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1 June 1, 2011  
 2 (9:30 A.M.)  
 3 VICE-CHAIR WHALEN:  
 4 Q. Good morning, everybody. We're here this  
 5 morning to hear oral submissions on  
 6 Newfoundland Power's application for the sale  
 7 of certain support structures in its  
 8 territory. I don't think we need to go any  
 9 further than that in terms of introducing the  
 10 matter. I would like though, for the purposes  
 11 of the record, I'll introduce the Panel and  
 12 ask the parties to identify themselves for  
 13 Judy's -- for the transcriber.  
 14 The Panel is Dwanda Newman, Commissioner;  
 15 to my left, Jim Oxford, Commissioner; myself,  
 16 I'm the vice-chair, I'll be acting as Chair of  
 17 this Panel. We have present for the Board,  
 18 Maureen Greene, our counsel, Board counsel,  
 19 and Cheryl Blundon, Board Secretary. Sam and  
 20 Doreen are there in the back from the staff.  
 21 And Newfoundland Power and the Consumer  
 22 Advocate, could you just introduce yourself  
 23 for the purposes of the transcriber?  
 24 KELLY, Q.C.:  
 25 Q. Thank you, Madam Chair. My name is Ian Kelly

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1 and with me as counsel is Gerard Hayes.  
 2 Behind me is Lorne Henderson and Diane Whelan  
 3 and also present for Newfoundland Power is  
 4 Gary Smith and Peter Alteen and Liam O'Brien  
 5 from our office is also present. I think that  
 6 covers the Newfoundland Power team.  
 7 VICE-CHAIR WHALEN:  
 8 Q. Welcome. Some familiar faces and some new  
 9 faces. Welcome. Consumer Advocate.  
 10 MR. JOHNSON:  
 11 Q. Good morning, Madam Chair, Commissioners,  
 12 Thomas Johnson, Consumer Advocate. I appear  
 13 alone.  
 14 VICE-CHAIR WHALEN:  
 15 Q. Thank you, sir. I guess for the purposes of  
 16 the proceeding this morning, Mr. Johnson, you  
 17 will go first with your submission. Just  
 18 before though, Maureen, is there anything you  
 19 wish to -  
 20 MS. GREENE:  
 21 Q. No, Madam Vice-Chair, there's been nothing  
 22 brought to my attention by any of the parties  
 23 that need to be addressed.  
 24 VICE-CHAIR WHALEN:  
 25 Q. Okay, all right. So we're clear to go?

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1 MS. GREENE:  
 2 Q. Yes.  
 3 VICE-CHAIR WHALEN:  
 4 Q. Thank you. Mr. Johnson, when you're ready.  
 5 MR. JOHNSON:  
 6 Q. Vice-Chair, Commissioners, in this  
 7 application, Newfoundland Power is seeking the  
 8 Board's approval to sell 40 percent of its  
 9 joint use poles and essentially the right to  
 10 bill and collect monies from third parties  
 11 with respect to attachments to the support  
 12 structures. This is what approval is sought.  
 13 As Consumer Advocate, I have reviewed the  
 14 Company's application and its evidence,  
 15 including the evidence put forward in the RFI  
 16 replies and including the evidence and orders  
 17 put forward by the Company back in 2001 when  
 18 these poles were purchased, and which have  
 19 been made part of the record, and have  
 20 concluded that I do not believe that on the  
 21 whole and with all of the circumstances that  
 22 this sale to Bell Aliant is in the customers'  
 23 interest. It really comes down to that.  
 24 The first point I'd wish to make is that  
 25 this proposed sale is fully reviewable by the

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1 Board at this time as a utility cannot sell  
 2 the whole or part of its undertaking until the  
 3 approval of the Board has been granted under  
 4 Section 48, full stop.  
 5 As I read the Company's materials and  
 6 argument, they appear to be saying that  
 7 because the Board recognized the existence of  
 8 the repurchase obligation in order No. PU 6  
 9 (2001/02) and ultimately approved Newfoundland  
 10 Power's acquisition of the joint use support  
 11 structures in PU 17 (01/02), then the Board's  
 12 proper take on this is that an application  
 13 under Section 48 would be necessary to  
 14 "finalize" the obligation upon Newfoundland  
 15 Power to sell the joint use support  
 16 structures. They use the term "finalize" at  
 17 page 25 of their brief. I'm not sure,  
 18 frankly, what Newfoundland Power is getting at  
 19 with this finalize language, but if it is to  
 20 suggest that this Board's scrutiny of this  
 21 sale application is to be somehow lessened to  
 22 attenuated in light of the existence of a sale  
 23 obligation in the facilities partnership  
 24 agreement, they are, with all due respect,  
 25 wrong.

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1 First of all, this Board, in PU 17, only  
 2 approved the purchase by Newfoundland Power of  
 3 Aliant's joint use support structures. While  
 4 a resale may have been contemplated, as a  
 5 possibility in the facilities partnership  
 6 agreement, the Board was expressly of the  
 7 opinion that its approval of the facilities  
 8 partnership agreement was not required and  
 9 that Newfoundland Power "will have to apply to  
 10 the Board for approval before the sale of any  
 11 of the support structures, as contemplated, is  
 12 finalized." So the facilities partnership  
 13 agreement was not approved.

14 In fact, the Board's non-approval of the  
 15 facilities partnership agreement was not  
 16 without a context. In fact, the record from  
 17 Consent No. 2, which was the hearing of the  
 18 first application held in May of 2001, in that  
 19 Mr. Kelly states, before the Board, in the  
 20 transcript at page three on June 7th that "the  
 21 facilities partnership agreement needs  
 22 approval because it contains terms and  
 23 conditions regarding the potential transfer of  
 24 assets and so that does require, in our view,  
 25 approval." And in fact, in the July 26th,

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1 2001 application, which was the second  
 2 application, Newfoundland Power specifically  
 3 requested that the Board make a order  
 4 "approving the modified facilities partnership  
 5 agreement," which the Board declined to do, as  
 6 we see in PU 17.

7 Now given that Newfoundland Power had  
 8 specifically sought this approval precisely  
 9 because the facilities partnership agreement  
 10 contained terms and conditions regarding the  
 11 potential transfer of assets, and given the  
 12 Board's declining to do so and given the  
 13 Board's clear statement that its approval  
 14 would be necessary under Section 48 for any  
 15 sale, Newfoundland Power and Bell Aliant had  
 16 to be put on notice that if and when called  
 17 upon to approve a sale, the Board would not be  
 18 seen as in any way of having given a blessing  
 19 or a nod to a retransfer. Rather, the sale  
 20 would be fully subject to Section 48.  
 21 Presumably the parties were prepared to  
 22 conclude their transaction on this basis and  
 23 with this well known to them.

24 The second point I would wish to make at  
 25 the outset is that Newfoundland Power is not

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1 presenting this proposal to sell 40 percent of  
 2 its support structures because the current  
 3 arrangement is not working or has been found  
 4 to be wanting from the perspective of  
 5 Newfoundland Power and its customers.

6 In fact, in looking at Mr. Hughes'  
 7 evidence in 2001, from June 7th, page seven,  
 8 he described the new arrangement at the time  
 9 as a major step forward in joint use pole  
 10 ownership and management. He called it "a  
 11 more efficient arrangement, more cost  
 12 effective and administratively simple. It has  
 13 important benefits for our customers." In  
 14 fact, according to the evidence given at the  
 15 June oral hearing by Mr. Hughes, at page four,  
 16 on June 8th, the operational efficiency gains  
 17 were not even factored in to the economic  
 18 analysis in support of the purchase. He said  
 19 at the time that Mr. Ludlow had gone through a  
 20 myriad of examples in his testimony of where  
 21 there's duplication and where there's  
 22 bureaucracy and he said it was very hard to  
 23 come up with a number when you're talking  
 24 about the value of the absence of something  
 25 and how much you could save.

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1 In fact, we were told, and this is  
 2 important, that we could expect operational  
 3 efficiencies to get even better in subsequent  
 4 renewal terms beyond 2010. And in fact, in  
 5 the July 2001 Exhibit 10, page three of eight,  
 6 for the record, it states as follows: "the  
 7 benefits associated with increased operational  
 8 efficiencies however, which are expected to be  
 9 more fully realized in subsequent renewal  
 10 terms, would have a positive impact of the NPV  
 11 of the arrangement in subsequent terms." So  
 12 the projection was that the best was yet to  
 13 come, as these operational efficiencies rolled  
 14 out and could be properly monetized. It's a  
 15 critical point.

16 In fact, when one looks back upon the  
 17 record of the hearing before the Board in  
 18 2001, the obligation on Aliant to repurchase  
 19 was seen, and may I say, and was sold as an  
 20 escape hatch for the benefit of Newfoundland  
 21 Power, that Newfoundland Power could voist  
 22 upon Aliant at the time.

23 Mr. Barry Perry, the then VP Financial  
 24 and CFO, stated, at page 23 of the transcript,  
 25 he said "as well, you know, we have

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1 protections in the contract. If Aliant  
 2 removes themselves from non-joint use poles,  
 3 they have to pay us back the net book value.  
 4 If they detach from up to 10,000 poles, we can  
 5 force them to buy the poles at net book value,  
 6 and at the end of the day, if after ten years,  
 7 we find that the transaction has not performed  
 8 up to what we expected, we can force Aliant to  
 9 buy back the poles at net book value. So, we  
 10 have, first of all, most of the components of  
 11 the transaction are known at closing and there  
 12 are those protections built into the contract  
 13 that I think protect Newfoundland Power  
 14 against any major changes in the business  
 15 that, you know, we are acquiring here from  
 16 Aliant."  
 17 Now for the record, this protective  
 18 mechanism was also discussed at page five of  
 19 the May 2001 application. The application,  
 20 which was looking ahead to 2010, said "in  
 21 2010, Newfoundland Power will either be  
 22 receiving a compensatory stream of rental  
 23 income from Aliant or will be able to divest  
 24 itself of the poles that it is now purchasing  
 25 from Aliant. This ensures that Newfoundland

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1 Power's customers will not be adversely  
 2 impacted by currently unforeseeable material  
 3 changes."  
 4 So let us be clear, we are not here  
 5 before the Board in an application where  
 6 Newfoundland Power is asking to divest itself  
 7 of these poles because the arrangement hasn't  
 8 been working or is not expected to keep  
 9 working well. There is no suggestion that  
 10 Newfoundland Power wanted to bring an end to  
 11 its ownership of these joint use support  
 12 structures. This sale is driven by Bell's  
 13 option to repurchase, realistically speaking.  
 14 Another point I wish to make at the  
 15 outset is that this sale, unlike the purchase  
 16 proposal ten years ago, does not have a  
 17 protective mechanism which would allow  
 18 Newfoundland Power to trigger an ability to  
 19 repurchase these structures back from Aliant  
 20 at some future point, so as to ensure that  
 21 Newfoundland Power's customers, to quote the  
 22 Company in 2001, "will not be adversely  
 23 impacted by currently unforeseeable material  
 24 changes." This protective mechanism, which  
 25 was put forward as a source of comfort, is not

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1 present here. An option to repurchase is much  
 2 more desirable than a right of first refusal.  
 3 An option to repurchase can be triggered at  
 4 the option of the purchaser. A right of  
 5 refusal depends upon the desire of the owner  
 6 to sell, which may never materialize.  
 7 So how does the Board go about  
 8 determining whether to approve Newfoundland  
 9 Power's application to sell 40 percent of its  
 10 joint support structures?  
 11 As you're aware, no test has been laid  
 12 down in our Act. There is no explicit  
 13 guidance in the Act, not unlike a lot of  
 14 provisions of the Public Utilities Act. So  
 15 the Board must set about determining its own  
 16 approach to the interpretation of Section 48  
 17 and its application.  
 18 Now, in my brief, I have mentioned how  
 19 Alberta has developed a so-called no harm  
 20 test, and as I said in my brief, the no harm  
 21 test balances the potential, the potential  
 22 positive and negative effects of the proposed  
 23 sale to determine whether its in the overall  
 24 public interest, and it was said in the EUB-  
 25 2000-41 case that moreover the Board has held

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1 that it must be satisfied that customers of  
 2 the utility will experience no adverse impact  
 3 as a result of the reviewable transaction, and  
 4 that's the case that's referenced at Tab 3 of  
 5 my materials and referencing page eight.  
 6 And in that same case, at page eight, the  
 7 Alberta Board said "the Board believes that  
 8 its duty to ensure the provision of safe and  
 9 reliable service at just and reasonable rates  
 10 informs its authority to approve an asset  
 11 disposition by a public utility pursuant to  
 12 Section 91.1(2) of the PUB Act. Therefore,  
 13 the Board is of the view that subject to those  
 14 issues which can be dealt with in future  
 15 regulatory proceedings, see Appendix 1, it  
 16 must consider whether the disposition will  
 17 adversely impact the rates customers will  
 18 otherwise pay and whether it will disrupt safe  
 19 and reliable service to customers. As already  
 20 noted, the Board also accepts that it must  
 21 assess potential impacts on customers in light  
 22 of the policy reflected in the EU Act, namely  
 23 the unbundling of the generation, transmission  
 24 and distribution components of electric  
 25 utility service and the development of

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1 competitive markets and customer choice. As a  
 2 result, rather than simply asking whether  
 3 customers will be adversely impacted by some  
 4 aspect of the transactions, the Board  
 5 concludes that it should weigh the potential  
 6 positive and negative impacts of the  
 7 transactions to determine whether the balance  
 8 favours customers or at least leaves them no  
 9 worse off, having regard to all of the  
 10 circumstances of the case. If so, then the  
 11 Board considers that the transactions should  
 12 be approved."  
 13 Now I don't think there is a magic  
 14 incantation of a phraseology that the Board  
 15 must feel it must go through, but I think this  
 16 is precisely the sorts of considerations and  
 17 overall approach that I think the Board may  
 18 wish to consider in its deliberations of this  
 19 application.  
 20 Now if we look at the economic case  
 21 behind this proposed transfer of these assets,  
 22 this is not a strong economic case at all.  
 23 It's not -- when you're weighing it, it's not  
 24 one that overburdens the scales in favour of  
 25 the customer in any way, shape or form. In

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1 2001, when the purchase of these poles were  
 2 approved, it was in the interest of customers  
 3 and the ownership of those poles and that  
 4 purchase, it still is in the interest of  
 5 customers. The real driver behind the sale is  
 6 not the benefits of the sale, which I have  
 7 called thin based on the Company's own  
 8 projections, but the fact that Bell Aliant has  
 9 triggered a repurchase. I could not fathom  
 10 that Newfoundland Power would be here looking  
 11 for approval of this sale in the absence of  
 12 the so-called right to repurchase, not where  
 13 the proffered benefits are so thin or, as the  
 14 Company put it, "relatively modest" at page  
 15 eight of its reply.  
 16 "The Consumer Advocate has pointed out  
 17 that according to the Company's evidence at  
 18 Exhibit 8, the positive revenue requirement  
 19 impacts over the first two years of the  
 20 proposed arrangement, which are primarily due  
 21 to transitional effects, are followed by  
 22 negative annual review impacts for the next  
 23 number of years." I have argued that with  
 24 this surplus occurring entirely in the first  
 25 two years that it was difficult to see how

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1 this will actually benefit ratepayers since  
 2 rates are already developed for 2011 and  
 3 Newfoundland Power is not expected to file a  
 4 rate case before May of 2012, using 2013 test  
 5 year.  
 6 Now Newfoundland Power has said that the  
 7 shown deficiency of some 461,000 over the  
 8 period from 2013 to 2015 is only .02 percent  
 9 of Newfoundland Power's revenue requirements,  
 10 a diminimous amount, and they say that the  
 11 Consumer Advocate's focus is unduly narrow.  
 12 They say by looking at the negative, while  
 13 disregarding the positive, the previous  
 14 positive annual impacts in 2011 and 2012, it  
 15 presents a skewed perspective on the cost  
 16 impacts associated with the application.  
 17 To that, I say that my concern with the  
 18 surpluses being front end loaded and my  
 19 concern about whether customers will truly  
 20 benefit from these is very much like the  
 21 concern expressed by the Board in PU 6. In PU  
 22 6, the Board noted as follows, in its  
 23 decision. "The Board was compelled to examine  
 24 the argument of Newfoundland Power with  
 25 respect to the effect on customers of not

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1 allowing the inclusion of the non-joint use  
 2 poles in the rate base. In addition to the  
 3 operational efficiencies identified, this  
 4 transaction has been presented as one which  
 5 will have a net positive financial impact on  
 6 the Company's revenue requirement and hence  
 7 customers."  
 8 It was suggested that not allowing the  
 9 non-joint use poles in the rate base, the  
 10 Board would effectively be foregoing revenue  
 11 which will not be made available to customers.  
 12 The Board said "while the Board is extremely  
 13 cognizant of its role in balancing the  
 14 utility's, customer and shareholder's  
 15 interests, it is difficult to see the direct  
 16 benefit of this transaction for customers.  
 17 The Board is not convinced, based on the  
 18 information provided, that customers will  
 19 actually realize any of the benefits in the  
 20 same way that shareholders will since the  
 21 effect on revenue requirement and hence rates  
 22 won't be tested until the next rate hearing.  
 23 The Company indicated that this will not  
 24 likely occur until 2002 when rates for 2003  
 25 will be set."

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1 Now similarly, I am not convinced, far  
 2 from it, that customers will actually receive  
 3 any of the benefits which are said to exist,  
 4 thin as they are already presented to be in  
 5 Exhibit 8.  
 6 So beyond 2012, revenue requirement  
 7 impacts are negative and we are told that they  
 8 will be ongoing -- there will be ongoing  
 9 diseconomies of scale due to shared ownership  
 10 as compared to single ownership. I, frankly,  
 11 view this as a risk as to whether customers  
 12 will be held harmless as a result of the sale.  
 13 I would observe as well that in 2001, the  
 14 Company, for the record, at the transcript of  
 15 June 8th, page four, line 14, said that it was  
 16 hard to come up with a dollar amount to put on  
 17 the savings that would come about from the  
 18 absence of duplication or bureaucracy, because  
 19 you're talking about the value of the absence  
 20 of something. I submit to the Board that the  
 21 same applies here when trying to calculate the  
 22 cost associated with joint ownership and  
 23 ongoing diseconomies of scale.  
 24 The other point of note, when one goes  
 25 back and looks at the proposal to buy these

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1 poles in the first place and compares it to  
 2 the current present sale proposal, is that  
 3 back in 2001 the Company conducted and filed a  
 4 sensitivity analysis at Exhibit 10 of their  
 5 evidence and I'm referring particularly for  
 6 the record to Table 3, page eight of eight of  
 7 Exhibit 10. And that sensitivity analysis was  
 8 to provide what the Company called an  
 9 additional measure of confidence in the  
 10 Company's financial analysis of the benefits  
 11 of the proposed deal.  
 12 And Mr. Perry explained in his testimony,  
 13 June 8th, page 20, and as well on June 7th,  
 14 page 20, two quotes run in succession, that  
 15 "we've tested this project very hard as to  
 16 possibilities in the future and it still  
 17 stands up as a very positive project." So  
 18 they said that they tested their financial  
 19 assumptions to ensure that if something did  
 20 occur over the ten-year period that we had not  
 21 assumed or that was not in accordance with our  
 22 best analysis of what we expect, what would be  
 23 the resultant impact on NPV or on the annual  
 24 contribution to revenue. And Newfoundland  
 25 Power's evidence, as the record will show, was

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1 that still with this sensitivity testing,  
 2 Newfoundland Power could not bring about a  
 3 negative position and annual net contribution  
 4 to revenue stayed at all times positive.  
 5 No such analysis is put forward by the  
 6 Company here. In fact, as we've said in our  
 7 brief, even a one percent reduction in cost of  
 8 equity in 2013 to 2015, or for that matter, a  
 9 proportional decrease in the Company's cost of  
 10 debt, bringing incremental cost of capital to  
 11 6.90 from the assumed 7.35 would result in a  
 12 negative levelized revenue requirement and a  
 13 negative net present value deficiency over the  
 14 2011 to 2015 period.  
 15 On the service side, this again is not  
 16 being brought -- this is not being proposed to  
 17 enhance service. Newfoundland Power has tried  
 18 to put in place arrangements and agreement on  
 19 standards so service levels will be preserved.  
 20 And frankly, we will have to see what the  
 21 impact will be of Newfoundland Power  
 22 relinquishing responsibility to Aliant to  
 23 carry out inspection and planned maintenance  
 24 of joint use support structures on the basis  
 25 of 40 percent ownership being in Bell Aliant,

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1 a point confirmed in PUB-NP No. 49. But the  
 2 bottom line is that with this new arrangement,  
 3 Newfoundland Power will no longer have  
 4 exclusive or primary responsibility in  
 5 relation to all joint use structures, an  
 6 exclusive arrangement that was put forward as  
 7 being highly desirable just ten years ago.  
 8 Given that Newfoundland Power was acting  
 9 to transfer these poles back to Bell Aliant  
 10 and trying to build protections around that, I  
 11 can't fault Newfoundland Power for its efforts  
 12 in trying to make Bell adhere to its standards  
 13 and for creating penalties and incentives to  
 14 motivate Bell Aliant where needed. But  
 15 frankly, it is hard to say if it will be as  
 16 good as the present situation or not. I  
 17 certainly hope so.  
 18 Certainly, this situation is apparently  
 19 without precedent where an electric utility  
 20 has purchased all the joint use structures in  
 21 its service territory from a telecom provider  
 22 due to the fact that it results in operational  
 23 and economic advantages and then sells these  
 24 back again.  
 25 Now I made the submission in my brief, at

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1 paragraph 31, that one should not lose sight  
 2 of the fact that some proposed sales may have  
 3 consequences that go beyond normal quality of  
 4 service issues, such as reliability and  
 5 maintenance standards. Newfoundland Power is  
 6 a poles and wires utility and they're looking  
 7 to sell 40 percent of its poles to a company  
 8 that is not regulated by this Board, a point  
 9 that is expressly made in this Board's notice  
 10 of application to the public, that reads "take  
 11 notice that the approval of the application  
 12 will result in the sale of 40 percent of  
 13 poles, anchors and related equipment which are  
 14 currently owned by Newfoundland Power and used  
 15 jointly with Bell Aliant, joint use support  
 16 structures. The joint use support structures  
 17 will be sold to Bell Aliant -- which will be  
 18 sold to Bell Aliant would be subject to  
 19 regulation by the Canadian Radio and  
 20 Telecommunications Commission, CRTC. Service  
 21 and maintenance of these joint use support  
 22 structures will be the responsibility of Bell  
 23 Aliant. The joint use support structures  
 24 which will be retained by Newfoundland Power  
 25 will remain subject to regulation by the Board

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1 and will be serviced and maintained by  
 2 Newfoundland Power."  
 3 Now the context here is the permanent  
 4 sale of core used and useful assets of  
 5 Newfoundland Power. This is not like the  
 6 lease situation which Newfoundland Power has  
 7 likened this to, because in a usual lease  
 8 situation, when the lessee does not wish the  
 9 lease to go on any longer, it can purchase it.  
 10 With this proposal, that option is gone, no  
 11 matter how beneficial it might prove to be in  
 12 the future for Newfoundland Power to own all  
 13 of its poles again. There is no protection.  
 14 (10:00 A.M.)  
 15 In my brief, I also pointed out that one  
 16 might question the advantage of having 40  
 17 percent of the joint use poles beyond the  
 18 direct regulation of the Public Utilities  
 19 Board of Newfoundland and Labrador. I raised  
 20 the potential sale situation by Bell Aliant.  
 21 Bell Aliant could sell its joint use support  
 22 structures either with or without the rest of  
 23 its enterprise here in Newfoundland and  
 24 Labrador and this Board would not have to be  
 25 given notice of sale or give its approval to

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1 sale to ensure that the sale protects the  
 2 rights and interests of electricity customers,  
 3 and I said in my brief that it was unclear how  
 4 the rights and interests would be protected.  
 5 Notably, Newfoundland Power's reply brief  
 6 said nothing in reply to this concern. That's  
 7 harm to Newfoundland Power's customers.  
 8 That's potential harm to Newfoundland Power's  
 9 customers.  
 10 I note that in the Trans Alberta utility  
 11 sale of its distribution business -- that's a  
 12 case that I've presented at Tab 3 of my  
 13 materials -- the EUB noted that the proposed  
 14 transferees were not yet designated as public  
 15 utilities under Alberta's Act and therefore  
 16 the Board put a condition on its approval of  
 17 the sale that neither transferee of these  
 18 distribution assets shall dispose of the  
 19 assets and/or shares without Board approval,  
 20 as if they were both designated public  
 21 utilities under Alberta's statute, which is at  
 22 page 31 of that decision.  
 23 In that case, the Board noted, at page  
 24 two, that the transferees would be owners of  
 25 public utilities and therefore subject to

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1 regulation by the Alberta Board. In fact, as  
 2 a reading of that case will disclose,  
 3 UtiliCorp, which was going to be the  
 4 purchaser, on the issue of continuity of safe  
 5 and reliable service, submitted that it would  
 6 be bound by all existing Board orders and that  
 7 the Board retain jurisdiction to deal with any  
 8 service issue. Bell Aliant won't be.  
 9 I submit that these are obviously  
 10 important considerations when a utility is  
 11 selling important and useful utility assets.  
 12 The other point I made in my submission  
 13 was whether it would be more advantageous to  
 14 have terms of access to these joint use poles  
 15 determined by the CRTC or the Board. The  
 16 Company's reply brief would leave the  
 17 impression that the terms of joint use, if not  
 18 arrived at by the parties, would be determined  
 19 under arbitration, but the disputes that go to  
 20 arbitration are the interpretive disputes  
 21 only. So, if there was a dispute under a  
 22 joint use agreement itself, say as to how a  
 23 provision was meant to work or how it was to  
 24 be interpreted, that could be arbitrable under  
 25 -- that would be Article 18 of the proposed

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1 JUA, which is at page 17 of the JUA XVIII.  
 2 But that arbitrator would not have the power  
 3 to or be asked by the parties to come up with  
 4 the terms of joint use once it expired. The  
 5 parties would have to do that themselves and  
 6 if they failed to agree upon these terms  
 7 regarding the use, conditions or compensation  
 8 for the use of support structures, that would  
 9 be determined by the relevant regulator,  
 10 depending upon who owns the poles. That's the  
 11 issue that I was referring to in my brief.  
 12 Touching on the legal liability issues,  
 13 frankly, I'm -- I stand fully behind the  
 14 analysis that I provided in my brief on the  
 15 legal liability issues and I note that  
 16 Newfoundland Power's reply brief takes no  
 17 issue with the cases that I've referenced from  
 18 the Supreme Court of Canada or the analysis  
 19 that I've employed where I've walked the Board  
 20 through the provisions of the JUFPA and the  
 21 JUA and the sale agreement. I agree that  
 22 Newfoundland Power has an obligation of good  
 23 faith performance to apply to the Board for  
 24 approval. But if approval is not granted,  
 25 that's a condition precedent for the sale that

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1 has not been met, and no one had a right to or  
 2 should have reasonably thought that Board  
 3 approval was a fait d'accompli. There is no  
 4 basis for liability if Newfoundland Power, as  
 5 it has done, made diligent efforts to  
 6 prosecute the application for approval before  
 7 the Board.  
 8 So at the end of the day, the Board has  
 9 to take into account both the positive and the  
 10 negative effects of the proposed sale in all  
 11 of the circumstances in their totality. The  
 12 Board should satisfy itself that the customers  
 13 of the utility will experience no adverse  
 14 impact as a result of the transaction. You  
 15 must weigh the positive and negative impacts  
 16 of the transaction to determine whether the  
 17 balance favours customers or at least leaves  
 18 them no worse off, having regard to all of the  
 19 circumstances.  
 20 Given the potential negative implications  
 21 of a final sale of these core used and useful  
 22 assets to a party beyond the Board's  
 23 regulatory powers, and in light of the lack of  
 24 significant proffered benefits, and indeed,  
 25 the potential for customers to be worse off,

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1 this is not a transaction where the balance  
 2 favours customers or at least leaves them no  
 3 worse off, and that's precisely why I oppose  
 4 the granting of approval. Thank you.  
 5 VICE-CHAIR WHALEN:  
 6 Q. Thank you, Mr. Johnson. Do you wish to ask  
 7 any questions of Mr. Johnson now?  
 8 COMMISSIONER NEWMAN:  
 9 Q. No questions for Mr. Johnson.  
 10 COMMISSIONER OXFORD:  
 11 Q. No, no questions.  
 12 VICE-CHAIR WHALEN:  
 13 Q. I may have one, but I think I'd prefer to wait  
 14 and hear from Newfoundland Power, if that's  
 15 okay. Ms. Greene, do you have anything you  
 16 wish to -  
 17 MS. GREENE:  
 18 Q. No, Madam Vice-Chair.  
 19 VICE-CHAIR WHALEN:  
 20 Q. Mr. Kelly, you're up.  
 21 (10:10 A.M.)  
 22 KELLY, Q.C.:  
 23 Q. Thank you, Madam Chair. Madam Chair, there is  
 24 before you a comprehensive record consisting  
 25 of the application, the pre-filed evidence,

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1 exhibits, responses to requests for  
 2 information and consent exhibits. There has  
 3 been no evidence filed in opposition to this  
 4 application, and of course, it goes without  
 5 saying that the Board must decide the  
 6 application on its merits, based upon the  
 7 evidence contained in the record, not  
 8 suppositions by counsel or any other thing.  
 9 It's got to be based upon the evidence in the  
 10 record.  
 11 And it's worth going back a little bit  
 12 and just looking at a bit of the history of  
 13 this. Prior to 2001, Newfoundland Power and  
 14 Bell Aliant each owned support structures in  
 15 the province and shared the use of those  
 16 structures. The costs were shared on a 60/40  
 17 basis in keeping with recognized public  
 18 utility practice in Canada and the ownership  
 19 ratio was maintained at that 60/40 basis to  
 20 facilitate joint use and the equitable cost  
 21 sharing between the two entities.  
 22 The purpose of joint use arrangements is  
 23 to reasonably apportion the costs of those  
 24 support structures. Joint use arrangements  
 25 are not prima facie intended to benefit one

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1 party at the expense of the other. That’s an  
 2 important point to keep in mind. It’s a joint  
 3 use. It’s a cost sharing.  
 4 In 2001, Newfoundland Power purchased all  
 5 of the joint use support structures from Bell  
 6 Aliant. The transaction included provisions  
 7 as to price, service standards, a ten-year  
 8 joint use term, renewal provisions, and a  
 9 right to repurchase by Bell Aliant at the end  
 10 of the term, and the initial purchase  
 11 transaction therefore expressly contemplated  
 12 and recognized that right of Bell Aliant to  
 13 repurchase the support structures at the end  
 14 of the term. That was part of the  
 15 transaction.  
 16 In 2010, Bell Aliant gave notice of its  
 17 intention not to renew the existing joint use  
 18 arrangements and exercised its right to  
 19 repurchase the support structures.  
 20 Newfoundland Power and Bell Aliant then sat  
 21 down and negotiated revised terms for joint  
 22 use of the support structures, including  
 23 provisions for the repurchase for Bell Aliant  
 24 of the 40 percent of the structures, for a  
 25 price of 45.7 million dollars, in accordance

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1 with the deal that had previously been  
 2 negotiated.  
 3 So the evidence before the Board  
 4 indicates that the initial transaction  
 5 materially benefited Newfoundland Power’s  
 6 customers during that ten-year term. The  
 7 benefits actually achieved exceeded those  
 8 which Newfoundland Power initially forecast,  
 9 primarily as a result of the declining cost of  
 10 capital during that period. In other words,  
 11 we’d locked in rental rates based upon that  
 12 cost of capital, so as the cost of capital  
 13 fell, the benefit to customers actually turned  
 14 out to be more than we initially contemplated  
 15 and the total is about ten million dollars.  
 16 But that ten-year arrangement has now expired.  
 17 So it’s not a question of comparing where we  
 18 have been over the past ten years. This is  
 19 now Bell Aliant has exercised its right so the  
 20 question is where do you go going forward.  
 21 And the evidence before the Board in this  
 22 application indicates that Newfoundland  
 23 Power’s customers will continue to benefit  
 24 from the new joint use arrangements. The  
 25 transaction has a positive net present value,

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1 whether you consider that over a five-year  
 2 period or a ten-year period compared to the  
 3 renewal of the existing joint use partnership  
 4 arrangements. And the transaction also  
 5 includes terms to ensure the maintenance of  
 6 service standards for Newfoundland Power’s  
 7 customers.  
 8 Exhibit 8 conservatively estimates the  
 9 net present value over five years at  
 10 approximately half a million dollars. The  
 11 estimate is conservative for two reasons.  
 12 First, it is based upon the current low  
 13 interest rate environment which results in the  
 14 current low rate of return on equity to  
 15 Newfoundland Power, and as the North American  
 16 economies recover, it’s reasonable to expect  
 17 that interest rates will rise to more normal  
 18 levels and hence, as a result of that, the  
 19 return on equity will increase because of the  
 20 automatic adjustment formula. And as the  
 21 response to CA-NP 9 illustrates, a one percent  
 22 increase on the return on equity increases the  
 23 net present value to approximately 1.25  
 24 million. So in terms of sensitivity to what  
 25 our potential change is going forward, this is

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1 potentially likely to be more beneficial than  
 2 the forecast in Exhibit 8. But we’ve put  
 3 forward a conservative estimate of here’s  
 4 based upon current conditions.  
 5 The second point is that the Exhibit 8  
 6 analysis does not include the other potential  
 7 benefits which are described and set out in  
 8 PUB-NP 35.  
 9 Now the repurchase of the support  
 10 structures by Bell Aliant does require the  
 11 approval of the Board, pursuant to Section 48  
 12 of the Public Utilities Act, and much of the  
 13 discussion here is about what is the role and  
 14 the approach that this Board must take under  
 15 Section 48 of the Public Utilities Act.  
 16 That’s one of the key questions. And it’s  
 17 important to keep in mind that the Board  
 18 doesn’t have an unfettered jurisdiction or  
 19 discretion with respect to approval or  
 20 disapproval. The Board can’t simply do  
 21 whatever it likes. The Board’s jurisdiction  
 22 is governed by the regulatory principles found  
 23 in the Public Utilities Act and the Electrical  
 24 Power Control Act. That’s the starting point.  
 25 The Board’s overriding mandate is to ensure



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1 that Newfoundland Power provides reasonable  
 2 service to customers at reasonable rates.  
 3 Those are the two key bits, and you'll find  
 4 those principles reflected in Section 37 of  
 5 the Public Utilities Act in particular and  
 6 Section 3 of the Electrical Power Control Act.  
 7 Then we come to Section 53 and 48. Joint  
 8 use of support structures is specifically  
 9 encouraged and mandated by Section 53 of the  
 10 Public Utilities Act, and of course, the  
 11 social policy reasons for joint use are pretty  
 12 obvious. There are substantial economic  
 13 savings in having infrastructure used for  
 14 multiple purposes, as opposed to each service  
 15 provider having to build and maintain its own  
 16 separate facilities. And there are also the  
 17 esthetic and environmental impacts of  
 18 duplicate structures.  
 19 So the Legislature set out what -- how  
 20 that would be approached in Section 53 and  
 21 what the Legislature did was it put the  
 22 primary responsibility for joint use on the  
 23 utility, imposed it on us, not on the Board.  
 24 Section 53.2 limits the Board's role in  
 25 establishing joint use arrangements to

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1 circumstances where the utility has not been  
 2 able to reach agreement with the other party  
 3 on the use, conditions or compensation, and  
 4 Section 53 requires joint use of facilities in  
 5 the absence of substantial detriment to the  
 6 utility service. And that concept in Section  
 7 53 that the burden is on the utility to  
 8 negotiate it if possible and the Board has a  
 9 secondary role, that's not peculiar to  
 10 Newfoundland. You'll find that same concept  
 11 at the Federal level in Section 43 of the  
 12 Telecommunications Act. So that's how the  
 13 legislatures have approached this.  
 14 So what do we have here? We have  
 15 Newfoundland Power and Bell Aliant, two  
 16 sophisticated parties, have negotiated and  
 17 reached agreement on the joint use of support  
 18 structures and they have reached comprehensive  
 19 agreements which cover all aspects of  
 20 providing service and maintaining that  
 21 service. There's arbitration provisions  
 22 contained in those agreements and so, it is  
 23 those agreements which then ensure the  
 24 continuation of service and the concern that  
 25 my friend, Mr. Johnson, raises that somehow we

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1 have to go off to the CRTC to ensure it is  
 2 simply not correct because the Federal  
 3 arrangements, just like the Newfoundland  
 4 arrangements, put the burden on the utilities  
 5 to ensure that they have joint arrangements in  
 6 place and so, we have now negotiated  
 7 provisions with arbitration provisions to  
 8 ensure that service is maintained to  
 9 customers.  
 10 And Newfoundland Power and Bell Aliant  
 11 have been down this road before. This is not  
 12 something new. Previously there were joint  
 13 use 60/40 sharing arrangements and  
 14 Newfoundland Power and Bell Aliant have worked  
 15 reasonably over the years.  
 16 Now as I previously indicated, Bell  
 17 Aliant's right to repurchase the support  
 18 structures was part of the terms of the  
 19 initial acquisition by Newfoundland Power. So  
 20 consequently, Newfoundland Power has a  
 21 contractual obligation, which it must perform  
 22 in good faith, to convey 40 percent of the  
 23 support structures to Bell Aliant. And  
 24 correspondingly, the Board has an obligation  
 25 to exercise its powers and jurisdiction in a

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1 manner that doesn't frustrate Bell Aliant's  
 2 right to reacquire, to repurchase those  
 3 assets.  
 4 So what the Board has to do is to review  
 5 the transaction to ensure that the resulting  
 6 joint use arrangements provide reasonable  
 7 service at reasonable rates and do not result  
 8 in substantial detriment to the service  
 9 provided by Newfoundland Power's customers.  
 10 And the record is clear that we meet that  
 11 test, and that's the correct test.  
 12 Let me elaborate a little bit further.  
 13 The substantial detriment test in Section 53  
 14 for joint use arrangements is similar to the  
 15 no harm test that has been established by the  
 16 Alberta Board and then sanctioned by the  
 17 Supreme Court of Canada in relation to the  
 18 disposition of assets, and this is where we  
 19 come to now, what's the relationship between  
 20 53 and 48? And Section 48, in this province,  
 21 deals with the disposition of assets and these  
 22 two tests are substantially similar. Will  
 23 there be any material harm to customers from  
 24 the transaction? That's the test that has  
 25 been determined now for a disposition of

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1 assets, reasonably sanctioned by the Supreme  
 2 Court of Canada, and its interesting that in  
 3 that respect, the Section 53 language and the  
 4 test formulated under Section 48 is  
 5 substantially the same. So what you're seeing  
 6 there is the regulator looking at, first of  
 7 all, under 53, the burden is on the utility,  
 8 which we've exercised. What's the Board's  
 9 role? It's really to make sure that we're not  
 10 doing any substantial -- imposing any  
 11 substantial detriment on our service or  
 12 imposing any material harm on our customers,  
 13 and it's worth taking a quick look at the case  
 14 that my friend, Mr. Johnson, was good enough  
 15 to put at Tab 2, which is the Fortis Alberta  
 16 decision in December 2010, because it's the  
 17 culmination of a whole series of cases,  
 18 including the Atco case to the Supreme Court  
 19 of Canada establishing this no harm test.  
 20 And if you go to -- it's at Tab 2 of Mr.  
 21 Johnson's authorities, and if you go to page  
 22 three of the decision, down to paragraphs 11  
 23 and 12, at the bottom of the page, the Board  
 24 is setting out the test to be applied. The  
 25 first bullet is not particularly important in

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1 paragraph 11. It's the second bullet. "The  
 2 Commission must determine whether customers  
 3 have been harmed, either as to the result of a  
 4 detrimental impact to the quality or quantity  
 5 of customer service or by way of a rate impact  
 6 as a result of the proposed disposition of the  
 7 asset. Should the Commission find harm, the  
 8 Commission may deny the transaction or if  
 9 there is a close connection, it may attach a  
 10 condition," et cetera. But note that the  
 11 precondition to the Board acting is a finding  
 12 of harm. That's the test.  
 13 So, in order to deny the transaction or  
 14 make some remedial order, the Board must first  
 15 find that the transaction will result in harm,  
 16 either through a detrimental impact on service  
 17 or on rates. And such a factual finding has  
 18 to be based on the evidence before the Board.  
 19 It can't be fanciful. The Board has to be  
 20 satisfied on the balance of probabilities that  
 21 customers would be detrimentally impacted,  
 22 either in service or in rates, and there's no  
 23 evidence of any harm to Newfoundland Power's  
 24 customers in this record. There is simply no  
 25 evidence of harm. Indeed, the evidence is

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1 clear and uncontradicted that service  
 2 standards will be maintained. There's a  
 3 comprehensive mechanism in place to ensure  
 4 service is maintained and the transaction has  
 5 a further positive net present value. The net  
 6 present value is in addition to benefits that  
 7 have already been captured.  
 8 So, let's just summarize what  
 9 Newfoundland Power has achieved for its  
 10 customers out of this series of transactions.  
 11 Firstly, approximately ten million dollars in  
 12 benefits over the past ten years. During that  
 13 period, as the record indicates, efficiency  
 14 gains have been achieved. So we're now all  
 15 working on the same standards of construction,  
 16 et cetera. Those efficiency gains have been  
 17 achieved and will continue under the new joint  
 18 use arrangement. So they're not going to be  
 19 lost. They're going to continue.  
 20 There's a further positive net present  
 21 value benefit of approximately half a million  
 22 dollars going forward, despite the fact that  
 23 this is -- you start from the proposition one  
 24 party is not trying to gain at the expense of  
 25 the other. This deal still shows a positive

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1 net present value of half a million dollars.  
 2 And then there are the further potential  
 3 benefits which may arise as set out in PUB-NP  
 4 35.  
 5 So, Bell Aliant has the right to  
 6 repurchase its proportionate share of the  
 7 structures and to revert to the type of joint  
 8 use arrangements that were in place prior to  
 9 2001. That's the given. The Board can only  
 10 deny the transaction or impose remedial orders  
 11 upon proof of harm to customers and the  
 12 speculative possibilities that have been put  
 13 forward simply do not meet the required  
 14 threshold of evidentiary proof.  
 15 And there's a further point that the  
 16 Alberta boards have made repeatedly now in  
 17 these decisions. If there are some -- if  
 18 there is some future difficulty which arises,  
 19 it can and should be dealt with at the point  
 20 in time when the issue arises, when it's known  
 21 and when it can be properly addressed. It  
 22 doesn't make any sense for the Board to try to  
 23 fashion remedial orders for theoretical  
 24 possibilities. What is it you would actually  
 25 do? Because nobody has been able to say

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1 "here's the harm which needs to be  
 2 ameliorated." So trying to fashion some kind  
 3 of remedial order in advance makes no sense.  
 4 The Alberta board have taken the position  
 5 "look, if there's a problem, there will be  
 6 opportunities to deal with that going  
 7 forward."  
 8 Now, I want to deal with one point that  
 9 my friend made as he was going forward here.  
 10 He pointed out the fact that the benefits in  
 11 the first couple of years are positive and  
 12 then they are, at a very minor level, negative  
 13 in the second year -- sorry, in 2013-2015.  
 14 Now, first of all, there's -- it's important  
 15 to keep in mind, and you'll see this if you go  
 16 to PUB-NP 46, that as a result -- it might  
 17 even be worth turning up CA -- sorry, PUB-NP  
 18 46.  
 19 It's important to keep in mind that with  
 20 the expiry of the current arrangements, the  
 21 rental revenue to Newfoundland Power  
 22 decreases. So we start from the proposition  
 23 there is approximately a one million dollar  
 24 reduction in revenue which happens because the  
 25 existing arrangements have expired, and so

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1 that revenue needs to be replaced and as  
 2 Exhibit 9, I believe is the exhibit number,  
 3 indicates even with the additional revenue  
 4 which is derived in the early years, that  
 5 still doesn't replace all of the million  
 6 dollar loss and Newfoundland Power's projected  
 7 rate of return is 8.24 percent, I believe is  
 8 the number, instead of the -- 8.21 percent,  
 9 Mr. Hayes is correcting me, instead of the  
 10 allowed rate of return of 8.38 percent. So,  
 11 this is not a case where that revenue is  
 12 somehow not -- is somehow flowing to the  
 13 benefit of shareholders. Our allowed -- we  
 14 will still be under our allowed rate of  
 15 return. So that revenue is important to  
 16 maintain the financial integrity of the  
 17 utility, which is one of the issues provided  
 18 for the Board under the Electrical Power  
 19 Control Act, in the EPCA, as an important  
 20 consideration, and maintaining the financial  
 21 integrity of the utility is an important  
 22 benefit to customers. So customers don't  
 23 exist in somehow an abstract. Service is  
 24 provided because there is a financially secure  
 25 utility providing it. And in the subsequent

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1 years, the amount is diminimous. It is ten  
 2 times less than the amount that the Alberta  
 3 boards have said is to be considered a  
 4 diminimous level and when you factor that into  
 5 Newfoundland Power's entire expense burden, it  
 6 is minuscule.  
 7 So, when you look at that situation, it  
 8 is not a situation where customers are somehow  
 9 being deprived. Rather, there is, in total, a  
 10 net present value benefit which accrues in  
 11 this particular situation. And the net  
 12 present value analysis is the methodology that  
 13 this Board has directed the utilities to use  
 14 to determine whether transactions should be  
 15 permitted or should not be permitted. That's  
 16 the methodology which this Board has quite  
 17 rightly said we should look at a net present  
 18 value analysis to determine whether approval  
 19 should be given or should not be given. So  
 20 that's a very important factor that I think  
 21 the Board needs to keep in mind.  
 22 Now, my friend then goes on and he  
 23 suggests that the Board should simply refuse  
 24 to approve the repurchase by Bell Aliant,  
 25 arguing that Newfoundland Power would be

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1 immune from legal liability, and with the  
 2 greatest respect to the Consumer Advocate,  
 3 that position is not correct and it is,  
 4 frankly, a little bit reckless. He first of  
 5 all points to Zhilka and Tunney as conditions  
 6 precedent. There's a hugely important  
 7 difference here because those cases relate to,  
 8 for example, zoning changes where the matter  
 9 is coming before that regulator or decision  
 10 maker for the very first time. That's not the  
 11 case here. This matter has been previously  
 12 before the Board and there is, and there was  
 13 and is, a recognized right of repurchase which  
 14 was known from day one, known to everybody  
 15 from day one. So that right of repurchase was  
 16 known from the beginning.  
 17 And two problems arise if the Board  
 18 simply rejects the application and says "well,  
 19 okay, there'll be no harm to Newfoundland  
 20 Power" because that's not what will happen.  
 21 The first would be a significant financial and  
 22 operational uncertainty for Newfoundland  
 23 Power. We've dealt with that in the  
 24 submissions and in the responses to  
 25 information. First of all, the transaction

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1 will be in limbo. Newfoundland Power won't  
 2 receive the 45.7 million dollar purchase price  
 3 and will have an unfulfilled contractual  
 4 obligation to convey the support structures to  
 5 Bell Aliant. That virtually invites  
 6 litigation.  
 7 Second then, there is the substantial  
 8 risk of legal liability to Newfoundland Power  
 9 and hence, ultimately costs to customers if  
 10 the Board doesn't approve the transaction,  
 11 because Newfoundland Power has a contractual  
 12 obligation to permit Bell Aliant to repurchase  
 13 the support structures. The Board approved  
 14 the initial acquisition by Newfoundland Power,  
 15 being aware that Bell Aliant had that right to  
 16 repurchase at the end of the term.  
 17 Newfoundland Power's customers have benefitted  
 18 from the transaction, which included that  
 19 right of repurchase. So having received the  
 20 benefit in good faith, we took that ten  
 21 million dollars to the benefit of our  
 22 customers, we must in good faith fulfil the  
 23 obligation to reconvey the structures to Bell  
 24 Aliant. And the Board, while it has an  
 25 oversight duty here, can't simply willy nilly

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1 say "look, we don't like this and we're going  
 2 to exercise our powers in a manner that will  
 3 frustrate Bell Aliant's contractual right of  
 4 reacquisition." That's got to be respected.  
 5 The Board then needs to focus on the key  
 6 issues: is there any evidence of material harm  
 7 in this transaction? And when you look at it,  
 8 it doesn't meet that test.  
 9 And the requirements of good faith  
 10 performance of contractual obligations have  
 11 been -- is now well established in the case  
 12 law in Canada and Newfoundland. In fact,  
 13 we've put in our material a copy of a case in  
 14 which I was involved in as counsel in which  
 15 the other side did not perform in good faith a  
 16 five-year obligation to purchase services from  
 17 the particular customer. And if you look at  
 18 that case and you go to it, it's at -- in our  
 19 reply submissions as the attachment.  
 20 (10:30 A.M.)  
 21 If you go to paragraph 73, which is on  
 22 page 14 of the case, towards the bottom of the  
 23 page, paragraph 43, our Court refers to the  
 24 Alberta decision in Mesa Operating Limited  
 25 Partnership and the Court says "in Canada, the

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1 test does not include the need for the  
 2 plaintiff to show that the defendant  
 3 intentionally acted in bad faith. The common  
 4 law duty to perform in good faith is breached  
 5 when a party acts in bad faith, that is when a  
 6 party acts in a manner that substantially  
 7 nullifies the contractual objectives or causes  
 8 significant harm to the other, contrary to the  
 9 original purposes and expectations of the  
 10 parties."  
 11 And one of the provisions of the original  
 12 transaction, of course, was Bell Aliant had a  
 13 right to repurchase and they've chosen to  
 14 exercise it for their own business purposes,  
 15 and so we can't simply frustrate that right of  
 16 reacquisition. It's a contractual right which  
 17 they have.  
 18 The Alberta Court goes on, the next  
 19 little bit here, they say "where discretion is  
 20 lodged in one of two parties to a contract or  
 21 transaction, such discretion must, of course,  
 22 be exercised in good faith." That simply  
 23 means that what is done must be done honestly  
 24 to effectuate the object and purpose the  
 25 parties had in mind in providing for an

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1 exercise of power.  
 2 And here, while the Board is not a party  
 3 to the contract obviously, it does exercise a  
 4 regulatory discretion or a regulatory judgment  
 5 which affects that contractual performance.  
 6 So as it is doing that, it must exercise that  
 7 discretion or judgment based upon the evidence  
 8 and in accordance with the requirements of the  
 9 electrical -- sorry, the Public Utilities Act  
 10 and the Electrical Power Control Act, and that  
 11 takes you back to Section 53, is there  
 12 substantial detriment, to Section 48, is there  
 13 some real evidence proven on the record on the  
 14 balance of probabilities of some material  
 15 harm, in which case then the Board has some --  
 16 has a power to say no. But in the absence of  
 17 that, the basic proposition is that the  
 18 transaction is to be approved.  
 19 So, a determination by the Board not to  
 20 approve the repurchase by Bell Aliant in the  
 21 absence of evidence of harm does expose  
 22 Newfoundland Power to a significant risk of  
 23 legal liability with then potential adverse  
 24 cost consequences for our customers. So,  
 25 we're very mindful of that and we urge

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1 significant caution with the approach put  
 2 forward by my friend, Mr. Johnson, which is  
 3 "oh, don't worry, you can act with impunity  
 4 here" because Bell Aliant bargained for, at  
 5 the very beginning of this, and got, a right  
 6 to repurchase. They've exercised that right  
 7 for their purposes. It can't simply be  
 8 ignored and kind of made to go away.  
 9 Now, as I said at the beginning of my  
 10 comments, joint use arrangements are intended  
 11 to reasonably apportion the cost of support  
 12 structures. They're not intended to benefit  
 13 one party at the expense of the other.  
 14 Newfoundland Power has managed its joint  
 15 use arrangements with other service providers  
 16 very well. In 2001, Newfoundland Power had an  
 17 opportunity, we took that opportunity, to  
 18 enter into joint use arrangements that it felt  
 19 would materially benefit its customers. It's  
 20 expectations were actually exceeded as a  
 21 result of favourable economic circumstances.  
 22 Bell Aliant has now chosen to exercise its  
 23 right to repurchase the structures. So we sat  
 24 down as required under Section 53 and  
 25 negotiated new joint use arrangements, which

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1 recognized that changed reality and which  
 2 provide even further benefits to customers.  
 3 We didn't even come out of this empty handed.  
 4 There is, on the go-forward basis, half a  
 5 million dollars in further benefits and if we  
 6 come out simply neutral, there would be no  
 7 harm, but we actually have negotiated in good  
 8 faith. As the record indicates, our senior  
 9 management engaged in this process with Bell  
 10 Aliant and we have come out with what we  
 11 believe to be a reasonably good and fair deal  
 12 for Newfoundland Power and for its customers.  
 13 Newfoundland Power will continue to  
 14 manage the utility in a manner which provides  
 15 reasonable service at reasonable rates for its  
 16 customers and will continue to seek  
 17 opportunities to provide benefits for our  
 18 customers. And Madam Chair, on that basis,  
 19 Newfoundland Power respectfully requests that  
 20 the Board approve the transaction and grant  
 21 the order requested. Happy to answer any  
 22 questions as best I can as counsel.  
 23 VICE-CHAIR WHALEN:  
 24 Q. Thank you, Mr. Kelly.  
 25 COMMISSIONER NEWMAN:

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1 Q. I don't have any questions.  
 2 VICE-CHAIR WHALEN:  
 3 Q. Nothing. I just wanted to confirm one thing,  
 4 I guess, and perhaps see if I can understand  
 5 the go-forward piece that we're talking about.  
 6 I do understand now that Newfoundland Power  
 7 has not included any right to repurchase these  
 8 joint use poles in the joint use agreement  
 9 that's currently being negotiated?  
 10 KELLY, Q.C.:  
 11 Q. Madam Chair, perhaps the best way to answer  
 12 that is this. There is a first right of  
 13 refusal. In other words, we're back to Bell  
 14 Aliant would own 40 percent.  
 15 VICE-CHAIR WHALEN:  
 16 Q. Yeah.  
 17 KELLY, Q.C.:  
 18 Q. And Newfoundland Power would own 60 percent.  
 19 There are then service standards. So my  
 20 friend poses the hypothetical question "what  
 21 if Bell Aliant decides not to use its poles  
 22 any more?" What are they going to do, let  
 23 them all fall down? It's kind of a silly  
 24 example, with due respect. If Bell Aliant  
 25 were to convey to an affiliate, it has to be

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1 reasonably approved by Newfoundland Power. If  
 2 they sell their poles, if they decide to sell  
 3 the business, we have a first right of  
 4 acquisition of those poles. So the poles  
 5 aren't going to disappear.  
 6 My friend raises the question of "well,  
 7 these are used and useful assets." Yes, they  
 8 are used and useful assets. They will  
 9 continue to be used and useful assets whether  
 10 they're owned by Bell Aliant or whether  
 11 they're owned by Newfoundland Power. You  
 12 don't have to own the asset in order for  
 13 Newfoundland Power to -- for it to be a used  
 14 and useful asset. The asset is there.  
 15 Newfoundland Power has its attachments to it.  
 16 There was a comprehensive mechanism to permit  
 17 those attachments, as negotiated between the  
 18 parties, in accordance, not only with 53 of  
 19 the Public Utilities Act, but 43 of the  
 20 Federal Telecommunications Act.  
 21 So there is nothing that can  
 22 realistically happen to those poles that  
 23 Newfoundland Power's customers are not  
 24 protected.  
 25 VICE-CHAIR WHALEN:

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1 Q. But the contractual piece that's been  
 2 considered now is not the same language that  
 3 was in the -- that Bell Aliant is exercising  
 4 now under its option to repurchase? It's not  
 5 framed in the same way? Is that my  
 6 understanding? At the end of ten years,  
 7 Newfoundland Power does not have an automatic  
 8 right to repurchase?  
 9 KELLY, Q.C.:  
 10 Q. No, because we've gone back to the 60/40  
 11 share.  
 12 VICE-CHAIR WHALEN:  
 13 Q. Right.  
 14 KELLY, Q.C.:  
 15 Q. So we're back in -  
 16 VICE-CHAIR WHALEN:  
 17 Q. So it's a reversion back to 2001?  
 18 KELLY, Q.C.:  
 19 Q. Right.  
 20 VICE-CHAIR WHALEN:  
 21 Q. Right.  
 22 KELLY, Q.C.:  
 23 Q. And so you wouldn't expect there to be -- Bell  
 24 Aliant has exercised, for its business  
 25 reasons, the right to, what I'll say, go back

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1 to the previous arrangement. There are  
 2 obviously some important differences in  
 3 particular in relation to standards, but  
 4 they've chosen to own 40 percent. So that's  
 5 fine. There is now a comprehensive mechanism  
 6 for making sure that the costs are shared  
 7 appropriately, that service standards are met.  
 8 The question then would become what would  
 9 happen if Bell Aliant ever got out of the  
 10 telecommunications business, there would be  
 11 poles that they would need to dispose of and  
 12 which Newfoundland Power would obviously  
 13 acquire. But the suggestion that Bell Aliant  
 14 is getting out of the telecommunications  
 15 business is -- if, as, and when it happens,  
 16 it's a perfect example of what the Alberta  
 17 Board says is that's a consideration that  
 18 would be addressed at that point in time.  
 19 It's a theoretical possibility which is --  
 20 it's inconceivable.  
 21 COMMISSIONER NEWMAN:  
 22 Q. Excuse me, just to clarify. So the right of  
 23 first refusal, there's no price established  
 24 now as there was in 2001 for that purchase?  
 25 It would be, as in a typical right of first

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1 refusal, the price would be whatever the other  
 2 purchaser was willing to pay for those poles?  
 3 KELLY, Q.C.:  
 4 Q. It would be at net book value. I'm pretty  
 5 sure that that's the result that -  
 6 COMMISSIONER NEWMAN:  
 7 Q. Is that in the contract?  
 8 KELLY, Q.C.:  
 9 Q. It is. I think it's net book value  
 10 transaction.  
 11 COMMISSIONER NEWMAN:  
 12 Q. Thank you.  
 13 COMMISSIONER OXFORD:  
 14 Q. If Bell Aliant had not initiated this  
 15 particular action, would Newfoundland Power  
 16 have -- would they have been content to extend  
 17 the current agreement?  
 18 KELLY, Q.C.:  
 19 Q. You can't answer that question in the  
 20 abstract, Commissioner, and let me just  
 21 explain why. The ten-year term had expired.  
 22 So now the question is going to be, okay,  
 23 let's assume that Bell Aliant says "well,  
 24 we're content to negotiate new terms." They  
 25 wouldn't be content to simply continue to have

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1 the existing arrangement because look at the  
 2 ten million dollar benefits that Newfoundland  
 3 Power's customers have received over that  
 4 period. So there would have been a  
 5 renegotiation.  
 6 If we had sat down -- if Bell Aliant had  
 7 not said "look, there's no point in talking  
 8 about it because we want the poles back" --  
 9 that's essentially the position that Bell had  
 10 took. If Bell Aliant had not taken that  
 11 position, then we would have -- our management  
 12 team would have sat down and had that  
 13 negotiation and discussion, and if, as a  
 14 result of that, we could have come out of it  
 15 at a position that would have ensured, at  
 16 minimum, reasonable equitable cost sharing on  
 17 a go-forward basis, then yes, we would have  
 18 been content to maintain that arrangement, no  
 19 question about it.  
 20 On the other hand, if in fact that could  
 21 not have been achieved, then, as my friend,  
 22 Mr. Johnson indicated, you'd have to look at  
 23 what your other options would have been at  
 24 that point in time as well, including the  
 25 ability to require Bell Aliant to take back

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1 the poles.  
 2 What is important to keep in mind is that  
 3 you're not comparing here where we were with  
 4 ten million dollars worth of benefits. That  
 5 benefit -- those benefits accrued and that  
 6 deal expired. The question then becomes  
 7 "okay, what is now possible?" and what was  
 8 possible because of what Bell Aliant chose to  
 9 do, was simply the negotiation process which  
 10 was available to us. But what would have  
 11 happened if Bell Aliant had taken a different  
 12 position would really have depended then upon  
 13 the outcome of that negotiation process and  
 14 whether that negotiation process could have  
 15 achieved, at a minimum, a neutral position or  
 16 some reasonable benefits for customers.  
 17 COMMISSIONER OXFORD:  
 18 Q. That's it for me.  
 19 VICE-CHAIR WHALEN:  
 20 Q. I think I'm okay.  
 21 KELLY, Q.C.:  
 22 Q. Thank you, Madam Chair. Ms. Greene, anything  
 23 to add or questions for either?  
 24 MS. GREENE:  
 25 Q. Yes, I actually have a question for

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1 clarification from Newfoundland Power to  
 2 ensure, for the purpose of the record, that  
 3 this with respect to the significance of the  
 4 term in the contract, the 2001 contract,  
 5 relating to Bell's right to repurchase at the  
 6 end of the term. I would ask counsel to  
 7 expand on some of the comments that he made  
 8 with respect to the ability to frustrate  
 9 Bell's right to purchase and the extent to  
 10 which the knowledge that the Board had that  
 11 such a term existed should be a relevant  
 12 factor for the Board to consider.  
 13 (10:45 A.M.)  
 14 KELLY, Q.C.:  
 15 Q. As Board counsel will know, a regulator or an  
 16 administrative decision maker must exercise  
 17 its powers in good faith and what that means  
 18 in law is you have to exercise them in  
 19 accordance with the statutory provisions and  
 20 in accordance with the principles contained in  
 21 the statute, and there's a long line of case  
 22 authority going back in Canada to Roncarelli  
 23 and Duplessis. Padfield case in England is a  
 24 perfect example and our own Court of Appeal  
 25 has dealt with that a number of times.

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1 So, what that means is you can't exercise  
 2 your power for an extraneous purpose. You  
 3 can't simply decide "gee, I don't want Bell to  
 4 have these poles back, so I'm not going to let  
 5 them have them back." You can't do that.  
 6 That's simply frustrating a contractual right.  
 7 What then becomes important is the Board must  
 8 look at what has the Legislature said and what  
 9 are the tests that have been set out in the  
 10 legislation, number one, and then in the case  
 11 law which has developed the legislation,  
 12 number two. And that's where you get to the  
 13 question of detrimental impact and no material  
 14 harm.  
 15 So what the Board has to do is to -- not  
 16 to say -- not to ask itself the question: do I  
 17 like it that Bell Aliant will have 40 percent  
 18 of the poles, because that's not the relevant  
 19 question. The relevant question under the  
 20 statute is: will customers still have  
 21 reasonable service at reasonable rates and is  
 22 there any detrimental impact on service, in  
 23 other words reasonable service, and is there --  
 24 -- and/or is there any material harm arising  
 25 from the transaction. So if you ask -- and if

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1 you ask yourself those questions, you must  
 2 then say "on this record, I, as the Board" --  
 3 you, as the Board, have an obligation to  
 4 decide on the record on the balance of the  
 5 evidence, on the balance of probabilities and  
 6 when you look at it, just as the Alberta Board  
 7 said, we must be satisfied that there's harm  
 8 before we can then act.  
 9 So, that's the point that I'm making.  
 10 You can't simply say "I don't like this and  
 11 hence, I'm going to frustrate that right of  
 12 repurchase."  
 13 And let me give you kind of a silly  
 14 example which kind of makes the point. Let's  
 15 say Newfoundland Power leased a piece of  
 16 property, a building or whatever, and at the  
 17 end of the ten-year lease, Newfoundland Power  
 18 couldn't say to the landlord, "well, you can't  
 19 have your building back." Nor could the Board  
 20 say to Newfoundland Power, "you can't let them  
 21 have their building back." It's the  
 22 landlord's building. Why? Because the  
 23 landlord has a legal right in that building.  
 24 Well here, Bell Aliant has a legal,  
 25 contractual right of reacquisition, so the

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1 Board -- Newfoundland Power has a good faith  
 2 obligation and the Board cannot simply  
 3 frustrate Bell Aliant's right, though the  
 4 Board does have the power, does have the  
 5 right, as the Alberta cases indicate, to look  
 6 at the transaction to ensure there's no  
 7 detrimental impact on service and there's no  
 8 material harm on service and rates. And  
 9 that's the point. I hope that clarifies the  
 10 discussion.

11 MS. GREENE:  
 12 Q. Yes, thank you. There's only one other second  
 13 question. It's with respect to the test to be  
 14 applied with respect to the disposition of  
 15 assets under Section 48. Having read your  
 16 written argument and then the oral argument  
 17 this morning, I wanted to ensure that the  
 18 record was clear that -- my understanding is  
 19 that you do not see a significant difference  
 20 in the test. That you have interchanged  
 21 substantial detriment with the test developed  
 22 in Alberta of harm to the customer. Is that  
 23 correct?

24 KELLY, Q.C.:  
 25 Q. Yeah, I think those two seem to be essentially

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1 the same. The test for joint use under 53 is  
 2 substantial detriment. But having said that,  
 3 I do recognize that the Board is exercising  
 4 the power under Section 48 and so the no harm  
 5 test, which is the Alberta test and sanctioned  
 6 by the Supreme Court of Canada, and I think  
 7 that obviously cannot simply mean no harm if  
 8 you calculated it to the penny. Obviously it  
 9 means something material in the circumstances.  
 10 So no material harm, no substantial detriment.  
 11 These things are more or less about the same.

12 MS. GREENE:  
 13 Q. Thank you, Madam Chair. Those were my  
 14 questions.

15 VICE-CHAIR WHALEN:  
 16 Q. Mr. Johnson, is there anything arising from  
 17 Panel or counsel questions?

18 MR. JOHNSON:  
 19 Q. Just one point, Madam Vice-Chair, and that is,  
 20 even if the Board were to be persuaded that  
 21 the Section 53 comes into the Section 48 test  
 22 and a substantial harm is needed, I submit to  
 23 you that it's evident on the face of this that  
 24 customers in the province, at the end of this  
 25 proceeding, if there is an approval, will have

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1 gone from a situation where this Board has  
 2 full regulatory authority over these  
 3 structures, including the ability of  
 4 Newfoundland Power to sell them, to a  
 5 situation where this Board no longer is  
 6 present and those rights are to be adjudicated  
 7 in some fashion that I'm still not very clear  
 8 about. Now if that -- if substantial harm is  
 9 a test, well, that's substantial harm,  
 10 precisely the reason why the Alberta regulator  
 11 made sure to confirm that even in the interim  
 12 period in that Alberta Utilicorp case that  
 13 there was a protection that these vital used  
 14 and useful assets couldn't just be sold  
 15 without the Board's oversight.

16 Those are my submissions.

17 VICE-CHAIR WHALEN:  
 18 Q. Thank you. Mr. Kelly, any final -  
 19 KELLY, Q.C.:  
 20 Q. That case dealt with buying the whole  
 21 electrical utility system. If you take my  
 22 friend's argument that Newfoundland Power must  
 23 own all its poles, just stop and think about  
 24 that. That was the -- Bell Aliant owned 40  
 25 percent of the poles for decades. They are

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1 simply going back to that position. If it is  
 2 absolutely essential that Newfoundland Power  
 3 own all the poles, you couldn't have Section  
 4 53 of the Public Utilities Act because that  
 5 contemplates that there will be different  
 6 entities and it means that you share the use  
 7 of poles so you don't have economic wastage  
 8 and you don't have these esthetic and  
 9 environmental positions.

10 So, it's not a tenable position to simply  
 11 say that the Board must take the position that  
 12 Newfoundland Power has to own all of the poles  
 13 so it maintains control because the  
 14 legislative structure created by the  
 15 Legislature of Newfoundland and Labrador and  
 16 by the Parliament of Canada in Section 43.5 of  
 17 the Telecommunications Act, those two pieces  
 18 in our federal democracy, dictate a different  
 19 result.

20 So, my friend's position that you got to  
 21 own all the poles in order to have a viable  
 22 regulatory system is simply not correct, not  
 23 in accordance with federal democracy. There's  
 24 nothing more I can say to that, Madam Chair.

25 VICE-CHAIR WHALEN:



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1 Q. That's fine.  
2 KELLY, Q.C.:  
3 Q. Thank you.  
4 VICE-CHAIR WHALEN:  
5 Q. I guess that would conclude our matter for  
6 this morning, unless there's anything else  
7 that needs to be raised before we adjourn to  
8 consider the application?  
9 MS. GREENE:  
10 Q. No, Madam Chair, there's no other issues.  
11 VICE-CHAIR WHALEN:  
12 Q. Thank you very much.  
13 KELLY, Q.C.:  
14 Q. Thank you, Madam Chair and Commissioners.  
15 VICE-CHAIR WHALEN:  
16 Q. Five minutes early, thank you.  
17 UPON CONCLUSION AT 10:53 A.M.

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1 CERTIFICATE  
2 I, Cindy Sooley, hereby certify that the foregoing  
3 is a true and correct transcript of the hearing of  
4 the Public Utilities Board of Newfoundland and  
5 Labrador held in the matter of an application by  
6 Newfoundland Power on the 1st day of June, A.D.,  
7 2011 at the offices of the Public Utilities Board,  
8 120 Torbay Road, St. John's, Newfoundland and  
9 Labrador and was transcribed by me to the best of  
10 my ability by means of a sound apparatus.  
11 Dated at St. John's, Newfoundland and Labrador this  
12 3rd day of June, A.D., 2011  
13 Cindy Sooley

<p>-.-</p> <p><b>.02</b> [1] 15:8</p> <p><b>-0-</b></p> <p><b>01/02</b> [1] 4:11</p> <p><b>-1-</b></p> <p><b>1</b> [2] 1:1 12:15 <b>1.25</b> [1] 31:23 <b>10</b> [3] 8:5 18:4,7 <b>10,000</b> [1] 9:4 <b>10:00</b> [1] 22:14 <b>10:10</b> [1] 27:21 <b>10:30</b> [1] 46:20 <b>10:45</b> [1] 58:13 <b>10:53</b> [1] 65:17 <b>11</b> [2] 37:22 38:1 <b>12</b> [1] 37:23 <b>120</b> [1] 66:8 <b>14</b> [2] 17:15 46:22 <b>17</b> [4] 4:11 5:1 6:6 25:1 <b>18</b> [1] 24:25 <b>1st</b> [1] 66:6</p> <p><b>-2-</b></p> <p><b>2</b> [4] 5:17 12:12 37:15,20 <b>20</b> [2] 18:13,14 <b>2000-41</b> [1] 11:25 <b>2001</b> [18] 3:17 5:18 6:1 7:7 8:5,18 9:19 10:22 14:1 17:13 18:3 28:13 29:4 40:9 49:16 53:17 54:24 58:4 <b>2001/02</b> [1] 4:9 <b>2002</b> [1] 16:24 <b>2003</b> [1] 16:24 <b>2010</b> [5] 8:4 9:20,21 29:16 37:16 <b>2011</b> [6] 1:1 15:2,14 19:14 66:7,12 <b>2012</b> [3] 15:4,14 17:6 <b>2013</b> [3] 15:4,8 19:8 <b>2013-2015</b> [1] 41:13 <b>2015</b> [3] 15:8 19:8,14 <b>23</b> [1] 8:24 <b>25</b> [1] 4:17 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