the entitlement
15 of the court, or tribunal in this case, to draw an adverse
16 inference when evidence was available and for some
17 reason, unexplained, the party with whom the evidence
18 resided didn't provide it.

19 In *Edison and Freake*, Newfoundland decision,
20 I would reference paragraph 22 at page 8, and paragraph
21 23 as well perhaps. In the *Butler Estate* decision I would
22 reference pages 4 and 6. At page 4, paragraph 13 I'm
23 referring to, and at page 6 it's paragraph 20. And the
24 *Scotia Fuels* decision, page 13 and 14 and 15, I think, are
25 the areas where you'll see the most discussion on this
26 topic, particularly the conclusion at page 15 and 16. I
27 think it's at paragraph 24. "It's well recognized that
28 where a party witness fails to present evidence which
29 is in the power of the party witness to give, then such
30 failure justifies a court drawing the inference that the
31 evidence would have been unfavourable to the party to
32 whom the failure was attributed." So I make those
33 points.

34 Now, the next point and final point, Mr.
35 Chairman, I want to make is again tied to the
36 Intervenor's written submission of 15 November, and
37 the reason I raise this, Mr. Chairman, is that the
38 amendment, there was an amendment to the *Automobile*
39 *Insurance Act* to add Section 61, and the amendment, I
40 think, received royal assent, is passed and received
41 royal assent. Assent was effective December the 16th,
42 2002. I'm just going to read for you Section 61, Sub 1.
43 "Lieutenant Governor in Council may appoint, upon the
44 terms and conditions Lieutenant Governor in Council
45 may determine, a consumer advocate for the purpose of
46 a matter before the Board under this act." And then I'll
47 read (2) as well. It's only a short section. "The cost
48 relating to the Consumer Advocate shall be borne by
49 the Board."

50 That's the new section, received royal assent
51 on the 16th, I think I said, of December 2002, but there
52 has been no order-in-council appointing the Consumer
53 Advocate pursuant to Section 61, or at least we can't
54 find it, and we've contacted the office of the legislative
55 council to inquire of this issue and we're told that an
56 advocate had not yet been appointed. That call was
57 made yesterday, or day before yesterday. So I don't
58 know if Mr., if the Consumer Advocate can offer
59 something on that point, but I do want to address and
60 comment on paragraph one of the submission, and that
61 says, "The Intervenor is a consumer advocate
62 appointed on an interim basis by the Department of
63 Government Services and Lands on November 13th,
64 2002, to represent the province's consumers at public
65 hearings in this matter which are scheduled to
66 commence on December 11th, 2002. The Intervenor's
67 interim appointment is expected to be confirmed in the
68 immediate future upon enactment of Bill 9, an act to
69 amend the *Automobile Insurance Act*, a copy of which is
70 attached to Schedule A to this submission. I've just
71 referred you to the section, Mr. Chairman.

72 So perhaps the Consumer Advocate can
73 enlighten us on this appointment but we were told
74 yesterday that it had not occurred, and so if it has not
75 occurred, then all I can suggest to you is this, whatever
76 status the Consumer Advocate has here, it is not the
77 status of a consumer advocate under Section 61 of the
78 *Automobile Insurance Act*.

79 (2:45 p.m.)

80 Thank you, Mr. Chairman. That's all I have to
81 say and obviously the extent that I will speak again will
82 depend on rebuttal issues that may arise.

83 MR. SAUNDERS, PRESIDING CHAIRMAN: Yes.

84 MR. STAMP, Q.C.: Thank you.

85 MR. SAUNDERS, PRESIDING CHAIRMAN: It's
86 quarter to three. Commissioner Powell, do you have
87 any questions that you wish to put to Mr. Stamp?

88 COMMISSIONER POWELL: No. I thought he did a
89 very good job. I got a lot of food for thought but no
90 real questions, thank you.

91 MR. SAUNDERS, PRESIDING CHAIRMAN: Okay.
92 Commissioner Martin? No? I have just one, I think it
93 was, and I had marked that earlier before you started,

1 and that is in relation to your comment at page four of
2 your written argument. I think I know what you
3 intended or what you mean, but I just wanted to hear
4 you confirm, I guess, what my thought was on it, and
5 that is in paragraph 2 you use the phrase, "The entire
6 cost of those member companies," and then in the third
7 last line on that sheet you use the phrase, "The cost of
8 capital," and I'm wondering if there's a relationship that
9 you're tying between the two here in terms of the entire
10 cost of the member companies including the cost of
11 capital.

12 MR. STAMP, Q.C.: Well, Mr. Chairman, I actually,
13 perhaps I should have used more to separate those two
14 discussions, because the entire cost that I'm referring to
15 in the earlier point is really those costs which have
16 been well, I guess, discussed. I'm referring specifically
17 to the premium taxes, health levies, some of these
18 association dues that have been referenced, and I think
19 basically there's been a discussion at 5.5 percent or
20 whatever that number ...

21 MR. SAUNDERS, PRESIDING CHAIRMAN: Right.

22 MR. STAMP, Q.C.: ... would be, so the discussion on
23 the cost of capital or the return on equity and so on,
24 that's simply a point that I wanted to make that that's a
25 cost, I say it's a cost, but it's not one of the ones that is
26 recognized when Facility directs its actuaries to
27 develop a rate, so it's not here as part of that cost,
28 although I think, you know, if I were some of the 96
29 percent, and I am in fact, it disappoints me that this is
30 the way it is in some ways.

31 MR. SAUNDERS, PRESIDING CHAIRMAN: Yes, okay.
32 Go back then to your opening comments today and
33 that's in respect of the zero profit discussion ...

34 MR. STAMP, Q.C.: Yes, sir.

35 MR. SAUNDERS, PRESIDING CHAIRMAN: ... that
36 we've had over the past three years, I guess.

37 MR. STAMP, Q.C.: Yes.

38 MR. SAUNDERS, PRESIDING CHAIRMAN: Two
39 different occasions. And I'm particularly interested in
40 one of the remarks you made but you didn't go far
41 enough to my mind, and that is I think you were saying
42 that whether or not a profit provision is included in
43 future rates is entirely up to the Board of Directors. Is
44 that what I understood you to say?

45 MR. STAMP, Q.C.: In the view that we submit, Mr.
46 Chairman, is this, the Consumer Advocate has
47 suggested that there is a legislative prohibition or an
48 enactment ...

49 MR. SAUNDERS, PRESIDING CHAIRMAN: I'm going
50 to ask him about that.

51 MR. STAMP, Q.C.: ... that says these people who are
52 insured in this mechanism, they must as a right have
53 this on a break even basis, and we say, no, absolutely
54 not.

55 MR. SAUNDERS, PRESIDING CHAIRMAN: Okay.

56 MR. STAMP, Q.C.: And we say that although the
57 Board, the Facility Board, has determined to proceed
58 this way, and over a long time, there's no guarantee that
59 that will, I guess, continue indefinitely, and these
60 things will be determined, I guess, by the circumstances
61 that present themselves as things unfold, but for now
62 that's exactly how it's been filed, but not by reason of
63 legislation, Mr. Chairman, if I may say that.

64 MR. SAUNDERS, PRESIDING CHAIRMAN: Okay,
65 alright. That clarifies it. It's ten to three and I think I'd
66 need a break or I need a break at this stage if no one
67 else does. I drank too much water again before I came
68 in. So if we can break now until, say, 3:05, we'll then
69 continue with your final argument. Are there any
70 questions that you had of Mr. Stamp, by the way, or
71 anything for clarification before you commence, or was
72 there anything that you wanted to ask him ... no, I
73 guess not.

74 MR. O'FLAHERTY: Nothing springs to mind.

75 MR. SAUNDERS, PRESIDING CHAIRMAN: Nothing
76 springs to mind, okay. How about you, Ms. Newman?

77 MS. NEWMAN: No.

78 MR. SAUNDERS, PRESIDING CHAIRMAN: No.
79 Alright then. I guess we're clear sailing then in terms of
80 your oral argument when we return at 3:05. Thank you.

81 *(break)*

82 *(3:10 p.m.)*

83 MR. SAUNDERS, PRESIDING CHAIRMAN: Okay, Mr.
84 O'Flaherty, when you're ready.

MR. O'FLAHERTY: Thank you, Mr. Chairman. Mr. Chairman, and Commissioners Powell and Martin, I'd like to say at the outset that on behalf of myself and my partner, we'd like to thank the members of the Board for their attention to the evidence and our arguments during the hearing, and also to express our appreciation to the Board staff for their assistance and professionalism. This has been our first opportunity to practice before the Board, and it's, despite the timeframe in which we were thrust into this matter, it has certainly been an enjoyable experience and a privilege.

There's an accepted notion, I would say, in litigation, that as the day draws to the end there's less attention that can be, and capacity in a tribunal to listen to arguments, and I'm certainly cognizant of that. I would say, unfortunately, I do have to go to a certain depth into the evidence. In my submission, that's in the best of my client, and I hope that you'll bear with me if from time to time it may seem to drag a little bit.

I will try to be, and I will attempt to be as efficient as possible today in making these submissions. I want to make some initial comments about the role of the Consumer Advocate at this hearing. I want to then address the relevant statutory scheme, bearing in mind the submission of Mr. Stamp that it may or may not be an issue that the Board wishes to consider in its final decision in this matter, but I will be making some submissions on this oft debated issue of whether or not this scheme contemplates a specific provision for profit, and whether or not that is, by means of administrative (inaudible) or direction, as Mr. Stamp suggests, or whether it's as a result of the law in this province, as I suggest.

I will then review briefly the evidence of the lay witnesses, the people who have come before the Board and given submissions. I think it's only fair to review what they have said. And in terms of the actuarial evidence, I will restrict myself to really two main issues which I've identified as the issues for us from the outset, and those are the issue of the loss development factors, and what has been identified as a consistent system of selecting loss development factors that tend to be the lowest, well they're always the lowest, and that tend to drive up the indicated rates, and therefore the rate, the premiums for the people that I represent.

The second issue is going to be the issue of the winter of 2000 and 2001, upon which we called a considerable amount of evidence. I would then conclude with just briefly touching on some rating issues, and I'll make some comments on the issues raised by Mr. Stamp in the oral submissions.

In terms of the role of the Consumer Advocate, it is to represent the ratepayers that are directly affected by this application. I have actually been asked a question about this by Mr. Simpson on the stand ... who do you represent? Do you represent the four percent in this case? That is who I represent here. I would point out, following up on the last point made by Mr. Stamp, that I do so in accordance with an Order in Council, and I do so in accordance with a legislative provision on Section 61 of the Act. I don't have a copy of the Order in Council with me, but there is an Order in Council, and I'll address that in costs, on the issue of costs. I have asked my friend, Board Counsel, for a copy of it, however, I'll leave it to her to determine whether or not that will be made available to myself and to Mr. Stamp in this process.

Now, at times in the hearing process, and including when I read the argument for the Applicant, the suggestion seems to be made that the proper role of the Consumer Advocate is to represent all of the consumers in the province, because somehow the suggestion is that all consumers will be affected by this application, and that by myself and my partner striving to ensure that the rates for the four percent are fully justified, we are somehow doing a disservice to the 96 percent. I think I should address that, take that issue on head-on.

It does need to be addressed, and I will make it perfectly clear, lest there is any confusion in this regard, that the role of the Consumer Advocate in this hearing is to represent the four percent of consumers in this province who presently utilize the Facility Association mechanism, or will be required to utilize the Facility Association mechanism in the policy period that will commence on the effective date that's set by the Board.

(3:15 p.m.)

Now, that may be five percent, that may be six percent, that may be three percent, but those are the persons who are the ratepayers, and those are the persons that we represent at this particular hearing.

1 Now, who are these people? Well, they're
2 simply the ratepayers, they're the men and the women
3 ... and young men and women, who put their hands in
4 their pockets to pay the premiums that go to service
5 this particular mechanism.

6 I believe that it's important to address this at
7 the outset because there are two main issues that flow
8 from this. The first is this issue or spectre of cross-
9 subsidization that's been raised on a number of
10 occasions. Now, the suggestion has been made that if
11 something less than the full rate is ordered ... sorry, as
12 requested is ordered by this Board that the good
13 drivers, or which has later been modified as a result of
14 the evidence, to the best drivers ... will somehow be
15 forced to pick up the slack for the people that I
16 represent.

17 The system, however, under the law of this
18 province, is that it is the members of Facility
19 Association by law who are required to fund the
20 shortfall. It is not the general population of
21 Newfoundland and Labrador or the other consumers
22 that make up that population who fund the shortfall, it
23 is the insurance companies who make up the Facility
24 Association. So make no mistake about that, that is
25 what the law says.

26 I would ask the Clerk just to pass up a case
27 here that we'll be filing, which is a decision of the
28 Ontario Court of Appeal, which is ... Facility
29 Association is not a body that's been, as far as we can
30 determine, in court ... they have a copy of it, they have
31 a copy ... that has been before the courts on very many
32 occasions, but this is one occasion on which they
33 have.

34 And the Ontario Court of Appeal, in this
35 particular decision, which is the Toronto Transport
36 Commission Insurance Company decision, and it's not
37 in the context of a rate filing, it's in the context of
38 collecting from one of their members. At paragraph
39 four of this decision, the Ontario Court of Appeal states
40 as follows: "The Act requires TTT Insurance, like
41 every licensed automobile insurer, to be a member of
42 the Facility Association and to help pay for it. The
43 Facility Association arranges for high risk drivers who
44 cannot otherwise do so, to obtain automobile insurance
45 with certain designated automobile carriers. It also
46 funds the costs of that insurance to the extent that
47 these costs exceed the premiums charged to the high
48 risk drivers". And as we know under the law in this

49 particular province, those costs are passed on, if there
50 is an excess, back to the members of the Facility
51 Association.

52 The second issue ... sorry, I guess to clarify
53 my point on this, Mr. Chairman and Commissioners,
54 there is no requirement for the 96 percent to fund any
55 shortfall. I would characterize this as essentially a
56 divide and conquer argument. Whatever ... whether or
57 not those members, if they did find a particular ... if
58 there was a shortfall in the rates, would be attempting
59 to directly recover those funds from the 96 percent is a
60 separate issue, and I would submit that is the issue
61 which is of pure speculation.

62 Mr. Simpson was unable to tell us if this has
63 ever happened in the past when I asked him about this.
64 Ms. Power and Mr. Anthony testified as to how this
65 might work indirectly, and I will address that later when
66 I get to their evidence. But I think it's important to
67 remember that if there has been any cross-subsidization
68 at all in this jurisdiction, it has flowed from the four
69 percent to the 96 percent, if that even happens, because
70 there's no evidence before the Board that can really tell
71 us how that might happen.

72 Now, according to Mr. Morris, this is illegal,
73 it's not permitted to happen. The insurance companies
74 are not entitled to do that. That's not my issue here
75 today. My issue today is the four percent of the people
76 that fund this particular process that pay for, at the end
77 of the day, myself, Mr. Goodland, Mr. Stamp, Mr.
78 Whalen, Mr. Pelley, everybody involved here, those are
79 the four percent that I am here to represent.

80 And that leads me to the second persistent
81 theme in this particular application that I want to
82 address head-on, and I refer the Board to the opening
83 motion, and that is the protestations of counsel that
84 information is not available to the Applicant, or that it
85 would be expensive to obtain. I will also remind the
86 Board of the evidence of Mr. Simpson, that somehow
87 the process in this jurisdiction is more onerous than it
88 should be, or inappropriate, and that in other
89 jurisdictions they're able to blow in and out in a day
90 and have rates approved.

91 I also note the submission regarding CLEAR
92 and how a further dislocation study might be somehow
93 expensive or onerous. And I also note the argument, or
94 the point that's made in the argument in criticism of our

1 efforts here regarding the adverse inference, that
2 expense was not an issue in this particular hearing.

3 Well, all of those matters, Mr. Chairman and
4 Mr. Commissioners, seem to me to ignore a fundamental
5 perspective, and that is that the people who are actually
6 paying for this are the four percent. Those are the
7 people who pay for this entire process from the outset
8 when the rates are set, and thereafter when we're
9 involved in this process, that is essentially ... according
10 to the evidence of Mr. Simpson, each jurisdiction pays
11 its own cost of the hearings, and that's what's
12 happening here. So those are the people that have
13 always paid in this jurisdiction to have a separate rate
14 set, and I am the person who is appointed to represent
15 them, and properly so under the legislation.

16 Now, I would therefore submit on behalf of the
17 ratepayers that this is the mindset that needs to be
18 scotched (*phonetic*) once and for all, and it refers back to
19 the point, Mr. Chairman, that you raised. The
20 perspective, of course, of the Applicant is that it has
21 the right to a particular rate under the legislation, and it
22 has a right to recover particular costs. Well, I would
23 ask you to consider whether or not ... look at it a little
24 bit differently. Actually the right is for these particular
25 persons who are paying for a separate rate to be set for
26 them, on the basis of expensive actuarial judgement,
27 whether or not it is those persons who are entitled to a
28 rate that is set on a zero profit basis. That's the
29 perspective that I hope to bring to the Board in all of
30 the submissions that I bring here today.

31 Now, I therefore, in that light, I therefore
32 applaud the Board in requiring further evidence to be
33 called, and information be provided upon the
34 reasonable request of the ratepayers, because at the
35 end of the day, this hearing is no different than any
36 other ratepayer hearing that the Board does. It's about
37 rates that will be charged to consumers, and whereas
38 here the Board orders a public hearing into those rates,
39 it is fully appropriate for the Applicant to respond to
40 those requests.

41 The Applicant must provide that information,
42 and it should, and this follows up on your point
43 throughout this process, Commissioner Powell, it
44 should provide complete and understandable financial
45 statements which explain what it is it is doing with the
46 money that belongs or that comes from these particular
47 people. I don't think that's an unreasonable request at
48 all, and I think it's something from a procedural

49 perspective that the Board should address. People
50 should know how much does this process cost? What
51 are we paying to do this? Because at the end of the
52 day, they are footing the bill for it.

53 Again, and this harkens back to my
54 submissions regarding Mr. Simpson. I believe it is also
55 incumbent upon the Applicant to provide witnesses, be
56 they underwriters, be they rating professionals, be they
57 claims persons, who can explain the particular
58 proposals that they bring before the Board that say at
59 the end of the day we want more money from those
60 people. I don't think that's an unreasonable request at
61 all. So from my perspective, I don't think this is a
62 circumstance in which unreasonable requests are being
63 made, or that anybody is being put to added expense.
64 I believe the expense is borne by my clients and at the
65 end of the day, if it takes a 14 day hearing to get the
66 right answer, to get the correct number, well then
67 they're well served by that. They're better served than
68 having a one day, blow in and out, a conversation, cup
69 of coffee, and Mr. Simpson arriving back in Toronto
70 and getting an email from the Alberta Board. I think
71 this is the appropriate process, and I think if my clients
72 were asked, and the feedback seems to be positive, they
73 would say they want to know what the answers are to
74 these important questions.

75 So I would urge the Board then to continue
76 along this line, to ignore this spectre of cross-
77 subsidization, and to bear in mind the perspective that
78 I'm attempting to bring to the Board's deliberations
79 which is a different one, I concede, from that of Mr.
80 Stamp and Mr. Whalen, but I believe at the end of the
81 day it is the correct perspective that the Board should
82 bear in mind.

83 Now, what's our theory of the case? Well, our
84 theory of the case is straightforward. We have
85 suggested from the outset that the rates that are being
86 proposed here will end up in excess, sorry, excess
87 beyond the rate level needs of the Facility Association.
88 We have submitted from the outset that the evidence
89 would demonstrate that there is a consistent pattern of
90 making selections and assumptions that lead to higher
91 rates. That focus is primarily is on the loss
92 development factor section. It also touches though, as
93 well, on this issue of just selecting a zero percent
94 frequency rate for the comprehensive coverage.

95 I don't intend to delve into all of the areas. I'm
96 going to focus right in on the loss development factors

1 on those particular, in that particular aspect of our case.
2 In terms of the second part of the case that's important,
3 from our perspective, and our theory of the case has
4 been that the winter of 2000 and 2001 was an
5 aberration, and caused accidents far beyond what are
6 normally experienced in this jurisdiction, and should
7 not be taken into account for the purposes of
8 projecting further rates.

9 Now, it is my submission that the evidence has
10 demonstrated that both of these points are well
11 founded on the evidence, and that the results would
12 therefore be, if you approve the rates as presently
13 proposed, that in 2003 my clients will pay more
14 premiums than they are required to. They will pay
15 excess premiums to the Facility Association, and I
16 intend to review some of that evidence in detail.

17 Now, the evidence has also established that
18 certain of the rating changes proposed by the
19 Applicant had either no evidentiary basis in terms of
20 actuarial evidence, or they have a limited evidentiary
21 basis, and this harkens back to what I've referred to
22 before. I would submit it is incumbent upon the
23 Applicant to bring witnesses forward who can describe
24 and explain what these particular proposals mean ... not
25 somebody who comes as a professional witness and as
26 a consultant to present the particular proposal. That
27 person doesn't have expertise in these particular areas.
28 That person comes to read from a prepared script. He's
29 a very good witness, I'll concede that about Mr. Pelley,
30 and I'm not even questioning his sincerity, but at the
31 end of the day he's not with the Applicant, and the
32 Applicant is the one that wants the money.

33 What is it that my clients want? Well, it's
34 simple. What they want is that they would like to be
35 charged a premium that is commensurate with the
36 losses and the expenses that are incurred by the Facility
37 Association, not by its members, by the Facility
38 Association, no more and no less. If it ... and as I've
39 said, if it has required a long hearing to get to that
40 point, then I believe they will be well served.

41 I'll deal now with the legislative basis briefly
42 for the rate making. There are three Acts that are
43 involved, and my friend with the Board has outlined
44 what those are ... the *Insurance Companies Act*, the
45 *Automobile Insurance Act*, and the *Public Utilities Act*. My
46 submission is that the Board should set the rates in
47 strict accordance with that existing legislative scheme,
48 and it should set the rates by reference to normal rate

49 setting principles that it uses in other hearings, one of
50 which that I would particularly emphasize before the
51 Board, is that the rates be simple and understandable,
52 so that the persons who are paying the rates can, it can
53 be explained to them and they can understand the basis
54 upon which these decisions are being made.

55 Transparency is something that the Board
56 should always strive, wherever possible, to provide for
57 the ratepayers of this province. That is one of the
58 fundamental philosophical problems that the Consumer
59 Advocate has with this process of Mr. Pelley picking
60 numbers from a column and deciding that this one is no
61 good, that one is no good, and that one is no good,
62 because at the end of the day, that's completely
63 subjective. That is not something that's simple and
64 understandable. It's not something that can be tracked
65 from one filing to the next filing to the next filing. It is
66 not consistent, and it is not, in my respectful
67 submission, the appropriate manner in which rates
68 should be set for this particular case, particularly where,
69 as here, it has been shown to be an unbalanced
70 approach.

71 Now, I think it's also well established by the
72 case law that the Board, as a rate setting body, should
73 always bear in mind that based on the complexity of the
74 material that's involved here, they will have to rely at
75 the end of the day on objective expert evidence in order
76 to critically analyze the application. And I concede, as
77 Mr. Stamp has pointed out, that the reliability and
78 objectivity of the expert evidence in this case has
79 become a key issue, and in fact, it's been suggested that
80 somehow the Consumer Advocate was, should have
81 brought forward another witness with respect to that.

82 I should turn to that now, the point ... I will
83 point out that the first time this has been raised is, of
84 course, in the Applicant's argument, that there was
85 even an issue about this. When we filed our
86 Intervenor's submission, we, of course, identified the
87 person who we had retained, we identified the company
88 they were with, and we indicated that it was our
89 intention to take advice from that individual and to get
90 an expert report from them.

91 (3:30 p.m.)

92 Now, of course, that follows the pro forma
93 basic intervenor's submission that you find in the
94 PUB's particular rules and regulations, but in any event,
95 that was on November the 14th. On or about December

the 3rd, we filed a list of witnesses with this Board indicating who we actually would call as a witness. That person's name was not on the witness list. It has been known from that point forward that we would not call another witness, sorry, another actuary at this particular hearing, and we made that decision ourselves that we would not do so.

We have received no information request about what that person's advice was. There is a discovery procedure available under this particular process, and this is the first time we hear of it, after the evidentiary portion of the hearing is concluded. Now, I would remind the Board that there are similarities in this particular scenario to the rule in Brown & Dunn, the normal common law rule, that you can't impeach witnesses after they've left the stand on the basis of what they, you know, putting other evidence to other witnesses about what that witness might or might not have said. In this particular context, what's happening is the Applicant is suggesting now, after the case is closed, that there's some difficulty with this evidence, or you should draw an adverse inference from it, when they have not even asked us what the evidence was. Was there any evidence? Was there a report? They made no efforts whatsoever to contact us about that. In my view, that's completely inappropriate.

The explanation is quite simple. At the end of the day we didn't call the witness on the basis of our own judgement about the timing that we had in this particular case, and about the relative expenses involved with this particular case, so that's the decision, and that's the explanation that I'll put on the record here today. And as I said, I don't believe that there's any basis upon which the Board can draw an adverse inference, and if it was an issue, it should have been raised in the last eight week period before Thursday past, or whenever it was that I received this particular document.

Now, I want to return now to the rate making model, and this is one of the issues whether or not there's a specific provision for profit. And this is one of the ... and I agree with Mr. Stamp on this particular point, that as the rate filing has been prepared on a zero profit provision, to a certain extent this is an issue strictly speaking that does not have to be decided by this Board. That is the issue of whether this is done by virtue of administrative decision or as a matter of law.

I would, however, submit that it is a decision, or it is a point that has, I won't say plagued the Board, but has certainly been put before the Board for the last three years, and in that context it may be something that the Board should address and should indicate whether this particular legislative scheme that's presently in place actually by law requires it to be zero profit provision rate setting, or not.

So I will make some submissions about that, and I think the point that I was focusing on in Mr. Stamp's argument was the assertion that you brought him to, and Mr. Chairman, at page four, that it is the right of FA and the right of its members to have automobile insurance rates approved which reflect the entire costs of the, of the member companies in providing insurance.

Now, Mr. Stamp's comment is that, well that didn't include the cost of capital down below. I had assumed that that's what he meant, that it did include the cost of capital, so I filed, you know, I've made some submissions about the cost of capital and whether or not you would need to have a specific reference in the legislation or some specific rate making tool directed in the legislation to determine what is the cost of capital. Because, of course, as everybody knows, there are any number of different ways upon which a return on investment, or a return on capital can be calculated. It can be done as it is, I believe, in the Electrical Power ... EPCA, it's done in terms of maintaining the sound financial position of Newfoundland and Labrador Hydro. That's one method upon which you get a rate of return.

Another method might be a market rate of return. Another method would be a fair rate of return. You see these different phrases in the legislation, and that, I would submit, provides guidance to the Board when they are sitting as a rate making body.

Now, in this particular case, you are asked to set rates for the Applicant. The Applicant is the Facility Association. There is nothing in this legislation that tells you that the Facility Association is entitled to make a return on investment.

In fact, they are specifically described as an unincorporated, non-profit association of insurance companies. Now, if we looked at those words alone, in my submission, the natural meaning of those words is that when you set rates for that particular body, you

1 must do so on the basis of no profit. There has to be a
2 zero profit provision.

3 Does unincorporated add anything to this?
4 Well, unincorporated, in my submission, goes to the
5 point made by the Ontario Court of Appeal, and that is
6 that it is the members who stand good for the debts for
7 any losses. They are the persons that are responsible
8 at the end of the day. If there are, if there is a shortfall
9 ... now there hasn't been a shortfall in Newfoundland
10 and Labrador, we know that from the evidence, but if
11 there was. So the situation is, the FA provides the
12 means by which my clients can get insurance. The
13 members stand good for any losses and are required to
14 make up that shortfall. That's the legislative scheme
15 which is set out.

16 Now, in whatever context the Board sets rates,
17 it has to do a couple of things. First of all, it has to
18 determine what is the rate of return, or what is the
19 investment upon which you could set a rate of return.
20 There is such a duty, I would concede that, in a
21 legislative context which does provide specifically for
22 a rate on return. You have to determine what the
23 investment is.

24 In this particular case, there is no such
25 investment that's provided by Facility Association, and
26 there is no such rate of return, duty to investigate the
27 rate of return placed upon this Board. The situation is
28 quite, you know, quite straightforward. The legislative
29 scheme does not provide for a return on capital, and
30 there are no parameters set out upon which such a
31 determination can be made, so it's difficult for me to see
32 how you could even enter into an inquiry into what the
33 particular investment is that you're trying to give a rate
34 of return on. There's been no evidence placed before
35 the Board about that, about what the capital
36 requirements are, etcetera, for particular member
37 companies, and, in fact, my suspicion is that if any of
38 the companies were to be asked about that, that would
39 be viewed as proprietorial information. But in any
40 event, we don't have the, we don't have that material
41 before the Board.

42 I did ask Mr. Morris, when he testified,
43 whether or not he had any indication that there was a
44 concern about this issue of capital adequacy among the
45 insurance companies. Bear in mind, he only regulates
46 four insurance companies, because they're the only four
47 local writers, and he indicated that he had never
48 received such an inquiry before, concerning capital

49 adequacy, that is. That doesn't really direct to the point
50 of whether the Board has authority to do so, but it may
51 explain why there's no evidence placed before the
52 Board about this issue.

53 At the end of the day then, it is my submission
54 that the FA is simply the means by which consumers
55 are entitled to have insurance provided to them, and the
56 members are simply the persons who are the, they stand
57 in the role of a guarantor. They make good any losses.
58 They have no right to make a profit under this particular
59 scheme.

60 In fact, if you look at Sections 97, 98, and 102
61 of the *Insurance Companies Act*, the legislation doesn't
62 grant rights to FA or the members at all. Instead it
63 imposes obligations upon them. They are obliged to
64 provide this service, and my clients are obliged to pay
65 for it, in order for the greater good, so that there is
66 access to insurance throughout the province for all
67 drivers, all users of the highways in this province.
68 That's considered a legislative goal, and this is the
69 means by which they do it. So I would submit that the
70 situation is legally clear. This Board is required to set
71 the rates on a zero profit basis, because that's the
72 legislative mechanism that's provided, and it's not
73 because of an administrative decision of, you know, of
74 the Facility Association.

75 Now, in the Applicant's argument, reference is
76 made to the historical basis upon which the assigned
77 risk plan worked. I would agree that the assigned risk
78 plan was not provided for on a non-profit basis, but it
79 wasn't necessary for it to be done so at that time in
80 order to keep rates fair and affordable.

81 Under the assigned risk plan, there was no
82 special rate set for persons who are considered poor
83 risks. This is just a ... everybody's poor risk receded
84 into one pool, and they shared those risks, and the
85 evidence has been that there was no special rate set for
86 those individuals.

87 This is a completely different system. Here,
88 this particular segment of the consumers pay for a
89 separate rate to be established. Now, Mr. Stamp has
90 agreed that that rate, setting that rate by themselves
91 does have a measure of fairness involved with it, and of
92 course, I would agree with that as well. That is a fair
93 provision. Whatever their particular rate is is what they
94 should pay.

1 Now, why is it, and I submit that there is an
2 element of affordability in this. Why is it meant to be
3 affordable? Well, I would submit that it's meant to be
4 affordable because the insurance companies are not
5 permitted to uplift that rate again on top of what the
6 actual rate is, that's been provided for the four percent
7 or five percent, or whatever it is. They're simply not
8 permitted to do that under the legislation.

9 I think we should bear in mind as well that
10 nobody, the way this is designed, nobody is intended
11 to lose out on this. The brokers get their commissions,
12 the servicing carriers get their fees, and whether or not
13 they are particularly satisfied with the level of those
14 fees, or with the level of those commissions, that's
15 really an issue, an internal issue for the Facility
16 Association, and I think the evidence was clear at the
17 end of the day that whether or not it could be said that
18 this is a profitable business in one way or the other, it
19 certainly wasn't, at least conceded by Mr. Anthony, it
20 wasn't business that has cost his company any money
21 in the last 17 years of operation in this province.

22 In any event, the insurance industry did not
23 wish to continue with the risk sharing pool, and the
24 Facility Association was the result under the
25 legislation.

26 Now, I want to just briefly look at ... I want to
27 turn from that point on to the ... just what did the
28 witnesses say, the lay witnesses, I'll call them, at this
29 particular hearing. Mr. Hickey, I would characterize Mr.
30 Hickey as a very frank and forthright witness, and he
31 provided evidence as to the manner in which
32 consumers are ultimately insured through the Facility
33 Association mechanism.

34 Mr. Chairman and Mr. Commissioners, let there
35 be no mistake. Mr. Hickey determined that they are put
36 into Facility Association as a result of the underwriting
37 rules, guidelines, and procedures of the member
38 companies, so it is the member companies that
39 determine the make-up of the Facility Association.

40 He also indicated that given the general state
41 of the industry, that it is logical that this population of
42 Facility would increase, he said that was a logical
43 conclusion, given the tightening market. Now, Mr.
44 Stamp has indicated there is no evidence that this
45 would be the case. Well, I would point to Mr. Hickey's
46 evidence on that point.

47 I would also remind the Board that in DJS-2,
48 the figure shown for premium was \$18 million for 11
49 months of last year, and Mr. Simpson agreed that that
50 goes to \$20 million, that's a fair estimate, and that's in
51 the evidence.

52 Now, how is it that we cannot accept on the
53 evidence that the population of Facility is growing from
54 2001 when the numbers were about \$12 million in
55 premium, to \$20 million last year, and then you have Mr.
56 Hickey saying that the market is tightening again, and
57 that the population will, it is logical to conclude it will
58 grow again. That's the evidence upon which the
59 Consumer Advocate submits that this group, this four
60 percent is growing all the time.

61 I would refer to the points raised by
62 Commissioner Powell about the exhibit DJS-3,
63 illustration five, which is the breakdown of the
64 population of Facility Association by means of clean
65 driving record, and no, and accidents and convictions.
66 You will recall that the figure of 60 percent of persons
67 in Facility in 2001 had no clean driver ... sorry, had a
68 clean driving record. I believe it was suggested by
69 Commissioner Powell that this means that essentially
70 it's about 1.5 percent of the pool is actually the bad
71 drivers. They're the ones with the accidents, and then
72 there's another whole portion of Facility Association
73 that are not in Facility Association as a result of their
74 particular risk profile, at least as it relates to accidents
75 and convictions.

76 So again, I would bring that to the Board's
77 attention and ask you to consider that when you are
78 looking at Mr. Stamp's submission today, that there is
79 no indication that there will be more people in Facility
80 Association in the years to come, and that their risk
81 profile will be somehow better. My submission is,
82 based on this evidence, that is exactly what is going to
83 happen as a result of the tightening market.

84 Mr. Hickey also testified that the increases
85 that are being sought here are devastatingly large
86 increases. Now, he's the person on the ground who is
87 dealing with the consumer, and that's his perspective,
88 and I think that's a very important perspective to have
89 shared with the Board.

90 Mr. Anthony was initially called by the Board
91 as a servicing carrier representative, however, I think he
92 provided another important perspective to the public
93 hearing process, and that is that of a senior executive

1 with a member company of Facility Association. I think
2 it will be difficult to characterize Mr. Anthony as an
3 objective witness because he is the President and CEO
4 of one of the member companies. And of course, the
5 member companies' interest is in having the highest
6 possible rates charged to Facility Association drivers,
7 my clients, so that there is the least possible risk to
8 them that they will have to support any shortfall.

9 I still think though that he was an important
10 witness about the issues of the realities of acting as a
11 servicing carrier, and also these larger industry
12 contexts, that I believe are significantly important to the
13 rate making model.

14 Mr. Anthony testified as to the fact that
15 compensation for servicing carriers was just adequate
16 in direct examination, but he agreed, as I have indicated
17 on cross-examination, there was no indication that
18 participating in Facility Association has cost his
19 company any money.

20 (3:45 p.m.)

21 In terms of the issue of the impact of being in
22 FA in the year 2001, well his message was black and
23 white. It's the same as Jennifer Power's message, that
24 if not, if it were not for FA we would have shown a
25 profit. His testimony was if you were to look at their
26 statements, that is CGU's, if Facility Association did not
27 exist, they would have shown an income before taxes of
28 \$499,000. Now, that's on perspective on it, but as was
29 brought out in cross-examination, there is another
30 perspective on it. If the underwriting results of the 96
31 percent were better, or if the investment income was
32 better, then, of course, the company could have shown
33 a profit, so again, this is an example of the divide and
34 conquer approach. Everything is the fault of the four
35 percent, and everything should be focused upon them.
36 It is my submission that this circumstance is much more
37 complex than that. It is not just the situation of what
38 are the losses in the four percent, and you can take a
39 set of numbers, as I'm sure Commissioner Powell knows
40 from his years as an accountant, and you can make
41 them show a number of different outcomes. That is the
42 message that has been brought by the member
43 companies, I agree, but I would ask the Board to
44 consider at the end of the day, the wider industry
45 context in what's happening.

46 And this, I think, goes again to Mr. Anthony's
47 evidence that's relied upon by the Applicant, that in the

48 general market there's a 30 to 40 percent increase in
49 rates. Well, I think there's two points that need to be
50 made about that. First of all, as I've indicated from the
51 outset, the rates that are set in Facility Association for
52 my clients are completely irrelevant to the rates that are
53 set in the general market. These are two separate
54 processes based on two independent sets of data, so
55 my clients pay to have their rates set on one particular
56 actuarial analysis ... that's their accidents that are
57 committed by persons in that particular group. The
58 benchmark is set on the basis of the other 96 percent
59 excluding Facility data. Therefore, whatever matters
60 that happen in the general market, whatever results that
61 occur there, I cannot fathom how that could have any
62 relevance to a rate increase in the Facility Association
63 market when the rates are set on a separate actuarial
64 basis.

65 Secondly, there's another explanation as to
66 why it is that the rates are going up in the general
67 market, and I think this is relevant too. In the general or
68 wider industry context, we know from exhibit JP-1, and
69 we know generally from the evidence of Hickey and Mr.
70 Anthony, that the, that the market is tightening. Why
71 is the market tightening? Well, I have submitted, and
72 the evidence I believe supports, the reason the market
73 is tightening is because the strategy of the voluntary
74 market was to capture market share.

75 They were out capturing premium and they got
76 away from rate adequacy, and if you look at Mr.
77 Hickey's evidence, he concedes this, that the rates were
78 not adequate in the general market. They wanted to
79 capture the premium, I'm submitting, because they
80 wanted to invest it in the investment market, and to
81 make money on that side, and the 1990s were a great
82 time to make money in the investment market, but as of
83 2001, and this is brought into clear focus by exhibit JP-
84 1, this is the message from Egal Mayer (*phonetic*), I hope
85 I have that name correct in any event, as he states,
86 "When investment returns are high, insurers lose their
87 focus on disciplined underwriting and premium
88 adequacy. This coupled with rising claims costs
89 triggers the cycle and brings us to where we are today.
90 We, like all other players in the industry, have
91 responded by increasing our rates by double digits in
92 the last half of 2001, and expect this to continue
93 throughout 2002 in order to obtain adequacy in
94 premium levels." So what the voluntary market was
95 doing was they were, they took their eye off the ball,
96 they didn't concentrate on rate adequacy because they
97 knew they could make up the money on the investment

side. Now they've had to respond, so what we're seeing in the voluntary market is a market that's responding to not having adequate rates and raising those.

With all due respect, in the FA market, nobody is competing for the business there, it's always set, as the evidence has been, on the same rate. So whether a person walks in through the door of Anthony Insurance or they walk in through the door of Coop Insurance, or they walk in through the door of Mr. Hickey's brokerage firm, they have to get the same rate. It's just a rating manual, the rate gets applied, and that's one of the fairness aspects. If you buy a Facility policy here or if you buy one in St. Anthony, or if you buy one in Labrador City, the price is the same, so there's no issue here of competing for market share, which is one of the dynamics in the voluntary market.

This is a long-winded way of saying there is no comparison that can be drawn between a rate increase in the voluntary market, and what is acceptable, what is an acceptable rate increase in the Facility Association market.

I think as, Mr. Chairman, you brought out at one particular point on this issue of grey market, the issue of whether or not there is a grey market, or whether there is that middle range, is merely a question of how the rates are calculated between these two particular sets of the population. If there is, based on the accident experience, a gap created, well then there's a middle market. If there's not, that's simply what the numbers say, so ... I'm almost finished with Mr. Simpson then, sorry, with Mr. Anthony.

One of the other issues I wanted to touch upon with Mr. Anthony was this issue of whether or not there could be losses carried forward from one year to the next into the voluntary market, and this is the issue of cross-subsidization as well. I would ask that you look carefully at that evidence, and the evidence of Jennifer Power regarding that particular submission.

Her evidence ultimately on cross-examination on this point, because you recall her exhibit said if the full market rates are not approved in this particular rate filing, CGU will go to the, will file a rate filing to recover these monies from the regular market, okay?

Now, her evidence ultimately on cross-examination on that point was that while a loss in the

FA book of business does form a component of the ultimate rates for next year, it would not be the determining factor, or a determining factor of the rates in the voluntary market. It would be included in the target ROE calculation, but would not be the only factor in either scenario, whether in 2001 when rates are low ... sorry, when losses are being incurred ... or in 1997 when they would have dragged money out of the Facility Association residual market.

So therefore, while Ms. Power's exhibit specifically indicated that if the full rate was not granted, this would be the result, I think the picture again is much more complex than that.

Now, just dealing briefly with Ms. Power, I want to refer you to her evidence, which is at page 4, I believe it's the volume of evidence on January the 15th or 14th. In any event, she stated, "If the full rate is not allowed, then companies would have to deal with an underwriting loss in the FA". She went on to say, lines 31 to 37 on page 2, "Should the FA rate filing not be approved, CGU will seek to file an increase for the regular market automobile and recoup the underwriting loss of the FA. Our middle market product, Elite Advantage Plus, which writes over 5 million written premium in Newfoundland and Labrador, would not be able to operate at inadequate premium levels". So this brings sharply into focus the message from the member companies. The same member companies that sit on the board of directors of FA, and the same ones that deal with Mr. Pelley. If the full rate is not ordered these are the consequences, it's black and white.

Well, I'll simply point out from my client's perspective, that this argument assumes from the outset that the full rate is justified, and I would submit that if the full rate as requested is not justified and is ordered by the Board on the basis of these types of submissions, what will happen is a surplus will result, and that surplus will, in the words of the FA brochure, be distributed to the insurance companies to help them to control costs in the regular market.

Now, I'm representing the people into whose pockets, or out of whose pockets these monies come. Now, it is my submission that the Board should look very closely at whether or not these rates are fully justified, and to give appropriate weight to whether or not this particular, and I won't call it a threat, it's not a threat from the voluntary market, but it's a suggestion that there will be dire consequences if the full rate is

not, is not ordered, that those submissions be given the weight that they deserve.

As I've argued from the outset, rates cannot be set on the basis that this would allow the Applicant to take more money from my clients than they need to meet the rate levels that are required next year.

I want to just touch briefly on the evidence that was provided by Ms. Harnum and Mr. Kehoe. They were the public presenters as well with Ms. Power. I believe that each of those brought compelling evidence with respect to the impact on individual consumers when they are placed in FA, and the types of techniques that are available to challenge that decision.

Mr. Kehoe brought a further perspective about the operation of a taxi industry that was both insightful and objective, in my submission. Now, this isn't evidence, but as of today I received a message from Mr. Kehoe that, in fact, he was able to obtain insurance for Nan from CGU. I can't verify that fact, I just pass it on, but just to show that it appears that there's a happy ending to the story for Mr. Kehoe.

I would comment briefly on the evidence of Mr. Morris. He testified that he had been involved in a previous hearing before this Board, and in that case in the capacity of a party, and that he is the senior civil servant responsible for supervision of this particular mechanism in the province. Now, he outlined what his particular view is of the legislation, and he gave uncontradicted evidence as to what the statutory scheme is. He also provided, in my submission, the only uncontradicted audited annual statements of the performance of Facility Association in this particular province, from its inception to December 2001. The exhibit he provided was the audited information that's at the end of the year been cleared by their auditors as to what their operations are, so that's the information, the best information that you have to rely upon about what the operations of Facility Association have been in this province since its inception, and they show a significant excess of surplus over deficits.

Mr. Whiffen testified as to the climatological conditions that were observed at weather stations in the St. John's area in the winter of 2000 and 2001. That evidence, well I'll refer to that when I'm reviewing the evidence of the winter. He testified though, and I want to make this (inaudible), that these conditions were

reasonably representative of conditions on the remainder of the Avalon, and that the likelihood of those conditions occurring again, that combination of conditions occurring again, was in the neighbourhood of one to two percent.

Sgt. Hill is a senior member of the RNC, I believe he's on the Force 20 to 21 years, and he provided a breakdown of accident statistics from 1996 to the end of 2002 that are compiled by him within the Accident Investigation Division of the RNC. He was not asked, and I want to address this suggestion in the argument, that he was somehow, he didn't bring all the information or all the relevant information to the Board. Well, he was not asked by us not to bring any specific information. He developed his own data bank, and that's what he testified to. If there was another data bank available that could have provided similar information, again, this is all a matter of December 3rd, filed as an intervenor's pre-filed evidence, that should have been something that was addressed by the Applicant at that particular time.

Sgt. Hill testified that the accident statistics were representative, and this was in questioning from Commissioner Powell, representative of an area in which 250,000 people reside, and in his opinion it represented approximately half the accidents in the province in that given year.

The accident data that was testified to by Sgt. Hill showed a very significant increase in accidents in each of December 2000, January 2001, February 2001, and April 2001, over the corresponding months in the other years. There was also an increase in March.

He testified, and this is the important part of his evidence, that in his opinion, the winter conditions contributed to the increase in accidents, and that the major factor as reported to him by his eight accident investigators during that period of time was the winter conditions. So we have the benefit of, albeit by means of hearsay, of both his opinion on this, and the other accident investigators within his division.

Finally, he testified that based on his experience as a police officer, which is obviously considerable, that private passenger vehicles are off the road in advance of commercial vehicles in adverse weather conditions.

Now, Sgt. Hill's evidence is criticized, not his evidence, but the weight to be given his evidence is criticized by the Applicant on two bases. First, that he is unable to provide any information with respect to the breakdown of these commercial and private passenger vehicles when it comes to the accidents that occurred during that year. And second, that, as I said, there's somehow evidence available through ICAN that he didn't provide. I have addressed that second point. With respect to the first point, that evidence does not exist as to whether or not there were commercial or private passenger vehicles involved in those accidents. It's simply not available, and the absence of that evidence does not in any way weaken his evidence as to whether or not private passenger vehicles are off the road first as opposed to commercial vehicles. Sgt. Hill is an extremely experienced accident investigator, and I would submit he testified in a forthright and honest manner.

(4:00 p.m.)

In terms of Mr. Cluney and Mr. Beckett, those witnesses were called to provide the Board with a geographic perspective of the province, that is the inventory of the public roads here, and in fact all of the roads in the Province of Newfoundland and Labrador, and the number of vehicles that operate on our highway system.

The evidence was called and, I would submit, shows that in this province private passenger automobiles are the primary source of transportation, and that there is very little, if anything, in the way of public transportation available.

Finally, Mrs. Marshall provided statistics as to the population of senior citizens in the province, and the portion of senior citizens that receive a guaranteed income supplement. Now, as to the remainder of Mrs. Marshall's evidence with respect to the impact of an increase, it would be my submission that it would be unreasonable for me to ask the Board to rely on any other aspects of her pre-filed evidence relating to impacts in light of the obvious confusion that was displayed regarding the role of Facility Association.

I think in total then, in terms of the lay witnesses, the perspectives that are brought by each of these is important and it forms the background of this particular rate filing.

I want to turn now to the two issues which are the actuarial issues. I don't know if the Board wants to take a five minute break or anything like that, because I am going to, I'm going to be delving into the loss development factors in greater detail than perhaps the Board had anticipated.

MR. SAUNDERS, PRESIDING CHAIRMAN: How about you, Commissioner Powell, do you need a ...

COMMISSIONER POWELL: No.

MR. SAUNDERS, PRESIDING CHAIRMAN: Is there anybody else in the room that needs a break? No? Carry on, we'll carry on until we hear someone has got ...

MR. O'FLAHERTY: Okay, in terms of the issue of loss development, the Applicant correctly has pointed out that the Board's actuary found the use of the five year average to be reasonable. The argument also states, however, that Mercer Risk took exception with the judgemental exclusion of certain data points from within the five year history.

Now, Mr. Chairman, it's not my, it's not my intention to get bogged down in semantics, but I think it's important to be specific about what it is that the Board's actuary has and has not objected to in the Eckler approach in order to arrive at a proper decision on which approach is the appropriate one.

In my view, Mercer Risk did not take exception in either the report or in the testimony of Ms. Elliott, with the approach adopted by Pelley, of the general practice, that is, of making judgemental exclusions. In fact, that is the approach that was taken by Mr. Pelley in 2001, and in that particular circumstance, the Board's actuary did not take objection with it because it was balanced, because there were high points excluded as well as low points being excluded.

The exception that's taken in this particular case to the approach adopted by Mr. Pelley is the practice of excluding only the lowest point or points without excluding any high points whatsoever, and the result of this is that this increases the average loss development factors in each case in which a judgemental exclusion is made.

Furthermore then, the Board's actuary took exception, and this is in evidence, with the failure to

1 provide for any rationale, any consistent rationale for
2 these particular judgemental exclusions. The Board's
3 actuary also pointed out in her report, and I believe this
4 is at page 12, that when the same approach was used,
5 or proposed to be used in 1997, the result would have
6 been, and was, significantly higher loss cost estimates
7 over the present estimates for the current year.

8 So in other words, when you cast your mind
9 back to 1997, this was the approach that was being
10 proposed by Mr. Pelley in 1997. If you then look
11 forward to 2002 and see what would have happened if
12 you had accepted that approach, the same approach
13 that's being proposed this year back in 1997, her
14 evidence was, well what would have happened is, it
15 would have resulted in significantly higher loss
16 estimates than what Facility Association itself is now
17 saying would have happened back in those years.

18 Now, this is not a situation where we're
19 looking back in the past and somehow being arbitrary
20 or unfair with Mr. Pelley. This is a circumstance in
21 which one actuary says, okay, you're proposing to use
22 a particular system. We don't agree with that system.
23 We think that you should use a more balanced system
24 of doing it. We think if you use the system you're
25 proposing, it will result in higher estimated loss costs,
26 and therefore higher rates than you actually need. And
27 in support of that, we looked back at what you did in
28 2001 and in 1997, and we find that in 1997 when you did
29 adopt that approach, that's exactly what happened.
30 That's very important evidence.

31 Now, it was only when Mr. Pelley actually
32 testified at the hearing that we could then glean what
33 the specific reason was for each of the rationales, and
34 I want to review that evidence with you, and I'll read
35 some excerpts from his evidence, and I will provide the
36 actual places in which the evidence is found and then
37 you can refer to it either in reviewing my submission, or
38 at this point if you wish.

39 On direct examination, Mr. Pelley explained
40 that his basic objective in selecting loss development
41 factors for exclusion was, "Our objective in going
42 through this process", I'm quoting now, "is to choose
43 to put to the red dot where we think the history, the
44 recent history is telling us is a reasonable expectation
45 for the future". That's at December 12th, at page 4, lines
46 56 to 59.

47 Now, on the same page at line 63, he then
48 addresses the first point, and this is when he was going
49 through BGP-3, which you will recall is the coloured
50 chart which shows the yellow dots, black dots, and the
51 red line which is the red dots. Concerning this point,
52 and this is the interval actually, if you're going to be
53 looking at the exhibits, the interval is at 4.4 of the
54 appropriate schedule, which is Schedule A of the filing.

55 He's talking about the first point excluded and
56 he says, "The first black dot, moving from left to right
57 on this exhibit, appears in development interval two,
58 that's the 24 to 36 month interval. It's the lowest value
59 in the column, it's substantially below any of the other
60 blue dots which represents the latest history, and we
61 did not consider the data point to be representative of
62 our expectation for the future. It did have in the more
63 distance past, it did have some history, some historical
64 values that were in that vicinity, but that was not the
65 recent historical pattern, and our objective here is to
66 use the history of the past to build an expectation of
67 the future."

68 He goes on then to say, "It is, is it in the
69 neighbourhood of the recent history", this is the issue,
70 "and is that an appropriate guide to making a selection
71 for the future development interval". That's at page 5,
72 lines 1 to 10. So it would be my submission then that
73 the initial or the primary rule that we're going to be
74 faced with when we're dealing with Mr. Pelley's
75 exclusions is one needs to look at the recent history
76 first, and then one looks at the more long-term history
77 in those columns, in the loss development triangles.

78 Mr. Pelley went on then to claim that we would
79 then see a very similar pattern as we go through these
80 intervals, and that reference is at page 5, lines 71 to 72.
81 Now, there is another interval, you will recall, in which
82 the last two of the five points were excluded, and this is
83 in private passenger, bodily injury. He then discusses
84 the exclusion of two of the five data points in the third
85 interval shown on BGP-3, and he explains how it's the
86 latest, "the three latest values that were selected, they
87 are tightly clustered, and they represent the latest three
88 values, and it's a verifiable fact that the general claims
89 environment in Newfoundland and Labrador, as well as
90 other Atlantic jurisdictions, has become harsher".
91 That's page 6, lines 3, and 6 to 10. So the emphasis now
92 is on the most recent information, which is fair enough,
93 because that's what he said from the outset, the basic
94 objective is to look at the most recent history.

Now, in his direct evidence he makes no mention of the exclusion of the value in the fourth interval which appears to be supportable by two points in the older historical data, and this is brought out by Board Counsel. This exclusion is not the oldest data point in the five year value, so in this case a later value is included than one which is excluded, which must have been presumably less relevant to this harsher claims environment. But on cross-examination, Mr. Pelley was questioned about the rationale for not excluding the first blue data point. If you will recall the exhibit, I pointed out to him that there was a blue data point which appeared to jump right off the top of the page. This is in the first interval of that particular chart.

Now, it was pointed out that if one were to use an objective test, and I was using the numbers from the five year average, which was his selected default approach, if one were to use an objective test to determine an outlier for this entire chart, this point on the chart would seem to be the outlier, because it was 22 points off the average line, and none of the other exclusions were that far off the average line.

Now, Mr. Pelley had a rationale for the inclusion of that point. He referred back to the points in the recent history that supported the inclusion, and he also then brought up yet another consideration, and this was the consideration that in your first interval you're going to see more variability because this was the interval in which things tend to be more volatile.

So in this case the rationale for including the point is, which is the furthest point objectively from this red line, and cannot be rationalized on the basis of the recent history, because it doesn't show up in the recent history. This is now turning to the older history, and it's the first development interval. Well, fair enough, fair enough. Then I brought him to the issue of what about in 2001 when you had this high point in the same interval, which is just as volatile, why did you exclude it in that particular case?

Mr. Pelley did exclude that high point, which was 26 points off the five year line back in 2001. Now, let's turn to the issue of the selection of data points in the commercial loss development. The same pattern exists that the Board's actuary has brought to your attention, which is it's always the lowest point. Every single time it's the lowest point or points.

When you go to the commercial vehicle property damage loss development factors, the first interval is at 4.34, Appendix B. In this case the explanation provided is as follows. "The two excluded data points do fall within the range of the long-term historical view, but they are not in our view sufficiently responsive to the latest experience". Now, in this case, the points excluded are 1997 and 1998.

Just one sec, sorry, Mr. Chairman. In this particular case the points excluded are in 1997 and in 1998, but the 1996 value is being included. Now, here Mr. Pelley has chosen to include the oldest of the five year historical values, and excluded two more recent points, points that enjoy clear support in each of these years, '91, '92, '93, '94, and '95, so the exclusion of 1.024 does not follow the rule of similarity to recent history, as it is almost identical to 1996's. The exclusion of .9609, while not a point similar to the most recent history, was very supportable on these other five years, which I've just outlined.

Now, Mr. Pelley was asked about the exclusion of a data point in the second interval of the loss triangle on page 4.38. In that case you will recall, or perhaps you will recall, the exclusion was the most recent year of any of the particular data points, and was also almost identical to the three points immediately before the five year period, '92, '93, and '94. In this case both the primary rule and the secondary rule are being ignored. In this case the evidence of Mr. Pelley was that he conceded it was harder to exclude that point, and that this particular coverage was troublesome for sure.

Well, when, and when Ms. Newman pressed him for specifics about this, there was a new rule that appears. Mr. Pelley testifies at page 17 on December 17th as follows. "One of the other considerations is the pattern of changes that go from one interval to another interval, and we made the selection in that case to try to establish a position that we felt was a reasonable position going forward". So now you've got a situation where the first rule is it's got to be in the recent history. The second rule is it's got to be in the older history. Then, because this particular point doesn't meet either one of those particular rules, there is another reason.

(4:15 p.m.)

Now, I'm not saying that Mr. Pelley is not being sincere about these exclusions. That's not my point, Mr. Chairman and Mr. Commissioners. What I'm

1 saying is that if you take it from the perspective of
2 persons who have to pay these rates, who want rates to
3 be simple and understandable, this is a situation where
4 somebody is taking numbers out of a list, a column of
5 numbers and saying that one's no good, that one's no
6 good, and when they're being asked what the reason is
7 for it, there's no understandable pattern here
8 whatsoever. The only pattern that emerges is it's
9 always the lowest number. It's not a balanced
10 approach.

11 Now, finally, on the commercial loss
12 development factors, Mr. Pelley was brought to page
13 4.32, under column 48/36. Now, I actually brought
14 these two sheets with me because I would ask that the
15 Clerk show these sheets to the Board. I'm going to
16 show you the difference between these two.

17 Now, Mr. Chairman, Mr. Commissioners, you
18 have before you two exhibits which are from the filing.
19 This was, Mr. Pelley was brought to these pages, well
20 he was brought to 4.32, which is the third party liability,
21 bodily injury tort, 31 December 2001 document, and the
22 document that I have provided you with is the third
23 party liability, bodily injury tort, 31 December 2001, for
24 the private passenger vehicles. It's just taken from the
25 previous schedule, that is Schedule A.

26 Now, Mr. Pelley was brought to column 48/36,
27 where the value of 1.2809 is found in the 1995 accident
28 year, and I'd just ask you to look at that point. Just
29 above that point is .7632. Now, that's the lowest point
30 in this five year period and that was excluded. If you
31 go up to the other exhibit, you will see that in 1995, in
32 the column 48/36, .9561 was excluded, as was the next
33 one, which is .9753, because the selection they're
34 making in the top one is the last three years, okay, they
35 exclude both these years.

36 Now, I want to point out to you the evidence,
37 how, how ... what the stark contrast is in the two
38 approaches that are being used for the exact same
39 coverage, for the exact same year, for the exact same
40 development interval. Now, as pointed out by Board
41 Counsel, in this case on page 4.32, the number which is
42 0.7632 in 1994 was excluded, and the number 1.2809 was
43 included. Now if you look at the ... and well this is
44 conceded by Mr. Pelley in any event in his evidence ...
45 there is no support in either the recent or in the longer
46 term for that value, but that was not relied upon here to
47 exclude that point, even where the interval shows a last
48 three years average of .9823, and an all years average of

49 1.0130. Instead, all that happened was that Mr. Pelley
50 selected the .7632 for exclusion, and he left in the
51 1.2809.

52 Now, on the equivalent private passenger
53 chart at page 4.4, again, this is loss development, third
54 party liability, bodily injury tort for the same year, for
55 the same development interval, and the same coverage,
56 a low number is excluded.

57 Now, let's look at the two pieces of evidence.
58 For the exclusion on page 4.4, the explanation was as
59 follows. "While in the context of rate making and given
60 this history, I found it difficult to embrace the", and I'll
61 get the exact one, "the .9753 and .9561 as being
62 reasonable expectations for the future rating period. I
63 mean the balance of the history is just not supporting
64 values that are that low". So that was his explanation,
65 in the balance of the history.

66 The equivalent explanation for the same
67 coverage for commercial vehicles is as follows. "A
68 large part of it is the expectation for movement as you
69 go from one development interval to the next. There is
70 a lot of judgement involved when you're dealing with
71 small volumes, and we have that problem with spades
72 (*phonetic*) in this particular instance. So it was a
73 judgement call. I agree that the 1.2809 is a high value,
74 but I don't think the 1.0570 as a selection factor is
75 unreasonable".

76 So that's the two, that's the contrast. So on
77 the one case you have Mr. Pelley saying, well, we're
78 going to exclude that number, that's the .9561, which is
79 in 1995, because the balance of the history is just not
80 supporting that value. When he's asked why doesn't
81 he exclude the 1.2809, he concedes that the balance of
82 the history doesn't support that value, but that in this
83 case it's the expectation for movement as you go from
84 one development interval to another.

85 Now, the point, Mr. Chairman, in a long-
86 winded way, and Mr. Commissioners, is that when Mr.
87 Pelley is given this opportunity to explain his rationale
88 for exclusions, there is simply no consistency to the
89 rationales, even to the point that different rationales are
90 provided for the same coverage, the same development
91 interval, in the same year.

92 Now, I would submit that the difference
93 between this rate filing and 2001 is clear, and the reason
94 why Ms. Elliott was prepared to give approval to the

2001 rate filing as opposed to the 2002 is also clear because in her opinion, the earlier approach shown in 2001 was a balanced approach, and it was considered by her to be acceptable. She has, however, provided testimony in response to cross-examination from Mr. Stamp, that this latter approach is biased and recommends its rejection.

Now, on behalf of the ratepayers, that is the people who, in similar circumstances would have had to put their hands in their pockets for more excess premiums in 1997 if this approach had been adopted, I'm simply urging the Board not to adopt this approach in this particular year. The Board should never ignore the recommendation of its independent actuary lightly, and particularly should not do so in this case where there is clear and compelling evidence to support why she is making the recommendation she is making. You have the history in 1997 and you have these clear inconsistencies that are shown in what the particular rationale is.

Furthermore, it does not lead to a simple and understandable and transparent rate making approach. In fact, it's completely ad hoc. It's completely judgemental, and I believe that ratepayers are entitled to have a rationale explanation for why decisions are being made that affect them financially.

Now, in this particular case, and I'll refer to this at the end, we have an actuarial consultant who has close connections with the FA. There's no doubt about that. Mr. Pelley conceded that. He's been involved with them since the beginning of FA. Mr. Pelley, we're asked to accept here that Mr. Pelley does not feel any pressure whatsoever to ensure that there is a comfort zone in these particular rates, okay? Well, if he doesn't feel any pressure from the insurance industry, then he's the only one in my submission.

We've heard evidence here from Mr. Anthony and from Ms. Power, and seen these letters filed in evidence that are indicating that essentially if this rate filing doesn't go on the hundred percent the basis the way that it's set, that the sky will fall in this particular province, that insurers will leave, that money will have to be paid by the voluntary market. Well, in my respectful submission, Mr. Pelley does feel that particular pressure, and the Board should be very careful in this circumstance, and should stick with the evidence of its independent actuary who feels no such pressure, is not representing anybody with a financial

interest in the outcome here, and should stick with a clear and understandable, straightforward and consistent approach. This is not anything unreasonable to request. This is, as Commissioner Powell has pointed out, this is the post-ENRON era we're in now today. There is nothing wrong with asking questions, there's nothing wrong with suggesting to people, well this should be clear and understandable, and you should give us all the information.

Now, if this approach could have shown to be balanced throughout the cross-examination, then Ms. Elliott would have probably conceded, or at least in her report, it would be indicated that she would concede that the approach is okay. It's not what she would have done, but the approach is acceptable, but that's not, that's not the evidence before the Board. The evidence before the Board is that the Board's actuary's approach should be adopted and accepted in this case, and the use of loss development exclusions by Mr. Pelley should be removed from this equation and should not influence the rates that are set here.

Now, I just want to turn to loss trend. I think the main issue for, under loss trend is really the issue of the winter of 2000/2001. Now, again, Mr. Stamp has made the point that at the end of the day, this is not a big financial issue for the Board. I don't believe that is the case. I believe it's always an issue for the Board when it's money that comes out of the ratepayer's pocket. If it's not meant to be charged to them, then there should be no provision for charging the rates to consumers on that basis.

I do want to talk about one thing though before I get to the winter of 2000/2001, and that's the issue of seasonality. I'm troubled by the suggestion of the Applicant's argument at page 27 that suggests that Ms. Elliott excludes the two additional years of data to lower the commercial trend rate. I think if the Board actually looks at the evidence, and this is this notion that if you went back an extra two years, the rate would be higher ... her testimony about the statistical significance of seasonality over a twelve year period is found at pages 25 and 26 of the transcript for December 18th. The entire testimony relates to the private passenger trend, and her reference is to a difference in trend of 7.5 and 7.1 percent. This is one of the difficulties I had sometimes with the Applicant's argument not being footnoted, in that it doesn't provide sometimes a ready access to what the information is.

1 But in this particular case, page 27 of the
2 argument, what's being stated is that Ms. Pelley (*sic*), or
3 sorry, Ms. Elliott somehow went back over the data ...
4 and I'll bring you right to it ... I'm referring to page 27,
5 and this is the third paragraph. As Mr. Pelley
6 demonstrated, we're talking about seasonality in BGP-3
7 at page 31, the MMC commercial bodily injury
8 regression failed the seasonality statistical T test, again
9 raising the very real question as to whether inclusion of
10 the seasonality regression variable is meaningful in the
11 fit of MMC regression curve. Well that's correct. BGP-
12 3, page 31, is the commercial bodily injury regression
13 analysis that's done by Mr. Pelley. And then it goes on
14 to say, Ms. Elliott offered an interesting solution for
15 this problem. She explained that she could get the
16 MMC regression for this particular coverage to pass
17 the T test if she went back and included an additional
18 two years of data history in the regression curve. If she
19 did this, she was pleased to report that the regression
20 then achieved a satisfactory T test score.

21 And it goes on to say, in fact, she said the
22 inclusion of the additional two years resulted in a
23 commercial trend rate higher than adopted by Eckler.
24 Well, at the next page, even more, even more difficult to
25 accept is to say her solution is to exclude the two
26 additional years, thereby achieving her lower trend rate,
27 and argue that her regression can achieve seasonality
28 T test success by using the extra period of history for
29 that one purpose. She apparently sees nothing strange
30 or peculiar about this logic.

31 Well, that evidence that she was giving about
32 the extra two years, that had nothing to do with the
33 commercial trend. It was a ... what she was doing was
34 indicating that seasonality passes all these T tests, if
35 you do extend for an extra two years, but that was in
36 the context of the private passenger trend. So I think
37 the Board should be very careful in reviewing this
38 particular part of the submission.

39 At the end of the day, I would submit that
40 these issues that have been raised by the Applicant are
41 really a smoke screen. The real issue before the Board
42 is whether or not, by analyzing this data on a half
43 yearly basis, you can ... it does permit the type of
44 indepth and precise analysis that the Board's actuary
45 recommends as opposed to a yearly, the use of annual
46 data which is recommended by Mr. Pelley.

47 This is crucial for the purposes of the analysis
48 of the trend for commercial vehicle bodily injury trend

49 for 2000/2001. Now, in the development of loss trend
50 for commercial vehicle coverage, both the actuaries
51 exclude certain data as representing outliers. The
52 exclusion of outliers for the purpose of developing loss
53 trends is clearly an accepted approach. Both of them
54 are doing it.

55 I would submit that the difference is, of course,
56 in this particular case, the Mercer analysis is excluding
57 both high points and low points, and that's why it can
58 be considered a balanced approach. The question is
59 whether we are to exclude the data from the worst
60 winter in recorded history in this jurisdiction because of
61 its unreliable, or sorry, its inherent unreliability.

62 (4:30 p.m.)

63 Well, the empirical evidence doesn't lie. At
64 Appendix B, page 5.4, we can see, and this in the rate
65 filing, we can see what the particular loss costs are for
66 2000 and 2001. Those particular loss costs are shown
67 as \$9,102,216 and \$9,767,022. Now, if you track this
68 back over the previous years back to 1989, and this is
69 on page 5.3, there are no numbers that look anything
70 like this on an annual basis. The next number before
71 that in (inaudible) is \$5,921,000. The next one is
72 \$4,728,000, then \$4,424,000, then \$3,974,000. It's all twos
73 and threes and fours, so even on an annual basis, 2000
74 and 2001 are way off the chart.

75 Now, it doesn't surprise me that Mr. Pelley's
76 line, he could fit a line to those numbers and conclude
77 they are not outliers. The situation though is when you
78 look at the half yearly data, which is the data that's
79 relied upon by the Board's actuary, does that bring this
80 more sharply into focus? Can we really see what's
81 going on within those two accident years?

82 Well, we know that in those particular two
83 accident years, and this is uncontested evidence before
84 the Board, that the half yearly data showed that
85 incurred losses were close to 70 percent higher in 2000-
86 2 than in the comparable period in 99-2, and 40 percent
87 higher in 2000-1 than the comparable period in 2000.
88 Now, that evidence is found at the transcript, December
89 17th, page 22, lines 44 to 69.

90 As I've said, analyzed on an annual basis, the
91 2000 and 2001 losses were the highest values shown in
92 this rate filing exhibit, and the 2000 losses were 50
93 percent higher than those in '99.

1 Now, let's look at the evidence about why this
2 is related to the winter. Well, we know that there was
3 the most snow ever fell. Now that's not the end of the
4 world, just because there was a lot of snow. But we
5 also know that in that particular winter there was a
6 lower than average rainfall, we've experienced plenty of
7 rain here this winter, and there was record snow depth,
8 and there was a high frequency of moderate snowfall
9 events, rather than a series of heavy snowfall events.
10 It's that combination of events, that combination of
11 different factors coming together that was considered
12 to be unusual by the expert. It's not the fact that there
13 was just a high value of snow, and this is brought out
14 in the point that Mr. Stamp made in his argument. Well,
15 why don't we see in February the snowfall wasn't, you
16 know, as considerable as it was in ... or there wasn't as
17 big a gap between snowfalls in February, why isn't
18 there a larger accident experience shown ... or sorry,
19 why is there larger accident experience shown. Well,
20 the answer, of course, is because of the lower than
21 average rainfall and the record snow depth, because by
22 that stage in the winter, the snow banks around town,
23 and this was testified to by Sgt. Hill, was one of the
24 contributing factors. The depth of snow on the ground
25 here contributes to the accidents. That's the
26 circumstance.

27 The evidence also demonstrates that both the
28 frequency of accidents and the volume of the incurred
29 losses increased significantly over the previous
30 periods. Again, as I pointed out in my written
31 submission, the industry evidence of frequency of
32 accidents in the benchmark confirms this as well. And
33 finally we have the opinions of Hill that both the major
34 reason reported to him for the accidents was the
35 snowfall and the adverse weather conditions, and
36 secondly, his opinion that commercial vehicles are on
37 the road longer.

38 Now, based on the foregoing, I would submit
39 that you have significant evidence before you upon
40 which you can decide to accept the approach that's
41 recommended by Mercer Risk and exclude these two
42 data points in question from the trend in losses. You
43 would be accepting the commercial vehicle bodily
44 injury trend of 8.4 percent as opposed to what's
45 proposed by Eckler which is 11.4 percent, which would
46 amount to about 31 percent over the future projected
47 period.

48 The evidence fully supports the conclusion
49 that the worst winter in this jurisdiction's history

50 inflated the loss experience for these particular two half
51 yearly periods. The evidence specifically links the
52 weather to the increased accidents, and supports the
53 explanation provided for the difference in the loss
54 experience between commercial vehicle and private
55 passenger coverages.

56 Now briefly I just want to look at ULAE. I'm
57 not sure, when I read the submission of the Applicant,
58 I wasn't sure if they were suggesting that the Board
59 should accept the more updated expense factor which
60 has been generated by IBC. I would suggest that it's
61 incumbent upon the Board to do so. This updated
62 expense factor relates to the data being used by the
63 Applicant, and to use an older expense factor for the
64 2001 data, using a 2000 AIX expense factor for the 2001
65 data just doesn't seem to make any sense whatsoever.

66 Furthermore, this is the number which is
67 provided by IBC, and Mr. Pelley agreed that there was
68 logic in using the more updated figure, and using more
69 updated evidence generally.

70 In terms of the credibility standard, again,
71 when I read the argument of the Applicant, it's difficult
72 to really pinpoint whether or not they're saying we
73 should accept the Board's actuary's recommendation on
74 this. Well, what I can say from the evidence is that Mr.
75 Pelley did not dispute that the approach has merit and
76 said that they would be prepared to study it. Well, you
77 know, Mr. Commissioner, Mr. Chairman, with all due
78 respect, this same recommendation was made in 2001,
79 and they agreed to study it then, but it wasn't acted
80 upon. I would submit that the preponderance of the
81 evidence supports rejecting this approach and
82 requiring the use of this approach as recommended by
83 the Board's actuary in this particular case.

84 I want to turn briefly to the rating issues. The
85 private passenger program proposes the
86 implementation of CLEAR. The primary difficulty with
87 implementing CLEAR is the fact that the policy in force
88 file that's used is more than two years old. This carries
89 with it a risk that there will be dislocation for the
90 persons that I represent.

91 Furthermore, which is evidence which I was
92 not aware of, it turns out that CLEAR is not
93 implemented in the voluntary market on the widespread
94 basis that I had understood it to be, and I don't fault
95 anybody else for that. That's just the understanding
96 that I had.

1 In fact, it was indicated by Mr. Anthony that
2 it has been implemented by a fair number of national
3 insurers and is slowly getting adopted. The Insurance
4 Corporation of Newfoundland does not use CLEAR in
5 the voluntary market. This seems to me to be
6 inconsistent with the premise that was put forward by
7 the Applicant that it merely follows the market, it
8 doesn't lead.

9 For all these reasons, basically that there is no
10 widespread implementation of CLEAR as suggested, or
11 as I understood originally, but secondly that there is a
12 risk with the use of the old policy in force file, it is my
13 submission that the Board should decline the
14 implementation of CLEAR at this point, and direct that
15 a further and more up to date policy in force file be
16 completed, and then an application proceed on that
17 basis.

18 The accident and conviction surcharge
19 schedule issue is ...

20 MR. SAUNDERS, PRESIDING CHAIRMAN: Before
21 you go any further, Mr. O'Flaherty ...

22 MR. O'FLAHERTY: Yes.

23 MR. SAUNDERS, PRESIDING CHAIRMAN: Looking
24 at the weather outside as well as I'm looking at the
25 clock, and how much time are you going to be requiring
26 to finish?

27 MR. O'FLAHERTY: Two minutes.

28 MR. SAUNDERS, PRESIDING CHAIRMAN: Oh, then
29 carry on.

30 MR. O'FLAHERTY: Okay. The accident and
31 conviction surcharge schedule, as I've already
32 indicated, we believe should not be, should not be
33 accepted by the Board. These changes should not be
34 accepted as proposed by the Board because they are
35 simply not based on any actuarial evidence
36 whatsoever.

37 Furthermore, because of the profile that's
38 being shown of the, of Facility, that is in BGP number ...
39 sorry, DJS-2, illustration five, we now know that most of
40 the people in Facility Association actually have no
41 accidents or convictions. Therefore this notion of
42 behaviour modification seems to me to be something
43 that doesn't have any substance behind it.

44 We do ask for a five percent, as set out in the
45 written argument, and I won't get into it in great detail,
46 we do ask for a five percent clean driver discount. That
47 was done by the Board, an additional five percent was
48 ordered by the Board in New Brunswick, without any
49 change to the off balance factor, and it was done on the
50 basis, I would submit, of their assessment of this
51 particular figure, that there was such a high figure.

52 So the last point I want to go to is the
53 reliability. I don't want to ... I want to submit this one
54 case on the issue of the role of an expert witness. I
55 won't get into it in great detail except to say that this
56 case makes it clear, and the law in Canada is clear, that
57 experts must not be permitted to become advocates.
58 That is not the role of an expert witness before the
59 Board, and if a Board, a witness does assume that
60 particular role, then his or her evidence must be given
61 correspondingly less weight.

62 Now, in this particular case you have really
63 two different, two completely different roles being
64 played by the actuaries. One the one hand ... and this
65 was averted to by yourself, Mr. Chairman, as you
66 pointed out in cross-examination at one point, you said
67 that Ms. Elliott is an actuary, she is not an actuary ...
68 and I'm paraphrasing now ... she is not an actuary and
69 consultant retained by the Board to advise on other
70 insurance matters. When she was ... she wouldn't
71 provide an opinion on matters that were outside her
72 expertise, and that was the explanation that you
73 provided to Mr. Stamp for that particular, for that
74 particular approach.

75 That is the appropriate approach in our
76 submission, and that is the reason, or one of the
77 reasons why the advice of the actuary should be
78 accepted in this particular case.

79 I know I'm rushing a bit now, but I want to
80 conclude as quickly as possible. The last issue is the
81 issue of costs. As I've said, my friend has a copy of
82 the, of this particular Order in Council, and I don't know
83 if she's going to pull a rabbit out of the hat here today
84 and show it to us. In any event, I'm paraphrasing ...
85 what it provides for is that the cost of the Consumer
86 Advocate ... the Consumer Advocate is appointed
87 effective November 16th, something like that, November
88 13th ...

89 MR. SAUNDERS, PRESIDING CHAIRMAN: Well, why
90 don't we get the ...

MS. NEWMAN: Yeah, for the record, I'm not prepared to provide copies of the Order in Council during the hearing. I can give the substance of what's contained in this Order in Council. It does indicate that pursuant to the authority under Section 61 of the Automobile Insurance Act, Peter O'Flaherty is appointed as Consumer Advocate effective November 13th.

MR. O'FLAHERTY: Okay, the 13th.

MS. NEWMAN: To represent consumers at a Public Utilities Board rate hearing with respect to FA.

MR. STAMP, Q.C.: The date of the order, please, Mr. Chairman?

MR. SAUNDERS, PRESIDING CHAIRMAN: The date of the order?

MS. NEWMAN: January 6th.

MR. O'FLAHERTY: So we would simply ask for our costs on that point. And one last point which was a comment of Mr. Stamp regarding the questions that I had of Mr. Pelley regarding the 2001 rate filing, and this is whether or not they had actually, Eckler's had actually used half year data in, and adjusted for seasonality for trend. I would simply refer you to the evidence on December the 20th when I was cross-examining Mrs. Elliott regarding that issue. I brought her directly to the 2001 filing on page six, under the section "loss trend", which says in Section 8.2 we have updated the third party liability projection factors to reflect bodily injury and property damage experience as of 30 June 2000. In doing so we have applied the selected models from the 1999 AIX analysis with an adjustment to the resulting 2000-1 projection factor to account for seasonality, and the exhibits that I referred her to were in, I believe, 8.2 of the Act, sorry of the filing. I think those are all the issues that I have. I thank you ... and I realize I spoke quite fast, but I would have thought that you would have been reviewing these, you know, particular submissions once they come out on Ms. Ebsary's transcript, and you know, hopefully that it wasn't too confusing. Unless you have any questions, or I hope you do have some questions, those are my submissions on behalf of the Consumer Advocate.

MR. SAUNDERS, PRESIDING CHAIRMAN: Okay, thank you, Mr. O'Flaherty. Okay, Commissioner Powell?

(4:45 p.m.)

COMMISSIONER POWELL: A lot of food for thought, I don't know if I have any questions or not. I'd almost have to read the transcript, but I have a number of things noted that I want to ... I still have ... one thing, I guess reading the transcript, I still have the struggle trying to put my mind around all these legislative requirements and the rationale for what actually are the costs of FA. It seems to me it doesn't flow as easily as it, as you might think it should, and while you're fairly emphatic in your written submission and your follow-up, you don't have any real words in terms of A, B, C, D, E, in tying that all together any more than what you've done?

MR. O'FLAHERTY: This is in terms of the issue of the ...

COMMISSIONER POWELL: ... the profit and cost, profitability, the whole, you know ...

MR. O'FLAHERTY: Right.

COMMISSIONER POWELL: You know, just what distinguishes ... based upon, I think, what legal counsel for the Board said on page two, historically the Board has established rates based upon the actuarially justified loss costs.

MR. O'FLAHERTY: Uh hum.

COMMISSIONER POWELL: And if we go through, and I think I asked the question of Mrs. Pelley (*sic*), not Mr. Pelley, Mrs. Elliott, about the, whether the rates being set in FA, if they're based on a formula, historically what you do ... if I was talking about general rates, not including some costs, would that not make these rates invalid, I mean so ... yes, I recall that discussion, and I think her evidence, or at least as I understood it, was that there is, there is a component within the rate for profit but it's zero within the particular rate calculation for this particular applicant.

COMMISSIONER POWELL: But what about the other aspects of the return on capital and ...

MR. O'FLAHERTY: Well, yes, and that's a point that myself and Mr. Stamp clearly disagree upon. His position is that, as I understand it, that this is, it is done this way, and it is done in this case, certainly following that rationale, and they are not looking to recover cost

1 of capital, but he takes the position it's done as, on the
2 basis of an administrative decision, or a direction from
3 the Board, and I take the position that that's the
4 legislative requirement, so I think that's where the
5 debate is, and I also concede Mr. Stamp's point that it
6 strictly speaking doesn't have to be determined by the
7 Board, but I see some value in outlining, you know,
8 what the rules are. I'm sorry that I was unable to
9 provide any further help for you as to why I believe it
10 is the legislative provision, but I would rely primarily
11 upon Sections 97 to 102 of the *Insurance Companies Act*,
12 and also upon the general role, if you were sitting as a
13 Board member on, for example, the, you know, a general
14 rate application for Newfoundland Power, or
15 Newfoundland Telephone, or Newfoundland Hydro.
16 There are specific provisions in all of that legislation
17 which talk about what the rate of return is, or what's the
18 return on investment that a utility can get. In this case,
19 there is none, and it is my submission that there isn't
20 one because there is none allowed.

21 COMMISSIONER POWELL: Okay, if you don't say it
22 you don't get it, but how do you rationalize that with
23 the established rates based upon the actuarial (*phonetic*)
24 justified loss cost? That's my ... my interpretation of
25 that, that's a very broad ... it covers all ...

26 MR. O'FLAHERTY: Well, I think the rates do, in this
27 case, they do actually get established after an actuarial
28 analysis of the actuarially justified loss costs, but those
29 loss costs don't include what you'd find in, for example,
30 the benchmark, which is a return on equity calculation.
31 I don't think there is any, there is any difference. I don't
32 think the loss costs include the return on equity in the
33 benchmark. I think those are an expense, that's a valid
34 expense. I think the difference here in the application
35 before the Board is that under this particular legislative
36 scheme there is no valid expense for return on equity
37 for the Applicant, but I don't think the loss costs are
38 not actuarially justified. I mean, you know, in this
39 particular document, the rate filing, the loss costs are
40 addressed fully in terms of the actuarial evidence. Does
41 that provide any assistance?

42 COMMISSIONER POWELL: Yeah, I can see where
43 you're coming from, it's something we've got to bang
44 our heads around. You would agree that the legislation
45 sort of doesn't point you ...

46 MR. O'FLAHERTY: I do agree, it's not clear ... it's ...
47 you know ...

48 COMMISSIONER POWELL: It's something that
49 probably should be addressed.

50 MR. O'FLAHERTY: It's capable of, it's capable of
51 argument, and that's what Mr. Stamp and myself are
52 doing.

53 COMMISSIONER POWELL: That's right.

54 MR. O'FLAHERTY: It's not spelled out.

55 COMMISSIONER POWELL: So there should be a little
56 bit more clarity there.

57 MR. O'FLAHERTY: I agree that if it was clearer, then
58 there wouldn't be as much uncertainty as to what the
59 legislation does provide for, but I don't think that takes
60 away from the argument that I'm making. I think the
61 position that I'm submitting is the stronger of the two
62 arguments because of the factors that I've outlined.

63 COMMISSIONER POWELL: I'm just going through my
64 notes here now. No, I think that's all I have, Mr.
65 Chairman.

66 MR. SAUNDERS, PRESIDING CHAIRMAN: Okay,
67 thank you, Commissioner Powell, Commissioner
68 Martin?

69 COMMISSIONER MARTIN, Q.C.: Nothing.

70 MR. SAUNDERS, PRESIDING CHAIRMAN: I just
71 have one, I think, Mr. O'Flaherty, and I know that you
72 made quite a point early in your remarks this afternoon
73 to state that you were representing the four percent,
74 and I just want to make sure that I heard you correctly
75 in that ... and you didn't refer to the Order in Council,
76 because I think the Order in Council appoints you as a
77 Consumer Advocate to represent the consumers of
78 Newfoundland, if I'm not mistaken, and when you made
79 your submission, your intervenor submission, which
80 I'm reading from here in paragraph one, you restated
81 that, because you said here that you're appointed to
82 represent the province's consumers. Now, at that stage,
83 and until we got into the hearing, it wasn't clear if you
84 were representing the four plus the 96, or if you were
85 representing all of the consumers ... or I'm sorry, or only
86 the four percent. You seem to have made it clear that
87 you're representing the four percent today, and is that
88 what you intended to do, to make that clear?

MR. O'FLAHERTY: Oh, I think if you review the transcript, in these ...

MR. SAUNDERS, PRESIDING CHAIRMAN: Yes, I reviewed the transcript, and there were several instances where you said that you were representing the four percent.

MR. O'FLAHERTY: Correct.

MR. SAUNDERS, PRESIDING CHAIRMAN: But I'm wanting to make sure that you understand that that's in conflict, in the words in any case, with what's in your Order in Council, and what's in your final, or in your intervenor's submission.

MR. O'FLAHERTY: Well, I mean I don't, I'm not ... I'm not involved with what's in the Order in Council, obviously I have no involvement with that. I understand, I think I have the correct understanding of what my role is. I'm here to represent the ratepayers.

MR. SAUNDERS, PRESIDING CHAIRMAN: Right.

MR. O'FLAHERTY: And the ratepayers are the four percent.

MR. SAUNDERS, PRESIDING CHAIRMAN: The four percent.

MR. O'FLAHERTY: And they are not the 100 percent of the people in the province, so in respect of the intervenor's submission, I think it's a little harsh, and I don't mean to say that you're (inaudible) off on me, but we were ...

MR. SAUNDERS, PRESIDING CHAIRMAN: I just want to be sure what you're representing.

MR. O'FLAHERTY: Yeah, we were appointed on November the 14th, and ...

MR. SAUNDERS, PRESIDING CHAIRMAN: Yes, I understand that.

MR. O'FLAHERTY: And I also understand as well that, you know, from the comments of the Applicant's argument, that as time has passed, it seems that the great focus on getting this done and how much of a hurry we were in, and how important it was, seems to have somewhat faded into the past, but at that particular point in time, that was the situation.

Everything had to be done yesterday, and that's the document that I put in, but there's no, there's been no confusion in my mind ... whenever I've been asked about this in the hearing, I've said I represent the four percent. That's the basis of my retainer, and I can't comment on whether that puts me in conflict somehow with the Order in Council, but I still would ask for my costs in accordance with that order.

MR. SAUNDERS, PRESIDING CHAIRMAN: No, I wasn't raising it for the purpose of getting into a discussion on the costs, that's another matter.

MR. O'FLAHERTY: Okay.

MR. SAUNDERS, PRESIDING CHAIRMAN: But I wanted to give you the proper description when we do write our order as to whom you're representing, so it's safe to say you're representing the four percent.

MR. O'FLAHERTY: I'd prefer if you would state that I'm representing the ratepayers who are affected by this legislation, by this particular application. Now, I mean we've been calling it the four percent, and that harkens from Mr. Whalen's opening comments. I mean that was his opening statement. I don't think it is four percent. Next year it will be 10 percent or four percent or three percent, or whatever.

MR. SAUNDERS, PRESIDING CHAIRMAN: You're representing those ratepayers that are in FA.

MR. O'FLAHERTY: That are directly affected by this particular application, yes, the ratepayers.

MR. SAUNDERS, PRESIDING CHAIRMAN: Yes.

MR. O'FLAHERTY: And you're right, I have adopted the phrase four percent, but that's only because that's basically the way it was described in the legislation, sorry, throughout the hearing.

MR. SAUNDERS, PRESIDING CHAIRMAN: Okay, alright, how about you, Ms. Newman, do you have some final remarks?

MS. NEWMAN: Yes, I do have a few items I wanted to go through, mainly referencing the written submissions of the parties, to clarify points that I think should be clarified on the record. I expect it might take another 15 minutes or so.

1 MR. SAUNDERS, PRESIDING CHAIRMAN: Okay, so
2 that brings me to you, Mr. Stamp, your final words,
3 what time would you expect?

40 MR. SAUNDERS, PRESIDING CHAIRMAN: Okay,
41 thank you, we'll see you in the morning.

4 MR. STAMP, Q.C.: I probably wouldn't have been too
5 long, I guess I would be shorter if I had some time to
6 prepare for it. That's the difficulty in these things,
7 preparation allows for brevity and lack of it doesn't.

42 *(hearing adjourned)*

8 MR. SAUNDERS, PRESIDING CHAIRMAN: Yeah.

9 MR. STAMP, Q.C.: If we're talking about 15 minutes
10 from the Board's solicitor, and I mean assuming I had
11 some time to do that, I should think that at the most,
12 you know, combined, combined presentation, we'd be
13 no more than an extra hour. That being the case, given
14 what I see and the staff often have a little less
15 enthusiasm for this than perhaps some of us do, maybe
16 it's better to do that tomorrow morning.

17 MR. SAUNDERS, PRESIDING CHAIRMAN: I think
18 what we should do is adjourn now and resume in the
19 morning at a time convenient to everybody.

20 MR. WHALEN, Q.C.: We can't see the building next
21 door so that's ...

22 MR. SAUNDERS, PRESIDING CHAIRMAN: That's
23 right, it's a good idea to get out of here or we'll spend
24 the night together, God forbid. Is 9:00 comfortable, or
25 9:30?

26 MR. STAMP, Q.C.: 9:30 would be a little bit more ... in
27 case we have to ...

28 MR. WHALEN, Q.C.: If we have to shovel out.

29 MR. SAUNDERS, PRESIDING CHAIRMAN: Yes, sure,
30 well let's say 9:30, and if there's a problem then we'll
31 deal with that in the morning.

32 MR. STAMP, Q.C.: And we will be brief, Mr. Chairman,
33 I can assure you.

34 MR. SAUNDERS, PRESIDING CHAIRMAN: So the
35 time you're going to take overnight is going to take a
36 half an hour off the hour.

37 MR. STAMP, Q.C.: If I can get home, or some place,
38 that will be the case. If I sleep in the car I won't be
39 much help.