

1 New Brunswick Board of Commissioners of Public Utilities

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3 In the Matter of an application by the NBP Distribution &

4 Customer Service Corporation (DISCO) for changes to its

5 Charges, Rates and Tolls - Revenue Requirement

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7 Delta Hotel, Saint John, N.B.

8 January 10th 2006

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New Brunswick Board of Commissioners of Public Utilities  
In the Matter of an application by the NBP Distribution &  
Customer Service Corporation (DISCO) for changes to its  
Charges, Rates and Tolls - Revenue Requirement  
Delta Hotel, Saint John, N.B.  
January 10th 2006

CHAIRMAN: David C. Nicholson, Q.C.

COMMISSIONERS: Jacques A. Dumont  
Patricia LeBlanc-Bird  
H. Brian Tingley  
Diane Ferguson Sonier  
Ken F. Sollows  
Randy Bell

BOARD COUNSEL: Peter MacNutt, Q.C.

BOARD STAFF: Doug Goss  
John Lawton

BOARD SECRETARY: Lorraine Légère

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CHAIRMAN: Good morning. This is a Motions Day in the Disco  
application for changes in its Charge, Rates and Tolls.

Could I have appearances for the record for the applicant?

MR. MORRISON: Good morning, Mr. Chairman, Commissioners.  
Terry Morrison, David Hashey, Lori Clarke and Mike Gorman  
for the applicant.

CHAIRMAN: Thank you, Mr. Morrison. And I saw Mr. Plante  
for the Canadian Manufacturers and Exporters coming in, is

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2 that correct?

3 MR. LAWSON: Yes, Mr. Chairman. He is accompanied by Gary  
4 Lawson representing the CME, as well as, Andrew Booker.

5 CHAIRMAN: What was the last name, Mr. Lawson?

6 MR. LAWSON: Andrew Booker.

7 CHAIRMAN: Thank you. Conservation Council?

8 MR. COON: Yes, Mr. Chairman. Good morning. David Coon for  
9 the Conservation Council.

10 CHAIRMAN: Good morning, Mr. Coon. Eastern Wind? The  
11 Irving Group?

12 MR. BOOKER: Good morning, Mr. Chair and Commissioners.  
13 Andrew Booker for the J.D. Irving companies.

14 CHAIRMAN: Thank you, Mr. Booker. The Jolly Farmer is not  
15 here. Mr. Gillis?

16 MR. GILLIS: Mr. Gillis is here.

17 CHAIRMAN: You have to wave your hand, Mr. Gillis. Actually  
18 he is in a bad position this morning. He can't see for  
19 the pillar. Okay. Thanks, Mr. Gillis. Rogers Cable?

20 MS. VAILLANCOURT: Christiane Vaillancourt here for Rogers  
21 Cable, Mr. Chairman.

22 CHAIRMAN: Thank you. Self-represented individuals?

23 MR. ROWINSKI: Yes. Good morning, Mr. Chair. Jan Rowinski  
24 here. It's nice to be here.

25 CHAIRMAN: Mr. Rowinski. Municipal Utilities?

2 MR. GORMAN: Good morning, Mr. Chairman and Commissioners.

3 Raymond Gorman appearing for the Municipal Utilities. I'm  
4 joined this morning by Eric Marr and Dana Young.

5 CHAIRMAN: Thanks, Mr. Gorman. Vibrant Communities? Public  
6 Intervenor?

7 MR. HYSLOP: Good morning, Mr. Chairman. With me today is  
8 Mr. O'Rourke and Ms. Power.

9 CHAIRMAN: Thanks, Mr. Hyslop. And the Board can't help but  
10 recognize Mr. Anderson who was seen prior to the hearing.  
11 Where is Mr. Anderson?

12 MR. ANDERSON: Way at the back, Mr. Chairman.

13 CHAIRMAN: And Mr. Anderson, you are here today --

14 MR. ANDERSON: Representing the Honorable Mr. Fitch --

15 CHAIRMAN: Thank you, sir.

16 MR. ANDERSON: -- if need be.

17 CHAIRMAN: Thank you. Any Informal Intervenors here today  
18 who want to go on the record? That was Mr. Stewart's arm  
19 I believe.

20 MR. STEWART: Well, I'm not sure if I qualify as an  
21 Informal Intervenor in the particular context, Mr.  
22 Chairman. But I would wish myself and my clients to be on  
23 the record.

24 Christopher Stewart. I'm appearing this morning for  
25 Fraser Paper, St. George Power Limited, Bayside Power and

1 Grandview Cogeneration.

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2 CHAIRMAN: Fine, Mr. Stewart. I would say that you are an  
3 active Intervenor in a restricted fashion. How is that?

4 MR. STEWART: I couldn't have said it better myself.

5 CHAIRMAN: Any preliminary matters?

6 MR. MACNUTT: Mr. Chairman, Peter MacNutt appearing for the  
7 Board. And I have with me Doug Goss, Senior Adviser and  
8 John Lawton, Adviser.

9 CHAIRMAN: Mr. MacNutt, you are so omnipresent that I don't  
10 need you on the record. Thank you, sir.

11 That was preliminary. Anything else? Mr. Hashey?

12 MR. HASHEY: A couple of short matters, Mr. Chairman. First  
13 of all, there were some IR's delivered electronically  
14 yesterday that responded to some of the PI's questions.  
15 I believe the Secretary has the hard copies. They were  
16 sent out electronically yesterday. And possibly you might  
17 want to mark those as exhibits.

18 CHAIRMAN: Are those all of them in this grouping, Mr.  
19 Hashey? Or is that just part of them?

20 MR. HASHEY: No. I think there is one that comes into issue  
21 this morning which was what we know as 114, which we are  
22 trying to resolve. And Mr. Morrison will be dealing with  
23 that issue on the PROMOD matters, you know, and the fuel  
24 costs, this type of thing.

25 CHAIRMAN: All I'm saying is -- do we have a hard copy,

2 Madam Secretary? Is it in a binder?

3 MRS. LEGERE: No.

4 CHAIRMAN: So it is just the -- it is just 114 that you are  
5 dealing with or --

6 MR. HASHEY: That is the only one that is not answered here  
7 particularly.

8 MR. MORRISON: There are two others that are related to 114  
9 that are supplementals that came in, Mr. Chairman, which  
10 are IR's 2 and 3.

11 Oh, yes. I'm sorry. We have put an answer on record.

12 I'm sorry.

13 MR. HASHEY: Those are answered. But they may come into  
14 issue in discussion this morning. I think that is what my  
15 friend is --

16 CHAIRMAN: I guess all I'm doing is that I don't want to  
17 have an exhibit and then find out there are two or three  
18 other interrogatories or a group of interrogatories that  
19 are supplementals that are being answered. I would rather  
20 have them all in one exhibit, Mr. Hashey.

21 MR. HASHEY: You may want to wait until we deal with the  
22 issues this morning. It is fine with me.

23 CHAIRMAN: All right. I think I will do that.

24 MR. HASHEY: The only other one I point out is that there  
25 were some supplementals that came from Rogers. And they

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2 were sent and substituted in the book, in the IR book. So  
3 there is no need to mark any other exhibit.

4 But the Interrogatories that have been posed by Rogers  
5 have been answered. And, of course. a number went out  
6 yesterday to Rogers for them to answer. So we could deal  
7 with that during the Rogers hearing. That won't be a  
8 problem.

9 CHAIRMAN: Yes. I think that would be better as well,  
10 Mr. Hashey. Thank you. Anything else?

11 MR. HASHEY: That is it from my end.

12 CHAIRMAN: Mr. Morrison?

13 MR. MORRISON: Well, there is a couple of issues on the  
14 table this morning, Mr. Chairman. I guess we should deal  
15 with what Mr. Hashey alluded to which was IR 114. And you  
16 will recall that IR 114 was a request from the PI, wanted  
17 detailed PROMOD information back to 1999.

18 We had a discussion with the PI back when we were here  
19 before Christmas. And it was agreed between us that  
20 subject to -- well, at that time there was a Board order  
21 ordering us to file the PROMOD inputs and outputs which we  
22 did.

23 Subsequent to that Mr. Hyslop had consulted with his  
24 expert who provided a list of information that went beyond  
25 the PROMOD inputs and outputs. And we have been

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discussing those over the past couple of weeks and as early as just a few moments ago.

I think we have come to -- we are very, very close to an agreement as to what the parameters of that audit should be. That of course is subject to -- we can't provide anything without a Board Order.

And for reasons which we have held consistently throughout this hearing, we have opposed the disclosure of any of the PROMOD information, because Disco has contractual -- and its affiliated companies have contractual obligations, confidentiality obligations both with respect to the NUG's and with respect to Orimulsion information.

So without a Board Order directing us to make that information available, we will not make that information available. And I'm sure Mr. Stewart will have some comments with respect to that.

CHAIRMAN: But Mr. Morrison, what is it that the Board ordered with frankly the concurrence of yourself and the Public Intervenor towards the end of the last day we were here if it weren't for you to file subject to the confidentiality given to you by Section 133, the inputs in the PROMOD model?

MR. MORRISON: And we did that.



2 CHAIRMAN: You have done that?

3 MR. MORRISON: We have done that. The issue is that  
4 subsequent to our doing that -- subsequent to the Board's  
5 order on December 21st, Mr. Hyslop indicated that the  
6 PROMOD inputs were not sufficient, that he wanted  
7 additional information over and above the PROMOD inputs.  
8 So we are in discussions with him as to the parameters of  
9 that additional information.

10 MR. MACNUTT: Mr. Chairman, I'm going to just seek  
11 clarification. Mr. Morrison said he did that. What did  
12 he do? Because we are not aware of it being filed with  
13 the Board.

14 MR. MORRISON: It was filed with the Board on December 23rd.  
15 The PROMOD inputs were filed with the Board in confidence  
16 on December 23rd.

17 CHAIRMAN: In bright pink.

18 MR. MORRISON: In bright pink paper.

19 CHAIRMAN: I'm not familiar. Mr. Goss, are you aware of  
20 that? I'm not saying that you didn't at all. I'm just  
21 simply saying I'm personally not aware of that.  
22 And is the Secretary aware?

23 MRS. LEGERE: What document?

24 CHAIRMAN: Well, it was pink paper filed on the 23rd of  
25 December.

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MRS. LEGERE: It is there in our vault.

CHAIRMAN: It is in our vault. Okay.

Now having said that, I have in front of me a letter from Mr. Hyslop dated the 21st of December 2005 addressed to Mr. Hashey. And attached is a list.

And would you assist the Board by referring to that list and tell us what is involved that you are objecting to that is on there. In other words, what are you not prepared to file?

MR. MORRISON: Actually, Mr. Chairman -- and we have had these discussions -- we are prepared to file all of the information. There is an issue around number 4 which is the historic past five years data for all Genco assets which is on that list.

CHAIRMAN: Yes.

MR. MORRISON: And what we have -- what we are prepared to provide to the Public Intervenor is that information up to October 1st 2004. And subject to some confirmations that we are doing right now, I believe Mr. Hyslop has agreed that that would be sufficient.

The only issue of course is it would have to be done under a Board order. And Mr. Stewart will have some comments on that I'm sure. So I think with a little time this morning, Mr. Chairman, if we have a break, this issue

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2 will become -- will be resolved.

3       There is another issue. And again we will have more  
4       discussions with Mr. Hyslop on this. And it relates to  
5       this. We were under the understanding that if the Board  
6       ordered us to provide this information, that Mr. Hyslop  
7       would have his expert Mr. Chernick come to NB Power and  
8       meet with NB Power personnel, review all of this  
9       information and they would do whatever they wanted to do  
10      in terms of a report and so on.

11      We didn't understand that all of this information would  
12      actually have to be physically filed. And

13      Mr. Hyslop indicated this morning that that may be the case.

14      It is only an issue between Mr. Hyslop and Disco.

15      If no other Intervenor requires this information be put on  
16      the record -- it was my understanding that Mr. Hyslop is  
17      happy to have his expert come and review the information  
18      rather than having Disco compile it and actually file it.

19      It would be a process similar to what La Capra did. So  
20      that is another issue.

21      And I guess in that regard no other Intervenor is  
22      concerned or wants to have this information placed on the  
23      record and is happy to have the Public Intervenor's expert  
24      review the information and prepare a report.

25      Then certainly that is the most expedient means of

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2 dealing with it. And we have, Disco has personnel ready  
3 tomorrow, if the Board so orders, to meet with  
4 Mr. Hyslop's expert if he is available.

5 CHAIRMAN: Now my reading just quickly here of 133 is that  
6 if that were the case, Mr. Morrison, there is no  
7 protection provided by 133.

8 Because it says "where information obtained by the Board  
9 concerns the cost of a person, et cetera or other  
10 information that is by its nature confidential is obtained  
11 from such person."

12 That is the only reason in the Board's Order of the last  
13 time we were together. We said you file with us. Because  
14 it is certainly -- I believe it is Mr. MacNutt's opinion  
15 and shared by the panel that it has to be filed with us in  
16 order for the protection of 133 to be automatically there.

17 Am I correct, Mr. MacNutt?

18 MR. MACNUTT: Yes, Mr. Chairman, if I understand it.

19 MR. MORRISON: Having said that, Mr. Chairman, it may not be  
20 an issue. The only question that we are trying to  
21 determine now is how quickly we can get that information  
22 in a form that would be suitable for filing. A lot of it  
23 is electronic as you can appreciate. So I guess what I'm  
24 asking --

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CHAIRMAN: You can file it electronically. I mean, there is nothing wrong with that.

MR. MORRISON: I think if we can have a few minutes with Mr. Hyslop later in the morning we might be able to resolve the entire issue quite frankly, Mr. Chairman.

CHAIRMAN: Yes. All right.

MR. LAWSON: Mr. Chairman, if I might just address -- Gary Lawson for the CME. We certainly are as an Intervenor interested in seeing that information. So just so that everybody is aware, we would like to indeed see that file.

CHAIRMAN: Fine, Mr. Lawson. So what you are suggesting now, Mr. Morrison, is that we take a break and you have an opportunity to continue with Mr. Hyslop and speak with him, is that correct?

MR. MORRISON: On this particular issue. If the Board wants to move on to other matters that is fine. But on this particular issue I think we can get it resolved with a half-hour or 45 minutes of discussion and confirmation of certain technical issues.

CHAIRMAN: All right. I have got -- the Board is curious about a number of things. And that is in our review of the PPA's, and that is the broad general characterization of what is in exhibit A-4, we have run across a number of different entries in those PPA's that Disco has a PROMOD,

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2 is that correct?

3 MR. MORRISON: I don't understand your question,

4 Mr. Chairman.

5 CHAIRMAN: Oh, all right. If I put it, there is a Genco

6 PROMOD and there is a Disco PROMOD that is envisaged in

7 the agreements.

8 Because otherwise -- and there are provisions in there

9 whereby Genco has got to provide Disco with the inputs, et

10 cetera and presumably any changes in parameter from the

11 commercially available PROMOD model.

12 Otherwise Disco can't check that Genco is in fact giving

13 them appropriate information concerning the results of the

14 PROMOD run.

15 MR. MORRISON: My understanding is that that oversight is

16 done by the Operating Committee which is made up of

17 members of both Disco and Genco. My understanding and

18 subject to check is that there is one PROMOD run.

19 The Operating Committee verifies that the inputs are in

20 accordance with the PPA's, the contractual provisions of

21 the PPA's. And they are verified through the Operating

22 Committee. That is my understanding.

23 CHAIRMAN: Then I wonder why the agreements in fact

24 continually refer to the fact that Disco will have its own

25 PROMOD.

2 MR. MORRISON: I'm not aware of that contractual provision  
3 at this moment, Mr. Chairman.

4 CHAIRMAN: Well, you look in the vesting agreement between  
5 Genco, Disco and Holdco. And you look at page 1 -- hang  
6 on. I may have the wrong page. Yes, I probably do. That  
7 deals with confidentiality.

8 Mr. Goss, would you help me out as to where in the  
9 agreement that is referred to? I probably have it.

10 MR. MACNUTT: Page 68, Mr. Chairman.

11 CHAIRMAN: All right. In that same agreement on page 67,  
12 going over to the top of 68, "Genco shall" -- and it is in  
13 paragraph 8.3, "Information", 8.3.1 and then 8.3.1.1.  
14 "Within a reasonable period after written request by Disco  
15 provide to Disco" -- that is Genco shall -- "information  
16 on the state of repair, condition and operation of any  
17 part of the Genco facilities or the Heritage PPA  
18 facilities which request shall not, unless the  
19 circumstances require, be made more frequently than  
20 annually."

21 In the next subparagraph, "promptly provide to Disco upon  
22 request information and data required for or input into or  
23 generated by Genco's PROMOD."

24 And then 8.3.2, "Disco shall promptly provide to Genco  
25 upon request information and data required for or input

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2 into and generated by Disco's PROMOD."

3 MR. MORRISON: As far as the first two articles that you  
4 refer to Mr. Chairman, it deals with information as  
5 provided, which is the PROMOD inputs basically that is  
6 shared with Disco. That is not an issue.

7 The last article that refers to the Disco -- or the Disco  
8 PROMOD run, it is my understanding at this point in time  
9 that essentially Disco doesn't have in-house capability to  
10 do that. And they rely on Genco to actually do the PROMOD  
11 run.

12 CHAIRMAN: So everything is taken at face value that it is  
13 okay and there are no errors and everything is tickety  
14 boo?

15 MR. MORRISON: No. That is not what I said, Mr. Chairman.  
16 And I think what the agreement says is that there is an  
17 Operating Committee that looks at the PROMOD inputs.

18 CHAIRMAN: All right. Okay. We won't go any further with  
19 that at this time. Well, before we do take the recess  
20 that you have requested, perhaps this is an appropriate  
21 time to turn to Mr. Gillis.

22 And Mr. Anderson, I presume you would like to get to a  
23 microphone as well, sir.

24 MR. ANDERSON: Yes. Thank you, Mr. Chairman.

25 CHAIRMAN: Mr. Gillis, the Board has your letter of January



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2 the 3rd. And as I recollect it there are really two parts in  
3 that.

4 Can you give us an indication of what it is you propose to  
5 do this morning?

6 MR. GILLIS: Thank you, Mr. Chairman. I would suggest  
7 that the adjournment is probably more appropriate if there  
8 can be a resolution with respect to disclosure, so that  
9 the process is fully transparent.

10 I'm really not going to substantially push the fact that  
11 the Minister may well be in contempt of this Board. The  
12 facts set out in my letter, the first part basically is  
13 history.

14 The second part with respect to the comment made by the  
15 Minister speaks for itself. And I as a citizen am  
16 bringing it before the Board in the event the Board did  
17 not have opportunity to be aware of the comment that was  
18 made, to be dealt with in the appropriate fashion.

19 But I don't wish to sidetrack the more significant issue  
20 with respect to what I perceive as more openness and fair  
21 disclosure with issues concerning the Minister's comment  
22 which may well be inappropriate.

23 CHAIRMAN: I'm sure you don't have any problem with us  
24 taking that break then, Mr. Anderson?

25 MR. ANDERSON: No, Mr. Chairman. Thank you.

2 CHAIRMAN: You let us know when you are ready to proceed,  
3 Mr. Morrison.

4 MR. MORRISON: Thank you, Mr. Chairman.

5 (Recess - 10:00 a.m. - 11:45 a.m.)

6 CHAIRMAN: Mr. Morrison and Mr. Hyslop, where do we stand?

7 MR. MORRISON: Mr. Chairman, I'm sorry it took us so long to  
8 do what we have done. In the event that the Board orders  
9 Disco to provide the PROMOD inputs in confidence, we have  
10 agreed on what the parameters of that filing would be,  
11 with the exception of one piece of information which the  
12 PI asked for, which is outlined in his November 14th 2005  
13 IR 113.

14 Disco has agreed to provide performance indicator data  
15 dealing with generation costs from Genco and Nuclearco up  
16 to September 30th 2004 but not thereafter. Thereafter  
17 those costs are fixed in the PPA's.

18 And given that it is Disco's revenue requirement and the  
19 revenue requirement is derived from the PPA's, it is our  
20 position that that information ought not to be provided.

21 So that is the one discreet piece of information that we  
22 are going to have a bit of an argument over.

23 CHAIRMAN: Just so I understand, Mr. Morrison, that  
24 information changes from year to year or could change from  
25

2 year to year as an input into the PROMOD.

3 MR. MORRISON: That is not my understanding, Mr. Chairman.

4 That information is that cost is fixed in the PPA. In  
5 other words the PPA price as set out in the PPA is  
6 dictated by the PPA.

7 The underlying generation and Nuclearco costs from which  
8 that PPA number is derived -- and we have had this  
9 argument before -- really goes behind the PPA pricing.  
10 And the PPA price is what -- from September 30th 2004 on  
11 is what drives Disco's costs.

12 And the argument with respect to -- and I'm prepared to  
13 make that argument -- the argument with respect to that  
14 piece coming from IR 113 is identical to the argument that  
15 I will be advancing at the Board's discretion whether now  
16 or later today with respect to our objection to having the  
17 PI's expert's reports on the ROE requirements of Genco and  
18 Nuclearco admitted into evidence.

19 I'm prepared to make that argument now, Mr. Chairman, if  
20 you wish me to. Or if you would prefer to wait until  
21 after lunch, I'm prepared to do it then as well. The  
22 argument is the same. And I would like -- would insist on  
23 advancing that argument before the Board.

24 CHAIRMAN: Well, Mr. MacNutt would be very put out with me  
25 if I didn't follow his schedule that he is talked to you

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2 about.

3 So Mr. Hyslop, what do you have to say?

4 MR. HYSLOP: Not much. There is a very minor issue on the  
5 extent of IR 113 and the follow-up IR where we ask them to  
6 complete the schedules. That has to be argued.

7 I do understand that the applicant is objecting to the  
8 further NERA reports that I filed on December 23rd. They  
9 are moving that they not be accepted into the evidence. I  
10 guess that will have to be argued.

11 And I understand -- I see my colleague Mr. Stewart here.

12 And when he is here I'm always -- I figure there is an  
13 issue over the NUG's information as it relates to PROMOD  
14 that is probably in issue.

15 And beyond that we are ad idem I think with respect to the  
16 information that is going to be disclosed. There is still  
17 an issue with regard to some of that information being in  
18 confidence.

19 And Mr. Hashey has drafted some material. And I  
20 understand they are waiting for instructions. That is my  
21 understanding of the lay of the land at noon today,  
22 Mr. Chairman.

23 I'm prepared to argue on the three outstanding issues.

24 Mr. Stewart may want to see the draft Order that is being  
25 circulated before he argues his position with respect to

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2 the NUG information.

3 I will leave that up to my colleague. Although I think we  
4 all have some understanding of what the issue is there.

5 Thank you.

6 CHAIRMAN: Mr. Stewart, do you want to argue about the NUG  
7 information at this time? I'm really at the -- and the  
8 panel is at the mercy of what you gentlemen want to do, as  
9 to how we do it, not knowing exactly where we are coming  
10 from on a lot of these things.

11 MR. STEWART: Well, Mr. Chairman, to a certain extent I'm  
12 also at the mercy of my two friends in terms of knowing  
13 what is going on as well. I arrived this morning thinking  
14 that there was a discreet bundle of information which  
15 would be up for consideration. Is it confidential? Is it  
16 not? Is it filed? Is it not?

17 And clearly this morning that is a bit in flux in terms of  
18 exactly what the parties' positions are in that regard.

19 It seems to me that we should define exactly what it is  
20 that we are arguing about before we argue about it.

21 CHAIRMAN: I agree with you, Mr. Stewart. How do you  
22 suggest we proceed, Mr. Morrison?

23 MR. MORRISON: Mr. Chairman, I would expect that the draft  
24 Order will be -- when I say draft Order, what Mr. Hyslop  
25 and I have tentatively agreed to subject to the Board's

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Order will be typed and should be ready in the next 15 or 20 minutes I would think. Mr. Hyslop's assistant is preparing that as we speak.

If I understand where Mr. Stewart is coming from, he would probably like to take a look at that before he advances his arguments. And that seems fair to me.

I have nothing further to say, Mr. Chairman. Thank you.

CHAIRMAN: I'm going to suggest a break for lunch and come back at quarter after 1:00. And you can share with Mr. Stewart that the draft Order that you are talking about as soon as it is typed.

Mr. Hyslop?

MR. HYSLOP: Yes. Thank you, Mr. Chair. I appreciate there are a number of other Intervenors in the room and the order relating to the outstanding issues that we are considering.

I want to make it clear to the Board and to these other Intervenors. We are going to put this forward to the Board. And certainly with the full intention of all the other Intervenors in the room having a right to comment or make comment. And we will supply them with drafts of what we are going to put in front of the Board prior to 1:15 as well.

2 MR. MACNUTT: Mr. Chairman --

3 CHAIRMAN: Just a second, Mr. MacNutt. Prior to 1:15 let's  
4 hope you can have it so that they will have an opportunity  
5 to look at it and understand before 1:15 exactly what it  
6 covers. Mr. MacNutt?

7 MR. MACNUTT: Yes. I was just wondering at what point the  
8 participants propose to put a draft before the Board. It  
9 might be appropriate if the Board could see it in private  
10 before the Board convenes to deal with it in public  
11 hearing.

12 CHAIRMAN: We will break for lunch, come back at 1:30. And  
13 we will be in our breakout room at 1:15 to look at your  
14 draft agreement. Thank you.

15 (Recess - 11:55 a.m. - 1:30 p.m.)

16 CHAIRMAN: If we have another one of these days, why we are  
17 going to lock some people in the room and we will keep the  
18 key. You get my meaning.

19 MR. MORRISON: Clearly.

20 CHAIRMAN: Mr. Morrison and Mr. Hyslop, where do we stand?

21 MR. MORRISON: Mr. Chairman, again -- and I will preface my  
22 remarks that I'm sure there is going to be arguments from  
23 Mr. Stewart and perhaps others on the issue of a Board  
24 order and what is to be included in it.

25 But presuming that the Board is inclined to or does

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direct Disco to file information with respect to the PROMOD and some other information arising from IRs, we have come to an agreement as to what the parameters of that information should be.

We have prepared what would be considered a draft order that has attached to it a schedule A which is the universe of that information if you will. It is all of the information that would be provided to the Board in confidence.

There is one issue. And I believe it is the only item on schedule A that there is an issue with. And that is the one I alluded to this morning which is some of the information that was requested by the Public Intervenor in his IR 113, Disco has provided all of the information requested up to and including September 30th 2004 which was the date of restructuring but has resisted providing information subsequent to September 30th 2004. And I believe both Mr. Hyslop and I will make some comments to the Board with respect to that.

And as I indicated earlier, my arguments with respect to that particular issue also relate to Disco's position with respect to the expert reports that are being offered by the PI.

And if I'm going to argue on Section 113 I might as



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2 well argue on that point as well because the argument is  
3 identical.

4 So I believe we have come to an agreement as to what the -  
5 - with the exception of again IR 113 -- what the  
6 parameters of that information should be.

7 And in that draft order which has been provided, and Mr.  
8 MacNutt and Mr. Goss have had some deal of input into  
9 this, we would propose that if the Board so orders Disco,  
10 that we would provide in confidence to the Board all the  
11 information that is set out in schedule A. The order also  
12 contemplates that we would also provide information that  
13 would go on the public record.

14 And of course there would also be a mirror version of a  
15 redacted type binder which would be open -- well, I guess  
16 you wouldn't really need the redacted binder if there is  
17 going to be a public information binder which would be  
18 available to anyone quite frankly to look at.

19 So that is what we have drafted. That is what we have put  
20 before the Board for its consideration.

21 CHAIRMAN: Mr. Morrison, just before I go to Mr. Hyslop, the  
22 information that you had alluded to before the break, I  
23 see that in schedule A as paragraph numbered 8, those  
24 items with the asterisks beside them?

25 MR. HYSLOP: No, Mr. Chairman. The information that I

2 alluded to with respect to IR 113 is item number 2 on schedule  
3 A.

4 MR. HYSLOP: Mr. Chair, if I might, I have asked for  
5 completion of all the missing figures in IR 113. That was  
6 one of my supplemental IRs. The words to September 30th  
7 2004 are what the applicant proposes to provide.  
8 I'm asking for all the information be provided, which  
9 would include some Genco information after the September  
10 30th 2004.

11 CHAIRMAN: What about paragraph 8 in the capacity rating  
12 average heat rate and O&M costs?

13 MR. HYSLOP: We would -- subject to this Board, subject to  
14 the argument of other Intervenors, we have accepted that  
15 that information would be provided to September 30th 2004.  
16 As the Public Intervenor, that is my position. Other  
17 parties may or may not disagree.

18 I have done so on the basis that it has been represented  
19 to me by Disco that the capacity rating average heat rate,  
20 the O&M costs were the ones that were used at September  
21 30th 2004 for purpose of setting the pricing in the  
22 purchase power agreements.

23 So that is the reason that we have agreed to -- I have  
24 agreed to accept that, Mr. Chairman.

25 CHAIRMAN: Thank you. Mr. Morrison, just so we understand,

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2 are you saying that for instance the PPAs are executed on the  
3 1st of October of each year? I guess that is -- or that  
4 is when the run takes place?

5 MR. MORRISON: There is a PROMOD run that is probably done a  
6 few days prior to that. But the fuel prices are fixed --

7 CHAIRMAN: Yes.

8 MR. MORRISON: -- established as of October 1st of each  
9 year, that is correct.

10 CHAIRMAN: So that for instance September the 30th, say 2005  
11 there was another run of PROMOD at that time?

12 MR. MORRISON: There would have been another PROMOD run,  
13 that is correct.

14 CHAIRMAN: And the capacity rating, let's face it, that  
15 wouldn't change over the period of time. But the average  
16 heat rate, what happens if that changes?

17 MR. MORRISON: I don't believe the average heat rate does  
18 change for purposes of the PPA, Mr. Chairman. It doesn't.  
19 It does not.

20 CHAIRMAN: All right. For the purpose of PPA. But what if  
21 it in fact did? What if the rating on one plant suddenly,  
22 for some technical reason, changed dramatically and  
23 therefore the average heat rate in fact dropped?

24 MR. MORRISON: Without looking through all the PPAs in  
25 detail, it is my understanding that that risk, in terms of

1  
2 heat rate, does not flow through to Disco.

3 I believe there are provisions in the PPA, and I couldn't  
4 identify them for you right now, that deals with  
5 extraordinary events. But as I understand it that would  
6 not affect Disco's pricing from Genco under the PPA.

7 CHAIRMAN: And likewise the O&M costs?

8 MR. MORRISON: That is correct.

9 CHAIRMAN: So if Disco -- or sorry, if Genco is able to  
10 achieve savings in the O&M costs that greatly reduce the  
11 costs of running the plant from what was estimated back in  
12 September 2004, they keep that.

13 MR. MORRISON: Likewise if they perform poorly they suffer  
14 the consequences.

15 CHAIRMAN: Okay. Mr. Hyslop?

16 MR. HYSLOP: I'm not sure what stage --

17 CHAIRMAN: I'm not either. Mr. Morrison, where are we now?

18 MR. MORRISON: Pardon me, Mr. Chair?

19 CHAIRMAN: Where are we now?

20 MR. MORRISON: Well, I guess -- I would assume that at this  
21 point Mr. Stewart may have some comments as to whether or  
22 not he agrees that this material should be provided in  
23 confidence to the Board. And I believe that he will make  
24 some comments in that regard. I don't like to speak for  
25 him.

2 We have circulated to all of the Intervenors what Disco  
3 proposes to redact, in other words that would not form  
4 part of the public record. And there may be Intervenors  
5 who would like to comment on that.

6 We have provided a list of what we feel should not be on  
7 the public record, that should be held completely in  
8 confidence. And I'm prepared to speak to that as well.

9 But other Intervenors may have some comments on that as  
10 well, Mr. Chair.

11 CHAIRMAN: Well, I will go back to Mr. Hyslop. You have  
12 nothing further to say at this time then in reference to  
13 the agreement that you and Disco have reached?

14 MR. HYSLOP: Just two points. I'm sure my friend did this  
15 inadvertence. Twice he said schedule A is the information  
16 that they are going to file in confidence.

17 And I think I'm correct in saying, Mr. Morrison, that what  
18 he meant was this is the information that is going to be  
19 filed, and some of it is going to be filed in confidence.

20 Am I correct -- I think I'm correct there.

21 MR. MORRISON: That is correct, Mr. Chairman.

22 MR. HYSLOP: And the second point is our position is, Mr.  
23 Chairman, on schedule A under item 2 it should read  
24 completion of the missing figures on 113 with a semicolon  
25 or a period and then the words to September 30th 2004

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2 would be struck out.

3 So other than that one point I'm in -- at least two of the  
4 parties to this proceeding are in agreement.

5 CHAIRMAN: Okay. Mr. Morrison, you agree with what  
6 Mr. Hyslop just said?

7 MR. MORRISON: I do, Mr. Chairman.

8 CHAIRMAN: Mr. Stewart, do you want to come forward, sir.

9 MR. STEWART: Mr. Chairman, if I may, perhaps I can put the  
10 cart before the horse just a little bit and speak to the  
11 document or my comments on the document that has been  
12 circulated, since that seems to be what everybody has in  
13 front of them for the moment.

14 CHAIRMAN: I think you can do that if you want to, but it  
15 was my understanding from Mr. MacNutt that we would deal  
16 with the horse first.

17 MR. STEWART: Fair enough.

18 CHAIRMAN: And let's not get into Tauruses during this  
19 hearing. But the horse anyway. And then we come back and  
20 go around the room for any further comments that anybody  
21 had in reference to this agreement.

22 MR. STEWART: Fair enough, Mr. Chairman. That's probably  
23 the best way to do it.

24 Well, Mr. Chairman, I would be a fool if I didn't  
25 acknowledge that I sort of sense a bit of momentum leading

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away from my position so far in the discussions that have been happening today in these proceedings both sort of on and off the record.

But I felt that it was important to as they say take a few moments and just make sure that we had a good understanding as to where we were and what sort of information was actually being discussed here in terms of what may be both filed with the Board on a confidential basis or put on the public record.

My first point, Mr. Chairman, is that when you look at the information that is being filed with the Board it seems to be -- or requested to be filed with the Board, it seems to break into two general categories. The first is the business of the PROMOD inputs. And of course I am only concerned with respect to those PROMOD inputs that would affect the non-utility generators.

And the second information -- or the second sort of broad category of information, there may be some overlap between the two, is the information which relates to the capacity or the energy purchase details and the pricing parameters of the non-utility generating contracts.

Now the first of those two things, the PROMOD inputs, I think it's important for us to review exactly what happened there to get us to this particular stage. And I

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wasn't present at the proceeding but my understanding is that the Board issued an order on December 20th requiring Disco to file with it those inputs on a confidential basis under the auspices of Section 133.

And I have in front of me the portion of the transcript, it's page 2762, and I don't think members of the Board need to go and refer to it particularly. But I'm just going to read a bit here. It's Mr. Morrison speaking to you. He says, Yes, Mr. Chairman. We were discussing earlier about the PROMOD input issue and the procedure under Section 133. That does create some difficulties. We would ask the Board to issue an order directing Disco to file that information with the Board under Section 133 because of the contractual -- and as you know our position is that this information should not be disclosed. But in the event that it is disclosed even in confidence to the Board there are some contractual issues that could make life very difficult for our client and some of the other NB Power group of companies.

I guess the long and short of it, Mr. Chairman, is that we have to take the position that we will not file the PROMOD inputs with the Board unless directed to do so. And then, Mr. Chairman, you ordered them to do so. And you made that order, with respect, without what I



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would suggest would be the proper hearing to consider the matter. Certainly those affected, including those very parties which Mr. Morrison expresses a concern about in his discussion with you were not given notice of that particular order.

And I raise that point not to chastise either Mr. Morrison or the Board but simply to say that I don't want to be in a position where it's said to me, well you can't object to the PROMOD input information being filed with the Board in confidence because well that has already been ordered.

And I would submit that to the extent that it has been ordered, as I have just referred you to in last December, that that order was made without the requirement that is imposed by the Public Utilities Act, that is, without a hearing, because the parties which would be affected by that hearing -- by that order were not given notice and not given the opportunity to be heard.

So while it may be that Disco has filed with the Board on a confidential basis pursuant to this order, the PROMOD inputs which among other things include the information with respect to the non-utility generators, our submission is that order was not a proper one, and that the issue as to whether or not that information should in fact be ordered to be disclosed is still very much on the table,

2 and that a hearing with respect to that issue we submit is  
3 taking place as we speak.

4 Why did Mr. Morrison raise those concerns? Well he raised  
5 those concerns because, as we all know, and as the Board  
6 has heard evidence on in the past, the power purchase  
7 agreements are between the non-utility generators and  
8 Genco. They all contain confidentiality provisions  
9 requiring the parties to keep the amounts paid under those  
10 contracts and the pricing formulas under those contracts  
11 confidential.

12 Why are there confidentiality provisions? Because they  
13 contain commercially sensitive information private to the  
14 parties who entered into the commercial arrangement.

15 The second broad category of information is that  
16 information which was originally sought in information  
17 requests I think it was number 3 and 4, and if I look at  
18 the document that Mr. Hyslop and Mr. Morrison just  
19 circulated, I guess it -- and if you look at schedule A in  
20 there, they are now reflected in paragraphs 3 and 4.

21 Again obviously I am only concerned to the extent that any  
22 of this information is information with respect to the  
23 non-utility generators.

24 Let's look at -- 3 is forecast years, 4 is actual years.

25 Among other things what is being asked for are the

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name of the supplier, the quantity and the amount of energy purchased from each supplier, the average price of the quantity, the price for the capacity, the price for the electricity, et cetera. The very heart of the details are the confidential information. So that's the information we are talking about. PROMOD inputs, the details of the commercial arrangements between Genco and the non-utility generators.

And if it's not any more clear, number 10 in the schedule A of the documents we circulated with you is "the pricing provisions of the Heritage PPAs". The pricing provisions of the individual NUG Genco contracts.

I was a little concerned about, as I alluded to earlier, the momentum which might be being generated here in these discussions today, not particularly because the Board may not accept our submissions. I mean, the Board will consider things and come to a proper decision I'm sure at the end of the day. But I was a little concerned that everyone in the room may be losing the proverbial forest for the trees. And I hope to back up a little bit and answer a couple of questions, and really they are variations on a theme. Where are we? What is this hearing about? And what context are we in?

This hearing is an application by Disco under Section

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101 of the Electricity Act for an application changing its charges, rates and tolls. We all know that. But I think it bears repeating.

Section 101 says, the Board shall on receipt of an application under this section proceed under Section 123.

Section 123 says a variety of things about giving notice to the Attorney General and what have you, but it only mandates the Board to do really one thing. Section 123(2) says, Where an application has been made and notice given the Board shall hold a hearing. So what is the context?

We have an application and the Board holds a hearing. That's what the statute mandates.

The only other particular guidance the Act provides -- this is the Electricity Act of course -- is contained back in Section 101(3), where it says, The Board shall when considering an application under this section, that is considering a rate application, base its order or decision respecting the charges, rates or tolls to be charged by the distribution corporation, shall base their decision on all of the projected revenue requirements for the provision of the services referred to in Section 97, that is distribution services.

So the Act mandates that you shall base your consideration on the projected revenue requirement. Well

2 again no great insight there. But that is the statutory  
3 mandate which is upon you.

4 I guess there is a further sort of overall requirement in  
5 Section 8.3 of the Public Utilities Act which does mandate  
6 that if the Board is setting rates then it is supposed to  
7 establish rates which are "just and equitable". And we  
8 have all heard a lot about that.

9 But I submit and I would suggest that the statute mandates  
10 that just and equitable means just and equitable rates  
11 based on the revenue requirement as mandated by Section  
12 101(3) of the Electricity Act.

13 So that's the kind of hearing we have. We have an  
14 application for a change in rates. The Board is mandated  
15 to hold a hearing. The Board is required to set just and  
16 equitable rates based on the revenue requirement. That's  
17 the mandate that is given to this Board by the statutes.  
18 Now in this particular case there is one other little  
19 twist. And that is the somewhat notorious now Section 156  
20 of the Electricity Act, which among other things, mandates  
21 the Board to accept certain things including the terms of  
22 the power purchase agreements.

23 Now those are the power purchase agreements between Disco  
24 and Genco and Nuclearco and the others. It doesn't even  
25 purport to reach to the power purchase agreements

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between Genco and our client.

So let's connect the dots again. Rate application, hold a hearing, based on just and equitable rates, based on the revenue requirement, Section 156 mandates certain things as being included in the revenue requirement, including the prices paid under the power purchase agreement.

Now of course this Board has considered the effect and consequences of Section 156 on these proceedings already.

And if I could I would like to refer you -- and I have a copy here so you don't need to all flip for it -- but the Board considered submissions on Section 156 and its effect on these proceedings last June and issued a ruling on the 9th of June in that regard.

And once again, as I read the decision, the Board generally came to two rulings with respect to Section 156.

And the first one appears at -- I have a copy of the transcript -- it's on the bottom of page 284 of the transcript. And I will read it to you.

"The Board has reached the conclusion that the total cost represented by the PPAs must be accepted as a necessary component of Disco's overall revenue requirement."

And further "Reviewing the various cost components

2 would, therefore, not be required simply for the purposes of  
3 establishing the total amount of costs that Disco is  
4 entitled to recover from its ratepayers i.e. its revenue  
5 requirement. Reviewing the various cost components would,  
6 therefore, not be required."

7 Second part of the ruling. "The traditional test for  
8 determining whether or not rates are fair and equitable" -  
9 - and we are back to that mandated requirement again --  
10 "between customer classes is the use of revenue to cost  
11 ratio. The Disco rate application includes generation  
12 costs reflected in the PPSAs, Section 156 requires the  
13 Board to accept those costs as part of Disco's revenue  
14 requirement. While the PPAs establish the total amount  
15 required to be paid by Disco, the Board must ensure  
16 fairness in the allocation of all costs between customer  
17 classes", et cetera.

18 Further down the page on page 285, there is a reference to  
19 if the costs are not spread around the rate classes  
20 properly this creates inefficiencies. And then the Board  
21 says "If such inefficiencies exist within a price  
22 structure of the PPSA, customer rates will not reflect the  
23 proper price signals."

24 And on page 286, the Board finds "The Board's regulatory  
25 jurisdiction is set forth clearly in the

2 Electricity Act. It has broad regulatory jurisdiction over  
3 Transco, System Operator and Disco. Section 136 of the  
4 Act gives broad powers to the Board to require any of  
5 those entities to file with it any documentation or  
6 information in their possession and the Act is also clear  
7 that the Board has no jurisdiction over the generation  
8 companies, including Genco and the NUGs."

9 Now that is a long ramble but what does it mean. What it  
10 means, in my submission, what you meant, what is meant  
11 when you read those pages, is that Section 156 says that  
12 you do not review the various cost components for the  
13 purposes of the revenue requirement. But in order to set  
14 just and equitable rates, when you are talking about the  
15 CARD element of the hearing, you ruled that you would look  
16 behind the PPAs to get that information. Because Section  
17 156 didn't allow you to for revenue requirement, but it  
18 did for the CARD. Because the Act didn't say you have to  
19 accept them for the CARD, Cost Allocation Rate Design.  
20 Decision of the Board July 27. If you recall, that had to  
21 do with a whole bunch of things. But what it had most to  
22 do with, at least of interest to myself and my clients,  
23 was disclosure of the NUG contracts. Inconsistent, I  
24 would submit, with your decision on the 9th of June, you  
25 found on page 661 of the transcript, "The



2 Board has determined that it does not have the jurisdiction to  
3 order NUG information to be filed with the Board and  
4 therefore, will not make an order with respect of it."

5 The Board reiterates part of its decision of the June 9th,  
6 and I quote from that decision, "The Act is clear that the  
7 Board has no jurisdiction over the generation companies."

8 On page 63, "In fact, the PPAs were assigned to Genco. It  
9 places the contracts beyond the reach of this Board in  
10 relation -- in matters relating to ratemaking."

11 So where are we now? Make no mistake about it, even  
12 though Mr. Morrison has worked very hard helping draft  
13 this document, as he pointed out on December 20th, Disco's  
14 position is that it will not file this information with  
15 the Board. So the information with respect to the non-  
16 utility generators that is sought by the Public Intervenor  
17 will not be filed voluntarily by Disco. It is certainly  
18 not going to be voluntarily filed by Genco. It is  
19 certainly not going to be voluntarily filed by my clients.

20 So the only way that information can be filed with the  
21 Board is if the Board orders it.

22 Our submission is in consistent with the Statute,  
23 consistent with the previous rulings of the Board in terms  
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2 of the interpretation it has placed upon the statutes, this

3 Board does not have jurisdiction to order Disco to

4 disclose that information. For better or for worse, the

5 Heritage power purchase agreements are between the NUGs

6 and Genco.

7 Section 156 says what it says. The Board has reviewed it

8 and come to a clear ruling that for the purposes of

9 revenue requirement, reviewing the various cost components

10 would therefore not be required for the purposes of

11 establishing the total amount of costs Disco is entitled

12 to recover. It is simply not relevant to the issues

13 before this Board. It is not relevant to the issues

14 before the Board, and as the Board has found repeatedly,

15 it has no jurisdiction to order the information from the

16 dealings between Genco and the non-utility generators. It

17 does not have jurisdiction over them.

18 The mere fact, I would submit, that Disco may be shown or

19 is collaterally aware of that data does not make it

20 theirs.

21 CHAIRMAN: I'm sorry, does not make it what?

22 MR. STEWART: Does not make it Disco's information.

23 CHAIRMAN: It has a right to it?

24 MR. STEWART: No. It has a right to ask for it. Doesn't

25 make it theirs. They have refused to give it to you.

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2 CHAIRMAN: All right. But refresh my memory. In the July  
3 decision that you read from, what was the decision  
4 concerning? What was the question posed at that time?  
5 Was it not that we had no authority to order Genco to do  
6 anything.

7 Now if it is information within the control of Disco,  
8 however, for instance, and you heard me this morning  
9 talking about the PROMOD model that they are supposed to  
10 have, so that they can run and track the costs that are  
11 coming through, then that is information in the control of  
12 Disco. How it got there, I don't know. But it is in the  
13 control of Disco. And the Act, I would submit, Mr.  
14 Stewart, is very clear that anything that Disco has, we  
15 have a right to require to be filed with us. So address  
16 that, if you would.

17 MR. STEWART: I will do my best, Mr. Chairman. The  
18 information is the issue. The information is information  
19 with respect to the arrangements between Genco and the  
20 non-utility generators. The mere fact that Genco has  
21 agreed to show that information to Disco under the  
22 auspices of its power purchase agreement with Disco, does  
23 not mean it is information -- it is not proprietary. It  
24 is not information which I believe the word used, Mr.  
25 Chairman, is controlled by Disco. It is merely information

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2 given to Disco.

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If I can use an analogy, Mr. Chairman, a client may give

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me information on the basis of a solicitor client

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privilege. I have the information. I know about it. I

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have received it. But it is not mine to disclose. It

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doesn't belong to me, in that sense. The only person who

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can consent to the release of that information is the

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client.

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Similarly, because of the contractual confidentiality

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provisions, the information about the arrangements between

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Genco and the non-utility generators is theirs. If they

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choose to disclose some of it to Disco, that doesn't mean

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that they have turned it over to the public. It doesn't

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mean that they have waived their right to the

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confidentiality of that information.

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In fact, as I recall, and I confess that I am not an

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expert on the Disco PPAs or that it has with Nuclearco and

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Genco, I believe that there are explicit confidentiality

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provisions in there of the information.

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CHAIRMAN: There certainly are but in it there is a section

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that says in 19.9.3, notwithstanding the foregoing, which

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deals with confidentiality, including everything that goes

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into -- is either inputted into or generated by Genco's or

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Disco's PROMOD, again we go back to that.

2 Notwithstanding the foregoing, a receiving party, which is  
3 Disco, may disclose, reveal, divulge or permit the use of  
4 confidential information, 19.9.3, as required by any  
5 governmental authority (other than the Province in its  
6 capacity as a shareholder of Disco, NB Power Holdco or  
7 Genco or any affiliate), et cetera, or applicable law  
8 provided where circumstances permit, where such disclosure  
9 is not made in the ordinary course to such governmental  
10 authorities prior to any disclosure, the disclosing  
11 parties shall be notified by the receiving party, Disco,  
12 of the proposed disclosure. And the receiving party  
13 shall, at the disclosing party's request, take reasonable  
14 steps to allow the disclosing party at its sole expense,  
15 which is you, to contest the requirement for disclosure  
16 and obtain an order or ruling to preserve the  
17 confidentiality of such confidential information.  
18 You go back to the definitions, we are definitely a  
19 governmental authority.

20 MR. STEWART: I think the last bit was the key, Mr.

21 Chairman. I mean I think it still requires you to have  
22 jurisdiction to require the disclosure of that  
23 information. And I think the information doesn't belong  
24 to Disco. It is a bit circular, I can see.

25 CHAIRMAN: Yes, but it goes on, "or to obtain an order or

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2 ruling to preserve the confidentiality of such confidential  
3 information." And that is what 133 does.

4 MR. STEWART: Okay. Even if I was prepared to concede that  
5 point, Mr. Chairman -- I'm not, but even if I was, that  
6 reference is only to PROMOD inputs. It doesn't reference  
7 anything else.

8 CHAIRMAN: Well, you may have a point there, Mr. Stewart.

9 MR. STEWART: I'm at a bit of a loss, Mr. Chairman. I  
10 didn't bring my -- I didn't look --

11 CHAIRMAN: You don't carry it everywhere with you, is that  
12 it? I wonder if one of the -- Mr. Goss can bring you up a  
13 copy of it, Mr. Stewart.

14 If you would like to take a break and look at this, why  
15 the Board will certainly give you that opportunity.

16 MR. STEWART: That would be a good idea.

17 CHAIRMAN: Okay. All right. We will -- you let us know  
18 when you are ready for us to come back in.

19 MR. STEWART: Sure. I can't imagine that it would take more  
20 than 10 minutes, Mr. Chairman.

21 CHAIRMAN: Okay. We will come back in at quarter after  
22 3:00.

23 (Recess - 3:05 p.m. - 3:20 p.m.)

24 CHAIRMAN: Go ahead, Mr. Stewart.

25 MR. STEWART: Thank you, Mr. Chairman. Just before I

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respond to the question, Mr. MacNutt as I observed, as wanted to do with you on occasion, has made a good point to me which I will just reference briefly.

And that is of course the obligation on the Board to set so-called just and equitable rates is also in subsection 101.5 of the Electricity Act and Public Utilities Act.

And Mr. MacNutt is probably correct. The more accurate or more pertinent reference should have been I think just to later on in Section 101 in the way I was discussing earlier.

With respect to the issue that you raised with me, Mr. Chairman, before we took the brief recess, my response to that point is twofold.

Based on the brief review I have had of these provisions and the particular version you have referenced me to, it seems that the confidentiality provision or the information speaks -- and the ability to disclose it if ordered by government authority.

It is very broad I will concede. But it is limited in some respects. It does say all information and knowledge relating to the operations hereunder including pricing, et cetera and data required for the PROMODs and information provided pursuant to any provision of this agreement.

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So in other words, information which has been provided by Genco to Disco in the normal course of the operation of this agreement. And I suspect probably the PROMOD inputs would fall into that.

I think we can assume -- I don't know if there has been any specific evidence on the point -- but clearly there have been PROMODs run. There have been reports filed of the review of those PROMODs. And they are in evidence.

But I don't believe that there is any particular evidence or any information that the list of documents that is in - - or the information or the data that is in Schedule A that has been floating around here for us to consider is in fact information which was provided to Genco by Disco except --

CHAIRMAN: Vice-versa.

MR. STEWART: -- or excuse me, the other way around, provided to Disco by Genco, not under the normal operations of this agreement, but perhaps it may have been something which they were able to, you know, physically lay their hands on as a result of the potential for a pending order.

I think even back when you refused to -- or declined to order that the NUG contracts be disclosed, you had



2 asked Mr. Hashey to actually physically obtain a copy of them.

3

4 So the mere fact that the information may be something  
5 which Disco can get its hands on from its sister company  
6 does not make it disclosable under the 19.9.3 unless it  
7 would otherwise fall under that provision in the normal  
8 course.

9 So if it is information which Disco already had, maybe  
10 your argument is a good one. If it is information that  
11 you make Disco go out and get, that is not information  
12 obtained under this agreement, and I would submit would  
13 not fall within the exception that you have referenced me  
14 to.

15 For example, in the Schedule A -- I'm just going to pick  
16 paragraph 4 (c) -- "for other energy purchases identify  
17 the supplier, the quantity of energy purchased, the  
18 average price per unit of quantity, the price for energy"  
19 -- I'm sorry. I'm going to stop there. There is no  
20 indication that Genco provides that information to Disco  
21 in the normal course, none.

22 CHAIRMAN: What goes into the PROMOD?

23 MR. STEWART: Well, it must be something different. Because  
24 if you look at 4 (c) it says "And the price for energy  
25 used in the PROMOD simulation." So -- and that is why I

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stopped where I did.

So there is some evidence that they provide PROMOD numbers. I don't think there is any evidence that they supply the other stuff.

There is no evidence for example that Disco is aware of the direct pricing, number 10, the pricing provisions of the Heritage PPAs.

CHAIRMAN: But surely to goodness those have to go into PROMOD.

MR. STEWART: No, not necessarily so.

CHAIRMAN: Well, okay. I don't know enough about PROMOD.

MR. STEWART: Well, and quite frankly, neither do I. The mere fact that the PROMOD inputs are asked for and then other information is asked for would lead me to believe that they are two different things.

Because if they weren't two different things, why are we asking for two different things? And if they are not two different things, then that list should be reduced to the PROMOD inputs.

My second submission on the point is that I think it is -- I think it would be appropriate if not necessary to read into Section 19.9.3 in the "as required by any governmental authority" -- and I read the definition of that, and it is very broad -- as validly required by any

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2 governmental authority.

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Not is simply because the governmental authority has

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requested it. And if you will recall, my submission with

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respect to the Board's lack of jurisdiction in this matter

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is twofold.

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Number one, that the contracts and the data surrounding

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the contracts between the non-utility generators and Genco

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are beyond the jurisdiction of the Board. That is number

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one.

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And even if I was to buy this argument, that the provision

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allowed you to reach through to get the data, even if you

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couldn't get the document. Because you can require Disco

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to disclose it. And Disco must under this power purchase

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agreement. Or they had the right to the agreement under

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the power purchase agreement.

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It doesn't deal with the second issue of jurisdiction.

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That is the Section 156 argument.

19

Mr. Sollows is looking confused.

20

MR. SOLLOWS: May I?

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MR. STEWART: Please.

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MR. SOLLOWS: I guess I am confused in that you went to 4

23

(c) and said for other energy purchases you want to -- at

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issue is the identity of the supplier, the quantity of

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energy purchased and the average price, okay.

2           The difficulty I'm having is that on article 8, page 66 I  
3           see that it deals with -- Section 8 (1) deals with  
4           metering. And it is under the auspices of the Operating  
5           Committee that Genco agrees to authorize the System  
6           Operator to provide Disco and its agents, advisers and  
7           representatives with access to metering data controlled by  
8           the SO as reasonably required by Disco from time to time.  
9           And it would seem to me that there, if we go back and look  
10          at what the Operating Committees intended to do in sort of  
11          operate these arrangements between the two companies, it  
12          would seem to me that at least the quantity of energy  
13          purchased clearly should be available, maybe not the  
14          price, but the quantity and the identity of the supplier.

15       MR. STEWART: Maybe. But the Chairman's point to me, as I  
16       understood it, was I had said -- made the submission in  
17       essence that this information was in the hands of Genco  
18       and the non-utility generators.

19       And those two parties were beyond the jurisdiction of the  
20       Board, just like they had possession of the power purchase  
21       agreement. And you ruled they are beyond the jurisdiction  
22       of the Board.

23       As I understood the Chairman's point, he said to me -- I'm  
24       sorry, then I made the further submission that the

2 mere fact that some of that information may have been  
3 disclosed to Disco in the normal course of business  
4 doesn't cease to change its identity as Genco NUG  
5 information.

6 In response to that the Chairman said well, wait a minute  
7 now, the agreement between Genco and Disco says they don't  
8 merely happen to know about it on this collaterally. They  
9 are entitled to have it and use it. And he referenced  
10 Section 19.

11 So my point in response to that was that even if I concede  
12 the Chairman's point in that regard, that you have to make  
13 a distinction between that information which Disco had as  
14 a normal course under the carrying on of business under  
15 this power purchase agreement, and information which it  
16 might be able to go out and obtain by being allowed  
17 voluntary or access to its sister company's files or  
18 information.

19 Now you pointed out to me and said well, wouldn't they  
20 have quantity numbers, because the agreement says that  
21 they are entitled to metering information? I don't know  
22 if they have quantity numbers or not. We don't have any  
23 information. There is no evidence of the Board that Disco  
24 in fact acquired that information. Maybe they do. Maybe  
25 they don't.

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But in order for you to have jurisdiction over it, Disco had to have -- if you follow the logic behind the Chairman's point of Section 19, Disco had to receive that information in the normal course of operating under this agreement.

My point was that as a Board, you are not entitled to just make those assumptions. You need to have evidence upon which you base those conclusions. And there is no evidence that, with the possible exception -- and I might be prepared to concede because if nothing else of the La Capra reports -- of anything being received by Disco other than the PROMOD inputs. Maybe there was. Maybe there wasn't. It doesn't matter if there is no evidence of the point.

CHAIRMAN: Mr. Stewart, if we continue to give -- quote that information as being confidential, then as I see it the hearing that is envisaged under 133 and also frankly as envisaged by the latter part of paragraph 19.9.3, that is the place where you argue, what you are arguing now. In other words, Disco, how did you get this? Therefore, is it within your control or is it not? Where did it come from? Did you pick it up out of a brown envelope in the middle of the night, et cetera, et cetera, et cetera?

2 But you are still -- you still have -- I haven't seen the  
3 PPA between the NUGs and Genco. And I don't know if they  
4 have been filed with us or not frankly. But I don't know  
5 the nature of the confidentiality provisions in that.  
6 All I know is that by the Board ordering this is that we  
7 are granting it statutorily approved confidentiality. So  
8 that the status of the information, as far as the general  
9 public is concerned, has really not changed.

10 MR. STEWART: Your point is well taken, Mr. Chairman.

11 Except I think it turns on both issues.

12 I think that in order for the information to be Disco's,  
13 in order for you to order it up in the first place, it has  
14 to be information which Disco would have acquired in the  
15 normal course of business, not simply information which  
16 you can go out, by beating file cabinets around the  
17 office, and getting information from its sister company.  
18 I don't think you have jurisdiction to make them go get  
19 information from others they do not have.

20 CHAIRMAN: Frankly this -- well anyway. Do you have  
21 anything else, Mr. Stewart?

22 MR. STEWART: I do, Mr. Chairman. And I will try to wrap it  
23 up here. All of that being said, I am going to come back  
24 to where I went back to Mr. Sollows, and that is that in

2   order for you -- never mind -- you know -- whose information  
3       it is, never mind the confidentiality provisions of the  
4       power purchase agreements. In order I would submit, as a  
5       matter of law for this Board to issue an order directing  
6       any party to disclose information to it, it must be  
7       relevant to the matters which are under consideration by  
8       this Board.

9       My point is -- and that's why I went through the statutory  
10      connecting of the dots -- is to what is in fact relevant  
11      to the matters before the Board. And with respect, your  
12      previous ruling on Section 156 says that reviewing the  
13      various cost components would therefore not be required  
14      simply for the purposes of establishing the total amount  
15      of costs.

16      So if the purpose of getting this information is to review  
17      the various cost components -- and I would submit that  
18      would be the only reason for getting it -- it's not  
19      relevant to the matters before you because the Board has  
20      reached the conclusion that the total cost represented by  
21      the PPSAs must be accepted as a necessary component of  
22      Disco's overall revenue requirement. The simple fact is  
23      that you are not entitled to revisit that issue and since  
24      you are not entitled to revisit that issue, that's your  
25      ruling on the point.



2 CHAIRMAN: But, Mr. Stewart, we ruled at that time that it  
3 certainly was relevant for the purposes of cost allocation  
4 or rate design which is one component of what we are doing  
5 now.

6 MR. STEWART: I agree. But it's not what you are doing now.  
7 You ruled on the cost allocation rate design. Now you are  
8 ruling on the revenue requirement. That's all that is  
9 before the Board now. And that's my point.

10 CHAIRMAN: Okay, fine. Anything else?

11 MR. STEWART: One more thing. Maybe this will go, Mr.  
12 Chairman, to the heart of what you just raised.  
13 I think I was anticipating that that point would be made  
14 back to me and I was trying to find some way in which I  
15 could characterize my submissions on that point to the  
16 Board. And I think it's best said in the context of an  
17 exchange that you had with Mr. Morrison. I was just  
18 reviewing the transcript from December 20th and it kind of  
19 jumped out at me.  
20 Mr. Morrison says -- you are referencing Section 156 and  
21 he says, well what is the point of looking at something if  
22 you can't do anything with it? And quite frankly that's  
23 my submission. What is the point of looking at the  
24 various cost components of the revenue requirement by  
25 looking at all the individual -- in my case

2 the NUG data, the NUG information, if you can't do anything  
3 with it, because you have already ruled that you must  
4 accept it.

5 And your response, Mr. Chairman, is, Because we can then  
6 comment on the process that has gone through to establish  
7 it, albeit it will not affect anything this time but my  
8 appreciation of how the PPAs are dealt with is that each  
9 year the parties sit down and establish the inputs, et  
10 cetera. So you know if the Board sees something that does  
11 not appear to be a just and reasonable way of setting  
12 rates then I think it is incumbent upon us as a public  
13 utility board -- and I'm just paraphrasing a bit -- that  
14 we point out to these folks that in fact do control these  
15 inputs and inform them because they are amendable today.  
16 And with respect, that would be the only reason for you to  
17 have that information, if you wanted to review the process  
18 that went around establishing the revenue requirement,  
19 because you would have already ruled that your are stuck  
20 with the revenue requirement at least in terms of the  
21 power purchase agreement prices.

22 And I would submit that if all you are gathering this  
23 information for is to make an editorial comment or an  
24 obiter comment with respect to how they are setting their  
25 rates or how -- that's beyond the purview of the Board.

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2 And that comes back full circle to where I started my  
3 submissions and say what kind of application do you have  
4 in front of you? What does the Act mandate you to do?  
5 The Act mandates you to consider the application and to  
6 set rates based on the revenue requirement. It does not  
7 mandate you to do anything else. This is not an inquiry  
8 under Section 128 of the Electricity Act. This is a rate  
9 application. Disco will lead its evidence and you will,  
10 as you are required to, accept it -- I think it's 101-4 --  
11 give them the rates they ask for or give them something  
12 else, but you are not mandated and I would submit have no  
13 jurisdiction to conduct an inquiry unless you convene a  
14 hearing to do that. You have not done that. This is an  
15 application. The Act also mandates that at least with  
16 respect to the PPAs, you accept them as part of the  
17 revenue requirement.

18 Mr. Morrison pointed out, what is the point of looking at  
19 something if you can't do anything with it? And I would  
20 take it one step further. With respect, if you are not  
21 going to do anything with it, if the statute mandates that  
22 you can't do anything with it, then there is no need for  
23 you to have it, and I would submit if there is no need for  
24 you to have it you have no jurisdiction to acquire it.

25 CHAIRMAN: Thanks, Mr. Stewart. Anybody else have any

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comments they wish to make? Mr. Hyslop?

MR. HYSLOP: Thank you, Mr. Chairman. Like my colleague Mr. Stewart, I think perhaps it's worthwhile to wonder where we got to this point.

And I think the first answer is that we got to that point I think from the decision that was made on June 9th, and we seem to always want to look at that decision to see where we are starting. And the third page of the decision -- I don't have the transcript, I have the decision itself, but the Board noted as follows. "The Board's regulatory jurisdiction is set forth clearly in the Electricity Act. It has broad regulatory jurisdiction over the transmission company, the System Operator and Disco. Section 136 of the Act gives broad powers to the Board to require any of those entities to file with it any documentation or information in their possession. The Act is also clear the Board has no jurisdiction over the generation companies." The Board says something pretty important. "We do believe strongly that if the NB Power group of companies has information that will assist this Board in establishing fair and equitable rates for the customers of Disco, then that information should be made available to this hearing process." And it goes on to say it can be treated confidentially.

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Section 136 -- I noted my colleague in his well thought out remarks however didn't deal specifically with 136 of the Act, which provides "the distribution corporation, the SO or a transmitter to whom the Board makes the request for documents or information of any kind shall furnish the required information to the Board." And I submit that that's very, very broad power to the Board and it seems to be in any type of hearing.

Now I want to go back a little further and I think part of the reason we have had such a deadlock over documents is a difference in philosophy. The utility has many times reiterated in more or less the same fashion as Mr. Stewart the comment that the power purchase agreements -- and I can make all kinds of technical arguments over 156 and I probably may make some of them before I am done, but the utility starts from the proposition these purchase power agreements have been made, the price that the distribution company pays to the generation company has to be accepted, and that's the end of the argument.

I go back and I compare where I am today to where I was in April when I first asked Mr. Hashey if we were going to get the purchase power agreements, and his first answer was no, but we didn't have to fight too hard for them, but my philosophy on it is a little different. And

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I think this goes to the very heart of regulation.

The Board decided in its CARD decision that as of yet there is no competition. And what I have got here is a contract between two affiliated corporations, the generation company and an affiliated corporation. And part of where I got to in the last couple of months dealing with all this is the idea of self-dealing between affiliated corporations isn't new to regulatory law or regulatory province. This is something that has been going on since the mid '80s, probably before, and it's been going on especially in the United States as deregulation takes place.

Now I don't want to bore the Board with all the research I have done, but I did do some research and I acquired from an outfit down in Ohio State, the National Regulatory Research Institute, they did a major article in 1996. I would be happy to provide it electronically. But what they have gone and done is they have looked at the whole question of these contracts between affiliated corporations. And what they say in the executive summary, they point out one of the real dangers that exists and this goes to the heart of regulation.

A utility owned generation and power procurement from an affiliate may be defined as self-dealing transaction.

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2 Self-dealing transaction because of its potential harm to  
3 ratepayers has traditionally been a source of considerable  
4 regulatory concern. Self-dealing may be viewed as abusive  
5 when it is both inefficient and deliberate. One form of  
6 abusive self-dealing, namely transfer pricing, is well  
7 known to regulatory economics. Transfer pricing occurs  
8 when a utility's affiliate charges above market price for  
9 its products knowing that these increased prices will be  
10 passed through to the ratepayers.

11 Now in the States if this was an application by Disco they  
12 would have to come before this Board and they would have  
13 to prove to the satisfaction of the Board that the pricing  
14 in their purchase power agreement meets the market. Now  
15 there is no market here, so we suggest the next best thing  
16 is they have to prove that it's consistent with the  
17 generation company's cost. And the obligation -- the  
18 obligation, Mr. Chairman, is not on the Public Intervenor.

19 In the United States it's up to the distribution company  
20 to come forward with that.

21 And I think with that thought in mind, that is why we  
22 press so hard to get at these generation costs as we have  
23 gone forward.

24 Now I want to add to that and I want to -- I am going to  
25 be very, very careful here, because I don't want anyone

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at this stage to take an implication that there is something not quite right between the pricing and the power purchase agreement and the actual costs that have been incurred by the generation company. But I go back to the document that we marked as PI-13 for identification, that was the Meehan Report, and in the Meehan Report there is a couple of suggestions in there about the pricing. And one of it is because of the type of audit La Capra did there is a potential for the inputs for the pricing in the PROMOD model to vary from the actual cost that the generation company incurs. Now is it a significant amount? Right now I don't know. But that's why I have asked these IRs that are before you today. Is it happening? Is there an advantage being taken of the distribution company? I don't know. But I'm here today to find out. And where this all leads me, Mr. Chairman, is there is good reasons for this Board as part of its overall regulatory authority and its authority under Section 128(ii), if you want to use it, to ask that question. Is there an abuse in the pricing arrangements? I don't go so far as my friend Mr. Stewart and concede the fact that Section 156 is the get-out-of-jail card. So that's the first point we make is that the things



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we have asked for here are important and they are relevant.

The second point we make I go back to Section 136, and unlike my friend who says there is no evidence they have the numbers, well you read the La Capra reports, it's pretty clear. They have all the inputs of the non-utility generators. Now I don't know and maybe Mr. Stewart or Disco can enlighten me, but I would assume that the non-utility generators must have consented to this information being passed on to La Capra. And we have put the La Capra studies into question. We didn't say that the work was improper but we have questioned the scope of the work that Disco asked them to do. And our view is you know if Mr. Stewart's clients agree that this information could be given to La Capra, by implication, it would seem to me, if the La Capra evidence gets put in to question, that the people that are putting it into question have a right to know what it is all about.

So I make those points, Mr. Chair, that the pricing under the non-utility generators contracts, the actual costs, and whatever the PROMOD inputs are, if they differ and they may not. They may be the same thing. But if there is a difference, it does go to the process of what just and reasonable rates are at the end of the day.

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2 I think it is clear to me that the implication in Section  
3 156 is you may have to accept that revenue requirement,  
4 but only if this distribution company shows at the end of  
5 the day, to use a statement from one of the later reports  
6 I filed, that only if at the end of the day, the  
7 negotiations that led to that agreement were done in a  
8 hard-nosed business fashion by Disco.

9 So I leave those points there, but I have a hard time and  
10 I will go back to the primary basis of my argument, is  
11 Section 136 and our view is under Section 136, I think  
12 that is so open-ended that if Disco has the information  
13 and they must have the information, because they have  
14 certainly indicated to me by the order we now have in  
15 front of the Board for consideration that they have access  
16 to it, they have -- I think this Board has clear power  
17 under Section 136 to act and order it to go under.

18 I do, however for the record, and out of great respect for  
19 the commercial sensitivity that the NUGs attach to these  
20 contracts, I would agree it should be filed under the  
21 confidential record and at least myself, as one of the  
22 Intervenors, will not be making any application to have it  
23 put on the public record.

24 Thank you very much, Mr. Chair.

25 CHAIRMAN: Thank you, Mr. Hyslop. Any other points?

2 MR. MORRISON: Yes, Mr. Chairman. I guess I thought we were  
3 going to be dealing with the Section 156 argument and I am  
4 prepared to put it off, but I am going to make the  
5 argument in connection with the Public Intervenor's  
6 experts reports and I will save that provided I do have  
7 the opportunity to address that before the day is out, Mr.  
8 Chairman.

9 I will say a couple things. First in response to Mr.

10 Hyslop, where he refers to the States and it is an

11 application by Disco and we have to make -- there is an

12 onus on us to prove that they are not unreasonable. This

13 isn't the States and I'm sure in Ohio, I am sure there is

14 no other jurisdiction other than perhaps Quebec that has a

15 section that is similar to 156.

16 So we have Section 156. The Board has ruled on it. It is

17 there. I am not going to reiterate what Mr. Stewart said

18 with respect to 156. But perhaps I am getting ahead of

19 myself just a little bit here. I would like to, if it is

20 the Board's pleasure, to confine my comments to the

21 information that is proposed to be filed.

22 With respect, and I am not going to argue

23 Mr. Stewart's position. He has done that quite ably. We

24 do have certain items on that list that Disco wants to be

25 held in confidence by the Board. In particular, on

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2 Schedule A, if you look at items 3(a) and 3(b), and these go

3 to fuel costs and fuel prices. And you will recall that

4 Mr. Bishop was here in the spring and Mr. Hashey made

5 forceful arguments with respect to why those costs are

6 commercially sensitive. We would propose that those be

7 held in confidence, Mr. Chairman.

8 As well, 4(a) and (b), they relate to the same issue, that

9 is fuel costs and fuel prices.

10 Number 5 is the PROMOD users manual. Personally we have

11 no -- take no issue with providing the PROMOD users manual

12 to anyone. However, we have a licensing agreement with

13 the PROMOD people, New Energy, I believe they are called.

14 They have agreed to provide it to Mr. Hyslop's expert

15 provided he sign a licensing agreement or a non-use

16 agreement.

17 So we would have to say that that has to be kept in

18 confidence until such time as they would agree to allow

19 any other public intervenor to access that manual. They

20 consider it proprietary.

21 As far as Disco is concerned, we have no issue with it

22 other than we are bound by our own licensing agreement.

23 Number 7 is -- sorry that was number 5. Number 6, that is

24 the PROMOD inputs and outputs which is a binder. What we

25 would propose there, Mr. Chairman, is that that binder

1  
2 would be provided but that information in the binder relating  
3 to fuel costs and prices, if the Board rules on the NUG  
4 information, heat rates and maintenance and outage  
5 schedules be kept in confidence. They are commercially  
6 sensitive and give competitors to Genco and of course, the  
7 flow through to Disco, an advantage.  
8 Number 7, the work papers relied on and are generated in  
9 process of driving inputs, we would ask that confidence --  
10 they be held in confidence as well. Quite frankly, we  
11 haven't reviewed them yet so we don't know what's in them,  
12 quite frankly. There may be confidential information.  
13 Number 8, the only items in number 8 that are of  
14 commercial sensitivity are the heat rates in (b) and the  
15 fuel prices and costs, number (f). And we would ask that  
16 they be held in confidence. And finally -- well almost  
17 finally, the materials provided to La Capra, number 9, we  
18 would -- and I don't know whether there is a separate  
19 binder of that material. I think it is all included in  
20 what is in this list. But if there is material in the La  
21 Capra materials, if you will, that relates to fuel costs,  
22 heat rates, maintenance and outage schedules, we would  
23 also ask that that be redacted in some form. And the  
24 pricing provisions of the Heritage PPAs, well that is Mr.  
25 Stewart's issue.

1  
2 So those are my specific comments with respect to the  
3 confidentiality issue. Both Mr. Stewart and Mr. Hyslop  
4 have gotten into the Section 156 argument, Mr. Chairman.  
5 As you know, we are taking the position that the Public  
6 Intervenor's experts reports not be admitted or at least  
7 portions of them not be admitted. And we do have to deal  
8 with IR-13. But I will shut up now and perhaps I will  
9 have an opportunity to address that shortly.

10 CHAIRMAN: Thank you, Mr. Morrison. Mr. Stewart, anything

11 -- oh, did Mr. Coon -- were you raising your hand?

12 Okay.

13 MR. COON: Just a point of clarification, Mr. Chairman. And  
14 that is whether Disco is arguing that number 10 of  
15 schedule A pricing provisions of the Heritage PPAs should  
16 be provided in confidence or whether they will be part of  
17 the public information?

18 MR. MORRISON: Well our position, as Mr. Stewart quite  
19 rightly put it, is that we take the position because of  
20 our contractual obligations, that we cannot file that  
21 information unless ordered to do so by the Board and that  
22 is the only way that we can do it because of our  
23 contractual obligations. And as to the merits of that, I  
24 will leave Mr. Stewart's argument on the record with no  
25 further comment.

1 MR. COON: So just to further clarify, in this proposal the

2 - 2908 -

3 filed information, number 1, the filed information shall be  
4 divided into two parts, the first part being the  
5 designated confidential information, the second part being  
6 referred to as public information, is Disco therefore not  
7 taking a position on whether the pricing provisions of the  
8 Heritage PPAs be designated as public information or is  
9 designated confidential information?

10 MR. MORRISON: Well, I guess we would take the position,  
11 Mr. Chairman, that if the Board orders that the material be  
12 filed, that it would be filed in confidence.

13 MR. COON: And one last point on that. Do I understand,  
14 Mr. Chairman, that the Heritage power purchase agreements  
15 refer to all the power purchase agreements, meaning these  
16 include the power purchase agreements between Disco and  
17 Genco and Disco and Nuclearco or only the NUG ones?

18 CHAIRMAN: For purposes of -- we were caught out in left  
19 centre on that as well. Because the Market Design  
20 Committee of the Heritage assets, et cetera were all the  
21 assets of Genco that had produced power. But suddenly in  
22 the PPAs it comes up Heritage PPAs. And that deals  
23 basically just with the non-utility generators.

24 MR. COON: Okay. Thank you, Mr. Chairman. As a former  
25 member of that Market Design Committee, it caught me out.

1 Thanks.

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2 CHAIRMAN: Mr. Stewart, do you have anything just in  
3 response to what Mr. Hyslop had to say or Mr. Morrison for  
4 that matter?

5 MR. STEWART: I do, Mr. Chairman. Two points. One is that  
6 if you look at the decision of June 9 -- or it might have  
7 been June 9, which talks about the Board's preparedness,  
8 if that is the word, to order disclosure under Section  
9 136.

10 And in fact on page 287, "The Board will therefore require  
11 Disco to provide answers to Information Requests on costs  
12 underlying the PPAs and any other documents the Board  
13 considers relevant for the purpose of setting just and  
14 reasonable rates."

15 Now when you look at the decision, as I pointed to you  
16 earlier, you said okay, well, we are stuck with the  
17 revenue requirement. It is a terrible way to put it. But  
18 the revenue requirement is mandated.

19 So in the previous page, on page 286 you talk about -- and  
20 285, you say "A traditional test for determining whether  
21 or not rates are fair and equitable between customer  
22 classes is the use of the revenue to cost ratio", et  
23 cetera, et cetera.

24 So while you do say we will -- we are provided broad  
25 jurisdiction under Section 136 and we will require



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2 disclosure of those documents -- disclosure of that  
3 information in documents -- you do so only for the  
4 purposes of setting just and reasonable rates. And you  
5 clearly point out that the only just and reasonable or  
6 just and equitable issue is the CARD considerations.

7 Secondly 136 is there. And it says what it says. But  
8 nowhere, nowhere does Section 136 mandate that the Board  
9 can request documents or information of any kind for the  
10 purposes of considering a rate application or for the  
11 purposes of looking behind Section 156.

12 So even if I accept Mr. Hyslop's argument that you somehow  
13 have the technical authority to require Disco to produce  
14 information or documentation under the power granted to  
15 you to Section 136, Section 136 does not grant you the  
16 authority to get that information and data to use it for  
17 the purposes of a Section 101 application. It doesn't say  
18 that.

19 In fact Section 101 sets out precisely what you are  
20 supposed to consider. And in fact Section 156 in my  
21 submission makes it clear you don't consider this  
22 information in this hearing.

23 Those are my submissions. Thank you.

24 CHAIRMAN: Good. We will take a recess to consider.

25 MR. STEWART: Excuse me, Mr. Chairman. You cut me off in

1  
2 terms of the issue of what should be confidential and what  
3 should not. Is that something we are going to consider  
4 after.

5 CHAIRMAN: Did I cut you off, Mr. Stewart?

6 MR. STEWART: You cut -- no. You said the cart before the  
7 horse -- the horse before the cart. Did you want me to  
8 give my comments on -- assuming for the moment you were  
9 prepared to issue this order what should and shouldn't be  
10 confidential, or is that for later discussion?

11 CHAIRMAN: Well I think with frankness Mr. Morrison has  
12 outlined it and you could probably be quite brief on it.  
13 Just a moment.

14 (Off the record)

15 CHAIRMAN: Go ahead, Mr. Stewart.

16 MR. STEWART: I will be --

17 CHAIRMAN: I guess the easiest way to handle this is you  
18 have heard what Mr. Morrison would -- if the Board were to  
19 rule that it should be filed with the Board the items in  
20 this draft agreement -- you have heard what he is going to  
21 make -- or he will suggest be confidential. So I would  
22 suggest to you the easy way is to simply refer to anything  
23 that Mr. Morrison has indicated would be put on the public  
24 record and tell us why it should remain confidential.

25 MR. STEWART: That was precisely my plan, Mr. Chairman. I

2 will be very brief. It's -- and quite frankly I'm not sure  
3 entirely what is being asked for here. But with respect  
4 to paragraphs of Schedule A 3(c) and 4(c), there talks  
5 about other energy purchases. I'm assuming other energy  
6 purchases may be purchases by Genco of a NUG and if that's  
7 the case and based on Mr. Hyslop's comments I would assume  
8 that both 3(c) and 4(c) should also be then filed in  
9 confidence.

10 And secondly the PROMOD inputs to the extent that there  
11 are inputs there which contain what -- the NUG  
12 information, that should be filed in confidence as well.  
13 If Genco doesn't mind putting on the public record the  
14 vast majority of those inputs which relate to it, that's  
15 fine. But we would request that the PROMOD inputs which  
16 relate to the NUGS, which I think is consistent with, you  
17 know, the other requests for confidence that the NUG data  
18 be kept confidential.

19 We would request that number 6 to the extent it reflects  
20 on NUGS is confidential as well. Thank you.

21 CHAIRMAN: So basically just those two you would make it in  
22 addition to what Mr. Morrison has said?

23 MR. STEWART: Yes. In addition to Mr. Morrison's list,  
24 3(c), 4(c) and in number 6 the PROMOD inputs or outputs  
25 which relate to NUGS.

2 CHAIRMAN: Yes. Sorry. The two (c)'s I grouped together.  
3 That's all.

4 MR. STEWART: That's all. Thank you.

5 CHAIRMAN: Okay. Anybody else any comment on that? All  
6 right. We will take a recess.

7 (Recess - 4:10 p.m. to 4:25 p.m.)

8 CHAIRMAN: I guess Disco is appropriately represented here  
9 to hear the ruling.

10 MR. SOLLOWS: Aply and sufficiently.

11 MR. MORRISON: Like rats from a ship.

12 MR. HYSLOP: Where is the press when we need them?

13 CHAIRMAN: Oh, dear. Well, the Board has taken a few  
14 minutes to review the arguments that Mr. Stewart has put  
15 to us and we want to make ourselves absolutely clear that  
16 we are directing and ordering the information to be filed  
17 by Disco which it has. Now not ordering it to go out and  
18 obtain it from another party. It is only what is in its  
19 possession that is to be filed.

20 We believe that Section 136 is as broad as any reading  
21 that you could get. It's clear that we can ask the System  
22 Operator, Transco or Disco for any information which they  
23 have and they have to file it with us. Period. Mr.  
24 Stewart, we agree that the additional information in  
25 paragraph 3(c) and 4(c) plus any NUG-related

2 information in I believe paragraph number 6 should be filed in  
3 confidence.

4 You and I, Mr. Stewart and Commissioner Sollows had  
5 conversation concerning the PPA and the provisions of it.

6 And we believe that what we are doing here certainly  
7 complies with the provisions of that agreement. Now  
8 that's not to say this Board is bound by what two parties  
9 may sit down and contract at all. But we are simply  
10 saying that there it has as well.

11 And I just point out that Section 156 is prefaced by the  
12 expression for the purposes of the first hearing, and it  
13 goes on from that point on, which we may hear great  
14 argument at a later date in a later hearing that it  
15 applies to the second hearing for rate changes of Disco,  
16 but certainly a first flush reading of that section  
17 indicates that it's applicable only to this particular  
18 hearing that we are trying desperately to conclude now and  
19 not the next one. So at the time of the next one we can  
20 look into any information that we want to.

21 Now the other important thing to remember is that  
22 regulators depend upon comparison of information of  
23 hearing over hearing over hearing. You look for trends  
24 and changes, et cetera. And that's one of the purposes of  
25 this hearing in our regulatory concept is would we have to

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start changing all the information that we were aware of in the early 90s and replacing it with information today so that we can compare and contrast that the next time that Disco comes in front of us.

So we believe, having said all of that, that the information that we are ordering be filed with us is relevant and is relevant to this proceeding, and that's the Board's Order.

Now I understand from Mr. MacNutt that Mr. Lawson may have something he wants to say, as well as anybody else want to say in reference to this draft agreement that's here. So I will just simply -- if I might I will go around the room and do it simply by table this time around. Mr. Coon, do you have anything further you want to say?

MR. COON: No, Mr. Chairman. Thank you.

CHAIRMAN: Mr. Gorman?

MR. GORMAN: It's acceptable to the Municipal Utilities, Mr. Chairman.

CHAIRMAN: Thank you. And to you, Mr. Lawson?

MR. LAWSON: Thank you, Mr. Chairman. I have raised these issues with the applicant's counsel and they are aware of them. There hasn't been any addressing of them, so I will raise them with the Board for consideration.

2 First of all, there hasn't been a schedule of the people  
3 who will have access to it identified, but I understand  
4 the intention is that will be anybody of the Intervenors  
5 who wish to. So that's satisfactory.

6 We have asked that the information be rather than filed  
7 and available by the 24th, that it would in fact be made  
8 available as soon as possible but not later than the 24th,  
9 so as to have access to it sooner because one can  
10 appreciate this will be substantial in volume is my  
11 expectation.

12 We have also asked and we would ask that it reflect that  
13 if to the extent that the information is available  
14 electronically it would be made available electronically  
15 which would make it certainly much easier than having to  
16 copy all of the materials to the extent that anybody  
17 wanted to look at them.

18 We have agreement I believe, but I will just put it on the  
19 record. In paragraph number 3, Mr. Chernick I believe it  
20 is, who would have an opportunity to meet with -- that any  
21 Intervenor would have the opportunity to participate in,  
22 sit in on that session, to sort of learn if they will.  
23 And the Intervenor had no problem with that and I do not  
24 believe, although I can't speak for the applicant, they  
25 may have an issue about it.

2 And lastly we do think though given the large volume of  
3 paper that will come and the significance given that it  
4 represents somewhere between 70 and 80 percent of the  
5 total costs coming from this, that there may be -- we  
6 don't want to hold up the time frame, but we would like to  
7 have the opportunity for interrogatories, few in number,  
8 and recognizing they will have to be few in number in  
9 order to be able to get a response on a timely basis, an  
10 opportunity for interrogatories arising out of the  
11 information that might be given as part of this.

12 CHAIRMAN: Mr. Morrison?

13 MR. MORRISON: Yes, Mr. Chairman. As far as most of what  
14 Mr. Lawson had to say we don't have any real problem. As  
15 far as the participation of Mr. Chernick comes up, I don't  
16 see that as a problem. The request to have information  
17 transferred electronically, the Order contemplates that  
18 the material be filed with the Board and that there will  
19 be a data rooms set up and the Intervenors will come and  
20 look at it and take whatever copies are available. And it  
21 was designed that way specifically because of the  
22 sensitive nature of this material. And we are amenable to  
23 having a data room here in Saint John if need be and one  
24 in Fredericton as well, if that's the wish. But we are --  
25 we would strongly resist having this stuff lying around on



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the Internet and in the ether. It is very sensitive information and that's why we are here today.

With respect to the IRs, quite frankly I have to say that I am adamantly opposed to another and further IR process.

This information has been filed and the reason we are here is in response to IRs. And we are a short time away from the hearing. All of our people are very busy. Quite frankly knowing a little bit about the information I don't know what IRs you could ask that this disclosure won't address, quite frankly. It's really very difficult for our people to get ready for this hearing in the next couple of weeks and be faced with another IR round. There will be ample time I'm sure. As you know IR is just another way of asking a cross-examination question. There will be ample time in the course of the hearing for Mr. Lawson and anybody else to test whatever information is by cross-examination. So I would resist an IR process, Mr. Chairman. And those are my comments.

CHAIRMAN: Any of the other parties have any input on that at all? Mr. Morrison, can I ask you certainly what is presently filed with the Board in confidence is in a separate room behind lock and key, can you provide supervision of that room in our premises when -- if somebody says they want to have it in Saint John? There

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2 is no reason you have to go rent a room or something like  
3 that.

4 MR. MORRISON: We would have absolutely no problem with  
5 that, Mr. Chairman, having someone available in Saint John  
6 if it's at the PUB offices. That would certainly be  
7 convenient from our point of view. The only question of  
8 course, it's just a matter of practicality, is if the  
9 Intervenors would let us know so that we can have the  
10 person available. We don't want to have to have someone  
11 staffed there, you know, business hours 9:00 to 5:00, five  
12 days a week if nobody shows up. So if someone from the  
13 Intervenors want to say that they want to be there  
14 Wednesday at 2:00 o'clock we will make sure that there is  
15 someone there to staff that room.

16 CHAIRMAN: Anybody have any problem with that practical  
17 arrangement? No? Okay. Good. That sounds good. Just a  
18 moment.

19 (Pause)

20 CHAIRMAN: We just took a minute. And with frankness we  
21 agree with Mr. Morrison's stance in reference to the two  
22 matters that Mr. Lawson covered, that he didn't agree  
23 with, i.e. that no set of interrogatories on this  
24 information, and secondly it not be provided over the  
25 Internet. It will be available in the room, either here

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in Saint John or in Fredericton.

I presume that some of that is in fact in electronic form now, Mr. Morrison.

MR. MORRISON: Some of it is, yes.

CHAIRMAN: Yes. So I would presume that this person that will be babysitting in our office premises will bring his or her own computer so it could be viewed on that.

MR. MORRISON: We will ensure that the proper technology is available.

CHAIRMAN: Fine. Let's see. All right.

So Mr. Morrison, help me out. Where do we go from here?

MR. MORRISON: I believe, Mr. Chairman, we are -- at least I requested that I make submissions with respect to the Public Intervenor's expert reports and the question of -- which is item 2 on schedule A to the proposed order which is the IR 113, "Additional Information".

I will try to be brief. And I will try not to replot the ground that Mr. Stewart has plowed this afternoon. But this is an issue that is important to Disco.

The information in IR 113, for example, we have provided and have agreed to provide all information up to September 30th 2004. Subsequent to that date of course the utility was restructured.

2           And the information that is being requested would  
3           essentially require us to file cost information that  
4           relates specifically to Genco and Nuclearco. Those costs  
5           flow through to Disco through the PPA's and through  
6           similar company agreements all of which are on the record.

7           In addition, and the reason I'm linking these two, is  
8           that the argument is essentially the same. In addition  
9           the Public Intervenor has had expert reports prepared by  
10          Messrs. Meehan and Makholm and Strunk. And I'm assuming  
11          that he will at sometime move to have those admitted into  
12          evidence.

13          They do relate in large part to the generator's costs.  
14          Now there are elements that relate specifically to Disco.

15          And we have no objection to that. For example, the  
16          Meehan report calls into question the pricing contained in  
17          the PPA's from Genco to Nuclearco.

18          And in essence what Mr. Meehan wants this Board to review  
19          is to review the PPA's to determine whether they are  
20          reflective of Genco's costs. And both the Makholm and  
21          Strunk reports are based in part or in large part on Mr.  
22          Meehan's report. Mr. Makholm attacks the capital  
23          structure and the rates of return for Genco and Nuclearco  
24          that are built into the PPA's.

25          And Mr. Strunk's report is based on Mr. Makholm's

2 criticism of the Genco and Nuclearco returns and the PPA's.

3 And he says that these costs are not reflective -- or he  
4 says that the returns, ROE's are not reflective of costs.

5 He then goes on to recalculate the PPA prices using his  
6 and Mr. Makholm's own set of assumptions. Estimates is  
7 what he calls them.

8 Aside from the fact that we believe that  
9 Mr. Strunk's report is rife with wrong assumptions and  
10 inaccuracies, these reports are being offered by the  
11 Public Intervenor for one objective and one objective  
12 only.

13 Essentially the Public Intervenor wants this Board to  
14 examine the assumptions underlying the PPA's and to  
15 recalculate actually the PPA prices for purposes of  
16 Disco's revenue requirement.

17 In short it is my submission that the only purpose of  
18 these reports is to have the Board completely ignore  
19 Section 156. And Mr. Stewart has raised with the Board  
20 and has reminded the Board of its June 9th decision. I'm  
21 not going to reiterate his arguments other than to say  
22 that the Board did make a decision that for purposes of  
23 the revenue requirement the PPA's must be accepted.

24 Now, we acknowledge that the Board did go on to say in its  
25 decision that Disco should make available information

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2 that would assist this Board in establishing fair and  
3 equitable rates.

4 And to that end, you will recall during the CARD hearing,  
5 Disco did provide a great deal of generation cost  
6 information, not for the purpose of justifying or  
7 defending those costs but for the purpose of explaining  
8 those costs, so this Board would have the information it  
9 needed to do the appropriate cost allocation review.

10 Some of -- and I don't want to go into great detail on  
11 this. But just to remind the Board of the information  
12 that has been filed, certainly the PPA contracts  
13 themselves have been filed. Fuel costs for three years  
14 have been audited by La Capra.

15 As far as the capital assets are concerned we have  
16 responded to interrogatories about the capital assets,  
17 that they were transferred at net book value and no one  
18 has taken any issue with that. We have had consolidated  
19 financial charges for fiscal years from March 2001 to  
20 September 30th 2004.

21 We have OM & A by business unit for the same period. We  
22 have detailed historical information on the NB group of  
23 companies on a combined and consolidated basis from 2001  
24 right to 2005, and historical information -- indicator  
25 information that we have agreed to provide in IR 113 up to

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September 30th 2004.

So there has been a great deal of generation cost information that has been placed before this Board. And again, not for the purposes of defending and justifying it, but for the purposes of allowing this Board to have a more fulsome notion of what those costs are and the reasonableness of those costs for purposes of your CARD deliberations.

Going back to the Board's ruling in June, it is my submission that if the Board is ruling that it must accept the PPA pricing for purposes of the revenue requirement, if that ruling is to have any meaning at all, then the experts' reports that Mr. Hyslop wants to have admitted into evidence should not be admitted into evidence.

Now admittedly there is a portion of Mr. Makholm's report that relates to the appropriateness of the return that Disco has applied for in this rate case. That is fine.

Have no objection to that. It relates to Disco's ROE.

Similarly there is a portion of Mr. Meehan's report that deals with fuel pricing. Again no objection to that portion. That is relevant information, relevant issue before this Board.

However, the admission of these reports as they relate

2 to the generator's costs would put Disco in an impossible  
3 position. There would be evidence on the record provided  
4 by the Public Intervenor, however flawed we may believe it  
5 is, that Disco would not be in a position to counter or  
6 rebut. Disco isn't in a position to defend or even  
7 comment upon the Genco or Nuclearco returns that are  
8 included in the PPA's.

9 Even if Disco could, an examination of those costs, in my  
10 submission, would result in turning this hearing into a  
11 revenue requirement hearing for Genco and Nuclearco. You  
12 would be forced to look at ROE's and deemed capital  
13 structures that are in the PPA's for Genco and Nuclearco.

14 You will recall the Transmission Tariff hearing. A  
15 great deal of time was spent dealing with, you know, the  
16 Roger Morans of this world who deal with risk assessments  
17 and what is the appropriate capital structure, what is the  
18 appropriate rate of return. We are not in a position to  
19 do that. We can't do it. So you return to this hearing,  
20 which is a revenue requirement hearing for Disco, into a  
21 revenue requirement hearing for Genco and Nuclearco.

22 And I think Mr. Stewart reminded you earlier of the other  
23 portion of the Board's ruling in June which was, and I  
24 will quote, "The Act is also clear that the Board has no  
25 jurisdiction over the generating companies."



2           Again to allow those reports to go in puts us in an  
3           untenable position. I agree that on Mr. Hyslop's part, on  
4           the Public Intervenor's part, it is quite a clever ploy.  
5           Because it allows something to be done through the back  
6           door that couldn't be done through the front.  
7           Moreover, again I would say that it is inconsistent with  
8           the Board's position that it doesn't regulate generating  
9           companies.

10          And I have to make this point crystal-clear. Because it  
11          came up in some of the comments that Mr. Hyslop said  
12          earlier, although he didn't make the accusation directly.

13          And I'm not accusing him of making an accusation.

14          But this is not a case of trying to shelter the  
15          information. The information, as far as Disco is  
16          concerned, is value-neutral. It is what is to be done  
17          with the information in this process that is the issue.  
18          If, as it seems apparent to me at least, that the whole  
19          issue of restructuring and the proclamation of the  
20          Electricity Act is to be put into question in this  
21          proceeding, then we submit quite frankly that it just  
22          cannot be permitted.

23          Also, from a practical perspective, and I have alluded to  
24          this a few moments ago, the regulatory schedule would be  
25          lost. That exercise in my submission would take months

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2 to complete, if in fact Disco could even offer any evidence to  
3 counter the ROE assumptions that are being made in the  
4 experts' reports.

5 I urge the Board not to fall into the trap of turning this  
6 hearing into a revenue requirement hearing for Genco and  
7 Nuclearco. And again if the Board's ruling with respect  
8 to 156 has any meaning at all, then it is my submission  
9 that you must not permit this hearing to be turned into a  
10 hearing examining the revenue requirement of the  
11 generators.

12 And those are my submissions, Mr. Chairman.

13 CHAIRMAN: Mr. Morrison, would you agree that the stance  
14 that you have taken right now is, to say the least, out of  
15 the ordinary?

16 Normally when it comes to looking at evidence you wait  
17 until the time of the hearing itself and you object to  
18 certain portions of either testimony and/or reports, et  
19 cetera at that time rather than asking the Board to sit  
20 here today and rule on the relevancy of what is in those  
21 reports, which of course we haven't seen.

22 I mean, Mr. Hyslop has chosen as part of his case to put  
23 that in. Is that not the story, to go back to  
24 Mr. Stewart's horse and cart, but --

25 MR. MORRISON: I would agree with you, Mr. Chairman, that it

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is unusual. But it really comes down -- and I think the issue that -- and I think Mr. Hyslop and I will agree on this point at least -- that it really comes down to an interpretation of what the Board meant in its Section 156 ruling.

And the reason why I'm asking the Board to deal with it up front, in other words putting the cart before the horse, it is a very practical, practical dilemma for Disco.

And the practical dilemma is this. If those reports are placed on the record, there is evidence on the record that quite frankly we don't agree with, but we are not in a position to rebut.

So if the Board then decides that Section 156 does not apply to this particular situation, we are in a situation where there is evidence on the record that we cannot rebut. And where does that leave us in terms of a practical effect of this hearing?

So yes, to a certain extent it is unusual. But given -- quite frankly, Mr. Chairman, I don't think there is anything usual about this particular rate application. So yes, it is unusual.

CHAIRMAN: Thanks Mr. Morrison. Now Mr. Hyslop like anybody else as well that wants to say something can say it. So I

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2 think really I will ask the other Intervenors, anybody who is  
3 prepared to support the Applicant's argument to do so  
4 right now. Then we will go to you, Mr. Hyslop.

5 Mr. Stewart, did you have anything you wanted to say?

6 MR. STEWART: Believe it or not, Mr. Chairman, I have  
7 nothing to say.

8 CHAIRMAN: Oh, you just wanted to leave, okay.

9 MR. STEWART: I'm escaping to the back row.

10 CHAIRMAN: Yes. All right. Fine. Thank you. Mr. Hyslop?

11 Or did I see Mr. Gorman's hand going? No, I didn't.

12 Okay. Mr. Hyslop, go ahead.

13 MR. HYSLOP: I will try to be brief, Mr. Chairman.

14 CHAIRMAN: Yes, do. Because the shorthand reporter has  
15 another hearing on at 5:00 o'clock.

16 MR. HYSLOP: I have got the time marked.

17 Mr. Chairman, the first point is the evidence that I have  
18 submitted is my case. And it is unusual. I want to go  
19 back very briefly. I'm going to start with what the Board  
20 said on May 22nd 1991 in its Financial Policies decision,  
21 just a couple of quick excerpts from page 73.

22 "The Board considers that the ownership of NB Power by the  
23 Province of New Brunswick should benefit the people of the  
24 province. And therefore the Board is of the view that the  
25 appropriate capital structure to be used when setting

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rates for NB Power is the actual structure that the company projects will exist in a future test year. The Board is of the view that using a market-related cost of equity would not be appropriate for the purposes of setting rates for NB Power."

And further at page 76, "The ownership of NB Power by the Province should benefit the people of New Brunswick. The Board is of the view that using a market-related rate of return would not be appropriate for the setting of rates for NB Power."

And at page 77, "Therefore the Board considers that the appropriate rate of return on the equity component of NB Power's capital structure should be the embedded cost of NB Power's debt."

I state that as a starting point. Now that is not reflected at all in the application before this for Disco nor does it appear to be the basis of the pricing in the PPAs from the Generation company and Nuclear company. Other than Section 156, I would really have thought that if it was going to be the legislative intent to get around the methodology used by this Board in 1991 and 1993 in terms of how it determines the proper rate of return for a government-owned utility, it would have said so in the legislation. I have no provision for any deemed or

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2 implied structures to be taken on.

3 I want to go on. And I want to refer very quickly to a  
4 couple of things that this Chairman and this Board said on  
5 December 20th, I believe. And I'm reading at page 2666 of  
6 the transcript.

7 The Chairman said "I'm going to throw something else on  
8 the table. We are the regulator under the Electricity Act  
9 of the Province. We probably, with the exception maybe of  
10 yourselves and some other people in this room, have  
11 greater appreciation and working knowledge of the  
12 legislation from the White Paper. And we have a  
13 responsibility to monitor the competitiveness of the  
14 marketplace that we are talking about."

15 "So having said all that do you believe that the  
16 legislature, in bringing in Section 156, wanted to tie our  
17 hands to the extent that if we were going to see something  
18 that was going on or not going on, that should not be  
19 allowed to comment on that and give a suggestion to the  
20 Market Committee folks or to the legislature or to the  
21 government or to yourselves, in our opinion that the  
22 marketplace would operate more efficiently?"

23 And there was a further quote at the end of that day. But  
24 I think that is the one that my colleague Mr. Stewart read  
25 into the record earlier. Now this Board was right on

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that date in terms of its power and where it should be looking at this.

Mr. Strunk says "If these folks have created" -- and that is what we are saying. They have created a deemed equity debt structure of 45 or 50 percent equity and 55, 50 percent debt. And they said on the equity portion we are entitled to 11 1/2 or 17 percent depending on the company. Well, you know, you think of that and you say maybe it makes sense, maybe it doesn't. But based on what this Board decided, based on what Mr. Makholm says is the way government-owned utilities are treated throughout North America, which is basically their return is based on their debt, you know, I think it is on this Board to look at and comment on that very issue. I think it is well within your jurisdiction.

And let's put it this way. Mr. Strunk in his calculations has put \$65 million in question in this revenue requirement because of this deemed equity structure and because of this deemed rate of return.

And I think that this is part of this reorganization, Mr. Chairman. And I don't want to bring it into an inquiry of the reorganization. But the bottom line is there is nothing in this Act that creates these debt

2 capital structures. And I think it is a long leap of faith to  
3 take Section 156 to the point that my friend  
4 Mr. Morrison has.

5 What are the plans of the utility with this structure?  
6 How are they going to use it? How is it going to affect  
7 the way this utility sets rates in the years that they are  
8 not before this Board?

9 There is a lot of issues here. And I don't want to call  
10 it a money grab or anything like that. But the bottom  
11 line here quite simply, Mr. Chairman, if you are going to  
12 be a Public Utilities Board and you are going to be a  
13 regulator of the electricity industry, this is a pretty  
14 fundamental question.

15 And I would move that all my reports be put on the record  
16 and entered as exhibits at this time. Thank you.

17 CHAIRMAN: Any other comments, Mr. Morrison?

18 MR. MORRISON: Very briefly, Mr. Chairman. Mr. Hyslop  
19 refers to Board decisions in May of 1991. Well, the world  
20 has changed quite a bit since May of 1991. The PI wants  
21 to pretend that restructuring hasn't taken place. And he  
22 wants to pretend that Section 156 doesn't exist.  
23 He refers to -- and I don't want to get into the merits of  
24 what Mr. Strunk had to say -- but deemed capital  
25 structures, Crown-owned utilities. Remember the



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Transmission Tariff hearing? This Board approved the deemed capital structure on a Crown-owned utility and not based on its actual capital structure.

And as far as debating the White Paper and policy, my only submission on that is, Mr. Chairman, this is not the place for that. There is a building in Fredericton with a dome on it for those debates.

Those are all my comments.

CHAIRMAN: Thank you, Mr. Morrison. Anybody else? No. We are going to reserve decision. We will -- do we have other matters that need to be discussed today?

MR. MORRISON: There is only one other matter, Mr. Chairman, which is a housekeeping matter, which the Secretary has brought to our attention, which deals with the marking of the IR responses that Mr. Hashey referred to this morning.

CHAIRMAN: We will do that tomorrow if it is okay with you.

MR. MORRISON: There is one other housekeeping matter, Mr. Chairman. And we had suggested a technical session on the rate proposal. We are filing the rate proposal that has come as a result of the CARD decision. And we thought that it might be valuable for Intervenors to be able to ask our people questions on methodology and how it was done.

I know this is outside of the Board's formal

2 processes. But we may -- I think we are looking at January  
3 23rd which is a Monday. If Intervenors want to  
4 participate in that I will be more than happy to answer  
5 their questions.

6 CHAIRMAN: Okay. Thank you, Mr. Morrison.

7 And I'm coming to you, Mr. Anderson, poor  
8 Mr. Anderson. I will conclude this. And then we will go to  
9 you, sir.

10 I just want to reestablish the dates, since we have gone  
11 through a good deal of shifting around. So that in fact  
12 there is no hearing during the week of the 16th of January  
13 as we had originally scheduled. There will be the hearing  
14 starting on the 24th of January, 25th and 26th dealing  
15 with the Rogers evidence.

16 We then adjourn over for a week and reconvene on the 6th  
17 of February and rise on the 9th. And I have to tell you  
18 that we have space at this hotel for the 6th and 7th. And  
19 we then have to move overnight down to presumably the  
20 Convention Centre for the 8th and the 9th.

21 We will go ahead and have continuation of the hearing on  
22 the week of the 13th through the 16th. And we will break  
23 our previous rule of coming back three weeks in a row by  
24 coming back for the 20th, 21st and 22nd. And then if  
25 necessary we will reconvene on March 1, 2 and 3. That

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2 is again breaking our rule about the Friday.

3 Then in an effort to keep Mr. Gorman's matrimonial peace,  
4 why we will not be sitting on the week of the 6th. But  
5 again if necessary we will go on on the week of the 13th  
6 for the Monday, Tuesday, Wednesday, Thursday.

7 And we have also scheduled the week -- gotten hotel space  
8 for the week of the 20th, 21st, 22nd, 23rd. And that is  
9 at the Delta in Fredericton.

10 I just -- I think that my fellow Commissioners and I have  
11 to say, Mr. Morrison, that I know throughout this hearing  
12 process we have all been working towards trying to get a  
13 decision ready by the end of February.

14 And I -- you know, we are dealing with a lot of fictions.

15 But that is one that I have to dispel. We are just not  
16 going to be able to do that. There is no practical way on  
17 earth that we could possibly do that.

18 And I think you can convey that to your client. There are  
19 many different methods. And I guess I have suggested at  
20 least one other, that we could deal with your revenue  
21 requirement for the test year, et cetera. But we can  
22 cover those later on.

23 So we will rise now. And we will reconvene tomorrow at  
24 10:30 in this room. And that will give the Board an  
25 opportunity to go through the transcript which will be

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coming overnight.

Now since all of that business is taken care of then it is time for Mr. Gillis' motion. Mr. Gillis, are you present?

No, he is not.

Once again, do you have a motion to make, Mr. Anderson?

MR. ANDERSON: Thank you, Mr. Chairman. The letter that was addressed to the Board on January 3rd 2006 from Mr. Gillis was a request that the Minister be summoned by the Board.

However the submission, brief as it was by Mr. Gillis this morning, seemed to have taken a different tack. And the tack was simply that Mr. Gillis had brought certain statements attributable to Minister Fitch to the attention of the Board for the Board's consideration. I will however deal with the proposition that Mr. Gillis made a motion. Since Mr. Gillis isn't here to make any argument on that, I assume and I will request however -- rather I will request that the motion be dismissed to the extent that it requests any action by this Board against the Minister.

CHAIRMAN: And that is granted. See you tomorrow morning at 10:30.

(Adjourned)

Certified to be a true transcript of the proceedings of this hearing as recorded by me, to the best of my ability.