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<p>1 (9:30 a.m.)</p> <p>2 CHAIRMAN:</p> <p>3 Q. Well, good morning everybody. I have very few</p> <p>4 preliminary remarks, which I'm sure you will</p> <p>5 appreciate. Darlene Whalen is on my left,</p> <p>6 Vice-Chairman; and on my right are Dwanda</p> <p>7 Newman, extreme right; and Jim Oxford. We are</p> <p>8 the panel on this hearing, and we have, of</p> <p>9 course, Board secretary, Cheryl Blundon.</p> <p>10 Where's Jackie? Board counsel. There she is.</p> <p>11 All right. Doreen Dray is down in the back</p> <p>12 and known to everybody, of course, is Sam</p> <p>13 Banfield, and Discoveries Unlimited, Judy Moss</p> <p>14 is going to produce the transcripts for this</p> <p>15 exercise, and under the supervision, of</p> <p>16 course, of Cheryl Blundon, and we should have</p> <p>17 everything transcribed and available by mid</p> <p>18 week.</p> <p>19 We've scheduled 9:30 to 2 p.m., with a</p> <p>20 short break at 11, but if things are going</p> <p>21 well, maybe we'll skip the break. We'll just</p> <p>22 see how it goes. I'm in the hands of all our</p> <p>23 participants here. So Jackie, I would ask you</p> <p>24 now to enter the matter and advise us of any</p> <p>25 other preliminary items.</p>	<p>1 which stated the new filing date to be June</p> <p>2 30th and once again, the interim rates were</p> <p>3 extended.</p> <p>4 The current application was filed by</p> <p>5 Hydro on June 30th, 2009 for an order to</p> <p>6 approve final rates for the Industrial</p> <p>7 Customers. Since that time, the parties have</p> <p>8 exchanged requests for information and</p> <p>9 response. Expert evidence has been filed.</p> <p>10 Following the filing of all this information,</p> <p>11 it was determined that a preliminary hearing</p> <p>12 on jurisdiction and authority of the Board</p> <p>13 would be beneficial. The issues to be</p> <p>14 explored today have been identified through</p> <p>15 consultation of parties' counsel and have bene</p> <p>16 outlined in the filings.</p> <p>17 As this is Hydro's application, they will</p> <p>18 present their oral arguments first, followed</p> <p>19 by the Industrial Customers, Abitibi</p> <p>20 Consolidated, Newfoundland Power and the</p> <p>21 Consumer Advocate. As discussed previously</p> <p>22 among counsel, we hope to conclude this</p> <p>23 hearing today and therefore we urge counsel to</p> <p>24 add to the written submissions, not simply</p> <p>25 repeat what was contained in the written</p>
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<p>1 MS. GLYNN:</p> <p>2 Q. Certainly, thank you. I'm just going to</p> <p>3 provide a brief background on the procedural</p> <p>4 history that has led to the preliminary</p> <p>5 hearing. Rates for the Industrial Customers</p> <p>6 for 2007 were set through the 2006 GRA. The</p> <p>7 normal rate stabilization plan adjustment for</p> <p>8 the Industrial Customers should have occurred</p> <p>9 on January 1st, 2008. However, on December</p> <p>10 20th, 2007, Hydro applied to the Board for a</p> <p>11 continuation of the 2007 rates due to</p> <p>12 potential volatility in rates based on</p> <p>13 significant load changes. The Board issued an</p> <p>14 interim order P.U. 34 2007 which continued the</p> <p>15 rates which were in effect for 2007.</p> <p>16 On December 11th, 2008, Hydro again</p> <p>17 applied for a continuation of the interim</p> <p>18 rates because of continuing load changes that</p> <p>19 could affect rate stability. The Board issued</p> <p>20 interim order P.U. 37 2008 which continued the</p> <p>21 rates until March 31st, 2009 and also required</p> <p>22 Hydro to file an application to finalize rates</p> <p>23 by January 31st, 2009.</p> <p>24 Hydro applied for an extension of this</p> <p>25 filing date and the Board issued P.U. 6, 2009</p>	<p>1 submissions.</p> <p>2 Again, given that this is legal argument</p> <p>3 and that the supporting documentation was</p> <p>4 mostly case law and legislation, we do not</p> <p>5 have the documents available electronically.</p> <p>6 So please ensure that the Commissioners are</p> <p>7 given time to locate any references that you</p> <p>8 may make to your documents. And I would ask</p> <p>9 the parties now to introduce themselves for</p> <p>10 the record and then we'll turn it back to the</p> <p>11 Chairperson.</p> <p>12 MR. YOUNG:</p> <p>13 Q. Geoffrey Young on behalf of Newfoundland and</p> <p>14 Labrador Hydro.</p> <p>15 HUTCHINGS, Q.C.:</p> <p>16 Q. Joseph Hutchings, and with me, Paul Coxworthy,</p> <p>17 for the Industrial Customers, Mr. Chair.</p> <p>18 MR. MOORES:</p> <p>19 Q. Gregory Moores on behalf of Abitibi</p> <p>20 Consolidated Company of Canada.</p> <p>21 KELLY, Q.C.:</p> <p>22 Q. Ian Kelly for Newfoundland Power, and with me,</p> <p>23 Gerard Hayes, and behind is Mr. Kevin Fagan.</p> <p>24 MR. JOHNSON:</p> <p>25 Q. Tom Johnson, Consumer Advocate.</p>

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<p>1 CHAIRMAN: 2 Q. So Mr. Young, you are up, sir. 3 HUTCHINGS, Q.C.: 4 Q. Mr. Chair, if I might raise one preliminary 5 point? 6 CHAIRMAN: 7 Q. Yes. 8 HUTCHINGS, Q.C.: 9 Q. We certainly don't have objection to the order 10 of presentation that counsel has laid out. 11 I'm just assuming that in terms of responses, 12 we'll roll back in the other direction, such 13 that, you know, Hydro will go last, have the 14 last rebuttal and we'd have the second last 15 and so on. 16 CHAIRMAN: 17 Q. Last in, first out. 18 HUTCHINGS, Q.C.: 19 Q. Yes. 20 CHAIRMAN: 21 Q. Yes, sir, we will - 22 MS. GLYNN: 23 Q. Certainly. 24 CHAIRMAN: 25 Q. - make sure everybody is happy, at least with</p>	<p>1 of that issue is. 2 First, on the procedural matter. As 3 counsel for the Industrial Customers have 4 pointed out in their submission, the process 5 leading up to today's session has been 6 somewhat protracted and in the context of the 7 numerous appearances I've made before this 8 Board, I'd characterize the process as being 9 somewhat confused. This is primarily due to 10 the difficult nature of the subject matter, 11 and we ask that the Board and our customers, 12 customers' representatives, be patient. This 13 is important and difficult stuff that we're 14 dealing with. 15 In our view, this is all due to the fact 16 that the RSP is a deferral account that 17 affects almost all customers in the province 18 and deals with large amounts of money. It is 19 intended to provide a smooth and non-volatile 20 means of collecting fuel costs so that the 21 risks of fuel price changes, fuel consumption 22 levels or hydraulic reduction, which are all 23 matters outside the Utility's control, are 24 borne by the customer but through a process 25 that prevents the inherent volatility from</p>
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<p>1 the procedure. 2 MR. MOORES: 3 Q. That's taking on a big burden there, Mr. 4 Chair. 5 CHAIRMAN: 6 Q. Okay, sir. 7 MR. YOUNG: 8 Q. Thank you, Mr. Chair. Good morning, 9 Commissioners. I'll try to be as brief as I 10 can this morning, given the fairly complicated 11 matter we have before the Board. I'll 12 restrict my comments to three areas. First 13 thing I want to do is go through the special 14 nature of the subject matter of the RSP. I'll 15 be brief on this, but I do want to speak, at 16 least to some extent, about the process and 17 the steps that have brought us to today and 18 why that's relevant to the matter we have here 19 today on the jurisdictional issue. 20 Second thing I would like to discuss is 21 the nature of interim orders generally under 22 the Public Utilities Act and for rate 23 regulation generally, and also, whether the 24 RSP is, in essence, a rate or a rule or 25 regulation and what the jurisdictional impact</p>	<p>1 being passed on to the customers in a manner 2 or in a time sequence that causes customer 3 hardships. This is an important problem to 4 solve. It's a worthy cause for the regulator 5 and the parties to appear before the Board to 6 embrace. In our view, the RSP has generally 7 worked very well over its 25 years or so of 8 operations, but it has not always been an easy 9 road to travel. 10 In December of 2007, Hydro is faced with 11 the problem with the Industrial Customers 12 component of the RSP. Industrial load had 13 fallen sharply and further load reductions 14 appeared possible. Moreover, there was a 15 potential for further changes in the other 16 direction over a period of a few years. In 17 those circumstances, the RSP appeared to be 18 causing rate volatility rather than rate -- 19 smoothing the rate volatility. It seemed to 20 be causing the problem. Hydro therefore 21 applied for an interim order to freeze rates 22 until a decision could be made as to an 23 application for final RSP rates that would 24 address the problem. Hydro has still not 25 applied for a final order based upon a new</p>

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<p>1 rate design, that is to say one that is based 2 upon a specific rate design methodology to 3 effect these changes.</p> <p>4 In Hydro's application of June 2009 for a 5 final Industrial Customer RSP order, Hydro 6 asked that the Board again retain the 7 Industrial Customer RSP rates it had applied 8 since January of 2008. However, I suppose, to 9 be honest, it's since January 2007. However 10 in the expert evidence submitted by the 11 parties and in the responses to the RFIs, an 12 obviously important rate setting issue has 13 been thoroughly discussed. In setting final 14 RSP rates and in dealing with the very large 15 balance in the Industrial Customers load 16 variation, what policy concerns should the 17 Board consider and how should those concerns 18 be addressed? More specifically, today we are 19 discussing the matter of setting final RSP 20 rates under the application Hydro made and 21 what options are properly before the Board.</p> <p>22 It's Hydro's submission that the fact 23 that the Board made an interim order as to RSP 24 rates puts beyond any serious doubt that the 25 Board has jurisdiction to determine the</p>	<p>1 the RSP was achieving fair and reasonable 2 rates and if it had determined that an order 3 was required to change the RSP rates, it could 4 have ordered the change after hearing from the 5 parties as a final order. This could have 6 happened in 2007 for the 2008 rate. The Board 7 instead allowed Hydro's application for an 8 interim order.</p> <p>9 I want to make a brief comment about the 10 mechanics of the Industrial RSP which contains 11 a one-year lag inherently in the way it works.</p> <p>12 Had the Board, in December of 2007, been 13 considering the final -- appropriate final 14 rates to make it effective January 1, 2008, it 15 would have been dealing with data and actuals 16 from 2007. Every year when the Board approves 17 the RSP rate component to be in effect for the 18 coming year, it is approving that rate based 19 upon cost factors that arose during the 20 previous 12 months.</p> <p>21 So in the hypothetical case I spoke of a 22 moment ago of the Board setting final rates in 23 2007 for 2008, the Board would have been 24 setting rates for the 2008 energy consumption 25 which were affected by and based upon actual</p>
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<p>1 appropriateness of the rates that applied 2 since the interim order was made or whether 3 some other rates ought to have applied.</p> <p>4 Further, it is Hydro's submission that the 5 Board is empowered to make a rate change to go 6 into effect perspectively that deals with the 7 activity in the RSP with the Industrial 8 Customer plan balance as if the Board had made 9 the order on January 1st, 2008.</p> <p>10 The Board is really doing the following: 11 it is considering what final order it would 12 have made effective January 1st, 2008 had the 13 Board had the benefit of the knowledge it has 14 gained in the intervening period. The 15 deferring of the decision and making an 16 interim order allows the Board to have the 17 20/20 benefit of the hindsight and it was for 18 this reason that the interim order was issued 19 in the first place. That's what interim 20 orders allowed the Board to do.</p> <p>21 Had things been different, had the very 22 fluid and dynamic circumstances in relation to 23 load and costs been more certain, the Board 24 might have considered, at the time it received 25 the application for the interim order, whether</p>	<p>1 cost factors that were compiled in 2007. In 2 this respect, even the prospective rate making 3 that occurs in the RSP in setting the rates 4 for the coming year, based upon the formulas 5 in the RSP rate structures, there is a need to 6 consider and take into account past events. 7 This is just the way the RSP works.</p> <p>8 I'd refer the Board to Newfoundland 9 Power's submission on this point and at 10 paragraph 64, I don't think we need to turn 11 there now, where this last point is explained 12 very succinctly and clearly. And looked at 13 from this perspective, the perspective of the 14 purpose of an interim order and from the 15 nature of the RSP, the Board finds itself 16 faced with making a decision today that is 17 based upon the same considerations as it would 18 have been faced with in December 2007 had 19 Hydro applied for a final order at that time. 20 But of course, it's had the knowledge of the 21 interim period.</p> <p>22 So what's different about doing it today? 23 Well, putting a regulatory decision off to a 24 later date when the Board can more fully 25 consider the matter is the purpose and role of</p>

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<p>1 interim orders. It's the reason the 2 legislature has given the Board that specific 3 power. Seen from this perspective, the 4 interim order issued in December of 2007, 5 that's P.U. -- order No. P.U. 34 2007 was a 6 clear signal that the final rate to be set 7 later would deal with that intervening period 8 between when the interim rate was set and when 9 the final rate would be set. The interim rate 10 was set based upon circumstances that were 11 unsettled and were not satisfactory to move 12 the Board to order final rates at the time, 13 thus they allowed the interim order.</p> <p>14 There can be no serious claim for vested 15 rights in this circumstance. The Industrial 16 Customers cannot expect the RSP refund amounts 17 to be paid over to them as if the Board had 18 not deliberately put that RSP decision aside 19 for another day. The Board might, if it 20 chooses to, keep all of the balance attributed 21 to Industrial class load reductions with the 22 Industrial class customer -- Industrial 23 Customer class, but is by no means required to 24 do so. The case law is clear that once an 25 interim order has been issued, the rate is at</p>	<p>1 set those rates, it had the legislated 2 authority, the jurisdiction, to call a hearing 3 into the matter and to set rates for 2008 4 based upon a change it was making to the RSP 5 rate structure. The Board would have had the 6 power to make this order after a hearing, just 7 as if it had the issue arisen in a GRA. The 8 Industrial Customers would not have any vested 9 rights to any RSP balances at that time.</p> <p>10 So the question is what jurisdiction the 11 Board has at this time to make a final order. 12 Is it empowered to make a different order than 13 the interim order based upon a more thorough 14 review of the matter? The case law is clear 15 that this is the purpose and nature of an 16 interim order. It puts an order in place for 17 a period of time, but later, at a time that a 18 final order is made, the Board is empowered to 19 consider whether its first order which may 20 well have been made upon limited information 21 and representations was the correct order to 22 have been made, the appropriate order to have 23 been made. On a final order, the Board then 24 has the opportunity to right any wrongs that 25 have occurred, but it may do so with effect</p>
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<p>1 risk. The Board is reserving its decision.</p> <p>2 If the Board finds that all it could have 3 done by the interim order was to freeze the 4 energy mill rate being paid by the Industrial 5 Customers without being empowered to consider 6 changes to the rate structure, the Board would 7 be strangling and rendering all but useless 8 the jurisdiction that the Board has been given 9 by the Legislature to make meaningful interim 10 orders for fair and reasonable rates. There 11 is no reason or basis to restrict the Board's 12 actions or considerations in carrying out an 13 interim order on this issue any more than the 14 Board would be restricted or constrained when 15 it considers a final order. Proper rate 16 making practices ought to imply in order for 17 the Board to issue an order that provides fair 18 and reasonable rates. Up to the point in 19 December of 2007 when Hydro applied to the 20 Board for a final order as to RSP rates, the 21 Industrial Customers did not have any vested 22 rights to the balance in the account that were 23 attributable to the Industrial Customer class 24 under the RSP rate structure rules.</p> <p>25 When the Board received an application to</p>	<p>1 back to the date that the interim order went 2 into effect.</p> <p>3 I would point the Board to page five of 4 the Industrial Customers' written brief and I 5 can read this. I would ask the Board to 6 consider whether anything useful or 7 meaningful, let alone liberal or purposeful, 8 could be achieved if the Board was, in making 9 interim order, constrained to make an order 10 that had no difference in outcome other than a 11 delay in the implementation of the rate 12 change, and I think this bears reading because 13 this succinctly puts one of the issues before 14 the Board. Not often that I read from 15 opposing counsel's briefs, but I think at this 16 point it's useful to point at the issue.</p> <p>17 This is at line 33 to 37 on page five. 18 "In the present case, the rate to IC was 19 approved in an interim" -- or I guess I should 20 say "Industrial Customers was approved on an 21 interim basis as of January 1st, 2008. The 22 Board is now in a position to determine what 23 the proper should have been made and make the 24 proper adjustment, which in this case will be 25 a refund to the Industrial Customers of</p>

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<p>1 amounts which have been overpaid since January 2 1st, 2008." That is the full extent of the 3 retrospective adjustments which the Act 4 contemplates or the intent of the Act can 5 support. I reiterate that that is a very, 6 very narrow jurisdiction that the Industrial 7 Customers are exceeding for the Board in this 8 matter and I think this is a matter that 9 requires some further consideration.</p> <p>10 I'd like to -- in analyzing this issue, I 11 would like to consider the distinction, and 12 this is an important one in the Industrial 13 Customers' submission, I would suggest, and 14 it's an important distinction in our view of 15 things, the distinction between rates and 16 rules under the RSP and what that really 17 means.</p> <p>18 Understanding the Industrial Customers' 19 position as outlined in their brief of law 20 requires an understanding of their view of the 21 distinction between RSP rules and RSP rates. 22 It is Hydro's submission that everything about 23 the RSP is rate related. That's what the RSP 24 is. It's a rate matter. There is nothing in 25 the RSP rules that deals with quality of</p>	<p>1 outcome that is consistent with proper rate 2 making principles, the only sensible way to 3 fix the problem is to fix or adjust a 4 component of the formula, just say the rules. 5 It makes a lot more sense to do that then it 6 does to tinker with the data, and if you're 7 going to use the RSP at all, you have 8 essentially two choices. You change the 9 formula or you make a judgment as to whether 10 or not some piece of data was improper or 11 gives the wrong outcome.</p> <p>12 But if the Board were to make a change to 13 the RSP components, to the rules, to the way 14 the formula is worked, there can be no serious 15 discussion as to whether or not the Board had 16 made a rate change. Obviously it has. They 17 had made a rate structure change perhaps you 18 could say, but it's a rate change. The rate 19 change is manifest in a change to the RSP.</p> <p>20 The Board understands that there is a 21 well established practice in this jurisdiction 22 and elsewhere setting up -- to set up 23 commodity related deferral accounts by 24 adjustment formulas. Making changes to those 25 formulas and methodologies has the effect of</p>
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<p>1 service issues, as to how you qualify for a 2 particular kind of service or as to any other 3 matter of the sorts of things that are 4 typically dealt with in the rules and 5 regulations as that word is generally used 6 before this Board and in the orders it makes.</p> <p>7 The RSP rules are just a means of 8 calculating a rate. That's their only role. 9 There are no RSP rules that pertain to 10 anything except calculating a rate. In the 11 normal course, when Hydro applies for an 12 annual RSP rate change, it takes its 13 information and that's actual and forecast 14 information. It flows those values through 15 the formulas in the RSP and out pops a rate. 16 The Board reviews the data, reviews the 17 calculations in accordance with the formulas 18 stated in the RSP rules and if the arithmetic 19 is done correctly, the RSP rate is approved. 20 That's how it's worked. It is essentially an 21 automatic adjustment formula to change rates 22 whereby the Board need not, if it chooses not 23 to, exercise its discretion.</p> <p>24 When a party comes before the Board and 25 makes a case that the RSP is not giving an</p>	<p>1 changing rates and it's all about rate 2 regulation and rate making.</p> <p>3 Section 70 of the Public Utilities Act 4 gives the Board jurisdiction to make a final 5 order setting rates and Section 75 gives the 6 Board jurisdiction to issue interim orders 7 about a schedule of rates. The RSP provisions 8 are nothing if they are not a rate schedule, 9 albeit one that works through an automatic 10 adjustment formula or process.</p> <p>11 Saying that the Board is empowered to 12 change the RSP rate but is not somehow 13 empowered to change the RSP rules is contrary 14 to the spirit of the Public Utilities Act and 15 to the EPCA and specifically it is contrary to 16 generally accepted public utility practices. 17 Rates and rules are not defined terms under 18 the Public Utilities Act.</p> <p>19 In our view, it would be specious to 20 interpret the Act in such a manner that rates 21 are only the pure miracle expressions, while 22 rules are essentially all the other words in 23 the Board's order. The Board's practice is -- 24 this Board's practice is that rate schedules 25 are comprised of those components of Board's</p>

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<p>1 orders that set or determine the amounts 2 customers are to pay for their services. 3 (9:50 a.m.) 4 It is clear that the RSP rules comprise a 5 portion of the total set of rate schedules. 6 Hydro submits that affecting a rate change 7 through making a change to the way the 8 deferral account formula works is a proper 9 exercise of the Board's rate making 10 jurisdiction. 11 As we understand it, the Industrial 12 Customers are arguing that any rate that is 13 not stated as an absolute number is beyond the 14 reach of the Board for the purposes of setting 15 an interim order. The argument is that once a 16 rate is set through a formula, that means that 17 a set of rules has to be applied and those 18 rules are somehow different than rates. This 19 approach to interpreting the Board's 20 jurisdiction flies in the face, in our view, 21 of the words of Mr. Justice Green in the 22 Stated Case, and this is at paragraph 17, but 23 I don't think the Board needs to turn there. 24 I'll read it. "It follows from these 25 provisions that a literal and technocratic</p>	<p>1 rate structure and a set of rules. So when 2 the Board is considering this, is it one or 3 the other? The argument is that it's only 4 rules and therefore the interim order can't 5 affect it because it doesn't have the power. 6 Hydro submits that both characterization 7 of the RSP being a rate or a rate structure or 8 being rules apply with equal force and a 9 distinction of that source is not required. 10 The RSP is, in this nature, a broad liberal 11 and obvious sense, a rate or a rate schedule. 12 Indeed, in paragraph 52 of Newfoundland 13 Power's brief, we see a quote from the 14 Industrial Customers' arguments from some 15 years ago to the Board in a GRA whereby the 16 RSP is referred to as a rate. It can be said 17 that the RSP is a rate or a rate structure or 18 rate schedule that contains rules to calculate 19 the RSP rates, but these are not mutually 20 exclusive concepts. There is no denying that 21 the RSP functions through the application of 22 formulas which are generally referred to as 23 its rules, but this does not take it outside 24 the Board's interim rate jurisdiction. 25 A quick look at the legislation is</p>
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<p>1 interpretation and application of the Act is 2 to be avoided in favour of an interpretation 3 which will advance the underlying purpose of 4 the legislation, as well as the Power policy 5 of the Province, and be consistent with 6 generally accepted sound public utility 7 practice." I think the warning from his words 8 is about literal and technocratic 9 interpretations that constrain the Board's 10 view. 11 The Industrial Customers' argument is 12 that the RSP operates automatically through 13 its rules, that the only RSP rate is the 14 number that is identified by the Board after 15 it goes through the process and confirms 16 Hydro's RSP calculations each year. It's as 17 if there were a blood-brain barrier between 18 the rules and the rate. Rules are not 19 specifically named in Section 75, which is the 20 interim order section. Therefore the interim 21 order could not have been made such that it 22 affects the RSP rules or at least so the 23 argument goes. There is a problem with this 24 logic. The problem is that it only holds true 25 if the RSP cannot simultaneously be a rate or</p>	<p>1 useful. I don't think we need to turn to it, 2 but I'll just summarize my view of several 3 provisions of the Public Utilities Act. 4 Section 70 empowers the Board to set a 5 utilities rate. Section 71 grants the Board 6 with the power to issue orders as to rules and 7 regulation as to a public utility service. 8 Section 75 empowers the Board to make interim 9 orders as to rates. Section 76 of the Public 10 Utilities Act grants the Board with power to 11 amend or rescind its orders, whether as to 12 rates or as to other matters. 13 This power, the Section 76 power, is 14 complimentary to the other powers and the 15 jurisdiction the Board holds. It is not 16 worded in the manner that it causes the 17 Board's jurisdiction to be restricted or 18 confined in relation to any other powers that 19 the Board holds. The fact that a rate 20 structure approved by the Board contains a 21 formulaic approach to rate setting in a way 22 that can, in some instances and for some 23 purposes, be characterized as rules does not 24 and cannot be a limit on the Board's 25 jurisdiction.</p>

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<p>1 In summary then, the interim order issued 2 by the Board preserved the Board's 3 jurisdiction to change the RSP rates back to 4 January 1st, 2008, the effective date of the 5 interim order, a process which, due to the 6 mechanics of the industrial RSP, could involve 7 considering cost and load data that occurred 8 or applied throughout 2007.</p> <p>9 Secondly, there are no vested rights in 10 the Industrial Customers to any portion of the 11 RSP balance that is affected by the interim 12 order. The nature of the interim order is 13 that the entire amount is at risk and that the 14 Board has jurisdiction over it.</p> <p>15 And finally, making a distinction between 16 the way the RSP operates between the formulas 17 or rules that are used to derive their rates 18 and the totality of the rate structure, the 19 RSP rate structure, is an exercise in hair 20 splitting that cannot be tolerated under a 21 reasonable purposive approach to rate making 22 or legislative interpretation.</p> <p>23 And I'm well under time, Mr. Chair, and 24 if there are any questions, I'd be more than 25 pleased to receive them.</p>	<p>1 The differences in the structure of the 2 RSP rates for the two customers and the way 3 their rate design works means that there was 4 not a need to apply to the Board, in Hydro's 5 view, the volatility wasn't there for an 6 interim rate. So it was allowed to continue 7 and we made no application to the Board to 8 change their rate. It made sense to us to do 9 that in the normal course, as opposed to 10 specifically. So I don't think much turns on 11 it from a jurisdictional perspective.</p> <p>12 COMMISSIONER NEWMAN: 13 Q. Thank you.</p> <p>14 CHAIRMAN: 15 Q. Anybody else? Alright, Mr. Hutchings, you're 16 next, sir.</p> <p>17 (9:58 a.m.) 18 HUTCHINGS, Q.C.: 19 Q. Thank you, Mr. Chairman. I guess I'll start 20 off in somewhat of a similar manner as my 21 friend, Mr. Young, did in terms of trying to 22 put this whole proceeding in context. What 23 brought us here is the application to make an 24 interim rate final and what happened as a 25 result of the imposition of the interim rate</p>
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<p>1 CHAIRMAN: 2 Q. Congratulations. Anybody? 3 COMMISSIONER NEWMAN: 4 Q. I wonder if you could tell me what Hydro 5 thinks the significance is of the fact that 6 there was an interim rate with respect to the 7 Industrial Customers rates but not an interim 8 rate with respect to Newfoundland Power's 9 rates, in light of the fact that this is a 10 plan that allocates funds between these two 11 major sets of customers?</p> <p>12 MR. YOUNG: 13 Q. To be honest, Commissioner, not that much 14 turns on that, in our view. The fact that 15 there was a rate for one and not for the 16 other, you know, froze the rate that the 17 customer pays for that period and the 18 accounting that goes on in the background and 19 that the Board is allowed to consider after 20 the fact because interim rate was made, 21 consider after the fact, it's just that. The 22 fact that there was no change in the 23 Industrial -- sorry, in Newfoundland Power's 24 rate, the Board can, after the fact, see the 25 transparency of that and see what's happened.</p>	<p>1 for the ICs is that there is now a large 2 surplus in the rate stabilization plan for 3 ICs.</p> <p>4 Part of that arose because the payment 5 that was being made in respect of the historic 6 RSP plan was continued long after that plan 7 was fully paid off. The historic RSP plan was 8 paid off in October of 2007, but it's been 9 paid into by most of the Industrial Customers 10 ever since. I'm not suggesting, and the ICs 11 don't suggest, that there is a vested right to 12 that. It simply suggests that it is patently 13 obvious that if you overpay on an account, you 14 get your money back once you find out that 15 you've overpaid. It's not much different than 16 continuing the debit on your bank account 17 after you paid off your car. If you thought 18 you had a 48-month plan and you actually had a 19 36-month plan and your car was paid off after 20 36 months, is anybody going to suggest that 21 you can't get that extra 12 months back if you 22 pay it? That's the historic plan part of 23 this, and I think that has to be considered 24 separately. Not saying it's a vested right, 25 just saying that it is just so patently</p>

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<p>1 obvious that that has to go back to the people 2 who paid it because it was paid on a bill that 3 had already been fully paid. That's part A. 4 The rest of it, the rest of the surplus, 5 is due to the load variation provision of the 6 RSP and under the existing rules that have not 7 yet been changed, which arose from agreements 8 involving all these parties in 2003 and in 9 2006, the Industrial Customers got the benefit 10 of load variation within the Industrial 11 Customer group and other customers didn't get 12 that benefit. That's what everybody agreed 13 to. That's what the Board put in its order 14 and that's the way it is. From the Industrial 15 Customers' point of view, the consumer 16 advocate and Newfoundland Power are no longer 17 happy with the deal. There's a bunch of cash. 18 They're making a grab for it. 19 That is the essence, in our submission, 20 of what is happening here and while 21 Newfoundland Power seems to think that this 22 was Hydro's initial idea, I think Hydro was 23 converted to the position because their 24 initial position was simply that the Board 25 should look at the RSP allocation rules.</p>	<p>1 conferring jurisdiction on and governing the 2 operation of the Board." So that's where we 3 have to go first. 4 And you know, I understand where Mr. 5 Young is coming from in terms of his 6 suggestions that, you know, he's talking about 7 blood-brain barrier, that rules and rates are 8 not mutually exclusive and that regards our 9 position is our hair splitting. I'm sorry. I 10 didn't make this up. The Legislature did. 11 The statute which governs everything that this 12 Board does and from which it must find its 13 power makes that distinction. It has one 14 section for rates, Section 70, which says how 15 -- that the utility shall not charge a rate 16 until its approved, and once approved, these 17 are the rates and tolls approved until 18 altered, reduced or modified provided with the 19 Act. 20 And then the Legislature gives a separate 21 power to the Board. In Section 71, it 22 requires the Public Utility to submit for the 23 approval of the Board the rules and 24 regulations which relate to its service and 25 amendments to them and upon approval by the</p>
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<p>1 The Consumer Advocate and Newfoundland 2 Power want to change, in our view, 3 retroactively the rules that they agreed to in 4 2003 and 2006 because of the way it turned 5 out, because there's a surplus. If there was 6 a deficit, I doubt they'd be running in to try 7 to force contributions on us to make up a 8 deficit in the load variation provision. So 9 that's the broad strokes of where we are. 10 For the purpose of the preliminary 11 issues, the first principle that we have to 12 deal with in terms of jurisdiction and 13 authority of the Board is the statute and that 14 is -- that point is succinctly made in the 15 Stated Case and you don't need to go to it, 16 but it's at paragraph 13, and the Court there 17 says "the answers to the questions which have 18 been posed must, of course, be given, taking 19 into account -- taking account of the 20 legislative framework within which the Board 21 operates. The Board is a creature of statute 22 and its jurisdiction and powers to deal with 23 matters brought before it and the manner of 24 dealing with such matters must be found either 25 expressly or impliedly within the statutes</p>	<p>1 Board, they are the lawful rules and 2 regulations of the Public Utility. I didn't 3 create the distinction, the blood-brain 4 barrier or any mutually exclusive provision. 5 The Legislature did it. 6 CHAIRMAN: 7 Q. Excuse me, what are you calling it, the what? 8 HUTCHINGS, Q.C.: 9 Q. The blood-brain barrier. 10 CHAIRMAN: 11 Q. Blood-brain? 12 HUTCHINGS, Q.C.: 13 Q. That's - 14 MR. YOUNG: 15 Q. It's my analogy. 16 HUTCHINGS, Q.C.: 17 Q. Mr. Young's phrase. 18 MR. YOUNG: 19 Q. I think we can get by it and just say that 20 it's something that can't - 21 HUTCHINGS, Q.C.: 22 Q. It's impermeable, they say. 23 MR. YOUNG: 24 Q. - you know, biological impermeable membrane. 25 CHAIRMAN:</p>

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<p>1 Q. Impermeable?</p> <p>2 HUTCHINGS, Q.C.:</p> <p>3 Q. Impermeable, yeah.</p> <p>4 CHAIRMAN:</p> <p>5 Q. I can get that.</p> <p>6 HUTCHINGS, Q.C.:</p> <p>7 Q. You can't go from one side to the other of the</p> <p>8 blood-brain barrier.</p> <p>9 CHAIRMAN:</p> <p>10 Q. Okay, sorry, I didn't know what you were</p> <p>11 talking about.</p> <p>12 MR. JOHNSON:</p> <p>13 Q. I was just going to pretend I knew what it</p> <p>14 was.</p> <p>15 MR. MOORES:</p> <p>16 Q. I got it marked down with a question mark. I</p> <p>17 was going to Google it. Thank you for asking.</p> <p>18 HUTCHINGS, Q.C.:</p> <p>19 Q. You're the only one with the guts, Mr.</p> <p>20 Chairman. Anyway -</p> <p>21 CHAIRMAN:</p> <p>22 Q. Or stunned enough.</p> <p>23 HUTCHINGS, Q.C.:</p> <p>24 Q. But the -- no, I mean, it is a question, I</p> <p>25 mean, Mr. Young's position is that this thing,</p>	<p>1 generally is similar throughout different</p> <p>2 jurisdictions, we are, you are the</p> <p>3 Newfoundland and Labrador Public Utilities</p> <p>4 Board and you are governed by your particular</p> <p>5 statute, which is not the same as everybody</p> <p>6 else's statute. We're not the CRTC. We're</p> <p>7 not the Alberta Public Utilities Board. We</p> <p>8 are the Newfoundland and Labrador Public</p> <p>9 Utilities Board and we deal with our Act.</p> <p>10 The issue in respect of the definition of</p> <p>11 rates, and this is raised in both the Consumer</p> <p>12 Advocate's and the Newfoundland Power</p> <p>13 submissions, doesn't take into account the</p> <p>14 specific words of the Electrical Power Control</p> <p>15 Act. The argument is that rates are defined</p> <p>16 in the Electrical Power Control Act to include</p> <p>17 prices, charges, tolls or conditions applying</p> <p>18 to prices for power or other consideration</p> <p>19 given for the supplying of power.</p> <p>20 What is omitted in the submissions that</p> <p>21 have come from the other parties are the first</p> <p>22 three words of Section 2 of the Electrical</p> <p>23 Power Control Act, which are "in this Act."</p> <p>24 So this Act doesn't purport to define rates</p> <p>25 for all purposes. It purports to define rates</p>
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<p>1 the RSP, can be both a rate and a regulation.</p> <p>2 Well, that's all very well, but either it's</p> <p>3 under Section 70 of the Act or it's under</p> <p>4 Section 71 of the Act, and that's not as vital</p> <p>5 in terms of final orders, but in terms of</p> <p>6 interim orders, it is quite vital because</p> <p>7 Section 75 gives the power to make interim</p> <p>8 orders only in respect of rates, tolls and</p> <p>9 charges. It does not give any power to make</p> <p>10 an interim order in respect of rules and</p> <p>11 regulations, and this is in contrast, as we</p> <p>12 pointed out, with the power that the CRTC has,</p> <p>13 which can make any order interim.</p> <p>14 We have to come back to first principles,</p> <p>15 what the Act says. The Act gives power to</p> <p>16 make interim orders, but only in respect of</p> <p>17 rates, tolls and charges. So if we find that</p> <p>18 the thing being affected here is a rule or</p> <p>19 regulation, in our submission, it is clear on</p> <p>20 the face of the Act that the Board doesn't</p> <p>21 have power to make an interim order with</p> <p>22 respect to it.</p> <p>23 So we have to remember throughout all</p> <p>24 this that while there are general principles</p> <p>25 and a way that utility boards operate</p>	<p>1 for the purposes of this particular Act, and</p> <p>2 the purposes of this particular Act, I would</p> <p>3 suggest, are broader and different from the</p> <p>4 purposes of the Public Utilities Act. This</p> <p>5 Act declares a power policy. It operates at</p> <p>6 the 20,000 foot level and says these are the</p> <p>7 general principles and rules that should be</p> <p>8 applied, and for that purpose, a broad</p> <p>9 definition of rates may be appropriate.</p> <p>10 The Public Utilities Act is the working</p> <p>11 man's act. This gets down to the nitty</p> <p>12 gritty. This is down to calculation. This is</p> <p>13 down to what's in a rate base, what's not in a</p> <p>14 rate base. This is down to specifics of</p> <p>15 coming up with the number that shows up on the</p> <p>16 power bill, and the Public Utilities Act</p> <p>17 doesn't define the word "rates" at all. It</p> <p>18 uses the word "rates" but it doesn't define</p> <p>19 it, and in our submission, it is not</p> <p>20 appropriate in this situation to import the</p> <p>21 definition from the Electrical Power Control</p> <p>22 Act into the Public Utilities Act.</p> <p>23 We've distributed, over the weekend and</p> <p>24 this morning, in hard copy, the American</p> <p>25 Airlines versus Competition Tribunal case from</p>

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<p>1 Supreme Court of Canada and the issue which is 2 put by the argument, although it's not 3 specifically referred to in that way in any of 4 the arguments that have been put, is whether 5 or not, in our submission, these two statutes 6 are what they call in <i>pari materia</i>, do they 7 deal with the same subject matter basically, 8 can't get rid of the Latin, but -- and we 9 concede that they obviously do deal with the 10 same subject matter. They're dealing with the 11 question of electrical power regulation within 12 the Province of Newfoundland and Labrador. 13 That in itself, however, does not mean 14 that one imports a definition for one statute 15 into the other and the decision of the Federal 16 Court of Appeal which was approved by the 17 Supreme Court of Canada, and you have both 18 cases there, confirms that in a very specific 19 sense. There was a question of whether or not 20 the word "representations" in one Act should 21 be interpreted consistently with the words 22 "representations" in another Act, and the 23 Court quite clearly finds, and this is Chief 24 Justice Iacobucci, as he then was, later the 25 Supreme Court of Canada himself, at page seven</p>	<p>1 RSP rules." The Board calls them rules and 2 they are in the nature of rules, if you look 3 at it, because if the allocation provisions, 4 and that's what we're really talking about 5 here, of the RSP is a rate, whose rate is it? 6 It's not just the IC's rate. It's not just 7 the Newfoundland Power rate. It's not just 8 the Rural Customers rate. It's everybody's 9 rate. It is, in fact, a rule. It applies to 10 everyone. It is not an individual rate, and 11 that's the point that Commissioner Newman has 12 raised in that how does one deal with the fact 13 that making the RSP rules interim has to 14 impact persons other than the Industrial 15 Customers. 16 The point here being that where we have a 17 rule that applies to more than one class of 18 customers, we cannot simply ignore the impact. 19 If there is a different distribution now 20 proposed of the surplus arising from the load 21 variation in the RSP from that which the 22 current rules would dictate, that will mean 23 that some part of that surplus is going to go 24 somewhere else other than to the industrial 25 customers, and my friend is quite right. The</p>
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<p>1 of nine in the last paragraph, at the bottom 2 of the page, says "I do not dispute his 3 findings," that's the finding of the trial 4 judge "that the statutes are in <i>pari materia</i>. 5 However, I do not accept that the choice of 6 the words in sections 97 and 98 of the 7 Competition Act dictates their meaning in 8 section 9(3) of the Competition Tribunal Act." 9 And he refers to various other sections, and 10 the point being that notwithstanding that a 11 legislature defines a particular term in one 12 statute which is dealing with essentially the 13 same subject matter, that does not necessarily 14 mean that one imports that definition into the 15 other statute and you have to look at other 16 rules of interpretation, and the other rules 17 of interpretation are quite clear here in that 18 Section 70 and Section 71 deal quite 19 specifically and separately with rates and 20 rules, and I mean, the distinction is carried 21 throughout. 22 In the order P.U. 37 of 2008, the Board 23 itself says, in a separate paragraph from the 24 paragraph of its order that continues the 25 existing rates, it says "continue the current</p>	<p>1 RSP is, in its essence, a deferral account and 2 the deferral account designed to ensure that 3 rates are just and reasonable. 4 If there is some huge balance now taken 5 from the Industrial Customers RSP and 6 transferred to the benefit of Newfoundland 7 Power or other customers, is that not a 8 necessary implication that the rates that 9 Newfoundland Power were paying previously are 10 not just and reasonable? That's all that the 11 deferral account is doing. It's ensuring that 12 the rates are just and reasonable. So if you 13 scoop up a large amount of money now and apply 14 it against rates of Newfoundland Power, how 15 can you justify not saying "well, that must 16 mean that the rates of Newfoundland Power were 17 wrong"? But nobody has suggested that the 18 rates for Newfoundland Power have been 19 interim. They are right by decree. They 20 cannot be changed, nor is anyone suggesting, 21 as far as I'm concerned, that these rates are 22 not just and reasonable. They were always 23 considered to be just and reasonable. They 24 continue to be just and reasonable. Nobody's 25 made a complaint about them not being just and</p>

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<p>1 reasonable. How can one justify taking the</p> <p>2 benefit of this deferral account, as I said,</p> <p>3 the sole purpose of which is to ensure that</p> <p>4 rates are just and reasonable, and now</p> <p>5 reallocate that in some fashion which</p> <p>6 necessarily implies that none of the rates</p> <p>7 that anybody has been paying are just and</p> <p>8 reasonable? It just illustrates the fact that</p> <p>9 the rules are the rules and the rates are the</p> <p>10 rates. Live with the rules. If you want to</p> <p>11 change the rules, you can change the rules on</p> <p>12 a go-forward basis, but you can't go back and</p> <p>13 rewrite history in terms of what the rules are</p> <p>14 which determine the amounts of the deferral</p> <p>15 account.</p> <p>16 (10:15 a.m.)</p> <p>17 I want to speak about deferral accounts</p> <p>18 as well because there's a danger of simply</p> <p>19 saying well, deferral accounts are an</p> <p>20 exception to the rules about retroactive or</p> <p>21 retrospective regulation, and in a very</p> <p>22 limited sense, I guess, they are, but if you</p> <p>23 look to the decision in the 2010 ATCO case,</p> <p>24 and I'll refer you to the paragraph numbers.</p> <p>25 I think it starts around paragraph 163.</p>	<p>1 impose this particular RSP charge and then a</p> <p>2 year down the road or two years down the road,</p> <p>3 we will decide what we're going to do with the</p> <p>4 money that's in it. Not so.</p> <p>5 There are specific rules laid down.</p> <p>6 There are specific rules about when the</p> <p>7 hydraulic balance gets allocated. There are</p> <p>8 specific rules about when the hydraulic</p> <p>9 balance gets allocated. There are specific</p> <p>10 fuel riders to be put in place, and they're</p> <p>11 not all the same, but they are ordered by the</p> <p>12 Board. They are rules. They are part of the</p> <p>13 whole scheme that everyone has agreed to.</p> <p>14 I want to refer you to paragraph -- and I</p> <p>15 think it's probably useful to go to this. It</p> <p>16 is in Hydro's Book of Authorities, Hydro's</p> <p>17 brief, at Tab 2, which is the ATCO 2010 case,</p> <p>18 and it talks there about the function of</p> <p>19 deferred accounts. That's at page 38,</p> <p>20 starting at paragraph 162. There's a useful</p> <p>21 discussion which I won't read all of there,</p> <p>22 but down at paragraph 165 it said, "it is one</p> <p>23 thing to create a deferred account at the</p> <p>24 outset of an interim rate to specify what</p> <p>25 amounts it is to record during that period and</p>
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<p>1 You'll see that there are any number of</p> <p>2 different kinds of deferral accounts that have</p> <p>3 come into existence for different purposes</p> <p>4 before different Boards for many years. Some</p> <p>5 of them, like the account that was at issue in</p> <p>6 the 2009 Bell Canada decision, are almost</p> <p>7 totally discretionary accounts. Large amounts</p> <p>8 were accumulated and the CRTC was given the</p> <p>9 power to assign those monies for to help</p> <p>10 communities that were not properly served with</p> <p>11 Broadband or to help provide services to the</p> <p>12 deaf, any number of things. It was</p> <p>13 practically a discretionary account with the</p> <p>14 CRTC.</p> <p>15 The RSP is on the exact opposite end of</p> <p>16 that spectrum. The RSP is formulaic and for</p> <p>17 good reason. It -- I mean, all deferral</p> <p>18 accounts are contrary to the principle of</p> <p>19 inter-generational equity. It means that</p> <p>20 somebody will be paying for a service that</p> <p>21 they didn't get or get a benefit from a</p> <p>22 service that they didn't receive, but the</p> <p>23 whole principle behind the RSP is that one can</p> <p>24 apply the rules and come up with the numbers.</p> <p>25 It is not a question of saying that we will</p>	<p>1 at the end, to reconcile and clear out that</p> <p>2 account by a final rate in the way ordained at</p> <p>3 the outset," and that, in our view, is what</p> <p>4 the RSP is supposed to do.</p> <p>5 "It is quite another thing to return</p> <p>6 later to a fixed final rate and change it</p> <p>7 after the fact by ordering premium payments by</p> <p>8 or refunds to customers and then to try to</p> <p>9 justify that by creating for the purpose a new</p> <p>10 deferred account into which sums will be put</p> <p>11 retroactively and immediately removed by</p> <p>12 premium or refund." And it is, with respect,</p> <p>13 that second case that Newfoundland Power and</p> <p>14 the Consumer Advocate are trying to make here.</p> <p>15 They are trying to take the final rate for</p> <p>16 Newfoundland Power and effectively make it</p> <p>17 interim by use of a deferral account by</p> <p>18 reallocating balances within the RSP, and that</p> <p>19 is, in fact, the essence of a retroactive rate</p> <p>20 change.</p> <p>21 I want to refer briefly to the</p> <p>22 submissions of Newfoundland Power and I think</p> <p>23 my friend, Mr. Young, referenced this as well</p> <p>24 at paragraphs 52 and 53. We do not back away</p> <p>25 at all from the notion that the RSP is a rate.</p>

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<p>1 There is an RSP rate. If one looks at the 2 rate schedule, you will see an RSP line item 3 which is a specific mills per kilowatt hour 4 number and you can't call that anything but a 5 rate. What is not a rate are the rules which 6 are used to calculate that number. But in 7 paragraph 53, Newfoundland Power's submission 8 goes on to say "a purposive understanding of 9 order P.U. 34 of 2007, in the context of the 10 factual circumstances, makes it abundantly 11 clear that the interim rates order was 12 intended to permit the Board to consider the 13 operation of the RSP specifically in relation 14 to the load variation component." And I must 15 say, with respect, that the exact opposite is 16 true.</p> <p>17 It is useful to look at P.U. 37 of 2008 18 and that's in Newfoundland Power's Book of 19 Authorities under Tab 6, for those who don't 20 have it otherwise available. It's Tab 6 under 21 Board orders, two Tabs 6, second Tab 6 has 22 P.U. 37 of 2008.</p> <p>23 Just to put this in context, there had 24 already been issued a 2007 order which did 25 nothing more than make interim the rates for</p>	<p>1 was asked in respect of the RSP rules and 2 regulations.</p> <p>3 Read on in the order. The Board provided 4 notice of the application and invited comments 5 from the Consumer Advocate, Newfoundland Power 6 and each of Hydro's Island Industrial 7 Customers, and the Board did not receive a 8 submission from the Consumer Advocate, and 9 Newfoundland Power advised that it did not 10 intend to make any comments on the 11 application. The Island Industrial Customers 12 made representations. Hydro did not file a 13 reply, and whereas, the last one on that page, 14 the schedule of rates proposed by Hydro 15 eliminates reference to the historic plan and 16 continues existing rates of Hydro's Island 17 Industrial Customers increasing the rate to 18 tech. There was absolutely nothing else in 19 the rules and regulations of the RSP that was 20 even proposed to be changed by Hydro at this 21 time, and the next whereas clause, at the top 22 of page three, is most telling. "Whereas the 23 Board has considered Hydro's application, as 24 well as the submissions of the Island 25 Industrial Customers, the only customers</p>
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<p>1 Industrial Customers. There was no reference 2 to the rules or anything else, simply that the 3 rate became interim. By December of 2008, the 4 issues of volatility that Hydro had identified 5 previously had not been resolved and the Board 6 recited the history of all of this.</p> <p>7 So on the second page of the order, in 8 the third whereas clause on that page, it 9 recites "whereas on December 11, 2008, Hydro 10 filed the application for approval to: 1. 11 continue the existing Island Industrial 12 Customer interim rates, except that the rates 13 for tech would be increased to the same level 14 as the others; and 2. revise the schedule of 15 rates and the RSP rules and regulations" and 16 interesting again that the Board, in its 17 recital, and Hydro, in its application, refers 18 to the schedule of rates as one thing and the 19 RSP rules and regulations as another thing, 20 which is consistent with the way the Act 21 refers to it as far as we're concerned. In 22 any event, "revise the schedule of rates and 23 the RSP rules and regulations for Hydro's 24 Industrial Customers to remove reference to 25 the historic plan balance." That's all that</p>	<p>1 affected by the application," and in the 2 absence of a reply from Hydro to those 3 submissions, the Board decides to issue this 4 order.</p> <p>5 So how is it possible to say that order 6 P.U. 34 of 2007 makes it abundantly clear that 7 the interim rates order was intended to permit 8 the Board to reconsider the operation of the 9 RSP specifically in relation to the load 10 variation component? There's no mention of 11 load variation component in the order. The 12 only part of the rules that's mentioned is the 13 elimination of the historic plan. 14 Newfoundland Power didn't bother to say 15 anything about it. Consumer Advocate didn't 16 bother to say anything about it. The Board 17 took it that the only customers affected were 18 the ICs. How does that put the entire 19 operation of the RSP plan suddenly at risk, in 20 some way interim? That was never the 21 intention of this order, Mr. Chairman.</p> <p>22 It is our initial submission that the 23 Board did not have the power to make the rules 24 and regulations interim. If the Board finds 25 that it had that power, the most that one can</p>

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<p>1 read from this order is that the operation of 2 the historic plan portion of the RSP would 3 have become interim. There is nothing in this 4 order that gives the slightest hint that the 5 whole load variation provision and the general 6 operation of the RSP is suddenly somehow at 7 risk. This order confirms, in our view, that 8 the only customers affected are the Industrial 9 Customers. There's no issue here raised at 10 all of any reallocation from Industrial 11 Customers to anyone else of any plan balances 12 or anything of that nature.</p> <p>13 So even if the Board had the power to 14 make the rules and regulations interim, in our 15 submission, there is nothing in this order 16 that suggests that anything other than the 17 continuation of the history plan balance 18 provisions was made interim or intended to be 19 made interim by that order. Nobody asked for 20 it. Nobody other than the Industrial 21 Customers said anything about it.</p> <p>22 In conclusion, Mr. Chairman, we do not 23 contest that the Board has the power to change 24 the RSP rate for Industrial Customers from 25 January 1, 2008 onwards. There's no issue</p>	<p>1 the rules, and B. if it does have the power to 2 change the rules, the most it can do is to 3 deal with the historic plan, and I think it's 4 certainly appropriate that the Board terminate 5 that historic plan and arrange for return over 6 the overpayment. I spoke about that earlier, 7 but that is a broad jurisdiction.</p> <p>8 (10:30 a.m.)</p> <p>9 It is -- it does not render the interim 10 order provisions useless or without effect, as 11 my friend would say. It is a broad and proper 12 jurisdiction to use the funds in the IC 13 portion of the rate stabilization plan to do 14 what the plan intended to do, that is to say 15 stabilize the rates, and it has the benefit of 16 amounts having accrued that are now available 17 to be properly applied to ensure that IC rates 18 are stable over time, and that is a very broad 19 and useful jurisdiction and that is the exact 20 intent, in our submission, of the whole RSP 21 provision.</p> <p>22 I also need to reference what my friend 23 Mr. Young said in connection with the notion 24 that in order to fix the problem, one needs to 25 adjust the rules, and rather than change the</p>
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<p>1 about that. And contrary to what my friend 2 says, that is a broad and generous 3 jurisdiction. The Board has the power to look 4 at the operation of the RSP since that period 5 of time and determine how much the rate should 6 have been in 2008, how much it should have 7 been in 2009, what it should be in 2010, and 8 it can take into account potential other 9 volatility that may arise, and that was the 10 whole reason that this thing became interim in 11 the first place.</p> <p>12 If, as Hydro predicted, you'd end up with 13 huge swings between 2010 and 2011, the Board 14 has the power to smooth those within the rules 15 by setting the appropriate rate for Industrial 16 Customers as part of the RSP rate during that 17 period. What it doesn't, in our submission, 18 have power to do is change the rules and move 19 around, from the industrial plan to other 20 plans, monies that have accrued in that plan 21 in the meantime. We are not making a case for 22 a "vested right" to any of these funds. We're 23 simply saying that the rules have been 24 established, the rules have not been changed.</p> <p>25 A. the Board doesn't have the power to change</p>	<p>1 data. Now I think if you look back and indeed 2 look at the current pending application with 3 respect to Newfoundland Power and the 4 calculation of its RSP number, that's exactly 5 what Hydro did. They changed the data. They 6 changed the inputs, and this was approved by 7 the Board and nobody had any problem with that 8 last year and they're proposing to do it again 9 this year. They didn't propose to change the 10 rules. They just changed the inputs and said 11 well, you know, the -- let's use this as the 12 Industrial Customer load as opposed to the 13 original 2007 Industrial Customer load, and 14 that was Hydro's proposal and it was accepted 15 and the Board has approved it. So there are 16 ways around this and problems can be fixed by 17 adjusting the data as opposed to adjusting the 18 rules and the Board can stay within its 19 clearly available powers by adjusting the rate 20 on an interim basis, as opposed to adjusting 21 the rules.</p> <p>22 My friend has also submitted to you that 23 the IC proposal is contrary to generally 24 accepted public utility practices. With 25 respect, generally accepted public utility</p>

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<p>1 practices are a matter of fact and we do not 2 have facts before us in this hearing that 3 would support the position that my friend has 4 put to you in that regard. So the Board has 5 the power to go back to January 1, 2008 and 6 apply the appropriate RSP rate to the 7 Industrial customers. The Board does not, in 8 our submission, have power to change the 9 rules, specifically the allocation rules 10 within the RSP and if you find that you have 11 that power, you are limited, in our 12 submission, to dealing with the purpose of 13 P.U. 37 of 2008 as regards the rules and that 14 purpose was to eliminate the provisions 15 relative to the historic plan. 16 Whatever questions you have, members of 17 the Board, I'll try to deal with them. 18 VICE-CHAIR WHALEN: 19 Q. No, not yet. 20 CHAIRMAN: 21 Q. Mr. Moores, then you're next, sir. 22 (10:35 a.m.) 23 MR. MOORES: 24 Q. Thank you, Chairman Wells. I should have -- 25 for the record, I will state at the outset,</p>	<p>1 million dollars from the time that the 2 historic plan balance was brought to zero, 3 during October 2007 through the time when 4 Abitibi's Grand Falls mill closed, and of 5 course Abitibi ceased at that time to become 6 an Industrial Customer. 7 With respect to all of the other issues 8 that are in play here today, we've heard some 9 discussion obviously of load variation and the 10 RSP plan in general. I do want to reflect, 11 for the record, that Abitibi takes no position 12 on that, on those issues. As I say, we've 13 worked hard to set out our position in writing 14 and are very mindful of the time. So with 15 those brief comments, unless there are any 16 specific questions from the Panel, I believe, 17 as I say, our case is fully stated. 18 CHAIRMAN: 19 Q. Okay, and I guess Newfoundland Power is next. 20 KELLY, Q.C.: 21 Q. Thank you, Mr. Chairman. Mr. Chairman, I too 22 will be relatively brief. Detailed written 23 submissions have been filed and it's important 24 to keep in mind that what is in issue here 25 today is what jurisdiction does the Board</p>
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<p>1 when registered appearances, Mr. Colm Seviour 2 is reflected in the Abitibi submissions and of 3 course, he remains acting for Abitibi in this 4 matter. He's simply unable to attend with me 5 today. I will be mindful of the time and I 6 will be very brief. 7 As you will have gathered from the 8 written submissions, Abitibi's submission is, 9 we believe, fairly focused. Abitibi appears 10 today with a very narrow interest in the 11 proceeding. For clarity, Abitibi's interest 12 lies only in respect of the historic 13 overpayment. Mr. Hutchings had addressed that 14 a moment ago, at the outset, and made the 15 comment that in his view, I believe the phrase 16 he used was it was patently obvious that in a 17 situation where overpayments in respect of a 18 specific deferral account, a specific sub 19 element of the deferral account had been 20 continued, that the Board should examine that 21 issue and issue the order so that the refund 22 can be made to Abitibi. 23 Abitibi, we've indicated in the 24 submissions, overpaid on account of the 25 historic RSP repayment, approximately 2.3</p>	<p>1 have, not how should the Board exercise that 2 jurisdiction. I listened, especially to Mr. 3 Hutchings and much of his submissions really 4 come down to what should the Board do, not 5 what power does the Board have, and I think 6 it's important we focus on that question of 7 what power does the Board have. 8 (10:39 a.m.) 9 In that respect, the submissions of 10 Newfoundland Hydro and Newfoundland Power and 11 the Consumer Advocate are substantially 12 similar. The Board has full and complete 13 jurisdiction to deal with the Industrial 14 Customer rates from January 1, 2008 including 15 and how the RSP should operate from January 1, 16 2008, and in addition, the Board has the 17 jurisdiction to deal with all of the balances 18 in the RSP. That's 2007, '08, '09 and '10, 19 and if you just stop and think about it, in 20 2007, the Industrial rates were final, and the 21 operation of the RSP during 2007 was final, 22 but because of that operation, there was a 23 balance in that fund at the end of the year 24 and that balance hasn't yet been dealt with. 25 So the Board, of course, must have the</p>

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<p>1 jurisdiction to deal with that balance. It</p> <p>2 has to be dealt with.</p> <p>3 Ordinarily what would have happened is it</p> <p>4 would have gotten incorporated into the new</p> <p>5 RSP adjustments. There's be new fuel riders,</p> <p>6 et cetera. That didn't happen, so that adjust</p> <p>7 -- that balance still has to get dealt with,</p> <p>8 and then once you get to 2008 and 2009 and on</p> <p>9 into 2010, the Board essentially made the</p> <p>10 rates interim. So the operation, all those</p> <p>11 RSP adjustments going forward became interim.</p> <p>12 There's been much discussion about the</p> <p>13 historic rider. Well, yeah, but that was just</p> <p>14 a component that would, in the ordinary</p> <p>15 course, have also gotten a new fuel rider, et</p> <p>16 cetera. So you got to go through that</p> <p>17 consideration of what those rates ordinarily</p> <p>18 would have been, and so the operation of the</p> <p>19 RSP going forward is open to the Board and of</p> <p>20 course, needless to say, the disposition of</p> <p>21 the balances accruing during '08, '09 and '10</p> <p>22 are open to the Board and the Board has full</p> <p>23 and complete authority and jurisdiction to</p> <p>24 deal with those balances and in fact is</p> <p>25 required in law to do so, and they will deal</p>	<p>1 Stated Case decision. The Public Utilities</p> <p>2 Act and the EPCA, the regulations and the</p> <p>3 Board's orders are all to be interpreted</p> <p>4 broadly in a purposive fashion that best</p> <p>5 fulfils the statutory objectives, and in</p> <p>6 particular, the power policy of the province,</p> <p>7 and that is really clear from the Stated Case.</p> <p>8 The discussion begins at about paragraph</p> <p>9 15 and goes on through to about paragraph 36,</p> <p>10 and if I could just very quickly ask the Board</p> <p>11 to turn to paragraph 36. It's in our</p> <p>12 authorities at Tab 2, the Stated Case</p> <p>13 decision. I'll only take a second with this,</p> <p>14 but that's found at page 16 of the decision,</p> <p>15 and you'll see the Court makes a total of five</p> <p>16 or six points. The first three are the really</p> <p>17 critical ones.</p> <p>18 The Act should be given a broad and</p> <p>19 liberal interpretation to achieve its purpose,</p> <p>20 as well as the implementation of the power</p> <p>21 policy of the province. The Board has a broad</p> <p>22 discretion and hence a large jurisdiction in</p> <p>23 its choice of methodologies and approaches to</p> <p>24 be adopted to achieve the purposes of the</p> <p>25 legislation and to implement the provincial</p>
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<p>1 with them within the exercise of your judgment</p> <p>2 as set out in the various authorities.</p> <p>3 So how the Board is going to do that is</p> <p>4 not for this hearing, but in board legal</p> <p>5 terms, what is it that the Board has got to</p> <p>6 think about? The Board will exercise that</p> <p>7 jurisdiction in accordance with the power</p> <p>8 policy of the province, in particular to</p> <p>9 ensure that rates are reasonable and not</p> <p>10 unjustly discriminatory and in doing so, they</p> <p>11 will act in accordance with sound public</p> <p>12 utility practice, which as Mr. Hutchings said,</p> <p>13 is factually based and hence, a matter that</p> <p>14 the Board ultimately will have to hear</p> <p>15 evidence on as to what's the most appropriate</p> <p>16 disposition of these balances.</p> <p>17 I want to comment briefly on the</p> <p>18 submissions of Mr. Hutchings on behalf of the</p> <p>19 Industrial Customers and I want to make four</p> <p>20 points in essence. The first is that the</p> <p>21 Industrial Customers appear to take a very</p> <p>22 narrow interpretation of the Board's</p> <p>23 legislative mandate and powers, and that</p> <p>24 simply is just not in accordance with the</p> <p>25 Newfoundland Court of Appeal's decision in the</p>	<p>1 power policy. And third, the failure to</p> <p>2 identify a specific statutory power in the</p> <p>3 Board to undertake a particular impugned</p> <p>4 action does not mean that the jurisdiction of</p> <p>5 the Board is thereby circumscribed, so long as</p> <p>6 the contemplated action can be said to be</p> <p>7 appropriate or necessary. So it's a very</p> <p>8 broad jurisdiction the Board has, appropriate</p> <p>9 to fulfil the power policy, to carry out an</p> <p>10 identified statutory power and can be broadly</p> <p>11 said to advance the purposes and policies of</p> <p>12 the legislation, the Board will generally be</p> <p>13 regarded as having such an implied or</p> <p>14 incidental power. So the Board has ample</p> <p>15 statutory jurisdiction. Now that's the first</p> <p>16 point.</p> <p>17 The second point is that the Industrial</p> <p>18 Customers acknowledge in their submission,</p> <p>19 both Mr. Young and Mr. Hutchings referred to</p> <p>20 this, that the Board has the jurisdiction to</p> <p>21 determine the proper rates from January 1,</p> <p>22 2008. Where we really differ is what should</p> <p>23 the Board do with that jurisdiction. The</p> <p>24 Industrial Customer says that means there</p> <p>25 should be a refund, but the determination of</p>

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<p>1 whether there should be a refund or could be a 2 refund first requires kind of determining what 3 those final rates should be, and then require 4 the Board to address its mind in accordance 5 with the power policy to what's the 6 appropriate disposition of the funds in the 7 RSP. That's what the Board has to do in 8 exercising the jurisdiction.</p> <p>9 The third point that I wanted to make is 10 that the Industrial Customers argue that the 11 Board had no power to make the rules interim, 12 and they say that the RSP rules are not rates 13 and they attempt to argue that P.U. 37 2008 14 was ineffective to the extent that it purports 15 to make the RSP rules interim, and with the 16 greatest of respect to Mr. Hutchings, that's 17 just not correct. The RSP rules are part of 18 the rates. They are the conditions for the 19 supply or for the prices for power, and as 20 Hydro said, Mr. Young, they are how you do the 21 calculation to get the number. The IC rates 22 are made up, as I said earlier, of the RSP 23 adjustments that have to take place each year 24 and the Board made those RSP adjustments 25 interim. In 2008, they made those interim.</p>	<p>1 Tab 2 of Newfoundland Power's material - 2 sorry, Tab 3, the Electrical Power Control 3 Act. Keep in mind the EPCA comes into effect 4 in 1994, so it's long after the PU Act comes 5 into effect. At the very last page in the 6 statute, it says, "An Act", which in this case 7 would be the Public Utilities Act, "An Act or 8 a contract, whether enacted before or after 9 the commencement of this Act relating to a 10 producer or a retailer", and Hydro would be a 11 producer, "shall be read and construed subject 12 in all respects to this Act". So the 13 Legislature tells you, you must read the 14 Public Utilities Act and the words "rates" in 15 Section 70 and Section 73, etc, in all 16 respects subject to this Act, and the 17 definition of rates in this Act includes the 18 definitions, and, in fact, the broad power 19 that you have to apply is to ensure that 20 rates, including the conditions, are just and 21 reasonable. That's the power in the EPCA, and 22 you have to do that in accordance then with 23 the power policy of the province and sound 24 public utility practice. So you are directed 25 by Section 34 to read the Public Utilities Act</p>
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<p>1 So the appropriate RSP adjustments for 2008, 2 2009, and 2010 are now matters that are before 3 the Board and part of its jurisdiction. What 4 adjustments should be made to interim rates 5 is, therefore, a matter for the Board's 6 jurisdiction which you will consider in 7 accordance with sound public utility practice 8 when you get to the evidence in the case, and 9 how the Board arrives at such adjustments is a 10 matter of methodology, which as the Stated 11 Case says is a matter for the Board.</p> <p>12 Now Mr. Hutchings has spent a fair bit of 13 time trying to distinguish the definition of 14 rates in the Electrical Power Control Act. 15 First of all, there's a broad body of common 16 law authority, I think Mr. Johnson will deal 17 with this a little bit, that says that you 18 have to interpret statutory provisions in a 19 consistent fashion. There are a number of 20 cases from our Court of Appeal on that point, 21 but you frankly don't even have to get bogged 22 down in that because the Legislature has told 23 us that that is the principle you are to apply 24 here expressly in Section 34 of the Electrical 25 Power Control Act. So if you go to - it's in</p>	<p>1 in accordance with the EPCA. So it's not 2 simply as Mr. Hutchings says, oh, look, the 3 introduction to Section 2 of the EPCA says 4 "for the purposes of this Act", because you 5 can't skip over Section 34 of the Act which 6 says, "oh, by the way, we the Public Utilities 7 Act as being subject to this Act". You also 8 have to take into account then Section 118 of 9 the Public Utilities Act, which is interpret 10 the Public Utilities Act in a broad sensible 11 fashion to best fulfil its objective, then 12 read with the EPCA.</p> <p>13 So you do all that together. This Board 14 has ample jurisdiction to deal with the RSP 15 adjustments and the operation of the RSP on a 16 go forward basis from January 1, 2008, and as 17 Mr. Young quite correctly said, this Board in 18 exercising that jurisdiction will essentially 19 stand in the shoes that it would have been in 20 if it was sitting there on January 1st, 2008, 21 figuring out now what should we do with the 22 balance and what should we do with how this 23 should work going forward. That's your 24 mandate, that's what you have to do. We may 25 have disagreement along ourselves as to what</p>

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1 we think you should do, but that's not a
2 matter of your power as to what it is you can
3 do. That was the third point.

4 The final point that I wanted to deal
5 with, the fourth point, very quickly is the
6 effect of the Board's Orders P.U.11-2008 and
7 P.U. 22-2009 dealing with Newfoundland Power,
8 and I simply say the Industrial Customer's
9 argument on that is simply disingenuous, with
10 respect. Those orders have to be read
11 together in a purposive fashion, that's what
12 the Court of Appeal says, have to be read
13 together with the interim rate orders, P.U.
14 34-2007, P.U. 37-2008, and P.U. 6-2009.
15 They've got to be read together purposely to
16 give effect to the intent of the orders, not
17 in a way which defeats the purpose of the
18 orders. Just by way of example, the operation
19 of the Industrial rate orders did not go from
20 interim by virtue of P.U. 34-2007 to final by
21 virtue of P.U. 11-2008, back to interim by
22 P.U. 37-2008, and back to final by P.U 22-
23 2009. That's the effect of what Mr. Hutchings
24 would be suggesting to you. You'd be playing
25 somehow ping pong with the orders. Well,

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1 that's clearly not what the Board was doing.
2 The Board was acting purposively to say in
3 late 2007, okay, we got a problem here we need
4 to address that problem, so let's make the
5 rates interim so that when we stand here to
6 deal with this, we will have our jurisdiction
7 to deal with this from January 1, 2008, as Mr.
8 Young quite rightly put it.

9 So Mr. Chairman, that's the fourth point,
10 and when you boil all that down, the Board,
11 therefore, has full and ample power and
12 jurisdiction to determine on a final basis the
13 operation of the RSP from and after January 1,
14 2008; number two, determine on a final basis
15 the rates that the Industrial Customers should
16 pay effective from January 1, 2008, and then
17 determine the appropriate disposition of any
18 accumulated balance in the RSP for all of the
19 years from 2007 right through to currently,
20 and the Board can use some of that money, if
21 the Board deems appropriate, to look at what
22 the impact has been on Industrial rates over
23 that period of time. They can look at that in
24 terms of what the use it for Newfoundland
25 Power's customers on a go-forward basis.

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1 There's a number of things the Board can do
2 with it, but what the Board can do with it is
3 a matter for another day. For today, the
4 answer is clearly the Board has the power to
5 deal with all of these questions and it's
6 within the Board's jurisdiction.

7 Those are my submissions, Mr. Chairman,
8 Commissioners.

9 CHAIRMAN:

10 Q. Go ahead, Madam.

11 COMMISSIONER NEWMAN:

12 Q. So is it Newfoundland Power's position then
13 that there's no restriction at all on the
14 Board, I'm talking jurisdiction, on the
15 Board's jurisdiction to deal with that
16 balance. If it were negative, would the Board
17 have jurisdiction to order that the balance be
18 collected from other customers of Hydro, such
19 as Newfoundland Power?

20 KELLY, Q.C.:

21 Q. Well, the Board - if there was a negative
22 balance, for example, the Board - there has
23 been final rates for Newfoundland Power, so
24 the Board wouldn't go back to 2008 or 2009,
25 for example, but if there was a number that

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1 had to be collected, it's just like the
2 operation of the RSP at the end of any year.
3 If there is a negative balance in it that has
4 to be collected, the Board then has to
5 determine how that happens. Hence there's an
6 application every year, and that would get
7 rolled into the RSP adjustment for the future
8 year. So if hypothetically, clearly not this
9 case, there was a negative, it would get
10 collected on a go-forward basis because our
11 rates were final in that sense, but in this
12 case because the Industrial rates are interim,
13 they may have some of it apply - for example,
14 they haven't had a fuel rider for the last
15 couple of years at a point when fuel prices
16 have been high. So of that balance may get
17 used to offset some of that, but those are all
18 matters that come within the Board's
19 jurisdiction.

20 COMMISSIONER NEWMAN:

21 Q. Is Newfoundland Power aware of a circumstance
22 where the Board would have ever done such a
23 thing in the past, collected balances from one
24 plan from other plans, from Industrial
25 Customer's plan to a Newfoundland Power plan,

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<p>1 or vice versa? Are you aware that it's</p> <p>2 happened before?</p> <p>3 KELLY, Q.C.:</p> <p>4 Q. I'm not sure I totally get your question, but</p> <p>5 at the end of every year in the Rate</p> <p>6 Stabilization Plan there is either a balance</p> <p>7 or a deficit. That's the whole purpose of a</p> <p>8 deferral account to adjust actual forecast</p> <p>9 costs and actual costs. So if the actual cost</p> <p>10 for the fuel for the year had been more than</p> <p>11 forecast, then that will get collected on a</p> <p>12 go-forward basis, and that's all that would</p> <p>13 happen in any year. So that's simply how the</p> <p>14 plan operates on an annual basis. So in one</p> <p>15 sense, it happens every time.</p> <p>16 VICE CHAIR WHALEN:</p> <p>17 Q. My question, Mr. Kelly, more has to do with</p> <p>18 Newfoundland Power's position on definition of</p> <p>19 the rate, and my understanding is you take</p> <p>20 your - you jump off from the EPCA as being the</p> <p>21 overriding legislation, that your definition</p> <p>22 of a rate includes prices, charges, total, or</p> <p>23 conditions.</p> <p>24 KELLY, Q.C.:</p> <p>25 Q. Yes.</p>	<p>1 then Section 34 makes it clear that you are to</p> <p>2 read that with the Public Utilities Act as</p> <p>3 well.</p> <p>4 VICE CHAIR WHALEN:</p> <p>5 Q. So when the Board established interim rates</p> <p>6 for the Industrial Customers, the RSP</p> <p>7 component was just a part of that rate.</p> <p>8 KELLY, Q.C.:</p> <p>9 Q. Yes.</p> <p>10 VICE CHAIR WHALEN:</p> <p>11 Q. The Board established a rate which included</p> <p>12 all the components of the rate, and I'm</p> <p>13 thinking - because the term RSP rules, I mean,</p> <p>14 I've seen through a number of the Board orders</p> <p>15 as well as submissions we talk about RSP</p> <p>16 rules, we talk about rates, we talk about</p> <p>17 rates rules and regulations, and we talk about</p> <p>18 rules and regulations, and the Board, in its</p> <p>19 GRA orders, approves final rates through a</p> <p>20 schedule of rates, tolls, and charges, and we</p> <p>21 approve rules and regulations. We do those</p> <p>22 things separately, and the rules and</p> <p>23 regulations we refer to in that instance are</p> <p>24 the rules for the conditions of service, you</p> <p>25 know, all the things that go around the</p>
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<p>1 VICE CHAIR WHALEN:</p> <p>2 Q. So is it under the word "conditions" that you</p> <p>3 bring in the - that Newfoundland Power brings</p> <p>4 in the rules, calculation of the rate, you</p> <p>5 know, all the words that seem to be</p> <p>6 interchanged when we step outside talking</p> <p>7 about a rate, which is a total charge, I</p> <p>8 guess.</p> <p>9 KELLY, Q.C.:</p> <p>10 Q. Yes, and in one sense - that's correct, and</p> <p>11 it's kind of an easy technical answer when you</p> <p>12 read the statutes together, but I would also</p> <p>13 say that you have to stand back a little bit</p> <p>14 with that argument as well and look at, as the</p> <p>15 Court of Appeal says, the broad purpose and</p> <p>16 nature of the legislation as to what it is</p> <p>17 that the Board is doing setting rates, because</p> <p>18 as Mr. Young rightly points out, when you set</p> <p>19 a rate especially in a complex field like</p> <p>20 this, you're not just setting a number, you're</p> <p>21 setting a number, but with rules and</p> <p>22 conditions and how this is all going to</p> <p>23 operate, and purposively that's all part of</p> <p>24 rates and rate making and the definition in</p> <p>25 the EPCA just makes that abundantly clear, and</p>	<p>1 application rate, so to speak, in terms of who</p> <p>2 it applies to, how it gets charged, late fees,</p> <p>3 connection fees, all that stuff, right.</p> <p>4 KELLY, Q.C.:</p> <p>5 Q. Right.</p> <p>6 VICE CHAIR WHALEN:</p> <p>7 Q. But when you're talking about rules and</p> <p>8 regulations being interim, we're not talking</p> <p>9 about those rules and regulations.</p> <p>10 KELLY, Q.C.:</p> <p>11 Q. No.</p> <p>12 VICE CHAIR WHALEN:</p> <p>13 Q. We're talking about rules as they apply to the</p> <p>14 calculation of the RSP component of that rate.</p> <p>15 KELLY, Q.C.:</p> <p>16 Q. Right, because in every year you've got to do</p> <p>17 an RSP adjustment, and Mr. Young put it well,</p> <p>18 this is simply how you do the adjustment,</p> <p>19 which is therefore part of the rate.</p> <p>20 VICE CHAIR WHALEN:</p> <p>21 Q. Right.</p> <p>22 KELLY, Q.C.:</p> <p>23 Q. We're not talking about, for example, the</p> <p>24 quality of the meter that we have to put on a</p> <p>25 customer's house or the size of a transformer,</p>

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1 how much voltage its got to move power from
 2 "x" to "y", there's all kinds of rules and
 3 regulations dealing with those, but we're
 4 talking about what makes up the rate and the
 5 conditions that make up the rate are part of
 6 the rate.
 7 VICE CHAIR WHALEN:
 8 Q. So Newfoundland Power's position then is that
 9 the rate, by its very nature of being interim,
 10 must include the way that rate is calculated?
 11 KELLY, Q.C.:
 12 Q. Absolutely, and it really is as simple as
 13 that, Commissioner.
 14 VICE CHAIR WHALEN:
 15 Q. That's all I have, Chair, thank you.
 16 CHAIRMAN:
 17 Q. So I take it what you're saying is that with
 18 respect to the American Airlines decision, is
 19 that Section 34 overrides that decision.
 20 KELLY, Q.C.:
 21 Q. I think Mr. Johnson will deal with that
 22 particular case in more detail, but frankly,
 23 American Airlines is one example of a court
 24 interpreting the words in different places,
 25 but when you look at the vast rate of

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1 authority, the principle of reading statutes
 2 consistently together in a purposive sense is
 3 a very well accepted principle. This Board,
 4 in fact, grappled with it a little bit in the
 5 Water Management decision when you were having
 6 to consider the Environmental Protection Act
 7 provisions and the EPCA's provisions. So you
 8 read statutes in that case a little bit
 9 different. Here you're reading two statutes,
 10 the Public Utilities Act and the EPCA, which
 11 really are very closely related, in pari
 12 materia, I think is the technical term, so you
 13 read those statutes together, as the Court of
 14 Appeal says, in a purposive manner to achieve
 15 the legislative objective.
 16 CHAIRMAN:
 17 Q. Now do you want to take a break or do you want
 18 to carry on?
 19 MR. JOHNSON:
 20 Q. I'm okay to carry on if the Board is.
 21 CHAIRMAN:
 22 Q. All right, sir.
 23 10:58 A.M.
 24 MR. JOHNSON:
 25 Q. Thank you, Mr. Chairman, Vice Chair,

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1 Commissioner. The consumer advocate takes the
 2 position as well on this question of
 3 jurisdiction that this Board does, in fact,
 4 have the jurisdiction, as Hydro and as
 5 Newfoundland Power has said, to determine on a
 6 final basis the operation of the RSP effective
 7 from and after January 1st, 2008, and to
 8 determine on a final basis the rates to be
 9 paid by the Industrial Customers effective
 10 from and after January 1st, 2008, and that it
 11 has as well the jurisdiction to determine the
 12 appropriate disposition of any accumulated
 13 balance in the RSP.
 14 As Mr. Kelly has indicated, and as both
 15 of us have referred to in our briefs, him at
 16 Paragraph 64 and me at Page 28, due to the
 17 Board's Interim Order P.U. 34-2007, the RSP
 18 adjustments which would have been made on
 19 January 1st simply didn't occur. Therefore,
 20 an effect of the interim order is that amounts
 21 accrued in 2007 haven't been dealt with. So
 22 the Board must still deal with the disposition
 23 of the amounts accrued during 2007, and indeed
 24 the rates were made interim on January 1st,
 25 2008, at Hydro's request precisely because the

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1 RSP plan balance which was to be collected in
 2 the RSP component of the rate come January
 3 1st, 2008, raised serious volatility concerns.
 4 Frankly, Commissioners, it is important that
 5 the Board have the jurisdiction to make rates,
 6 and by extension the RSP rules interim in
 7 cases where it is appropriate and prudent to
 8 do so. That ability is an important aspect of
 9 the Board's rate setting power and its powers
 10 of supervision. It permits the Board to take
 11 timely action to put things on an interim
 12 basis for a period of time, a result which
 13 this Board would be deprived of if you ascribe
 14 to the narrow construction of both your powers
 15 and your orders that is being suggested to you
 16 by my friends for the Industrial Customers.
 17 Specifically, I would like to address the
 18 submission of the Industrial Customers that
 19 the Board has no power to make the rules and
 20 regulations, those affecting the RSP interim.
 21 As we know, they say that Section 75 extends
 22 only to rates and not to the RSP rules or
 23 regulations. In our submission, the
 24 Industrial Customers are indeed asking for the
 25 Board to ascribe to a very narrow

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<p>1 interpretation of the Board's jurisdiction 2 under Section 75 of the Act. One which is at 3 once non-purposive, and as well in my 4 judgment, contrary to the tenants of the 5 Stated Case, as Mr. Kelly has just indicated. 6 In addition to that criticism, as Mr. Kelly 7 has pointed out and to which I fully 8 subscribe, the ICs do not address or even 9 reference in their written submissions the 10 EPCA, which I find is remarkable, given the 11 fact that Section 34 effectively provides that 12 the PU Act and its provisions, including 13 Section 75, are to be read subject to the 14 EPCA. The EPCA, which in itself, defines 15 rates in a manner that it does, which would 16 clearly encompass and take under its wing, as 17 it were, RSP rules.</p> <p>18 Now as Mr. Kelly pointed out, and I think 19 it's correct, Section 34 effectively stops 20 this argument dead in its tracks, but given 21 the fact that the Industrial Customers has 22 indicated that the American Airlines case is 23 one that the Board should consider in terms of 24 construing the words in the two statutes, I 25 provided some further material for the Board's</p>	<p>1 sense harmoniously with the scheme of the Act, 2 the object of the Act, and the intention of 3 Parliament", and in Paragraph 29, they say the 4 famous passage from Driedger, "Best 5 encapsulates our Court's preferred approach to 6 statutory interpretation". Then in the 7 following paragraph at Paragraph 30, they 8 refer to something which is directly relevant 9 to this case where we have two statutes, as it 10 were, covering and having relation to the same 11 field of activity. They say, "Because of the 12 interaction in this case between the in 13 personam jurisdiction of the Newfoundland 14 Supreme Court under the Fisheries Act and the 15 in rem admiralty jurisdiction of the Federal 16 Court under the Federal Court Act, in 17 considering the entire context of Section 72 18 and the intent of Parliament, it is important 19 to keep in mind the principles for harmonizing 20 different statutes. Professor Ruth Sullivan 21 express these principles as follows, in 22 Sullivan, Driedger on the Construction of 23 Statutes", and the court quotes from Professor 24 Sullivan as follows, "The meaning of words in 25 legislation depends not only on their</p>
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<p>1 consideration as regards the issue of 2 statutory interpretation, and the sources that 3 I put before the court include a relatively 4 recent case from the Supreme Court of Canada 5 called R. v. Ulybel Enterprises Limited, and 6 as well, which I'll get to in a moment, a 7 treatise on statutory interpretation from 8 Professor Sullivan, and the third case that I 9 put before the Commissioners is a case from 10 our Court of Appeal in 2005 regarding the 11 Newfoundland Human Rights Commission and the 12 Workplace Health Safety and Compensation 13 Commission.</p> <p>14 Starting with the Supreme Court of Canada 15 case, I'll just take you if I could to 16 Paragraph 28 of that decision, and here's 17 where the court has affirmed, as it has done 18 in numerous cases, its endorsement of the 19 approach to the construction of statutes that 20 is set out in this following passage from 21 Driedger Construction of Statutes where the 22 court says quoting from Driedger, "Today there 23 is only one principle or approach; namely, the 24 words of an Act are to be read in their entire 25 context and in their grammatical and ordinary</p>	<p>1 immediate context, but also on a larger 2 context which includes the Act as a whole, and 3 the statute book as a whole. The presumptions 4 of coherence and consistency apply not only to 5 Acts dealing with the same subject but also, 6 albeit with lesser force, to the entire body 7 of statute law produced by Legislature. 8 Therefore, other things being equal, 9 interpretations that minimize the possibility 10 of conflict or incoherence among different 11 enactments are preferred".</p> <p>12 Now Commissioners, at Paragraph 52 of the 13 Ulybel case, it contains, if you will, the 14 upshot of the application of this particular 15 principle where the court said, "If the Court 16 of Appeal's narrow interpretation of Section 17 72 is adopted, an order for sale emanating 18 from the Federal Court would terminate the 19 jurisdiction of the Newfoundland Supreme Court 20 to order forfeiture", and then this is what's 21 important, "As between the Fisheries Act and 22 the grant of admiralty jurisdiction in the 23 Federal Court, such a result does not comply 24 with the principle of interpretation that 25 presumes a harmony, coherence, and consistency</p>

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<p>1 between statutes dealing with the same subject 2 matter". So this Board will be concerned that 3 its approach to its jurisdiction is one that 4 comports with a principle of interpretation 5 that presumes a harmony, coherence, and 6 consistency between statutes.</p> <p>7 Now the second text that I've provided is 8 Professor Sullivan's excerpt of the 5th 9 Edition of her text on the Construction of 10 Statutes. If the Commissioners have that 11 before you, I'll refer to certain passages 12 from that material. To start off 13 Commissioners, at Page 223 under the heading, 14 "The Presumption of Coherence", where she 15 states the governing principles. "It is 16 presumed that the provisions of legislation 17 are meant to work together both logically and 18 teleologically as parts of a functioning 19 whole. The parts are presumed to fit together 20 logically to form a rational internally 21 consistent framework, and because the 22 framework has a purpose, the parts are also 23 presumed to work together dynamically, each 24 contributing something toward accomplishing 25 the intended goal. The presumption is the</p>	<p>1 application of Driedger's principle gives rise 2 to what was described in the Ulybel case as a 3 principle of interpretation that presumes a 4 harmony, coherence, and consistency between 5 statutes dealing with the same subject 6 matter". Now that has very definite 7 implications for the business of the 8 definition of rates, and as you'll see, if I 9 can refer the Board to page 412 of Professor 10 Sullivan's material, she has a paragraph 11 headed up as statutes on the same subject, or 12 Statutes in Pari Materia. "Statutes enacted 13 by Legislature that deal with the same subject 14 are presumed to be drafted with one another in 15 mind", and, of course, we have direct evidence 16 of that through Section 34 of the EPCA, so 17 they are presumed to be drafted with one 18 another in mind, "so as to offer a coherent 19 and consistent treatment of the subject. The 20 governing principle was stated by Lord 21 Mansfield in R. vs. Loxdale where different 22 statutes in pari materia, though made at 23 different times or even expired and not 24 referring to each other, they shall be taken 25 and construed together as one system, and as</p>
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<p>1 basis for analysing legislative schemes, which 2 is often the most persuasive form of analysis. 3 The presumption of coherence is also expressed 4 as a presumption against internal conflict". 5 Now on the next page, Professor Sullivan makes 6 the point, and we're about half way down page 7 224, makes the point that the presumption - 8 I'm reading from the last paragraph there, 9 "The presumption of coherence applies not only 10 to single statutes, but to the statute book as 11 a whole". Then she quotes directly from 12 Justice Iacobucci's decision in Bell ExpressVu 13 where he says, "The preferred approach 14 recognizes the important role that context 15 must inevitably play when a court construes 16 the words of a statute. As Professor John 17 Willis incisively noted in his seminal article 18 "Statute Interpretation in a Nutshell" words, 19 like people, take their colour from their 20 surroundings. This being the case, where the 21 provision under consideration is found in an 22 Act that is itself a component of a larger 23 statutory scheme, the surroundings that colour 24 the words in the scheme of the Act are more 25 expansive. In such an instance, the</p>	<p>1 explanatory of each other", and this is what's 2 crucial, "The provisions of each are read in 3 the context of the others and consideration is 4 given to whether they are part of a single 5 scheme. The presumptions of coherence and 6 consistent expression apply as if the 7 provisions of these statutes were part of a 8 single Act. Definitions in one statute are 9 taken to apply in the others, and any purpose 10 statements in the statutes are read together". 11 Now I cannot think of a more fulsome reply to 12 the Industrial Customer's position that 13 somehow rates do not encompass the conditions 14 of those rates, including the RSP, because we 15 have it expressly by the EPCA and now we have 16 it very clearly laid out by virtue of the 17 common law as accepted by the Supreme Court of 18 Canada. I just note in passing that Mr. Kelly 19 is right that the American Airlines case is 20 just one of several that tries to apply these 21 principles. It is not a seminal case. In 22 fact, it is not even a case that bears a 23 reference in Driedger's materials on statutory 24 interpretation. 25 Finally as regards the argument made by</p>

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<p>1 the Industrial Customers, and one might say a 2 novel argument, that an order of this Board; 3 namely, Order 37 of 2008, should be strictly 4 and narrowly construed so as to not make the 5 RSP rules interim, first of all, I think we 6 first have to observe that it was Order 34- 7 2007 which first made the rates, as attached 8 in Schedule "A", which specifically says that 9 the rates are subject to the RSP, it was that 10 order which made the rates and the RSP interim 11 and this was after Hydro had laid out to this 12 Board its concerns with the RSP rate 13 volatility problem in its application if 14 things were just left alone and to have taken 15 a normal course. It was a concern borne out 16 of a circumstance that had happened with 17 Industrial Customers load experience, that 18 load experience being directly relevant to 19 what was going on within the RSP. So by the 20 time P.U 37-2008 came along the rates, and 21 hence the applicable RSP provisions, had 22 already been made interim. Secondly, the law 23 is very clear that neither this Board's 24 jurisdiction nor its orders are to be strictly 25 and narrowly construed in the fashion</p>	<p>1 expressing any desire for a break, so I will-- 2 so who goes first? I forgot. 3 HUTCHINGS, Q.C.: 4 Q. Back around. 5 MR. MOORES: 6 Q. Newfoundland Power, I guess. 7 CHAIRMAN: 8 Q. Newfoundland Power. 9 KELLY, Q.C.: 10 Q. There's nothing else that I can usefully add, 11 Mr. Chairman, unless you have any further 12 questions. 13 MR. MOORES: 14 Q. And from Abitibi's perspective, nothing to add 15 unless there's questions from the panel. 16 CHAIRMAN: 17 Q. Okay. 18 HUTCHINGS, Q.C.: 19 Q. I have a few points, Mr. Chair. In terms of 20 the power that the Board has, and that is 21 exactly what we've been trying to address here 22 in terms of disposition of the surplus, the 23 Industrial Customer's position is that Mr. 24 Kelly correctly says you have power to make an 25 appropriate disposition of the surplus, but in</p>
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<p>1 suggested. As a matter of fact, as I point 2 out at page 32 of my written materials, Board 3 orders are themselves regulation under the 4 Interpretation Act of the province, and as 5 such are deemed to be considered remedial and 6 are to receive the liberal construction and 7 interpretation that best ensures the 8 attainment of the object of the regulation 9 according to its true meaning. 10 Now in light of the fact that Hydro's 11 Application was prompted by concerns over what 12 would result if the RSP adjustments in 13 accordance with the normal RSP rules were to 14 take place, an order which would in effect 15 somehow make rates interim, but not make the 16 RSP rules interim, would hardly be a sensible, 17 much less remedial and liberal construction of 18 the order that you're construing. The rest of 19 my submissions are contained in my written 20 brief, so I'll confine my remarks to those 21 this morning. Thank you. 22 11:20 A.M. 23 CHAIRMAN: 24 Q. Okay, I guess we're up for final closing 25 remarks. Will we carry on? Nobody is</p>	<p>1 our view, the constraint is that the 2 appropriate disposition of the surplus must be 3 consistent with the existing RSP rules, which 4 is essentially to say that the surplus goes to 5 the benefit of the Industrial Customers. How 6 exactly it goes, what the calculations are, 7 whether there has to be an arrangement for 8 taking into account fuel riders that weren't 9 imposed, whether there has to be a levelling 10 out over time of the benefit to Industrial 11 Customers to avoid further volatility, all 12 those things are correct, but I think Mr. 13 Kelly's answer to Commissioner Newman was 14 telling in that Newfoundland Power's rates 15 have been final throughout this period. The 16 load variation provision does not pass between 17 the customer groups yearly. The load 18 variation provision stays within the class, 19 and whether or not people think that's the way 20 it should be as of today, that is the way that 21 it was agreed to be and that is the way that 22 it is, so that the only time that the load 23 variation provision gets levelled out, if you 24 will, is at a general rate hearing when the 25 rates are - there's no load variation because</p>

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<p>1 you have the current forecast at that time. 2 The point being that the limitation on the 3 power of the Board is to dispose of the 4 surplus within the existing rules applicable 5 to the RSP.</p> <p>6 Section 34 of the Electrical Power 7 Control Act was only read in part in the 8 submissions. If we read the whole thing, it 9 says, "An Act or contract, whether enacted 10 before or after the commencement of this Act, 11 relating to a producer or a retailer, shall be 12 read and construed subject in all respect to 13 this Act, which in a case of conflict shall, 14 notwithstanding provisions to the contrary 15 contained in another Act or contract, prevail 16 over a general or special Act enacted or a 17 contract entered into prior to the 18 commencement of this Act". That is a 19 resolution of conflict provision. It's called 20 that, but the heading is not a proper source 21 of interpretation, but it is a recognizable 22 resolution of conflict provision and there's 23 no conflict here. It isn't as if the Public 24 Utilities Act defines the rate to be one 25 thing, and the Electrical Power Control Act</p>	<p>1 broadly construing another one. All of the 2 Act has to be read as a whole, and you must 3 give effect to both the provisions of 70, 71, 4 and 75 in your determination as to what your 5 power may be.</p> <p>6 What my friends behind me have said about 7 interpreting statutes in a consistent fashion, 8 I don't have a lot of difficulty with as a 9 matter of principle. The point is that each 10 case has to turn on the particular statutory 11 provisions that are at issue. The American 12 Airlines case is an illustration of two 13 statutes admittedly in pari materia, where the 14 Supreme Court of Canada has said the 15 definition in one does not apply to the 16 definition in the other. My friend says the 17 American Airlines case is not cited in 18 Professor Sullivan's book. With respect, 19 Professor Sullivan is not on the Supreme Court 20 of Canada, but the Supreme Court of Canada is 21 the ultimate interpreter of the laws in this 22 country. So we can rely upon the American 23 Airlines case to conclude that whether or not 24 statutes are in pari materia, we will have to 25 look at what the statute says and determine</p>
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<p>1 defines it to be something else. There is no 2 definition of rate in the Public Utilities 3 Act, and the principle which is referred to in 4 some of the cases that my friends have cited 5 here in response to American Airlines is 6 expressio unius est exclusio alterius; that 7 is to say if you say one thing, you exclude 8 the other, and by saying that the Board has 9 power to make interim orders as to rates, 10 there is by implication a necessary exclusion 11 of the power to make interim orders about 12 other things. That is a longstanding 13 principle of statutory interpretation which, 14 in our submission, is the applicable one here. 15 Section 34 is intended to resolve a conflict. 16 There is no conflict. While the Board should 17 interpret the provisions of the Act liberally 18 and broadly, it cannot repeal them. Only the 19 Legislature can do that. The Legislature has 20 chosen to say this is the power about rates, 21 this is the power about regulations, this is 22 your interim power, your interim power applies 23 to rates, that's as far as it goes, and one 24 cannot purport to wipe out the effect of a 25 provision of the Public Utilities Act by</p>	<p>1 whether or not it is appropriate in the 2 circumstances to apply a definition from one 3 to the definition of the other, and if you 4 read closely the provision - the section at 5 page 412 of the Sullivan text that my friend 6 quoted to you, it starts at the second last 7 paragraph on page 412 to say, "The provisions 8 of each are read in the context of the others 9 and consideration is given to whether they are 10 part of a single scheme". It isn't to say you 11 read them as one Act. You have to consider 12 whether or not they are part of a single 13 scheme, and if it is not possible to give 14 proper meaning to the provisions of the Public 15 Utilities Act without implying a definition of 16 rate that may be different from in the 17 Electrical Power Control Act, you still need 18 to give force to the provisions of the Public 19 Utilities Act and that is essentially what 20 happened in the American Airlines case. As 21 I've said before, we don't contest the fact 22 that the Board has the power, which my friend 23 properly says it needs, to be able to set an 24 interim rate and then true up that rate, if 25 you will, at the end of the day when the</p>

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<p>1 conditions that gave rise to necessity of 2 putting in the interim rate are no longer with 3 us, but in doing that, the Board is to find by 4 the provisions of the Public Utilities Act - 5 and we haven't reviewed in detail all the 6 authorities, but I don't think anybody is 7 contesting that generally speaking statutes do 8 not speak retroactively, and the Board does 9 not have power to act retroactively unless 10 there is a specific provision allowing it to 11 do so. The specific provision here relates to 12 rates only and not to rules, in our 13 submission.</p> <p>14 The true meaning of Order No. 37 of 2008, 15 I think, is plain on its face. We don't need 16 to use any abstruse rules of statutory or 17 contractual or other interpretation to come to 18 a conclusion about the meaning of that order. 19 It was an order on its face that affected only 20 the Industrial Customers and it was accepted 21 that that was it at the time that the order 22 was made. So that order does not put the ICs 23 on any sort of notice that the whole RSP 24 scheme has become interim, and that is why I 25 went to the specific words of that order in</p>	<p>1 would suggest needs to be looked at on a 2 prospective basis, and the fact that Hydro has 3 to say that in its cover letter of June 30th, 4 2009, I think is evidence of the fact that no 5 one though that the RSP system was totally 6 open for change at that time. The 7 interpretation of the Public Utilities Act 8 that we've put forward, which does not allow 9 for new rules to become interim, I think 10 solves most of the issues that have been 11 raised here. It solves my friend, Mr. 12 Kelly's, ping pong issue in terms of the rate 13 - RSP is interim, it's final, it's interim, 14 it's final. If there is no power to make it 15 interim at all, then that issue doesn't come 16 up. There is no conflict in our submission 17 with Section 34, so Section 34 doesn't have to 18 impact your consideration here. There are 19 conditions attached to essentially any rate. 20 I mean, the condition of the Industrial 21 Customer rate that you have to be taking at a 22 certain load in order for that rate to apply 23 to you, that's a condition of the rate and 24 that's not an issue, but that's not in our 25 submission a rule or regulation, and the rules</p>
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<p>1 response to the arguments that had been made 2 to the effect that everything was open as a 3 result of that order. That just isn't the 4 purpose of that order. The purpose of that 5 order was to deal with this spent provision 6 about the historical plan balances so that 7 there is no substance to the argument that the 8 ICs should be taken to have notice of a 9 widespread review of the RSP provisions or a 10 repeal of the load variation provisions, which 11 have always been separate as between the 12 Industrial Customers and Newfoundland Power.</p> <p>13 We should refer back as well to the 14 application that began this process where 15 Hydro itself said, "Although the attached 16 application does not contain any proposed 17 changes, the Board may wish to consider 18 suspension of the existing load variation 19 allocation rules and holding in abeyance 20 current and future load variation amounts 21 until such time as Hydro can develop a 22 proposal to address the current anomalies in 23 the RSP". So this is not - it is only then in 24 2009 that Hydro says to the Board this is 25 something that needs to be looked at, and I</p>	<p>1 and regulations are separate and apart from 2 the rates, treated differently in the Act 3 which is the important point, and, therefore, 4 must be treated differently by the Board. You 5 cannot use broad provisions of powers to be 6 exercised liberally and provisions to be 7 construed broadly to reach a conclusion that 8 leaves you in conflict with the Act. Coming 9 back, as I said, the first principles in the 10 beginning, we still have to stay within the 11 words of the Act and within the powers that 12 are there. That is what our submissions were 13 directed towards, what the Board can do, not 14 what the Board should do. What the Board 15 should do will be dealt with at a later time. 16 Our submission now is that the Board can deal 17 with the interim rates and can deal with the 18 disposition of the surplus, but it must do 19 that within the confines of the existing RSP 20 rules and regulations, and to do otherwise is 21 something that the Board does not have power 22 to do. That's our submission, it is not the 23 question of what the Board should do, we'll 24 get to that, it's a question what the Board 25 can do, and our submission is that with</p>

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<p>1 respect to the load variation provision the 2 Board cannot change that with respect to any 3 time period prior to the date of an order 4 making the change. Any other questions you 5 have, ladies and gentlemen, I'll try to 6 address.</p> <p>7 CHAIRMAN:</p> <p>8 Q. What you're saying - I think I understand what 9 you're saying is that there was an interim 10 state of affairs created for the Industrial 11 Customers, but that doesn't necessarily imply 12 that it goes any further beyond that.</p> <p>13 11:32 A.M.</p> <p>14 HUTCHINGS, Q.C.:</p> <p>15 Q. There was an interim state of affairs created 16 in respect of the rate for the Industrial 17 Customers. We're saying (a) there isn't power 18 to make the rules interim in terms of changing 19 where the allocation is going to go, and that 20 fact, in our submission, or that position is 21 supported by the notion that if the rules are 22 interim with respect to the Industrial 23 Customers, then if we're going to have a zero 24 fund gain here, they have to be interim with 25 respect to Newfoundland Power, and nobody is</p>	<p>1 Hutchings, for telling me what I meant in my 2 letter. I wasn't that puzzled myself as to 3 what it meant. It didn't - I don't ascribe to 4 the meaning that he does. It was an issue 5 that was suggested to the Board that would 6 have to be dealt with, there's no doubt about 7 that. There are problems observed in the 8 activity within the RSP that would require 9 consideration of the Board presently, and 10 perhaps in the future if things don't work 11 out. The RSP has been around for 25 years, 12 which required a number of adjustments. This 13 was just a notion being raised by Hydro that 14 this was an issue to be dealt with. It wasn't 15 a matter of this is something later on and it 16 doesn't matter, another time we can deal with. 17 It didn't go that far.</p> <p>18 The second point I'd like to make, and it 19 relates to the last discussion that Mr. 20 Hutchings and the Chair just had, and it 21 relates to whether or not this has to do with 22 the Industrial RSP or the Newfoundland Power 23 RSP. I think it's useful to come back to 24 first principles just for a moment. Fuel was 25 consumed, electricity was used. The RSP is a</p>
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<p>1 suggesting - Newfoundland Power says their 2 rates are final, can't change our rates. So 3 if their rates are final, their RSP is final, 4 everybody's RSP is final. I think that's all 5 consistent. What is not final is the specific 6 rate, the RSP portion of the rate that will be 7 charged in respect of the Industrial Customers 8 from January 1, 2008, and that you have 9 complete discretion to deal with as long as 10 the benefits remains within the rules and 11 remains within the Industrial Customer group, 12 and you can spread out that surplus in a just 13 and reasonable manner so as to avoid 14 volatility in the Industrial rates.</p> <p>15 CHAIRMAN:</p> <p>16 Q. But I can go no further than that?</p> <p>17 HUTCHINGS, Q.C.:</p> <p>18 Q. No, no further than that. As you said in your 19 Order P.U. 37 2008, Industrial Customers are 20 the only ones affected.</p> <p>21 MR. YOUNG:</p> <p>22 Q. Thank you, Mr. Chair. As often the case 23 in times like this, the horse into the barn, 24 and I'll pick up my pace. Three points. 25 First I'd like to thank my learned friend, Mr.</p>	<p>1 means intended to distribute costs amongst 2 customers. It was observed that it happened 3 in a way that was inappropriate and an 4 application was made to the Board to have a 5 good hard look at that. You know, the Board 6 has discretion in the end to determine whether 7 or not rates are just and reasonable. It sets 8 the RSP rates, it approves them, it's a rate 9 structure, it's a rate structure with words 10 and with rules, but that doesn't take away 11 from the fact that it is within the Board's 12 jurisdiction to consider, and I'd echo Mr. 13 Kelly's comments that in the end there's a 14 balance in the RSP, there's other things going 15 on in the RSP, and the Board has jurisdiction 16 over all of them. There was a clear 17 indication that these rates were interim at 18 this time, and whatever you can say about the 19 RSP, it relates to fuel consumed by all 20 customers and the rates that ought to be paid, 21 generally speaking, by all customers are 22 within this Board's jurisdiction.</p> <p>23 My final point also arises to some degree 24 on the points raised by my learned friend, Mr. 25 Hutchings, and also I think perhaps by Mr.</p>

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<p>1 Johnson. The conflict between whether or not</p> <p>2 there is a - whether there's a conflict</p> <p>3 requiring Section 34 consideration or not,</p> <p>4 it's not something I'm terribly fussed about.</p> <p>5 Looking at the Driedger sentence Mr. Hutchings</p> <p>6 read out, "The provisions of each are read in</p> <p>7 the context of the others and consideration is</p> <p>8 given to whether they're part of a single</p> <p>9 scheme", I would say the EPCA and the Public</p> <p>10 Utilities Act are usually in the same breath</p> <p>11 in this forum, not just in a single scheme,</p> <p>12 they're the same thought process. These two</p> <p>13 statutes work hand in glove. So any doubt</p> <p>14 that these things are not within the same</p> <p>15 matter, and that they have a great effect one</p> <p>16 upon the other as to how the Board considers</p> <p>17 these issues, escapes me.</p> <p>18 My very last point is this, the section</p> <p>19 of the Public Utilities Act which gives the</p> <p>20 Board jurisdiction for interim order discusses</p> <p>21 a schedule of rates, tolls, and charges. Just</p> <p>22 on a plain faced reading of the RSP, it is a</p> <p>23 schedule of rates, tolls, and charges. That's</p> <p>24 my final submission, thank you.</p> <p>25 CHAIRMAN:</p>	<p>1 rates at some point become final. There's</p> <p>2 also an interim order provision in Section 75,</p> <p>3 an understanding of accounts and an</p> <p>4 understanding of - the ATCO case is a very</p> <p>5 useful one. The Board is not normally willing</p> <p>6 to go back and take from customers amounts</p> <p>7 which the utilities made a mistake about. So</p> <p>8 depending on the circumstances of how things</p> <p>9 arose, it will impact upon the Board's</p> <p>10 jurisdiction just to make the change. I'm not</p> <p>11 sure if that answers your question, but in a</p> <p>12 proper case I think that could happen within</p> <p>13 limits of the Board's purview.</p> <p>14 CHAIRMAN:</p> <p>15 Q. Anybody have anything further?</p> <p>16 MR. JOHNSON:</p> <p>17 Q. Mr. Chairman, just slightly - I didn't feel</p> <p>18 like going again first, having just stopped</p> <p>19 when I was before you a second ago, but the</p> <p>20 point to take on board in regard of that</p> <p>21 question is, of course, the centrality to this</p> <p>22 whole debate of the fact of the rates being</p> <p>23 made interim, and at page 16 of my submission,</p> <p>24 I refer directly to what the Supreme Court of</p> <p>25 Canada had to say in Bell Canada 1989, and</p>
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<p>1 Q. So like in a situation where the scenario</p> <p>2 would be reversed, for instance, let's say the</p> <p>3 Industrial Customers chugged along and there</p> <p>4 was some serious problems in the Light and</p> <p>5 Power sector of this whole rate stabilization,</p> <p>6 are you saying that it would be appropriate</p> <p>7 for the parties to come back here and then</p> <p>8 argue that the Industrial Customers should</p> <p>9 pick up some kind of a burden there?</p> <p>10 MR. YOUNG:</p> <p>11 Q. If there was an under recovery in expense and</p> <p>12 the Board received an application from Hydro</p> <p>13 indicating that the change had to be made, and</p> <p>14 there was a balance owing in the account, in</p> <p>15 the RSP, I think the Board would have it in</p> <p>16 its jurisdiction the right to look at that and</p> <p>17 say this is what's going on in the year, when</p> <p>18 we set rates again for the next period, we</p> <p>19 will consider how things happened. There</p> <p>20 becomes a time though, as Mr. Kelly pointed</p> <p>21 out, that the rates become final, and there is</p> <p>22 generally - there's a lot of case law before</p> <p>23 the Board today that touch upon this, they are</p> <p>24 generally desirous of - courts and of boards</p> <p>25 in relation to customer's expectation that</p>	<p>1 that was as follows; Justice Gonthier said,</p> <p>2 "However, the power to make interim orders</p> <p>3 necessarily implies the power to modify in its</p> <p>4 entirety the rate structure previously</p> <p>5 established by final order". Mr. Young, a</p> <p>6 moment ago referred to the RSP as part of the</p> <p>7 rate structure. So I'm afraid that if the</p> <p>8 shoe were on the other foot and rates were</p> <p>9 made interim, my customers would have to be</p> <p>10 put on notice that the rate structure is up</p> <p>11 for revision; it may not be revised, it may be</p> <p>12 revised, but it's an open question until the</p> <p>13 Board can wrestle with it in accordance with</p> <p>14 its jurisdiction and its powers under the</p> <p>15 EPCA, including commonly accepted utility</p> <p>16 principles.</p> <p>17 11:43 A.M.</p> <p>18 COMMISSIONER NEWMAN:</p> <p>19 Q. I just wanted to ask you, when you said the</p> <p>20 rates were made interim, do you think the</p> <p>21 Supreme Court of Canada would have required</p> <p>22 everybody's rates to be made interim, or do</p> <p>23 you think that by making one rate interim,</p> <p>24 they would suggest that you could change the</p> <p>25 rate structure for everyone?</p>

<p style="text-align: right;">Page 105</p> <p>1 MR. JOHNSON:</p> <p>2 Q. In this case, the IC rate was made interim.</p> <p>3 Now that may - Newfoundland Power's customer's</p> <p>4 rates were final over a period of time. So</p> <p>5 that would impinge, I suppose, upon what you</p> <p>6 can do to redress any Newfoundland Power</p> <p>7 customer rate issue, but certainly that</p> <p>8 doesn't indicate that Newfoundland Power</p> <p>9 customers - the Board having considered in its</p> <p>10 jurisdiction and considered a proper rate</p> <p>11 making principle and sound public utility</p> <p>12 practice can't order a disposition of a</p> <p>13 deferral account amount that was built up</p> <p>14 under a period when rates were interim for the</p> <p>15 benefit of our system users because this money</p> <p>16 essentially represents costs that were avoided</p> <p>17 at Holyrood by virtue of the fact that one</p> <p>18 customer's loss went down and they've not paid</p> <p>19 fuel rider since, our customers have, so</p> <p>20 that's where the expertise comes into play</p> <p>21 with the rate consultants that you'll hear</p> <p>22 from in the next session.</p> <p>23 COMMISSIONER NEWMAN:</p> <p>24 Q. It'll be your suggestion then that if there</p> <p>25 was a shortfall, the Board would have</p>	<p style="text-align: right;">Page 107</p> <p>1 tell you. Speaking for me, I'm grappling now.</p> <p>2 Is there anything further? If not, thank you</p> <p>3 very much. I think it was a very good</p> <p>4 exposition and we'll have to make a decision</p> <p>5 and we will in the course of time. I think</p> <p>6 the only two people who were in the room 25</p> <p>7 years ago, I don't want to date you Mr.</p> <p>8 Hutchings, but I can recall the discussions at</p> <p>9 the time. Were you around then too?</p> <p>10 HUTCHINGS, Q.C.:</p> <p>11 Q. I was.</p> <p>12 CHAIRMAN:</p> <p>13 Q. Mr. Kelly looks pretty grey down there, but I</p> <p>14 don't think - he wasn't involved in that one.</p> <p>15 KELLY, Q.C.:</p> <p>16 Q. I wasn't here for that initial discussion.</p> <p>17 CHAIRMAN:</p> <p>18 Q. So thank you all very much, it was very</p> <p>19 interesting, and we'll grapple with the matter</p> <p>20 and hopefully some blood will get to the brain</p> <p>21 and we'll make a sensible decision.</p> <p>22 (UPON CONCLUDING AT 11:45 A.M.)</p>
<p style="text-align: right;">Page 106</p> <p>1 jurisdiction to collect that in the future</p> <p>2 from consumers in the province if there was a</p> <p>3 shortfall in the Industrial Customer's plan?</p> <p>4 MR. JOHNSON:</p> <p>5 Q. I would suspect so. It would follow.</p> <p>6 CHAIRMAN:</p> <p>7 Q. That's what I was trying to get at.</p> <p>8 HUTCHINGS, Q.C.:</p> <p>9 Q. And that with respect is the typical</p> <p>10 definition of a retroactive rate. If it's not</p> <p>11 built into the RSP plan as a deferral account</p> <p>12 when the deferral account is made, it's a</p> <p>13 retroactive rate if you go back and recoup</p> <p>14 previous losses. That's what all the</p> <p>15 authorities say.</p> <p>16 CHAIRMAN:</p> <p>17 Q. Mr. Kelly is shaking his head.</p> <p>18 KELLY, Q.C.:</p> <p>19 Q. There's a deferral account, and so that's the</p> <p>20 whole purpose of the deferral account, trueing</p> <p>21 up that at the end of the day, and that's why</p> <p>22 it's within the Board's jurisdiction to</p> <p>23 grapple with that issue.</p> <p>24 CHAIRMAN:</p> <p>25 Q. Boy, we're going to grapple with it, I can</p>	<p style="text-align: right;">Page 108</p> <p>1</p> <p>2 CERTIFICATE</p> <p>3 I, Judy Moss, hereby certify that the foregoing is</p> <p>4 a true and correct transcript of a preliminary</p> <p>5 hearing in the matter of an application by</p> <p>6 Newfoundland and Labrador Hydro concerning Rate</p> <p>7 Stabilization Plan (RSP) components of the rates to</p> <p>8 be charged to Industrial Customers, heard on the</p> <p>9 14th day of June, A.D., 2010 at the Public</p> <p>10 Utilities Board, Prince Charles Building, St.</p> <p>11 John's, Newfoundland and Labrador and was</p> <p>12 transcribed by me to the best of my ability by</p> <p>13 means of a sound apparatus.</p> <p>14 Dated at St. John's, Newfoundland and Labrador</p> <p>15 this 16th day of June, A.D., 2010</p> <p>16 Judy Moss</p>

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